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

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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. 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

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Vienna Convention rules to whatever treaty is in question in the case: but it is practically unthinkable that the content of the law of treaties should be challenged – and even less likely that the very existence of the law of treaties should be questioned.

That last observation is perhaps explicable by the context. Litigation is not a place where it is considered prudent to raise questions about the very structure of international law. Cases may result in the drawing of structural lines: the relationship between the body of rules on self-determination and the body of rules on the acquisition of territorial sovereignty, which found clear expression in Judge Dillard’s separate opinion in the Western Sahara case, and the separation of the validity of grants of nationality into different categories in the Nottebohm case, are two examples. But the arguments put before the court are much narrower and more tightly focused than the doctrinal implications that may be drawn from the court’s judgment. So it is perhaps unsurprising that in the practice of international litigation the existence, and indeed even the content, of the law of treaties should have remained without serious challenge. The ‘law of treaties’ is, however, a concept that is ripe for reappraisal.

First, the very idea of a ‘treaty’ is a Procrustean bed: and one must not forget that Procrustes inflicted real pain. 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 United Nations (‘UN’) or the World Health Organization, has the appearance of making sense only if one first designates them all as treaties. In reality, as sets of rules establishing legal relations, they have in common little or nothing beyond the label that is affixed to them.

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2 On the general question of the drawing of lines between concepts, see E Hirsch, Dividing Reality (OUP, 1993).
3 Western Sahara, Advisory Opinion, ICJ Rep 1975 (16 October) 12, 121.
4 Nottebohm (Liechtenstein v Guatemala), Second Phase, Judgment, ICJ Rep 1955 (6 April) 4, para 17.
5 Six decades ago it would have been assumed that any reader of a book such as this would know who Procrustes was. Three decades ago, editors of law journals (particularly in the USA) would have insisted on copious footnote references to explain who Procrustes was. If you do not know, try Google and Wikipedia. O tempora, o mores! (ditto).
6 The problem was well understood at the time of the preparation of the VCLT, but not resolved: see, eg, Lord McNair, The Law of Treaties (OUP, 1961) 5–6.
This is not the place to attempt a comprehensive classification of instruments carrying the label of treaty. One reason is that if one accepts (as the ILC did)\(^7\) that there may be unwritten treaties, and that an unwritten treaty could be counted as an ‘instrument,’ it is far from obvious where the category of treaties ends and that of unilateral commitments which have some discernible link with each other \textit{ratione materiae} or \textit{ratione temporis} begins. Another reason is that the fineness of dissection has more to do with the sharpness of the knife than distinctions between the constitutive parts that are inherent in the body being dissected; and one of the points I try to make here is that all classifications of treaties are, like the limits of the category of treaties as a whole, essentially arbitrary.

It is sufficient for present purposes to draw attention to some of the main differences between the kinds of legal relations produced by treaties. To be more precise, I should say that the differences lie between treaty provisions, because provisions with different characteristics can and commonly do co-exist in a single instrument – the territorial dispositions, indemnities and obligations regarding future conduct and the terminations of states of war in peace treaties are good examples,\(^8\) as are the distinct provisions on substantive matters and on the procedures for the handling of disputes in a very wide range of treaties.

To begin, some treaties are dispositive, in the sense that their legal effects are wholly realized immediately upon their conclusion. A treaty that establishes an international boundary, or that recognizes a pre-existent boundary, would be an example. The treaty is essentially declaratory, rather than based on an exchange of things, each given in consideration of the other (although any actual boundary treaty may in fact involve swaps of land, or the entire boundary may be seen as an exchange or abandonment of claims in respect of parts of the entire area in dispute). The moment the treaty enters into effect, the boundary is where the treaty says it is; and in the case of a treaty that recognizes a pre-existent boundary, no legal weight will be given to a claim by either of the States parties that the boundary previously lay anywhere else.

Contrast that with the treaties establishing what became the European Union. One of the great mysteries of contemporary legal education in Europe is how students can give confident accounts of the interpretation and application of treaties in public international law one day, and give

\(^7\) See the ILC Commentary to Article 2, para (7). The index to McNair, \textit{The Law of Treaties} (n 6) 784, carries the wonderfully terse entry ‘Oral agreement, see Treaties,’ though his discussion of the point (ibid 7–10) is more nuanced.

\(^8\) See, eg, the San Francisco Peace Treaty, 8 September 1951, 136 UNTS 45.
an account of the great cases, such as Van Gend en Loos,\(^9\) that laid the foundations of the European legal order the next, as if they were all parts of a seamless tapestry made up of legal orders, national, regional and international. The European Court of Justice’s decision in Van Gend en Loos that a provision of the treaty concluded between the member States of the European Economic Community (‘EEC’)\(^10\) created rights for individuals that are directly effective within the national legal orders of member States is a decision that, for all the commonplace status that it has since achieved, was about as radical a departure as can be imagined from the traditional ‘treaty-as-contract’ analysis that the questions would have received had they been put before the International Court of Justice (‘ICJ’) at that time. It should not be forgotten that it was a case between a Netherlands national and the Netherlands government, and that two States parties to the treaty (Belgium, the Netherlands) challenged the Court’s jurisdiction in the case, on grounds based squarely within the traditional understanding in public international law of the proper way of handling treaties. But the Court rejected the challenges. The Court’s reasons for not confining the effect of the treaties to the member States, which were the only legal persons bound by them, and for not confining its own decision to the consequences of the treaty as between the States parties, leaving them to decide how to give effect in their own legal orders to the treaty obligations and to any obligations regarding reparation that might arise, were pegged precisely to the point that a treaty-as-contract analysis was inapposite. And that is my point. The European Court of Justice had the wisdom to see that the treaties establishing the European Communities (‘EC’) were not like other treaties.\(^11\) More importantly, the Court had the courage to act on that perception, and to do so boldly and decisively. It imagined into existence an entire, new, legal order, hammering into place the other great beams of that legal order, such as the supremacy of Community law and the


\(^10\) The Treaty establishing the European Economic Community, 1957, 298 UNTS 3.

\(^11\) At that time there were three separate ‘Communities’, each having its own constitutive treaty: the European Economic Community (‘EEC’), the European Coal and Steel Community (‘ECSC’) and the European Atomic Energy Community (‘Euratom’). Their constitutional relationship evolved by stages, and they were succeeded by the European Union (‘EU’). The Van Gend en Loos case was concerned with the EEC treaty.
'occupied field' doctrine of Community competences. These were not dispositive treaties, such as boundary treaties. These were treaties establishing a relationship – a little like marriage contracts, where certain basic terms are spelled out but the important thing is not the catalogue of express terms but the underlying relationship which is the object and purpose of the making of the agreement, even though there is barely any attempt to spell out the detailed rules of that relationship. Spouses do not often make express provision for what will happen if they move from rented to owned accommodation, for the clubs and societies of which they may remain members, for where holidays will be taken, and so on. Nor could the position in such eventualities be predicted. We have moved, as Henry Maine might have said, from contract to status. It is not simply that the few express terms in the instrument that signals the inception of the relationship – the marriage contract; the EC treaties – are supplemented by a host of implied terms. In the case of the EEC, there was no body of previous practice from which such terms could be drawn. It was the fact that the treaties establishing the European Communities were, in the eyes of the Court, intended to create a new relationship that warranted its extraordinary approach to the questions before it.

The Court did not scrutinize the treaty text and ask, what did the parties actually agree? It did not even say, what object and purpose can we discern from the treaties, which may guide us in the interpretation of the express treaty terms? In retrospect, at least, one can see the Court staking out its ground not as a passive, neutral adjudicator upon disputes that might arise from time to time over the meaning of a legal instrument, but rather as one of the key organs of the European Communities, with a key, active role to play in the progressive development of the European project. Whatever one may think of the European project, the dashing boldness of the Court in its early cases stands in sharp contrast to the

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13 Author of Ancient Law (John Murray, 1861); chapter V of which sets out his brilliant hypothesis that societies move from a condition where personal rights and duties rest on the status of individuals to a condition where they are freely negotiated and have a contractual basis. Maine was a professor at Cambridge, an influential government official in India and vice-chancellor of the University of Calcutta, and a professor at Oxford, before returning to Cambridge as Master of Trinity Hall, and was a doyen of jurists who make grand assertions unsupported by evidence or authority. Sometimes it is better to be interesting than to be correct.
cautious, almost two-dimensional, approach of the ICJ at that time. This view of dispute settlement as an integral part of the process, as a key part of the relationship established by the treaties, is a characteristic of other, more recent multilateral treaties. The 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement establishing the World Trade Organization are fine examples. At a certain point the treaty negotiators decide that there is no need to try to pin down further agreed solutions in express treaty provisions: the parties have agreed the core principles, and if problems arise the parties will discuss them and, if they cannot find a negotiated solution themselves, the parties are content to leave it to a dispute settlement body to decide.

There are several points implicit in what I have said so far. First, approaches to treaty interpretation should differ as between ‘dispositive’ treaties on the one hand and ‘relationship’ treaties that create new legal regimes on the other. In the former, but not the latter, case it makes sense to focus upon the question, what did the parties actually agree? In the latter, but not the former, case it makes sense to say that the parties may not have addressed a certain point at all in the express terms of the treaty (as ‘direct effect’ was not addressed in the EEC treaty) but that the point is one that bears crucially upon the relationship established by the treaty, that the Court has been given the role of responding to important lacunae, and that the Court will accordingly decide upon what are essentially teleological grounds, where the precise goal is fixed by the Court itself.

Second, the reasons for a difference in approach are not confined to treaty interpretation. Take a variant on the boundary treaty example, in which a boundary settlement involves the withdrawal of each party’s administration from certain areas and the exchange of certain parcels of land. If one party does not perform its obligations and fails to withdraw from and hand over a parcel of land, a contractual analysis based on breach of material terms in a treaty makes sense. But the imposition of a border tax or duty on a specific product contrary to the express terms of the EEC treaty (or now, the EU treaties) would almost certainly not be thought by other States parties to provide a legal justification for the termination of that treaty. A deal cannot survive the breaking of a material term: a relationship can. So the differences between types of treaties can affect the approach to questions of their validity and termination, as well as questions of their interpretation.

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14 This was the era of the judgments in the Barcelona Traction, ICJ Rep 1970, 3, Certain Expenses of the United Nations, ICJ Rep 1962, 151, and South West Africa (Second Phase), ICJ Rep 1966, 6, cases.
Third, the different perspectives that flow from the different types of treaty are extraneous to the treaties themselves. It was not by staring at the terms of the EEC treaty that the European Court of Justice decided that it should establish the doctrine of direct effect: it was by asking the question, what is our role in relation to the relationship that the States parties have established by this treaty? And the same question can be asked in cases where the scope of the treaty’s aims are at the other end of the spectrum, and the court or tribunal decides that its proper role is no more than that of a (perhaps ad hoc) neutral adjudicator on the question, what did the parties actually agree in the treaty?

At this point it may be helpful to refer briefly to some other kinds of treaty (or treaty provision). Boundary treaties were referred to above as dispositive treaties with instantaneous effect, in contrast with the long-term evolving relationship initiated by the EEC treaty. Treaties that declare the location of boundaries can also be contrasted with synallagmatic treaties that consist of an exchange of reciprocal promises regarding the parties’ future conduct (even within a fixed and limited framework that is not expected to evolve significantly), such as extradition treaties. For example, the ILC has singled out boundary treaties as not susceptible to unilateral denunciation at the will of one party or terminable on the ground of a fundamental change of circumstances.\(^\text{15}\)

That might be explained in terms of international law’s almost fetishistic respect for boundaries; but I think that it can also be explained in terms of the different distinction between executed and executory treaties.

Then there are treaties that purport to bind only States parties, such as the various treaties on nuclear non-proliferation or on high seas fisheries; and there are those treaties that purport to create an objective state of affairs, such as the treaties declaring the moon and other celestial bodies to be beyond the reach of national claims to sovereignty and of rights to deploy weapons systems there, and the deep sea-bed provisions in Part XI of the United Nations Convention on the Law of the Sea. In terms of the effect that it is intended, or hoped, that the treaty will have upon non-party States, and the legal consequences of denunciation, they are markedly different. The received wisdom seems to be that departure from a high seas fisheries regime can release the departing State from all of its

\[^{15}\text{See para 2 of the ILC Commentary to Draft Article 53 (VCLT, Article 56) and para 11 of the ILC Commentary to Draft Article 59 (VCLT, Article 62), in Sir A Watts, The International Law Commission 1994–1998 (OUP, 1999), 619, reprinting the ILC’s Final Draft Articles from the Yearbook of the ILC (1966) vol II, 177.}\]
treaty obligations, whereas the treaties on the ‘Moon and Other Celestial Bodies’ and the deep sea-bed have some kind of objective status. Similarly, bodies such as the UN are regarded as having an objective legal personality, opposable even to non-party States and other entities; and the agreed boundaries of States are also regarded as having an objective existence. While such purportedly objective statuses might be treated as instances of the emergence of a rule of customary international law alongside the treaty, this would be a remarkable claim when the practice consists precisely in doing nothing – in making no claim to sovereignty or sovereign rights over the area in question that is incompatible with the treaty regime. It stretches the conception of customary international law to describe it thus; and there seems to be no better reason for doing that than there is for adjusting the law of treaties to reflect the fact that not all treaties stand in the same relationship to the pacta tertiis principle.

Then there is the category of human rights treaties. It has been persuasively argued that these treaties are instances not of reciprocal exchanges of promises between States, analogous to synallagmatic contracts, but of pledges by each State party individually to uphold the rights set out in the relevant treaty. Cynics (and others) might argue that adherence to multilateral human rights instruments is no less a matter of reciprocal commitments than are treaties on international trade law or competition law. In the same way that trade and competition agreements seek to establish a level playing field for international commerce, they


17 This is the almost Swiftian designation employed in the 1979 Moon Treaty (the ‘Agreement Governing the Activities of States on the Moon and Other Celestial Bodies’): see UNGA Res 34/68 (5 December 1979), and 1363 UNTS 3. The application of the agreement is limited to ‘celestial bodies within the solar system, other than the earth’: see Article 1.1.

18 But not identically: there are subtle but important differences in the reasoning.

19 See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits Judgment, ICJ Rep 1986 (27 June), 14, paras 175–79.

20 See Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening), ICJ Rep 2012 (3 February) paras 55, 101, 106 and passim.

might say, so human rights agreements seek to ensure that in the promotion of human rights (which may, admittedly, be driven by altruism and moral conviction) no State or economy (or at least, none among a State’s significant trading partners) is advantaged by the government maintaining unacceptably low human rights standards. The key to understanding human rights treaties, on this view, is to focus not on the substance of the rights but on the fact that a lot of States can agree to sign up to them and that acceptance of the standards is, through a host of political, cultural and economic mechanisms, made a condition of ‘joining the club.’

Even if that view is accepted, so that the key characteristic of a human rights treaty is precisely that it is a ‘deal,’ a reciprocal exchange of promises, it is undeniable that human rights treaties are different from other treaties in certain respects. The best-known instance is the approach of the European Court of Human Rights to reservations and interpretative declarations in the Belilos case,22 which departs from the more strictly consensualist approach of the Vienna Convention. But one might also point to other subtle differences. For instance, it seems to be a characteristic of human rights treaties, and of other treaties that create dispute settlement procedures providing for the settlement of disputes through the litigation of cases before standing tribunals – the EU treaties are another outstanding example – that the tribunal is prepared to take an approach to treaty interpretation that is not only teleological (see above) but programmatic. The tribunal may say, there was a wrong done in this case and we will give a remedy, but because this is the first time we have explained the law on this point we will not treat cases in future so leniently. It may even say, as the European Court of Justice did in the Defrenne case,23 that though a wrong was done (there, sex discrimination in employment terms) it was so widespread that to allow all those who suffered similarly to initiate claims would cause economic chaos, so the judgment will operate only prospectively, in relation to discrimination occurring after the judgment (and in relation to claims already pending concerning earlier discrimination). One might argue that these are more a matter of the powers or the discretion of the tribunal than of the nature or effect of the treaty. But the point is that this phenomenon is, as far as I can see, largely confined to practice in the application of treaties where there is an understanding that the tribunal will play a continuing and

22 Belilos v Switzerland (Decision), App no 10328/83, (ECHR 29 April 1988).
23 Case C-43/75, Defrenne v Sabena (No 2), [1976] ECR 455.
active role in developing the law, and that in the case of these treaties (but not others) there is a distinctive approach to the interpretation and application of the terms of the treaty. The same phenomenon can also be seen to a lesser degree in situations where there is an expectation that a series of decisions by ad hoc bodies, or by chambers of a tribunal, will play such a role: the World Trade Organization disputes panels, and perhaps (in time) the various tribunals that operate under Part XV of the Law of the Sea Convention might be given as examples.

Another characteristic of a group of treaties of which human rights treaties are a prominent example is that, as far as many States parties are concerned, the treaty is not a negotiated consensus. It is a text drafted by others to which the State may or may not choose to accede, rather like a contrat d’adhésion, but whose existing provisions the State cannot, generally speaking, modify.24 In the case of such treaties it is impossible to say – in contrast to the position regarding bilateral treaties, where one can and does say – that tasks such as treaty interpretation can be defined in terms of a search for what the parties actually agreed between themselves.

The Vienna Convention itself separates out certain categories of treaty for special treatment. Boundary treaties25 have been mentioned already; and there is also special treatment for humanitarian treaties26 and treaties whose limited number of negotiating States makes apparent that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty.27

I could go on: but I hope that enough has been said to make the point that a considerable variety of legal instruments fall under the label of ‘treaties.’ The class of treaties is by no means a homogenous collection of instruments, even when viewed in the context of the matters that are the traditional concern of the law of treaties, such as interpretation, termination, and the permissibility and effects of reservations and interpretative declarations. This observation in turn leads to the question whether the category of ‘treaties’ is a useful one. Do all treaties have enough in common to warrant the creation of a distinct law of treaties?

Arguably the most basic characteristic common to all treaties is that they are agreements between two or more States or other international

24 Reservations, in so far as they are permissible, are one exception; but under the VCLT regime reservations operate essentially as consensual amendments of the treaty.
25 See VCLT, Article 62(2)(a).
26 See VCLT, Article 60(5).
27 One wonders how treaty-making practice within the EU, with its various ‘opt-out’ provisions, sits within this framework.
legal persons governed by international law. But even that characteristic does not really bind the category together. I have argued above that the law of treaties in fact treats in different ways various distinct kinds of instruments that all possess that characteristic – albeit in various forms, such as the paradigms of the bilateral treaty-contract and the multilateral treaty-contrat d'adhésion. The law of treaties itself thus accepts that the category is not homogenous. Moreover, it is at least arguable that a more rational, more exact and more useful common characteristic focuses not on the relationship between or among the parties to the treaty but upon the relationship of each individual State party to the text.

One might say that the true uniting characteristic is that each State commits itself to the application to itself of the treaty text by any tribunal that is competent to determine whether or not the State has acted in accordance with its obligations under international law. Forget consensus. Forget attempts to divine the common intention of the parties, which are at best exercises in the construction of a credible story of what the thinking of a wise, honest and near-omniscient hypothetical negotiator of the treaty might have been, while pragmatically ignoring the thoughts and intentions (if any) of the harried human beings who actually negotiated the treaty while trying to interpret their mandates and to keep an array of government departments and other interest groups happy and their own chances of promotion or of a generous pension intact – not to mention the thoughts (again, if any) of the parliament or minister or other body which actually takes the decision to assent to the treaty and ratify it. Like a good detective story, the truth does not matter as long as the story fits the handful of facts that we are given, in the travaux and elsewhere.

The one thing that is certain is that the State signed up to the treaty, and that should be the starting point for analysing the legal consequences of the State’s commitment. This approach would, in effect, invert the dictum, pacta sunt servanda: the point is not that treaties are binding (though they are), but rather that a text to which a State assents to be bound is a treaty. Pacta sunt quod servanda sunt.

Approached in that way, the law of treaties would be part of a broader body or law applicable to obligations to which a State explicitly commits itself, as distinct from the body of customary international law, which binds a State not because it has expressly assented to it but because State practice in general, in which the State may not have participated, has

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28 Cf VCLT, Article 2.1.
generated a rule from which the State has not excepted itself.\textsuperscript{29} If the commitment of the State is the starting point, there is no \textit{a priori} reason to confine it to commitments given in the context of bilateral and multilateral treaties. It could also embrace unilateral statements. Taking the classic \textit{Nuclear Tests} formula,\textsuperscript{30} the conclusion or accession of a treaty is an instance – overwhelmingly the most common, and paradigmatic, but still only an instance – of a broader conceptual category of actions by which a State commits itself legally to the application of certain legal rules. Similar commitments might be discerned in classical unilateral statements, or oral commitments such as the 1919 Ihlen Declaration.\textsuperscript{31} And unilateral commitments, and perhaps also rules of international law of equivalent effect, such as estoppel, fall within the broader conceptual category along with treaties.

One would then have to divide the broader category, but along different lines from those drawn by the Vienna Convention. A certain common core of principles relating to the validity of a State’s assent, the withdrawal or termination of that consent, and so on, would exist; but beyond that core, many other questions such as the approaches to treaty interpretation, the effects of treaties on third States, the effects of reservation and the like would be recognized as differing from one class of treaty or commitment and another.

Why bother? It is not that the result would be a difference in the outcomes of particular cases. The European Court would still blaze its trail and lay the foundations of a distinct Community legal order. Tribunals examining bilateral commercial treaties could still hold the parties to the letter of the treaty with a rigidity that even Shylock might envy. All that would change is the configuration of international law as a scholarly discipline, the taxonomy of international law. While scholars may be unable to make international law, they certainly have the dominant influence over the development of its analytical framework, within which courts and tribunals and governments operate. Where that framework is creaking under the weight of exceptions, or where the

\textsuperscript{29} Eg, by entering into a treaty (in the case of rules of customary law other than rules of \textit{jus cogens}) or according to the doctrine of persistent objection.

\textsuperscript{30} \textit{Nuclear Tests (Australia v France)}, Judgment, ICJ Rep 1974 (20 December), 253, para 43. This statement was distinguished almost out of existence (as a common lawyer would say) by the decision in \textit{Frontier Dispute (Burkina Faso v Republic of Mali)}, Judgment, ICJ Rep 1986 (22 December), 554, paras 39–40; but not so as to affect the argument here.

\textsuperscript{31} See the \textit{Legal Status of Eastern Greenland} case (1933), PCIJ Rep, Series A/B, No. 53, 22, at 71.
framework appears to be applied only formally and in a manner that sits awkwardly with the realities of the underlying situation, it is right to review the adequacy of that framework. There are, I think, signs enough that we have already reached that stage, and that the conceptual framework of what we have for generations called the law of treaties is ripe for reconsideration. The work of the International Law Commission on unilateral acts of States, and its work on the identification of customary international law, already addresses neighbouring topics. As the Vienna Convention approaches its half-century one is entitled to ask, given how the law has developed, would we approach the subject in the same way again?

33 See the ILC website, accessed 26 May 2014, at www.un.org/law/ilc/index.htm. The ILC has also been working on a range of other treaty-related topics in recent years.