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THE LAW OF TREATIES BEFORE DOMESTIC COURTS

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1. Introduction

This paper does not aim to reiterate the several fine books and treatises on the law of treaties - that is, the international legal rules governing the conclusion, application, termination, and so forth, of treaties. Rather, the paper focuses on how the law of treaties is used and applied in domestic courts. This is an increasingly relevant perspective, as a growing body of substantive international rules and norms is enshrined in treaties ('treaty law'), with normative effect in domestic legal orders.

Domestic courts may be faced with the entire range of rules codified in the Vienna Convention on the Law of Treaties (VCLT), the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT). Judging from the case law compiled in ILDC it seems, however, that certain questions are especially urgent: notably those regarding consent, entry into force, termination, interpretation and self-executingness of treaties. The sections in this paper generally correspond to themes and stages in the 'life of a treaty' which play a role in domestic case law: conclusion and entry into force (2); self-executingness (3); binding force and observance (4); reservations and declarations (5); interpretation (6); scope (7); successive treaties (8); amendment and modification (9); and termination and suspension (10).

This is not the only possible classification, or terminology. To some extent the terms are a matter of choice, which if consistently maintained does not always correspond to the terminology chosen by the various domestic courts. For example, as – in accordance with the regime of the Vienna Conventions – we do not distinguish between bilateral and multilateral treaties, we do not observe a distinction between 'termination' (used mostly in relation to bilateral treaties) and 'withdrawal' (used mostly in relation to multilateral treaties). We use the term 'self-executing' interchangeably with 'directly applicable' or 'directly effective'. On the other hand, for terminological clarity the following terms are to be distinguished: 'application' of a rule means it is being put to use on a legal case or question; 'implementation' refers to the creation of additional (international and – mostly – national) legal rules to flesh out a given treaty rule. 'Bindingness' of a treaty refers to its legal effect vis-à-vis a particular party, while 'entry into force' signifies the treaty instrument as such taking normative effect.

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1 University of Amsterdam and University of Vienna, respectively. The authors are grateful for the valuable research assistance of Mr Robin Peeters, erstwhile LLM student at the University of Amsterdam.

2 This paper will appear in an updated version in International Law in Domestic Courts Casebook, OUP 2016 (forthcoming).

3 See below under ‘Further reading’.


5 Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, 1946 UNTS 3; in force as of 6 November 1996.

A central feature of the treatment of law of treaties questions in domestic case law is the interaction (and occasional confusion) between the domestic and international law level. This interaction often adds a particular dimension to the legal questions addressed by national courts – such as when the domestic approval and the international expression of consent are combined to appraise the conclusion of a treaty, or when the normative scope of the international rule as such is linked to domestic law rules for incorporation to appraise its applicability in domestic law.

Leaving aside the interplay of international and domestic law, the question as to how a treaty formally takes effect within a domestic order is for the pertinent constitutional system to decide. That topic is treated in Part I - *vertical relationship between international law and domestic law of the prospective casebook on International Law in Domestic Courts*. In the current paper therefore we will not discuss the incorporation of international law into national systems, nor address their ‘monist’ and ‘dualist’ features. We will, however, look at the possible ‘self-executing’ character of treaties, as this relates to the normative quality of the international rule as such. More generally we do not address law of treaties aspects of topics, as for example state succession, that are treated in other parts of this book.

Support for this paper was found in selected case law from domestic courts in different jurisdictions. In the ILDC Database, as at June 1, January 2012, some 110 cases were identified as containing relevant issues related to the law of treaties. Of those, some thirty cases with highly substantial content were used. The remaining cases with law of treaties aspects are not per se without relevance. On the contrary, many contain relevant elements, or, while placed in one law of treaties category, have significance for at least one other category. This is why footnotes may refer to cases in addition to those mentioned in the main text.

7 *Oxford Reports on International Law in Domestic Courts* (ILDC); [http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts](http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts)

8 In addition to these cases classified in the law of treaties section, we have added several cases to the list which had been placed in the sources, foundations and principles of international law section but were labelled with a ‘law of treaties’ keyword.

9 The limited number necessarily implies that cases are referred to by way of example. The following criteria were applied for case selection. The choice of certain cases rather than others was made in first place with respect to their relevance for the topics discussed. However, certain topics came up more frequently than others, with e.g. the category of *interpretation* containing approximately thirty cases while the category of *fundamental change of circumstances* has only one. Since it seemed important to include a maximum of categories in the present contribution, this necessarily meant that for the smaller categories such as *fundamental change of circumstances or entry into force*, sometimes cases had to be chosen even though their content was not always in every way substantial. For the bigger category of *interpretation*, conversely, this led to deselecting several interesting cases, as to leave space for cases of other categories.

10 For example, cases in the category of *scope* were often relevant for *interpretation* too; those in *binding force and observance* also raised questions of *conclusion and entry into force or the self-executing character of treaties*. On the other hand, some ILDC categories did not appear helpful for the systemization of the cases – this was in any way the case with the category of *application*. The categories of *breach* and *effect for third states* comprised one and zero cases respectively. Those three categories were therefore deleted from the final list and the cases placed under categories where they were more suited. Other categories were joined and will be treated in one section because of their intrinsic relatedness, namely ‘binding force’ and ‘observance’; ‘termination and suspension’ and ‘fundamental change’. 
2. Conclusion and entry into force

Questions relating to the conclusion and entry into force of a treaty, as with the law of treaties in general, most often arise alongside an issue of substantive law. These questions may refer to rules of domestic law (for example the requirement of parliamentary approval for the government to bind the state to a treaty), or of international law (for example the need of ‘full powers’ for the state representative to perform international legal acts in relation to treaty-making). Oftentimes domestic courts are faced with questions that touch upon both the domestic and the international law level. Possible confusion is furthered by the terminological ambiguity of words such as ‘approval’, ‘adoption’ and ‘ratification’, which depending on the commentator and on the constitutional system concerned, may refer to a domestic legal act or an international legal act. Conclusion and entry into force together give the treaty full legal effect at the international level. How the treaty then takes effect within a particular domestic order is for the pertinent constitutional system to decide. This topic is addressed in Part I - vertical relationship between international law and domestic law in this casebook.

A. Conclusion

‘Conclusion’ of a treaty is a much-used but imprecise term, which depending on the context may comprise several stages, ranging from negotiation of the text to the treaty taking legal effect by ‘entry into force’. In this paper we take as the prime element of ‘conclusion’ the act by which a state (or other legal actor) expresses its legal will to be bound by an agreement. Such an ‘expression of consent to be bound’ (Article 11 ff. VCLT) may take different legal shapes and forms, notably that of ‘simplified signature’ (expressing consent by one single signing action – Article 12 VCLT) and ‘ratification’ (the confirmation of an earlier, non-definitive signature – Article 14 VCLT).

In the context of treaty conclusion domestic courts are generally faced with questions on the validity and the applicability of treaties in the domestic order. This involves, for example, the legal conditions for expression of consent. Some conditions pertain to international and some to domestic law, with an occasional intertanglement in the legal reading of the facts.

Thus, the ‘consent’ of a competent state organ at the domestic level and the ‘consent’ of a state at the international level may become linked in an intricate manner. This happened in the case Harksen v President of South Africa and ors11 where it was claimed that the consent of the President to extradite Mr Harksen to Germany in the absence of an extradition treaty amounted to an international agreement as such, and that in concluding this agreement the President had infringed the South African Constitution. The Constitutional Court however strictly observed the separation between the international and the domestic law level and reasoned that the president’s consent pertained only to the latter:

[14] Although presidential consent under section 3(2) [of the Extradition Act 67, 1962], may eventually have international resonance, the Act governs applications for extradition on the domestic plane only. This is true whether there is a treaty or not. Where South Africa is bound by an extradition treaty, its terms will govern the international obligations of this country to the foreign State. Nonetheless, as far as domestic law is concerned the implementation of those international obligations is expressly made subject to the provisions of the Act. Similarly, in a non-treaty extradition, the surrender of the person sought is subject to the requirements of the Act.

11 Harksen v President of South Africa and ors, Appeal to Constitutional Court, Case CCT 41/99; ILDC 659 (ZA 2000) 2000 (2) SA 825 (CC), 30 March 2000.
[...]  

[21] Although the judicial determination of the existence of an international agreement may require the consideration of a number of complex issues, the decisive factor is said to be whether “the instrument is intended to create international legal rights and obligations between the parties”. … the consent given by the President served merely to bring the appellant within the purview of the Act. It was a domestic act never intended to create international legal rights and obligations. It was not an agreement at all: neither an international agreement as maintained by the appellant nor an “informal agreement” as suggested by the High Court.

Similarly, the Polish Customs Chamber proceeded from a strict separation between legal orders when in SP SA v Director of the Customs Chamber in Łódź the question was brought whether a treaty that was being provisionally applied without having been ratified or promulgated could have binding effect in the Polish legal order. The Customs Chamber answered in the negative:

(Translation)

[12] Binding effect of the agreement in international relations is not identical with its binding effect within the domestic legal order of the country which is a party to such agreement. Therefore, the opinion issued in response to the claim that the Agreement, in its wording, constituted a source of law before it was promulgated, cannot be shared. The optional application of a treaty on a temporary basis before it enters into force, pursuant to Article 25(1) of the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 (Journal of Laws, 1990, No 74, item 439), applies to international law and does not revoke any binding provisions of the international agreement within the domestic [legal] order.

In the employment dispute League of Arab States v TM a blend of international and national law arguments was at issue. The Belgian Supreme Court decided that the League of Arab States (‘League’), though constituting an international organization, did not enjoy immunity from jurisdiction, inter alia on the ground that the federal parliament had failed to approve the Headquarters Agreement (HQA) between Belgium and the League which provided for such immunity. The League argued that parties had given their consent to be bound to the HQA by way of so-called simplified signature (as envisaged for IGOs in Article 12 of the 1986 VCLT) – from which it would follow that under Belgian law parliamentary approval was not required. The Supreme Court framed the question as one of international law and dismissed the possibility of simplified signature on the ground that the 1986 Vienna Convention with its Article 12 was not yet in force. This was a problematic argument as the Court did not broach the question of whether customary law of treaties allowed for this form. In fact, as appears from the travaux préparatoires of the 1969 Vienna Convention which contains an identical Article 12, the procedure of simplified signature had existed for a long time.

In many states judicial practice includes a ‘rule of construction’ (see below) or ‘treaty-conform interpretation’ which allows the court to take into account a treaty which has not (yet) taken effect at the domestic law level, because it has not been ratified by the state or ‘transformed’ into domestic law, as the case may be. In Englaro, as guardian of Englaro v Office of the Public

12 SP SA v Director of the Customs Chamber in Łódź, Complaint procedure, I SA/ Ld 1707/2002; ILDC 270 (PL 2003), 26 March 2003.
Prosecutor at the Tribunal of Milan and ors\(^\text{14}\) the Supreme Court held that the 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (in force as of 1 December 1999), which had not yet been ratified by Italy although such had been authorized and requested by the Parliament, could be used as an interpretative tool so as to give the domestic rules a meaning most consistent with that treaty.\(^\text{15}\) The difference with genuine ‘reception’ or ‘incorporation’ of the international treaty norm into the domestic order (see Part I) is of course that in case of a conflict, domestic law would prevail.

Finally, domestic courts may be faced with a question that in essence is preliminary – this is the question as to whether they are dealing with a treaty or a treaty framework at all. This has come up both in international (see ICJ 1994 Qatar v Bahrain\(^\text{16}\)) and domestic cases. In Dutch Seamen’s Welfare Foundation v Minister of Transport, Public Works, and Water Management\(^\text{17}\) that question hinged on the distinction between a treaty and an institutional act. The Dutch Seamen’s Welfare Foundation argued that adoption of the text of ILO Convention no. 163 concerning Seafarers’ Welfare at Sea and in Port (‘the ILO Treaty’) in the ILO Plenary Conference equalled ‘signature’ on the part of the member states in the sense of Article 14 of the VCLT. It would follow that the Netherlands state by terminating a subsidy to the Seamen’s Welfare Foundation had breached its legal obligation under Article 18 of the Vienna Convention\(^\text{18}\) not to defeat the object and purpose of the ILO Treaty prior to its final consent to be bound. The Dutch Council of State dismissed this reasoning and considered adoption of the text rather as a legal act of member states in an institutional framework:

(translation)

2.3. The appellant has argued that the Court has failed to appreciate that, since the State signed the ILO Treaty, this fact leads to direct treaty obligations for the State. […]

2.3.1 However, this argument is rejected. The text of the ILO Treaty was endorsed by the ILO conference on 8 October 1987. The ILO Statute does not provide for separate signature of ILO treaties by member states, rather it provides solely for ratification of a treaty. Therefore the ILO Treaty cannot be said to have been ‘signed’ by the Netherlands. Article 19(5) e. of the ILO Statute provides that a member state has no additional obligations other than providing periodic reports as indicated, as long as the Statute has not been ratified by the member state. It is a fact that the ILO Treaty has not been ratified by the Netherlands. There are, therefore, no other treaty obligations, other than the obligation to provide reports. Even where actual arrangements correspond to the objectives of the ILO Treaty, these nevertheless do not give rise to any treaty obligations,

\(^{15}\) See ibid, para. 7.2 – no English translation available.
\(^{16}\) Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility, 1 July 1994, 1994 ICJ Reports 112, 120ff.
\(^{18}\) Art. 18 VCLT reads: ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; […]’
nor to any legally binding expectations that future arrangements will accord with the ILO Treaty.

[...]

2.4 The appellant has also argued in vain that the Court failed to appreciate that article 18 of the Treaty of Vienna had been violated. No situation arises as described in article 18, preamble and in (a) and (b), of the Vienna Convention on the Law of Treaties regarding the ILO Treaty. Contrary to the considerations of the Court, the State is not therefore obliged to refrain from actions which would conflict with the object and purpose of the ILO Treaty.

[...]

B. Entry into force

The entry into force of a treaty (Article 24 VCLT) signifies the treaty instrument taking legal effect at the international level. That moment rarely coincides with the moment of taking effect in the domestic legal order. This discrepancy is a regular cause for questions brought before domestic courts. In the decision in National Federation of Guardianship Associations v France19 the French Council of State examined whether the legality of a Ministerial order could be assessed according to the revised European Social Charter, in case the Charter had entered into force in international law before the date of issuance of the Ministerial order, but had taken legal effect within the domestic legal order after that date of issuance. The Council held that the date of entry into force mentioned in the Charter solely governed the effects of the treaty at the international level. Its taking effect within the domestic legal order was subject to publication according to Article 55 of the French Constitution.20

3. Self-Executing Character of Treaties

Another fundamental question with which domestic courts are faced on a regular basis is whether a treaty provision is self-executing (also: ‘directly applicable’ or ‘directly effective’). That is, whether the treaty can be applied in the domestic legal order without additional regulation of an international or national character. This came up, for example, in Bug river claims, Czeslaw S v State Treasury and Minister of the State Treasury where the Polish Constitutional Court held that the reference to domestic measures in the text of the agreement concerned testified to the fact that they were not self-executing.21

This is to be distinguished from the question as to whether a domestic legal system allows for a rule to be invoked directly by an individual, or to be applied without ‘transformation’ into domestic statute law (see Part I of this Casebook). To be sure, self-executingness or direct applicability of a treaty (provision) is all the more relevant in countries with a predominantly

20 See para. 28 – no English translation available.
‘monist’ constitutional system for the reception of international law. For example in the United States, in order to allow a civil claim for a violation of a treaty provision, a court would have to find that the treaty (provision) was self-executing and conferred individual rights. This is similar in many legal systems of Latin American countries as well as, for example, in the domestic legal systems of Switzerland and The Netherlands.

In *Commonwealth of Pennsylvania v Judge* the Court stressed how direct applicability of the relevant treaty provision was a necessary condition for a treaty provision to be invoked before a domestic court. As the US had declared the ICCPR in its entirety non-self-executing (!), in casu the appellant was unsuccessful in his invoking of Article 6 ICCPR.

28 We believe that Appellant, in arguing that this Court must enforce the Committee’s determinations, has misapprehended the law of treaties. In asserting that all international agreements ratified by the Senate have binding force upon the courts of this country, Appellant ignores the distinction between self-executing and non-self-executing treaties. Indeed, contrary to Appellant’s assertion that ratification of the ICCPR rendered the treaty the supreme law of the land, with binding force on both the state and federal governments, ratification is not by itself sufficient to mandate enforcement of a non-self-executing treaty. [(See Sanchez-Llamas, ___ U.S. at __, 126 S.Ct. at 2680; Sosa, 542 U.S. at 735, 124 S.Ct. at 2767; Auguste v. Ridge, 395 F.3d 123, 133 n.7 (3d Cir. 2005) (“Treaties that are not self-executing do not create judicially enforceable rights unless they are first given effect by implementing legislation.”).]

In *A and B v Government of the Canton of Zurich* the question arose as to whether Article 13(2)(b) and Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights were to some extent self-executing. Without using the expression, the Court was looking for a possible directly applicable ‘minimum core content’ (as defined by the ICESCR Committee in 1994 General Comment no. 3) of the treaty, but in the case at hand found none.

\[c) \text{Subject to certain exceptions, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is not regarded in the jurisprudence of the Federal Court of Justice as directly applicable. [...]}\]

\[d) \text{As far as the provision of Article 13 (2) c. of the ICESCR now in question is concerned, the Federal Court clearly denied its direct applicability [...] There is no reason for departing from this Statement. It is not as such questioned by the petitioners. The only point can be whether Article 13 (2) c. (or b.) of the Covenant also has enforceable, directly applicable substance insofar as it prevents the national parliament from increasing or reintroducing charges, because this will mean a step back from the recognised constitutional objective (cf. on this Gebert, op. Cit., pp. 457–8; Jörg Künzli/Walter Kälin, The Importance of the UN Covenant on Economic, Social and Cultural rights to Swiss law, in Switzerland and The UN Human Rights Covenants (Die Schweiz und die UNO-Menschenrechtspakte), 2nd edition, Basel 1997, pp. 110 and 147–148). [...]}\]

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22 On such a treaty violation amounting to a deprivation of rights, see *infra*, the *Cornejo* case, fn 60 and accompanying text.


In Preventive Review of Unconstitutionality of Statute, Determination of Unconstitutional Omission to Legislate, Case No 7/2005 (III 31) the Hungarian Constitutional Court concluded inter alia that a promulgating act which provided that a self-executing treaty had been applicable from a date before the promulgation of the treaty, violated the prohibition of retroactivity and hence the Hungarian Constitution. In its reasoning the Court set out the mechanism for establishing direct applicability in the – dualist – Hungarian system.

3. Pursuant to Article 16 of Act XI of 1987 on Legislation, incorporation and publication of the treaty in domestic law are also required in the case of so-called self-executing treaties. If an international legal obligation becomes part of domestic law after incorporation without a specific statement from participant states or domestic legislators regarding direct applicability of the treaty, the law enforcement body decides in the case at hand whether the particular provision of the international treaty is applicable with regard to the given case. The precondition for applicability is that those subject to the international treaty are precisely defined private legal entities and that the rights and obligations included in the treaty are specific enough so that the treaty is enforceable without any further domestic legislative action.

4. [...] However, courts are authorised to make a final decision as to whether they classify as self-executing an international treaty or its individual provisions applicable to the given case. Hungarian law enforcement practice considers the Warsaw Convention as directly applicable when deciding legal disputes between private legal entities. (Courts have applied the Warsaw Convention in civil actions in the following cases: Judicial Decisions BH 1977. 436, BH 1982. 482, BH 1982. 531, BH 1983. 246, BH 1996. 332 and BH 1997. 197.) Furthermore, the Montreal Protocol amends several provisions previously classified as self-executing, including for example Articles 18 and 22 of the Warsaw Convention.

Incidentally, the Court also determined a particular domestic Law Decree (No. 27) to be inconsistent with the provisions of the VCLT; such for example in regard of the – according to the Court: confusing - use of the term ‘ratification’ to refer to the domestic law process of Parliamentary approval, rather than to the international legal act of expressing consent.26

4. Binding force and observance

A. Binding force

An intrinsic characteristic of treaties is their binding force, which has international as well as domestic dimensions. The ‘bindingness’ at the international plane is linked to the conclusion and entry into force of the treaty (see above). The legal effects in the domestic legal order, on the other hand, depend on a treaty’s domestic incorporation and are for the respective constitutional

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26 Ibid, para V2.
systems to determine.\textsuperscript{27} Especially in case of treaties which are supposed to create immediate effects at the national level, for example human rights treaties, the distinction between both planes is frequently blurred. This was evidenced in Denton v Director General National Intelligence Agency and ors\textsuperscript{28}, where the High Court of Gambia had to deal with human rights treaties (the African Charter on Human and Peoples’ Rights and the ICCPR) which had been ratified by Gambia but not given effect in the domestic legal order. Despite them not having been ‘domesticated’, the Court found that the treaties created legal obligations and applied them to the case:

19 From the onset, I wish to refer to the case of Caso Loyaza Tamago v Peru, 3rd June 1999, Inter American Court Series C Number 53 (1999). In this case, Peru had refused to implement the decision of the Inter American Court, and the Court observed that Article 27 of the Vienna Convention on the Law of Treaties of 1969 prohibits parties from invoking internal law to justify non-compliance with Treaty obligations.

20 I am bringing this up to address the Respondent’s contention that since the Gambia has not domesticated the African Charter [...] the Applicant cannot rely on the Charter. It is a fact that once a country signs a treaty, it should, strictly speaking, put into effect measures to domesticate it immediately on ratification. But there is no time limit to this; some countries do it faster than others. [...] But the fact that a country has not domesticated an international instrument, but has ratified it only, does not exonerate it from its obligations under that instrument.

21 This has been demonstrated fully with particular reference to the African Charter on Human and Peoples’ Rights, and in particular by the Government of the Gambia, which has rightly subjected itself to the jurisdiction of the African Commission on Human and Peoples’ Rights in many instances, where the Commission has ruled, for and against Gambia [...] If I am to agree that non domestication of the Treaties by the Gambia exonerates the government from its responsibilities under the Charter and the ICCPR, then I would seek to defeat the whole purpose of ratification and what it means to the Gambian government and her people. [...]\textsuperscript{29}

B. Observance

An implication of the binding force of treaties is their observance and due performance by the parties.\textsuperscript{30} This duty is most prominently expressed in the \textit{pacta sunt servanda} rule in Article 26 VCLT which together with the corollary duty in Article 27 VCLT (stating that a party may, in principle, not invoke the provisions of its internal law as justification for its failure to perform a

\textsuperscript{27} In Aust’s terms, for example, the international and national laws of treaties thus operate at different planes. (A Aust, Modern Treaty Law and Practice (CUP, 2nd ed., 2007) 178).

\textsuperscript{28} Denton v Director General National Intelligence Agency and ors, a 2006 decision of the High Court of Gambia. Decision on Application for Declaratory Relief, Civil HC 241/06/MF/087/F1; ILDC 881 (GM 2006), 24 July 2006. The case concerned the arrest and detention of a woman who had been held \textit{incommunicado} for three months without any charges being pressed against her.

\textsuperscript{29} See also para. 60: ‘Given the above analysis, I find that the arrest and continuous detention of the petitioner, can therefore be termed arbitrary, and be regarded as a violation of her right to freedom of liberty as contained in Article 19(3) of the Gambian Constitution, Article 6 of the African Charter on Human and Peoples’ Rights and Article 9 of the International Covenant on Civil and Political Rights.’

\textsuperscript{30} According to Reuter: ‘treaties are made to be performed’. (P. Reuter, Introduction to the Law of Treaties (Kegan, 2nd ed., 1995), para. 44).
treaty) operates as a bridge between the international and the domestic plane. Not surprisingly, domestic courts often refer to these rules when appraising the position of international law in the domestic legal order. While this clearly involves the reception of treaty law in the domestic legal order (addressed in Part I of this casebook), some judgments put strong emphasis on the international legal obligations and seemingly make these, rather than the domestic rules on the reception of treaty law, the deciding factor. Some of those judgments are reported here as an illustration of how domestic courts employ the international obligation of treaty performance and observance as the guiding norm.

In Linija v Latvia the Latvian Constitutional Court – seized in last instance with fines imposed on shipping companies in contravention of Latvia’s international obligations – maintained that in case of any contradiction between international law and domestic legislation, international law prevailed and had to be applied; a national norm conflicting with an international treaty was, according to the Court, null and void.

To reach its conclusion, the Court strongly relied on the necessary performance of treaties in good faith as envisaged in Article 26 VCLT.

(translation)

6. [...] The Vienna Convention foresees that states parties recognize the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems. Article 26 of the Vienna Convention provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Consequently, every state must observe its obligations under international treaties and other sources of international law. Therefore, a State may not conflict national law with international law. State’s national law may not contradict international obligations (law). [...] Therefore, it is evident from the national legislation as well as from the international obligations of the Republic of Latvia under the Vienna Convention on the Law of Treaties, in particular, the obligation to perform treaties in good faith, that in case of a contradiction between rules of international law, which have been approved by the Parliament, and national legislation, provisions of international law must be applied. Moreover, international obligations, which Latvia has undertaken by international agreements approved by the Saeima [Parliament] are binding also on the Saeima. It may not adopt legislation that contradicts these obligations. [...]”

Whether non-observance of obligations incurred by the Czech Republic in a bilateral extradition treaty was permissible on the ground of an alleged violation of domestic human rights obligations was the question in the constitutionality complaint re: Recognition of a Sentence Imposed by a Thai Court The Czech Constitutional Court referred to the pacta sunt servanda rule, recognizing it as a general principle of natural law and detailing the reasons to uphold it:

(translation)

31 In addition to the cases mentioned below, see also Ray Sigorta AS v Nunner Lojistic Ticaret Limited Sti, Appeal decision, E 2007/2970; K 2008/4599; ILDC 1034 (TR 2008), 7 April 2008, where the Court deals with the question how to observe the pacta sunt servanda principle.
33 ibid., operat. para. 1
34 Recognition of a Sentence Imposed by a Thai Court, Constitutional Complaint, I ÚS 601/04; ILDC 990 (CZ 2007), 21 February 2007.
34. The Constitutional Court submits that the Czech Republic is bound by international agreements, as follows from Article 1, Paragraph 2 of the Constitution, according to which “The Czech Republic shall observe its obligations under international law.” The corollaries of this clause include the general principle of natural law recognised by the international community of pacta sunt servanda, i.e. agreements must be kept. [...] 

The extent to which the state in question respects this principle not only has a role to play in strengthening that state’s own legal environment, through fostering citizens’ confidence in the law, but also offers a yardstick of the confidence with which the state is viewed in the international community. The extent to which the principle is respected provides a measure for some form of predictable conduct by subjects of international law and permits the mutual bona fide expectation that commitments arising from international agreements will be met, within the norms of international ius cogens. The order arising to some measure from international agreement appears to be the best environment for international cooperation and for the protection of a state’s interests — whether cultural, economic, political, or humanitarian — within that environment. A breach of international commitments therefore does not only bring with it international responsibility as specified under international law, but also a loss of confidence amongst the international community and a deterioration in cooperation between states.

On this basis, the Court decided in favour of the legal obligation of observance of treaties to the detriment of the individual applicant and denied the constitutionality complaint.35 Also in its conclusions, the Court upheld the principles of pacta sunt servanda and good faith as cornerstones of the international law of treaties:

58. The Czech authorities cannot therefore rule on objections which are essentially directed against Thai convictions, because the Czech Republic would run foul of the two principles which represent cornerstones of international treaty law and whose importance has been underlined by their incorporation in the Preamble of the UN Charter: the principle of pacta sunt servanda and the principle of good faith. The principle of good faith is a basic rule for interpreting the text of international commitments. Under the terms thereof, such commitments must be interpreted in good faith, taking into account the overall context of the respective treaty and in the light of the aim and purpose for which the treaty was concluded. The aim and purpose of the treaty concluded between the Kingdom of Thailand and the Czech Republic was to transfer the petitioner, at his own request, to his home environment, closer to his family and friends, and to enable him to serve the remainder of his sentence at home, in his native land. In light thereof, the Constitutional Court is unable to agree to the petitioner’s request that, due to a procedural defect, which falls well short of constitutional level, the Constitutional Court should annul the decisions by the Czech courts of general jurisdiction and release the petitioner. By granting the petitioner’s request the Constitutional Court would not only be breaching Article, 1 Paragraphs 1 and 2 of the Constitution of the Czech Republic, but also the credibility which the Czech Republic enjoys in international relations.

The international legal duty to perform treaty obligations was also the principal argument in President of the Turkish Republic of Northern Cyprus President v Assembly of the Turkish Republic of Northern Cyprus36, which was decided in first and last instance by the Northern Cyprus Supreme Court sitting as Constitutional Court. In this case, a constitutional review of

35 ibid, para. 57.
36 President of the Turkish Republic of Northern Cyprus President v Assembly of the Turkish Republic of Northern Cyprus, First and last instance, D 4/2005 (9/2005); ILDC 500 (TCc 2005), 25 November 2005.
treaties in the abstract was at stake. When addressing the question whether provisions of the 2000 Framework Protocol on the Establishment of a Campus in the Turkish Republic of Northern Cyprus (TRNC) could unilaterally be modified, the Northern Cyprus court likewise upheld the supremacy of international law. Overruling an older decision, the Court stated that treaty provisions could not be altered through constitutional review.\textsuperscript{37} In order to reach that conclusion, it relied on the principles of equality and reciprocity between states:

\textit{(translation)}

48 The most important principles applied in relations between states are the principles of equality and reciprocity. States, like persons or legal entities, expect that all parties to an agreement will follow its terms and conditions. If a party to an agreement reached after substantial negotiations says: “I am going to sign this agreement but if the Constitutional Court annuls any of its articles, it will not be executed in full”, this will create multiple problems because such a reservation will lead to another reservation by another party. With great probability, other articles of the agreement will also be annulled by the Constitutional Court of the other country. The resulting document will turn out to be quite a different agreement. [...]  

The Court also considered it a ‘worldwide principle’ that treaties were not subject to constitutional review:

66 It is a worldwide principle that international agreements are not subject to constitutional review. Saying “I am not reviewing the international agreement as a whole, I am just reading one of its articles along with an article from my Constitution and interpreting it in a different way” is no different from direct and open review of such agreement, because the consequences of both are the same. The agreement shall be rendered ineffective unilaterally, and the other party will not be able to execute the agreement under the principles of equality and reciprocity. No state would then wish to enter into agreements with a state which changes an international agreement through a unilateral decision.\textsuperscript{38}

In \textit{Legal Opinion on the Compatibility of the Bilateral Agreement Between the Governments of the United States and Benin with Article 98 of the Rome Statute of the International Criminal Court}\textsuperscript{39}, the Benin Supreme Court dealt with conflicting international obligations. More particularly, it had to decide whether a so-called ‘Article 98 Agreement’\textsuperscript{40} between Benin and the

\textsuperscript{37} ‘[... ] We may say that our country is about to face rather complicated legal problems due to this decision [(Decision no. 11/93; Docket no. 9/94, Constitutional Court)]. The Court held that the mentioned precedent, which had accepted the Constitutional Court’s power to declare a statutory provision unconstitutional where that provision originated from a treaty obligation, was dangerous for the foreign relations of TRNC – which were in any case very limited due to the unrecognized status of the entity.’ (Ibid., para. 48).

\textsuperscript{38} See also ‘[...] A universal principle dictates not to appeal to the Constitutional Court claiming violation of the constitution in international agreements. First, we need to analyse its scope and as to why this principle is adapted. [...]’ (Ibid., para. 47).

\textsuperscript{39} \textit{Legal Opinion on the Compatibility of the Bilateral Agreement Between the Governments of the United States and Benin with Article 98 of the Rome Statute of the International Criminal Court}, Legal opinion, Case number 029-C; ILDC 844 (BJ 2003), 25 July 2003.

\textsuperscript{40} Art. 98 of the Rome Statute: ‘Cooperation with respect to waiver of immunity and consent to surrender. 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the
United States, which would oblige Benin not to surrender US nationals to the International Criminal Court, was compatible with Benin’s obligations under the Rome Statute of the International Criminal Court (Rome Statute). To reach its conclusion that Benin was prevented from signing the Bilateral Agreement, the Court referred to Benin’s obligations arising from Articles 26 and 18 VCLT under the general law of treaties as well as to its specific obligations resulting from the Rome Statute (while it did not rely on Article 30 of the VCLT and the conflict clause of Article 98 of the Rome Statute):

(translation)

With regard to the general principles governing international treaties

34 It shall be recalled that the pacta sunt servanda rule confirmed in the Vienna Convention of 23 May 1969 to which Benin is also a party states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” (Article 26).

35 The corollary of this provision appears in Article 18 of the Vienna Convention, which lays down that “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty”.

36 The result is that Benin, which has freely consented to the Rome Statute, places loyalty and trust in the commitment made, especially with regard to its specific obligations under this Treaty.

With regard to the specific obligations resulting from the Rome Statute

37 Benin has ratified the Rome Statute which imposes obligations on it such as those regarding cooperation with the International Criminal Court; obligations whose scope is limited by the draft agreement put forward for signature.

38 Benin cannot withdraw from it by recourse to the exemptions under Article 98 of the Rome Statute. As there is no reservation, as article 120 strictly prescribes, any agreement that is made subsequent to the Rome Statute can only be taken as an evasion of the proper execution of its obligations.

5. Reservations and declarations

Immediately relevant to the binding force and observance of treaties are reservations and interpretative declarations, by which a state may adjust the scope of its treaty obligations at the time of expressing consent to be bound. Frequently, domestic courts are faced with questions of cooperation of that third State for the waiver of the immunity. 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.’

41 ‘Having regard to the above comments, the Government of Benin cannot sign the bilateral agreement proposed by the American Government without compromising its obligations under the Rome Statute establishing the International Criminal Court [...] (Compatibility of the Bilateral Agreement, supra n. 39, para. 45).
admissibility of reservations. In this context, also the distinction between reservations (which modify the scope of treaty obligations)\textsuperscript{42} and interpretative declarations (which specify but cannot alter the extent of treaty obligations) was prominently at issue.

The (non-)admissibility of reservations to bilateral treaties was a primary question in \textit{Karīņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia}\textsuperscript{43} where the Latvian Constitutional Court had to decide, \textit{inter alia}, whether the phrase 'observing the principle of inviolability of frontiers established by the Organization of Security and Cooperation in Europe' in Article 1 of the Law on the Republic of Latvia and the Russian Federation Treaty on the State Border of Latvia and Russia (Latvian Ratification Law) constituted a reservation, and a permissible one, to the Treaty on the State Border of Latvia and Russia. The Court held that the reference was an impermissible reservation to a bilateral treaty.\textsuperscript{44} To reach its conclusion, the Latvian Constitutional Court started out with a detailed distinction between reservations and interpretative declarations:

\begin{quote}
(translation)

\textit{77.2. International law does not prohibit States from making reservations when undertaking international obligations by amending specific rules of the treaty, as well as by attaching interpretative declarations or unilateral statements of different nature.}

In accordance with Article 2 (d) of the Vienna Convention, “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

[...]

\textit{International law permits that States attach interpretative declarations to the treaties. Interpretative declarations, according to the definition provided by the International Law Commission, unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions. [...]

Both reservations and interpretative declarations are the instruments of international law, with which a State can affect the international obligations that it itself undertakes in a favourable manner, provided that the respective amendments or explanations do not come into conflict with the object and purpose of the specific treaty. Similarly, these instruments are to be used not in the way that the State itself wants but by observing the rules of international law of treaties and customary law.}
\end{quote}

According to generally accepted doctrine, domestic statute law would not per se constitute a legal act at the international level and modify treaty relations with a co-contracting party. The Latvian Constitutional Court found however that the reference in the Latvian Ratification Law could have the character of a reservation, as it factually narrowed the preamble of the Border

\textsuperscript{42} See Art. 2(1)(d) VCLT.
\textsuperscript{43} \textit{Karīņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia, and joined case}, Constitutional review, Case No 2007-10-0102; ILDC 884 (LV 2007), 29 November 2007.
\textsuperscript{44} See ibid., substantive part, para. 4.
Treaty. Proceeding from there, the Court held that the reservation was impermissible for a bilateral treaty:

77.3. Any unilateral statement whereby a State indicated the manner in which it intended to implement the treaty as a whole should be viewed as a reservation. [...] 

The reference to the principle of inviolability of borders made in Article 1 of the Ratification Law narrows the Preamble of the Border Treaty, which refers to the UN and OSCE principles.

In the view of the Constitutional Court, such a reference in Article 1 of the Ratification Law can have the character of a reservation.

78. Expression of such a separate position that does not coincide with the position of the other State established in the Ratification Act and is not coordinated with the text of the concluded Border Treaty can considerably affect the fulfilment of the obligations undertaken in the particular Treaty and the international law opinion of the other party [...] 

78.2. International law does not permit formulating reservations to all international treaties. The Vienna Convention, as its preparatory materials show, deals with formulating reservations to multilateral international treaties. [...] 

It is not possible to formulate reservations that affect the content or application of bilateral international treaties [...] If a State still decides to do it, this means that it does not agree to the concluded treaty and proposes to reopen the negotiations [...] 

While the Latvian Constitutional Court examined the substance of the assumed reservation to decide upon its permissibility, in Public Prosecutor v Belgium and others the focus of attention of the Ghent Court of Appeal was on the domestic procedures required under domestic law (in casu parliamentary consent and publication) for reservations to be valid in the Belgian domestic legal order.

In FEMOSPP and the Federal Prosecutor v Echeverría and others, the Mexican Supreme Court had to deal with the admissibility of a Mexican ‘interpretative declaration’ to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (Convention on War Crimes) which determined that the non-applicability of statutory limitations would only concern crimes committed after the entry into force of the Convention for Mexico in June 2002.

When examining whether Mexico’s ‘interpretative declaration’ was in fact a reservation, the Mexican Supreme Court started with an analysis of the difference between interpretative declarations and reservations.

(translation)

174 In light of the foregoing, we should determine the legal nature of the “interpretative declaration” issued by the Mexican State when approving the analyzed Convention. The characteristics of these declarations are not defined in written rules of international law,

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such as the Vienna Convention; rather, in practice the States have understood them as unilateral declarations, made outside a treaty, which perform functions different from the “reservations”. In this regard, the interpretative declarations may not in any case “exclude or modify” the legal effects of a treaty for a signatory state. In this sense, the declarations are clarifying or explanatory declarations for the scope of the rules of the treaty for the purposes of domestic law. [...] 

176 From the foregoing [reference to Art 2.1.d VCLT] it is clear that there are substantial differences between interpretative declaration and reservation in international legislation, and that the term reservation or declaration does not depend on the designation or pronouncement with which it identifies, but rather on the material characteristics of the unilateral declaration issued by the State, the essence of the distinction being the exclusion or modification of the legal effects of certain provisions of a treaty in the application within the territory of the issuing State. [...] 

Turning to Mexico’s ‘interpretative declaration’, the Court decided that the declaration could be considered a reservation only if it modified the scope of application of the Convention on War Crimes which it found to be the case.

178 In those terms, the interpretative declaration issued by the Mexican State would have to be considered as a reservation if it were to modify in any way the scope of the effect of the analyzed Convention, which in the case in question would be the period of effect. [...] 

179 It could be submitted, as the Federal Prosecutor does, that the intention of the Convention is to rule even on acts carried out prior to its effective date within domestic law, which could be inferred from the wording of the Convention itself, which literally provides that:

“Article I. No statutory limitation shall apply to the following crimes, irrespective of the date of their commission [...]”.

180 In this case, the intention of the Convention would be to govern all crimes committed, regardless of their date. Therefore, the interpretative declaration issued by the Mexican State would actually modify the period of effect of the Convention, and would thus have to be qualified as a reservation. This designation, in principle would force the court to evaluate the reservation with regards to the object and purpose of the treaty, pursuant to article 19 c) of the Vienna Convention.

Somehow surprisingly, however, the Mexican Supreme Court ended with a purely domestic consideration, finding Mexico’s ‘interpretative declaration’ valid for being in line with Mexico’s constitutional limitations.47

6. Interpretation

A central task that comes with the application of treaties, as of domestic statute law, is the interpretation of written provisions. Courts may be asked to interpret treaty rules as such, or domestic rules that are an explicit translation of the treaty, or independent domestic rules against the backdrop of a particular treaty (see above on treaty-conform interpretation). In all cases courts appear to rely at least to some degree on the international canon of rules for treaty

interpretation as codified in Articles 31 and 32 of the VCLT. It helps that the VCLT framework for interpretation is famously broad, subsidiary and not very hierarchically structured. The reasoning of national and international courts often seems to touch upon as many interpretive tools as are applicable, to then use an interpretive tool of their choosing as the decisive factor. Traditionally, treaty interpretation conducted by international courts gives considerable weight to the aspect of consent as a basis of the treaty. Hence, VCLT Articles 31 and 32 emphasize a textual approach, whether alone or in concert with a focus on ‘intention’; a similar method may be gleaned from the ICI’s practice. Although mentioned in the VCLT, there is generally less concern for ‘object and purpose’ as a tool to establish the text’s meaning. In contrast, the interpretation of treaties by domestic courts appears more often inspired by the principle of effectiveness, or a teleological approach, to the text. As with ‘intent’ in treaty interpretation by domestic courts, the ‘purpose’ of the treaty may be found not only in the international context but also in national law or policy considerations. Naturally, in jurisdictions where the rule of precedent is observed, such as the US and, when it applies common law, Canada, judicial decisions as interpretive instruments have a more central role than envisaged in the Articles 31 and 32 of the VCLT (in which they go unmentioned).

In Pushpanathan v Canada the Canadian Supreme Court examined whether trafficking in narcotics was ‘contrary to the purposes and principles of the United Nations’ in the sense of Article 1(F)(c) of the Convention relating to the Status of Refugees (Refugee Convention), which describes a ground for exclusion from the protection of the Convention. The Court referred to a ‘textual analysis’ (para. 56) of the Convention, but overall it focused on the purpose of the treaty linked with the intent of the parties. Specifically, the Court used the purpose of Article 1(F) of the Refugee Convention (that is, to prevent persons having caused persecution and refuge of others from subsequently enjoying

48 Art. 31 VCLT addresses the VCLT’s general rules of treaty interpretation: ‘1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.’ M. Herdegen, ‘Interpretation in International Law’, in R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (OUP 2008), online available at http://www.mpepil.com; R. Gardiner, Treaty Interpretation (OUP, reprint 2010); following the ILC itself, such interpretation is frequently described as ‘an art not an exact science’; cf P. Merkouris, ‘Interpretation is a Science, is an Art, is a Science’ in M. Fitzmaurice and others (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (Martinus Nijhoff, 2010) 8-12.


50 Cf VCLT Arts. 31-33 and the identical language found in Arts. 31-33 of the 1986 VCLT (supra n. 6); cf I. Sinclair, The Vienna Convention on the Law of Treaties (MUP, 2nd edn, 1984) 131 (‘there is also the risk that the placing of undue emphasis on the “object and purpose” of a treaty will encourage teleological methods of interpretation’).

refugee protection) to delimit and meaningfully interpret ‘the purposes and principles of the UN Charter’.

The Court expressly employed international rules for treaty interpretation, both with regard to ‘incorporated’ and ‘translated’ treaty norms.\(^{52}\)

51 [...] Since the purpose of the Act incorporating Article 1F(c) is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada's obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law (Ward, supra, at pp. 713–16). [...] 54. [...] I am bound to approach the application of the exclusion clause, first, by reference to the existing jurisprudence of this Court and, second, by reference to the clear intent of the signatories to the Convention. Where, however, there is an unresolved ambiguity or issue, the construction most agreeable to justice and reason must prevail. [...] 56. The starting point of the interpretative exercise is, first, to define the purpose of the Convention as a whole, and, second, the purpose and place of Article 1F(c) within that scheme. [...] 57. [...] This overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place. [...] 63 What is crucial, in my opinion, is the manner in which the logic of the exclusion in Article 1F generally, and Article 1F(c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees. [...] 65 Determining the precise content of this phrase [“Contrary to the Purposes and Principles of the United Nations”] is significantly easier having defined a discrete purpose which Article 1F(c) was intended to play within the structure and purposes of the Convention. [...] The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable. [...] Thus, ultimately the deciding factor was political consensus rather than interpretation of the text in the strict sense:

74. There is no rational connection between the objectives of the Convention and the objectives of the limitation on Article 1F(c) as stated by the respondent. Until the international community makes clear its view that drug trafficking, in one form or another, is a serious violation of fundamental human rights amounting to persecution, then there can be no rationale for counting it among the grounds of exclusion. [...] 6 The dissenting opinion held that drug trafficking could, as in this case, fall under that category, based on and depending on the scale and gravity of the acts.

\(^{52}\) Ibid., para. 53, Gillian MacNeil, Analysis, Pushpanathan v Canada, para. 6.
King v Bristow Helicopters Ltd\(^{53}\) addressed the question whether a psychiatric condition constituted ‘bodily injury’ under Article 17 of the Warsaw Convention on International Carriage by Air (Warsaw Convention), for the purpose of claiming damages.

(Lord Steyn:) 16. It is irrelevant what bodily injury means in other contexts in national legal systems. The correct inquiry is to determine the autonomous or independent meaning of “bodily injury” in the Convention: R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477. And the premise is that something that does not qualify as a “bodily injury” in the Convention sense does not meet the relevant threshold for recovery under it. […]

(Lord Hope, with Lords Steyn and Mackay) 82. The meaning that is to be given to the words used in the Convention must be the meaning which was to be attributed to them when the Convention was entered into in 1929. But it must always have been intended that the application of that meaning to the facts would depend on the evidence. The proper approach is to make use of the best current medical and scientific knowledge that is available. […]

(Lord Hobhouse) 141. The word bodily is simpler. It means pertaining to the body. There must be an injury to the body. It is, as it must be, accepted that the brain, the central nervous system and the glands which secrete the hormones which enable the brain and the rest of the central nervous system to operate are all integral parts of the body just as much as are the toes, heart, stomach and liver. They are all susceptible to injury. […] The medical science of diagnosis exists to enable the appropriate inferences to be drawn from the observed evidence. Medicinal treatments (as with drugs) are prescribed on the basis that there is a physical condition which can be reversed or alleviated by physical means. […]

148. […] Therefore, it is the unadorned language of the article to which attention must be directed. It is again a descent into unprincipled subjectivism to use, as do the Court of Appeal (§§50 and 96) and others have done before them, the absence of travaux préparatoires as a tool of construction. Thus the Court of Appeal say: “We consider that it is highly significant that no mention was made of liability for mental injury [sic] in the course of the negotiations that resulted in the Warsaw Convention.” This is reasoning which speculates about the subjective intentions of the delegates and is not directed to the objective autonomous meaning of the words used. […]

149. Secondly it is also mistaken to interpret a convention such as the Warsaw Convention, or the various amended versions of it, as if they were intended to be historical documents frozen in time. […] The principle is more simple. Words have a meaning which does not change but the application of those words to the decision of any question depends on the facts and circumstances of the case in which that question arises. It is the facts and circumstances of the cases that change, not the meaning of the contractual words. […]

The Lords ran by all the interpretative instruments offered by the international law of treaties. Ultimately it was found that a psychiatric condition could qualify as ‘bodily injury’ for the purposes of Article 17 of the Warsaw Convention in those cases if and when it triggered, or was

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linked to, some physical condition.\textsuperscript{54} The temporal factor in the case was neutralized by the emphasis on the ‘ordinary meaning of the terms’; there was no hint to an evolutive interpretation or ‘living instrument’ doctrine.

The following case on the other hand appears as a textbook-case of intertemporal law and shows how the date of conclusion of a treaty informed the interpretation of some of its provisions, as the ‘critical date’ for determining the current legal situation lay in the past. The case \textit{Sea Hunt Inc and Commonwealth of Virginia v Unidentified Shipwrecked Vessel or Vessels and ors}\textsuperscript{55} concerned two Spanish Royal Naval vessels, LA GALGA and JUNO, which had been lost off the shores of present-day Virginia in 1750 and 1802 respectively. Both Spain and Virginia asserted ownership and salvage rights over the shipwrecks. A central question was whether Spain had – as was required – ‘expressly abandoned’ La Galga by the Definitive Treaty of Peace between France, Great Britain and Spain of 10 February 1763 (the ‘1763 Treaty’). The Court held this was not the case.

19 Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation. Both Spain and the United States agree that this treaty provision requires that in our territorial waters Spanish ships are to be accorded the same immunity as United States ships. They also agree that such immunity requires application of the express abandonment standard [...] We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities.

[...]

25 The plain language of this treaty provision contains no evidence of an express abandonment. First, Article XX does not include any of the common nouns that could refer to LA GALGA. Notably absent are the terms "shipwreck," "vessels,""frigates," or "warships." Other provisions of the treaty mention these terms explicitly. [...] Without any mention of shipwrecks or any seagoing vessels it is hard to read Article XX as an express abandonment of LA GALGA.

26 Second, the cession of state property in Article XX is limited to all that Spain possesses "on the continent of North America." The plain meaning of this is that Spain ceded to Great Britain only what was located on land. Spain did not cede possessions in the sea or seabed. [...] 

[...]

28 [I]n light of eighteenth century understandings, this "on the continent" language would hardly amount to clear and convincing evidence of an express abandonment of property in coastal waters. In fact, the three-mile coastal belt, well-recognized today, had no clear counterpart in eighteenth century international law. Ownership of the three-mile belt in the eighteenth century was but a "nebulous suggestion." \textit{United States v. California}, 332 U.S. at 32. When "in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies

\textsuperscript{54} Ibid.; see Roger O’Keefe, Analysis, \textit{King v Bristow Helicopters Ltd.}

\textsuperscript{55} \textit{Sea Hunt Inc and Commonwealth of Virginia v Unidentified Shipwrecked Vessel or Vessels and ors}, Appeal judgment, 221 F 3d 634 (4th Cir 2000); ILDC 940 (US 2000), 21 July 2000.

In the case Register of Wills for Baltimore County v Arrowsmith and ors\textsuperscript{56} two factors additional to the regular catalogue of interpretive tools entered the interpretation process: equity and the division of competences between the federal and the state level within the state. The US Court of Appeals decided that the Convention for the Avoidance of Double Taxation with Respect to Taxes on Estates, Inheritance, and Gifts between Germany and the United States did not render inapplicable the state of Maryland’s statute of limitations with respect to filing a claim for refund of inheritance taxes, even if this resulted in an unfair situation of \textit{de facto} double taxation:

36 We must interpret our State laws and the provisions of the Treaty as a court of law, not as a court of equity. While we recognize the unfortunate result that may befall appellees, we will not subvert the clear intention of those who drafted and ratified this Treaty on behalf of the United States, nor will we dismiss our Legislature’s mandate in establishing guidelines for prompt and efficient administration of estates. […]

The Court put considerable emphasis on the \textit{travaux préparatoires} of the Tax Treaty as evidence of the intention of the contracting parties, and the treaty’s object and purpose.

7. […] The express purpose of the Treaty was to prevent the double taxation of the estates of citizens or residents of the two countries. […].

19 Appellees argue that the scope of the Treaty must necessarily encompass state as well as federal taxes because viewed otherwise, the express purpose of the Treaty — to avoid double taxation — would be defeated. […] but […] Had the drafters intended the Treaty to “necessarily” apply to state estate and inheritance taxes, there would be no need for a separate provision that unequivocally refers to the credits afforded for state taxation. […]

21. […] With respect to the Treaty under scrutiny today, the Senate Committee on Foreign Relations provided an express declaration of understanding that is supportive of this Court’s conclusion. […] Thus, not only does a textual reading of the Treaty clearly indicate that it exclusively applies to Federal death taxes, but the Senate’s express language, e.g. “the proposed treaty does not apply to… taxes imposed by state or local governments,” impedes the ability to put forth any rational challenge to such application. […]

The Court then went on to consider the findings of other US Courts on similar tax treaties, which in international law is accepted (e.g. for the purpose of determining customary international law), as constituting general evidence, even though consisting of several bilateral treaties:

\textsuperscript{56} Register of Wills for Baltimore County v Arrowsmith and ors, Court of Appeals judgment, 778 A 2d 364 (Md 2001); ILDC 1246 (US 2001), 15 August 2001.
26 While we are one of a small number of courts to consider the impact of federal estate tax treaties on state probate proceedings, we are not the first. Given that the substance and purpose of these bilateral agreements are virtually identical, given that other bodies of authority, intimately involved in the making and implementation of these treaties (e.g. the Department of Treasury and the Senate Committee on Foreign Relations) have expressly asserted the inapplicability of the treaty provisions to state probate proceedings, and given the outcome of other similar judicial claims, we find significant support for our holding today that the United States-Germany Estate Tax Treaty does not impose on Maryland any duty or obligation to alter its probate proceedings to accommodate the appellees. [...] 

Next to interpretation of binding treaty norms, courts may adopt an interpretative discourse and refer to treaties without legal force in the domestic legal order, in order to support and legitimize a particular reading of a domestic legal provision. One example of such ‘treaty-conform interpretation’ is the Englaro case mentioned above. Another is the judgment in Frudenthal v Israel, where the Israeli Supreme Court interpreted domestic law – the criminal offence of trafficking in persons in an Israeli Statute – in conformity with international treaties, namely the 2000 Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which supplemented the Convention. It held that although Israel had not ratified these international instruments, by signing them, it had expressed its willingness to take part in an international effort to abolish trafficking and the Israeli Statute was thus to be interpreted in accordance with the spirit of the Convention and the Protocol.

(translation)

5. I will add that the offense involved in trafficking in persons has become a phenomenon of global concern, and many countries have declared war on it. As part of its efforts to join the international struggle against trafficking in persons, Israel signed the United Nations Convention Against Transnational Organized Crime, including the Protocol to Prevent, Suppress, and Punish Trafficking in Persons which supplements the Convention. The Convention and the Protocol, which will enter into force shortly, have yet to be ratified in Israel, but Israel's joining the Convention expresses its aspiration to take an active part in the norms that the family of nations has created around this issue. [...] 

In amending the Penal Law, Israel's legislature sought to take part in the international struggle against trafficking in persons — at this stage, trafficking for the purpose of prostitution — because the phenomenon has already infiltrated Israel. Consequently, the purposes of the legislation are identical to the purpose of the above-mentioned protocol. We therefore should interpret the provisions of the Israeli statute in accordance with the spirit of the Convention, which seeks to prevent the exploitation of power in the form of transferring people and trafficking in them for the purpose of prostitution or slavery. We should, therefore, interpret the statute according to its purpose, and in a way that will not defeat the goal of the legislation.

57 Englaro, as guardian of Englaro v Office of the Public Prosecutor at the Tribunal of Milan and ors, Appeal judgment, No 21748; ILDC 1431 (IT 2007) (2007) Foro italiano I-3025, 16 October 2007; see para. 7.2 – no English translation available.

58 Frudenthal v Israel, Appeal judgment, CA 11196/02; ILDC 364 (IL 2003), 3 August 2003.

59 ibid., para. 5.
Finally, a particular category of interpretive questions is whether a treaty creates individual rights, even if not explicitly addressed to individuals in the way of a human rights treaty. A well-known subject of debate is Article 36 of the Convention on Consular Relations, according to which local authorities must notify all detained foreigners ‘without delay’ of their right to have their consulate informed of their detention. In *Cornejo v County of San Diego and ors* the Court held that this provision entailed no individual right.

3. We agree with the district court that Article 36 does not create judicially enforceable rights. Article 36 confers legal rights and obligations on States in order to facilitate and promote consular functions. Consular functions include protecting the interests of detained nationals, and for that purpose detainees have the right (if they want) for the consular post to be notified of their situation. In this sense, detained foreign nationals benefit from Article 36’s provisions. But the right to protect nationals belongs to States party to the Convention; no private right is unambiguously conferred on individual detainees such that they may pursue it through § 1983. [...] 

The Court placed strong emphasis on intention, taking a national law perspective (referring to the domestic legal act of ‘ratification’ by Parliament) as much as an international perspective (referring to the drafters of the Convention). The seminal pronouncement by an international court on Article 36 of the Convention on Consular Relations is the International Court of Justice’s judgment in the *LaGrand* case in 2001. It is remarkable that in *Cornejo* the US Court referred to *LaGrand* only once, in relation to the functionalist rationale of the law on consular relations (para. 19). It did not, however, mention that the ICJ in casu had found Article 36(1)(b) to ‘create[...] individual rights for the detained person.’ This was pointed out only in the dissenting opinion (para. 24).

9[2] Therefore, the question here is whether Congress, by ratifying the Convention, intended to create private rights and remedies enforceable in American courts through § 1983 by individual foreign nationals who are arrested or detained in this country. It is an open question for us. [...] 

13 [...] Cornejo’s most compelling argument is that Article 36 textually uses the word “rights” in reference to a detainee’s being informed that he can, if he wants, have his consular post advised of his detention and have communications forwarded to it. This use of the word in paragraph 1(b) “arguably confers on an individual the right to consular assistance following arrest.” Bream, 523 U.S. at 376. However, it says nothing about the nature of “his rights” or how, if at all, they may be invoked. This language, therefore, must be considered in light of what the Convention, and Article 36, are all about. Restatement § 325(1) (noting that treaty terms are to be construed in their context and in the light of the treaty’s object and purpose). [...] 

24 Given that Article 36 does not unambiguously confer a right in individual detainees to support a cause of action under § 1983, we see no need for resort to the travaux préparatoires. [...] To the extent the travaux préparatoires is susceptible to different interpretations, it is too ambiguous under domestic law — which controls the exercise of

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60 *Cornejo v County of San Diego and ors*, Appeal Judgment, 504 F3d 853 (9th Cir 2007); ILDC 1080 (US 2007), 24 September 2007. (Paragraph numbers have been added to this decision by OUP/ILDC).

rights pursuant to paragraph 2 of Article 36 — to create a privately enforceable right not explicitly found in the text.

7. Scope

The determination of a treaty’s scope is intrinsically linked to treaty interpretation. It has a temporal and a territorial dimension. The temporal scope of application refers to the time-span covered by the operation of a treaty. The territorial scope, on the other hand, concerns the geographic area of treaty application. While this is usually a state’s territory, some treaties provide for extraterritorial extension (e.g. to overseas territories) or apply only to parts of a state’s territory as in certain instances of state succession.

In Hans-Jürgen Hartman M/S Kvitnes GmbH & Co KG v Ministry of Fisheries and Coastal Affairs the Norwegian Supreme Court had to answer the question whether a 1996 Protocol ratified by Germany, but not in force at the time of a shipwreck, was applicable to that shipwreck rather than the previously existing 1976 Convention on Limitation of Liability for Maritime Claims. The Court found that the 1996 Protocol was binding for Germany only after it entered into force in May 2004, irrespective of the fact that Germany had ratified it already in September 2001.

(translation)

24. When the Rocknes was lost, Germany was a party to the 1976 Convention. The 1996 Protocol entered into force in Germany on the same date as it entered into force internationally — on 13 May 2004. […]

26. […] The 1996 Protocol was, for Germany’s part, binding from the moment it came into force on 13 May 2004. With regard to Section 170 of the Norwegian Maritime Code, Germany cannot be considered to be a party in terms of international law from the date of ratification, namely 3 September 2001. […]

31 With regard to liable parties from states who are party to the 1976 Convention, the 1996 Protocol can therefore only be invoked for incidents which occurred after the date on which it came into force internationally. […]

A special issue concerning the territorial scope of the application of treaties in case of state succession arose in Ltd Partnership Z v High Court of the Canton of Thurgau. The question was whether the notification of bankruptcy directly to the domicile of an addressee in Baden was permissible in accordance with the 1825/1826 Agreement between the Swiss Confederation and

62 See Art. 29 VCLT: ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.’
63 For details see Aust, supra n. 27, 200ff.
64 Hans-Jürgen Hartman M/S Kvitnes GmbH & Co KG v Ministry of Fisheries and Coastal Affairs, Final decision on civil interlocutory appeal, Case no HR-2007-00325-A; ILDC 818 (NO 2007), 3 August 2003. See in this context also National Federation of Guardianship Associations vs France, Decision on annulment for abuse of power, No 213461; ILDC 765 (FR 2000), 7 July 2000 (see supra n. 19 and accompanying text).
65 Hans-Jürgen Hartman, supra n. 64, para. 31. The Norwegian Supreme Court’s findings — that a treaty applies only after its entry into force for the respective state — is in line with Art. 18 VCLT, which limits a state’s obligation prior to a treaty’s entry into force to the duty not to defeat the object and purpose of the treaty. See also Art. 24 VCLT.
66 Ltd Partnership Z v High Court of the Canton of Thurgau, Appeal judgment; ILDC 341 (CH 2005), 15 June 2005.
the Crown of the State of Württemberg, which established the national treatment of their citizens in cases of insolvency and provided for the direct sending through postal channels. Since the Agreement was restricted to the territory of former Württemberg and had never been extended to Baden as a consequence of the merger of the two territories in 1952, the Swiss Federal Court declined its applicability. The Court decided that in case of a unification of two territories a treaty is only applicable to the territory of the original treaty party without extending to the entire unified territory.

8. Successive treaties

Frequently linked to conclusion and entry into force, as well as to termination (see [below/above]) of treaties, are cases of successive treaties. Here the temporal order of treaties on the same subject matter may determine the applicability of an agreement internationally and domestically. In Resolution of the Supreme Court, Question of law brought by the Court of Appeal in Gdansk the Supreme Court found for applicability of an extradition treaty to proceedings initiated while a previous extradition treaty was still in force. Such on the ground that the previous treaty had been terminated by the conclusion of a new treaty by the same parties, as envisaged in Article 59 of the VCLT:

(translation)
15. [...] The provisions of Article 17(2) of the Treaty of 1998 stipulate that on the date of this Treaty entry into force, the Treaty of 1932 shall cease to be in force. This is the general rule lex posterior derogat priori. Article 17(3) of the 1998 Treaty regulates only a limited scope of intertemporal problems stipulating that extradition requests submitted after the entry into force of this Treaty shall be governed by this Treaty regardless of the date of the commission of the offence for which extradition is requested. This provision also allows for the application of new regulations.

20 [...] A treaty is thus considered to be no longer in force if there is a treaty concluded later, concerning the same subject matter (Article 59 of the Convention). Unless the treaty stipulates otherwise, its expiration releases the parties of their duties of any further fulfillment of their obligations thereunder (Article 70 of the Convention).

67 To reach its conclusion, the Court referred to the Ministry of Justice’s information as to the territorial scope of application: ‘[…] The Ministry for Justice, Federal and European Affairs for Baden-Württemberg also assumed in the above-mentioned opinion that the treaty remains in force now as before. However, from a territorial viewpoint it considered that it only applied to the territory of the former kingdom of Württemberg (including the former Hohenzollern lands) which had concluded the treaty and that the unification of the Lands of Württemberg-Baden, Württemberg-Hohenzollern and (south)Baden (situated in the S._____) in 1952 did not extend the scope of its validity […]’. (Translation; ibid., para. 2.2.2).

68 Compare the rule stipulated in Art. 31 of the 1978 Vienna Convention on the succession of States in respect of Treaties: ‘Effects of a uniting of States in respect of treaties in force at the date of the succession of States. 1. When two or more States unite and so form one successor State, […] 2.Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless: […] (c) in the case of a bilateral treaty, the successor State and the other State party otherwise agree. […]’. Note however that Switzerland is not a party to the Convention, which moreover relates to states and not territories.

69 Resolution of the Supreme Court, Question of law brought by the Court of Appeal in Gdansk, I KZP 47/02; ILDC 273 (PL 2003), 19 February 2003.
Whether the earlier or the later treaty was applicable to extradition requests submitted before the later treaty entered into force could not be determined on the basis of the text of the two treaties, nor on the basis of the general law of treaties. The Court henceforth resorted to national law and went on to decide that also in these cases the new treaty would apply:

21 As far as the domestic legal norms regulating procedural matters are concerned, it is generally accepted that the proceedings are being conducted in accordance with the law in force. In case of doubt, the rule dubio lex nova should be applied.

9. Amendment and modification

The process of agreeing on amendments and bringing them into force can be as difficult as negotiating and concluding the original treaty. On the other hand, because of their long life, many multilateral treaties are likely to need amendment. In view of these difficulties, states parties often resort to informal means in lieu of formal amendment procedures—subsequent agreements and practice being one of them. This is reflected in domestic case law.

The judgment of the German Constitutional Court Parliamentary group of the Party of Democratic Socialism in the German Federal Parliament v Federal Government70 concerned the 1999 NATO New Strategic Concept, that is NATO’s ‘roadmap’ for the following decade adopted at the NATO Summit meeting in Lisbon and which extended the organization’s scope of (self-defense) operation to territories of non-member states. The Court first examined the Concept’s legal status and found that it did not amount to a formal amendment to the original NATO Treaty.

(translation)

137 It cannot be concluded, based exclusively on the highly political character of the 1999 Strategic Concept, that the new Strategic Concept demonstrates the consent to amend the existing treaty. The new Strategic Concept of April 23 and 24, 1999, is a consensus paper that describes NATO’s new tasks and instruments only in general terms; thus, the new tasks and instruments are characterised by a high degree of flexibility and are open to a wide variety of interpretations. [...]  

138 In particular, the wording of the new 1999 Strategic Concept indicates that it is not a treaty. It is true that in particular, the central passages about the missions that do not fall under Article 5, and about the Security Council’s mandate for such missions, contain legal concepts and legal terms. The text, however, mostly consists of descriptions and analyses of the present political situation in the Euro-Atlantic area and of the new threats that result from this situation, and of declarations of intention that are too general to create, from the new Strategic Concept as such, obligations that would arise from a treaty.

The Court affirmed that a treaty could also be amended without an explicit manifestation of intent, but with sufficiently clear objective circumstances pointing to the existence of a consenting will to amend the treaty:

139.2. The content of the new 1999 Strategic Concept also cannot be regarded as an amendment of the Treaty that can be inferred from acts of the parties. A treaty can be amended without an explicit manifestation of an intent to amend the treaty if objective circumstances that are sufficiently clear point to the existence of a consenting will to amend the treaty [cf. ICIJ, Maritime Delimitation and Territorial Questions, loc. cit., [paras. 25 et seq.]]. If commitments that are made in the 1999 Strategic Concept are, in an insurmountable and clearly discernible manner, inconsistent with the area of operation that is defined in the Treaty, or if they contain an expansion of the Treaty beyond the scope that has been binding to this point, this indicates the parties’ consent to amend the Treaty. If there are no indications of a corresponding subjective consent of the parties to be bound by the document and of a consent to amend the Treaty, the inconsistency with the existing Treaty must, however, be sufficiently clear in the new 1999 Strategic Concept in order to trigger the procedure pursuant to Article 59.2(1) of the Basic Law. This is not the case here. In particular, the issue that is at the centre of the Organstreit [Constitutional Dispute between federal organs] proceedings, i.e., the expansion of the Alliance’s security policy approach to crisis response operations, constitutes only a further development of the NATO Treaty, which cannot be interpreted, at any rate with the degree of certainty required for assuming the existence of a consent to amend the Treaty that can be inferred from acts of the parties, as an inconsistency with, or as an expansion of, the content of the existing Treaty.

In the absence of a formal amendment, the German Constitutional Court referred to other forms of legally relevant acts, especially in the area of treaty interpretation:

148 [...] If the new 1999 Strategic Concept is interpreted accordingly, such commitments under international law [resulting from the consent to the new 1999 Strategic Concept for the Federal Republic of Germany below the level of the conclusion of the Treaty] can take the shape of: (1) a binding concretisation of the content of the Treaty by the competent NATO organs; or (2) an authentic interpretation of the NATO Treaty by the parties to the Treaty; but also (3) a joint enhancement, outside the Treaty, of a practice under international law (Article 31.3, letters [a] and [b] of the Vienna Convention on the Law of Treaties, cf. ICIJ, Case concerning Kasikili/Sedudu Island [Botsswana/Namibia], Judgement, paras. 49 et seq.; Heathrow Airport User Charges Arbitration, in: American Journal of International Law 88 [1994], pp. 738 and 742). [...]”

The German Constitutional Court’s decision thus reflected the difficult dividing line(s) between interpretation, informal modification and formal amendment. Altogether, the Court chose a traditional approach to treaty amendment and lawmaking, in line with the VCLT’s and the ICJ’s position, finding that the NATO New Strategic Concept was to be regarded neither as an international treaty nor as an amendment of the NATO Treaty.71

Occasionally the notion of amendment appears to be mixed with that of successive treaties on the same subject matter. This is shown in Attorney-General v Zaoui and Inspector-General of Intelligence and Security72. In the case at issue, a refugee seeking judicial recourse against expulsion had argued inter alia that by virtue of Article 30 VCLT relating to the application of

successive treaties, Article 33(2) of the 1951 Convention relating to the Status of Refugees (the ‘1951 Convention’) had been ‘amended’ by the more absolute prohibitions of refoulement contained in Article 3(1) CAT and Articles 6(1) and 7 ICCPR. The New Zealand Supreme Court rejected the applicant’s position and clarified that Article 30 VCLT dealt with successive treaties relating to the same subject matter rather than with treaty amendments.73

[50] Those provisions [Art 30(3, 4.a) VCLT] are designed for treaties that create bilateral rights and obligations. They do not easily apply to the present situation where the obligations of article 33 are in substance unilateral as well as being owed erga omnes (to all the other parties collectively). More significantly in the present context, the provisions do not, contrary to the submissions, regulate the amendment of treaties. That is a matter dealt with in articles 39–41 which are not applicable in the present case. Rather, as the heading to article 30 shows, its provisions concern the application of successive treaties relating to the same subject matter. That is to say, article 33.2 of the 1951 Convention has not itself been amended by the later ICCPR and Torture Convention. Rather, they have to be applied in a successive way.

10. Termination and suspension of treaties

Invalidity, termination and suspension are much discussed in literature,74 but seem to have less practical relevance. Case law, both international and domestic, is limited. Out of the 110 cases, a mere four dealt with termination and suspension, and none with invalidity.

The British case R (Kibrís Türk Hava Yollari) v Secretary of State for Transport (and the Republic of Cyprus as an interested party)75 discussed in much detail the VCLT’s termination, withdrawal and suspension provisions (Articles 57-62 VCLT) and their procedural complements laid down in Articles 65-68 VCLT. Such in order to decide on the extension of a Turkish Airline’s operating permit between United Kingdom and Northern Cyprus. Since the granting of permits as requested would have constituted a breach of the UK’s obligations vis-à-vis the Republic of Cyprus (RoC) under the 1944 Chicago Convention on International Aviation,76 the British Court examined, inter alia, whether the Convention had been suspended as between the UK and the RoC with respect to Northern Cyprus because of the RoC’s loss of control over Northern Cypriot territory. The judges analysed especially whether there was a case of supervening impossibility of performance (Article 61 VCLT), which in the end they denied.

37. That provision [Article 61 VCLT] is very narrow in scope, relating to termination or suspension in consequence of the permanent or temporary disappearance or destruction

73 It may be criticized, though, that the Court did not refer to the principle of maximum protection which is generally applicable in the case of human rights treaties. (See eg Art. 5 ICCPR).
75 R (Kibrís Türk Hava Yollari and CTA Holidays limited) v Secretary of State for Transport (and the Republic of Cyprus as an interested party), Court of Appeal (Civil Division) on Appeal from the Queen’s Bench Division administrative Court, [2010] EWCA Civ 1093, 12 October 2010. The RoC had refused to grant permission for scheduled flights operated by the claimant. (Ibid., para 45).
of an object indispensable for its execution. That is not this case. In any event, (a) this is not a case of impossibility of performance of the treaty, and (b) no party has invoked impossibility of performance as a ground for suspending the operation of the treaty.

38. As to (a), the RoC's rights under the Chicago Convention are capable of being exercised in respect of northern Cyprus even without effective control over the territory itself. The rights may not be fully effective and enforceable, but they can be exercised effectively, as has been done in practice, by withholding permission for, or imposing limitations on, flights over the territory and by the non-designation of airports in the territory. The RoC is entitled to rely on other states to honour their obligations under international law to respect its decisions on such matters; and the effectiveness of the exercise of its rights is evidenced most obviously by the fact that all states other than Turkey have in practice respected those decisions.

39. As to (b), suspension pursuant to Article 61(1) does not occur automatically but has to be invoked. Articles 65-68 lay down formal procedures to be followed and make provision for judicial settlement, arbitration and conciliation. Far from having exercised the right to invoke suspension of the convention, however, the RoC continues to rely on the treaty as having full force and effect; and there is no evidence that any other contracting state has invoked suspension of the treaty in relation to northern Cyprus.

The judges moreover found that the VCLT set out an exhaustive list of grounds and consequences regarding suspension, termination and withdrawal:

41. […] The general principle asserted by the appellants is said to result in the automatic suspension of sovereign rights, including treaty rights, without any invocation of suspension as required under the provisions of the Vienna Convention. […]

42 […] the preamble to the Vienna Convention takes the matter no further forward: the rules of customary international law continue to govern questions not regulated by the Convention, but the circumstances in which treaty rights may lawfully be suspended are regulated by the Convention, as Article 42(2) (quoted above) makes clear. […]

This considered, the judges felt necessitated to look for answers outside the VCLT’s scope as indicated in Article 73 VCLT, notably in the areas of state responsibility (especially force majeure) and the outbreak of hostilities between the treaty parties. Having found none of them applicable, they also rejected that the “RoC’s entitlement to exercise its rights under the Chicago Convention had been suspended in relation to northern Cyprus even though the rights themselves had not been suspended”.

68. […] The RoC remains the relevant state party to the convention, and the Government of the RoC continues to represent the RoC under the convention and is recognised by the ICAO as the only legitimate government of the state. The authorities of the TRNC have no status under the convention. Indeed, they purport to represent not the RoC but the TRNC, which is not recognised as a state and is on no view a party to the convention. […] The authorities of the TRNC may purport to exercise, in relation to northern Cyprus, the rights of the RoC under the convention but neither under the convention itself nor by virtue of any principle of customary international law can they be said to have displaced the Government of the RoC as the body entitled to exercise the convention rights of the RoC.

77 Ibid., paras. 43-67 and 69.
78 Ibid., para. 68.
[...] the argument as to suspension of entitlement to exercise the convention rights, as distinct from suspension of the convention rights themselves, gets the appellants nowhere.

The judges concluded, accordingly, that ‘the grant of the permits sought by the appellants would constitute a breach of the United Kingdom’s obligation to respect the rights of the RoC under the Chicago Convention and would in consequence be unlawful as a matter of domestic law.’

In X and Y v Government and Administrative Tribunal of the Canton of Zurich the Federal Supreme Court of Switzerland discussed, among others, the legal effects of the termination of the 1872 Treaty on Establishment and Commerce between Russia and Switzerland (the ‘1872 Treaty’) after the October revolution in 1917 by the then Russian government which had not been recognized de iure but only de facto by Switzerland. In the course of its considerations, the Swiss Court referred to the division of competences between the government and courts concerning treaty termination. Only political organs would be in the position to terminate international treaties whereas it was for courts to decide upon the legal question whether a treaty was still in force in a particular case. In order to find that the 1872 Treaty had been – at least – suspended, the Court referred to subsequent practice, affirming that despite the normalization of the relationship between Switzerland and the Soviet Union after 1946, the treaty had never been invoked by either state party.

In RD v Belgium the Belgium Court of Cassation analysed whether the EU Council Framework Decision of 2002 on the European arrest warrant had terminated the 1962 Treaty on Extradition and Mutual Assistance in Criminal Matters between Belgian, Luxembourg and the Netherlands (the ‘1962 Treaty’). The Court found that the unanimous approval of the Framework Decision constituted a ’consultation’ in the sense of Article 54(b) VCLT and thus amounted to treaty termination by consent:

(translation)

48) Whereas the unanimous approval by the European Union Member States of the Council Framework Decision on 13 June 2002 constitutes a consultation as defined in Article 54 (b) of the Vienna Convention of 23 May 1969; [...] 

50) Whereas in implementing the Framework Decision of the Council of 13 June 2002 into their national law, Belgium and Luxembourg, Member States of the European Union, withdrew, in accordance with Article 54 (b) of the Vienna Convention of 23 May 1969, from the Treaty of 27 June 1962 on Extradition and Mutual Assistance in Criminal Matters concluded between them, insofar as this treaty concerns extradition and subject to the provision of Article 10.4 of Luxembourg Law; [...] 

79 Ibid., para. 69.
80 X and Y v Government and Administrative Tribunal of the Canton of Zurich, Appeal judgment, Case no ATF 132 II 65; ILDC 340 (CH 2005), 22 November 2005 – no English translation available.
81 ‘4.2.3 Es fragt sich demnach, ob die Kündigung aus dem Jahre 1917 zum Erlöschen des Niederlassungsvertrages geführt hat. Zwar sind die politischen Behörden allein zuständig, einen Staatsvertrag zu kündigen (BGE 49 I 188 E. 3 S. 194 f.). Die Gerichte entscheiden hingegen selbständig über die Rechtsfrage, ob ein Staatsvertrag noch gilt (BGE 81 II 319 E. 4 S. 330; 78 I 124 E. 3 S. 130). [...]’
82 Ibid., para. 4.2.5.
Still, the judgment may be criticized. It seems indeed problematic to imply termination by consent (Article 54(b) VCLT) as the Belgium Court did. The EU Council Framework Decision and the 1962 Extradition Treaty do not necessarily have the same scope and one may wonder whether it truly was the intention of the parties to remove the Extradition Treaty from the international legal order.

The most-tried ground for unilateral termination and suspension of treaties is the ‘fundamental change of circumstances’ or so-called rebus sic stantibus clause. The Macanese Supreme Court decision A v B and others addressed treaty termination in an alleged case of fundamental change of circumstances. At stake was the applicability of the 1930 Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes which established a lower interest rate than Macanese laws. The applicant company, asking for a higher interest rate in accordance with Macanese domestic provisions, argued inter alia that the Asian economic crisis constituted a fundamental change of circumstances which had terminated or suspended the 1930 Convention. Having confirmed the superior hierarchical position of international treaty law over the laws of Macao, the Macanese Supreme Court affirmed the solid normative status of the rebus sic stantibus rule, but did not find it to be applicable in the case at hand. Such first based on a factual argument, as there was no proof that the required change of circumstances had actually taken place. Most importantly, however, the Court stated that it would have been for the treaty parties – Portugal or, after 19 December 1999, the Central People’s Republic of China – to invoke changed circumstances. Since neither of the parties had done so, the Court found that the Macanese Decree Law regarding commercial interest rates violated the 1930 Convention and was thus inapplicable.

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84 The 1962 Extradition Treaty contained – contrary to the EU Council Framework Decision – also provisions on ‘small judicial assistance’ between the states parties. What is more, the European arrest warrant only applied to relatively serious crimes, while the Extradition Treaty was also applicable to minor offences. For details see Cedric Ryngaert, Analysis, RD v Belgium, A5-A7.

85 It might have been more appropriate for the Court to refer to Art. 30 VCLT on successive treaties relating to the same subject matter which affirms in paragraph 3 ‘[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59 [of the VCLT], the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty’. Cf. also ibid., A8.


87 As regards the new legal order established through the creation of the Macau Special Administrative Region: International treaties where China was not a party but which had been implemented by Macao, as the 1930 Convention, were permitted to remain applicable in Macao in accordance with Art. 138 of the Basic Law which entered into force on 20 December 1999. See A. Zimmermann, Staaten Nachfolge in internationalen Verträgen (Springer, 2000), 852. The Central People’s Republic of China notified the UN Secretary General in 1999 thus of the 1930 Convention’s continued applicability. (See Ricardo Sousa da Cunha, Analysis, A v B and ors, F3-F4).

88 A v B and ors, supra n. 86, para. 58.

89 ibid., para. 63.

90 ibid., paras. 77-78.
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