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OF TREATIES

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1. Introduction


In its judgment in the Loizidou Case, the European Court of Human Rights labelled the European Convention as a ‘law-making treaty’, with matching competences for the ‘Convention institutions’.

Classifications of treaties are also not new. In his 1930 article for the British Yearbook of International Law, McNair distinguished between ‘widespread functions and legal character of the instruments which it is customary to comprise under the term “treaty”’. Triepel had earlier proposed in 1899 a distinction between a Vertrag on the one hand and a Vereinbarung as a communal expression of identical wills on the other. More recently, Weiler has pointed to ‘differentiating factors of treaties’, with accordingly differing hermeneutics.

This chapter aims to trace the classifications of treaties prevalent in international affairs, without a claim to exhaustiveness, and to look at their significance within and outside the law of treaties framework. Findings may further our understanding of the various treaty typologies used today, often without clarity about the implications. A first aim is to

3 A.D. McNair, ‘The Functions and Differing Legal Character of Treaties’, British YbIL, 11 (1930), 100-118.
explore—in line with the project of which this paper is a part—which typologies of treaties are reflected in the 1969 Vienna Convention on the Law of Treaties (VCLT). As it turns out, together with the 1969 Vienna Convention, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, sparingly differentiate between treaties. This is somewhat different when we look at international law (doctrine) at large, or at broader discourses such as on justice and effectiveness.

The following sections consider the use of ‘typology’ (rather than ‘taxonomy’) as a tool—with form, normative effect and content as the main distinctive elements (Section 2). The chapter then addresses some typologies based on form (Section 3); some typologies based on normative effect—with special attention for the ‘law-making treaty’ as this typification has a prominent place in PIL discourse (Section 4) as well as typologies based on content (Section 5).

One thing this brief exploration of treaty typologies brings out, is how the treaty has moved beyond its identity of a content-neutral, formal instrument and has gained prominence as a context-dependent vehicle for normative authority.

2. Typologies, Taxonomies and the ‘Essential Juridical Character’ of Treaties

Treaty classifications sometimes have been connected with propositions about fundamental differences between legal instruments. McNair recommended that ‘we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules’, although he did not elaborate. The presumption that all treaties are in a fundamental sense the same legal instrument, had been a point of contestation before, with for example Triepel’s distinction, and, later, that of Rosenne, who considered constituent treaties of international organisations to be so different that ‘it is deceptive to see in diplomatic and legal [...] incidents concerning the constituent instruments “precedents” for the general law of treaties, and vice versa."

7 McNair, supra n. 3, at p. 118.
Such propositions are generally framed as *challenges* to the law of treaties - which brings out the underlying assumption (confirmed during the forty years codification process of the law of treaties) of the treaty as a single legal instrument governed by a unified set of rules, an ideal that recently has been under discussion again in relation to the ‘Vienna Plus’ ILC Guide to Practice on Reservations to Treaties.\(^9\) However, the following does not aim to engage with the debate on the completeness of the international law system, nor with that on the fragmentation of international law.\(^10\) Likewise, whether the various types of treaties identified in practice can be said to constitute *the same* legal instrument, is not the subject of this chapter, which looks at legal instruments generally taken to be governed by the ‘law of treaties’.

For a discussion about classifications of treaties then this chapter, as would be fitting in our discipline, takes the work of the pre-eminent scholar on the law of treaties of the pre-VCLT era—Lord Arnold McNair—as a starting point.\(^11\) In his 1930 article, McNair tentatively distinguished between treaties ‘having the character of conveyances’; contract treaties; law-making treaties (comprising both ‘constitutional international law’ and ‘ordinary international law’) and ‘treaties akin to charters of incorporation’ that is, constitutive treaties of international organisations. McNair related these differences to the ‘fundamental juridical character’ of treaties,\(^12\) but it is not certain to what extent he meant to make an ontological claim about different legal instruments. He did attach certain legal implications to some of the treaties he singled out; such as treaties of cession which (after execution) would not be affected by hostilities,\(^13\) and the *rebus sic stantibus* doctrine which would not be applicable to ‘legislative treaties’ in the same way as to ‘contractual’ treaties.\(^14\)

McNair’s distinctions combine criteria of form with those of normative effect, and internal-legal with external perspectives. His listing of various international agreements works as a single level *taxonomy*, conveying a clear picture of variety that makes good support eg for a plea to relax the traditional unified view of treaties. The current chapter chooses a somewhat different approach by looking at *typologies* of treaties—this is relevant as a host of typifications is found in legal doctrine and debate today. The notion

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\(^11\) McNair, *supra* n. 3.

\(^12\) *Ibid.*, at p. 103.

\(^13\) *Ibid*.

\(^14\) *Ibid*, at p. 110.
of typology\textsuperscript{15} suggests a classification of concepts rather than empirical facts, and it points to a construct built around particular attributes or dimensions to which the actual objects of classification do not necessarily correspond fully, nor exclusively. The rationale of a particular typology moreover depends partly on the context. Typologies do not necessarily last forever, as they hinge on particular questions to be answered and analyses to be made.

Along these lines, McNair’s ‘treaties of conveyance’ comprised cession treaties and other arrangements dealing with recognition or transfer of title over territory, somewhat analogous to domestic property rights.\textsuperscript{16} Arguably, that type or typology would nowadays include also status treaties, such as a boundary treaty or, in late modern terms, treaties creating territorial \textit{objective regimes}, such as the 1959 Antarctica treaty. For its part, the type of treaty creating objective regimes (conceptualised around the 1960s, even if actual examples can be found from the nineteenth century onwards)\textsuperscript{17} initially was often used to include also \textit{non-territorial} arrangements, notably constitutive treaties of international organisations (IOs).\textsuperscript{18} In fact, constitutive treaties are a case in point for the relativeness of treaty typologies. McNair found that such treaties ‘create[d] something organic and permanent and they seem therefore to demand recognition as falling into a special category of treaty.’\textsuperscript{19} In the 1930s, international organisations were less ubiquitous in international affairs, their legal status was uncertain and to attribute separate legal personality to organisations was an exceptional and controversial proposition;\textsuperscript{20} so it made sense not to include IO constitutive treaties in a larger category, but to set them apart completely as a \textit{sui generis} type of treaty ‘akin to charters of incorporation’.\textsuperscript{21} This was different once the taboo on legal personality for organisations had been lifted through the \textit{Reparations} Advisory Opinion of the International Court of Justice in 1949, while the number of organisations started growing rapidly. Unsurprisingly IO constitutive treaties were now frequently found in a category with other treaties that produce an effect for third parties—generally speaking the treaty type creating objective regimes. In fact, the ‘objective legal personality’ of the United Nations as proclaimed by the ICJ in the \textit{Reparation} Opinion was often linked and likened to the ‘objective effect’ of a treaty.\textsuperscript{22}

\textsuperscript{15} Leaving aside the distinction between ideal-type, extreme-type and empirical-type: see, further, S. Kluge, ‘Empirically Grounded Construction of Types and Typologies in Qualitative Social Research’, Forum Qualitative Sozialforschung, Vol. 1 (http://nbn-resolving.de/urn:nbn:de:0114-fqs001145).
\textsuperscript{16} McNair, \textit{supra} n. 3, at pp. 101-103.
\textsuperscript{19} McNair, \textit{supra} n. 3, at p. 117
\textsuperscript{20} C.M. Brölmann, \textit{The Institutional Veil in Public International Law} (Oxford: Hart Publishing), pp. 54-64.
\textsuperscript{21} McNair, \textit{supra} n. 3, at p. 116
\textsuperscript{22} See Reuter, \textit{supra} n. 18, at p. 121.
More recently this has changed again; with the advancement of international organisation and phenomena of multilevel governance, organisations increasingly came to stand out for their institutional dimension. The debate now has come to be focused on the organisation’s legal independence, its institutional or even ‘constitutional’ mechanisms, its autonomous development on the basis of compétence de la compétence, while the treaty by which all this was created, has faded into the background. The typification of IGO constituent treaties, changing from a separate class of ‘treaties akin to charters of incorporation’ to a sub-type of objective regime treaties, to a separate type of constitutive (and ‘constitutional’) treaties, is one example of how seemingly self-evident typologies may shift over time.

A typology then may be relevant because it can be connected to certain differentiations in the VCLT framework; for example: Article 60 (2) VCLT sets out a special rule for the unilateral termination of a multilateral treaty commitment (while, incidentally, there is no special regime for reservations to multilateral treaties—unsurprisingly so, in view of the bilateralised concept of reservations in the VCLT). A typology can also point to implications in the general public international law framework; for example: treaties which set out erga omnes partes obligations have implications for the definition of ‘injured state’ in the law of responsibility. Or a typology can bring out effects in a non-formal legal discourse such as that based on justice; for example: the category of ‘unequal treaties’ has weak legitimacy in the justice debate.

This chapter is concerned with types of treaty that are found in contemporary international legal discourse. Treaties, as legal phenomena in general, often appear conceptualised and rubricated in binary oppositions, especially within the formal legal framework. This means one-dimensional classifications (a rule is either ‘of a general normative scope’ or ‘not of a general normative scope’) rather than multidimensional ones. As moreover the treaty types in use are often not mutually exclusive, as for instance ‘law-making’ and ‘multilateral’, it means we are technically dealing with several typologies, frequently of the single-level kind that is built on two opposing (‘polar’) types. Any treaty is thus likely to belong to more than one typology. For example, the 1982 United Nations Convention on the Law of the Sea may be called a multilateral treaty (as opposed to for example a bilateral treaty), or a lawmaking treaty (as opposed to for example a contract treaty), or an environmental treaty (as opposed to for example an

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arms treaty). The choice for a particular typology will depend on the discursive context—which might be an activist agenda but also a courtroom procedure—and can be an element in legal framing.

The following singles out a number of typologies under three main headings: typologies based on form, typologies based on normative effect and typologies based on content. Form typologies include the ones based on laterality; on the participation to a treaty; on the nature of parties; on appearance of the treaty and on designation of the treaty. The normative effect typologies include the ones based on normative force; on normative completeness at the international level; on normative completeness at the national level; and (most famously) the typology based on regulatory function. The content typologies hinge on substantive areas of international law, and on (implicit) claims of hierarchy.

3. Typologies Based on Form

This category includes various typologies revolving around formal aspects of the treaty instrument. The most commonplace is the typology based on laterality; it includes bilateral treaties and multilateral treaties, as well as the occasionally referred to plurilateral treaties, which may denote either bilateralised agreements, with more than two parties but two sides to the agreement (with typically the 1975 Lomé Agreement as an example), or treaties open to a limited group of parties ‘due to subject matter or geography’, or in WTO context, to treaties to which WTO members can choose to become a party as opposed to ‘multilateral treaties’ which by definition have all WTO member states as a party). In this typology might be fitted also mixed agreements; even though these treaties have other attributes that technically provide a better basis for typification—notably the additional normative layer of the internal order of the EU—these treaties seem to be discussed most often in terms of laterality.

The Vienna Convention recognises laterality as a factor in the somewhat unwieldy provision of Article 60, on termination or suspension of a treaty on the basis of material breach by another party. The article provides what would be a parallel to the exceptio non adimpleti contractus in domestic law of contract, but (logically) not without effort

when it comes to multilateral treaty relations.\(^{29}\) Thus Article 60 (2) (b) VCLT maintains strict reciprocity in the relation between the defaulting state and the state that is ‘especially affected’ by the breach, but in regard of other states parties the VCLT adds a variable (‘radically changed’ positions) related to the normative effects of the treaty (see below in Section 4). In the history of the 1969 Vienna Convention, ‘material breach’ has rarely been explicitly invoked—with the 1997 Gabčíkovo-Nagymaros Case as a comparatively recent exception—and never successfully.\(^{30}\)

The typology based on the participation comprises the types ‘open’ and ‘closed’ treaties, which – if based on geographic parameters- are generally dubbed ‘universal’ and ‘regional’ treaties. The aforementioned term ‘plurilateral’ is sometimes found as synonymous to ‘closed’ treaties, that allow only specific states to become party.\(^{31}\) The Vienna Convention regime attaches some importance to such treaties through Article 20 (2); the flexible formulation goes back to a categorical unanimity rule in an earlier draft for the category of ‘plurilateral treaties’, which as such was under discussion in the ILC in the 1950s and 1960s but later abandoned.\(^{32}\)

A typology which in the past had considerable legal relevance, is the one based on the nature of parties. Since international law doctrine puts up a threshold for treaty-making capacity, in a positive law framework this currently boils down to three types of treaties: treaties between states, treaties between international organisations (IOs) and states, and treaties between IOs. Initially the emerging treaty-making practice of international organisations had been reconcile with the statist legal system by taking the position that agreements concluded by IOs were legally different instruments from agreements concluded by states.\(^{33}\) Such had been the suggestion of the Permanent Court when it said ‘tout contrat qui n’est pas un contrat entre des états en tant que sujets du droit international a son fondement dans une loi nationale’,\(^{34}\) and it was also the opinion of sole arbiter Professor Dupuy in the 1978 Texaco v Libyan Arab Republic award; he held

\(^{29}\) Cf. Art. 60 (2) VCLT (‘A material breach of a multilateral treaty by one of the parties entitles: [...] (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State ... ’).

\(^{30}\) Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (1997) ICJ Rep. 7 (on Art. 60 as invoked by Hungary, in particular at pp. 60-62 (paragraph 96) and pp. 65-66 (paragraphs 105-108).


\(^{32}\) Art. 20 (2) VCLT (‘When it appears from the limited number of the negotiating States and the object and purpose of a treaty 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, a reservation requires acceptance by all the parties’). See, further, C. Walter, ‘Article 20’ in Dörri and Schmalenbach (eds.), supra n. 26, pp. 287-306, at p. 296.

\(^{33}\) Bröllmann, supra n. 20, at pp. 132-133.

that states alone can be parties to a treaty, whereas agreements between, for example, states and IOs would be ‘instruments of another nature’.\textsuperscript{35} This perspective was also at the root of a proposal tabled in the ILC during the preparatory stages of the 1969 Vienna Convention, to disregard treaties between organisations but to take into account treaties to which a state \textit{and} an organisation were parties.\textsuperscript{36}

Although the terminological distinction between ‘treaties’ of states and ‘agreements’ of organisations persisted for quite some time and to some extent still does today\textsuperscript{37}, the underlying concept was abandoned, essentially because it became untenable in the light of developing doctrine and practice. The crucial factor here was the prevailing view of international law as a unified legal order in which different legal subjects interact by definition under one set of rules. The law of treaties moreover operates from the principle of equality of parties; thus—in defiance of initial recommendations to the contrary—it could not and did not make a legal distinction between treaties on the basis of parties. This was ultimately confirmed by the two Vienna Conventions, which turned out extremely similar.\textsuperscript{38} There may come a time when other actors, such as TNCs or NGOs unstoppably enter international treaty-making practice, causing a party-based typology again to gain prominence.

Finally there are typologies based on the \textit{appearance} of the treaty instrument (for example consisting of a number of component documents, or two letters, or a single piece of parchment or a paper napkin), and on the \textit{designation} of the treaty. Possible legal implications of such typifications, which could be seen before the UN era,\textsuperscript{39} have been neutralised as distinctive features in the 1969 Vienna Convention regime (Article 2 (1) (a): ‘...whatever its particular form or designation’).\textsuperscript{40} Outside the VCLT framework, on the other hand, references to a particular type such as an ‘MOU’ can have considerable legal or political relevance, as negotiating parties who are like-minded states may use particular terms to express their intention for striking a non-binding political accord (thus the UK and Netherlands make extensive use of gentleman’s agreements, often named MOU,\textsuperscript{41} but France does not, while the UN consistently uses the name ‘MOU’ for its many

\textsuperscript{35} Texaco Overseas Petroleum Company/California Asiatic Oil Company v Govt. of Libyan Arab Republic, 17 ILM, 1 (1978), 1-37, at 23 (paragraph 66).

\textsuperscript{36} YblLC (1965–I), 777th Mtg. (paragraph 7).

\textsuperscript{37} If only because IO treaties can generally be set apart from state treaties for their politically modest purport; see, also, H.G. Schermers and N.M. Blokker, \textit{International Institutional Law: Unity with Diversity} (Leiden: Martinus Nijhoff, 5th rev. ed., 2011), §1744, who observe the distinction, but without attaching (general) legal implications.

\textsuperscript{38} Brölmann, \textit{ supra} n. 20.


\textsuperscript{40} As to the matter of form confirmed in the \textit{Aegean Sea Continental Shelf: Greece v. Turkey} (1978) ICJ Rep. 3, at p. 39 (paragraph 96).

\textsuperscript{41} Aust, \textit{ supra} n. 31, at pp. 34-39.
binding agreements with other organisations and states). The typology based on designation may otherwise point to the political context of treaties in a different sense. Even if the name does not determine the international juridical status an unassuming title such as ‘letter of intent’ may have effects in domestic law - it may downplay the necessity for explicit approval of parliament, or it may increase the possibility of striking an accord in the form of an ‘executive agreement’ in constitutional systems such as the U.S., France and Germany.42

These typologies are based on formal aspects of the treaty. This is true to the spirit of the Vienna Convention, which is famously focused on the instrument rather than on the obligations stemming from it.43

4. Typologies Based on Normative Effect

A next class of typologies hinges on what might be called the normative effect of treaties. These typologies are arguably the most present in international law discourse – even though little trace of them can be found in the VCLT framework or even the law of treaties generally. In this category four appear especially prominent: the typology based on normative force, the typologies based on normative comprehensiveness in an international context and in a national context, respectively, and the typology based on regulatory function.

The normative force typology comprises two polar types, viz. treaties creating objective effects or: an ‘objective regime’, on the one hand, and treaties creating a subjective regime on the other. The legal effect vis-à-vis non-parties of the former type of treaties is taken as one of scope, and not one of content, as the typification of ‘objective regime’ revolves around normative effect. The typology is tried and tested among international lawyers, but it falls outside the framework of the Vienna Convention, which through Articles 34-37 rigorously adheres to the requirement of consent on the part of third states for both rights and obligations.44 International law doctrine has come to terms with the phenomenon by detaching the regime from the treaty by which it was created:

44 See also the chapter by Craven in M. Bowman and D. Kritsiotis (eds), Conceptual and Contextual Perspectives on the Modern Law of Treaties (CUP 2015).
the paradigmatic account is found in the judgment of the International Court of Justice in *Case Concerning the Territorial Dispute*: Libyan Arab Jamahiriya v. Chad in February 1994.45

The typology based on normative completeness at the international level contrasts framework treaties with comprehensive treaties.46 The VCLT framework shows no sensibility to this distinction, but the typology is a factor in international governance discourse, a notable example being the context of environmental protection. The typology also points to the composite character of a treaty regime as a whole and usually also to the continuous development of the treaty(‘s regime). This characteristic is very familiar and present in the public debate as a vehicle for policy-making and normative development in the issue area at hand, witness for example the public stature of the UN Framework Convention on Climate Change and protocols, tied together and dynamised by annual COPs and MOPS and ensuing ‘decisions’.47 The only reflection in the VCLT, one could argue, is the ineptitude of provisions operating with a temporal factor (the later in time principle and the earlier in time principle, in Article 30 (3) and 30 (4) (b) respectively) for governing this type of treaty which for the dynamic aspect of the regime it creates, has been termed ‘continuing treaty’.48

The typology based on normative completeness at a national level comprises the polar types self-executing and non-self-executing treaties. Through the VCLT prism this typological distinction is, again, invisible; but in international law discourse it has an important role, as the linchpin for the connection between international and domestic law. In the context of domestic law it is a key typological distinction in the process of actual application and implementation of a treaty. Thus, in 2006, the Netherlands was reprimanded by the Committee of the International Covenant of Economic, Social and Cultural Rights ‘to reassess the extent to which the provisions of the Covenant [ICESCR] might be considered to be directly applicable. It urges the State Party to ensure that the provisions of the Covenant are given effect by its domestic courts, as defined in the

45 ‘A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy’. *Case Concerning the Territorial Dispute*: Libyan Arab Jamahiriya v. Chad (1994) ICJ Rep. 6, at p. 37 (paragraph 73).

46 To be distinguished from the treaty regimes which can be divided in at least composite types of regime (traité cadre plus (eg) protocols) and singular types.

47 See also the chapter by French and Scott in M. Bowman and D. Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2015)

48 The term is taken from Joost Pauwelyn who conceptualises the WTO treaty, multilateral human rights treaties or environmental treaties as ‘continuing treaties’ which makes it, in his view, inappropriate to apply Art. 30 VCLT: J Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, AJIL, 95 (2001), 535-578, at 546.
Committee’s General Comment 3, and that it promotes the use of the Covenant as a domestic source of law.49

The most prominent normative effect-based typology is the one focused on regulatory function. It comprises three types: constituent or constitutive treaties of international organisations; contract (or ‘synallagmatic’) treaties; and law-making (‘non-synallagmatic’ or—the slightly awkward term—‘normative’) treaties.

A constitutive treaty is a portal to the internal, institutional dimension of an organisation.50 This dimension sits uneasy with the horizontal set up of international law, as becomes apparent for example in the problematic construction in the 2011 Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (ARIO), to take the ‘rules of the organization’ not as internal law but as lex specialis.51 The Vienna Conventions, on the other hand, do recognise the internal legal sphere of organisations in a general reservation clause contained in similar Articles 5.52 Article 5 of the Vienna Conventions genuinely delimits the operation of international law and demarcates a boundary between the law of treaties and the institutional law of organisations. The provision is a ‘without prejudice’ clause expressly reserving the right of international organisations to maintain their own rules with regard to their constituent treaties and to the treaty-making process in their framework.53 That the institutional order is thus construed as to some extent closed off from general international law, is also reflected in

50 Rosenne, supra n. 8, at pp. 246-248.
51 This is contestable for several reasons, for one because internal rules cannot have general normative force under general international law; and general ‘internal law’ by definition does not amount to a more specific rule ‘on an identical subject’. See, also, J. d’Aspremont, ‘A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union’ in V. Kosta, N. Skoutaris and V. Tzevelekos (eds.), The EU Accession to the ECHR (Oxford: Hart Publishing, 2014), pp. 75-86.
52 K. Schmalenbach, ‘Article 5’ in Dörr and Schmalenbach (eds.), supra n. 26, at pp. 89-99 (‘Article 5—Treaties constituting international organizations and treaties adopted within an international organization’—The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization’).
53 As to the 1986 Convention, in view of the—still—scant practice of organisations functioning in the framework of other organisations, the Special Rapporteur had considered ‘[i]t is obvious that there can be no article in the draft articles similar to Art. 5 of the 1969 Convention’ (Reuter III, YbILC (1974–II) (Part One), at 145). The Commission thought differently. On second reading a parallel Article 5 (Treaties constituting international organizations and treaties adopted within an international organization) was inserted in the draft ultimately to become part of the 1986 Vienna Convention; the provision is, however, not entirely symmetrical to its 1969 counter-part. It secures ‘no prejudice’ to ‘any relevant rules of the organization’ in case of constituent instruments only when these are treaties between states and organisations. Constituent treaties with exclusively organisations as parties were left out of account, with no further explanation on the part of the Commission (YbILC (1982) (Part Two), at 23).
the special role reserved for the ‘competent organ of the organisation’ in Articles 20 (3) (Reservations) and 77 (2) (Depositary) of the 1986 Vienna Convention.

That leaves ‘contract treaties’ and ‘law-making treaties’.$^{54}$ McNair appears to have considered the distinction between these two types as one of the most ‘fundamental’$^{55}$ and linked to the ‘essential juridical character’ of the treaties.$^{56}$ As the ‘contract treaty’ (with a normative content susceptible to reciprocity, which matches the contractual form of the instrument) is generally taken to be the unmarked, prototypal form of treaty, the ‘law-making treaty’ is here a logical starting point. This treaty type has a longstanding position in legal discourse, and merits some elaboration,$^{57}$ all the more because it is an awkward notion. Firstly it is questionable whether treaties can create law at all, as Sir Gerald Fitzmaurice famously pointed out: ‘Considered in themselves, and particularly in their inception, treaties are, formally, a source of obligation rather than a source of law.$^{58}$ But regardless even of how ‘law’ is defined, ‘law-making’ has a received meaning in the context of treaties. It refers to a treaty provisions with a general normative scope, with a statutory rather than a contractual function. This was what the International Court of Justice looked for when it examined whether a treaty provision was likely to have assumed force of customary law, viz. that ‘the provision concerned should … be of a fundamentally norm-creating character …’.$^{59}$

Of the four ILC Special Rapporteurs on the Law of Treaties Fitzmaurice was the most sensitive to this categorisation.$^{60}$ Next to bilateral or multilateral treaties that are based on a reciprocal exchange of rights or benefits (as would be any classically contractual treaty, for instance establishing a customs union), he identified a category of

law-making treaties (traités-lois) … where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other

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$^{54}$ Reuter, supra n. 18, at pp. 26-28.
$^{55}$ McNair, supra n. 3, at p. 106.
$^{56}$ McNair, supra n. 3, at pp. 103 and 106.
$^{57}$ Cf. the search for provisions of ‘a generally norm-creating character’ in the 1958 Continental Shelf Treaty by the International Court of Justice in North Sea Continental Shelf Cases: FRG/Denmark; FRG/Netherlands (Judgment), (1969) ICI Rep. 3, at pp. 41-42 (paragraph 72). Cf. also the statement by Alain Pellet, as Special Rapporteur for the ILC on reservations to treaties, on how it is ‘unusual for a treaty to be entirely normative or entirely synallagmatic’: YBILC (1997–1).
$^{59}$ North Sea Continental Shelf Cases, supra n. 57, at pp. 41-42 (paragraph 72); the passage also points to the practical complication that many treaties contain a mixture of law-making and contractual norms, which would make it more helpful to apply the notion to individual norms rather than to treaties as a whole. This aspect is left out of account in the present chapter.
parties to the treaty ….61

Fitzmaurice took a novel and rather technical approach which not only looked to the function of a treaty, which up until then had been the main take on ‘law-making treaties’,62 but also to the legal relations resulting from it. Thus, in addition to contractual and law-making treaties63 he identified a class of ‘interdependent treaties’, for which the performance of one party is dependent on that of all the other parties (the standard example given by him was a disarmament treaty). This separate category, although analytically sound, never caught on and cannot count as a ‘type’ that was ever in use.

The essence of a law-making treaty is the absence of a bilateral, synallagmatic relation with other treaty parties (even if in the framework of a multilateral treaty). This means a law-making treaty is different from the grid of bilateralised relations envisaged for the purpose of the reservations regime by the International Court of Justice in its advisory opinion in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide in May 1951.64 Rather, the construction is reminiscent of the ‘consensual bond’ which comes into being upon acceptance of the jurisdiction of the International Court of Justice under the optional clause in Article 36(2) of the ICJ Statute.65 Indeed, Brilmayer conceptualises the commitment to a non-synallagmatic treaty as a ‘pledge,’ in contrast to the commitment to a ‘treaty’ of the contract type.66 Law-making treaties elude the compliance pull of reciprocity—it is noteworthy that Fitzmaurice had proposed to extend the exception for ‘treaties of a humanitarian character’ in Article 60 (5) VCLT (see Section 5 below) to all law-making treaties. Human rights treaties are the pre-eminent example of law-making treaties in this sense.67 They are not only non-

63 A distinction which he carried on from interbellum legal scholars, as is pointed out by J. Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law (Cambridge: Cambridge University Press, 2003), pp. 56-57.
64 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, (Advisory Opinion) (1951) ICI Rep. 15; even though the Court took a synallagmatic approach to the question of the legal effects of reservations to the Genocide Convention, the Court also shed light (at p. 32) on the overall nature of the Convention: ‘[i]n such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest’; cf. C. Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’, EJIL, 21 (2010), 125-171.
67 See the chapter by Chr. Chinkin in Conceptual and Contextual Perspectives on the Modern Law of Treaties (CUP 2016).
synallagmatic, they are what has been called essentially ‘inward-turned’. This is how the Inter-American Court for Human Rights construed that ‘[i]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction’.

The complexities arising when regular treaty mechanisms (and concomitant reciprocity dynamics) are applied to human rights treaties fully came to light during the seventeen years of work in the ILC on reservations to treaties (see also Section 5 below). In 2011, the ILC adopted the Guide to Practice on Reservations to Treaties as ‘a soft law instrument mixing, however, hard rules with soft recommendations’.

Law-making treaties are recognised only implicitly by the VCLT framework (in the wake of Fitzmaurices distinctions, which in Pauwelyn’s words have left ‘traces’ in the Vienna Convention), in the context of termination/suspension or modification by one or some of the parties. Articles 41 (1) (b) (as confirmed by reference in Article 30) and 58 (1) (b) stipulate that no inter se modification or suspension, respectively, is allowed if this changes the effectuation of rights and obligations for the other treaty parties (without, however, the sanction of invalidity proposed by Fitzmaurice). Since this would always be the case in a treaty with integral or interdependent obligations (which are after all erga omnes partes) law-making treaties are here set aside. Article 60 (2) (c) (for Article 60 (2) (b) see Section 3 above) gives the right to invoke unilateral suspension of the treaty between itself and the breaching party if the treaty is of such nature (that is, containing integral or interdependent obligations) that the breach were to fundamentally change treaty performance by the other parties. Treaties which set out erga omnes partes obligations—arguably most law-making treaties—have implications for the definition of ‘injured state’ in the law of responsibility.

Other than this, the VCLT framework shows no sensibility to the typological distinction...
between law-making and contract treaties. One likely reason is the tension between form and function apparent in this treaty type. The treaty instrument (and arguably the treaty concept as such) is based on a contractual notion and hinges on the precepts of freedom of contract and consent as the basis of obligation, and reciprocity as the mechanism for performance—which is the reason for its historic success as a rule-making device in international affairs in the first place.

Meanwhile international law is increasingly expected to cater to communal values and communal needs, as transpires from the statement of the then president of the International Court of Justice en marge of the advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* in July 1996:

> [t]he resolutely positivist, voluntarist approach of international law still current at the beginning of the century ... has been replaced by ... a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.\(^\text{76}\)

But for their contractual form treaties are not *per se* the instrument for the creation of such communal international rules. In fact, ‘treaties’ have existed much longer than the notion of international law,\(^\text{77}\) while ‘international law’ existed long before it started to be written in treaties. The central law-making role which in our time has come to be conferred upon the UN codification conventions is essentially due to a lack of alternative. States drafting the UN Charter had strongly opposed conferring upon the Organisation the power to enact binding international rules. Likewise, proposals to give the General Assembly powers to impose certain general conventions on states by some form of majority vote had been rejected.\(^\text{78}\) That treaties have thus been taking care of both the contractual and the statutory function in international law lies at the root of the much-quoted statement by Arnold McNair that ‘[t]he treaty is the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions.’\(^\text{79}\)

While the idea of ‘law-making treaties’ goes back to the late nineteenth century, this treaty type, as the vehicle for codification, became a key element in the postwar narrative of a secure, fair and objective international law—and hence of the *international rule of*


\(^\text{78}\) Cf. introduction on the ILC website (http://www.un.org/law/ilc/).

law, as can be seen from the fostering of multilateral treaty-making as part of declared ‘rule of law’ promotion by the United Nations today.80

In contemporary international law discourse moreover the law-making treaty type often appears to be linked to a public81 aspect of international law, usually combined with the idea of a communal dimension of the international legal order. Such a dimension, sometimes in a particular issue area (be it the use of force, the care for transboundary watercourses or the protection of the individual), is part of a complex debate which addresses: communal values; rules with a general normative content and a ‘statutory’ function; a decline in the importance of individual states’ consent—sometimes in an intricate combination. The vision of an international community82 then implicitly proceeds from the idea of a unified system of law (as becomes clear also from the concern over its ‘fragmentation’).83

5. Typologies Based on Content

Finally of the content-based typologies, two in particular stand out: a typology based on issue area and—intricately connected—a typology based on hierarchy linked to the substance of the treaty.

The law of treaties is famously agnostic to the substance or the negotium of treaties. Rosenne held that ‘as the law of treaties does not envisage a legal distinction between treaties on the basis of content, it is unsurprising that it has proven difficult to classify international agreements in a legally relevant manner’.84 This is true depending on one’s understanding of ‘legally relevant’. The one type of treaty (provisions) set apart on the basis of content in the Vienna Conventions, in Article 60 (5), is ‘the protection of the human person contained in treaties of a humanitarian character.’ This exception to the rule of Article 60 (on the termination or suspension of the operation of a treaty as a

81 Cf. Hersch Lauterpacht, who early on set forth a reasoning that international law of necessity comprised ‘objective law’ next to consent-based rules stemming from treaties (Private Law Sources and Analogies of International Law (London: Longmans, Green & Co., 1927), for example at pp. 54-55); cf. supra n. 4.
consequence of its breach) was introduced in the text during the Diplomatic Conference in 1969, and served to save individuals from the ‘entirely inappropriate negative application of the principle of reciprocity.’\textsuperscript{85} From the travaux it can be gleaned the provision is to cover both human rights law and humanitarian law treaties.\textsuperscript{86}

This said, there is commonly mention of ‘human rights treaties’ and ‘humanitarian law treaties’ in a wider context than termination/suspension, and of ‘environmental law treaties’, ‘trade law treaties’, or any other rubric linked to an area of human activity and cooperation.\textsuperscript{87} In these cases, aside from actual normative content, the genre is so to speak a self-standing value. This can be seen in a division of policy areas (take for instance the division of policy areas in domestic governments and concomitant mandates for treaty negotiations) or in a form of ‘legal modelling’ of treaty arrangements on certain subjects (take, for instance, the contested argument that customary investemt law may be created through a quantity of uniform BITs).\textsuperscript{88}

Different epistemic communities may use different typologies. Most international organizations employ a typology for internal categorisation purposes. Foreexample in the International Labour Organisation a distinction is employed between the ‘fundamental’ Conventions, the ‘governance’ (or ‘priority’) Conventions and the ‘technical’ Conventions, in this case with implication in terms of reporting duties for the Member States (regular reports on implementation are requested at shorter intervals for the first two types).\textsuperscript{89}

Closely linked is the content typology which makes a (sometimes implicit) a claim of hierarchical order,\textsuperscript{90} or ‘relative normativity’ to use an older term, among treaties or treaty provisions. In this category we find among others a ‘fundamental rights treaty’, a ‘codification treaty’, a ‘constitutional treaty’ or on the other hand a ‘treaty with subsidiary rules’—to name a few typifications frequently used. Three in particular need to be mentioned.

\textsuperscript{85} T. Giegerich, ‘Article 60’ in Dörr and Schmalenbach (eds.), supra n. 26, pp. 1021-1050, at p. 1046.
\textsuperscript{87} Or linked to a longstanding area of legal study and classification: see the list of Multilateral Treaties Deposited with the Secretary-General of the United Nations (https://treaties.un.org/pages/ParticipationStatus.aspx) including the types of ‘obscene publications’ and ‘maintenance obligations.’\textsuperscript{88} A. Al Faruque, ‘Creating Customary International Law through Bilateral Investment Treaties: A Critical Appraisal’, Indian JIL, 44 (2004), 292-318.
\textsuperscript{89} I am indebted to Ann Trebilcock for information on the ILO; see, further, Trebilcock’s chapter in Conceptual and Contextual Perspectives on the Modern Law of Treaties (CUP 2016) and, otherwise, Brömman, supra n. 20, at pp. 128-132 on the typologies used by OECD, FAO, UN and EU.
First, human rights discourse, which oftentimes relies on an intricate combination of hierarchy typology and issue area typology. Such for example by use of the word ‘fundamental’ (which, unlike e.g. *jus cogens*, does not denote a formal legal category). Even though the VCLT framework does not recognise human rights treaties outside the context of article 60, the typification of human rights treaties or ‘fundamental rights’ treaties does appear as a persuasive authority both outside and within the framework of positive international law. The latter in processes of interpretation (Article 31 VCLT) and conflict of treaties (art 30 VCLT). See in this respect for instance the 1991 Short case, in which the Dutch Supreme Court gave priority to Article 2 European Convention of Human Rights (which in conjunction with the ‘Soering doctrine’ prohibited extradition of the American officer to the US) over the Status of Forces Agreement with NATO (which prescribed extradition). Human rights treaties moreover seem eligible for interpretation through a variant of the *living instrument doctrine*, whereas an appeal for evolutionary interpretation of certain conventional treaties is less likely to be honoured (note for instance the refusal of the International Court of Justice to extend the prohibitive rule regarding chemical weapons in the Geneva Protocol of 17 June 1925 to the later developed nuclear weapons). Otherwise differentiation in the context of on reservations to treaties in PIL doctrine at large has received something of a push from the work of the ICL on reservations to human rights treaties. On the attempts to adjust the rules on reservations for these ‘inward-turned’ rules, see above Section 4.

Second is the ‘constitutional treaty’ type, that was singled out by McNair. He identified two kinds of law-making treaties: ‘Treaties creating Constitutional International Law’ (such as Hague Convention I for the Pacific Settlement of International Disputes, and the 1919 Covenant of the League of Nations) and ‘Treaties creating or declaring ordinary International Law or ‘pure law-making treaties’ (such as ‘most of The Hague Conventions of 1899 and 1907, [which] contain rules governing the conduct of war’). In our time, the constitutional treaty (not to be confused with treaties constituting an international organisation) does not have a place in the VCLT framework. It is, however, a topos in international law and policy—one reflection of which are the efforts to construe the UN Charter as the world’s constitution. Otherwise this typification too may be taken as persuasive authority in the context of treaty interpretation. Compare the approach of the

92 *Legality of the Threat or Use of Nuclear Weapons*, supra n. 76, at p. 248 (paragraphs 54-56).
93 Simma and Hernández, supra n. 69.
94 McNair, supra n. 3, at p. 112.
CJEU in the first *Kadi* decision; the CFI in 2005 had reasoned in a classic international law framework, in line with which the UN charter took precedence over the EU treaty ex Article 103 of the Charter. In 2008 the Court took the EU treaty as a constitutional treaty, setting out concomitant ‘fundamental values’, and it thus bypassed the traditional conflict of treaties position.97

A third type of treaty that needs mention as it creates normative hierarchy based on its content, is the treaty conflicting with *jus cogens*. Such treaty conflict is actually addressed by the VCLT and the conflicting treaty rendered void by Articles 53 and 64 (Fitzmaurice originally had proposed this sanction for treaties conflicting with any law-making treaty or ‘integral obligation’).98 This is a strong feature of the Vienna Convention framework. However, as the category of *jus cogens* is essentially contested, and agreement exists about few norms other than the prohibition of slavery and the prohibition of genocide, there is room for considerations of justice and morality outside the VCLT. This is difficult in contemporary international law discourse. McNair held that ‘a treaty is null and void if its object is either illegal or immoral’,99 but lawyers in our time are un-easy in addressing such questions (cf. the phenomenon of unequal treaties), with aspects of fairness and justice relegated to other areas of study.

### 6. Concluding: Multiple Typologies and Multiple International Law Discourses

This chapter has outlined a number of treaty typologies *en vogue* in international law discourse today, rubricated under the headings of form, normative effect, or content. Going back to the starting point of this chapter—from our cursory overview it appears the Vienna Conventions offer few flexibilities to particular types of treaties. The typology based on laterality plays a role in that Article 60 sets out a variant of the *exceptio non adimpieti contractus*, with special rules for multilateral treaties. Otherwise, the Vienna Conventions recognise IO constitutive treaties by way of a general reservation clause in their (almost) identical Articles 5. As for content, only Article 60(5) of the VCLT explicitly singles out treaties of a ‘humanitarian character’. Thus, apart from a few more traces described in the chapter, the Vienna regime has special rules for one form-type (multilateral), one normative effect-type (constitutive treaty) and one content-type (‘treaties of a humanitarian character’). Treaties concluded by IOs then are set apart by the 1969 Vienna Convention in so far as they are excluded from its scope and relegated to the 1986 Vienna Convention (which, however, is so similar that it is difficult to speak of

99 McNair, *supra* n. 3, at p. 108.
‘differentiation’). While Lord McNair wrote a plea for legal awareness to the differing ‘legal character’ of treaties, and to the need for accordingly developing different rules,\(^{100}\) this was not to become a trend in the codification process of the law of treaties that started in the late 1940s.

Meanwhile, it seems typologies of treaties abound in international legal discourse among lawyers and policy-makers. In the category of normative effect typologies, the most prominent typological distinction is arguably the one between ‘law-making’ and ‘contractual’ treaties. The law-making treaty type has been an object of discussion since the late 19\(^{th}\) century, and is still today a frequently used analytical tool in treaty practice, doctrine and IR. But the VCLT framework is famously unreceptive to the special characteristics of ‘non-synallagmatic treaties’, which thus have hardly left a trace (with the exception of article 60(3)). Surely this is partly due to the fact that law-making treaties suffer from a gap between form and function.\(^{101}\) After all, in form the treaty instrument is very much geared to contractual, reciprocal relations, based as it is on the freedom of contract and ‘the general principle of consensualism which constitutes the basis of any treaty commitment [and which] necessarily entails the legal equality of the parties’.\(^{102}\)

Another prominent typification, this time based on content, is the ‘human rights’ or ‘fundamental rights’ treaty; it appears with considerable persuasive power outside the VCLT framework, while partly within the law of treaties paradigm, related to application and interpretation.

A cursory overview as in this chapter cannot do justice to the variety of treaty typologies and the ways in which these are put to use in international law discourse, especially outside the scope of the Vienna Conventions. Moreover, the relevance of typologies is partly defined by the context. A context such as ‘armed conflict’ is explicitly excluded from the VCLT regime (see Article 73; this does not preclude that, as is suggested by McNair and the recent work of the ILC, hostilities may give relevance to particular typological distinctions among treaties). But other issues of context and choice of typology remain, with further questions to be answered and trends to be discerned: is there a hierarchy among treaty typologies? What are the politics of treaty typologies?

\(^{100}\) McNair, supra n. 9, at p. 118.
\(^{101}\) Even if in practice issues are partly captured by the VCLT’s special rule for multilateral treaties in Art. 60.
\(^{102}\) P. Reuter, Tenth Report on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations, YbILC (1981-II) (Part One), at 46; cf. the Commission’s commentary on the final draft Articles in its 1982 Report, YbILC (1982).
What this chapter does show, is how the treaty has moved beyond its role of a content-neutral, formal instrument and how depending on the context the treaty has gained relevance as a body of normativity with broader implications.