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Righting the World Through Treaties: the Changing Nature and Role of International Agreements in the Global Order

Abstract: In this paper presented at the Joint Study Institute in Oxford, Michael Bowman traces the history of international law, with its basis in custom, and identifies the late Nineteeth century as the period when multi-lateral treaties became commonplace. He considers whether such treaties, which were essentially static in nature, provide a suitable framework for the Twenty-first century global community. However, since the Vienna Convention, treaties have become dynamic as they now incorporate mechanisms for continuous monitoring and review of treaty obligations.
Keywords: treaties; international law

Introduction

Righting the World: Freedoms and Obligations in a Regulated Society represents an intriguing and challenging theme for the 2006 BIALL Joint Study Institute. All of us no doubt like to engage in "putting the world to rights" on occasions, whether in the form of written submissions to learned journals, oral presentations to academic or professional conferences, or just generally mounting our high horses in the pub with our friends. It is difficult to say which of those modes of communication is likely to prove the most productive in the long term, but the great advantage of occasions like this is that they enable you to do a little of each, and so perhaps get the best of all possible worlds! My particular contribution to your conference is concerned with the changing nature and role of treaties as part of this process of righting the world.

The historical evolution of the international legal system

Any attempt to pinpoint the precise origins of the system of public international law is bound to be arbitrary, but most would agree upon the significance of the Treaty of Westphalia, 1648 as an important historical milestone. It was this treaty which brought to an end the Thirty Years War, precipitated the dissolution of the Holy Roman Empire and thereby consolidated the position of the nation-state as the basic building block of the international community. It also, perhaps, marked a key staging point in the move towards recognition of the importance of a functioning legal system to govern the relations between the members of this community.

In the early stages of the process of developing such a system, writers reigned supreme.[1] From the early 16th Century, indeed, Spanish academics and theologians such as Vitoria (1480–1546) and, later, Suarez (1548–1617) had written and lectured about a universal law of nature grounded in religious principles, and covering such matters as the sanctity of agreements and the justifications for the use of force. Other authors, such as the Italian Alberico Gentili (1552–1608), who converted to Protestantism, fled to England and later became Regius Professor of Civil Law here at Oxford, addressed similar themes but from a more secular perspective. Later came the Dutch scholar Hugo de Groot, usually known as "Grotius" (1583–1645) and sometimes referred to as the "father of international law". Grotius, it seems, was something of a child prodigy, composing Latin verse at the age of eight, commencing studies at the University of Leyden only three years later, and receiving his doctorate at the age of 15. (I can sense you warming to him as I speak!) As a young man, Grotius was one of a number of dissident public officials who became embroiled in the religious and political disputes of the day; lured by some pretext to the Dutch Parliament building, he was arrested by the authorities, subjected to a highly politicised trial and sentenced to life imprisonment. Happily, he escaped

a couple of years later to Paris where, in 1625, he wrote his celebrated work on the laws of war and peace, *De Iure Belli ac Pacis*.[2] Later, he was personally involved in negotiations for the drafting of early versions of the treaty to end the Thirty Years War. Although himself devoutly religious, Grotius emphasised the role of reason, rather than religion, in the development of the law of nature, arguing that a commitment to justice was inherent in man's social make-up. He also, however, drew heavily on the actual practice of states in his formulation of legal principles, and these complementary approaches to the identification of normative rules subsequently led to something of a schism between two rival schools of jurisprudence.

Specifically, Samuel Pufendorf (1632–94) became the leader of the 'naturalist' school, grounding international law in a theoretical system of values which paid little regard to the actual practice of states, or the customs and agreements which it generated. But even by this time, a counter-movement had emerged – the so-called 'positivist' school – of which one of the principal initiators was Richard Zouche (1590–1660), who sought to discern the scope and substance of international law from the meticulous investigation of the conduct of states, rather than from theoretical explanations or abstract value systems. Positivism proved to be more in keeping with the empirical spirit of the age, and gained predominance under the influence of writers such as Cornelius van Bynkershoek (1673–1743). It offered a comfortable fit with the post-Westphalian community of nation states, the sovereign equality of each member of which was emphasised by the Swiss lawyer Emerich deVattel (1714–1767).[3]

The Positivist legacy

One of the principal consequences of the ascendancy of positivist thinking was that international law became grounded very firmly in the day-to-day activities and preoccupations of foreign offices and similar government agencies, which naturally had a decisive effect in shaping the contours of the subject. Since states were the primary, if not the sole, actors on the international stage, and states themselves were conceived as essentially territorial actors, great emphasis was placed upon the concepts of statehood and personality, and on the mechanisms and consequences of the acquisition of sovereignty over territory and the exercise of authority within it. As a consequence of the notion of national sovereignty, it was generally no business of other states how that authority was exercised, and what went on within national boundaries was accepted as largely beyond the bounds of interference by other states. Inevitably, however, states had to interact with each other on the *international* plane, and rules were therefore required to regulate the conduct of these relationships and the means for establishing a minimum basis of co-operative activity – thus the law of diplomatic relations and the law of treaties became consolidated within the system. Crucial to this was the recognition of the principle known as *pacta sunt servanda* – that treaties were binding in international law and therefore had to be complied with. In so far as disputes might arise, mechanisms for dispute settlement and principles of liability would be required, and were accordingly developed. Rules were also needed to regulate the interaction and possible conflict of state activities in areas falling outside territorial boundaries, especially in maritime areas: hence the evolution of the law of the sea from the foundations provided by those early writers. To underpin all this, of course, mechanisms had first to be agreed in accordance with which legal rules could themselves be generated, resulting in the recognition of the formal and material sources of international law – i.e. custom, treaties, general principles of law, academic writings and, in due course, judicial decisions. These topics – sources of law, the relationship between national and international law, statehood and personality, territory, jurisdiction, state responsibility, diplomatic relations, the law of the sea and dispute settlement – have constituted the basic subject-matter of the law, and dictated the contents of textbooks on the subject, well into the post-war era and, indeed, more or less to the present.[4]

Since all that was essentially required in the early stages was a set of legal rules to ensure the relatively harmonious co-existence of states, together with a basic minimum of positive co-operation, most of the foundational principles of international law were customary in origin; that is, the system comprised largely unwritten rules deriving from the practice of states, as expressed in their national legislation and other governmental programmes, and in their diplomatic activities and exchanges.[5] Thus, if states began to claim special sovereign rights over the marine areas immediately adjacent to their coastlines, a legal entitlement to do so might be established on the basis of the number and frequency of such claims and the nature and strength of the response of others, in the form of protest or acquiescence.[6] In accordance with these processes, a maritime zone known as the territorial sea, in which the coastal state enjoyed sovereign authority subject only to rights of innocent passage by ships of other nations, came to be recognised. Its breadth was originally determined on the basis of the range of cannon fire from the shore, before being fixed at a conventional figure of three miles. Over the course of time, this belt has increased in width (to up to 12 miles) and further off-shore areas, such as the contiguous zone and the EEZ, have also achieved recognition.

In addition to their customary rights and duties, however, states remained free to assume additional commitments and entitlements on a consensual basis, through agreements that they might choose to enter into. Treaties, indeed, had been a feature of inter-communal relations from the earliest times, with scholars identifying prototypes as far back as two millennia before the birth of Christ, when a boundary treaty inscribed on a block of stone was concluded between the rulers of Lagash and Umma in Mesopotamia.[7] During the formative period of international law, however, the role of treaties was essentially subsidiary, largely paralleling the role of contracts in municipal law. They served to supplement

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the commitments imposed upon states by the general law, taking the form of agreements to encourage trade, establish fishing arrangements or determine the modalities for peace after periods of conflict, for example.

Limitations of the Positivist, state-centred approach

This system functioned reasonably well, but was certainly not without its drawbacks and deficiencies. Amongst the most important were the following:

a) ***Limitations of mechanism***. As international relations began to become more complex, there was a need for greater clarity, intricacy and precision in the establishment of legal norms than was readily possible through custom. Obviously custom – based upon the practice of states accompanied by the necessary psychological element of a sense of legal obligation or entitlement, *opinio iuris* – represented a relatively primitive and cumbersome method for the development of legal rules of the sophistication that contemporary international society seemed to require. In the absence of anything resembling legislation within the international legal order, states began to turn to treaties to fill the gap and, by the turn of the 20th Century, the phenomenon of the multilateral, standard-setting treaty was becoming commonplace, addressing such controversies as the treatment of war victims (whether military or civilian), the imposition of restrictions upon methods of warfare so as to reduce the scale of suffering, and the exercise of navigational and other rights in international rivers and watercourses, alongside more mundane questions like the publication of customs tariffs, the exchange of official documents and the international recognition of patents, copyrights and other forms of intellectual property.[8] Subsequently, the trickle of such instruments turned into a veritable flood.

Yet, for a number of reasons, even the multilateral treaty must be considered a relatively primitive mechanism for the solution of international controversies. They have to be painstakingly negotiated amongst large numbers of states, often in the form of multiple language texts, and the eventually agreed formulations of principle generally represent no more than the lowest common denominator of international consensus. No state can be compelled to participate, and even if they choose to do so, the option of excluding particular commitments through the use of reservations, or indeed of withdrawing entirely if the undertaking becomes unduly burdensome, is commonly available. Reliable means for obtaining an authoritative determination of the meaning and scope of the provisions ultimately agreed may often be unavailable and the process of modifying these terms to meet changing needs can be complex and time-consuming. Close scrutiny of compliance is commonly resisted, on the grounds of expense or incompatibility with national sovereignty. Although considerable ingenuity has been employed by treaty draftsmen, particularly in the environmental field, to develop the treaty instrument to meet contemporary needs, the whole process still has something of a "scrapheap challenge" aspect to it, as though a group of enthusiastic boffins were trying to modify a blunderbuss to deliver a tactical nuclear weapon!

b) ***Limitations of focus***. Whereas natural lawyers inevitably concerned themselves with fundamental questions of morality and justice, the positivist conception of public international law largely skirted around such issues, except insofar as they happened to engage the attention of diplomats and foreign offices as forming part of some wider international controversy – the treatment of wartime casualties has been mentioned as an example. But the treatment by any government of *its own civilian* population remained a matter of domestic jurisdiction, and beyond the purview of international law. From the end of World War I this position began to change, however, as the establishment of the International Labour Organisation (ILO) saw the question of rights in the workplace elevated to the international agenda, with the conclusion of a lengthy series of agreements addressing specific issues such as accident compensation, sickness insurance, hours of work and the employment of women and children.[9] The horrors of the Nazi regime in Germany prompted rapid and wide-ranging developments after World War II, with the birth of the human rights movement proper, as exemplified in the (non-binding) Universal Declaration of Human Rights 1948, followed by the 1950 European Convention on Human Rights and a series of other legally enforceable instruments.[10] Two decades later, the attention of the international community for the first time turned more systematically to the question of environmental protection, which had previously scarcely featured at all in the thinking of governmental agencies concerned with foreign affairs, except perhaps where direct controversy over the exploitation of resources or the causing of transboundary harm had occurred,[11] or where a particular faction or pressure group had succeeded in forcing some question of current concern on to the international agenda, usually achieving no more than a grudging, small-scale, reactive solution.[12] As we move into the new millennium, the scale and seriousness of environmental problems, and the need for a more proactive, co-ordinated and comprehensive response is more widely appreciated, though a great deal remains to be done in terms of implementation.[13] Now that the conservation of species is relatively well ensconced in the global consciousness, I believe that the protection of *individual animals* may become an important area of controversy and concern for international law over the next few decades, as there are certainly innumerable wrongs to be righted in our treatment of them. A few treaties, or individual provisions are already in existence, especially in Europe, and the attention devoted to this question is likely to grow.[14]

c) ***Limitations of structure***. While the post-Westphalian system of nation states might be judged to have served the needs of the international community reasonably well

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for some 300 years, over the last 50 years or so it has come to look increasingly outmoded. The principal problem is, perhaps, that changes in social, political and economic perspectives, and technological developments in the fields of trade, transport, travel and communications have led to the *globalisation* of many areas of human activity, so that few of them are now neatly contained within national frontiers. For an example, one has only to think of the field of education, which at the tertiary level is now conducted on a truly global basis. As a result, the distinction between domestic and international affairs no longer has nearly as much relevance as in the past. Many areas of legal regulation require uniform responses, regardless of geographical locations or political idiosyncrasies.[15] In particular, the growing awareness of the nature and scale of the global environmental crisis, to which national boundaries are virtually irrelevant, has highlighted the anachronistic structure of international society. Fault-lines and sticking points still on occasion reflect national differences, but more commonly the battle-lines are drawn up on a different basis entirely. While legal mechanisms and institutions cannot escape eventual adjustment to the underlying realities they seek to regulate, the process is painfully slow. Supra-national economic communities have emerged, but still tend to serve as a focus for controversy and dissent, as attachments to national sovereignty remain extremely strong.[16] This tendency is, of course, especially pronounced in the thinking of all those members of the international community where such sovereignty has been only recently acquired, often following centuries of foreign domination. As a result, the escalation in the seriousness of many problems tends to outstrip both the political will and the functional capacity to address them.

d) ***Limitations of participation***. The state-centred view of international society is also itself something of an impediment to progress, despite the fact that there have clearly been considerable changes in the prevailing perceptions of international personality since World War II. The enormous growth in the numbers, activities and functional importance of inter-governmental organisations, whether political or technical, has been noteworthy, resulting in the acceptance of their legal capacity, where appropriate, to enter into agreements binding in international law or present claims in defence of their interests.[17] But this capacity is in a sense derivative from that of the states which created them, and a more significant development has undoubtedly occurred through the transformation in the status of the human person, with the consequence that ordinary individuals now possess extensive rights, not to mention certain duties,[18] under the international legal system directly.

Yet it is still states who retain control of the basic law-making processes. Individuals have no formal powers in this area, nor indeed do the non-governmental organisations which are so prominent in agitating for change. Although they have been active in highlighting the need for new conventions, and indeed in producing specific proposals and drafts, they can achieve little without the formal sponsorship of governments.[19] While they are commonly accorded rights of attendance, and often participation, in the meetings of institutions established to review the implementation of international agreements, they lack formal voting rights to further the objects of their concerns. Even now, no agreement to which a non-governmental organisation is a party can be regarded as a treaty binding under international law.[20] The reality is that many governments, particularly in the Third World, remain profoundly suspicious of the activities and motivations of NGOs, if not openly hostile. Yet while their democratic credentials and representative authenticity are commonly questioned, such challenges do not always carry conviction. Bodies like the Royal Society for the Protection of Birds (RSPB), for example, command a greater membership[21] in the UK than any of the major political parties (or even, I have seen suggested, that of all of them combined), and when acting in collaboration with other such organisations through the medium of umbrella groups, such as Birdlife International,[22] speak for an enormous global constituency. Accordingly, some treaty institutions have embraced them relatively warmly,[23] and the commitment, expertise and funding they provide is often one of the main engines for progress.

Challenges and incongruities in the system

It will be apparent from these observations that, although the treaty was originally conceived as a consensual arrangement for reflecting and advancing the respective rights and interests of the parties to it – for the most part sovereign states – it is now being routinely employed for a subtly different purpose, namely to impose obligations upon national governments to compel them to address some significant threat to an important interest of the "international community" seen in its widest sense (i.e. as a complex, multi-layered and multi-faceted assortment of individuals, peoples, political communities, corporations, special interest groups, national societies and transnational consortia.) This results both from, and in, a number of incongruities within the system which produce a range of thorny challenges to be overcome.

First, governments themselves cannot actually be *compelled* to participate in these arrangements, and often those whose involvement is most urgently required are the ones least willing to co-operate. In recent times, the persistent refusal of the US to commit itself to major legal initiatives has come to represent a particularly serious problem for the international community.[24] In addition, developing countries commonly harbour suspicions that such initiatives are designed to serve the interests of the developed world at the expense of their own, or at least offer little benefit to themselves. Thus, calls to subscribe to regimes for the protection of the human person may generate impatient responses – sometimes in the form of slogans such "breakfast before human rights" – from those

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whose primary concern is with economic development, while environmentalism is commonly portrayed by the same constituency either as "the new imperialism", or as a novel manifestation of quasi-religious fundamentalism.[25]

In some cases, non-participation may be due to genuine concerns about the validity or viability of the treaty's objectives, or the means selected to achieve them. Consequently, great care must be taken in the drafting process.[26] Substantive commitments and implementation arrangements must be contrived so as to be meaningful, without appearing so onerous or intrusive as to scare nations away. Scientific uncertainties surrounding many issues must be sensitively addressed. The framework convention, which leaves substantive obligations fairly loose and generalised, and concentrates on the establishment of institutional arrangements through which those commitments may be amplified and particularised over time, has proved a reasonably successful strategy, particularly in the environmental field, where it has been employed most frequently.[27]

In some cases, however, collaborative efforts can be undermined by seemingly trivial considerations. The 1971 Wetlands Convention, for example, was originally drawn up in various languages, with a proviso that the English version was to prevail in the event of inconsistency.[28] Though ostensibly a reasonable device for avoiding uncertainty, such provisions are in fact relatively unusual in standard-setting agreements, and produced the particular consequence here that France and many other francophone countries declined to participate in the agreement at all. In order to remove this impediment to participation, it was agreed to amend the text to make all language versions equally authentic.[29] As part of this process it was decided to review the French and English texts to identify possible discrepancies. Three or four minor differences of nuance or emphasis were found: the French text in each case marginally diluting the effect of the English. The French government sportingly suggested treating these discrepancies as errors of translation and rectifying the French text to align it more precisely with the English.[30] So the English text *did* ultimately prevail, though there was no longer a clause in the agreement saying that that should happen. It must, I suppose, all have been a question of principle!

Even where states do agree to participate, it is not always with great enthusiasm, their involvement sometimes being akin to that of the bridegroom at a shotgun wedding. Consequently, their attempts at implementation may be half-hearted, or, indeed, no more than a token effort. This may occur where there has been a change of government or regime since ratification, or where this originally occurred under some form of political pressure – dictated, perhaps, by deference to the wishes of more powerful members of the international community or by manifesto promises rashly made in order to attract votes in the course of a general election campaign. Most often, however, governments have simply signed up with little or no idea of what they were letting themselves in for, or perhaps the burdens and implications of the obligations involved may have increased over time beyond all original expectations.[31] Commonly, the resulting lack of commitment manifests itself in an unwillingness to make dramatic, or indeed any, changes to national arrangements in order to satisfy treaty obligations, or to acquire or develop the technical expertise that might make compliance a practical reality.

Convention on Trade in Endangered Species

The National Legislation project adopted under the 1973 Convention on Trade in Endangered Species (CITES),[32] for example, has sought to identify countries that engage in high volumes of trade in protected species, but whose legislation does not appear to meet the requirements of the Convention.[33] In a number of cases it has proved necessary to recommend a total suspension of trade with such states, which has generally proved successful in prompting the necessary action on their part. The option of total withdrawal from the Convention is less attractive to recalcitrant parties in this case, since Article 10 of CITES requires parties who trade with non-CITES countries to demand from them documentation comparable to that required of parties themselves. This effectively subjects outsiders to the burdens of the Convention but without the opportunity to influence its development. Thus the United Arab Emirates has so far been the only state to withdraw following pressure over non-implementation, and even then chose to rejoin just two years later. It has, however, remained a focus of concern over illicit trade, and become the subject of a specific recommendation regarding suspension of trade, which seems at last to have resulted in some positive action on its part.[34] The use of trade sanctions has nevertheless been questioned, both on account of the lack of specific authorisation for it in the text of the treaty itself and of possible conflict with WTO rules, and as a remedy it has certainly been employed with a degree of caution, and only in the most egregious cases. If it had been applied, as some suggested, to those who had failed to comply with CITES' reporting requirements for three consecutive years, some 20% of the parties would have been at risk, while if applied to those whose legislation was judged unsatisfactory but who did *not* engage in high levels of trade, some 73 states would have had to be sanctioned!

Use of autonomous institutional arrangements

Further problems result from the fact that many modern standard-setting agreements, particularly in the environmental field, now contain their own autonomous institutional arrangements, involving regular meetings of the parties, permanent secretariats, standing committees, scientific agencies etc, and reluctance is often evident to provide the financial resources necessary to enable these organisations to function effectively.[35] Contributions are usually on the UN scale, and therefore related in a general way to ability

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to pay, but this is not guaranteed to secure the co-operation of either the rich or the poor. Once again, this has sometimes been tackled by withdrawal of voting rights or other privileges, or denial of eligibility to benefits that the treaty may offer.[36] The availability in principle of such benefits, whether in the form of technical or financial support or technology transfer is, of course, one of the key incentives to enthusiastic participation and effective implementation, especially on the part of governments of developing states, as many contemporary treaty-makers have come to realise.[37]

As noted above, participation is sometimes brought about through external political pressures, rendering governmental commitment to the enterprise ambivalent or unpredictable. Occasionally, it is attributable to political deals of one sort or other, and extracted as the price of some sort of valued benefit quite independent of the operation of the treaty in question. Thus, it is rumoured that a number of recent accessions to the Whaling Convention (ICRW)[38] have been prompted by guarantees of large-scale development assistance in return for supporting the Japanese bid to secure a resumption of commercial whaling.[39] This is not necessarily conducive to the proper performance of treaty obligations in good faith. Elsewhere, the carrot of EU membership has been dangled so as to impose acceptance of all sorts of commitments by would-be members.

A second major consideration to bear in mind is that the real clash of interests involved in cases involving alleged breaches of obligation in standard-setting treaties is very frequently not between those of states as such. In the human rights field, plainly, the conflict in question is essentially between the individual and the government at whose hands (s)he has suffered injustice or abuse – usually, but not always, his/her own national government – and the generalised reporting procedures upon which some treaties are reliant are not necessarily an effective mechanism for addressing such problems.[40] In some cases, political and economic pressure has been brought to bear against states with a poor human rights record, but such action tends to represent the exclusive prerogative of the powerful, and is sometimes applied with regrettable selectivity.[41] Although various treaties provide for the institution of (quasi-)judicial proceedings by one government against another for breaches of human rights obligations,[42] these are rather seldom utilised, and then primarily in defence of a state's own nationals[43] or within the context of long-running political disputes between states – e.g. Ireland and UK over Northern Ireland, or Cyprus and Turkey over territorial/political questions.[44] In other circumstances, the institution of such proceedings is the very last thing a state would contemplate, knowing that it might well prompt retribution in kind at some later stage. Of course, this problem has been overcome under the European Convention by establishing procedures allowing individual victims to institute claims on their own behalf, generating a vast jurisprudence on the interpretation and implementation of the Convention.[45] Similar arrangements have been instituted under certain other human rights treaties.[46]

In other fields, the process may be one of coaxing and cajoling more or less reluctant states into the acceptance and implementation of normative standards that they themselves have had little part in devising – for example, the various action plans for the conservation of threatened bird species proposed by ornithological NGOs and endorsed for the purposes of the Berne nature conservation agreement covering the European region.[47] In such cases, both the credibility of the organisation's work and its general demeanour and relations with governments are likely to prove critical to the initial acceptance of such plans, as well as to the prospects of their effective implementation.

In many cases the crucial conflicts which arise are not even necessarily of an international character. Indeed, a key practical effect, if not aspiration, of the role of treaties in the modern world is to forestall, resolve or at least influence, *internal* governmental controversies. The World Heritage Convention,[48] for example, has become extremely important in the context of Australian domestic politics. Back in the 1970s, the state government of Tasmania devised a scheme to construct a dam on the Gordon River to generate hydro-electric power. The area was one of pristine wilderness, and the likely ecological effects were judged by many to be catastrophic. A huge chorus of protest was raised, both in Australia and beyond, and many environmentalists, including the British TV film-maker and botanist David Bellamy, got themselves arrested in a mass occupation of the site. The dam became a key issue in the 1983 Australian election, the victorious Labour party having promised to halt the project. Once in government, they successfully nominated the site for World Heritage listing and attracted the support of the World Heritage Committee in their opposition to the dam. They also introduced domestic legislation to prevent its construction, prompting a furious constitutional row over the respective powers of the federal and state governments. By a majority, the High Court of Australia upheld the legislation on the basis that the power to conduct foreign affairs belonged to the federal government, and the management of treaty relations fell squarely within it: (*Commonwealth of Australia v State of Tasmania*).[49] Later cases confirmed this principle, and explored its ramifications in relation to further conservation controversies both in Tasmania and Queensland.[50]

Similar internal power struggles may occur on the horizontal levels of government. A nice example comes from the practice of the Ramsar Convention. A recommendation agreed at the 1993 CoP called upon the government of Mauritania to ensure that the route of the planned Inter-Maghreb highway did not pass through or otherwise adversely affect the Banc d'Arguin National Park,[51] a vital site for migratory waterbirds on their passage through North Africa. An angry challenge by more conservation-minded nations opposed to such developments? Actually no – close scrutiny of the Conference record reveals that the measure was proposed by the

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Mauritanian delegation itself, and that the head of that delegation was none other than the park's director![52] This was plainly an attempt to gain a little extra leverage, in the form of an expression of international concern, in the internal debates which were to follow with a doubtless much more affluent and powerful ministry of transport or development. Of course, instances of outright conflict between states, or groups of states, do still occur, as in the case of the divergence of opinion between the pro- and anti-whaling nations under the ICRW, or the Southern and Eastern African countries over exploitation of the African elephant,[53] but this clearly now represents only one variety of conflict scenario which may arise in relation to the implementation of treaty obligations.

A final key point is that many of the rules devised to regulate the adoption, interpretation, implementation and termination of treaties themselves (to be found for the most part in codified form in the 1969 Vienna Convention on the Law of Treaties) reflect to some extent the practice of bygone eras, when modern conditions and needs had still to emerge. In a reflective postscript to the first chapter of his 1989 work, *Developments in the Law of Treaties 1945–1986*, the Israeli scholar and former member of the International Law Commission Shabtai Rosenne argued that "no attempt has been made to get to grips with the real nature and function of the multilateral treaty today, or to answer the question, what *is* a multilateral treaty, especially a treaty which is subject to no personal, spatial or temporal limitation".[54] In particular, "none of the Vienna Conventions touch upon the nature of the obligations arising from the multilateral treaty-instrument, in the more precise sense of between whom and how those obligations run. Alongside this, the treatment of the instrument itself may be seen as emphasising, perhaps excessively, the bilateral element in the relations created by the performance of the treaty".[55] This is undeniably the case, and there is, perhaps, a need for clearer recognition of the fact that when ratifying a multilateral law-making treaty, particularly one that seeks in some way to "put the world to rights", governments function not so much as principals acting in defence of their own interests, but as servants, agents or trustees on behalf of the interests of the international community, or some section of it. Although this is true primarily at the moral, social and political level, the implications in the legal sphere also require to be recognised. From an early stage, for example, the European Court of Human Rights has provided the forum for a lively and intense debate over the proper approach to interpretation of the Convention, with British judges arguing on a number of occasions that it should be interpreted in a cautious and conservative manner, and in accordance with the principle that limitations on the sovereignty of states could not lightly be presumed.[56] The justification for this approach was said to be that states would cease to lend their support to continued implementation of the Convention, but no meaningful consideration seemed to be given to the political realities underlying this assumption: would any major European political party seriously contemplate entering an election campaign or, more importantly, succeed in convincing the electorate, on a manifesto of withdrawal from the regional human rights guarantee?[57] Happily, the rather illiberal British view did not prevail, and interpretation by the Court has generally been such as to advance the object and purpose of the treaty as effectively as possible.[58]

An associated point is that there has been a significant transition in the nature and structure of treaties negotiated during the period since the Vienna Convention was itself elaborated back in the 1960s. In particular, the kind of instrument that, being typical of that and earlier eras, was doubtless in the forefront of the contemplation of those who undertook the drafting work, was of an essentially *static* nature – a formal "snapshot" of obligations framed at a particular moment in history and encapsulated in durable form. Yet many modern treaties, through their incorporation of institutional machinery to keep under continuous review the questions of implementation and further development of the obligations they contain, have more of a *fluid*, *dynamic* and *organic* character; they are essentially processes rather than events, moving pictures rather than snapshots in time. This has various implications for the rules concerning their interpretation and implementation, with particular regard to (i) the role of subsequent practice by contrast with the original intentions of the parties as reflected in the *travaux préparatoires*, and (ii) issues concerning relationships with external legal rules, particularly on an inter-temporal basis. Although the drafting of the Vienna Convention is far from ideal for the purpose of addressing these questions effectively, some slender foundation can usually be identified within the text to permit the kind of progressive approach that is required.[59] In that regard, much will depend upon whether the Vienna Convention itself can demonstrate the capacity to evolve as a "living instrument", capable of continuous development to meet the unfolding challenges of tomorrow. For the most part it has stood up to the test of time reasonably well, but may still require further attention and reform if treaties are to maximise their capacity to fulfil the current and future aspirations of international society.[60]

Conclusion

I hope by this brief overview I have been able to generate a slightly better understanding of the role of international treaties and agreements in the contemporary project of "righting the world". Of course, even if I have, that will not of itself have done much to put the world to rights: perhaps in that context I should remind you of the final pronouncement of Grotius himself, on 28 August 1645:

> "By understanding many things, I have accomplished nothing."

And with that he promptly expired of exhaustion! In order to spare you the same fate, I'll leave it there.

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References

[1]For a helpful overview of the role of writers in the early development of the international legal system, see M.N.Shaw, *International Law* (5th edn., 2003), Chapter 1, esp. pp.22–31. The works of many of these early luminaries are currently available through the *Classics of International Law* series, collated under the aegis of the Carnegie Endowment for International Peace.

[2]He had already, by that time, produced his other best-known work, *Mare Liberum* (The Free Seas).

[3]Vattel's own work displayed elements of both positivism and naturalism; in fact the latter approach was never entirely eclipsed and has in recent times enjoyed something of a revival.

[4]Though it is fair to point out that the most recent generations of textbooks have tended to adopt a more expansive approach, leading to the incorporation of treatment of human rights, the environment, the international economy, international criminal law etc.: for examples, see A.Cassese, *International Law* (2nd edn., 2004), esp. Part V; M.D.Evans (ed.), *International Law* (2nd edn., 2006), esp. Part VII.

[5]Custom tends to be the primary source in most primitive systems of law: see generally C.K.Allen, *Law in the Making* (7th edn., 1964).

[6]On the processes governing the formation of custom in international law, see the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases (1969) ICJ Rep 3.

[7]Shaw, *International Law*, at p.14.

[8]See generally M.J.Bowman and D.J.Harris, *Multilateral Treaties: Index and Current Status* (1984).

[9]The texts of these early agreements can be found in the ILO publication *International Labour Organisation Conventions and Recommendations, 1919–1966*.

[10]For a valuable collection of relevant texts, see I.Brownlie and G.S.Goodwin-Gill, *Basic Documents on Human Rights* (5th edn., 2006) and, for helpful introductory analysis, see, e.g., S.Davidson, *Human Rights* (1993); J.Donnelly, *International Human Rights* (2nd edn., 1998); M.R.Ishay, *The History of Human Rights* (2004); J.A.Mertus, *The United Nations and Human Rights* (2005).

[11]See, e.g., the *Bering Sea Fur Seals* arbitration (1893) *Moore's Int. Arb.* 755; *Trail Smelter* arbitration (1941) 3 RIAA 1907; *Lac Lanoux* arbitration (1957) 24 ILR 101.

[12]For an early example, note the 1902 Convention for the Protection of Birds Useful to Agriculture, 102 BFSP 969.

[13]For discussion, see generally P.W.Birnie and A.E.Boyle, *International Law and the Environment* (2nd edn., 2002); A.Kiss and D.Shelton, *International Environmental Law* (2nd edn., 1999); P.Sands, *Principles of International Environmental Law* (2nd edn., 2003); S.Lyster, *International Wildlife Law* (1985); M.J.Bowman and C.J.Redgwell (eds.), *International Law and the Conservation of Biological Diversity* (1996).

[14]For the text of relevant instruments, see M.Austen and T.Richards, *Basic Legal Documents on International Animal Welfare and Wildlife Conservation* (2000). For discussion, see, e.g., M.J. Bowman, "The Protection of Animals under International Law" (1989) 4 Conn JIL 487; S.R.Harrop, "The Dynamics of Wild Animal Welfare Law" (1997) 9 JEL 289; A.Gillespie, "Humane Killing: A Recognition of Universal Common Sense in International Law" (2003) 6 JIWLP 1.

[15]For discussion, see, e.g., P.S.Berman (ed.), *The Globalization of Law* (2005); B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2nd edn., 2002); A.Kiss, D.Shelton and K.Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003).

[16]The point is all too clearly demonstrated by recent debates regarding the European Constitution.

[17]Note in particular the *Reparations* case (1949) ICJ Rep 174. See generally C.F.Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn., 2005); J.Klabbers, *An Introduction to International Institutional Law* (2002); P.Sands and P.Klein (eds.), *Bowett's Law of International Institutions* (5th edn., 2001); H.G.Schermers and N.M.Blokkker, *International Institutional Law* (4th edn., 2003); N.D.White, *The Law of International Organisations* (2nd edn., 2005).

[18]E.g., those recognised by the various war crimes tribunals established at Nuremberg, Tokyo and elsewhere.

[19]See generally A.M.Florini (ed.), *The Third Force: the Rise of Transnational Civil Society* (2001); R.B. Hall and T.Biersteker (eds.), *The Emergence of Private Authority in Global Governance* (2003); A.Hurrell and B.Kingsbury (eds.), *The International Politics of the Environment: Actors, Interests and Institutions* (1992); P.Sands, "The Environment, Community and International Law" (1989) 30 Harv ILJ 393; S.Tarrow, *The New Transnational Activism* (2005).

[20]There are now quite a few of these, particularly in the field of the conservation of migratory species: see the website of the 1979 Bonn Convention on Migratory Species, <http:www.cms.int/>.

[21]Certainly over 1 million: see the Organisation's *Annual Reports* at <http:www.rspb.org.uk/>

[22]Formerly known as ICBP, the International Committee (later *Council*) for Bird Protection (later *Preservation*), founded in 1922.

[23]Birdlife International are, for example, one of the NGOs accredited with International Organisation Partner (IOP) status pursuant to Resolution VII.3 of the Conference of the Parties to the 1971 Ramsar Wetlands Convention, 996 UNTS 245. Others include IUCN, WWF, Wetlands International and the International Water Management Institute.

[24]Note, by way of examples, the Law of the Sea Convention, the Kyoto Climate Change Protocol, the Biodiversity Convention, the International Criminal Court, the Anti-Personnel Mines Convention.

[25]See, e.g., R.H.Grove, *Green Imperialism* (1995); P.J.Shah and V.Maitra, *Terracotta Reader: A Market Approach to the Environment* (2005), esp. Part IX; D.Lal, "Ecofundamentalism" (1995) 71 International Affairs 22.

[26]For fuller elaboration of these points in the context of environmental agreements in particular, see M.J.Bowman, "The Effectiveness of International Nature Conservation Agreements" in H.T.Anker and E.M.Basse (eds.), *Land Use and Nature Protection: Emerging Legal Aspects* (2000).

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[27]For notable examples, see, e.g., the 1979 Bonn Migratory Species Convention, note 20 above; 1979 Convention on Long-Range Transboundary Air Pollution, 18 ILM 1442; 1985 Vienna Convention for the Protection of the Ozone Layer, 26 ILM 1529.
[28]See the testimonium clause at the end of the treaty.
[29]See the clause as amended by the 1982 Protocol, 22 ILM 698.
[30]For discussion of this issue, see the *Proceedings of the 4th Meeting of the Contracting Parties to the Ramsar Convention*, PLEN 4.5; Ramsar DOC.C.4.7; M.J.Bowman, "The Ramsar Convention Comes of Age" (1995) Neths ILR 1, at pp.44–45; C. de Klemm and I.Creteaux, "The Legal Development of the Ramsar Convention" Ramsar INF.C.5.19, at p.41. The process of rectification of errors in treaty texts is dealt with in Article 79 of the Vienna Convention on the Law of Treaties.
[31]Frequent complaints are voiced by states regarding, for example, the burdens involved in compliance with the reporting obligations established by or under various multilateral treaties.
[32]993 UNTS 243.
[33]Some 14 states were identified in the first three phases of the Project, for information as to which see, e.g., the Reports of the Chairman of the Standing Committee of CITES, CoP12, Doc.8, and CoP13 Doc.7.1.
[34]For information, see CoP12 Doc 8, *ibid.*, paras.35–37.
[35]In relation to the Ramsar Convention, for example, see Bowman, *op. cit.* n.30, at pp.39–43.
[36]See, e.g., the World Heritage Convention, Article 16(5).
[37]As regards Ramsar, see Bowman, *loc. cit.* n.35 and, for another early example of financial support, see the 1972 World Heritage Convention, Articles 19–26. For comprehensive provision regarding both financial support and technology transfer, see the 1992 Biodiversity Convention, 31 ILM 818, Articles 15–21.
[38]1946 International Convention for the Regulation of Whaling, 161 UNTS 72.
[39]See Anon., "Vote-Buying Whistle-Blower Urges Europe to Stop Japan at the Whaling Commission" *Greenpeace International* 26 April 2002; Anon., "REGION: Pacific Countries Asked to Unite on Whale Protection" *Pacific Magazine* 15 June 2006.
[40]For an overview of implementation arrangements under UN human rights treaties, see, e.g., Shaw, *International law*, pp.281–312, and, for more detailed consideration, P.Alston and J.Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000); Mertus, *op. cit.* n.10.
[41]H.J.Steiner and P.Alston, *International Human Rights in Context* (2nd edn., 2000), Chapter 13.
[42]See, e.g., the European Convention, as amended, Article 33; American Convention, Article 45; 1998 Protocol to the African Convention, Article 5; International Covenant on Civil and Political Rights, Article 41.
[43]See, e.g., *Denmark v Turkey* Case No.34382/97, 5.4.00.
[44]*Ireland v UK* (1978) 2 EHRR 25; *Cyprus v Turkey* (1975) 2 DR 125. There are a few exceptions, however: see, e.g., the *Greek Case* (1969) 12 YBECHR 170, brought by Denmark, Norway, Sweden and Netherlands in response to the actions of the Greek military junta.
[45]For recent information on the Court's workload, see Lord Woolf's *Review of the Working Methods of the European Court of Human Rights* (December 2005).
[46]See, e.g., Mertus, *op. cit.* n.10; I.Butler, "A Comparative Analysis of Individual Petition in Regional and Global Human Rights Protection Mechanisms" (2004) 23 *Univ Queensland LJ* 22.
[47]1284 UNTS 209. For the plans themselves, see B.Heredia, L.Rose and M.Painter, *Globally Threatened Birds in Europe: Action Plans* (1996).
[48]1972 UNJYB 89.
[49](1983) 46 ALR 625; 68 ILR 266.
[50]See generally M.Tsamenyi and J.S.Beding, "Implementing International Environmental Law in Australia" (1990) 2 JEL 108; T.A.Atherton and T.C.Atherton, "The Power and the Glory" (1995) 69 Austr LJ 631; D.Farrier and L.Tucker, "Beyond a Walk in the Park" (1998) 22 *Melbourne Univ LR* 564.
[51]Ramsar Recommendation REC. C.5.1.
[52]See the *Proceedings of the 5th Meeting of the Conference of the Parties to the Ramsar Convention*, W.G. C.5.1(Rev.), p.5; PART. C.5.1(Rev.), p.15.
[53]See on this issue R.Martin, *African Elephants, CITES and the Ivory Trade* (1986); E.Barbier *et al*, *Elephants, Ivory and Economics* (1990); M.J.Glennon, "Has International Law Failed the Elephant?" (1990) 84 AJIL 1; D.J.Harland, *Killing Game* (1994); J.Hutton and B.Dickson, *Endangered Species, Threatened Convention* (2000), esp. Chapter 10; R.Leakey and V.Morell, *Wildlife Wars* (2002).
[54]At p.80.
[55]*Ibid.*, at pp.82–83.
[56]For a striking example, note the dissenting judgment of Judge Fitzmaurice in the case of *Golder v UK* (1975) EHRR 524.
[57]That is not to say, of course, that there may not be short-term political advantage in railing against individual unpopular decisions through the medium of the tabloid press.
[58]None of the predicted untoward consequences seems to have occurred – in fact by every measurable standard the ECHR has gone from strength to strength.
[59]Article 31(3) is of particular potential is this context.
[60]As indicated at various points in this paper, issues that come particularly to mind in this context include the definition of treaties, participation, interpretation, amendment (especially by subsequent practice), the nature and consequences of breach and relationship with other treaties and legal rules (especially on an inter-temporal basis).

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