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Typologies and the ‘Essential Juridical Character’ of Treaties

CATHERINE BRÖLMANN

1 Introduction

Legal scholarship, doctrine and practice differentiate between treaties. References to ‘peace treaties’, ‘environmental treaties’, ‘fundamental treaties’, ‘contract treaties’, ‘constitutional treaties’ and ‘self-executing treaties’ are a received part of public international law discourse. In his dissenting opinion in the *South West Africa Cases* of July 1966, Judge Tanaka spoke of the League Mandates’ ‘characteristics similar to law-making treaties’.¹ In its judgment in the *Loizidou Case*, the European Court of Human Rights labelled the European Convention on Human Rights (ECHR)² as a ‘law-making treaty’, with matching competences for the ‘Convention institutions’.³

Classifications of treaties are also not new. In his 1930 article for the *British Yearbook of International Law*, Lord Arnold McNair distinguished between the ‘widely differing functions and legal character of the instruments which it is customary to comprise under the term “treaty”’.⁴ Heinrich Triepel had earlier proposed a distinction between a *Vertrag* on the one hand and a *Vereinbarung* as

¹ Following Lassa Oppenheim, he defined this as ‘concluded for the purpose of establishing new rules for the law of nations’; see *South West Africa Cases*: Ethiopia v. South Africa; Liberia v. South Africa (Second Phase) (1966) ICJ Rep. 6, at p. 266 (Dissenting Opinion of Judge Tanaka).

² 213 UNTS 221.

³ *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A, No. 310, p. 25 (§84).

⁴ A. D. McNair, ‘The Functions and Differing Legal Character of Treaties’, *BYbIL*, 11 (1930), 100–118.

a communal expression of identical wills on the other.⁵ More recently, Joseph Weiler has pointed to ‘differentiating factors of treaties’, with accordingly differing hermeneutics.⁶

This chapter aims to trace the classifications of treaties prevalent in international affairs and to examine their significance within the framework of the law of treaties and of international law in general. The findings make no claim to exhaustiveness, but they do further our understanding of the variety of treaty typologies in use and their legal meaning, with concomitant implications for the politics of treaty making and application. A first aim is to explore – in line with the original project of which this chapter is a part – which typologies of treaties are reflected in the 1969 Vienna Convention on the Law of Treaties (VCLT).⁷ As it turns out, the 1969 Vienna Convention, as is the case with the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,⁸ differentiates between treaties only sparingly. This is somewhat different when we look at international law (doctrine) at large, or at broader discourses, such as those concerning justice and effectiveness.

The following sections consider the use of ‘typology’ (rather than ‘taxonomy’) as a tool – with form, normative effect and content as the main distinctive elements (Section 2). The chapter then addresses some typologies based on form (Section 3); on normative effect – with special attention for the ‘law-making treaty’⁹ as this typification has a prominent place in public international law discourse (Section 4) – and on content (Section 5).

⁵ H. Triepel, *Völkerrecht und Landesrecht* (Leipzig: Verlag von C.L. Hirschfeld, 1899). The basis for the binding force of the *Gemeinwillen*, Triepel himself admitted, had to be found in an extra-legal context. Cf. A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: J. Springer, 1926), p. 20 (‘... als Grundlage des Völkerrechts’); see, also, P. Kooijmans, *The Doctrine of the Legal Equality of States* (Leiden: A.W. Sythoff, 1964), pp. 133–134.

⁶ See J. H. H. Weiler, ‘Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century’, *IIJ International Legal Theory Colloquium: Interpretation and Judgment in International Law* (NYU Law School, 14 Feb. 2008), p. 6, and J. H. H. Weiler, ‘The Interpretation of Treaties – A Re-examination’, *EJIL*, 21 (2010), 507.

⁷ 1155 UNTS 331. ⁸ *ILM*, 25 (1986), 543–592.

⁹ This chapter partly builds on earlier research: C. M. Brölmann, ‘Law-Making Treaties: Form and Function in International Law’, *Nordic JIL*, 74 (2005), 383–404, and C. M. Brölmann, ‘Specialized Rules of Treaty Interpretation: International Organizations’ in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), pp. 507–524.

2 Typologies, Taxonomies and the 'Essential Juridical Character' of Treaties

Treaty classifications have been frequently connected with propositions about fundamental differences in legal instruments. McNair famously recommended that 'we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules',¹⁰ although he did not elaborate. The presumption that all treaties are in a fundamental sense the same legal instrument had been a point of contestation before with, for example, Triepel's distinction and later that of Shabtai Rosenne, who considered constituent treaties of international organizations to be so different that 'it is deceptive to see in diplomatic and legal ... incidents concerning the constituent instruments "precedents" for the general law of treaties, and *vice versa*'.¹¹

Such propositions are generally framed as *challenges* to the law of treaties – which brings out the underlying conception (confirmed during the forty years' codification process of the law of treaties) of the treaty as a single legal instrument governed by a unified set of rules; this conception was again under discussion in relation to the 'Vienna Plus' International Law Commission's (ILC) *Guide to Practice on Reservations to Treaties*,¹² but the theoretical debate is inconclusive. The current chapter does not aim to engage with that debate and does not deal with questions of the completeness or, indeed, of the fragmentation of international law.¹³ It proceeds from the class of legal instruments generally taken to be governed by the 'law of treaties'.

For a discussion of prevailing treaty classifications, this chapter, as would be fitting in our discipline, takes as a starting point the work of the pre-eminent scholar on the law of treaties of the pre-VCLT era.¹⁴ In his 1930 article, McNair tentatively distinguished between treaties 'having the character of conveyances'; contract treaties; lawmaking treaties (comprising both 'constitutional international law' and 'ordinary international law') and 'treaties akin to charters of incorporation', that is, constitutive

¹⁰ McNair, *supra* n. 4, at 118.

¹¹ S. Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge: Cambridge University Press, 1989), pp. 257–258.

¹² International Law Commission, *Guide to Practice on Reservations to Treaties*, Doc. A/66/10; see, e.g., the comments of M. Milanovic and L.-A. Sicilianos, 'Reservations to Treaties: An Introduction', *EJIL*, 24 (2013), 1055–1059. See, further, *infra* n. 72 and n. 73 (and accompanying text).

¹³ For further development of these themes, consider M. Koskeniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden JIL*, 15 (2002), 553–579.

¹⁴ McNair, *supra* n. 4.

treaties of international organizations. McNair related these differences to the ‘fundamental juridical character’ of treaties,¹⁵ but it is uncertain to what extent he meant to make an ontological claim about different legal instruments. He did attach specific legal consequences to some of the treaties he singled out, such as treaties of cession, which (after execution) would not be affected by hostilities,¹⁶ and the *rebus sic stantibus* doctrine, which would not be applicable to ‘legislative treaties’ in the same way as to ‘contractual’ treaties.¹⁷

McNair’s distinctions combine criteria of form with those based on normative effect and internal-legal with external perspectives. His listing of various international agreements works as a single level *taxonomy*, creating a clear picture of variety that makes good support, for example, for a plea to relax the traditional unified view of treaties. The current chapter chooses a somewhat different approach by looking at *typologies* of treaties – this is relevant as a host of typifications is found in legal doctrine and debate today. The notion of typology¹⁸ suggests a classification of concepts rather than empirical facts, and it points to a construct built around particular attributes or dimensions to which the actual objects of classification do not necessarily correspond fully nor exclusively. The rationale of a particular typology, moreover, depends partly on the context. Typologies do not necessarily last forever, as they hinge on particular questions to be answered and analyses to be made.

Along these lines, McNair’s ‘treaties of conveyance’ – which comprised cession treaties and other arrangements dealing with recognition or transfer of title over territory, somewhat analogous to domestic property rights¹⁹ – arguably would nowadays include also status treaties, such as a boundary treaty or, in late modern terms, treaties creating territorial *objective regimes*, such as the 1959 Antarctic Treaty.²⁰ For its part, the type of treaty creating objective regimes (conceptualised around the 1960s, even if actual examples can be found from the nineteenth century onwards)²¹ initially was often used to include also *non-territorial*

¹⁵ *Ibid.*, at 103. ¹⁶ *Ibid.* ¹⁷ *Ibid.*, at 110.

¹⁸ Leaving aside the distinction between ideal-type, extreme-type and empirical-type: see, further, S. Kluge, ‘Empirically Grounded Construction of Types and Typologies in Qualitative Social Research’, *Forum Qualitative Sozialforschung*, Vol. 1 (<http://nbn-resolving.de/urn:nbn:de:0114-fqs0001145>).

¹⁹ McNair, *supra* n. 4, at 101–103. ²⁰ 402 UNTS 71.

²¹ M. Fitzmaurice, ‘Third Parties and the Law of Treaties’, *Max Planck Yb. UN Law*, 6 (2002), 37–137, and C. Fernández de Casadevante Romani, ‘Objective Regime’ in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Vol. VII) (Oxford: Oxford University Press, 2012), pp. 912–915.

arrangements, notably constitutive treaties of international organizations (IOs).²² In fact, constitutive treaties are a case in point for the relativeness of treaty typologies. McNair found that such treaties 'create[d] something organic and permanent and they seem[ed] therefore to demand recognition as falling into a special category of treaty'.²³ In the 1930s, international organizations were less ubiquitous in international affairs, their legal status was uncertain and to attribute separate legal personality to organizations was an exceptional and controversial proposition;²⁴ so it made sense not to include IO constitutive treaties in a larger category but to set them apart completely as a *sui generis* type of treaty 'akin to charters of incorporation'.²⁵ This was different once the taboo on legal personality for organizations had been lifted through the advisory opinion of the International Court of Justice (ICJ) in *Reparation for Injuries Suffered in the Service of the United Nations* in April 1949,²⁶ while the number of organizations started growing rapidly. Unsurprisingly, constitutive treaties of IOs were now frequently found in a category with other treaties that produce an effect for third parties – generally speaking, the treaty type creating objective regimes. In fact, the 'objective legal personality' of the United Nations as proclaimed by the ICJ in the *Reparation* opinion was often linked and likened to the 'objective effect' of a treaty.²⁷ More recently, this has changed again; with the advancement of international organization and phenomena of multilevel governance, organizations increasingly have come to stand out for their *institutional* dimension. The debate now has come to be focused on the organization's legal independence, its institutional or even 'constitutional' mechanisms, its autonomous development on the basis of *compétence de la compétence*, while the treaty by which all this was created has faded into the background. The typification of IO constituent treaties, changing from a separate class of 'treaties akin to charters of incorporation' to a sub-type of objective regime treaties, to a separate type of

²² See P. Reuter, *Introduction to the Law of Treaties* (Geneva: Geneva Institute of International Studies, 2nd ed., 1995), pp. 124–125; see, also, the contributions to this volume of Waibel and Miltner at pp. 201–236 (Chapter 8) and 468–505 (Chapter 15) respectively.

²³ McNair, *supra* n. 4, at 117.

²⁴ C. M. Brölmann, *The Institutional Veil in Public International Law* (Oxford: Hart Publishing, 2007), pp. 54–64.

²⁵ McNair, *supra* n. 4, at 116.

²⁶ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) (1949) ICJ Rep. 174.

²⁷ See Reuter, *supra* n. 22, at p. 121.

constitutive (and ‘constitutional’) treaties, is one example of how seemingly self-evident typologies may shift over time.

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

This chapter is concerned with treaty types identified in contemporary international law discourse. Treaties, as legal phenomena in general, often appear conceptualised and rubricated in binary oppositions,²⁸ especially within the formal legal framework. This means one-dimensional classifications (a rule is either ‘of a general normative scope’ or ‘not of a general normative scope’) rather than multidimensional ones. Moreover, as the treaty types in use are often not mutually exclusive,²⁹ as in the case of the ‘lawmaking’ and the ‘multilateral’ types, it means we are technically dealing with several typologies simultaneously, many of them of the single level kind that is built on two opposing (‘polar’) types.³⁰ Any treaty is thus likely to belong to more than one typology. For example, the 1982 United Nations Convention on the Law of the Sea³¹ may be called a multilateral treaty (as opposed to a bilateral treaty, for example), or a lawmaking treaty (as opposed to a contract treaty, for example) or an environmental treaty (as opposed to an arms treaty, for example). The choice for a particular typology will depend on the discursive

²⁸ Classically, M. Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011), pp. 298–299. See, also, D. A. J. Telman, ‘International Legal Positivism and Legal Realism’ in J. Kammerhofer and J. d’Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), pp. 241–263, at pp. 261–262.

²⁹ K. B. Smith, ‘Typologies, Taxonomies, and the Benefits of Policy Classification’, *Policy Studies J.*, 20 (2002), 379–385, at 381.

³⁰ ‘Community–society Continua’ in *International Encyclopedia of the Social Sciences* (1968), in Encyclopedia.com (31 July 2014) (www.encyclopedia.com/doc/1G2-3045000227.html).

³¹ 1833 UNTS 3.

context – which might be an activist agenda but also a courtroom procedure – and can be an element in legal framing.

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

3 Typologies Based on Form

This category includes various typologies revolving around formal aspects of the treaty instrument. The most commonplace is the typology based on *laterality*; it comprises *bilateral treaties* and *multilateral treaties* as well as the occasionally mentioned *plurilateral treaties*, which may point to either bilateralised agreements, with more than two parties but two 'sides' to the agreement (with a treaty such as the 1975 Lomé Agreement as a typical example),³² or to treaties open to a limited group of parties 'due to subject matter or geography'³³ or, in the context of the World Trade Organization (WTO), to treaties to which WTO members can choose to become a party³⁴ (as opposed to 'multilateral treaties' which by definition have all WTO Member States as a party). Into this typology might be fitted also *mixed agreements*; even if these treaties have other attributes that technically provide a better basis for typification – notably the additional normative layer of the internal order of the European Union – they seem to be discussed most often in terms of laterality.

The Vienna Convention recognises laterality as a factor in the somewhat unwieldy provision of Article 60, on termination or suspension of a treaty on the basis of material breach by another party.³⁵ The article

³² ILM, 9 (1975), 595–640.

³³ K. Schmalenbach, 'Article 2' in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer, 2012), pp. 27–48, at p. 31.

³⁴ B. Hoekman and P. Mavroidis, 'Embracing Diversity: Plurilateral Agreements and the Trading System', CEPR Discussion Paper No. DP10204 (2014) (<http://ssrn.com/abstract=2512732>).

³⁵ On Art. 60 VCLT, see, e.g., J. Klabbers, 'Side-stepping Article 60: Material Breach of Treaty and Responses Thereto' in M. Tupamäki (ed.), *Finnish Branch of ILA 1946–1996: Essays on International Law* (Helsinki: Finnish ILA Branch, 1998), pp. 20–42, and

provides what would be a parallel to the *exceptio non adimpleti contractus* in domestic law of contract, but (logically) not without effort when it comes to multilateral treaty relations.³⁶ Thus, Article 60(2)(b) VCLT maintains strict reciprocity in the relation between the defaulting State and the State that is ‘specially affected’ by the breach, but in regard of other States parties the VCLT adds a requirement (‘radically changed’ positions) related to the normative effects of the treaty (see Section 4). In practice since the 1969 Vienna Convention, ‘material breach’ has rarely been explicitly invoked – with the *Gabčíkovo-Nagymaros Case* of September 1997 as a comparatively recent exception – and never successfully.³⁷

The typology based on *participation* comprises ‘open’ and ‘closed’ treaties, which – if turning on geographic parameters – are generally dubbed ‘universal’ and ‘regional’ treaties. The aforementioned term ‘plurilateral’ is sometimes found as synonymous to ‘closed’ treaties, in that only specific States are allowed to become a party.³⁸ The Vienna Convention regime attaches some importance to such treaties through Article 20(2); the flexible formulation goes back to a strict unanimity rule in an earlier draft for the category of ‘plurilateral treaties’, which as such was temporarily under discussion in the ILC in the 1950s and 1960s.³⁹

A typology which in the past had considerable legal relevance is the one based on the *nature of parties*. Since international law doctrine puts up a threshold for treaty-making capacity, in a positive law framework this boils down to three types of treaties: treaties between States, treaties

M. Fitzmaurice, ‘Material Breach of Treaty: Some Legal Issues’, *Austrian Rev. Int’l & European L.*, 6 (2001), 3–44.

³⁶ Cf. Art. 60(2) VCLT (‘A material breach of a multilateral treaty by one of the parties entitles: . . . (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State . . .’); *supra* n. 7.

³⁷ *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep. 7 (on Art. 60 VCLT as invoked by Hungary, in particular at pp. 60–62 (paragraph 96) and pp. 65–66 (paragraphs 105–108)). See, further, the contribution to this volume of Fitzmaurice at pp. 748–789 (Chapter 23).

³⁸ A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 3rd ed., 2013), pp. 15 and 125.

³⁹ Art. 20(2) VCLT (‘When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties’): *supra* n. 7. See, further, C. Walter, ‘Article 20’ in Dörr and Schmalenbach (eds.), *supra* n. 33, pp. 287–306, at p. 296.

between IOs and States and, finally, treaties between IOs. Initially, the emerging treaty-making practice of international organizations had been reconciled with the statist legal system by taking the position that agreements concluded by IOs were legally different instruments from agreements concluded by states.⁴⁰ Such had been the suggestion of the Permanent Court of International Justice when it said 'tout contrat qui n'est pas un contrat entre des états en tant que sujets du droit international a son fondement dans une loi nationale';⁴¹ it was also the opinion of sole arbitrator René-Jean Dupuy in the 1978 *Texaco v. Libyan Arab Republic* award, who held that States alone can be parties to a treaty, whereas agreements between, for example, States and IOs would be 'instruments of another nature'.⁴² This conception was likewise at the root of a proposal tabled in the ILC during the preparatory stages of the 1969 Vienna Convention to disregard treaties between organizations but to take into account treaties to which a State *and* an organization were parties.⁴³

Although the terminological distinction between 'treaties' of States and 'agreements' of organizations persisted for quite some time and to some extent still does today,⁴⁴ the underlying concept was abandoned, essentially because it became untenable in the light of developing doctrine and practice. The crucial factor here was the prevailing vision of international law as a unified legal order in which different legal subjects interact by definition under one single set of rules. Moreover, the law of treaties operates from the principle of equality of parties; thus – in defiance of initial recommendations to the contrary – the system could not and did not make a legal distinction between treaties on the basis of parties. This was ultimately confirmed by the two Vienna Conventions, which turned out extremely similar.⁴⁵ There may come a time when other

⁴⁰ Brölmann, *supra* n. 24, at pp. 132–133.

⁴¹ *Case Concerning the Payment of Various Serbian Loans Issued in France: France v. Serb-Croat-Slovene State*, 1929 PCIJ, Series A, No. 20, 41. A similar view is found in C. Parry, 'The Treaty-Making Power of the United Nations', *BYbIL*, 26 (1949), 108–150.

⁴² *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Govt. of Libyan Arab Republic*, ILM, 17 (1978), 1–37, at 23 (paragraph 66).

⁴³ *YbILC* (1965–I), 10 (paragraph 7).

⁴⁴ If only because IO treaties can generally be set apart from treaties of States for their politically modest purport; see, also, H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity with Diversity* (Leiden: Koninklijke Brill NV, 5th rev. ed., 2011), p. 1121 (§1744), who observe the distinction but without attaching (general) legal implications.

⁴⁵ Brölmann, *supra* n. 24.

actors, such as transnational corporations or non-governmental organizations, unstopably enter international treaty-making practice, causing a party-based typology to gain new prominence.

Finally, there are typologies based on the *appearance* of the treaty instrument (which may consist of a number of component documents or two letters or a single piece of parchment or a paper napkin) and on the *designation* of the treaty. Possible legal implications of such typifications, which could be seen before the UN era,⁴⁶ have been neutralized *qua* distinctive features in the 1969 Vienna Convention regime (Article 2(1)(a) VCLT: 'whatever its particular form or designation').⁴⁷ Outside the VCLT framework, on the other hand, references to a particular type such as an 'MOU' can have considerable legal or political relevance, as negotiating parties who are like-minded States may use particular terms to express their intention for striking a non-binding political accord (thus the UK and the Netherlands make extensive use of gentleman's agreements, often named 'MOU',⁴⁸ but France does not, while the UN consistently uses the name 'MOU' for its many binding agreements with other organizations and States). The typology based on designation may otherwise point to the political context of treaties in a different sense. Even if the name does not determine the international juridical status, an unassuming title such as 'letter of intent' may have effects in domestic law: it may downplay the necessity for explicit approval of parliament, or it may increase the possibility of striking an accord in the form of an 'executive agreement' in constitutional systems such as those of the United States, France and Germany.⁴⁹

These typologies are based on formal aspects of the treaty. This is true to the spirit of the Vienna Convention, which is famously focused on the instrument as such rather than on the obligations stemming from it.⁵⁰

⁴⁶ Cf. A. M. Stuyt, *Formeel Tractatenrecht* (Den Haag: Staatsuitgeverij, 1966), p. 29.

⁴⁷ *Supra* n. 7. As far as form is concerned, this was e.g. confirmed in the *Aegean Sea Continental Shelf: Greece v. Turkey* (1978) ICJ Rep. 3, at p. 39 (paragraph 96).

⁴⁸ Aust, *supra* n. 38, at pp. 34–39.

⁴⁹ Cf. C. Davenport, 'Obama Pursuing Climate Accord in Lieu of Treaty', *N.Y. Times*, 27 Aug. 2014, A1.

⁵⁰ See S. Rosenne, *Breach of Treaty* (Cambridge: Grotius Publications, 1985) and S. Rosenne, 'Bilateralism and Community Interest in the Codified Law of Treaties' in W. Friedmann, L. Henkin and O. J. Lissitzyn (eds.), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup* (New York, NY: Columbia University Press, 1972), pp. 202–227, at p. 205. Cf. J. Klabbers, 'The Community Interest in the Law of Treaties: Ambivalent Conceptions' in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer and C. Vedder (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011), pp. 768–780, at p. 770.

4 Typologies Based on Normative Effect

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

The *normative force* typology comprises two polar types, *viz.* treaties creating objective effects or an 'objective regime', on the one hand, and treaties creating a subjective regime on the other. The legal effect *vis-à-vis* non-parties of the former type of treaty is taken as one of scope and not one of content, as the typification of 'objective regime' revolves around *normative effect*. The typology is tried and tested among international lawyers. However, it falls outside the framework of the Vienna Convention, which through its Articles 34–37 rigorously adheres to the requirement of approval (or, in technical terms, 'consent', 'assent' and 'acceptance') on the part of third States for both rights and obligations.⁵¹ The exception is Article 62(2) (a) VCLT, which explicitly singles out boundary treaties. It is a reflection of general international law doctrine, which has come to terms with the phenomenon by detaching the regime from the treaty by which it was created: the paradigmatic account is found in the judgment of the International Court of Justice in *Case Concerning the Territorial Dispute between Libya and Chad* in February 1994.⁵²

The typology based on *normative completeness at international level* contrasts framework treaties with comprehensive treaties.⁵³ The VCLT framework shows no sensibility to this distinction, but the typology is a factor in international governance discourse, a notable example being the context of environmental protection. The typology also points to the composite character of a treaty regime as a whole and usually also to the continuous development of the treaty('s regime). This characteristic is very familiar and present in the public debate as a vehicle for policy-making and normative development in the issue area at hand; witness, for example, the public stature of the United Nations Framework Convention on Climate

⁵¹ See, also, the contribution to this volume of Craven at pp. 103–135 (Chapter 5).

⁵² *Case Concerning the Territorial Dispute: Libyan Arab Jamahiriya v. Chad* (1994) ICJ Rep. 6, at p. 37 (paragraph 73) ('[a] boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy').

⁵³ To be distinguished from the treaty *regimes* which can be divided at least into composite types of regime (*traité cadre* plus, e.g., protocols), on the one hand, and singular types on the other.

Change and protocols,⁵⁴ tied together and dynamized by annual COPs and MOPs and ensuing ‘decisions’ which may themselves lead to new and prominent treaties, as in the case of the 2015 Paris Agreement.⁵⁵ The only reflection of this typology in the VCLT, one could argue, is the *ineptitude* of provisions operating with a temporal factor (the later in time principle and the earlier in time principle, in Article 30(3) and 30(4)(b) respectively) for governing this type of treaty which, for the dynamic aspect of the regime it creates, has been termed ‘continuing treaty’.⁵⁶

The typology based on *normative completeness at a national level* comprises the polar types of self-executing and non-self-executing treaties. Through the VCLT prism this typological distinction is, again, invisible; but in international law discourse it has an important role, as the linchpin for the connection between international and domestic law. In the context of domestic law it is a key typological distinction in the process of actual application and implementation of a treaty. Thus, in 2006, the Netherlands was reprimanded by the Committee of the International Covenant of Economic, Social and Cultural Rights ‘to reassess the extent to which, the provisions of the Covenant might be considered to be directly applicable. It urges the State Party to ensure that the provisions of the Covenant are given effect by its domestic courts, as defined in the Committee’s General Comment 3, and that it promotes the use of the Covenant as a domestic source of law’.⁵⁷

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

A constitutive treaty is a portal to the internal, institutional dimension of an organization.⁵⁸ This dimension sits uneasily with the horizontal set-up of international law, as becomes apparent, for example, in the problematic construction in the 2011 Articles on the Responsibility of

⁵⁴ 1771 UNTS 107.

⁵⁵ Entered into force on 4 Nov. 2016 (http://unfccc.int/paris_agreement/items/9444.php). See, also, the contribution to this volume of French and Scott at pp. 677–709 (Chapter 21).

⁵⁶ The term is taken from Joost Pauwelyn who conceptualises the WTO treaty, multilateral human rights treaties or environmental treaties as ‘continuing treaties’ which makes it, in his view, inappropriate to apply Art. 30 VCLT: J. Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, *AJIL*, 95 (2001), 535–578, at 546.

⁵⁷ UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Netherlands (24 Nov. 2006), U.N. Doc. E/C.12/NLD/CO/3, §19.

⁵⁸ Rosenne, *supra* n. 11, at pp. 246–248.

International Organizations for Internationally Wrongful Acts,⁵⁹ to take the 'rules of the organization' not as internal law but as *lex specialis*.⁶⁰ The 1969 and 1986 Vienna Conventions, on the other hand, do recognise the internal legal sphere of organizations in a general reservation clause contained in similar Articles 5.⁶¹ Article 5 of the Vienna Conventions genuinely delimits the operation of international law and demarcates a boundary between the law of treaties and the institutional law of organizations. The provision is a 'without prejudice' clause expressly reserving the right of international organizations to maintain their own rules with regard to their constituent treaties and to the treaty-making process in their framework.⁶² That the institutional order is thus construed as to some extent closed off from general international law is also reflected in the special role reserved for the 'competent organ of the organization' in Articles 20(3) (Reservations) and 77(2) (Depositary) of the 1986 Vienna Convention.⁶³

That leaves 'contract treaties' and 'lawmaking treaties'.⁶⁴ McNair appears to have considered the distinction between these two types as one of the most 'fundamental'⁶⁵ and linked to the 'essential juridical

⁵⁹ GAOR 66th Sess., Supp. 10, Doc. A/66/10, 54.

⁶⁰ This is contestable for several reasons, for one because internal rules cannot have general normative force under general international law, and general 'internal law' by definition does not amount to a more specific rule 'on an identical subject'. See, also, J. d'Aspremont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union' in V. Kosta, N. Skoutaris and V. Tzevelekos (eds.), *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2014), pp. 75–86.

⁶¹ K. Schmalenbach, 'Article 5' in Dörr and Schmalenbach (eds.), *supra* n. 33, pp. 89–99 ('Article 5 – *Treaties constituting international organizations and treaties adopted within an international organization* – The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization').

⁶² As to the 1986 Convention, in view of the – still – scant practice of organizations functioning in the framework of other organizations, the Special Rapporteur had considered '[i]t is obvious that there can be no article in the draft articles similar to Art. 5 of the 1969 Convention': Reuter, *YbILC* (1974–II) (Part One), 145. The Commission thought differently. On second reading, a parallel Art. 5 (*Treaties constituting international organizations and treaties adopted within an international organization*) was inserted in the draft ultimately to become part of the 1986 Vienna Convention; the provision is, however, not entirely symmetrical to its 1969 counterpart. It secures 'no prejudice' to 'any relevant rules of the organization' in case of constituent instruments only when these are treaties between States and organizations. Constituent treaties with exclusively organizations as parties were left out of account, with no further explanation on the part of the Commission: *YbILC* (1982) (Part Two), 23.

⁶³ *Supra* n. 8. ⁶⁴ Reuter, *supra* n. 22, at pp. 26–28. ⁶⁵ McNair, *supra* n. 4, at 106.

character' of the treaties.⁶⁶ Whereas the 'contract treaty' (with a normative content susceptible to reciprocity, matching the contractual form of the instrument) is generally taken to be the unmarked, prototypical form of treaty, the 'lawmaking treaty' is here a logical starting point. This treaty type has a long-standing position in legal discourse, and merits some elaboration,⁶⁷ all the more because it is an awkward notion. Firstly it is questionable whether treaties can create law at all, as Sir Gerald Fitzmaurice famously pointed out: 'Considered in themselves, and particularly in their inception, treaties are, formally, a source of obligation rather than a source of law'.⁶⁸ But regardless even of how 'law' is defined, 'lawmaking' has a received meaning in relation to treaties. It refers to treaty provisions with a general normative scope, with a statutory rather than a contractual function. This was what the International Court of Justice looked for when it examined whether a treaty provision was likely to have assumed force of customary law, *viz.* that 'the provision concerned should . . . be of a fundamentally norm-creating character'.⁶⁹

Of the four ILC Special Rapporteurs on the Law of Treaties, Fitzmaurice was the most sensitive to this typification.⁷⁰ Next to bilateral or multilateral treaties that are based on a reciprocal exchange of rights or benefits (as would be any classically contractual treaty, for instance establishing a customs union), he identified a category of 'lawmaking treaties (*traités-lois*) . . . where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the

⁶⁶ *Ibid.*, at 103 and 106.

⁶⁷ Cf. the search for provisions of 'a generally norm-creating character' in the 1958 Geneva Convention on the Continental Shelf by the International Court of Justice in *North Sea Continental Shelf Cases*: FRG/Denmark; FRG/Netherlands (Judgment) (1969) ICJ Rep. 3, at pp. 41–42 (paragraph 72). Cf., also, the statement by Alain Pellet, as Special Rapporteur for the ILC on reservations to treaties, on how it is 'unusual for a treaty to be entirely normative or entirely synallagmatic': *YbILC* (1997–I), 176 (paragraph 79).

⁶⁸ G. G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in F. M. van Asbeck *et al.* (eds.), *Symbolae Verzijl: présentées au Professeur J.H.W. Verzijl à l'occasion de son LXX-ième anniversaire* (La Haye: M. Nijhoff, 1958), pp. 153–176, at p. 159.

⁶⁹ *North Sea Continental Shelf Cases*, *supra* n. 67, at pp. 41–42 (paragraph 72); the passage also points to the practical complication that many treaties contain a mixture of law-making and contractual norms, which would make it more helpful to apply the notion to individual norms rather than to treaties as a whole. This aspect is left out of account in the present chapter.

⁷⁰ This section relies partly on C. M. Brölmann, 'Law-Making Treaties: Form and Function in International Law', *Nordic JIL*, 74 (2005), 383–404.

other parties to the treaty'.⁷¹ Fitzmaurice took a novel and rather technical approach which not only looked to the function of a treaty – up until then the main take on 'lawmaking treaties'⁷² – but also to the legal relations resulting from it. Thus, in addition to contractual and lawmaking treaties,⁷³ he identified a class of 'interdependent treaties', for which the performance of one party is dependent on that of *all* the other parties (the standard example given by him was a disarmament treaty). The latter category, although analytically sound, never caught on and cannot count as a 'type' that was ever in use.

The essence of a lawmaking treaty is the absence of a bilateral, synallagmatic relation with other treaty parties (even if in the framework of a multilateral treaty). This means a lawmaking treaty is different from the grid of bilateralised relations envisaged for the purpose of the reservations regime by the International Court of Justice in its advisory opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in May 1951.⁷⁴ Rather, the construction is reminiscent of the 'consensual bond' which comes into being upon acceptance of the jurisdiction of the International Court of Justice under the optional clause in Article 36(2) of the ICJ Statute.⁷⁵ Indeed, Lea Brilmayer conceptualises the commitment to a non-synallagmatic treaty as a 'pledge,' in contrast to the commitment to a 'treaty' of the contract type.⁷⁶

⁷¹ G. G. Fitzmaurice, Second Report on the Law of Treaties, Doc. A/CN.4/107 (15 March 1957), p. 31.

⁷² Cf. the position of Georges Scelle that '[lawmaking treaties] present an entirely different interest of stability and generality. They aim to establish a rule of law and are true legislative acts': *Le Pacte des Nations et sa liaison avec le Traité de Paix* (Paris: Recueil Sirey, 1919), p. 49 (translation quoted in A. D'Amato, 'Treaties as a Source of General Rules of International Law', *Harvard ILJ*, 3 (1962), 1–35, at 15).

⁷³ A distinction which he carried on from interbellum legal scholars, as is pointed out by J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), pp. 56–57.

⁷⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) (1951) ICJ Rep. 15; even though the Court took a synallagmatic approach to the question of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, the Court also shed light (at p. 32) on the overall nature of the Convention: '[i]n such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest'. Cf. C. Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', *EJIL*, 21 (2010), 125–171.

⁷⁵ Cf. *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria: Cameroon v. Nigeria* (Preliminary Objections) (1998) ICJ Rep. 275, at p. 291 (paragraph 25).

⁷⁶ L. Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements', *BYIL*, 77 (2006), 163–202.

Lawmaking treaties elude the compliance pull of reciprocity – it is noteworthy that Fitzmaurice had proposed to extend the exception for ‘treaties of a humanitarian character’ in Article 60(5) VCLT (see Section 5) to all lawmaking treaties. Human rights treaties are the pre-eminent example of lawmaking treaties in this sense.⁷⁷ They are not only non-synallagmatic, they are what has been called essentially ‘inward-turned’. This is how the Inter-American Court for Human Rights construed that ‘[i]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction’.⁷⁸ The complexities arising when regular treaty mechanisms (and concomitant reciprocity dynamics) are applied to human rights treaties⁷⁹ fully came to light during the seventeen years of work in the ILC on reservations to treaties (see also Section 5). In 2011, the ILC adopted the Guide to Practice on Reservations to Treaties⁸⁰ as ‘a soft law instrument mixing, however, hard rules with soft recommendations’.⁸¹

Lawmaking treaties are recognised only implicitly by the VCLT framework (in the wake of Fitzmaurice’s distinctions, which, in Joost Pauwelyn’s words, have left ‘traces’ in the Vienna Convention),⁸² in the context of termination/suspension or modification by one or *some* of the parties. Articles 41(1)(b) VCLT (as confirmed by the reference in Article 30 VCLT) and 58(1)(b) VCLT stipulate that no *inter se* modification or suspension, respectively, is allowed if this changes the effectuation of rights and obligations for the other treaty parties (without, however, the sanction of invalidity proposed by Fitzmaurice).⁸³ Since this would

⁷⁷ See the contribution to this volume of Chinkin at pp. 509–537 (Chapter 16).

⁷⁸ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Inter-American Court of Human Rights, Advisory Opinion OC-2/82, 24 Sept. 1982, §29.

⁷⁹ See, e.g., B. Simma and G. I. Hernández, ‘Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?’ in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), pp. 60–85, and L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Dordrecht/Boston, MA/London: Springer, 1995).

⁸⁰ Guide to Practice on Reservations to Treaties, *supra* n. 12, at p. 19 (paragraph 75).

⁸¹ A. Pellet, ‘The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur’, *EJIL*, 24 (2013), 1061–1097.

⁸² J. Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’, *EJIL*, 14 (2003), 907–951, at 912–915.

⁸³ G. G. Fitzmaurice, Third Report on the Law of Treaties, Doc. A/CN.4/115 (18 March 1958), p. 27 (Art. 19).

always be the case in a treaty with integral or interdependent obligations (which are, after all, *erga omnes partes*), lawmaking treaties are here set aside. Following on from Article 60(2)(b) VCLT,⁸⁴ paragraph (c) of Article 60 VCLT gives the right to invoke unilateral suspension of the treaty between itself and the breaching party if the treaty is of such nature (that is, containing integral or interdependent obligations) that the breach were to fundamentally change treaty performance by the other parties.⁸⁵ Treaties which set out *erga omnes partes* obligations – as arguably most lawmaking treaties do – have implications for the definition of 'injured State' in the law of responsibility.⁸⁶

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

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

[t]he resolutely positivist, voluntarist approach of international law still current at the beginning of the century . . . has been replaced by . . . a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.⁸⁷

But for their contractual form, treaties are not *per se* the instrument for the creation of such communal international rules. In fact, 'treaties' have existed much longer than the notion of international law,⁸⁸ while 'international law' existed long before it started to be written in treaties. That in

⁸⁴ On which, see Section 3 earlier in this chapter.

⁸⁵ On treaties conflicting with *jus cogens*, see Section 5 (*infra*).

⁸⁶ Art. 42(b) of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts: GAOR 56th Sess., Supp. 10, Doc. A/56/10, 43.

⁸⁷ *Legality of The Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep. 226, at pp. 270–271 (paragraph 13 of Declaration by President Bedjaoui).

⁸⁸ P. Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002), p. 304; see, also, the contribution to this volume of Lesaffer at pp. 43–75 (Chapter 3).

our time the central (inter-State) lawmaking role which has come to lie with the UN codification conventions is essentially due to a lack of alternative. States drafting the 1945 United Nations Charter⁸⁹ had strongly opposed conferring upon the Organization the power to enact binding international rules. Likewise, proposals to give the General Assembly powers to impose certain general conventions on States by some form of majority vote had been rejected.⁹⁰ That treaties have thus been taking care of both the contractual and the statutory function in international law lies at the root of the much-quoted statement by McNair that '[t]he treaty is the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions'.⁹¹

While the idea of 'lawmaking treaties' goes back to the late nineteenth century, this treaty type, as the vehicle for codification, became a key element in the postwar narrative of a secure, fair and objective international law – and hence of the *international rule of law*, as can be seen from the fostering of multilateral treaty-making as part of declared 'rule of law' promotion by the United Nations today.⁹²

In contemporary international law discourse, moreover, the lawmaking treaty type often appears to be linked to a public⁹³ aspect of international law, usually combined with the idea of a communal dimension of the international legal order. Such a dimension, sometimes in a particular issue area (be it the use of force, the care for transboundary watercourses or the protection of the individual), is part of a complex debate which addresses communal values, rules with a general normative content and a 'statutory' function and a decline in the importance of individual states' consent – sometimes in an intricate combination. The vision of an international community⁹⁴ then implicitly proceeds from the idea of

⁸⁹ 1 UNTS 16. ⁹⁰ Cf. introduction on the ILC website (www.un.org/law/ilc/).

⁹¹ A. D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 739.

⁹² See Fifth Annual Report of the Secretary-General on the Strengthening and Coordinating United Nations Rule of Law Activities: Doc. A/68/213/Add.1 (11 July 2014); and see, e.g., the strong lawmaking narrative in the United Nations codification project: *Treaty Event 2014: Towards Universal Participation and Implementation* (United Nations Headquarters: 23–25 Sept. 2014 and 30 Sept.–1 Oct. 2014).

⁹³ Cf. Hersch Lauterpacht, who early on set forth a reasoning that international law necessarily comprised both 'objective law' and consent-based rules stemming from treaties: *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (London: Longmans, Green & Co., 1927), pp. 54–55.

⁹⁴ See, e.g., B. Simma & A. Paulus, 'The "International Community": Facing the Challenge of Globalization', *EJIL*, 9 (1998), 266–277; cf. the different contributions on this theme in the

a unified system of law (as becomes clear also from the concern over its 'fragmentation').⁹⁵

5 Typologies Based on Content

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

The law of treaties is famously agnostic to the substance or the *negotium* of treaties. Rosenne held that 'as the law of treaties does not envisage a legal distinction between treaties on the basis of content, it is unsurprising that it has proven difficult to classify international agreements in a legally relevant manner'.⁹⁶ This is true depending on one's understanding of 'legally relevant'. The one type of treaty (provisions) set apart on the basis of content in the Vienna Conventions, in Article 60(5), is 'the protection of the human person contained in treaties of a humanitarian character' (for Article 62(2)(a) VCLT, which sets apart the objective effect of a boundary created by treaty as mentioned in Section 4). This exception to the rule of Article 60 VCLT (on the termination or suspension of the operation of a treaty as a consequence of its breach) was introduced in the text during the Diplomatic Conference in 1969 and served to save individuals from the 'entirely inappropriate negative application of the principle of reciprocity'.⁹⁷ From the *travaux préparatoires*, it can be gleaned the provision is to cover both human rights law and humanitarian law treaties.⁹⁸

This said, there is commonly mention of 'human rights treaties' and 'humanitarian law treaties' in a wider context than termination/suspension and of 'environmental law treaties', 'trade law treaties' or any other rubric linked to an area of human activity and cooperation.⁹⁹ In these cases, aside

broad sense in Fastenrath, Geiger, Khan, Paulus, von Schorlemer and Vedder (eds.), *supra* n. 50.

⁹⁵ See the Report of the ILC on the Work of its Fifty-Sixth Session: Doc. Supp. No. 10 (A/59/10), pp. 281–304.

⁹⁶ Cf. Rosenne, *supra* n. 11, at pp. 190 *et passim*.

⁹⁷ T. Giegerich, 'Article 60' in Dörr and Schmalenbach (eds.), *supra* n. 33, pp. 1021–1050, at p. 1046.

⁹⁸ B. Simma and C.J. Tams, 'Article 60 (1969)' in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Vol. II) (Oxford: Oxford University Press, 2011), pp. 1351–1378, at pp. 1367–1368.

⁹⁹ Or linked to a long-standing area of legal study and classification: see the list of Multilateral Treaties Deposited with the Secretary-General of the United Nations

from actual normative content, the *genre* is so to speak a self-standing value. This can be seen in a division of policy areas (take, for instance, the division of policy areas in domestic governments and concomitant mandates for treaty negotiations) or in a form of ‘legal modelling’ of treaty arrangements on certain subjects (take, for example, the contested argument that customary investment law may be created through a quantity of uniform bilateral investment treaties).¹⁰⁰

Different epistemic communities may use different typologies. Most international organizations employ a typology for internal categorisation purposes. For example, in the International Labour Organization, a distinction is employed between the ‘fundamental’ Conventions, the ‘governance’ (or ‘priority’) Conventions and the ‘technical’ Conventions, with consequences in terms of reporting duties for the Member States (regular reports on implementation are requested at shorter intervals for the first two types).¹⁰¹

Related to the content typology based on issue area, is the typology which makes a (sometimes implicit) claim of hierarchical order,¹⁰² or ‘relative normativity’ to use an older term, among treaties or treaty provisions. In this category we find among others a ‘fundamental rights treaty’, a ‘codification treaty’, a ‘constitutional treaty’ or on the other hand a ‘treaty with subsidiary rules’ – to name a few typifications frequently used. Three in particular come to the fore.

The first is human rights discourse, which oftentimes relies on an intricate combination of hierarchy typology and issue-area typology, for example by the use of the word ‘fundamental’ (which, unlike *jus cogens*, does not denote a formal legal category). Even though the VCLT framework does not recognise human rights treaties outside the context of Article 60, the typification of human rights treaties or ‘fundamental rights’ treaties does appear as a persuasive authority both outside and within the framework of positive international law, the latter in processes of interpretation (Article 31 VCLT) and conflict of treaties

(<https://treaties.un.org/pages/ParticipationStatus.aspx>) including the types of ‘obscene publications’ and ‘maintenance obligations’.

¹⁰⁰ A. Al Faruque, ‘Creating Customary International Law through Bilateral Investment Treaties: A Critical Appraisal’, *Indian JIL*, 44 (2004), 292–318.

¹⁰¹ I am indebted to Anne Trebilcock for information on the ILO; see, further, that author’s contribution to this volume at pp. 848–880 (Chapter 26), and, otherwise, Brölmann, *supra* n. 24, at pp. 128–132 on the typologies used by OECD, FAO, UN and EU.

¹⁰² Cf. J. Vidmar, ‘Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?’ in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012), pp. 13–41.

(Article 30 VCLT). See in this respect for instance the 1991 *Short Case*, in which the Dutch Supreme Court gave priority to Article 2 ECHR (which in conjunction with the 'Soering doctrine' prohibited extradition of the American officer to the United States) over the Status of Forces Agreement with NATO (which prescribed extradition).¹⁰³ Moreover, human rights treaties seem eligible for interpretation through a variant of the *living instrument doctrine*,¹⁰⁴ whereas an appeal for evolutionary interpretation of certain conventional treaties is less likely to be honoured (note for instance the refusal of the ICJ to extend the prohibitive rule regarding chemical weapons in the 1925 Geneva Gas Protocol¹⁰⁵ to the later developed nuclear weapons).¹⁰⁶ Otherwise, differentiation in the context of reservations to treaties in public international law doctrine at large has received something of a push from the work of the ILC on reservations to human rights treaties.¹⁰⁷ On the attempts to adjust the legal regime on reservations to these 'inward-turned' rules, see Section 4 earlier in the chapter.

Second is the 'constitutional treaty' type that was singled out by McNair. He identified two kinds of lawmaking treaties: 'Treaties creating Constitutional International Law' (such as Hague Convention I for the Pacific Settlement of International Disputes¹⁰⁸ and the 1919 Covenant of the League of Nations)¹⁰⁹ and 'Treaties creating or declaring ordinary International Law' or 'pure lawmaking treaties' (such as 'most of The Hague Conventions of 1899 and 1907, [which] contain rules governing the conduct of war').¹¹⁰ In our time, the constitutional treaty (not to be confused with treaties constituting an international organization) does not have a place in the VCLT framework. It is, however, a *topos* in international law and policy¹¹¹ – one reflection of which are the efforts to construe the United Nations Charter as the world's constitution.¹¹² Otherwise, this typification too may be taken as persuasive authority in the context of treaty interpretation. Compare the approach of the Court of Justice of the European Union in the first *Kadi* decisions; in 2005, the

¹⁰³ *Short v. Kingdom of The Netherlands*, ILM, 29 (1990), 1375–1389.

¹⁰⁴ See, further, the contribution to this volume of Moeckli and White at pp. 136–171 (Chapter 6).

¹⁰⁵ 94 LNTS 65.

¹⁰⁶ *Legality of the Threat or Use of Nuclear Weapons*, *supra* n. 87, at p. 248 (paragraphs 54–56).

¹⁰⁷ Simma and Hernández, *supra* n. 79. ¹⁰⁸ 187 CTS 410. ¹⁰⁹ 225 CTS 195.

¹¹⁰ McNair, *supra* n. 4, at 112.

¹¹¹ J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

¹¹² B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia JTL*, 36 (1998), 529–619.

Court of First Instance had reasoned in a classic international law framework, in line with which the United Nations Charter took precedence over the EU treaty *ex* Article 103 of the Charter. In 2008, the Court took the EU treaty as a constitutional treaty, setting out concomitant ‘fundamental values’; it thus bypassed altogether the traditional ‘conflict of treaties’ position.¹¹³

A third type of treaty that creates normative hierarchy based on its content is the treaty which conflicts with *jus cogens*. This type is actually addressed by the VCLT, and the relevant treaty is rendered void by Articles 53 and 64 (Fitzmaurice originally had proposed this sanction for treaties conflicting with any lawmaking treaty or ‘integral obligation’).¹¹⁴ This is a strong feature of the Vienna Convention framework. However, as the category of *jus cogens* is essentially contested, and agreement exists about few norms other than the prohibition of slavery and the prohibition of genocide, there is room for considerations of justice and morality outside the VCLT. This is difficult in contemporary international law discourse. McNair held that ‘a treaty is null and void if its object is either illegal or immoral’,¹¹⁵ but international law these days is uneasy in addressing such questions (think of the phenomenon of ‘unequal treaties’), with dimensions of fairness and justice relegated to other disciplines.

6 Concluding: Multiple Typologies and Multiple International Law Discourses

This chapter has outlined a number of treaty typologies *en vogue* in international law discourse today, rubricated under the headings of form, normative effect and content. Going back to the starting point of this chapter, from our cursory overview it appears the Vienna Conventions offer few flexibilities to particular types of treaties. The typology based on laterality, for example, plays a role in that Article 60 VCLT sets out a variant of the *exceptio non adimpleti contractus*, with special rules for multilateral treaties. Otherwise, the Vienna Conventions recognise IO constitutive treaties by way of a general reservation clause in their (almost) identical Articles 5. As for content, only Article 60(5) VCLT explicitly singles out treaties of a ‘humanitarian character’. Thus, apart from a few traces described in this chapter, the

¹¹³ Case T-306/01 *Kadi and Al Barakaat Foundation v. Council and Commission*, p. II-3533, ECJ (CFI), 21 Sept. 2005; Judgment on appeal in Joint Cases C-402/05 P and C-415/05 P, ECJ (GC), 3 Sept. 2008.

¹¹⁴ Fitzmaurice, *supra* n. 83. ¹¹⁵ McNair, *supra* n. 4, at 108.

Vienna regime has special rules only for one form-type (multilateral treaties), two normative effect-types (boundary treaties and constitutive treaties), and one content-type ('treaties of a humanitarian character'). Treaties concluded by IOs then are set apart by the 1969 Vienna Convention to the extent that they are excluded from its scope and dealt with in the 1986 Vienna Convention (which, however, is so similar that it is difficult to speak of 'differentiation'). While McNair wrote a plea for legal awareness of the differing 'legal character' of treaties and of the need to develop different rules accordingly,¹¹⁶ this was not to become a trend during or after the codification process of the law of treaties that started in the late 1940s.

Meanwhile, it seems typologies of treaties abound among lawyers and policy-makers. In the category of normative effect typologies, the most prominent typological distinction is the one between 'lawmaking' and 'contractual' treaties. The lawmaking treaty type has been an object of discussion since the late nineteenth century and is still today a frequently used analytical tool in treaty practice, doctrine and international relations. It has also been a key element in the postwar narrative of an 'international rule of law'. With the exception of Article 60(3) VCLT, the VCLT framework is however famously unreceptive to the special characteristics of 'non-synallagmatic treaties'. Surely this is partly due to the fact that lawmaking treaties suffer from a gap between form and function.¹¹⁷ After all, in form the treaty instrument is very much geared to contractual, reciprocal relations, based as it is on the freedom of contract and 'the general principle of consensualism which constitutes the basis of any treaty commitment [and which] necessarily entails the legal equality of the parties'.¹¹⁸

A prominent treaty type defined by content is the 'human rights' or 'fundamental rights' treaty. This typification has considerable persuasive power, but its relevance lies outside the VCLT framework, even if

¹¹⁶ *Ibid.*, at 118.

¹¹⁷ Even if in practice issues are partly captured by the VCLT's special rule for multilateral treaties in Art. 60: *supra* n. 7.

¹¹⁸ P. Reuter, Tenth Report on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations, *YbILC* (1981-II), 46; this looks to concrete traits of the treaty instrument and not to the fair doubts as to whether the contractual analogy as such is the most helpful in the conceptualisation of treaties. On this issue, see A. Rasulov, 'Theorizing Treaties: The Consequences of the Contractual Analogy' in C. J. Tams, A. Tzanakopoulos and A. Zimmermann (eds.), *Research Handbook on the Law of Treaties* (Cheltenham: Edward Elgar, 2014), pp. 74–122.

partly *within* the law of treaties paradigm, related to application and interpretation.

A single chapter cannot do justice to the variety of treaty typologies and the ways in which these are put to use in international law, especially outside the scope of the Vienna Conventions. Moreover, the relevance of typologies, and hence their existence, is partly defined by the context, such as a legitimacy or fairness discourse or – in a positivist framework – the circumstance of an ‘armed conflict’. The fact that this latter context is expressly excluded from the VCLT regime (Article 73) does not preclude the possibility that, as suggested by McNair and the recent work of the ILC,¹¹⁹ the occurrence of hostilities may give relevance to particular typological distinctions among treaties. In this sense, a treaty typification may indeed point to the ‘essential juridical character’ of a particular type (McNair also used the term ‘type’), as specific ‘legal consequences . . . seem . . . to follow’ from that classification.¹²⁰ But issues of context and choice of typology remain, with further questions to be answered and trends to be discerned: Is there a hierarchy among treaty typologies? What are the politics of treaty typologies? What this chapter does show is how the treaty has moved beyond its role of a content-neutral, formal instrument to gain relevance as a context-dependent body of normative authority.

¹¹⁹ McNair, *supra* n. 4, at 103 (‘the real reason why a treaty of cession . . . is not, once it has been carried out, affected by a subsequent state of war between the parties is surely that the treaty has, like a conveyance, produced its effect and has ceased to have vitality; . . . it ceases no outstanding obligations’). See, also, 2011 Draft Articles on the Effects of Armed Conflicts on Treaties: *YbILC* (2011–II).

¹²⁰ McNair, *supra* n. 4, at 103.