

The Oxford Guide to Treaties

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Introduction

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The treaty is an august instrument. Since antiquity, treaty-makers have recognized the sacrosanct nature of commitments embedded in treaty form. The Bible, for example, records the obligatory character of a treaty forged by Joshua and the Gibeonites. The Hebrew God had directed Israelites to destroy all neighbours living in the promised land of Canaan—‘save nothing alive that breathes’¹—but permitted them to spare foreigners from distant lands. The inhabitants of Gibeon lived in Canaan and knew they faced extinction. They sent a mission to the Israelite leader, Joshua, using worn sandals, cracked wineskins, and mouldy bread to disguise themselves as a delegation from afar. Joshua fell for their deception and made a treaty of peace with Gibeon that Israelite leaders ratified by oath. When the Israelites learned the Gibeonites’ true identity days later, they proposed to ignore that covenant and annihilate the city. But their leaders refused to breach the treaty with Gibeon: ‘We have sworn to them by the Lord, the God of Israel, and now we may not touch them . . . let them live lest wrath be upon us, because of the oath which we swore to them.’²

The Gibeon story reveals both the treaty’s power and its sacred origins. Despite clear fraud in its formation, Israel considered the treaty binding. It did so by viewing the treaty to include not one, but two, promises: first, a secular promise between Israel and Gibeon to behave in certain ways, and, second, a divine promise by the Israelites to their God to perform the first promise. Whatever irregularities characterized that first promise, the second (divine) promise remained. As a result, the treaty’s original binding authority depended not so much on promises amongst parties, but on the divine pledges accompanying them to guarantee performance.³

Today, of course, we no longer associate treaties with divine promises. Starting (loosely) with the Peace of Westphalia, international relations secularized. In the process, the existence and force of divine pledges and oaths in treaty-making eroded

¹ Deuteronomy 20:10–18 (English Standard Version).

² Joshua 9:3–21 (English Standard Version).

³ In one of the earliest surviving treaty texts—a 1259 BCE treaty between Egypt and the Hittite Empire—the two rulers call upon the Gods of Egypt and Hittite to bear witness to their promises. See G Beckman, *Hittite Diplomatic Texts* (Scholars Press, Atlanta 1996) 92 (Treaty between Hattusili III of Hatti and Ramses II of Egypt). A few centuries later in China, Sun Tzu advised that ‘peace proposals unaccompanied by a sworn covenant indicate a plot’. Sun Tzu, *The Art of War* (L Giles trans) (El Paso Norte Press, El Paso 2009) 30. The Romans, however, did not rely on promises, but demanded hostages to ensure the performance of their agreements. See D Bederman, *International Law in Antiquity* (CUP, Cambridge 2001) 190.

and has now largely disappeared. So what gives modern treaties their binding authority? The standard response is *pacta sunt servanda*. Article 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines this principle as follows: '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.⁴ But *pacta sunt servanda* does not make treaties binding simply because a treaty says so, even one as venerable as the VCLT. Basing the binding character of treaties on consent to a treaty has obvious tautological problems (as do explanations based on State consent through customary practice).⁵ Rather, *pacta sunt servanda* exists as a general principle of 'natural law', independent of party promises or State practice.⁶ As such, it is a secular cousin to the divine law family of pledges that gave earlier treaties force. Unlike those oaths, however, *pacta sunt servanda* requires no secondary promises (to the divine or otherwise); it flows directly from the primary promise(s) among treaty parties.

Pacta sunt servanda thus serves as the necessary starting point for any study of treaties; it identifies an important function—to obligate performance—that treaties serve. But it is just a starting point. To say treaties are binding, says nothing about *what* qualifies as a treaty in the first place, *who* can make one, or *how* a treaty should be applied, interpreted, avoided, or ended.

Those questions *are* addressed in the law of treaties' seminal document—the VCLT. For more than four decades, this instrument, its *travaux préparatoires* and the critical earlier work of the International Law Commission (ILC) and its four Special Rapporteurs, have served as *the* lens through which States and their lawyers address treaty questions.⁷ Today, the VCLT has 111 States parties, but that

⁴ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 26; *ibid* preamble (noting *pacta sunt servanda* 'rule' is 'universally recognized').

⁵ See eg TM Franck, *The Power of Legitimacy Among Nations* (OUP, Oxford 1990) 187 ("Why are treaties binding?" is a question usually answered by the superficial assertion that "treaties are binding because states have agreed to be bound" . . . But the binding force . . . cannot emanate solely from the agreement of the parties. It must come from some ultimate unwritten rule of recognition, the existence of which may be inferred from the conduct and belief of states."); A Rubin, *Ethics and Authority in International Law* (CUP, Cambridge 1997) 15 (consent must be 'a natural law rule or a rule that rests on prior consent, thus introducing an infinite regress').

⁶ GG Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 153, 164 ('the rule *pacta sunt servanda* . . . does not require to be accounted for in terms of any other rule. It could neither not be, nor be other than what it is. It is not dependent on consent, for it would exist without it.'). 'Natural law' generally refers to international law sources that exist independent of State consent whether based on divine dictates or secular moral argument. See eg A Verdross and HF Koeck, 'Natural Law: The Tradition of Universal Reason and Authority' in RJ Macdonald and D Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff, Dordrecht 1983) 31 (discussing religious-based approaches to natural law); FR Tesón, *A Philosophy of International Law* (Westview Press, Boulder 1998) 2 (articulating a Kantian conception of international law based on certain 'morally legitimate' principles).

⁷ The ILC first took up the law of treaties in 1949. Four renowned British international lawyers served as Special Rapporteurs—JL Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphrey Waldock. Together, they authored sixteen reports on the law of treaties between 1950 and 1966. The ILC reported on its progress to the UN General Assembly in 1959, and in 1966 forwarded draft articles on the law of treaties and accompanying commentary, which formed the

number understates its true reach. Much of the VCLT codified or has since come to constitute customary international law.⁸

But even the VCLT affords an incomplete image of the treaty. Its provisions do not deal with all types of treaties or the questions they raise. Some further illumination may be gleaned from the far less widely invoked, but often still useful 1978 and 1986 Vienna Conventions,⁹ or more recent ILC work.¹⁰ But even considered collectively, those sources still leave important issues unaddressed (eg treaty-making by other subjects of international law, the role of NGOs, or the application of treaties in domestic law). Moreover, even where the VCLT or its companions do deal with a topic, it is often without great detail, and may even, in some cases, leave a false impression of actual practice. Such outcomes are a necessary byproduct of the VCLT's celebrated flexibility—the fact that its 'rules' are frequently drafted so that States may contract around them or choose from among a list of available options.¹¹ With a few notable exceptions (the prohibition on treaties that violate pre-emptory norms or *jus cogens*), the law of treaties that the VCLT presents is a default one.

The present *Oxford Guide to Treaties* endeavours to tackle all of the major treaty-related topics in a single volume. It provides a comprehensive and current guide to treaty law and practice, including (but not limited to) issues raised in the VCLT and later codification efforts. There is a strong need for such a treatment. Many earlier, important works on treaty law are now dated (although still quite useful).¹² More recent work has tended to focus on the Vienna Convention(s) exclusively,¹³ a

basis for the VCLT negotiations. Online access to all of the ILC's work is available at <http://untreaty.un.org/ilc/guide/1_1.htm>.

⁸ Indeed the VCLT's pull is so strong that it is often applied without regard to the fact that VCLT Art 4 purports to limit its application to treaties concluded after the VCLT's 1980 entry into force. See eg *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1059 [18] (applying the VCLT's interpretative provisions to a 1890 treaty).

⁹ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543 ('1986 VCLT'); Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3.

¹⁰ Eg ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-first Session (3 May–23 July, 1999), UN Doc A/56/10 55 [3]; ILC, 'Guide to Practice on Reservations to Treaties' at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf> (forthcoming in [2011] YBILC, vol II(2)).

¹¹ Thus, the VCLT frequently frames its rules or some of their elements as endorsing the application of whatever the treaty provides (eg Arts 10, 12–17, 19–20, 22, 24–25, 28–31, 33, 40–41, 44, 54–58, 72, 76–78). It also regularly authorizes parties to 'otherwise agree' (eg Arts 11, 22, 25, 37, 44, 70, 72, 77, 79) or to allow the establishment of a different intention to vary the rule's application (eg Arts 7, 12–15, 28–29, 37, 39, 44, 59).

¹² Eg P Reuter, *Introduction au droit des traités* (2nd edn Presses universitaires de France, Paris 1985); H Blix and J Emerson, *The Treaty Maker's Handbook* (Oceana, Dobbs Ferry 1973); A McNair, *Law of Treaties* (2nd edn OUP, Oxford 1961).

¹³ O Corten and P Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP, Oxford 2011); ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden 2009); I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn MUP, Manchester 1984).

subset of treaty topics,¹⁴ or a single topic in particular.¹⁵ The most current comprehensive treatment, Anthony Aust's *Modern Treaty Law and Practice* is superb, but reflects the views of one author and does not 'presume to be an academic work'.¹⁶

This *Guide* seeks to explore treaty questions from theoretical, doctrinal, and practical perspectives. Thus, in addition to reviewing the relevant rules and case law, it offers some theoretical grounding for that doctrine and, where necessary, explores the actual practice, particularly if it differs from the VCLT's terms. In terms of structure, the *Guide to Treaties* is divided into six Sections. The first five sections contain twenty-five chapters on treaty issues by leading international lawyers and political scientists from the academy, diplomatic service, the International Court of Justice, the United Nations, and the World Bank. As the leading experts on their respective topics, these contributors were tasked with describing a particular treaty-related concept, rule, or practice and, where applicable, existing challenges and areas of disagreement. Contributors were also invited, where appropriate, to offer normative claims and discuss the need for some evolution or change in their respective areas. Thus, each chapter constitutes a stand-alone essay. Read together, however, the chapters presents an overarching introduction to the current state of treaty law and practice as well as the tensions and pressure points that arise in modern treaty-making.

Section I addresses foundational issues for treaty-making. Chapter 1 explores the definitional question of what is a treaty, while Chapter 2 contrasts the treaty with its current chief competition, the political commitment. Chapters 3 to 5 then tackle a separate question—who can make treaties? Treaty-making (and thus treaty law) is most often associated with States. But a host of non-State actors also now purport to make treaties, raising questions about their authority, the circumstances in which they do so, and complicated issues of procedure and responsibility. Chapter 3 explores these questions with respect to International Organizations (IOs), and the import of the 1986 VCLT in the process. Chapter 4 looks at the EU's robust and complex treaty-making. Chapter 5 takes on a rarely addressed topic—treaty-making by 'other subjects of international law' including overseas dependencies, sub-federal territorial units, and insurgencies. In contrast to those actors, non-governmental organizations (NGOs) generally lack the formal capacity to make treaties. Nonetheless, as Chapter 6 explains, NGOs are highly visible and occasionally influential actors in the multilateral treaty context.

Section II moves beyond initial questions of definition and capacity to examine issues surrounding treaty formation. Chapter 7 surveys the often complicated

¹⁴ G Ulfstein and others, *Making Treaties Work: Human Rights, Environment and Arms Control* (CUP, Cambridge 2007); DB Hollis, MR Blakeslee, and LB Ederington (eds), *National Treaty Law & Practice* (Martinus Nijhoff, Leiden 2005); M Fitzmaurice and O Elias, *Contemporary Issues in the Law of Treaties* (Eleven Publishing, Utrecht 2005).

¹⁵ Eg R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008); J Klabbbers, *The Concept of Treaty in International Law* (Kluwer, The Hague 1996); S Rosenne, *Breach of Treaty* (CUP, Cambridge 1985).

¹⁶ A Aust, *Modern Treaty Law and Practice* (2nd edn CUP, Cambridge 2007) 3. Despite this caveat, Aust's volume is fairly well earmarked in academic circles.

process of treaty-making—from negotiations, to conclusion, to expressions of consent to be bound, to entry into force—exploring not just the law but the actual practice at each stage. Chapter 8 explores one area where a treaty may have legal effects prior to its entry into force: the practice of ‘simple signature’, signing a treaty as a prelude to potential ratification. Beyond signature, treaty-makers occasionally desire to apply their treaties sooner than the text’s entry-into-force provisions (or more pertinently their domestic legal requirements) allow. Chapter 9 explains the concept of provisional application as a response to such scenarios. Chapter 10 surveys the role of the depositary and the legal requirements of registering and publishing treaties once they are in force, with particular attention to *the* predominant actor: the United Nations. Section II concludes with the issue most likely to complicate a treaty’s formation—unilateral statements, particularly reservations. Chapter 11 surveys the history of reservations and examines how to evaluate their permissibility and legal effects, particularly in cases of objections by other States.

Section III addresses issues such as where, to whom, how and when treaties apply once they are in force. Chapter 12 assesses the rules as to *where* a treaty applies, examining the general rule of integral territorial application and the important questions associated with when and how a treaty may bind a State extraterritorially. Chapter 13 turns to the question of *to whom* a treaty applies by exploring two exceptions to *pacta tertiis* (the notion that a treaty binds its parties and *only* its parties): (a) third party rights and duties and (b) the resurgent idea of objective regimes, which apply certain types of treaties to non-parties irrespective of consent. Chapter 14 explores treaty amendments, an area where the practice regularly departs from the VCLT’s default rules, including procedural mechanisms that affect amendments without requiring each party’s explicit consent.

Of course, treaties are not just applied internationally; in terms of a treaty’s efficacy, its application under one or more domestic laws may be as (if not more) important than international law. Chapter 15 surveys how domestic legal systems approach treaty application and the varied treatment that results from different treaty types and domestic actor preferences. Chapter 16 returns to the international frame, asking how treaties apply in cases of disruption to the international legal order—State succession—a topic addressed (albeit not entirely successfully) by the 1978 Vienna Convention.

The final two chapters of Section III examine treaty application beyond the confines of the treaty text itself. Chapter 17 takes up the recent phenomenon by which treaties create so-called ‘treaty bodies’. It considers why and how States establish them, and what authority they have to flesh out the treaty’s commitments via substantive decision-making, compliance efforts, or coordination with other international actors. Chapter 18 examines treaty conflicts and the normative fragmentation of international law more generally. It explains why and how treaties may conflict and surveys techniques for resolving conflicts, whether by drafting or interpreting around them, relying on the VCLT’s default rules, or employing classic canons of treaty construction: *lex posterior*, *lex prior*, and *lex specialis*.

Section IV focuses on a critical treaty issue—its interpretation. Chapter 19 offers a nuanced account of one of the VCLT’s seminal contributions to international

law—a single set of interpretative ‘principles’ if not actual rules. The uniformity of VCLT Articles 31–33, however, operates in some tension with claims that the nature of certain treaties warrants exceptional, or at least specialized, interpretative frameworks. This *Guide* offers two case studies of such claims. First, Chapter 20 examines the extent to which the VCLT interpretative rules apply to treaties that constitute an IO and the boundaries between IO law and the law of treaties. Second, Chapter 21 asks whether VCLT Article 31 is sufficiently flexible to apply to normative treaties, including those involving human rights. It concludes that the VCLT can accommodate interpretative rules specialized for human rights treaties and that the principle of effectiveness in particular is a necessary application of these treaty provisions, rather than some extra-legal choice to elevate human rights treaties above other treaties.

Section V concludes the substantive chapters with an examination of the rules and practices associated with avoiding or exiting treaty commitments. Chapter 22 discusses the importance of validity rules to the law of treaties, while reviewing the relative dearth of practical examples implementing the VCLT rules for invalidating treaties because of constitutional concerns, error, fraud, corruption, coercion, or *jus cogens*. Chapter 23 catalogues the various remedies available when a party breaches a treaty commitment. It explains how reliance on the law of State responsibility or treaty-specific provisions are better options than VCLT provisions on termination or suspension in cases of material breach. Chapter 24 examines various claims of exceptional circumstances, including supervening impossibility of performance, fundamental change of circumstances and necessity, which a State may invoke to try and exit a treaty commitment or excuse its non-performance. Finally, Chapter 25 brings the experts’ contributions to a close with an overview of the various ways to denounce, withdraw from, or terminate a treaty alongside a discussion of how and why international law governs treaty exit, including the VCLT’s key provisions.

The *Guide to Treaties* sixth and final section adopts a different approach. In 1973, Hans Blix and Irina Emerson edited the *Treaty Maker’s Handbook* to help newly emerging States appreciate the intricacies of treaty-making as a matter of both domestic and international law post-decolonization.¹⁷ One of the work’s lasting legacies was the inclusion of sample provisions drawn from existing treaties on various treaty topics such as participation, duration, and amendment. The volume remains a staple among treaty negotiators even as it has become increasingly dated.¹⁸

¹⁷ Blix and Emerson (n 12) Foreword.

¹⁸ The UN and the Council of Europe have each issued their own highly useful explanations of treaty-making, including some similar sampling of treaty clauses, all of which are available online. UN Office of Legal Affairs, *Treaty Handbook* (2006) <<http://treaties.un.org>>; UN Office of Legal Affairs, *Final Clauses of Multilateral Treaties Handbook* (2003) <<http://treaties.un.org/doc/source/publications/FC/English.pdf>>; COE, ‘Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe’ (February 1980) <<http://conventions.coe.int/Treaty/EN/Treaties/Html/ClausesFinales.htm>>.

Section 6 offers a new set of approximately 350 sample clauses, building off the *Treaty Maker's Handbook* framework with several modifications. First, based on current practice, Section 6 includes samples of clauses not found in Blix and Emerson's earlier work (eg participation clauses for regional integration organizations, NGO participation clauses, clauses signalling an intent to conclude a political commitment). Second, this new treatment reorganizes the treatment of other topics Blix and Emerson did consider; for example, in lieu of simply reproducing Preambles, clauses that implicate a treaty's object and purpose are presented instead. This change reflects a third key difference in the current sampling. The *Treaty Maker's Handbook* was compiled at a time when newly emerging States needed a how-to manual to build their own treaty law and practice, often from scratch. Thus, that volume included samples of constitutional provisions on treaty-making and examples of the instruments States used to do so (eg full powers, instruments expressing consent to be bound, succession instruments). In contrast, today, most States and other treaty-makers have developed and standardized their own specific rules, practices, and instruments for treaties and treaty-making. As a result, there is less need for a compilation of such rules or instruments, and they are not included in the current *Guide*.¹⁹ Instead, the current set of sample clauses focuses on illustrating variations and precedents in treaties themselves. Doing so, it is hoped, may better inform those who actually work with treaties when they encounter future issues of treaty formation, application, interpretation, and exit.

So, who should read this book? Certainly, Section VI and many of the earlier chapters are drafted for international lawyers and policy-makers who attend treaty conferences and negotiations. But, it would be a mistake to characterize this book as some sort of practitioner's manual; the chapter treatments were also designed with academics in mind. Indeed, there is a largely unspoken expectation in international law, that written work will adopt either an academic or practical approach, but never both. The current *Oxford Guide to Treaties* rejects this dichotomy as a false one. Theories about treaties and explanations of actual treaty practice are neither mutually exclusive nor adversarial in nature. Practitioners who operate without understanding the scope and rationale for a particular treaty rule are short-handing themselves when it comes to working with that rule in the novel situations that inevitably arise. Similarly, those who focus only on theoretical explanations for treaty-making without understanding how States and other subjects of international law actually use them risk making disabling assumptions. In other words, a true *guide* to treaties requires an appreciation of the theories that generated a particular treaty law, the content of that law, *and* the ways that law is (or is not) applied in practice. It is such a holistic approach that lies at the root of the current compilation. Thus, the *Oxford Guide to Treaties* is designed to serve as a first reference point

¹⁹ Modern compilations of such rules and instruments are, in any case, available elsewhere. See eg Aust (n 16) Appendices B–J, L–O (modelling various treaty and MOU forms and providing examples of various treaty-related instruments); Hollis and others (n 14) (including national treaty-related legislation and documentary samples from nineteen representative States); see also *Treaty Handbook* (n 18); *Final Clauses Handbook* (n 18).

for everyone who works with treaties, whether international lawyers, diplomats, IO officials, NGO representatives, academics, or students.

Today, treaties are an essential vehicle for organizing international cooperation and coordination. In both quantitative and qualitative terms, they are the primary source for international legal commitments and, indeed, international law generally. States, IOs and other subjects of international law have concluded tens of thousands of treaties; some 64,000 treaties have been registered with the UN alone.²⁰ From a qualitative perspective, treaties dictate the content (and contours) of every field of international law, from trade to the environment, from human rights to aviation. They now occupy, in whole or in part, most areas of international relations and quite a few areas of domestic regulation as well. As the 2006 ILC Study Group argued, moreover, the law of treaties may prove key to addressing international law's fragmentation as its fields deepen, mature, and increasingly interact.²¹

Simply put, a facility with treaties has become an indispensable part of the job description for all those who work in the fields of international law or international relations. Chances are that when a lawyer or policy-maker confronts a question of international law today, it is likely (if not inevitable) that one or more treaty provisions will prove relevant to the inquiry. The *Oxford Guide to Treaties* seeks to broaden and deepen how we approach and answer such questions and to assist all those who study treaties in appreciating the potential (and limits) of this august form of international agreement.

²⁰ See Chapter 10 (Part II).

²¹ ILC Study Group, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, 15 (finalized by M Koskenniemi).