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Application of treaties

1. The observance of treaties

The doctrine of **pacta sunt servanda**, the rule that treaties are binding on the parties and must be performed in good faith, is a fundamental principle of international law. The rule is included in the VCT 1969 by **Article 26 which provides that ‘every treaty in force is binding on the parties to it and must be performed in good faith’**. The principle is certainly one of customary international law evidenced by widespread **state practice and opinio juris**. The fact that it is a recognised rule of customary international law enables the VCT 1969 itself to be binding. Arguably, *pacta sunt servanda* constitutes a higher rule of customary law since it is difficult to envisage how a system of international law could operate without it.

Arguably, *pacta sunt servanda* constitutes a higher rule of customary law since it is difficult to envisage how a system of international law could operate without it. In this sense it might be viewed as constituting one of the true **sources** of international law in the sense of a *Grundnorm* as identified by Kelsen.

2. Territorial application

- Unless a different intention appears from the treaty or is otherwise established, **Article 29 provides that a treaty is binding upon each party in respect of its entire territory.** This is the general rule, but it is possible for a state to stipulate that an international agreement will apply only to part of its territory. In the past, so-called ‘colonial application clauses’ were included in some treaties by the European colonial powers, which declared whether or not the terms of the particular agreement would extend to the various colonies.
- The issue of territorial application arises where parties to a treaty have overseas territorial possessions, and the presumption is that a treaty applies to all the territory for which Contracting States are internationally responsible. Thus, unless the contrary is explicitly indicated, treaties to which the UK is a party apply to the British colonies and all territory for which the UK is internationally responsible

3. Non-retroactivity

- Non-retroactivity. A law can only be applied to an act that occurs after the law was adopted.
- **Article 28 of the VCT 1969 reflects the customary rule of non-retroactivity of treaties.** The provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the treaty entered into force for that state, unless a different intention appears from the treaty or is otherwise established. The rule applies to the VCT 1969 itself which has no application to any treaty entered into before the VCT 1969 came into force.
- Where treaties are the subject of **ratification** it is necessary to remember the rule expressed in **Article 18 of the VCT 1969 which provides that states, having signed a treaty, should not act in any way to defeat the object and purpose of the treaty until it has made a clear final decision with regard to ratification.** It should also be noted that treaties can apply to continuing situations.

4. Treaties and third parties

The general rule is that international agreements bind **only the parties to them**. The reasons for this rule can be found in the fundamental principles of the **sovereignty and independence of states**, which posit that states must **consent** to rules before they can be bound by them. *This, of course, is a general proposition and is not necessarily true in all cases.*

The general rule expressed in the maxim, *pacta tertiis nec nocent nec prosunt*, is that treaties cannot bind third parties without their consent. The rule is affirmed in **Article 34 of the VCT 1969**. However, situations in which the rights and duties of third parties are involved have occasionally been created by treaties which are said to establish objective regimes, creating rights and obligations valid universally (*erga omnes*). *Erga omnes* is not a term used in VCT 1969 but Article **36 does provide**:

A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right to a third state, or to a group of states to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

- This point arises with regard to **article 2(6) of the United Nations Charter which states that:**

“The organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security”.

It is sometimes maintained that this provision creates binding obligations rather than being merely a statement of attitude with regard to non-members of the United Nations. This may be the correct approach since the principles enumerated in article 2 of the Charter can be regarded as part of customary international law, and in view of the fact that an agreement may legitimately provide for enforcement sanctions to be implemented against a state guilty of aggression.

Treaty interpretation

One of the enduring problems facing courts and tribunals and lawyers, both in the municipal and international law spheres, relates to the question of interpretation.

As far as international law is concerned, there are **three basic approaches to treaty interpretation**.

The First centers on the **actual text** of the agreement and emphasizes the analysis of the **words used**.

The Second looks to the **intention of the parties** adopting the agreement as the solution to ambiguous provisions and can be termed the subjective approach in contradistinction to the objective approach of the previous school.

The third approach adopts a wider perspective than the other two and emphasizes the **object and purpose of the treaty** as the most important backcloth against **which the meaning of any particular treaty provision should be measured**.

- However, the Court recalls that, according to customary international law as expressed in **Article 31 of the Vienna Convention on the Law of Treaties** of 23 May 1969, a treaty must be **interpreted in good faith** in accordance with the ordinary meaning to be given to its terms in their *context* and in the light of its object and purpose.
- **Under Article 32**, recourse may be had to **supplementary means** of interpretation such as the **preparatory work** (*travaux préparatoires* e.g. *documentary evidence of the negotiation, discussions, drafting final treaty*) and the **circumstances** in which the treaty was concluded.
- The word ‘**context**’ is held to include the preamble and annexes of the treaty as well as any agreement or instrument made by the parties in connection with the conclusion of the treaty. The **Eritrea–Ethiopia Boundary Commission** in its boundary delimitation decision emphasized that the elements contained in article 31(1) were guides to establishing what the **parties actually intended or their ‘common will’**.

- It has also been noted that the process of interpretation ‘is a judicial function, whose purpose is to determine the precise meaning of a provision, but which cannot change it.

1. Good faith

The principle of good faith underlies the most fundamental norm of treaty law **pacta sunt servanda**. If the parties to a treaty are required to perform the obligations of a treaty in ‘good faith’, it is logical to interpret the treaty in ‘good faith’.

2. Ordinary meaning

The ordinary meaning does not necessarily result from a strict grammatical analysis. In order to arrive at the ordinary meaning account will need to be taken **of all the consequences which reasonably flow from the text**. It is also clear that the ordinary meaning of a phrase cannot be ascertained divorced from the context the phrase has in the treaty as a whole. **In the Employment of Women During the Night case (1932)**, Judge Anzilotti said:

‘...I do not see how it is possible to say that an article of a convention is clear **until the subject and aim of the convention have been ascertained**, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the contracting parties **intended to do** and the aim that they had in view is it possible to say either that the **natural meaning of terms** used in a particular article corresponds with the real intention of the parties, or that the natural meaning of the terms used falls short of or goes further than such intention....’

- This view can be contrasted with the decision of the ICJ given in the advisory opinion in the Competence of the General Assembly for the Admission of a State to the **UN case (1950) ICJ Rep at p 8.** where the Court said that:

The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give effect to them in their **natural and ordinary meaning in the context** in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.

3. The context and the object and purpose

The context, for the purposes of interpretation, includes the text, its preamble and annexes and any agreement relating to the treaty made between all the parties, or made by some of the parties and accepted by the other, in connection with the conclusion of the treaty. The text of the treaty must be read as a whole. The preamble to the treaty will often provide assistance in ascertaining the object and purpose of a treaty.

4. Supplementary means of interpretation

Although Article 32 talks of ‘**supplementary means of interpretation**’, in practice international tribunals do tend to shape any differences between Article 31 and Article 32 and the preparatory work often referred to by the French term **travaux préparatoires** is regarded as a considerable aid. In the **Employment of Women case the PCIJ** referred to the *travaux préparatoires* to confirm the clear meaning of the text. One possible restriction on the use of **travaux préparatoires** as an aid to interpretation arises where some of the parties to the dispute have not been involved in the preparatory work leading to the treaty.

- **Multilingual treaties**

Treaties are often drafted in two or more languages. In the case of bilateral treaties, the normal practice is that the treaty texts should be drawn up in the two languages of the parties, **both texts being equally authentic**. Multilateral conventions may be concluded in many languages: conventions concluded under the auspices of the **UN will be drawn up in Arabic, Chinese, English, French, Russian and Spanish**; the treaty by which Greece became a member of the European Union was concluded in eight languages. A more common practice is to conclude a treaty in two or three widely spoken languages and for these two or three texts to be equally authentic, and for a number of official translations to be deposited with the signed original. If a number of texts are equally authentic, they may be read in conjunction in order to ascertain the meaning of the convention.

The amendment and modification of treaties

- Although the two processes of amending and modifying international agreements share a common aim in that they both involve the revision of treaties, they are separate activities and may be accomplished in different manners.
- Amendments refer to the **formal alteration** of treaty provisions, affecting **all the parties** to the particular agreement, while **modifications** relate to variations of certain treaty terms as between particular parties only.
- Prior to VCT 1969 the customary law rule was that a treaty could not be revised without the consent of all the parties, although there was evidence that by 1969 state practice had already begun to depart from the rule.

Many multilateral treaties lay down specific conditions as regards amendment. For example, the United Nations Charter **in article 108 provides** that amendments will come into force for all member states upon adoption and ratification by two-thirds of the members of the organization, including all the permanent members of the Security Council.

Problems can occur where, in the absence of specific amendment processes, some of the parties oppose the amendments proposed by others. **Article 40 of the Vienna Convention** specifies the procedure to be adopted in amending multilateral treaties, in the absence of contrary provisions in the treaty itself.

Under Article 40 of VCT 1969 provides that;-

(1). Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs;-

(2). Any proposal to amend a multilateral treaty as between **all the parties must be notified** to all the contracting States, each one of which shall have the right to take part in:

(a) The **decision** as to the action to be taken in regard to such proposal;

(b) The **negotiation** and conclusion of any agreement for the amendment of the treaty.

Two or more parties to a multilateral treaty may decide to change that agreement as between themselves in certain ways, quite irrespective of any amendment by all the parties. This technique, **known as modification**, is possible provided it has not been prohibited by the treaty in question and provided it does not affect the rights or obligations of the other parties.

Modification, dealt with in Article 41, indicates an inter se agreement concluded between certain of the parties only, and intended to alter the provisions of the treaty between themselves alone. Modification is only allowed if:

- It is permitted by the treaty;
- It is not prohibited by the treaty;
- It does not affect the other parties to the treaty;
- It is not incompatible with the treaty.

More usually amendment or modification is achieved in the case of multilateral treaties by another multilateral treaty which comes into force only for those states which agree to the changes



THANK YOU