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FORMALISM VERSUS FLEXIBILITY IN THE LAW OF TREATIES

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in the Law of Treaties**

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FORMALISM VERSUS FLEXIBILITY IN THE LAW OF TREATIES

Jean d'Aspremont

I. Introduction

The common narrative about treaties is rather one-dimensional. Both treaties and their legal regime are meant to be formal. First, treaties themselves, albeit possibly made through non-formal processes, are usually construed as formal instruments meant to regulate a given aspect of international life. Second, and more fundamentally, the making, identification, validation, application, interpretation, modification and termination of treaties are regulated by a set of formal constraints meant to formally organize various aspects of their existence and functioning. In that sense, treaty law is traditionally perceived as a toolbox providing instruments for the formal translation of the exercise of public authority at the international level.¹ Treaty law thus contrasts with customary law, which in some ways could be seen as the realm of *laissez-faire*.

This contribution aims to show that the law of treaties can be read very differently, and that the dominance of formalism in treaty law is much more nuanced and qualified than the general perception sketched out in the preceding paragraph suggests. It will be argued that from its making to its termination, a treaty see-saws between formalism and flexibility, and that the body of rules designed by international lawyers to regulate the life of treaties mirrors this constant oscillation: the law of treaties, as codified in the two

¹ ILC, *Study on Treaties and Times: Effect on Treaties of Subsequent Agreement and Practice* (Preliminary Study by G Nolte, A/63/10,) Annex A, para 5.

Vienna Conventions, displays both formal rationality and flexibility. This chapter aims to shed some light on the various, and disparate, features of this fundamental tension.

It is more specifically submitted here that the oscillation between formal rationality and flexibility comes to a head at three different levels: at the moment of the creation of the treaty, at the moment of its validation and identification as a treaty properly so-called and, finally, at the moment of its application, that is when the provisions of a treaty are confronted with the facts and accordingly need to be interpreted. At each of these stages, the tension between formal structures and flexibility is solved according to a different equilibrium. The different balances struck are themselves unstable and in a constant state of flux, for they are treaty-dependent and have not been definitively concretized by the rules of the Vienna Conventions. It is true that the constant oscillation between formalism and flexibility also infuses the rules on suspension and termination. However, as suspension and termination form the subject of a separate contribution, the 'un-making' of treaties will be addressed only briefly.

The three dimensions of the life of a treaty studied here – creation, identification/validation and application/interpretation while interwoven, need to be distinguished so as to understand how the balance between formalism and flexibility in treaty law is struck.² This is why, after some preliminary remarks on the understanding of terminology (II.), this chapter separately addresses the tension between formalism and flexibility in the making of treaties (III.), their identification/validation (IV.) and their application/interpretation (V).

² The distinction between law-identification and content-determination is at the heart of my earlier study *Formalism and the Sources of International Law* (OUP, 2011). In the same vein, see A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, (OUP, 2008) 285-286; J Beckett, 'Behind Relative Normativity : Rules and Process as Prerequisites of Law', (2001) 12 EJIL 627-650; J Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', (2005) 16 EJIL 213, 217; O Corten, *Méthodologie du Droit International Public* (Editions de l'Université de Bruxelles, 2009) 213. See *contra* P Reuter, 'Traité et Transactions. Réflexions sur l'Identification de Certains Engagements Conventionnels', in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Giuffrè, 1987) 399 et seq.

II. Formalism and Flexibility as Power-Delegating Structures

The following paragraphs aim to spell out what is meant by formalism – i.e. formal structures of thought – and flexibility in the design of some of the secondary rules pertaining to international treaties. For the purpose of the arguments made here, *formalism* means the erection of formal structures within which the creation, identification/validation and application/interpretation of a treaty must be carried out. Formalism entails that these three operations will function against the backdrop of a set of predefined standards, thereby limiting the leeway of the makers, addressees, interpreters or observers of a treaty. These standards may be mostly procedural (at the making stage), cognitive (at the identification stage) or hermeneutic (at the application stage). In themselves, these standards do not dictate a particular result for any of these three operations, as such a result cannot be predicted by the law of treaties. Yet, the formal standards therein set formal limits as to what these operations can generate. In that sense, formalism in treaty law does not provide predictability as to what kind of regulation is contained within a treaty. It does not dictate how treaty must be made, identified and validated or applied and interpreted. Instead, formalism provides a surface of predictability for the users and consumers of treaty law as to what *cannot* be achieved by these three operations. Thus, the predictability provided by formalism as it is understood here is negative. These constraints, formally imposed on the creation, identification/validation, and application/interpretation of treaty, are all informed by the presupposition that such formal standards provide a firmer basis for coherence in treaty making. In their absence, treaty law, as a tool for international regulation and governance, may be seen as lacking any distinct value as a regulatory instrument over other sources of rules.

On the other hand, *flexibility*, as it is understood here, is based on the delegation of power to the maker, the addressee, the observer or the interpreter of the treaty. It presupposes that each of these actors will have the ability to competently address questions of making, identification/validation or application/interpretation that may arise in the life of a treaty. Flexibility is thus premised on the idea that such answers are not knowable *in abstracto*

and cannot be anticipated by the law of treaties. Further, even if they could be known and predicted, it is not appropriate that they are. Flexibility thus shies away from attempting to predict what will happen during the creation, identification/validation or application/interpretation stages. It transfers the burden of predicting any outcomes to the makers, addressees, interpreters or observers of the treaty. It is thus a form of regulation characterized by *laissez-faire* and, as a result, allows for the constant adjustment of an agreement to ensure its survival in a constantly changing environment.

The use of the term *flexibility* in this chapter should be distinguished from *semantic flexibility* within the text of the treaty itself. Indeed, the words and phrasing contained within a treaty text can be vague in varying degrees. The reasons for this vagueness can be reduced to several categories. It can be ordinary – i.e. inherent in the indeterminacy of language –, transparent – i.e. intentionally indeterminate, as this is the limit of the consensus that was reached during negotiations or to award a greater leeway for interpretation to the authority applying the treaty – or, as legal philosophers have termed it, ‘extravagant’.³ Any one of these categories of vagueness, when present in the text of a treaty, brings about semantic flexibility, especially at the level of application/interpretation. This type flexibility is of only indirect concern in this chapter. Certainly, semantic flexibility raises questions of indeterminacy, and these will be touched upon in section 4. However, the focus here is on the tension between formalism and flexibility in techniques designed by the law of treaties to address semantic flexibility, and not on semantic flexibility itself.

The choice of more or less formalism or flexibility in treaty making is sometimes made consciously and at other times it is not. In some instances it is the result of a political choice for more formal constraints or, conversely, for more *laissez-faire*. This choice is never one-dimensional or absolute. The rigidity associated with the law of treaties can be alleviated by flexible mechanisms, whilst the uncertainty inherent in flexibility (particularly with regard to the delegation of power) is allayed by the inclusion of formal

³ On the various types of vagueness, see generally A Marmor, ‘Varieties of Vagueness in the Law’ (2013) USC Legal Studies Research Paper No 12-8 <<http://ssrn.com/abstract=2039076>>.

structures. At the same time, it is important to note that the balance between formalism and flexibility is itself the result of internal systemic dynamics and evolves with the practice of those authorities in charge of the interpretation and application of treaties. Indeed flexibility can be self-generated, and the balance between formalism and flexibility may not always stem from a conscious decision. This is why the oscillations between formalism and flexibility found in the making, identification/validation and application/interpretation of treaties are inherently variable. The following paragraphs will confirm this.

III. Formalism and Flexibility in the Making (and Unmaking) of Treaties

In international law, the process by which rules are made can be formalized.⁴ This is usually manifested by resort to compulsory formal procedures. If such procedures are not respected, the norm in question will be deprived of legal effect. In the design of the law of treaties, it could have potentially been decided that international treaty-making abide by a strictly formal procedure. In this framework, the existence and validity of the treaty would be determined, *inter alia*, by reference to whether this formalized procedure had been respected by the contracting parties. The drafters of Vienna Conventions decided not to follow this particular course. First, oral agreements have been left outside the scope of the Vienna Conventions, are governed by customary international law and are not subject to any specific procedural requirements. By their nature, oral agreements are entered into as a result of informal processes. Second, even for written agreements, treaty-making has not been made subject to any formal procedure. The expression of individual consent and the meeting of all individual consents can generate a valid treaty falling within the scope of the Vienna Conventions, irrespective of the process of their expression. Indeed, for written treaties there is also great flexibility as to how a text can be authenticated, as the parties themselves determine the authentication process.⁵ Likewise, an expression of consent can be done through one of the various modes suggested by the Vienna

⁴ J Salmon (ed), *Dictionnaire de Droit International Public* (Bruylant, 2001) 516.

⁵ Article 10 of the 1969 and 1986 Vienna Conventions.

Conventions or 'any other means if so agreed'.⁶ The regime of the Vienna Conventions in respect of the making of treaties is inherently flexible. It does not require that the method of expressing consent be subject to strict formal procedures but rather provides some signposts or suggestions as to how this may be carried out. It is interesting to note that in early debates within the International Law Commission, the necessity of codifying the conclusion and adoption process was not deemed to be necessary.⁷

There is certainly a degree of healthy pragmatism behind this *laissez-faire* approach, and the flexibility of the Vienna Conventions themselves. Indeed, it would have been detrimental to the success of the Conventions if too formal a procedure for treaty-making had been imposed, as it could potentially discourage subjects of international law from translating their agreements into treaties falling within the ambit of the Conventions. In that sense, the flexibility regarding treaty-making found in the law of treaties can be seen to promote the appeal of treaty law as a method for concluding international agreements in general.

Albeit primarily flexible, the regulation of international treaty-making under the Vienna Conventions contains some aspects which have been subject to formal standardization. It is necessary to mention here some important qualifications, as these endeavours to formalize certain dimensions of treaty-making remain modest and continue to allow for the possibility of more flexible options agreed by parties to prevail.

1. The definition of the powers of the delegates in charge of adopting or authenticating a treaty has been formalized.⁸ The infringement of such formal standards can deprive an act relating to the conclusion of a treaty of legal effect, when performed by a person who cannot be considered to represent the State in question.⁹ Such an infringement can even lead to the invalidity of a treaty in the

⁶ Article 11 of the 1969 and 1986 Vienna Conventions.

⁷ Yearbook of the ILC (1950) vol I, 67-99.

⁸ Article 7.1 of the 1969 and 1986 Vienna Conventions.

⁹ Article 8 of the 1969 and 1986 Vienna Conventions.

case of a manifest violation of a rule of internal law of 'fundamental importance' regarding the competence to conclude treaties.¹⁰ Such formalization is, however, qualified. First, it is stipulated that 'if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers' this person is deemed to represent the State in question for the purpose of expressing consent to be bound by a treaty.¹¹ Second, this formalization is significantly tempered by a system of presumptions with regards to positions held which are automatically deemed to represent the State in question for the purpose of adopting, authenticating or expressing consent to be bound by a treaty.¹² Third, the verification of such powers is, in practice, very flexible.¹³ There even are international organizations where confidence is said to suffice for conferences or treaties negotiated under their auspices.¹⁴ In this respect it is noteworthy that at the Vienna Conference of 1968-1969, the powers of the delegates were only verified at the very end.¹⁵

2. The modes of adoption, authentication and consent are the object of some attempts at formalization. For instance, the Vienna Convention suggests that a two-thirds majority of those present and voting should be the mode of adoption of a treaty.¹⁶ Signature is also considered to be the traditional mode of authentication.¹⁷ Likewise, it is accepted that signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession can all be means of expressing consent to be bound by the treaty.¹⁸ However, these

¹⁰ Article 46 of the 1969 and 1986 Vienna Conventions.

¹¹ Article 7.1.b) of the 1969 and 1986 Vienna Conventions.

¹² See Article 7.2 of the 1969 and 1986 Vienna Conventions.

¹³ Report of the Special Rapporteur Fitzmaurice, Doc A/CN.4/101, Yearbook of the ILC (1956) vol II, 123; G Scelle, *Précis de Droit des gens* (Sirey, 1932) 462.

¹⁴ See the examples cited by P Kovacs, 'Article 7' in O Corten and P Klein (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire Article par Article* (Bruylant, 2006) 210-211.

¹⁵ Ibid, 211.

¹⁶ Article 9 of the 1969 and 1986 Vienna Conventions.

¹⁷ Article 10 of the 1969 and 1986 Vienna Conventions.

¹⁸ Article 11 of the 1969 and 1986 Vienna Conventions.

formalized suggestions by the Vienna Conventions as to the modes of adoption, authentication and consent are only indicative, and the parties can agree on any other mode. The specific modes agreed upon by parties will always prevail over those laid out in the Conventions.

3. The *laissez-faire* approach of the Vienna Conventions regarding international treaty-making is often qualified in practice by domestic rules or the internal procedures of international organizations. At the domestic level, and although the constitutional rules of most States increasingly allow simplified forms of agreement¹⁹, the treaty-making rules of some States dictate strict formalities. Such formal procedural requirements can impinge upon the negotiation phase and require pre-negotiation arrangements. This is the case for instance with domestic procedural requirements in some federal States.²⁰ Most of the time, however, such requirements are only relevant in the post-negotiation phase and pertain to the ratification, incorporation or implementation of treaties. Be that as it may, these domestic procedural requirements do not, as such, curb the flexibility of treaty-making at the international level.
4. The law of some international organizations sometimes lays down procedural requirements prior to the negotiation. This is the case in relation to some of the

¹⁹ See generally GS Krutz, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (University of Michigan Press, 2009); A Gras, 'Les "executive agreements" aux États-Unis' (1972) 76 *Revue Générale de Droit International Public* 973-1045; AP Knoll, 'International Executive Agreements: Their Constitutionality, Scope and Effect' (1969) 2 *Case Western Reserve J Intl L* 94-119; EM Byrd, *Treaties and Executive Agreements in the United States: Their Separate Roles and Limitations* (Nijhoff, 1960); A Aust, *Modern Treaty Law and Practice* (CUP, 2000) 160-161.

²⁰ See eg the Belgian constitutional rules on the negotiation of treaties pertaining to matters falling within the competences of the federated entities. In particular, see the Cooperation Agreement of 8 March 1994 between the Federal State, the Communities and the Regions on the procedure to be followed for the conclusion of mixed treaties, *Moniteur belge*, 17 December 1996. For the English version of this agreement, see A Alen and R Ergec, *Federal Belgium After the Fourth State Reform of 1993* (Ministry of Foreign Affairs, External Trade and Development Cooperation, 1994) 57. On this matter, see generally J Wouters and L De Smet, 'The Legal Position of Federal States and their Federated Entities in International Relations – The Case of Belgium', (2001) Institute for International Law, KU Leuven, Working Paper No 7, June 2001 <<http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP07e.pdf>>.

mixed agreements between the European Union and Member States with third parties.²¹ This is when where neither the Community nor the Member States have exclusive competence a particular area. Representation of Member States must be ensured and formal coordination mechanisms are put in place.

5. Some treaties are adopted through the decision-making procedures, and by virtue of instruments, of international organizations. In this case, the treaty-making process is – partly – subject to the formal procedure of the organization concerned.²²
6. Although as a matter of principle the organization of treaty-making under the Vienna Conventions regime rests on a high degree of flexibility, there is one aspect which is the object of much stricter formalization: the formulation of reservations. Indeed, the Vienna Conventions prescribe limits as to the content²³, the moment of formulation²⁴, the form of communication to other parties²⁵, the necessity of the confirmation of reservations made upon signature²⁶, and, particularly in the case of reservations to constitutive elements of international organizations, the procedure of acceptance²⁷ of reservations. Paradoxically, however, the enforcement mechanisms of these formal limitations remain flexible. There is no formalized annulment procedure for invalid reservations and enforcement depends upon the objections of other parties. These objections in

²¹ See D McGoldrick, *International Relations Law of the European Union* (Longman, 1997)78-79: 'an agreement can be regarded as mixed if the European Community and one or more of the Member States are parties to it. . . . An agreement can also be regarded as mixed if the European Community and the Member States share competence in relation to it, even if only Member States can be parties. Finally, an agreement can be in a mixed form because of requirements relating to its financing or relating to its provisions on voting... if competence in the subject matter of a Treaty lies partly with the European Community and partly with the Member States, then the agreement is described as a mixed one'.

²² See GA Res 42/263 (28 July 1994) pertaining Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

²³ Article 19 of the 1969 and 1986 Vienna Conventions.

²⁴ Article 19 of the 1969 and 1986 Vienna Conventions.

²⁵ Article 23 of the 1969 and 1986 Vienna Conventions.

²⁶ Article 23.2. of the 1969 and 1986 Vienna Conventions.

²⁷ Article 20 of the 1969 and 1986 Vienna Conventions.

themselves have no specific legal effect and bring about substantially the same effects as the acceptance of the reservation in question.²⁸ Thus, even in the case of reservations, flexibility remains the dominant paradigm.

7. Parties to international treaties are under an obligation to register the treaty with the Secretary General of the United Nations²⁹. Although such a procedural requirement does not bear upon the validity of treaties, it has the effect of significantly formalizing the process of treaty-making. Its importance is undermined by the non-registration of 'agreements in simplified form' and the lack of firm sanction for non-performance (other than non-invocability before UN organs).
8. Finally, the most important qualification to the flexible approach of the law of treaties in relation to treaty-making lies in the common resort to formal intergovernmental conferences³⁰ or the use of international organizations as a forum for the conclusions of treaties.³¹ In both cases, treaty-making processes are subject to strict formal procedural requirements. The importance of this qualification to the overall flexibility of treaty-making under the general regime ought not to be exaggerated, particularly in the light of the flourishing practice of 'agreements in simplified forms', especially for bilateral agreements.³² 'Agreements in simplified form' are treaties proper, although they originate in *ad hoc* and often non-formal procedures which depart from the traditional, solemn treaty-making procedures and are usually not subject to registration with the

²⁸ Cf para 1 and para 3 of Article 21 of the 1969 and 1986 Vienna Conventions. On this point, see J Verhoeven, *Droit International Public* (Larcier, 2000) 410.

²⁹ Article 80 of the 1969 Vienna Convention and Article 81 of the 1986 Vienna Convention. See also Article 102 of the UN Charter.

³⁰ See generally Aust, *Modern Treaty Law* (n 20) 66 – 70.

³¹ See GA Res 42/263 (n 23).

³² C Lipson, 'Why Are Some International Agreements Informal?' (1991) 45 *International Organization* 495; Fitzmaurice, 'The Identification and Character of Treaties...' (n 34) 142; GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993) 55. Such a finding was already made by M Lachs, 'Some Reflections on Substance and Form of International Law' in Wolfgang Friedmann, Louis Henkin, and Oliver Lissitzyn (eds), *Transnational Law in a Changing Society, Essays in Honor of P Jessup* (Columbia UP, 1972) 99.

Secretariat of the United Nations.³³ It is precisely this non-formal character in their creation, especially at the domestic level, that entices States to conclude such agreements.³⁴

In the light of the foregoing, it appears reasonable to assert that treaty-making, albeit occasionally subject to formal standards, remains largely flexible. The dimensions of treaty-making that have been subject to formal standardization are limited and largely leave open the possibility for parties to agree on more flexible options. Thus, as far as the making of treaties is concerned, parties enjoy considerable leeway as to how they organize their negotiations, express their consent or make reservations.

Although the present chapter is not concerned with modification or termination, it is interesting to note that the flexibility paradigm which dominates the making of treaties also produces effects in the *modification* and *termination processes*. In the case of modification of treaties, for instance, it is widely acknowledged that subsequent practice can alter the effects of treaties.³⁵ By the same token, it is accepted that a treaty which establishes a boundary can be modified by a non-formal act.³⁶ In the case of termination, a non-formal action can sometimes be deemed to terminate a treaty even in the presence

³³ On agreements in simplified form, see C Chayet, 'Les Accords en Forme Simplifiée' (1957) 3 AFDI 205-226; FS Hamzeh, 'Treaties in Simplified Form – Modern Perspective' (1968/69) 43 BYIL 179-189; J Salmon, 'Les Accords Non Formalisés ou "Solo Consensu"' (1999) 45 AFDI 1, 22; P Gautier, 'Les Accords Informels et la Convention de Vienne sur le Droit des Traités Entre Etats, Mélanges Jean Salmon: Droit du Pouvoir, Pouvoir du Droit (Bruylant, 2007) 425-454; see also P Gautier, *Essai sur la Définition des Traités Entre Etats* (Bruylant, 1993) 149-309. For an earlier recognition of agreement in simplified form, see the 1935 codification of the law of treaties by the Harvard Research, (1935) 29 AJIL Sup 697-698 (although it excluded simple exchange of notes from its definition of treaty).

³⁴ A Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 ICLQ 787, 811. J Klabbers, *The Concept of Treaty in International Law* (Kluwer, 1996) 29; M Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2003) 73 British YB Intl L 141, 142.

³⁵ ILC, *Study on Treaties and Times* (n 1)

³⁶ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia/Singapore)*, Judgment ICJ Rep 2008 (23 May) para 120

of a formal termination procedure.³⁷ Further, behaviour at odds with treaty prescriptions can in some instances lead to termination, even in the presence of a formal termination procedure.³⁸ As modification and termination are the subject of other chapters of this work, they will not be further expanded on here. It suffices to show that the flexibility that informs the regulation of treaty-making can also dominate the 'unmaking' of treaties.

IV. Formalism and Flexibility in the Identification of Treaties

The identification of a treaty is the operation whereby an international agreement is identified as a treaty proper and thus as belonging to the international legal order. It is as a result of this identification that an agreement becomes subject to the secondary rules of the international legal order pertaining to the law of treaties. It is also by virtue of such identification that the treaty produces primary rules within that legal order. Identification of a rule as a legal rule simultaneously entails a process of validation. Because validity is the specific form of existence of rules³⁹, identifying a treaty amounts to validating it. Identification and validation are thus intertwined operations, and they rest on the same equilibrium between formalism and validity. The following paragraphs will thus engage simultaneously with questions of identification and validation.

If a treaty is invalid, it ceases to belong to the international legal order and its membership of this legal order is retroactively terminated. Some of the reasons for *retroactive* termination are a direct reflection of the main treaty-identification parameter, i.e. *intent*. If there was no intent to create a treaty, the agreement concerned cannot

³⁷ *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction Judgment ICJ Rep 2000 (21 June) 25, para 28.

³⁸ Article 60 of the 1969 and 1986 Vienna Conventions. See also the termination of the mandate of South Africa over Southern Africa, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion ICJ Rep 1971 (21 June) para 42-105.

³⁹ This is a point compellingly made by Kelsen. On the extent of this conceptual revolution, see N Bobbio, 'Kelsen et les Sources du Droit' in *Essais de Théorie du Droit* (M Guéret tr, Bruylant/LGDJ, 1998) 235.

belong, or ever have belonged, to the international legal order.⁴⁰ Not all the grounds of invalidity are related to intention and consent.⁴¹ This section only focusses on the balance struck between formalism and flexibility in the processes of identification and validation and does not deal with the invalidity of treaties in any broader sense.

As a preliminary remark, it should be stated that the fact that the regime of treaty-making is primarily informed by flexibility does not automatically entail that the identification of treaties is equally flexible. Indeed, an agreement can originate in a very non-formal process and still be identified as a treaty using formal criteria. Conversely, an agreement that has been elaborated by virtue of a very formal procedure may be subject to a non-formal identification process, that is can be ascertained by virtue of non-formal indicators. In that sense, formalism and flexibility at the law-making level are intrinsically separate from formalism and flexibility at the identification level.

It is truistic to say that the parties to a treaty make a norm and elevate it into a conventional legal rule to achieve a given purpose. According to mainstream treaty theory, a norm that has been agreed on and enshrined in a treaty is classically called the *negotium*. If the parties decide to translate their agreement into a written instrument, the written instrument enshrining the norm is called the *instrumentum*. The *instrumentum* is the formal 'container' of the obligation.⁴² According to this position, authors of a treaty have complete control over both the *negotium* and the *instrumentum*. They determine

⁴⁰ See Articles 46-52 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

⁴¹ Article 53 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

⁴² Such a distinction was already made by Kelsen, 'Theorie du droit International Public' (1953-III) 84 *Collected Courses* 1, 136. This distinction was also made by the Special Rapporteur Briery of the ILC on the Law of Treaties, *Yearbook of the ILC* (1950) vol II, A/CN.4/32 para 30. See also the report of Fitzmaurice, *Yearbook of the ILC* (n 14), Article 14 and commentary No 24. See also the dissenting opinion of Judge Basdevant, *Ambatelios*, ICJ Rep (1 July 1952) 169; See also 1935 codification of the Harvard Research, (n 33) 690. Some authors have preferred the words *actum* and *actus* to draw such a distinction between the content of the act and the instrument where it is enshrined: see J Dehaussy, cited by J-P Jacqué, *Elements Pour une Théorie de l'Acte Juridique en Droit International Public* (LDGJ, 1972) 52. Jacqué, however, draws a distinction between, on one hand, the *negotium-instrumentum* dichotomy, which are two constitutive elements of the legal act, and the act-norm dichotomy on the other hand. See Jacqué, *Elements Pour une Théorie* 47-56.

both the content and the formal container.⁴³ In terms of treaty identification, it is essential to point out that both the content and container can potentially indicate whether the norm in question is an international legal rule. It goes without saying that such a possibility does not exist for oral treaties; whose identification is intended to be entirely flexible and non-formal. The following paragraphs accordingly solely address written treaties, as the existence of an *instrumentum* makes it possible for formalism to play a role in the identification-process.

Theoretically speaking, a written agreement's membership of the international legal order could be determined by either a pre-defined content (*negotium*) or a pre-defined type of container (*instrumentum*). This means that identification could be made either flexibly or formally. If it were made dependent on the substance of the norm, the identification process would leave it to the fluctuating substantive content of the agreement to elevate it to the status of an international agreement. On the other hand, if it is the written instrument that determines an agreement's membership of the international legal order, the identification process could be considered as being primarily formalistic.

According to mainstream theory, the decisive criterion in the identification of treaties is never found in the *negotium* but only in the *instrumentum*. In particular, the formulation of clear obligations is not considered a *constitutive element* of any legal act.⁴⁴ The

⁴³ In the same vein, K Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581; H Hillgenberg, 'A Fresh Look at Soft Law', (1999) 10 EJIL 499, 504-505. For criticism of the correlative idea that States can freely decide whether to activate international law, see Klabbers, *The Concept of Treaty* (n 34) and J Klabbers, 'Not Re-Visiting the Concept of Treaty' in A Orakhelashvili and S Williams (eds), *40 Years of the Vienna Convention on the Law of Treaties* (BIICL, 2010), 29-39. On the choice between law and non-law, see J Klabbers, 'The Commodification of International Law' (2006) Select Proceedings of the European Society of International Law, (vol 1, Hart, 2008), 341-358. See also the account of the cost and benefits of non-law by Lipson, 'Why Are Some International Agreements Informal?' (n 35).

⁴⁴ For a classical example, see Rousseau, *Principes Généraux du Droit International Public* (vol 1, Pedone, 1944) 156-157; J Basdevant, 'Règles Générales du Droit de la Paix', (1936) 58 *Recueil des Cours* 471-692, 208?. It is true that, in the international legal scholarship, some authors have attempted to elevate the content of a norm into a formal criterion to ascertain international legal rules, the most famous of them being Hersch Lauterpacht. See Separate Opinion of Judge Lauterpacht *Certain Norwegian Loans* ICJ Rep 1957 (6 July) 48; See also his dissenting opinion to the *Interhandel Case* ICJ Rep 1959 (21 March) 116. This also permeates his work as Special

instrumentum has usually been preferred to the *negotium* as the basis for the identification of written treaties.⁴⁵ As a result, the *negotium* has been left without any treaty-ascertainment effect, and treaties whose content is totally non-normative, that is treaties that do not contain any firm obligations, can still qualify – and be identified – as international treaties.⁴⁶ This *instrumentum*-based identification of international treaties has also been espoused in case-law.⁴⁷

Rapporteur on the Law of Treaties of the International Law Commission. See generally ILC Report, (1953, A/2456 (A/8/9)) chp V(II)(i), para 164 et seq and ILC Report, (1954, A/2693 (A/9/9)) chp I(III), para 8. See also 1935 codification of the law of treaties by the Harvard Research (n 33). Gautier, *Essai sur la Définition* (n 33) 63-74. Interestingly, some of these scholars have subsequently relented from this view. Compare Jacqué, *Elements Pour une Théorie* (n 43) 69-70 and J-P Jacqué, 'Acte et Norme en Droit International', (1991-II) 227 *Recueil des Cours* 357, 383.
⁴⁵ For a classical affirmation of that position, see P Reuter, *Introduction au Droit des Traités* (3rd ed, Presses Universitaires de France, 1995) 30 et seq. For criticism of that conceptual construction according to which States, through the choice of *instrumentum*, can freely decide to activate or not international law, see Klabbers, *The Concept of Treaty* (n 34); more recently, see Klabbers, 'Not Re-Visiting the Concept of Treaty' (n 44).

⁴⁶ Numerous treaties nowadays enshrine such a soft *negotium*. One of the most obvious examples is provided by the 1995 Framework Convention on the Protection of National Minorities of the Council of Europe which deliberately falls short of defining the concept of minorities, leaving it to parties to determine whether there are national minorities on their territory. On the legal problems generated by this convention, see generally J d'Aspremont 'Les Réserves aux Traités. Observations à la Lumière de la Convention-cadre du Conseil de l'Europe Pour la Protection des Minorités Nationales' in *Les Minorités, Recueil des Travaux de l'Association Henri Capitant* (vol LII/2002) 487-514. Another example of instrument with a soft *negotium* is provided by those agreements which are not self-sufficient in the sense that they require complementary instruments in order that their scope can be fully defined. This is commonly the case of framework conventions which abound in the field of environmental law or nuclear non-proliferation. These types of soft *negotium* usually are accompanied by provisions that require the parties to adopt complementary instruments (*pacta de contrahendo* or *de negociando*) that will flesh out the obligations contained in the original instrument. See the illustrations provided by A Kiss, 'Les Traités-cadres : une Technique Juridique Caractéristique du Droit International de l'Environnement', (1993) 39 *Annuaire Français de Droit International* 792. See also, R-J Dupuy, 'Declaratory Law and Programmatic Law: From Revolutionary Custom to "Soft Law"' in R Akkerman et al (eds), *Declarations of Principles. A Quest for Universal Peace* (1977) 247, 254; See also the *International Status of South-West Africa*, Advisory Opinion ICJ Rep 1950 (11 July) 128, especially 140.

⁴⁷ For instance, in the *North Sea Continental Shelf Case*, the Court deemed that the principle of equidistance enshrined in Article 6 of the 1958 Convention on the Continental Shelf was not normative but did not challenge its legal character (ICJ Rep 1969, para 72). Likewise, in the case pertaining to the *Military and Paramilitary Activities in Nicaragua*, (*Nicaragua v. United States of America*), the Court, despite contending that Article 3(d) of the Charter of the Organization of American States does not provide for any sort of obligation to the parties, it did not reject its legal character (ICJ Rep 1986, para 259-261). The same is true with respect to its judgment on the preliminary objections in the *Oil Platforms* case. In that case, although it considered that Article I

The foregoing demonstrates the dominant role played by formalism in treaty-identification on the surface. It is argued here, however, that this is as far as the role of formalism extends in the identification of a treaty. Indeed, even though the this model of formal law-identification, based on the *instrumentum*, lays down an adequate framework for the identification of written treaties, this identification remains ultimately dependent on the intention of the authors of these agreements. As a result, as is explained below, formalism in the treaty-identification process yields to flexibility.

It is well established that the identification yardstick provided by the first Vienna Convention ('governed by international law') is of little use, as it only refers to the consequence of an agreement being identified as a treaty rather than the process of its identification.⁴⁸ Although the Vienna Convention is silent as to the decisive criterion in treaty-identification, it is the view of the International Law Commission that the legal nature of an act hinges upon the intent of the parties. Indeed, apart from Fitzmaurice who argued that an explicit criterion should be included,⁴⁹ the International Law Commission and its Special Rapporteurs deemed it to be self-evident and found it unnecessary to specify in their definition of a treaty.⁵⁰ This opinion is shared by most international legal scholars.⁵¹ Thus, although treaty-ascertainment remains formal on its surface, the legal

of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, according to which 'there shall be firm and enduring peace and sincere friendship', did not contain any obligation, the Court did not disqualify it as an international legal rule (ICJ Rep 1996, para 28 and 31). For an analysis of this aspect of the case, see J d'Aspremont, 'Les Dispositions Non-Normatives des Actes Juridiques Conventionnels' (2003) 36 *Revue Belge de Droit International* 496, 518; See also, A Boyle and C Chinkin, *The Making of International Law* (OUP, 2007) 221.

⁴⁸ Fitzmaurice had explicitly made a distinction between the law-ascertainment criterion and the consequence of an agreement being ascertained as a treaty. See ILC Report, (1956, A/3159 (F) (A/11/9)), chp III(I), para 34 et seq.

⁴⁹ Ibid.

⁵⁰ ILC Report, (1966, A/6309/Rev.1 (F) (A/21/9)), part I(E) paras11-12, and part II, chp II, paras 9-38

⁵¹ Among others, see A Aust, *Modern Treaty Law and Practice*, (2nd edn, CUP, 2007) 20; Oppenheim's *International Law* (9th edn., Jennings & Watts eds.), Vol. I, 1992, at 1202. Klabbbers, *The Concept of Treaty* (n 34) 68; Fitzmaurice, 'The Identification and Character of Treaties...' (n 34)145 and 165-166; Orakhelashvili, *The Interpretation of Acts* (n 3) 59. See also the general remarks of I Seidl-Hohenveldern, 'Hierarchy of Treaties', in J Klabbbers and R Lefeber, *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag*, (Martinus Nijhoff, 1998) 7. See Jacqué, *Elements Pour*

nature of such an instrument is itself determined on the basis of a non-formal criterion: *intent*.⁵² This means that in the treaty-identification process, the inherent formalism of the function of a formal written instrument is subsequently replaced by the non-formal criterion of intent, thereby aligning the process much more with the notion of flexibility.

Indeed, nothing can be seen to be more flexible than an intent-based treaty identification criterion.⁵³ Such a criterion ultimately grounds the identification of international treaties on an often indiscernible psychological element, and makes treaty-identification a deeply speculative operation aimed at reconstructing the author(s)' intent.⁵⁴

It is noteworthy that, confronted with the impossibility of establishing intention on the basis of formal criteria, international scholars and judges have repeated their attachment to a formal evidentiary process to ascertain such an intention.⁵⁵ This has particularly been the tendency of the International Court of Justice, which has striven to devise a formal methodology for the ascertainment of the intention of parties.⁵⁶ This methodology, as well as lacking consistency, has failed to alleviate the problems inherent in the establishment of intent. This is why international lawyers continue to struggle establishing intent as a basis for distinguishing treaties from other non-legal

une Théorie (n 43) 121; See C Chinkin, 'A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States', (1997) 10 *Leiden J Intl L*, 223-247.

⁵² See eg Orakhelashvili, *The Interpretation of Acts* (n 3) 59-60.

⁵³ In the same vein see Klabbers, *The Concept of Treaty* (n 34) 11 et seq. See also the remarks of Danilenko, *Law-Making* (n 35) 57 (who pleads for the necessity of a formal act of acceptance).

⁵⁴ *The Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (QB) (Comm), para 17: 'The search for a common intention is likely to be (...) elusive (...) because the contracting parties may never have had a common intention'.

⁵⁵ See eg K Widdows 'On the Form and Distinctive Nature of International Agreements' (1976-1977) 7 *Australian YB Intl L* 114. On this point, see the remarks of Fitzmaurice, 'The Identification and Character of Treaties...' (n 34) 145.

⁵⁶ As regards the identification of international treaties, see *Aegean Sea Continental Shelf (Greece v Turkey)*, Judgment ICJ Rep 1978 (19 December) para 95-107: emphasis is put on the actual terms and circumstances. Compare *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Judgment ICJ Rep 1994 (1 July). Regarding the identification of unilateral promise, see *Nuclear Tests (Australia v France)*, ICJ Rep 1974 (20 December) para 43. *Military and Paramilitary Activities in and against Nicaragua* (n 48) Merits. See *Frontier Dispute (Burkina-Faso/Mali)* ICJ Rep 1986. See the remarks of J Klabbers, 'Qatar v Bahrain: the Concept of 'Treaty' in International Law' (1995) 33 *ARV* 361-376.

agreements.⁵⁷ The difficulty of systematizing intent likely explains why the Court appears to have moved away from this methodology in more recent cases, as can be seen in its decisions in *Land and Maritime Boundary between Cameroon and Nigeria*⁵⁸ and *Pulp Mills on the River Uruguay*.⁵⁹

Against this backdrop, suggestions have been made to abandon intent as a criterion in the identification of treaties.⁶⁰ The author of this chapter has himself attempted to devise a new framework to construe the sources of international law in a dynamic fashion, grounded in the practices of law-applying authorities, which would overcome the difficulties inherent in the flexibility associated with intention as the decisive criterion in the identification of a treaty.⁶¹ Such propositions, however, have yet to be endorsed and substantiated by international legal scholarship or law-applying authorities. Until that occurs, it seems that identification of treaties will continue to be informed by flexibility, despite the formal trappings provided by the general theory of treaty-identification.

V. Formalism and Flexibility in the Application and Interpretation of Treaties

Stating that there cannot be any application of treaties without interpretation is extremely mundane.⁶² Indeed, it is uncontested that those authorities empowered to apply international treaties must inevitably interpret them. Treaty-application is primarily about

⁵⁷ See generally Klabbers, *The Concept of Treaty* (n 34) especially 245-250.

⁵⁸ See the laconic consideration of the Court regarding the nature of the Maroua Declaration adopted by Cameroon and Nigeria in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)* ICJ Rep 2002 (10 October) para 263 ('The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Article 2, para 1), to which Nigeria has been a party since 1969 and Cameroon since 1991, and which in any case reflects customary international law in this respect').

⁵⁹ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment ICJ Rep 2010 (20 April) para 138.

⁶⁰ Klabbers, *The Concept of Treaty* (n 34) especially 245-250.

⁶¹ d'Aspremont, *Formalism and the Sources* (n 3).

⁶² For a classical affirmation of that idea, see Scelle, *Précis de Droit des gens* (n 14) Vol II, 488. See also G Schwarzenberger, 'Myths and Realities in Treaty Interpretation' (1968) 9 Virginia J Intl L 18.

confronting a conventional rule with facts.⁶³ As a result, applying the treaty to the specific facts of each case requires an operation of interpretation which constructs a specific meaning for a particular rule for the specific situation to which it is applied. This is also why treaty-application and interpretation are not operations on which judges have a monopoly. Indeed, both legal scholars and addressees of treaties themselves are similarly engaged in the application and interpretation of treaties.

In terms of the argument put forward in this chapter, it is important to highlight that treaty-interpretation is ubiquitous and follows any attempt to apply a legal rule contained within a treaty to a factual situation. Interpretation, and thus the determination of a treaty's content in order to establish a standard of behaviour for a particular situation, simultaneously empowers the interpreter who is placed in a very unique position. This can be explained as follows.

Stating that the indeterminacy of ordinary language has contaminated the language of treaties is utterly unremarkable. Indeterminacy commonly stems from the openness of the ordinary language through which rules in treaties are expressed. Likewise, treaty rules, being the product of human thought,⁶⁴ are beset by ambiguities. These ambiguities may have been desired because they were the only manner in which the (absence of) consensus reached during negotiations could be translated into a written agreement. They could also manifest a deliberate delegation of powers of interpretation to the law-applying authority.⁶⁵ Whatever the foundations of the indeterminacy in the content of treaties, what it is important to highlight here is that, as a result of such indeterminacy,

⁶³ For an earlier affirmation, see J Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice: from the Manuscripts of Jeremy Bentham* (Hunt and Clarke, 1827).

⁶⁴ In the same vein, R Ago, 'Positive Law and International Law' (1957) 51 AJIL 691, 727-728.

⁶⁵ This is what A Marmor has called 'transparent vagueness'. See Marmor, 'Varieties of Vagueness in the Law' (n 4). On the vagueness of treaties and the powers of international judges, see generally M Forteau, 'Les Sources du Droit International Face au Formalisme Juridique' (2011) 30 *Observateurs des Nations Unies* 61-71. On the distinction between ambiguity (words' connotation) and vagueness (words' denotation), see the work of Michael Thaler as reported by J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, 2010) 118.

treaty application and interpretation are necessarily accompanied by a wide discretionary power for the authority in charge of carrying out these functions.

Whilst both the flexibility and wide discretion of law-applying authorities are necessary to preserve the meaningfulness of treaties when applied to factual situations⁶⁶, it is not surprising that this discretionary power is subject to checks and formal constraints. In general, the drafters of treaties have attempted to restrict the powers of judges and other law-applying authorities as much as possible. The restriction of the discretionary powers of law-applying authorities has been seen as indispensable to the preservation of their legitimacy.

Attempts to constrain the powers of law-applying authorities has traditionally amounted attempts to formalize and standardize their legal reasoning. More specifically, attempts to formalize the rationality of law-application and to constrain law-applying authorities' powers has usually meant the elaboration of rules of interpretation that guide content-determination by these authorities. It is this attempt that has given rise to the rules of interpretation found in Articles 31-33 of the Vienna Conventions,⁶⁷ which have now come to be viewed as reflecting customary international law and are frequently resorted to by courts and tribunals in practice.⁶⁸ This is not to say that there were no standards of

⁶⁶ ILC, *Study on Treaties and Times* (n 1) Annex A, 365.

⁶⁷ It is interesting to note that, although it has proved less successful, a similar endeavour has also been undertaken for unilateral acts and promises. See the Fourth report on Unilateral Acts of States, (A/CN.4/519) §§101-154 and Fifth report on Unilateral Acts of States, (A/CN.4/525) add 1, §§120-135. See the comments of J d'Aspremont, 'Les Travaux de la Commission du Droit International sur les Actes Unilatéraux des Etats' (2005) 109 *Revue Générale de Droit International Public* 163-189. See the contribution of Rodríguez Cedeño, Víctor and Torres Cazorla, Maria Isabel, 'Unilateral Acts of States', in *Max Planck Encyclopedia of International Law* (OUP, 2008). See also C Goodman, 'Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law' (2006) 25 *Australian YB Intl L* 43 or Orakhelashvili, *The Interpretation of Acts* (n 3) 465-486. Interestingly, the International Court of Justice asserted that the interpretation of unilateral acts is not necessarily governed by the same principles as international treaties. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep 2010 (22 July) para 94

⁶⁸ See eg *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, ICJ Rep 1991, 69-70, para 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Rep 1992, 582-583, para 373, and 586, para 380; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Rep 1994, 21-22, para 41; *Maritime*

interpretation before the Vienna Conventions. Themselves informed by earlier scholarly work⁶⁹, the formal standards of interpretation prescribed by the Vienna Conventions came to replace the sovereignty-protective principles of interpretation devised by international courts in the first half of the 20th century⁷⁰ by a toolbox of formal principles.⁷¹

Needless to say, the elaboration of formal standards of interpretation was not an easy enterprise. Such an achievement – which was deemed a miracle⁷² – was particularly painstaking work due to the difficulty in striking the subtle balance between the necessity to preserve flexibility in treaty application and interpretation on one hand, and the necessity of constraining the powers of law-applying authorities (by formal standardization of their legal reasoning) on the other.⁷³ The final balance struck by Articles 31-33 of the Vienna Conventions is thus the result of the tension and interaction between the opposing logics of flexibility and formalism.

The existence of formal rules of interpretation makes the application and interpretation of treaties, at least on the surface, a formal operation. Indeed, the existence of such principles shrouds these operations with a veil of formalism. These rules purport to

Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility, Judgment, ICJ Rep 1995, 18, para 33.

⁶⁹ See the *Annuaire de l'Institut de Droit International* (1956), 46, 364-5. See also <http://www.idi-il.org/>. AD McNair, *The Law of Treaties* (Clarendon Press, 1961) 466; See L Siorat, *Le Problème des Lacunes en Droit International. Contribution à l'Étude des Sources du Droit et de la Fonction Judiciaire* (LGDJ, 1958) 134 et seq. Rousseau, *Principes Généraux du Droit* (n 45) 676 et seq. See also P Verzijl, *Georges Pinson case* (1927-8) AD No 292, cited by C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 279. On the work of the International Law Commission. See MS McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus' (1967) 61 AJIL 992-1000.

⁷⁰ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, PCIJ 1925 Series B, No 12, 7 at 25.

⁷¹ On the rebuttal of that idea, see L Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681-700.

⁷² P Reuter, *Introduction au Droit des Traités*, (Armand Colin, 1972) 103. See Pellet and Dailler, *Droit International Public* (No 170, 6th ed, 1999) 262.

⁷³ JM Sorel, 'Article 31' in Klein and Corten (eds), *Les Conventions de Vienne* (n 15) 1291.

provide a formal methodology for the interpretation of international legal rules.⁷⁴ They are grounded in the idea that there is an inherent objective intelligibility and rationality in the logic of treaty-application.⁷⁵ They convey what one could describe as a 'Montesquian myth of textualism',⁷⁶ sometimes supplemented by internationalist and purposivist techniques, equating the interpretation of treaties with textual mining – that is, extracting an idea or rule from the text which exists objectively. In contrast to treaty-making and treaty-identification, formalism, at least on this surface, seems to dominate treaty-application and treaty-interpretation.

This is however as far as formalism has penetrated treaty application and interpretation. Indeed, the interpretation and application of treaties shows far more flexibility in practice. First, the elaboration of formal rules of treaty interpretation and application has not definitively struck a balance between flexibility and formalism. In fact, the balance between the two appears to be in a constant flux in international practice. This oscillation between normative creativity and formalization of content-determination can be observed in the decisions of courts and tribunals. In that sense, the tension between formalism and flexibility in the interpretation and application of treaties continues to be very dynamic. It is illustrative to mention two examples demonstrating the unstable character of the balance struck by the Vienna Conventions.

The controversies surrounding the use of subsequent practice and other relevant rules of international law as recognized by Article 31 (3) of the Vienna Conventions provide an example of this uneasy balance between formalism and flexibility. Although formally anchoring interpretation in the existing normative environment of the rule or existing

⁷⁴ See gen. S. Sur, *L'Interprétation en droit international public*, (Paris, LGDJ, 1974). See also Sorel, 'Article 31' *ibid.*, 1289-1338; Orakhelashvili, *The Interpretation of Acts* (n 3) 301-392; Kammerhofer, *Uncertainty in International Law* (n 66) 92 et seq.

⁷⁵ On the quest for immanent rationality, see EJ Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (May 1988) 97(6) *The Yale L J* 949-1016; SV Scott, 'International Law as Ideology: Theorizing the Relationship Between International Law and International Politics' (1994) 5 *EJIL* 313-325, especially 322.

⁷⁶ This is an expression I have used elsewhere. See J d'Aspremont, 'Wording in International Law' (2012) 25 *Leiden J Intl L*.

practice⁷⁷, Article 31 (3) has clearly reinforced the flexibility in treaty application and interpretation. The extent of that flexibility has not been objectively determined in practice and demonstrates decided variation. The ambition of the International Law Commission to provide guidelines related to this issue shows an acknowledgment that the use of this provision has been incoherent and unpredictable in practice and that further formalization is necessary.⁷⁸

A further example of the fluctuating balance between formalism and flexibility in the standards of interpretation found in the Vienna Conventions is provided by the development of conflicting and opposing techniques of interpretation under the same formal umbrella. These two interpretation techniques are namely: the (re)interpretation of a treaty on the basis of its *evolutive character*, and the (re)interpretation of a treaty on the basis of the *subsequent practice* of the parties; and they are both regularly found in the practice of international courts and tribunals. The former is based on an extrapolation of the intention of the parties.⁷⁹ The latter is grounded in an determination of subsequent and current practice of the parties, in line with Articles 31(1) and 31(3)(b).⁸⁰ It is not necessary here to carry out a detailed assessment of the natures, benefits and limitations

⁷⁷ Specifically on Article 31.3 (c), see P Merkouris, 'Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)' (2007) 9 Intl Comm L Rev 1; McLachlan, 'The Principle of Systemic Integration...' (n 70); See also J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in A Nollkaemper and OK Fauchald (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart, 2012) 141-166.

⁷⁸ ILC, *Study on Treaties and Times* (n 1) Annex A, 365.

⁷⁹ On evolutive interpretation, see Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I' (2008) Hague YB Intl L 101, 153. A famous example of interpretative interpretation of treaty is that endorsed by the European Court of Human Rights (see eg *Tyrer v the United Kingdom* (Judgment) App no 26 (ECHR 25 April 1978) para 31; *Marckx v Belgium* (Judgment) App no 31 (ECHR 13 June 1979) para 41; *Airey v Ireland* (Judgment) App no 32 (ECHR 9 October 1979) para 26; *Loizidou v Turkey* (Preliminary Objections) App no 310 (ECHR 23 March 1995) para 7).

⁸⁰ The use of subsequent practice in treaty-interpretation is widely recognized as a interpretation technique (see eg Report of the Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, , (finalized by M Koskeniemi, A/CN.4/L.682, 13 April 2006) and justifies that the ILC, as was indicated above, deemed it necessary to embark on the study of subsequent practice (see ILC, *Study on Treaties and Times* (n 1).

of these two techniques;⁸¹ for the argument put forward in this chapter it suffices to highlight that the availability of both techniques under the Vienna Conventions shows how unstable the equilibrium between formalism and flexibility in the application and interpretation of treaties continues to be.

This constant flux between formalism and flexibility falls short of shedding some light on the true extent of the limits of the formalization of the interpretation and application of treaties attempted by the regime of the Vienna Conventions. Indeed, there is a much more fundamental reason why the formalization of treaty content-determination has remained in limbo despite the elaboration of Articles 31-33 of the Vienna Conventions. A century of rule-scepticism and legal realism,⁸² as well as two decades of deconstructivism and critical legal studies,⁸³ have compellingly demonstrated the illusive character of formalism in law-interpretation and shed some light on the 'abuse of logic',⁸⁴ the 'abuse of deduction'⁸⁵ and the 'mechanical jurisprudence'⁸⁶ inherent in such a formal determination of the content of legal rules. The practice of law-application – including treaty-application – shows how flexibility has remained unchallenged despite the

⁸¹ On the motives that can potentially inform the choice for one of these two techniques, see J Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 *The L and Practice of Intl Courts and Tribunals* 443-494.

⁸² On the realist criticisms of formalism as a theory of legal reasoning in adjudication, see generally AJ Sebok, 'Misunderstanding Positivism' (1994-1995) 93 *Michigan L Rev* 2054, 2071.

⁸³ See eg D Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 *Leiden JIL* 84; D Kennedy, 'When Renewal Repeats: Thinking Against the Box', (1999-2000) 32 *NYU JILP* 335. M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2002) 502. M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2005) 306. N Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 *Harvard JIL* 81; T Skouteris, 'Fin de Nail: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship', (1997) 10 *Leiden JIL* 415; T Skouteris, *The Notion of Progress in International Law Discourse* (LEI Universiteit Leiden, 2008) chapter 3; For a similar interpretation of formalism from the vantage point of critical legal studies, see I Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism', (1990) 61 *BYBIL* 339, 345.

⁸⁴ Sebok, 'Misunderstanding Positivism' (n 83) 2093.

⁸⁵ D Kennedy, *The Rise and Fall of Classical Legal Thoughts*, (reedited in 2006, Beard Books) xviii.

⁸⁶ This is the famous expression of Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia L Rev* 605.

attempts to formally standardize both the application and interpretation of law.⁸⁷ Through these scholarly movements, the idea that the application of treaties is made behind a veil of ignorance has been severely undermined.⁸⁸

Interestingly, despite the demystification of formalism in the interpretation and application of treaties, observers and actors have continued to perpetuate the 'Montesquian myth of textualism' in the judicial application of law and continued to demote their function to textual mining. Everyone in the epistemic community of international law politely repeats that courts simply unearth the semantics that objectively exist in texts. At the same time, however, very few members of the community of international legal scholars still believe in such a parable. Despite the abovementioned compelling critiques of the myth of formal treaty-application in legal scholarship, the perpetuation of this Montesquian myth in international law is far from accidental and can be explained as follows. The Montesquian myth of textualism has been deemed indispensable to preserve the legitimacy of judicial decision-making processes. Without this myth, the exercise of governance by courts and tribunals would be made far more transparent, which would not be without severe repercussions on their authority and on the entire adjudicative process. Once the exercise of power by law-application authorities is uncovered and made transparent, other modes of legitimation in judicial decision-making will be needed to sustain the authority of courts and tribunals.⁸⁹ This is likely why theories of interpretation continue to flourish in international legal scholarship.⁹⁰

⁸⁷ See JHH Weiler, 'The Interpretation of Treaties - A Re-examination Preface' (2010) 21(3) EJIL 507; This was already expressed by Lauterpacht before the adoption of the Vienna Convention on the Law of Treaties, 'Restrictive Interpretation and the Principle of Effectiveness in The Interpretation of Treaties' (1949) 26 British YB Intl L 48, 53.

⁸⁸ This is the reason why I am convinced that international legal positivism is not about providing means to establish authoritative interpretation. The complex theories of interpretation that have been established to provide rationality (and hence authority) to argumentative reasoning are, in my view, alien to the knowledge of international law. They are, more simply, theories of argumentation. See J d'Aspremont, 'Herbert Hart in Post-Modern International Legal Scholarship' in J d'Aspremont and J Kammerhofer (eds), *International Legal Positivism in a Postmodern World* (CUP, 2013) (forthcoming).

⁸⁹ For such an endeavour, see I Venzke, *How Interpretation Makes International Law: On Semantic Authority, Legal Change and Normative Twists* (OUP, 2012); see also I Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative

The foregoing has attempted to demonstrate that, to a far greater extent than in the making or identification of treaties, it is the application and interpretation of treaties that serves to magnify the dynamic tensions between formalism and flexibility. The constant oscillation between the necessity for legitimization through the formal constraint of the powers of law-applying authorities, and the necessity of preserving flexibility to allow treaties to remain normatively meaningful, makes the equilibrium between formalism and flexibility here the most dynamic of the three examined in this study.

VI. Concluding Remarks

The statement that international law is the continuation of the struggle of politics by more civilized means⁹¹ is nowadays an uncontroversial assertion. It is generally accepted that international law brings about a displacement, rather than a neutralization, of the political confrontations in the international arena. Such a displacement of politics is carried out by virtue of a wide variety of different means.

Treaty law certainly constitutes one attempt to displace politics. Indeed, treaty law seeks to stabilize agreements reached among the main international actors by virtue of a formal standardization of (some aspects of) the making, identification, application and interpretation thereof. As indicated above, it does not dictate how treaties must be made, identified and validated or applied and interpreted, but provides a formal surface of predictability for the users and consumers of treaty law as to what cannot be achieved

Practice of Interpretation', (2012) 34 Loyola of Los Angeles Intl and Comparative L Rev <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868423>.

⁹⁰ In recent years, no fewer than six monographs have been written on interpretation. For a critical review of these works, see M Waibel, 'Demystifying the Art of Interpretation', (2011) 22 EJIL 571, 571-88.

⁹¹ This has been one of the lessons learnt from the last decades of international critical thinking. See eg M Koskenniemi, 'What is International Law For?' in M Evans, *International Law* (2nd ed, OUP, 2006) 57, 77.

with these three operations. In that sense, like any formalization of politics⁹², the type of formalism found in treaty law can be understood as an endeavour to control the making, identification, application and interpretation of norms through abstract categories. Treaty law should be seen as nothing more than a formal norm-management instrument.

It is important to realize that, albeit resting on an effort to formalize – to varying extents – the making, identification, application and interpretation of treaties, treaty law, like any other attempts to displace politics, does not seek to stifle it completely. On the contrary, politics survives on the formal surface in flexibility-friendly spaces, permitting the constant adjustment of the agreement and ensuring its survival in a constantly changing environment. In other words, in treaty law, politics are internalized in spaces which have been specifically designated for that purpose. In such pockets of flexibility provided by the Vienna Conventions, the law of treaties operates to delegate power to the maker, addressee, observer or interpreter of the treaty. This is well illustrated by the three dimensions of treaty law addressed in this chapter.

It is true that the creation of (or systemic self-generation of) pockets of flexibility found in the law of treaties can also be seen in other areas of international law, for example international adjudication⁹³ or the rules of international responsibility.⁹⁴ This means that,

⁹² D Kennedy, 'A New Stream of International Legal Scholarship' (1988-1989) 7 *Wisconsin Intl Law J* 1, 30.

⁹³ For instance, it is interesting to note that the International Court of Justice –following the Permanent Court of International Justice – in interpreting the conditions of its jurisdiction and its ability to seize itself of the cases submitted to it has demonstrated a strong endeavour preserve as much flexibility as possible. See eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment on the Preliminary Objections, ICJ Rep 1996 (11 July) para 26; *Temple of Preah Vihear (Cambodia v Thailand)*, Preliminary Objections, ICJ Rep 1961 (26 May) 31; *Northern Cameroons (Cameroon v United Kingdom)*, ICJ Rep 1963, 28; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Rep 1984, 428-429, para 83;. More recently, see the Joint declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf appended to the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Rep 2010 (30 November) <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=7a&case=103&code=gc&p3=4>>. For the case-law of the PCIJ on this question, see *The Mavrommatis Palestine Concessions, (Greece v Britain)*, Judgment PCIJ 1924 (30 August) Series A, No 2, 34; PCIJ, *Certain German Interests in Polish Upper Silesia*, PCIJ Series A, No 6, 14.

when it comes to preserving flexibility, the law of treaties behaves in a similar manner to other secondary rules of international law. The previous sections have demonstrated that, with regard to the law of treaties, the articulation between the formal surface for the 'domestication' of politics and the pockets of flexibility is particularly variable in practice. Indeed, as this study has attempted to demonstrate, the equilibrium between formalism and flexibility in treaty-making, treaty-identification and treaty-application varies considerably. For each of these dimensions of the life of a treaty, formalism and flexibility strike different balances and fluctuate according to disparate dynamics. Furthermore, the balance between flexibility and formalism found in each of these dimensions of the law of treaties is also unstable and subject to constant variation.

In conclusion it is argued that the complexity of the equilibrium between formalism and flexibility is symptomatic of the nature of the law of treaties. It is a manifestation of the very special nature of this branch of international law. In that sense, the complex, unstable and dynamic articulation between formalism and flexibility found in the law of treaties is anything but surprising. Indeed, it is the view of this author that the law of treaties boils down to an agglomeration of secondary rules which are of very different natures. Put simply, treaty law is primarily a composite set encompassing both rules of change⁹⁵ and, to a very limited extent, rules of adjudication⁹⁶. This set of rules is remarkably heterogeneous, and far more so than other sets of secondary rules found in international law.⁹⁷ It is in this context that the intricate, multi-layered nature of the

⁹⁴ On the flexibility left in the rules on international responsibility by virtue of the undefined concept of causality, see 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) Intl Organizations L Rev (forthcoming).

⁹⁵ On the difficulty in distinguishing the rules of recognition and the rules of changes, see J Waldron, 'Who Needs Rules of Recognition?' (2009) New York University School of Law, Public Law and Legal Theory Research Paper Series, Working paper No 09-21, April 2009<<http://ssrn.com/abstract=1358477>>.

⁹⁶ It is true that rules of recognition are strikingly absent from the Vienna Conventions and the pedigree by virtue of which treaties are identified is not directly determined by the Vienna Conventions and has been left to practice and scholarship (see section IVI).

⁹⁷ It is true that the rules on international responsibility could be said to be equally heterogeneous given their encapsulating of primary norms, rules on attribution which bears effect beyond the system of responsibility or rules of self-help.

Jean d'Aspremont. "Formalism versus Flexibility in the Law of Treaties " in Research Handbook on the Law of Treaties, ed. C. Tams, A. Tzanakopoulos and A. Zimmermann, Edward Elgar, 2014

articulation between formalism and flexibility in the law of treaties should be seen as an expression of the deeply complex and composite structure of this area of international law.