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The Law of Treaties

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Publication date

2018

Document Version

Final published version

Published in

International Law in Domestic Courts

[Link to publication](#)

Citation for published version (APA):

Binder, C., & Brölmann, C. (2018). The Law of Treaties. In A. Nollkaemper, & A. Reinisch (Eds.), *International Law in Domestic Courts : A Casebook* (pp. 197-242). Oxford University Press. <http://opil.ouplaw.com/view/10.1093/law/9780198739746.001.0001/law-9780198739746-chapter-6>

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Oxford Public International Law

6 The Law of Treaties

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From: International Law in Domestic Courts: A Casebook

Edited By: André Nollkaemper, August Reinisch, Ralph Janik, Florentina Simlinger

Content type: Book content

Product: Oxford Scholarly Authorities on International Law [OSAIL]

Published in print: 28 November 2018

ISBN: 9780198739746

Subject(s):

Treaties, amendments and modification — Extraterritorial application of treaties — Treaties, binding force — Treaties, entry into force — Treaties, self-executing — Treaties, successive — Relationship between international and domestic law

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I. Introduction

The current chapter does not aim at repeating the several books and treatises on the law of treaties¹—that is, the international legal rules governing the conclusion, application, termination, and so forth, of treaties. Rather, it focuses on how the law of treaties is used and applied in domestic courts. This perspective is increasingly relevant as a growing body of substantive international rules and norms is enshrined in treaties (or 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),² the Vienna Convention on Succession of States in respect of Treaties³ and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT).⁴ Judging from the case law collected in the ILDC it seems, however, that certain questions are especially urgent: notably those revolving around consent, entry into force, termination, interpretation, and self-executing character of treaties. The sections in this chapter then in a general sense correspond to themes and stages in the ‘life of a treaty’ that play a role in domestic case law: conclusion and entry into force (II); self-executing character (III); binding force and observance (IV); reservations and declarations (V); interpretation (VI); scope (VII); successive treaties (VIII); amendment and modification (IX); and termination and suspension (X).

This is not the only possible classification. To some extent, the terms are a matter of choice, which, if consistently maintained, does not always correspond to the terms 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 takes normative effect.

(p. 198) A central feature in the treatment of law of treaties questions in domestic case law is the interaction (and occasional confusion) between the domestic and international law levels. 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 Chapter 1 of this volume. In this chapter we will therefore not discuss the incorporation of international law into national systems, nor address their ‘monist’ and ‘dualist’ characteristics. We will, on the other hand, 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 only marginally address topics of the law of treaties, as, eg, state succession, that are treated in other parts of this book.

The basis for this chapter is constituted by selected case law from domestic courts in different jurisdictions. In the ILDC database, as of January 2017, some 500 cases were identified as containing issues related to the law of treaties.⁵ Of those, some forty cases with highly relevant content were used.⁶ 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.⁷ This is why footnotes may refer to cases in addition to those mentioned in the main text. Occasionally the chapter includes a reference to decisions of non-national human rights bodies, where this may provide relevant context.

II. 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 (eg, the requirement of parliamentary approval for the government to bind the state to a treaty), or of international law (eg, the need of ‘full powers’ for the state representative to perform international legal acts in relation to treaty-making—ultimately the ‘expression of consent to be bound’ as envisaged in Articles 11 ff of the VCLT). Domestic courts are often (p. 199) 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 to 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.⁸

1. 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 chapter 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’ (Articles 11 ff of the VCLT) may take different legal shapes and forms, notably that of ‘simplified signature’ (expressing consent by one single signing action—Article 12 of the VCLT) and ‘ratification’ (the confirmation of an earlier, non-definitive signature—Article 14 of the VCLT).

In the context of treaty conclusion, domestic courts generally face questions of the validity and the applicability of treaties in the domestic order. This involves, eg, 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 Others*,⁹ 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, observed a strict separation between the international and

the domestic law levels and reasoned that the president's consent pertained only to the latter:

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

[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. [...]

[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 (p. 200) 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.

An interplay of the international and the national law level was at issue also in *Bayan v Romulo, Muna v Romulo and Ople, Petition for certiorari, mandamus, and prohibition*.¹⁰ In this case the Philippine Supreme Court held that an exchange of notes on non-surrender of US nationals to the ICC constituted a valid treaty between the Philippines and the US; such first of all under Philippine law, as the president had validly expressed consent to be bound on behalf of the state without involvement of the Senate since for its subject matter the agreement could lawfully fall in the category of 'executive agreements'; and secondly under international law, which after all recognized both 'exchanges of notes' and the domestic law category of 'executive agreements' as regular treaties. As for substance, and incidentally, bilateral non-surrender treaties were admissible, in accordance with Article 98 of the ICC Statute.

Bayan v Romulo, Muna v Romulo and Ople, Petition for certiorari, mandamus, and prohibition, GR no 159618, ILDC 2059 (PH 2011), 1st February 2011, Philippines; Supreme Court

22 [...] An exchange of notes falls "into the category of inter-governmental agreements," which is an internationally accepted form of international agreement. The United Nations Treaty Collections (Treaty Reference Guide) defines the term as follows:

An "exchange of notes" is a record of a routine agreement, that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The

technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.

23 In another perspective, the terms “exchange of notes” and “executive agreements” have been used interchangeably, exchange of notes being considered a form of executive agreement that becomes binding through executive action. On the other hand, executive agreements concluded by the President “sometimes take the form of exchange of notes and at other times that of more formal documents denominated ‘agreements’ or ‘protocols’.” As former US High Commissioner to the Philippines Francis B. Sayre observed in his work, *The Constitutionality of Trade Agreement Acts*:

The point where ordinary correspondence between this and other governments ends and agreements — whether denominated executive agreements or exchange of notes or otherwise — begin, may sometimes be difficult of ready ascertainment.

[...]

24 It is fairly clear from the foregoing disquisition that E/N BFO-028-03 — be it viewed as the Non-Surrender Agreement itself, or as an integral instrument of acceptance thereof or as consent to be bound — is a recognized mode of concluding a legally binding international written contract among nations.

25 Article 2 of the Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” International agreements may be in the form of (1) treaties that require legislative concurrence after executive (p. 201) ratification; or (2) executive agreements that are similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters than treaties.

26 Under international law, there is no difference between treaties and executive agreements in terms of their binding effects on the contracting states concerned, as long as the negotiating functionaries have remained within their powers. Neither, on the domestic sphere, can one be held valid if it violates the Constitution. Authorities are, however, agreed that one is distinct from another for accepted reasons apart from the concurrence-requirement aspect. As has been observed by US constitutional scholars, a treaty has greater “dignity” than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people; a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment.

27 Petitioner parlays the notion that the Agreement is of dubious validity, partaking as it does of the nature of a treaty; hence, it must be duly concurred in by the Senate. Petitioner takes a cue from *Commissioner of Customs v. Eastern Sea Trading*, in which the Court reproduced the following observations made by US legal scholars: “[I]nternational agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties [while] those embodying adjustments of detail carrying out well established national policies and traditions and those involving arrangements of a more or less temporary nature take the form of executive agreements.”

28 Pressing its point, petitioner submits that the subject of the Agreement does not fall under any of the subject-categories that are enumerated in the Eastern Sea Trading case, and that may be covered by an executive agreement, such as commercial/consular relations, most-favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and settlement of claims. [...]

30 We are not persuaded.

On the other hand, the Polish Customs Chamber proceeded from a strict separation between legal orders when in *SP SA v Director of the Customs Chamber in Łódź*¹¹ 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.

SP SA v Director of the Customs Chamber in Łódź, Complaint procedure, I SA/ Ld 1707/2002, ILDC 270 (PL 2003), 26th March 2003, Poland; Supreme Court

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 provisional 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), (p. 202) applies to international law and does not entail any binding provisions of the international agreement within the domestic [legal] order.

In the employment dispute *League of Arab States v TM*,¹² a blend of international and national law arguments was at issue. The Belgian Supreme Court decided that the *League of Arab States* (League), although 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 inter-governmental organizations 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 contain 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 Prosecutor at the Tribunal of Milan and ors*¹³ the Italian 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,¹⁴ 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.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*¹⁶) and domestic cases. In *Dutch Seamen's Welfare Foundation v Minister of Transport, Public Works, and Water Management*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 (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 by terminating a subsidy to the Seamen's Welfare Foundation had breached its legal obligation under Article 18 of the Vienna Convention¹⁸ not to defeat the (p. 203) 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.

Dutch Seamen's Welfare Foundation v Minister of Transport, Public Works, and Water Management, Higher appeal judgment, Case No 200410468/1, Decision No LJN: AU0095, AB (2006) No 17727, ILDC 852 (NL 2005), 27th July 2005, Netherlands; Council of State [RvS]

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, 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. [...]

2. Entry into force

The entry into force of a treaty (Article 24 of the 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 France*¹⁹ 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

III. 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 (p. 204) is, whether the treaty can be applied in the domestic legal order without additional regulation of an international or national character. The issue came up, eg, in *Bug river claims, Czesław 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 Chapter 1 in this volume). To be sure, self-executingness or direct applicability of a treaty (provision) is all the more relevant in countries with a predominantly 'monist' constitutional system for the reception of international law. For instance, 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.²² This is similar in many legal systems of Latin American countries, as well as, eg, in the domestic legal orders of Switzerland and the Netherlands.

In *Commonwealth of Pennsylvania v Judge*²³ 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 Supreme Court had declared the ICCPR in its entirety (!) to be non-self-executing,²⁴ *in casu* the appellant was unsuccessful in his invoking of Article 6 of the ICCPR.

Commonwealth of Pennsylvania v Judge (Roger), Appeal Judgment, 916 A.2d 511 (Pa 2007), 591 Pa 126, ILDC 1218 (US 2007), 21st February 2007, United States; Pennsylvania; Supreme Court [Pa]

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").

29 [...] Further, the United States Supreme Court has stated that the ICCPR is not self-executing and, thus, does not create obligations that are enforceable in domestic courts. [...]

(p. 205) In *A and B v Government of the Canton of Zurich*²⁵ the question arose as to whether Articles 13(2)(b) and 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.

A and B v Government of the Canton of Zurich, Appeal against a Regulation of 15 September 1999 adopted by the Canton of Zurich on the Tuition at Schools of Higher Education, Case No 2P.273/1999, BGE 126 I 242, ILDC 350 (CH 2000), 22nd September 2000, Switzerland; Federal Supreme Court [BGer]

2. — [...] c) 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) 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). [...]

3.— Article 13 (2) (b) and (c) of the ICESCR do not contain, as will be shown, any enforceable guarantees concerning rights of the individual, that might be invoked in the present case on the basis of Article 84 (1) c. Constitution by Constitutional Objection.

In *S Y Q C v Government of the City of Buenos Aires*,²⁶ the Argentinian Supreme National Court more explicitly found that, while there was a wide margin of discretion by the individual state, a reasonableness test was called for in order to identify to what extent the obligation had to be fulfilled. The case dealt with the question of whether the international obligation to provide adequate housing was relative to a state's available resources. In reliance especially on the UN Economic and Social Council's statement to take steps to the maximum of available resources, the court held that every right entailed a core obligation that had to be satisfied by the state.²⁷ Only then would the international human rights commitments be met by Argentina.

While the self-executing character of a treaty is a condition for application of a treaty or some of its provisions, in the domestic legal order, such application would generally still be dependent on publication.²⁸ Thus, in *Preventive Review of Unconstitutionality of Statute, (p. 206) Determination of Unconstitutional Omission to Legislate, Case No 7/2005 (III 31)*,²⁹ 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.

Madl, Preventive review of unconstitutionality of statute, Mádl, President of Hungary, Determination of Unconstitutional Omission to Legislate, Case No 7/2005 (III 31), Decision No 41/2005, ILDC 828 (HU 2005), 29th March 2005, Hungary; Constitutional Court

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 as, eg, in the arguably 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.³⁰

In *X v University of Lucerne*,³¹ the Swiss Federal Supreme Court held that Article IV(1) of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (Lisbon Treaty) concerning the recognition of qualifications regarding access, mobility, and degrees in higher education, was self-executing and directly applicable also at the lower administrative levels of the Swiss state, following from the fact that *in casu* the Confederation as well as the cantons, and—by delegation—the universities, were competent to make decisions on recognition, in accordance with the Lisbon Treaty.(p. 207)

X v University of Lucerne, Student Administration Office and Department of Education and Culture of the Canton of Lucerne, Final appeal judgment, 2C_457/2013, BGE 140 II 185 (partly published as), ILDC 2370 (CH 2014), 13th March 2014, Switzerland; Federal Supreme Court [BGer]; Second Public Law Division

4.2 Rightly, the applicant criticizes the view that the Lisbon Convention was — as is the case with the Council of Europe Convention No 15 — not self-executing for present purposes: According to relevant case law, a treaty norm is directly applicable if its content is sufficiently precise and clear to form the basis of a decision in a particular case. The norm thus has to be justiciable, ie define the rights and obligations of an individual and be directed at the competent authorities. The latter determines whether the norm can be directly applied (BGE 136 I 297 para 8.1; 133 I 286 para 3.2; 124 III 90 para 3a). The Lisbon Convention as a joint treaty within the framework of the Council of Europe and UNESCO is based through its Article IV(1) on the principle of acceptance of qualifications acquired abroad. Since its entry into force, states parties have had the obligation to show that recognition decisions were transparent and fair, justified, non-discriminatory and within the scope of the Convention. Indeed, each state party retains the competence to determine the substantial differences that exist between foreign qualification programmes and its own study system and to require that the

applicants undertake additional training where necessary. However, the responsibility to demonstrate that an application does not meet the presumed equivalence respectively the correspondent requirements between the states parties lies with the body undertaking the assessment (Article III(3)). Procedural guarantees safeguard the rights accorded by the Convention (cf Article III(5)). It is, therefore, generally assumed that the principle of acceptance respectively of (mutual) recognition — substantial differences in programmes aside — may be directly invoked and that Article IV(1) has self-executing effect within the meaning of the case law. This also applies in cases such as the present where the responsibility to make recognition decisions lies within the competence of the member states, ie the Cantons and their institutions (Article II(1)).

IV. Binding Force and Observance

1. 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. 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 systems to determine.³²

In this sense, the Russian Constitutional Court held in *Constitutionality of Part 3 of Article 1244 of the Civil Code of the Russian Federation*,³³ concerning the Russian legal system that certain treaties were directly applicable, unless they contained a state's obligation to change its domestic law.³⁴ The Russian Constitutional Court ultimately found, however, that it had no competence to decide whether the specific international provision had supremacy over national law.

(p. 208) Especially in case of treaties which are supposed to create immediate effects at the national level, eg human rights treaties, the distinction between both planes is frequently blurred. This was evidenced in *Denton v Director General National Intelligence Agency and ors*,³⁵ 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.

Denton v Director General National Intelligence Agency and ors, Decision on Application for Declaratory Relief, Civil HC 241/06/MF/087/F1, ILDC 881 (GM 2006), 24th July 2006, Gambia; High Court

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. [...]³⁶

2. Observance

An implication of the binding force of treaties is their observance and due performance by the parties.³⁷ This duty is most prominently expressed in the *pacta sunt servanda* rule in Article 26 of the VCLT, which, together with the corollary duty in Article 27 of the VCLT (stating that a party may, in principle, not invoke the provisions of its internal law as justification for its failure to perform a 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 (p. 209) of international law in the domestic legal order.³⁸ While this clearly involves the reception of treaty law in the domestic legal order, 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*³⁹ 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.⁴⁰ To reach its conclusion, the court strongly relied on the necessary performance of treaties in good faith as envisaged in Article 26 of the VCLT.

Linija v Latvia, Judgment of the Constitutional Court of the Republic of Latvia on a request for constitutional review, Case No 2004-01-06, Latvian Herald, No 108, 3056, ILDC 189 (LV 2004), 7th July 2004, Latvia; Constitutional Court

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. [...]

Similarly, in *On the Constitutionality of Part 3 of Article 1244 of the Civil Code of the Russian Federation*,⁴¹ the Russian Constitutional Court referred to the *pacta sunt servanda* principle of Article 26 of the VCLT, to answer the question of whether domestic law contradicted an international treaty. It moreover underlined the domestic legal provisions that stipulated the supremacy of international principles and treaties over Russian domestic law, such as Article 15(4) of the Russian Constitution, Article 5 of the Federal Law on international treaties and Article 7 of the Russian Civil Code.⁴²

(p. 210) 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*.⁴³ 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.

On the Constitutionality of Part 3 of Article 1244 of the Civil Code of the Russian Federation, Constitutional proceedings, No 2531-O, ILDC 2448 (RU 2014), 6th November 2014, Russian Federation; Constitutional Court

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.⁴⁴ 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 (p. 211) 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 v Assembly of the Turkish Republic of Northern Cyprus*,⁴⁵ which was decided at the first and last instance by the Northern Cyprus Supreme Court sitting as the Constitutional Court. In this case, a constitutional review of treaties in the abstract was at stake. When addressing the question of 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 similarly upheld the supremacy of international law. Overruling an older decision, the court stated that treaty provisions could not be altered through constitutional review.⁴⁶ In order to reach that conclusion, it relied on the principles of equality and reciprocity between states:

President of the Turkish Republic of Northern Cyprus v Assembly of the Turkish Republic of Northern Cyprus, First instance, D 4/2005 [9/2005], ILDC 500 (TCc 2005), 25th November 2005, Cyprus

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.⁴⁷

(p. 212) In *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*,⁴⁸ the Benin Supreme Court dealt with conflicting *international* obligations. More particularly, it had to decide whether a so-called 'Article 98 Agreement'⁴⁹ between Benin and 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,⁵⁰ the court referred to Benin's obligations arising from Articles 26 and 18 of the 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):

Benin, Legal Opinion, Case No 029-C, ILDC 844 (BJ 2003), 25th July 2003, Benin

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.

As to economic, social, and cultural rights, the question often arises to what extent these rights are binding upon the state parties. In *S Y Q C v Government of the City of Buenos Aires*,⁵¹ the (p. 213) Argentinian Supreme National Court found that, while there was a wide margin of discretion by the individual state, the obligations had to undergo a reasonableness test to identify to what extent the obligation had to be fulfilled. It moreover held that every right entailed a core obligation that had to be satisfied by the state. It noted: 'Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. [E]ven in times of severe resource constraints, State parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes'.⁵² Only then would the international human rights commitments be met by Argentina.

V. 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 admissibility of reservations. In this context, also the distinction between reservations (which modify the scope of treaty obligations)⁵³ 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 *Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia*⁵⁴ where the Latvian Constitutional Court had to decide, *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.⁵⁵ To reach its conclusion, the Latvian Constitutional Court started out with a detailed distinction between reservations and interpretative declarations:

Border Treaty, Re, Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia, Constitutional Review, Case No 2007-10-0102, ILDC 884 (LV 2007), 29th November 2007, Latvia; Constitutional Court

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. [...]

International law permits that States attach interpretative declarations to the treaties. Interpretative declarations, according to the definition provided by the International Law Commission, are a 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. [...](p. 214)

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.

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 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*⁵⁶ 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*,⁵⁷ 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:(p. 215)

Federal Prosecutor assigned to the Special Office of the Attorney General for Federal Crimes Committed by Public Servants against Persons Related to Past Social and Political Movements and Federal Prosecutor assigned to the Second District Federal Court for Criminal Proceedings in the Federal District v Echeverría (Luis) and Moya-Palencia (Mario), Appeal Decision, Appeal No 1/2004-PS, Appeal No 8/2004-PS, ILDC 76 (MX 2005), 15th June 2005, Mexico; Supreme Court of Justice of the Nation

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, 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.

Somewhat 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.⁵⁸

(p. 216) In *GE v Germany*⁵⁹ the substantial question was whether the reservation made by Germany to Article 26 of the International Covenant on Civil and Political Rights was applicable to the communication. Letter (c) of Germany’s reservation to the Optional Protocol stated that the Committee shall not be competent for communications ‘by means of which a violation of article 26 of the [ICCPR] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant’. In the instant case, the complainant claimed that his right to freely exercise or choose an occupation was violated by Germany. Germany pointed out that work-related rights were not covered in the ICCPR and thus concerned rights ‘other than those guaranteed under the aforementioned Covenant’, meaning that the Human Rights Committee was not competent owing to Germany’s reservation.⁶⁰

GE v Germany, Admissibility, UN Doc CCPR/C/104/D/1789/2008, Communication No 1789/2008, IHRL 3817 (UNHRC 2012), 26th March 2012, United Nations General Assembly [UNGA]; Office of the High Commissioner for Human Rights [OHCHR]; United Nations Human Rights Committee [UNHRC]

7.3 The Committee notes the State party's argument contesting the Committee's competence in this case due to paragraph (c) of its reservation to the Optional Protocol [...] The State party, in its submission, construes the claim by the author as basically referring to an alleged violation of his right to choose or exercise an occupation, which is indeed not covered by the Covenant on Civil and Political Rights. The Committee, however, considers the present communication as related to an alleged violation of the autonomous rights to equality and non-discrimination enshrined in article 26 of the Covenant. The Committee is thus not precluded from proceedings to examine whether the admissibility requirements have been met.

The finding of the Committee was criticized by some of its members for not adequately interpreting Germany's reservation. In the individual opinion by Committee member Mr Neuman, joined by members Mr O'Flaherty, Sir Nigel Rodley, and Mr Iwasawa, it says:

The majority [...] takes the occasion, in paragraph 7.3 of its decision, to address one of the State party's reservations to the Optional Protocol, and gives the reservation an untenable interpretation.

Part (c) of Germany's reservation to the Optional Protocol denies the competence of the Committee with respect to communications "by means of which a violation of article 26 of the [Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant." From its language and context, it is clear that this reservation purports to limit the Committee's competence over article 26 claims to situations in which an author alleges discrimination with respect to some other right contained in the Covenant, in a provision other than article 26 itself. Thus, the reservation would reduce the Committee's competence to cases where article 26 serves an "accessory" function, similar to the function of the non-discrimination norm in article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

I fully agree with the majority's position that the rights to equality and non-discrimination enshrined in article 26 of the Covenant are autonomous, not merely accessory. [...]

The Federal Republic of Germany did not make a reservation to article 26 when it ratified the Covenant, and therefore is substantively bound by the full meaning of (p. 217) article 26. When, however, Germany ratified the Optional Protocol to the Covenant in 1993, it sought to prevent communications based on this autonomous character of Article 26 from being brought before the Committee, by articulating the reservation quoted above.

The Committee maintains in paragraph 7.3 of its decision that the reservation does not apply to the author's claim of age discrimination, because the author's claim asserts a violation of the autonomous rights to equality and non-discrimination enshrined in article 26. This interpretation not only contradicts the clear meaning of the reservation, but appears to deprive the reservation of any content whatsoever. Every claim of discrimination [...] can be described as relating to the autonomous right enshrined in article 26.

I do not see how such a nullifying interpretation can be justified. To the contrary, the reservation (if permissible) would exclude the author's claim of discrimination from the Committee's competence precisely because the claim is autonomous and not accessory – that is what the reservation means. Germany's reservation might be impermissible, but the majority does not address that question, construing the reservation instead as inapplicable to the author's claim, on grounds that would render it inapplicable to every claim.

Although Mr Neuman and the other committee members disagreed with the majority's finding and addressed the possibility of the reservation to be impermissible, they nevertheless decided not to go into detail with the question of permissibility:

I will not explore the permissibility of the reservation here, because I do not see sufficient reason to reach that question, given that the communication is already inadmissible on grounds of lack of exhaustion of domestic remedies. [...] Having responded to the majority's interpretation, I would postpone analysis of the more difficult question of the permissibility of the reservation until a communication is presented that genuinely requires it.

Similarly, Mr Salvioli notes in his individual opinion:

1 I am not satisfied with the way in which the Committee has handled the *E. v. Germany* case [...]. The Committee has found the complaint inadmissible on the grounds of non-exhaustion of domestic remedies without first having resolved the issue of its competence, which is called into question by the State party on the basis of its reservation to the Optional Protocol. [...]

4 I cannot, however, agree with the line of reasoning that appears at the end of paragraph 7.3 of the decision, in which the Committee concludes that there is no connection between subparagraph (c) of Germany's reservation, formulated when it ratified the Optional Protocol, and the author's complaint, for the reason that the communication refers exclusively to a possible violation of his stand-alone rights to equality and non-discrimination. [...]

6 The right to work and other workplace rights are not covered by the International Covenant on Civil and Political Rights [...]; for that reason the argument put forward by Mr. G. E. in the communication under consideration is directly related to the reservation formulated by the State party on ratifying the Optional Protocol. The Committee resolved the matter of its competence using an unconvincing line of argument and avoiding what it should have done, which was to consider the case in the light of whether or not Germany's reservation was valid.

7 The Committee's first competence with regard to individual communication is its "competence with respect to its competence", whereby an international body is deemed competent to decide whether or not it is competent. In my view, therefore, (p. 218) it would not have been right either on the one hand to find that subparagraph (c) of Germany's reservation applies to Mr. G. E.'s case (which is correct though for a different reason from that put forward by the Committee in paragraph 7.3 of its decision) but on the other hand to decide not to examine the validity or otherwise of the reservation simply because the domestic remedies had not been exhausted. The first issue of admissibility to be resolved is that of the Committee's competence, and all the more so when that competence is questioned by the State.

8 [...] Addressing other matters of admissibility ahead of the competence issue may well offer a less thorny path, but runs counter to the legal logic that should guide an international protection body like the Human Rights Committee.

Unlike Mr Neuman, however, Mr Salvioli expressly addresses the question of the validity of Germany's reservation:

10 The subparagraph in question constitutes a reservation that directly affects a provision of the Covenant, namely article 26. However, at the time the State ratified the Covenant, in 1973, it formulated no reservation to the aforementioned article. Under article 19 of the Vienna Convention on the Law of Treaties (1969), a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation.

11 Only in 1993, when it ratified the Optional Protocol, did Germany formulate the reservation in question [...]

12 In the instant case, the Committee should have declared itself competent to resolve the matter, but not for the reasons set forth in the last part of paragraph 7.3 of the Views. [...] Firstly, subparagraph (c) of the German reservation has no validity, as it constitutes a reservation to article 26 of the International Covenant on Civil and Political Rights that was made not when it should have been, at the time of ratification, but 20 years subsequently. A careful reading of the reservation leads one to conclude that it refers in fact not only to the competence of the Committee but also to the actual content of article 26, which it aims to circumscribe.

13 Secondly, the Committee's competence to deal with this case rests on the complementary argument that the reservation in question is also incompatible with the substance of the Protocol, and is thus equally invalid, since it attempts to oblige the Committee to interpret the article, which touches on a fundamental tenet of international human rights law (nothing less than the principles of equal protection of the law and non-discrimination) in a manner that is restrictive and contrary to the Committee's understanding.

14 Only once the issue of the Committee's competence had been resolved on the grounds of the non-validity of subparagraph (c) of Germany's reservation, should the Committee have proceeded to conclude that the complaint filed by Mr. G. E. was inadmissible because of his failure to exhaust all domestic remedies.

*María Cruz Achabal Puertas v Spain*⁶¹ dealt with a reservation made by Spain when ratifying the Optional Protocol to the ICCPR excluding the Human Rights Committee's competence with regard to cases that have already been 'examined' under another international investigation or settlement procedure. In the case at hand, the European Court of Human Rights had already dealt with the matter and declared the complaint inadmissible. However, the Human (p. 219) Rights Committee practically circumvented this reservation, by acknowledging its existence, but noting that 'in the particular circumstances' the reservation posed 'no obstacle to its examining the present communication'.⁶²

This was criticized by committee members Ms Seibert-Fohr, Mr Iwasawa, Ms Motoc, Mr Neuman, Mr Shany, and Mr Vardzelashvili in their dissenting opinion:

María Cruz Achabal Puertas v Spain, Merits, UN Doc CCPR/C/107/D/1945/2010, IHRL 3809 (UNHRC 2013), 27th March 2013, United Nations General Assembly

[UNGA]; Office of the High Commissioner for Human Rights [OHCHR]; United Nations Human Rights Committee [UNHRC]

We are unable to agree with the admissibility decision rendered by the Committee in this case [...]. When the Spanish Government acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, it did so “on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement.”

According to the Committee’s established jurisprudence [...], this condition is not fulfilled if a case has been dismissed only on procedural grounds. [...] However, when the European Court of Human Rights has based a declaration of inadmissibility not solely on procedural grounds but also on reasons that include “a certain consideration of the merits of the case”, then, according to the Committee’s jurisprudence, a matter should be deemed to have been “examined” within the meaning of the reservation to article 5, paragraph 2 (a) of the Optional Protocol. [...] The Committee has recognized that “even limited consideration of the merits” of a case constitutes an examination within the meaning of the respective reservation. [...]

We see no reason to depart from this long-standing interpretation in the case before us. The European Court based its inadmissibility decision on the argument that it did not find “any appearance of violation of the rights and freedoms guaranteed by the Convention and its Protocols.” We fail to see how this could be interpreted other than as an even limited consideration of the merits.

[...] It is not for the Human Rights Committee to assess whether the examination of a case has been sufficiently careful under a procedure which enforces a norm affording an equivalent level of protection to that provided by article 7 of the Covenant, and which was invoked unsuccessfully by the author of a communication before the matter was brought to the Committee.⁶³

(p. 220) In *X and ors*,⁶⁴ the French Court of Cassation reaffirmed that it was the judge’s duty to interpret any treaty invoked by the parties, including any reservation or declaration related to such a convention. The question of the power to interpret treaties arose because the investigative Chamber in the instant case had relied on material of the indicted persons, which they were not allowed to use owing to reservations made by Luxembourg on the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocol to that Convention.

VI. 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.⁶⁵ 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, Articles 31 and 32 of the VCLT emphasize a textual approach, whether alone or in concert with a focus on 'intention'; a similar method may be gleaned from the ICJ's practice.⁶⁶ Although mentioned in the VCLT, there is generally less concern for 'object and purpose' as a tool to establish the text's meaning.⁶⁷ 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 (p. 221) 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*⁶⁸ 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 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.⁶⁹

Pushpanathan and Canadian Council for Refugees (intervening) v Minister of Citizenship and Immigration, Appeal to Supreme Court, [1998] 1 SCR 982, (1998) 160 DLR (4th) 193, (1998) 11 Admin LR (3d) 1, ILDC 182 (CA 1998), 4th June 1998, Canada; Supreme Court [SCC]

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 (p. 222) 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. [...]

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.

Article 1F of the Refugee Convention was also at issue in *Febles v Canada*,⁷⁰ with the specific question as to whether Article 1F(b) was applicable to deny the protection of the Convention to persons who had committed serious non-political crimes outside a country of refuge prior to admission to that country, even if these persons had had served their sentence(s) in full, as in the present case, or only if such persons were fugitives from justice. By systematically applying the instrumentarium of Article 31 of the VCLT, the Supreme Court found nothing in the ordinary meaning, the context, or the object and purpose of the provision indicated that it should be given a narrow interpretation so as to refer only to fugitives. The Supreme Court expressly noted the auxiliary nature of Article 32 of the VCLT and the absence of a need to consult the *travaux préparatoires* for further clarification in the case at hand.

Febles v Canada (Citizenship and Immigration), Febles, Amnesty International (intervening) and ors (intervening) v Minister of Citizenship and Immigration, Appeal decision, 2014 SCC 68, [2014] 3 SCR 431, 376 DLR (4th) 387, Case No 35215, ILDC 2285 (CA 2014), 30th October 2014, Canada; Supreme Court [SCC]

The ordinary meaning of Article 1F(b)'s terms “has committed a serious ... crime” refers only to the crime at the time it was committed and not to anything subsequent to the commission of the crime. There is nothing in the text of the provision suggesting that Article 1F(b) only applies to fugitives, or that factors such as current lack of dangerousness or post-crime expiation or rehabilitation are to be considered or balanced against the seriousness of the crime.

The context around Article 1F(b) supports this interpretation. The immediate context of Article 1F(b) is Article 1F as a whole. There is nothing in the wording of Articles 1F(a) and 1F(c) to support the view that the exclusion from refugee protection under Article 1F(b) is confined to fugitives. Nor does Article 33(2) of the Refugee Convention support the view that Article 1F(b) is confined to fugitives. The reason Article 33(2) applies only to particularly serious crimes, and has the additional requirement that “danger to the community” be demonstrated, is

because it authorizes removal of a person whose need for protection has been recognized.

Likewise, the object and purposes of the Refugee Convention do not support the contention that Article 1F(b) is confined to fugitives. The Refugee Convention has twin purposes: it aims to strike a balance between helping victims of oppression by allowing them to start new lives in other countries, while also protecting the interests (p. 223) of receiving countries, which they did not renounce simply by negotiating specific provisions to aid victims of oppression. The Refugee Convention is not itself an abstract principle, but an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests. Accordingly, exclusion clauses should not be enlarged in a manner inconsistent with the Refugee Convention's broad humanitarian aims, but neither should overly narrow interpretations be adopted which ignore the contracting states' need to control who enters their territory. Ultimately, the purpose of an exclusion clause is to exclude, and broad purposes do not invite interpretations of exclusion clauses unsupported by the text. Article 1F(b) is not directed solely at fugitives and neither is it directed solely at some subset of serious criminals who are undeserving at the time of the refugee application. Rather, in excluding all claimants who have committed serious non-political crimes, Article 1F(b) expresses the contracting states' agreement that such persons by definition would be undeserving of refugee protection by reason of their serious criminality.

Excluding people who have committed serious crimes may support a number of subsidiary rationales — it may prevent people fleeing from justice; it may prevent dangerous and particularly undeserving people from entering the host country. It may help preserve the integrity and legitimacy and ultimate viability of the refugee protection system. It may deter states from exporting criminals as refugees. It may allow states to reduce danger to their society from serious criminality cases as a class, given the difficult task and potential for error when attempting to determine the ongoing dangerousness of criminals from abroad on whom they may often have limited reliable information. Whatever rationales for Article 1F(b) may or may not exist, its purpose is clear in excluding persons from protection who previously committed serious crimes abroad.

With respect to the *Travaux préparatoires*, the Vienna Convention conditions for their use in interpretation are not present in this case. The meaning of Article 1F(b) is clear, and admits of no ambiguity, obscurity or absurd or unreasonable result. Therefore, the *Travaux préparatoires* should not be considered. Further, even if they were considered, the *Travaux préparatoires* do not support the contention that Article 1F(b) is confined to fugitives.

*King v Bristow Helicopters Ltd*⁷¹ addressed the question of 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.

M, Re, King v Bristow Helicopters Limited, Appeal judgment, [2002] UKHL 7, [2002] 2 AC 628, [2002] WLR 578, [2002] 2 All ER 565, ILDC 242 (UK 2002), 28th February 2002, United Kingdom; House of Lords [HL]

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. [...](p. 224)

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 a ‘bodily injury’ for the purposes of Article 17 of the Warsaw Convention in those cases if and when it triggered, or was linked to, some physical condition.⁷² 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 of *Sea Hunt Inc and Commonwealth of Virginia v Unidentified Shipwrecked Vessel or Vessels and ors*⁷³ 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 (p. 225) 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.

Sea Hunt Incorporated 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), 21st July 2000, United States; Court of Appeals (4th Circuit) [4th Cir]

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.” *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 individually had any right of ownership of the seabed of the sea adjacent to the American coast.” Report of Special Master Maris, O.T. 1973, No. 35 Orig. at 47, adopted by *United States v. Maine*, 420 U.S. 515 (1975). Sovereign rights to the territorial sea were not established in international law until some time in the nineteenth century. See *California*, 322 U.S. at 33; accord *Maine*, 420 U.S. at 524. Nineteenth century and present-day views of territorial cession are hardly dispositive of what mid-eighteenth century treaty signatories intended. See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *United States v. Ancog*, 190 F. Supp. 696, 698 (D. Guam 1961).

In *Anonymous v Public Prosecutor*,⁷⁴ the Netherlands Supreme Court decided that Article 105 of the United Nations Convention on the Law of the Sea, in combination with relevant United Nations Security Council resolutions, provided a ‘procedure prescribed by law’ as required by Article 5 of the European Convention on Human Rights and hence sufficed as a legal basis for detention at sea in the context of a counter-piracy mission. The court interpreted the requirement ‘a procedure prescribed by law’ from a conceptual angle, and found a legal basis in (p. 226) international law, tied in with European human rights law. Lawfulness meant that detention had to rest on a legal basis, which must be pre-existing and meet certain requirements of quality. *In casu* the court found that Article 105 UNCLOS sufficed as a legal basis for deprivation of liberty as it satisfied general principles of rule of

law, legal certainty (clarity and foreseeability of the law), proportionality, and protection against arbitrariness.

In the case *Register of Wills for Baltimore County v Arrowsmith and ors*⁷⁵ 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 *de facto* double taxation.

Register of Wills for Baltimore County v Arrowsmith and Others, Court of Appeals judgment, 778 A 2d 364 (Md 2001), ILDC 1246 (US 2001), 15th August 2001, United States; Maryland

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 *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 (eg for the purpose of determining customary international law), as constituting general evidence, even though consisting of several bilateral treaties.

Register of Wills for Baltimore County v Arrowsmith and Others, Court of Appeals judgment, 778 A 2d 364 (Md 2001), ILDC 1246 (US 2001), 15th August 2001, United States; Maryland

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 (p. 227) 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 interpretive 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.⁷⁶ Another is the judgment in *Frudenthal v Israel*,⁷⁷ 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 therefore to be interpreted in accordance with the spirit of the convention and the protocol.⁷⁸

Frudenthal (Michael) v Israel, Appeal judgment, CA 11196/02, ILDC 364 (IL 2003), 3rd August 2003, Israel; Supreme Court; Supreme Court as Court of Appeal; Criminal Division

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.

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 (p. 228) their consulate informed of their detention. In *Cornejo v County of San Diego and ors*⁷⁹ the court held that this provision entailed no individual right.

Cornejo v County of San Diego and ors, Appeal Judgment, 504 F3d 853 (9th Cir 2007), ILDC 1080 (US 2007), 24th September 2007, United States; Court of Appeals (9th Circuit) [9th Cir]

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'.⁸⁰ This was pointed out only in the dissenting opinion.⁸¹

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

See also *Doe v Doe*,⁸² in which the Israeli Supreme Court based its decision as to whether Article 15 of the Hague Convention on the Civil Aspects of International Child Abduction conferred an (p. 229) individual right of legal action, ultimately on the object and purpose of the Convention. The court held that, while Israeli law allowed an individual to file an application under Article 15 to Israeli courts, the application would need to be appropriate in light of such object and purpose of the Hague Convention: that is, it would support the main proceedings through a clarification of Israeli law as required by the foreign court.

VII. 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,⁸³ some treaties provide for extraterritorial extension (eg to overseas territories)⁸⁴ 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*⁸⁵ the Norwegian Supreme Court had to answer the question of 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 2001.⁸⁶

Reederei Hans-Jürgen Hartman M/S Kvitnes GmbH & Company KG v Ministry of Fisheries and Coastal Affairs, Final Decision on Civil Interlocutory Appeal, Case No HR-2007-00325-A, ILDC 818 (NO 2007), 15th February 2007, Norway; Supreme Court

(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 day 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. [...]

(p. 230) Another case dealing with the temporal scope of a treaty was *Kell v Canada*.⁸⁷ In this case, an indigenous woman named Ms Kell alleged violation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), because she had been denied legal relief after having been arbitrarily evicted from her property by her abusive partner. Canada claimed that the facts relevant to the communication had occurred before the entry into force of the Optional Protocol of the Convention. Thus, the temporal scope had not been met (paras 4.2, 4.3, and 6.1). The Committee nevertheless found that the claim was admissible *ratione temporis* as the discrimination of Ms Kell had continued after the entry into force of the Optional Protocol, thus constituting a pending continuing claim.

Kell v Canada, Merits, UN Doc C/51/D/19/2008, IHRL 1971 (CEDAW 2012), 28th February 2012, Committee on the Elimination of Discrimination against Women [CEDAW]

7.5 The Committee found that since the author's claim had not been barred by limitation in any of the proceedings before the domestic courts after ratification of the Protocol, and since the author's claim had already been pending before the courts at the time of ratification and entry into force of the Protocol, her claim constituted a pending claim. The Committee was of the view that the subject matter and discriminatory effect of the alleged violation did not cease to exist, as the claim was a pending continuing claim not barred by limitation. The Committee considered the facts that are the subject of the communication to be of a continuous nature,

and found that admissibility *ratione temporis* is thereby justified, and declared the communication admissible under article 4, paragraph 2(e), of the Optional Protocol.

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*.⁸⁸ 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 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.⁸⁹ 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.⁹⁰

(p. 231) A similar question arose in *Azra Basic v United States*.⁹¹ In this case, Azra Basic, subject to charges of war crimes committed against civilians, first filed a motion to dismiss the complaint owing to the fact that the 1901 Treaty between the United States and the Kingdom of Serbia for the Mutual Extradition of Fugitives from Justice (Extradition Treaty) did not apply to Bosnia and Herzegovina.⁹² She alleged that Bosnia and Herzegovina had not been under Serbian governance at the time of entry into force of the Extradition Treaty. Moreover, Bosnia and Herzegovina had not directly succeeded to that treaty. Later, Ms Basic recognized the validity of the Extradition Treaty, but challenged its application on the grounds that the crimes she was charged with were not within the scope of the Extradition Treaty. With regard to both arguments, the court held as follows.

Azra Basic v United States, Trial judgment, 2012 WL 3067466 (ED KY), ILDC 1990 (US 2012), 27th July 2012, United States; Kentucky

15 [...] c) The treaties named in the Complaint are in full force and effect, meaning the extradition mechanics apply. [...] The Court found in its prior order on Basic's motion to dismiss that BiH succeeded to Yugoslavia's position as a party to the treaty between the United States and Serbia. [...] Further, both the United States and BiH are bound by the CAT. [...] BiH succeeded to the CAT and provided a formal instrument of succession to the UN Secretary-General on September 1, 1993 with "effect from 6 March 1992." [...] The CAT, by its terms, operates to incorporate torture as an extraditable offense under the Treaty. CAT, Art. 8

[...] **e)** The Complaint charges Basic with a crime or crimes that fall within the scope of the Treaty's extradition ambit. The Complaint [...] cites a request to extradite Basic to face a charge of "war crimes against civilians" under Article 142 of the criminal code applicable in the Republika Srpska (a BiH subdivision) and Article 173 of the general criminal code of BiH. Those statutes appear variously in the record. [...] The war crimes statutes referenced place under the rubric of "war crimes" various specific acts. These include, as pled, the underlying alleged acts of murder and torture by Azra Basic. [...]

15.1 The Treaty does not list "war crimes" per se, but it does expressly direct extradition for "murder". Treaty, Art. II ("Extradition shall be granted for the following crimes and offences: 1. Murder[.]"). The CAT, which binds both BiH and the United States, inserts "torture" as an extraditable category. Per the CAT, acts of torture (a defined term) must be criminal offenses under the laws of each "State Party." CAT, Art. 4, Sec. 1 (emphasis added). All such offenses further "shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties." *Id.* at Art. 8, Sec. 1. The CAT thus requires criminalization of "torture," and requires that torture be extraditable. The BiH statutes tie the

torture scope to the international range of illegality. The Treaty and the CAT combine to establish that the war crimes specified in the Complaint – murder and torture in violation of the code sections alleged – are within the extradition scope of the Treaty. The Court must interpret treaty language liberally [...]. A treaty that includes “murder” and (via the CAT) “torture” surely, under any reasonable construction, includes as extraditable predicates war crimes premised on the same specific categories of criminal allegations. See also *In re Extradition of Handanovic*, 829 F. Supp. 2d 979, 989 (D. Or. 2011) (“When (p. 232) determining whether crimes not included in a list treaty by name are nonetheless extraditable, courts have followed the well-established rule that treaties are to be construed liberally to favour the obligation to surrender fugitives.”) (citation omitted).

*Swiss Compensation Office v M*⁹³ dealt with the question of whether there was a customary international law rule according to which treaties with a predecessor state were automatically in force with the successor state. Specifically, a Social Security Agreement was concluded between Switzerland and the Federal People’s Republic of Yugoslavia in 1962. It entered into force in 1964, and continued to be in force with Serbia. When the Republic of Kosovo seceded from Serbia, Switzerland recognized Kosovo as an independent state. The question thus arose whether the bilateral agreement between Serbia and Switzerland would also apply to the newly established Republic of Kosovo. The Swiss Federal Supreme Court stated as follows.

BGer, Urteil vom 19.06.2013 - 9C_662/2012, Swiss Compensation Office v M, Decision of the Swiss Federal Supreme Court, 9C_662/2012, ILDC 2371 (CH 2013), 19th June 2013, Switzerland; Federal Supreme Court [BGer]; Social Chamber II

3 It is clear and undisputed that the Agreement of 8 June 1962 between the Swiss Confederation and the Former (Socialist) Federal Republic of Yugoslavia on Social Security ([...] hereinafter: Social Security Agreement [...]) continued to be in effect with regard to the Republic of Serbia [...]. On 17 February 2008 the Serbian province of Kosovo declared its independence. The Swiss Federal Council recognized Kosovo as an independent state on 27 February 2008. [...]. The Federal Supreme Court also referred to Kosovo as a sovereign state [...].

4.1 When the territorial sovereignty over a certain area changes, i.e. when a new state takes the place of another state as a sovereign over certain territory, the question of treaty succession arises. It concerns the question whether and when a newly established state may continue to apply treaties initially concluded with the predecessor state.

4.2.1 For the present case concerning the secession of Kosovo – the separation and creation of a new state while the old territorially reduced state continues to exist [...] – the Social Security Agreement does not contain any rules.

4.2.2 The Vienna Convention of 23 May 1969 on the Law of Treaties (Vienna Convention, VCLT [...]), which entered into force in Switzerland on 6 June 1990, shall not, according to Article 73, prejudice any question that may arise in regard to a treaty from a succession of States.⁹⁴

As regards the question of customary international law and state succession, the Swiss Federal Court stated as follows.

4.2.3 The Vienna Convention on Succession of States in Respect of Treaties of 1978 (hereinafter: Vienna Convention), which entered into force in 1996 and regulates what should happen with already existing international treaties in the event of state succession, has not been ratified by the Swiss Confederation [...]. In some part, rules were codified which deviate from customary international law

[...], which might explain the low acceptance and lack of practical relevance [...]. In addition, the Swiss Confederation criticized that, according to the Vienna Convention, bilateral treaties automatically continue to apply in the case of dismemberment and secession (Article (p. 233) 34 of the Vienna Convention) [...]. Such automatism does not find support in customary international law [...].

4.2.4 Pursuant to long-standing case-law of the Federal Supreme Court, there is no rule of customary international law according to which treaties concluded with the predecessor state were automatically in force in the relationship with a newly established state and the opposite party of the predecessor state [...].

4.4 As long as the concerned states have not agreed upon an explicit provision [...], there are essentially three principles for the assessment of the question whether and under which requirements a successor state may continue the treaties of the predecessor state: continuity, continuity ad interim and tabula rasa. [...] Depending on the concerned subject matter (cf. for example human rights or border treaties) and the concerned (third) party and its international obligations [...] they are applied in different ways [...].

5.1 In the Swiss Confederation, regarding the question of (bilateral) treaty succession through a successor state, a certain practice has evolved, which is featured primarily by the discontinuity (no automatic duplication of treaty relations) of treaties.

5.2 In *BGE 105 Ib 286 E. 1c S. 291* [...] the Federal Supreme Court held that it cannot be suggested that a rule of customary international law exists according to which treaties concluded with the predecessor state were automatically in force in the relationship with the newly established state and the opposite party of the predecessor state. A bilateral treaty only remains in force, if the newly established state and the opposite party agree to continue the treaty; either through explicit or conclusive action. [...]

5.3 [T]he Federal Supreme Court considered in *BGE 132 II 65 E. 3.5.2 S. 73 f.* [...]: “In a document by the Directorate of Public International Law of the Swiss Federal Department of Foreign Affairs of 30 March 1992 it was inter alia held with regard to Ukraine [...] that there are no generally recognized principles in the area of treaty succession; nor do successor states automatically succeed to the rights and obligations of the original state. It must be examined for each treaty, whether the succession of the rights and obligations of the original state through the newly established state meets the needs of both parties to the treaty. This examination often takes a lot of time. In the meantime, the concerned treaties should continue to apply temporarily, not so much for legal reasons, but rather for practical reasons [...].

Concerning Kosovo’s secession and the question of treaty succession, the Swiss Federal Court held as follows.

6.1 The secession of Kosovo by definition requires that the Republic of Serbia remains a subject of international law [...]. The Social Security Agreement therefore continues to be in effect with regard to Serbia [...].

6.4 Regarding the question of the continuity of bilateral treaties, it appears from the reproduced facts that Switzerland has, also in relation with Kosovo, chosen a pragmatic approach. It is of crucial importance that, also in this case, there has been no automatic treaty succession. It was decided to continue to apply the bilateral treaties, taking into account the interests of the newly established state as well as Switzerland through negotiations. In the meantime, the treaties in question

were applied temporarily, not for legal reasons, but for practical reasons – especially due to reasons of legal certainty to prevent a legal “interruption” in the event of definitive treaty succession. In other words, the bindingness of the treaty ended – in the relationship with the (former Serbian) state territory of the Kosovo – in principle with the establishment (p. 234) and recognition of the Republic of Kosovo as a successor state [...]; with its declaration of independence, Kosovo has given up its legal identity with Serbia [...]. Accordingly, a formal termination of the agreement was not required [...]. Neither the current state of international law (the law of treaties) [...] nor its practice [...] in the context of successor states – especially in recent times – is opposed to the handling and approach of Switzerland. The fact that Switzerland continued to apply the Social Security Agreement temporarily does not lead to a different result. The Republic of Kosovo was at all times aware that a consensus with Switzerland was needed for a definite treaty succession [...]. It was therefore aware that the treaty would continue to apply conditionally. With the final decision of Switzerland not to transfer any agreements between itself and the Republic of Serbia onto the Republic of Kosovo, solely the state of suspension was ended and not the Social Security Agreement itself. [...] Apart from that, with the pragmatic continuity of the treaty it becomes apparent that treaties can have not only a prenatal, but also a post-mortem existence. The former is regulated in Article 25 VCLT as a provisional application of a treaty not yet in force [...]. By contrast, in this case the application of a treaty not any longer in force is under consideration. [...] Under these circumstances, the dogmatics call for an analogous application of Article 25 VCLT, which, in its paragraph 2, stipulates that the state of suspension can be terminated unilaterally through notification – without any negative consequences [...].

As regards the non-continuance of the Social Security Agreement, the Swiss Federal Court held as follows.

8 As an interim result it should therefore be held that the former Serbian province, and of today the Republic of Kosovo, has, with its secession, brought about – with respect to its territory as well as its treaty obligations – an effective change under international law and that the non-continuance of the Social Security Agreement by Switzerland on the new territorial authority as of 1 April 2010 is lawful.

Concerning the extraterritorial scope of treaties, in *MEN v Denmark*⁹⁵ a Burundian asylum-seeker alleged that Denmark had violated her rights under the CEDAW. Denmark had rejected MEN’s claim for asylum and had prepared her deportation to Burundi. This, even though she claimed that she would face a real risk of persecution in Burundi, being a member of the opposition party, and ‘as a woman, could be subjected to rape or other forms of bodily harm upon her return’.⁹⁶ Denmark was of the opinion that the communication should be declared inadmissible *ratione loci* and *ratione materiae*, as the author’s claims related to violations that might be possibly committed by Burundi, not by Denmark:

4.6 The State party submits that the return of the author to Burundi will not lead to a violation of the provisions of the Convention, as claimed by the author. [...] The State party further submits that the alleged violations in the author’s complaint relate to Burundi and not to Denmark. The State party argues that the Committee lacks jurisdiction over the relevant violations in respect of Denmark, and therefore, the communication is incompatible with the provisions of the Convention. The author’s claims are based not on any treatment that she will suffer at the hands of

the State party, but on consequences that she may suffer if she is returned to Burundi. [...]

4.7 The State party submits that the concept of jurisdiction for the purposes of article 2 of the Optional Protocol must be considered within the general meaning of the (p. 235) term in public international law. Thus, the words “under the jurisdiction of a State party” must be understood to mean that a State’s jurisdictional competence is primarily territorial and that State jurisdiction is presumed to be exercised throughout its territory. Only in exceptional circumstances can certain acts of a State party produce effects outside its territory, triggering its responsibility (“extraterritorial effect”). The State party submits that no such exceptional circumstances exist in this case.

4.8 The State party further submits that there is no jurisprudence by the Committee that indicates that the provisions of the Convention have extraterritorial effect. [...]

4.9 [...] The State party argues that it is responsible only for obligations vis-à-vis individuals under its jurisdiction and cannot be held responsible for discrimination in another country. Returning a person who comes to the State party simply to escape from discriminatory treatment in her own country, however objectionable that treatment may be, cannot constitute a violation of the Convention by that State party.

The CEDAW Committee eventually held that the communication was inadmissible under article 4(1) of the Optional Protocol (failure to exhaust local remedies).⁹⁷ However, regarding the extraterritorial application of the convention, it noted that if there was a ‘real, personal and foreseeable risk’ that gender-based violence would occur even in another country and jurisdiction, states had a positive duty to protect women from such a risk:

8.9 As to the State party’s argument that nothing in the Committee’s jurisprudence indicates that any provisions of the Convention have extraterritorial effect, the Committee recalls that, under article 2(d) of the Convention, States parties undertake to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation. This positive duty encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person’s rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention. For example, a State party would itself be in violation of the Convention if it sent back a person to another State in circumstances in which it was foreseeable that serious gender-based violence would occur. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later [...].

The committee thus acknowledged that a state had duties to protect women from harm that occurred outside its territorial boundaries. However, it nevertheless held that the allegations made by the complainant were not sufficiently substantiated.

8.9 What amounts to serious forms of gender-based violence will depend on the circumstances of each case and would need to be determined by the Committee on a case-by-case basis at the merits stage, provided that the author had made a prima facie case before the Committee by sufficiently substantiating such allegations. In the present case, the author failed to sufficiently substantiate her allegations for purposes of admissibility and the Committee need not examine them further.⁹⁸

(p. 236) VIII. Successive Treaties

Frequently linked to conclusion and entry into force, as well as to termination 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 *Question of law regarding the interpretation of Article 17(2) of Treaty on Extradition between the Republic of Poland and Australia, Re, Reference to Supreme Court on Preliminary Question*⁹⁹ 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:

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).

Whether the earlier or the later treaty was applicable to extradition requests submitted before the later treaty entered into force could neither 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.

IX. 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.

(p. 237) The judgment of the German Constitutional Court *Parliamentary group of the Party of Democratic Socialism in the German Federal Parliament v Federal Government*¹⁰⁰ 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-defence) 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.

New Strategic Concept Case, Parliamentary group of the Party of Democratic Socialism in the German Federal Parliament v Federal Government (represented by the Federal Chancellor), Constitutional dispute between federal organs (Organstreitverfahren), 2 BvE 6/99, ILDC 134 (DE 2001), 22nd November 2001, Germany; Constitutional Court [BVerfG]

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. ICJ, *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 (p. 238) 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. ICJ, Case concerning Kasikili/Sedudu Island [Botswana/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 law-making, 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.¹⁰¹

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 Security*.¹⁰² In the case at issue, a refugee seeking judicial recourse against expulsion had argued *inter alia* that by virtue of Article 30 of the VCLT relating to the application of successive treaties, Article 33(2) of the 1951 Convention relating to the Status of Refugees (1951 Convention) had been 'amended' by the more absolute prohibitions of refoulement contained in Article 3(1) of the CAT and Articles 6(1) and 7 of the ICCPR. The New Zealand Supreme Court rejected the applicant's position and clarified that Article 30 of the VCLT dealt with successive treaties relating to the same subject matter rather than with treaty amendments.¹⁰³

Attorney-General v Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission (intervening), Appeal to Supreme Court, [2005] NZSC 38, (2006) 1 NZLR 289, (2005) 7 HRNZ 860, ILDC 81 (NZ 2005), 21st June 2005, New Zealand; Supreme Court

[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 (p. 239) 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. [...]

X. Termination and Suspension of Treaties

Invalidity, termination, and suspension are much discussed in literature,¹⁰⁴ 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 (Kıbrıs Türk Hava Yolları) v Secretary of State for Transport (and the Republic of Cyprus as an interested party)*¹⁰⁵ discussed in much detail the VCLT's termination, withdrawal, and suspension provisions (Articles 57–62 of the VCLT) and their procedural complements laid down in Articles 65–68 of the VCLT. Such in order to decide on the extension of a Turkish Airline's operating permit between the 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,¹⁰⁶ 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 of the VCLT), which in the end they denied.

R (Kıbrıs Türk Hava Yolları 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 (not in ILDC)

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 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 (p. 240) 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 it necessary to look for answers outside the VCLT's scope as indicated in Article 73 of the VCLT, notably in the areas of state responsibility (especially *force majeure*) and the outbreak of hostilities between the treaty parties.¹⁰⁷ 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'.¹⁰⁸

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. [...] 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'.¹⁰⁹

In *X and Y v Government and Administrative Tribunal of the Canton of Zurich*¹¹⁰ 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 (1872 Treaty) after the October revolution in 1917 by the then Russian government, which had not (p. 241) been recognized *de jure* 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 of whether a treaty was still in force in a particular case.¹¹¹ 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.¹¹²

In *RD v Belgium*¹¹³ the Belgian 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 Belgium, Luxembourg, and the Netherlands (1962 Treaty). The court found that the unanimous approval of the Framework Decision constituted a 'consultation' in the sense of Article 54(b) of the VCLT and thus amounted to treaty termination by consent.

RD v Belgium, Final Appeal/Cassation, Case No P.04.1211.N, JT 2005, 322, ILDC 6 (BE 2004), 24th August 2004, Belgium; Court of Cassation

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; [...]

However, the judgment may be criticized. It seems indeed problematic to imply termination by consent (Article 54(b) of the VCLT) as the Belgian court did. The EU Council Framework Decision and the 1962 Extradition Treaty do not necessarily have the same scope¹¹⁴ and one may wonder whether it truly was the intention of the parties to remove the Extradition Treaty from the international legal order.¹¹⁵

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 Supreme Court of Macao decision *A v B and Others*¹¹⁶ addressed treaty termination in an alleged case of fundamental change of circumstances. At stake was the applicability of the 1930 Convention (p. 242) Providing a Uniform Law for Bills of Exchange and Promissory Notes, which established a lower interest rate than Macanese laws.¹¹⁷ 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,¹¹⁸ the Macanese Supreme Court affirmed the solid normative status of the *rebus sic stantibus* rule,¹¹⁹ but did not find it to be applicable in the case at hand. The court based this, first of all, 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.¹²⁰

Footnotes:

* Our gratitude is due to Mr Robin Peeters (LLM) as well as to Mrs Isabella Brunner for their valuable research assistance.

1 See, eg, commentaries: Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012); Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011).

2 Vienna Convention on the Law of Treaties (VCLT) (adopted on 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

3 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978, entered into force on 6 November 1996) 1946 UNTS 3.

4 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) 25 ILM 543.

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

6 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 eg 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.

7 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’.

8 See T Ingadottir, ‘Enforcement of Decisions of International Courts at the National Level’ Chapter 10 in this volume.

9 *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.

10 *Bayan v Romulo, Muna v Romulo and Ople, Petition for certiorari, mandamus, and prohibition*, GR no 159618, ILDC 2059 (PH 2011), 1 February 2011, Philippine Supreme Court.

11 *SP SA v Director of the Customs Chamber in Łódz*, Complaint procedure, I SA/Ld 1707/2002; ILDC 270 (PL 2003), 26 March 2003. See also *Ushakov v Russian Federation*, Constitutional proceedings, No 8-π, Sobranie zakonodatel’stvo Rossiiskoi Federatsii, 9 April 2012, No 15 item 1810, ILDC 1930 (RU 2012), 27 March 2012, in which the Russian Constitutional Court held that provisionally applied treaties could not be implemented at the national level unless they were officially published, in the same way as treaties that had formally entered into force.

12 *League of Arab States v TM*, Appeal judgment, Case No S.99.0103.F; ILDC 42 (BE 2001), 12 March 2001.

13 *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.

14 (signed 4 April 1997, entered into force 1 December 1999) ETS No 164.

15 See *Englaro, as guardian of Englaro v Office of the Public Prosecutor at the Tribunal of Milan and ors* (n 13) para 7.2—no English translation available.

16 *Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, 120 ff.

17 *Dutch Seamen's Welfare Foundation v Minister of Transport, Public Works, and Water Management*, Higher appeal judgment, Case No 200410468/1; ILDC 852 (NL 2005) LJN No AU0095; AB (2006) No 17727, 27 July 2005.

18 VCLT (n 2) Article 18 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; [...]'.

19 *National Federation of Guardianship Associations v France*, Decision on annulment for abuse of power, No 213461; ILDC 765 (FR 2000), 7 July 2000.

20 See para 28—no English translation available.

21 *Bug river claims, Czesław S v State Treasury and Minister of the State Treasury*, Cassation judgment, I CK 323/02; ILDC 268 (PL 2003) OSNC 2004/6/103, 21 November 2003, para 27—no English translation available.

22 On such a treaty violation amounting to a deprivation of rights see *Cornejo v County of San Diego and ors*, Appeal judgment, 504 F 3d 853 (9th Cir 2007); ILDC 1080 (US 2007), 24 September 2007. See also the text accompanying n 79 below.

23 *Commonwealth of Pennsylvania v Judge (Roger)*, Appeal judgment, 916 A 2d 511 (Pa 2007); 591 Pa 126; ILDC 1218 (US 2007), 21 February 2007.

24 'Several times [...] the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing. [...] [A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.' *Sosa v Alvarez-Machain*, 542 US 692 (2004), IV. A and C.

25 *A and B v Government of the Canton of Zurich*, Appeal judgement, Case No 2P. 273/1999; ILDC 350 (CH 2000) partly published as BGE 126 I 242, 22 September 2000.

26 *S Y Q C v Government of the City of Buenos Aires*, Review of facts motion before the Supreme Court, Q 64 XLVI, ILDC 2384 (AR 2012), 24 April 2012, Argentina; Supreme Court.

27 *ibid*, para 14: 'Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. [E]ven in times of severe resource constraints, State parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes'. Quotation taken from UNCESCR: 'An evaluation of the obligation to take steps to the "maximum of available resources" under an optional Protocol to the Covenant' (2007) UN Doc E/C 12/2007/1, para 4.

28 *cf 8 December Murders case, Public Prosecutor v Bouterse and Others*, 11 May 2012, ILDC 1892 (SR 2012).

29 *Preventive Review of Unconstitutionality of Statute, Determination of Unconstitutional Omission to Legislate*, Case No 7/2005 (III 31); [41/2005] Hungarian Official Gazette, 1989–1998; ILDC 828 (HU 2005), 29 March 2005.

30 *ibid*, para V2.

31 *X v University of Lucerne, Student Administration Office and Department of Education and Culture of the Canton of Lucerne*, Final appeal judgment, 2C_457/2013, BGE 140 II 185 (partly published as), ILDC 2370 (CH 2014), 13 March 2014, Switzerland; Federal Supreme Court [BGer]; Public Law Chamber II.

32 In Aust's terms, for example, the international and national laws of treaties thus operate at different planes. See A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 159.

33 *On the Constitutionality of Part 3 of Article 1244 of the Civil Code of the Russian Federation*, Constitutional Proceedings, No 2531-O, ILDC 2448 (RU 2014), Russian Constitutional Court, 6 November 2014.

34 *ibid*, ref 5, p 9.

35 *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 *incommunicado* for three months without any charges being pressed against her.

36 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'.

37 According to Reuter: 'treaties are made to be performed'. See P Reuter, *Introduction to the Law of Treaties* (2nd edn, Kegan 1995) para 44 or P Reuter, *Introduction to the Law of Treaties* (Routledge 2012) para 44.

38 In addition to the cases mentioned below see also *Ray Sigorta AS v Nunner Lojistik 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 of how to observe the *pacta sunt servanda* principle.

39 *Linija v Latvia*, Judgment of the Constitutional Court of the Republic of Latvia on a request for constitutional review, Case No 2004-01-06; ILDC 189 (LV 2004), 7 July 2004.

40 *ibid*, operative para 1.

41 *On the Constitutionality of Part 3 of Article 1244 of the Civil Code of the Russian Federation* (n 33).

42 At para 3.0, page 8 of the judgment; Unfortunately, the Constitutional Court decided to leave open the question of whether a national law conflicted with international law, stating that such an interpretation was not within its competence.

43 *Recognition of a Sentence Imposed by a Thai Court*, Constitutional Complaint, I ÚS 601/04; ILDC 990 (CZ 2007), 21 February 2007.

44 *ibid*, para 57.

45 *President of the Turkish Republic of Northern Cyprus 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.

46 '[...] 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).

47 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).

48 *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.

49 Article 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 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'.

50 '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 [...]' *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* (n 48) para 45.

51 *S Y Q C v Government of the City of Buenos Aires*, Review of facts motion before the Supreme Court, Q 64 XLVI, ILDC 2384 (AR 2012), 24 April 2012, Argentina; Supreme Court. The case dealt with the question of whether the international obligation to provide adequate housing was relative to a state's available resources.

52 ibid, para 14.

53 See VCLT (n 2) Article 2(1)(d).

54 *Kariņš 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.

55 See ibid, substantive part, para 4.

56 *Public Prosecutor v Belgium and ors*, Appeal judgment, T Strafr 2001, 267; ILDC 40 (BE 2001), 19 January 2001.

57 *FEMOSPP and the Federal Prosecutor v Echeverría and others*, Appeal decision, Appeal No 1/2004-PS, Appeal No 8/2004-PS ILDC 76 (MX 2005), 15 June 2005.

58 *ibid*, paras 181, 182, and 193; critical also M Cortina-Borja, Analysis, *FEMOSPP and the Federal Prosecutor v Echeverría and Others*, ILDC 76 (MX 2005) A6.

59 *GE v Germany*, Admissibility, UN Doc CCPR/C/104/D/1789/2008, Communication No 1789/2008, IHRL 3817 (UNHRC 2012), 26 March 2012, United Nations General Assembly [UNGA]; Office of the High Commissioner for Human Rights [OHCHR]; United Nations Human Rights Committee [UNHRC].

60 *ibid*, para 4.2.

61 *María Cruz Achabal Puertas v Spain*, Merits, UN Doc CCPR/C/107/D/1945/2010, IHRL 3809 (UNHRC 2013), 27 March 2013, United Nations Human Rights Committee [UNHRC].

62 *ibid*, para 7.3.

63 Contrary to that statement, committee members Mr Flinterman and Mr Salvioli stated in their opinion: ‘1 We agree with the Committee’s finding that the reservation introduced by Spain on its ratification of the Optional Protocol in the particular circumstances of the case cannot be regarded as an obstacle to the examination of the merits of the communication of the author under article 5, paragraph 2 (a), of the Optional Protocol. It would have been important, however, if the Committee would have highlighted the particular circumstances of the case in more detail. This would have made it clear that the Committee would only deviate from its general respect for reservations [...] in exceptional circumstances. [...] 4 [...] In such cases where the physical integrity, yes indeed the right to life, of the individual complainant has been at stake, it should be clear from the record of the (inadmissibility) decision of the European Court of Human Rights that the Court has sufficiently given attention to the merits of the case in order to constitute an examination for purposes of the preclusionary effect of a reservation, like the Spanish one, to article 5, paragraph 2 (a), of the Optional Protocol. If that is not the case, the Committee may legitimately declare the communication admissible despite the reservation, like it did in the present case’.

64 *X and ors*, Appeal judgment, no 13-84.778, ILDC 2376 (FR 2014), 15 January 2014, France; Court of Cassation [Cass]; Criminal Division.

65 VCLT (n 2) Article 31 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) <http://www.mpepil.com> (last accessed 26 January 2018); R Gardiner, *Treaty Interpretation* (OUP, reprint 2010); following the ILC itself, such interpretation is frequently described as ‘an art not an exact science’.

- 66** See, eg, S Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties' in G Hafner and others (eds), *Liber Amicorum Professor Seidl-Hohenveldern* (Martinus Nijhoff 1998) 721-48.
- 67** cf VCLT 1969 (n 2) Articles 31-33 and the identical language found in 1986 VCLT (n 4) Articles 31-33; cf I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, MUP 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').
- 68** *Pushpanathan v Canada* (Minister of Citizenship and Immigration), Appeal to Supreme Court, (1998) 1 SCR 982; ILDC 182 (CA 1998) as amended by (1998) 1 SCR 1222, 4 June 1998.
- 69** *ibid*, para 53, G MacNeil, Analysis, *Pushpanathan v Canada*, ILDC 182 (CA 1998) A6.
- 70** *Febles v Canada (Citizenship and Immigration), Febles, Amnesty International (intervening) and ors (intervening) v Minister of Citizenship and Immigration*, Appeal decision, 2014 SCC 68, [2014] 3 SCR 431, 376 DLR (4th) 387, Case No 35215, ILDC 2285 (CA 2014), 30 October 2014, Canada; Supreme Court [SCC].
- 71** *M, Re, King v Bristow Helicopters Limited*, Appeal judgment, [2002] UKHL 7, [2002] 2 AC 628, [2002] WLR 578, [2002] 2 All ER 565, ILDC 242 (UK 2002), 28th February 2002, United Kingdom; House of Lords (HL).
- 72** *ibid*; see R O'Keefe, Analysis, *M, Re, King v Bristow Helicopters Limited*, ILDC 242 (UK 2002).
- 73** *Sea Hunt Incorporated 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.
- 74** *Anonymous v Public Prosecutor*, Judgment on merits, Case No 14/01783, ECLI:NL:HR:2015:3640, ILDC 2571 (NL 2015), 22 December 2015, Netherlands; Supreme Court [HR].
- 75** *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.
- 76** *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.
- 77** *Frudenthal v Israel*, Appeal judgment, CA 11196/02; ILDC 364 (IL 2003), 3 August 2003.
- 78** *ibid*, para 5.
- 79** *Cornejo v County of San Diego and ors* (n 22). (Paragraph numbers have been added to this decision by OUP/ILDC.)
- 80** *LaGrand Case (Germany v US)* [2001] ICJ Rep 466, paras 77 and 89.
- 81** D W Nelson, Senior Circuit Judge, dissenting, paras 27-52 of the *Cornejo* decision (n 22), reference to *LaGrand* in para 44.
- 82** *Doe v Doe*, Motion for leave to appeal, ILDC 2319 (IL 2014), 1930/14, 5 June 2014, Israel; Supreme Court.
- 83** See VCLT (n 2) Article 29: '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'.
- 84** For details see Aust (n 32) 178 ff.

85 *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 v France*, Decision on annulment for abuse of power, No 213461; ILDC 765 (FR 2000), 7 July 2000 (n 19) and accompanying text.

86 *Hans-Jürgen Hartman M/S Kvitnes GmbH & Co KG v Ministry of Fisheries and Coastal Affairs* (n 85) 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 VCLT (n 2) Article 18, 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 *Peru—Agricultural Products, Guatemala v Peru*, Panel report, WT/DS457/R, ITL 081 (WTO 2014), 27 November 2014, World Trade Organisation [WTO]—under binding force. See also VCLT (n 2) Article 24.

87 Merits, UN Doc C/51/D/19/2008, IHRL 1971 (CEDAW 2012), 28 February 2012, Committee on the Elimination of Discrimination against Women [CEDAW].

88 *Ltd Partnership Z v High Court of the Canton of Thurgau*, Appeal judgment; ILDC 341 (CH 2005), 15 June 2005.

89 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 of the scope of its validity [...]' (Translation; *ibid*, para 2.2.2).

90 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.

91 *Azra Basic v United States*, Trial judgment, 2012 WL 3067466 (ED KY), ILDC 1990 (US 2012), 27 July 2012, United States; Kentucky.

92 Treaty between the United States of America and the Kingdom of Serbia for the Mutual Extradition of Fugitives from Justice (signed 25 October 1901, entered into force 12 May 1902) 32 Stat 1890, 1902 WL 17946. The Extradition Treaty subsequently applied to the successor states of the Kingdom of Serbia, namely the Kingdom of Serbia, Croatia, Slovenia, and subsequently also to Yugoslavia.

93 *Swiss Compensation Office v M*, BGer, Urteil vom 19.06.2013—9C_662/2012, *Swiss Compensation Office v M*, Decision of the Swiss Federal Supreme Court, 9C_662/2012, ILDC 2371 (CH 2013), 19 June 2013, Switzerland; Federal Supreme Court [BGer]; Social Chamber II.

94 Translation by authors since there was no English translation by ILDC.

95 *MEN v Denmark*, Admissibility, UN Doc CEDAW/C/55/D/35/2011, IHRL 3847 (CEDAW 2013), 26 July 2013, Committee on the Elimination of Discrimination against Women [CEDAW].

96 *ibid*, para 3.

97 *ibid*, para 8.3.

98 See also *MS (on behalf of MS's husband and their two minor children) v Denmark*, Admissibility, UN Doc CEDAW/C/55/D/40/2012, IHRL 3844 (CEDAW 2013), 22 July 2013, Committee on the Elimination of Discrimination against Women [CEDAW], which also concerned the extraterritorial application of provisions in the CEDAW. However, in that case the Committee decided to leave out the question of admissibility *ratione loci* and *ratione materiae* entirely and only referred to its deliberations on the 'foreseeability principle' in another decision (*MNN v Denmark, Communication No 33/2011*). See also *YC v Denmark*, Admissibility, UN Doc CEDAW/C/59/D/59/2013, IHRL 3848 (CEDAW 2014), 24 October 2014, Committee on the Elimination of Discrimination against Women [CEDAW], where the question of extraterritoriality arose as well, but the Committee decided not to address this specific issue, since the communication was already inadmissible on other grounds.

99 *Question of law regarding the interpretation of Article 17(2) of Treaty on Extradition between the Republic of Poland and Australia, Re, Reference to Supreme Court on Preliminary Question*, I KZP 47/02, ILDC 19 February 2003, 273 (PL 2003).

100 *Parliamentary group of the Party of Democratic Socialism in the German Federal Parliament v Federal Government*, Constitutional dispute between federal organs (Organstreitverfahren), BverfG, 2 BvE 6/99; ILDC 134 (DE 2001), 22 November 2001.

101 For criticism of this 'anachronistic' point of view see, eg, H Sauer, 'Die NATO und das Verfassungsrecht—neues Konzept, alte Fragen' 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002) 317, 336; see generally B Schlütter, Analysis, *Parliamentary group of the Party of Democratic Socialism in the German Federal Parliament v Federal Government*, ILDC 134 (DE 2001) A3–A5.

102 *Attorney-General v Zaoui and Inspector-General of Intelligence and Security*, Appeal to Supreme Court, (2005) NZSC 38; ILDC 81 (NZ 2005), 21 June 2005.

103 It may be criticized, however, in 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, ICCPR, Article 5.

104 See, eg, F Capotorti, 'L'extinction et la suspension des traités' (1971-III) 134 *Recueil des Cours* 427; G Haraszti, 'Treaties and the Fundamental Change of Circumstances' (1975-III) 146 *Recueil des Cours* 1; N Kontou, *Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press 1994); C Feist, *Kündigung, Suspendierung und Rücktritt von völkerrechtlichen Verträgen* (Duncker & Humblot 2001); M M Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff 1996); D W Greig, *Invalidity and the Law of Treaties* (BIICL 2006); C Binder, *Die Grenzen der Vertragstreue im Völkerrecht am Beispiel nachträglicher Umstandsänderung* (Springer 2013).

105 *R (Kibris 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.

106 *ibid*, para 45. The RoC had refused to grant permission for scheduled flights operated by the claimant.

107 *ibid*, paras 43–67 and 69.

108 *ibid*, para 68.

109 *ibid*, para 69.

110 *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.

111 *ibid*: ‘4.2.3 The question is therefore, whether the termination from the year 1917 has led to the extinction of the Settlement Treaty. While the political authorities are solely competent to terminate a treaty (*BGE 49 I 188 E. 3 S. 194 f.*), it is the courts which decide independently on the legal question, whether a treaty is still valid (*BGE 81 II 319 E. 4 S. 330; 78 I 124 E. 3 S. 130*). [...]’.

112 *ibid*, para 4.2.5.

113 *RD v Belgium*, Final appeal/Cassation, No P041211N; ILDC 6 (BE 2004); (2005) *Journal des Tribunaux* 322, 24 August 2004.

114 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 C Ryngaert, Analysis, *RD v Belgium*, ILDC 6 (BE 2004) A5–A7.

115 It might have been more appropriate for the court to refer to Article 30 of the VCLT (n 2) 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’. See also C Ryngaert, Analysis, *RD v Belgium*, ILDC 6 (BE 2004) A8.

116 *A v B and ors*, Appeal judgment, Case No TUI-S-2/2004; ILDC 626 (MO 2004), 2 June 2004—no English translation available.

117 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 Article 138 of the Basic Law which entered into force on 20 December 1999. See A Zimmermann, *Staatennachfolge in internationale Verträge* (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 *A v B and ors*, ILDC 626 (MO 2004) F3–F4.

118 *A v B and ors* (n 116) para 58.

119 *ibid*, para 63.

120 *ibid*, paras 77–78.