CAMBRIDGE
Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

1

Introduction: The Interplay of Concept, Context and Content in the Modern Law of Treaties

MICHAEL BOWMAN AND DINO KRITSIOTIS

According to Article 38(1) of the Statute of the International Court of Justice,[1] the Court is mandated to resolve all disputes that come before it by reference to certain well-established bodies of legal norms, most notably (i) international treaties or conventions, on the grounds that they generate rules which have been explicitly recognised by the parties; (ii) international custom, as evidenced by general practices which are accepted as legally binding and (iii) general principles of law recognised by the international community as a whole.[2] For the purposes of the international legal system generally, the proposition that custom and treaties represent the primary mechanisms for the creation of legal norms is unlikely to generate much controversy. By contrast, the question of whether either of these sources of legal norms and functions can be said to enjoy primacy *inter se* – and, if so, which – is liable to prove more contentious.

It is clear that the practice of treaty-making is one of considerable longevity, being commonly asserted to date back to the stone-inscribed boundary treaty concluded around 2100 BC between the ancient Mesopotamian kingdoms of Lagash and Umma.[3] Yet treaties of themselves cannot really be expected to produce meaningful normative effects in the absence of some pre-existing, or at least co-emergent, customary conception regarding their inherent capacity to bind the parties to them: to put it another way, pacts alone are of little service in the absence of

[1] The Statute is, of course, an integral part of the 1945 Charter of the United Nations: 1 UNTS 16.

[2] Academic writings and court decisions are, of course, also mentioned in the Statute as ‘subsidiary means for the determination of rules of law’.

[3] See, e.g., M. N. Shaw, *International Law* (Cambridge: Cambridge University Press, 8th ed., 2017), p. 10.

© in this web service Cambridge University Press www.cambridge.org

Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

concomitant recognition that *pacta sunt servanda*.[4] From that perspective, then, custom (from which this fundamental principle is ultimately derived) must perhaps be regarded as the *primordial* source of all international obligation. On the other hand, any discussion of custom itself is certain to turn before long to its rather crude and cumbersome nature and relative unsuitability to the needs of modern society, which typically require the crafting of technically complex and structurally detailed bodies of rules in written form in order to achieve the sophisticated mode of normativity that the situation is likely to demand. As a result, treaties have for most practical purposes come to secure pride of place within the global legal order, enhancing their claim currently to be regarded as the primary (or perhaps 'prime-ordinal') source of international rights and obligations.

Even here, however, the practical utility – indeed, the very viability in principle – of such instruments is ultimately dependent upon the co-existence of a supporting (though ideally no less detailed and highly elaborated) body of norms to regulate the conclusion, activation, application, interpretation, development, enforcement, duration and possible extinction of treaties themselves: it therefore comes as no surprise that such a body of rules is now long established, having been generated originally by customary means, before itself being progressively translated into treaty form, from the late 1960s onwards, under the aegis of the United Nations' International Law Commission.[5] Perhaps, then, treaties and custom should now be regarded as co-existing, of necessity, in a state of profound and permanent interaction and co-dependence. Whatever the truth of the matter, the absolutely central and critical role played by the law of treaties within the contemporary international legal order can scarcely be doubted.

Yet if treaties, and perhaps more importantly the body of legal norms by which they themselves are regulated, are to continue to serve the interests of the international community to maximum effect, it would seem essential that they be subject to continuous evaluation and appraisal of the most radical and rigorous kind. In the light of this consideration,

[4] That is to say, that treaty commitments are to be complied with, which constitutes the foundational principle of treaty law: see the second preambular recital of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[5] For access to the entire product of the Commission's work on the law of treaties, see the *Analytical Guide to Work of the ILC* (http://legal.un.org/ilc/guide/gfra.htm), Topic 1. For an earlier, purely regional, attempt at codification, see the Pan-American Union's 1928 Havana Convention on Treaties, reproduced in *AJIL Supp.*, 29 (1935), 1205–1207.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

the relative paucity of scholarly writing on the subject of the law of treaties, at least until very recently, must be regarded as somewhat surprising. As far as the English language was concerned, there was, to be sure, one renowned monograph on the old customary law of treaties,[6] and once the law came to be codified, this was supplemented by a couple of basic commentaries on the 1969 Vienna Convention of the Law of Treaties (VCLT) itself,[7] together with a handful of other works on specialised aspects of the subject.[8] Naturally, the law of treaties was also from time to time the subject of attention in the periodical literature.[9] Yet by comparison with other major substantive areas of international law, such as the law of territory and jurisdiction, human rights, the law of the sea, international humanitarian law and so forth – all of which are themselves to a considerable extent treaty-based – the depth and breadth of this body of legal scholarship seemed surprisingly modest, especially in light of the fact that the significance of treaty law is so deep and pervasive across the international legal order as a whole. The position has, however, been radically transformed in recent times by what can only be described as a veritable explosion of writing in this field, with works at every level of generality and specificity having been presented for our edification and enlightenment.[10] No longer can it be claimed, at least with any semblance of justification, that the field of treaty law has been unduly neglected.

***

It is perhaps not surprising that this dramatic proliferation of scholarly activity and attention should have generated some soul-searching of a rather fundamental kind. In particular, no less an authority than Vaughan Lowe, the erstwhile Chichele Professor of Public International

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

7 R. D. Kearney and R. E. Dalton, 'The Treaty on Treaties', *AJIL*, 64 (1970), 495–561; T. O. Elias, *The Modern Law of Treaties* (Dobbs Ferry, NY: Oceana, 1974); I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2nd ed., 1984) and P. Reuter, *Introduction to the Law of Treaties* (London/New York, NY: Pinter Publishers, 2nd ed., 1989). See, further, S. Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (Dobbs Ferry, NY: Oceana Publications, 1970).

8 See, e.g., S. Rosenne, *Breach of Treaty* (Cambridge: Grotius Publications, 1985) and S. Rosenne, *Developments in the Law of Treaties 1945–86* (Cambridge: Cambridge University Press, 1989).

9 For a selection of seminal articles, see S. Davidson (ed.), *The Law of Treaties* (Aldershot: Ashgate/Dartmouth, 2004).

10 No attempt will be made here to catalogue these works in full. Invaluable bibliographies can, however, be found at the end of each chapter of D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012).

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

Law at the University of Oxford, has questioned, in a recent essay,[11] whether convincing justification can any longer be found for the proliferation, or even for the very existence, of works concerning the law of treaties, given that the subject matter to which they relate must now be regarded as a decidedly curious and questionable phenomenon. This judgement is based upon the perception that, while the long familiar body of norms that collectively comprise the law of treaties might be judged to convey 'the appearance of solidity and certainty',[12] it is in reality 'creaking under the weight of exceptions', being 'applied only formally and in a manner that sits awkwardly with the realities of the underlying situation', rendering it 'right to review the adequacy' of the analytical framework it provides.[13]

This mismatch is seen to stem primarily, it would seem, from the vast array of different types of instrument it has perforce to embrace, ranging (to take just a handful of examples) from 'dispositive' treaties declaring the course of international boundaries, through bilateral agreements for the disbursement of financial aid, then to multilateral, standard-setting arrangements concerning marine affairs, human rights or Antarctica, and ultimately to constitutional documents establishing such bodies as the United Nations, the European Union or the World Health Organization (which are all themselves agencies of fundamentally different political characters). Amongst the most striking and significant legal outcomes generated by this vast miscellany of accords, he observes, have been the creation of (i) objective regimes or forms of status intended to be valid for parties and non-parties alike; (ii) directly enforceable rights for individuals, who had not traditionally been regarded as subjects of international law at all and (iii) dispute settlement bodies which serve not merely in the capacity of a 'passive, neutral adjudicator' of controversies that might occasionally arise regarding the meaning of treaty terms but rather as 'key organs' of the regime of which they form part, charged with an 'active role to play in [its] progressive development'.[14] Treaties, accordingly, represent a class or category of instrument which is by no means 'homogenous',[15] a point which is explicitly recognised, he notes, by the regime itself, insofar as it both accepts and addresses the

[11] A. V. Lowe, 'The Law of Treaties; or, Should this Book Exist?' in C. J. Tams, A. Tzanakopoulos and A. Zimmermann (eds.), *Research Handbook on the Law of Treaties* (Cheltenham: Edward Elgar, 2014), pp. 3–15.
[12] *Ibid.*, at p. 3. [13] *Ibid.*, at pp. 14–15. [14] *Ibid.*, at p. 7.
[15] *Ibid.*, at p. 12. For further discussion of this particular epithet, see the contribution to this volume of Bowman at pp. 392–439 (Chapter 13).

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

need to make exceptional provision for some of these special cases.[16] If such special provision is necessary, he continues, it begs the question as to whether the divergent needs of these various sub-categories might not in fact be better served by the abandonment of any attempt to maintain the viability of a single, distinct and unified law of treaties.

In addition to questioning the internal coherence of the category of 'treaties' itself, he goes on to doubt the conviction with which one might seek to distinguish the treaty-making process from cognate modes of norm-creation, such as that which comprises formal commitments undertaken unilaterally, in the fashion that has been recognised as legally binding by the International Court of Justice in various cases.[17] He further highlights the point by referring to the ongoing studies that are currently being conducted by the International Law Commission concerning (i) the unilateral acts of States and (ii) the identification of customary international law[18] and concludes by asking whether the law of treaties might not be similarly ripe for fundamental reconsideration.[19] At first glance, it might be assumed from this that the author is about to advocate the initiation of some grand, over-arching synthesis or re-configuration of *all* the various mechanisms of international norm-creation, but closer inspection makes clear that this is not in fact his intention; indeed, he seems disposed to accept the existence of a significant and meaningful divide between obligations deriving from treaty and from custom respectively, on the grounds that the latter category of norm

> binds a State not because it has expressly assented to it but because State practice in general, in which the State may or may not have participated, has generated a rule from which the State has not excepted itself.[20]

It seems reasonable to suppose, however, that the distinction between these two venerable modes of norm-creation is actually significantly greater than this, in the sense that the generative processes involved in each case work primarily with raw materials of a very different kind. To be specific, a treaty can be seen as a network or system of inter-

[16] Within the VCLT, see, e.g., Arts. 5, 20(3), 60(5) and 62(2)(a).
[17] *Legal Status of Eastern Greenland*: Denmark v. Norway, 1933 PCIJ, Series A/B, No. 53; *Nuclear Tests Case*: Australia v. France (1974) ICJ Rep. 253, and *Nuclear Tests Case:* New Zealand v. France (1974) ICJ Rep. 457.
[18] For details of this work, see the 'Analytical Guide to the Work of the International Law Commission' (viewable at http://legal.un.org/ilc/guide/gfrashtml).
[19] Lowe, *supra* n. 11, at p. 15.
[20] *Ibid.*, at pp. 13–14.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE
Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

related commitments and entitlements which are essentially forged and fashioned in *language*, with conduct playing only an ancillary role in shedding light on the meaning of the words that have been used.[21] In the case of custom, by contrast, the basic fabric from which norms are constructed comprises *actions* rather than words, or, to be more precise, actions as coloured by the *attitudes* by which they are motivated, at least in formal terms.[22] Here again, it must no doubt be conceded that the alternative form of fabric, language, plays an important ancillary role: for example, if putative customary principles are to prove capable of bearing normative import at all, they must certainly be capable of eventual encapsulation and expression in verbal form.[23] In addition, the conduct from which they are ultimately derived is very likely to be questioned, explained, challenged and defended through verbal exchanges of one sort or another. Yet, for all that, it remains the case that the basic fabric of custom as a source of law typically comprises actions rather than words.[24]

This in turn suggests that not only the processes by which the respective types of norm are initially generated but those through which they are identified, investigated and evaluated are likely to differ very significantly. In the case of custom, the enquiry will focus on conduct and therefore be of an essentially behavioural and sociological nature, as it would be, for example, when investigating the unwritten customs of tribal communities, whereas the process whereby legislative or treaty-based norms are analysed will require an approach and expertise of a rather different – essentially linguistic

[21] See, e.g., Art. 31(3)(b) VCLT, which allows subsequent practice a role in the interpretation of legal norms: *supra* n. 4.

[22] Thus, the two essential ingredients of custom as a source of law are the behavioural element of State practice – usually described as requiring a 'constant and uniform usage' – and the mental element of *opinio iuris* – typically translated as a feeling of legal obligation (or, presumably, in the case of permissive rules, *entitlement*). For further discussion, see, e.g., A. A. D'Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971); M. Akehurst, 'Custom as a Source of International Law', *BYbIL*, 47 (1976), 1–53, and G. J. Postema, 'Custom in International Law: A Normative Practice Account' in A. Perreau-Saussine and J. B. Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2007), pp. 279–306.

[23] This may, of course, eventually lead to formal codification, but any such development will be of a radically transformational character from a juridical point of view.

[24] Proverbially, of course, the former are regarded as having greater force and authenticity, but the maxim 'actions speak louder than words' was doubtless not conceived with States or governments in mind: in any event, much is likely to depend upon the precise context in which the words in question have been uttered or the conduct performed.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

and semiotic – character.[25] Considerations such as these would seem to render any proposal for the simple amalgamation of the two processes an inherently unpromising project.

***

It is accordingly easy to understand why Lowe's tentative proposal for regulatory unification is instead targeted specifically at the rather different interface between obligations generated by treaty and those assumed purely unilaterally, of the kind already mentioned.[26] Here the gulf is admittedly significantly smaller, since each category entails commitments which are voluntarily assumed and both conceived and expressed in verbal form. Nevertheless, there would still seem to be a potentially important distinction between commitments which are framed, expressed and embraced on purely unilateral terms and those which, as in the case of treaties (whatever the exact nature of the process through which they were negotiated), depend for their very validity on the fact of their *plurilateral* assumption and ownership. In particular, it seems reasonable to suppose that a rather different legal regime might be required to govern the *formal creation, effectuation* and *interpretation* of the commitments in question,[27] not to mention their duration,

[25] For a wide variety of perspectives, see, e.g., C. K. Allen, *Law in the Making* (Oxford: Clarendon Press, 1964); J. Austin, *The Province of Jurisprudence Determined* (1832) (Cambridge: Cambridge University Press, 1965) (W. E. Rumble, ed.); H. Kelsen, *Pure Theory of Law* (Berkeley, CA/Los Angeles, CA: University of California Press, 2nd ed., 1970) (transl. by M. Knight); J. B. Murphy, 'Nature, Custom and Stipulation in Law and Jurisprudence', *The Review of Metaphysics*, 43 (1990), 751–790; H. P. Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000); Perreau-Saussine and Murphy (eds.), *supra* n. 22, and D. J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010).

[26] See, in particular, *supra* n. 17 and n. 18 (and accompanying text).

[27] With regard to the interpretation of unilateral commitments, for example, the significance to be attributed to *individual intentions* would seem potentially to be very different from (and, in particular, much more prominent than) that which applies to treaty-based undertakings: note in this context the observations of the ICJ in the following cases with regard to declarations accepting the jurisdiction of the Court under Art. 36(2) of its Statute: the *Anglo-Iranian Oil Co. Case*: United Kingdom v. Iran (Preliminary Objection) (1952) ICJ Rep. 93, at pp. 102–107 and especially at p. 105; *Fisheries Jurisdiction Case*: Spain v. Canada (Jurisdiction) (1998) ICJ Rep. 432, at p. 454 (paragraph 49) and *Whaling in the Antarctic:* Australia v. France; New Zealand intervening (2014) ICJ Rep. 226, at p. 244 (paragraph 36). These are admittedly unilateral declarations of a highly specialised kind, since they not only derive their very force and validity from a treaty-style source (i.e. the Statute itself) but also result in the creation of something resembling a network of additional, bilateral treaty commitments (i.e. to other states that have made similar declarations). Yet these features seem only to magnify one's sense of the distinctions which might potentially be required

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

modification and possible extinction. It is difficult to be sure, since there are so few instances of purely unilateral pronouncements having been formally recognised as producing decisive legal effects, and it is this very point which generates a second and independent source of scepticism regarding the seriousness of the challenge that such undertakings should be judged to pose to the established law of treaties: for it is currently far from clear that their practical significance is really such as to justify a radical overhaul of a regime which is so well-entrenched and supported.

Indeed, Lowe himself observes that the invitation that was offered to the International Court of Justice in the *Case Concerning the Frontier Dispute* of December 1986[28] to recognise and give effect to another alleged unilateral commitment was not merely declined but rejected in terms which 'distinguished almost out of existence' the statement of principle through which the Court had recognised the possibility of attributing legal significance to such undertakings in the first place.[29] It seems clear that the key authority relied upon for that purpose, the *Nuclear Tests* cases from the 1970s,[30] involved circumstances of a highly unusual kind, in the sense that France was evidently seeking a means to forestall the possibility of an unfavourable decision being reached – and a highly unwelcome court order being made against it – in international legal proceedings in which it had resolutely refused to participate from the outset; in addition, however, it will doubtless have been anxious to assuage the concerns of other States in the South Pacific region which had not actually initiated the litigation but were seeking to become involved.[31] As was pointed out by the Court in the later, 1986, case, the French government had very few practical means of achieving these goals 'without jeopardizing its contention that its conduct was lawful'.[32] If, moreover, it was truly on the point of completing its programme of atmospheric testing, it had rather little to lose by giving an undertaking not to conduct any more such operations in the future. The circumstances were accordingly such as to be unusually conducive to the inference that its intention was to undertake a binding legal commitment

between the respective regimes governing treaty-based norms and commitments of a purely unilateral and genuinely free-standing character.

28 *Case Concerning the Frontier Dispute*: Burkina Faso v. Mali (1986) ICJ Rep. 554.

29 Lowe, *supra* n. 11, at p. 14 (fn. 30) (referring to paragraphs 39–40 of the judgment).

30 *Supra* n. 17.

31 See the Orders of 12 July 1973 (New Zealand), 20 Aug. 1973 (Australia) and of 20 Dec. 1974 (both) concerning the application by Fiji to intervene in the two sets of proceedings.

32 *Case Concerning the Frontier Dispute, supra* n. 28, at p. 574 (paragraph 40).

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

through the medium of a purely unilateral pronouncement. Although it would probably be unwise to assume that an *exactly* similar array of factual features would have to be demonstrated before an international court or tribunal could once again be persuaded to construe such an undertaking as legally binding, it does seem unlikely that any such finding would ever become anything other than wholly exceptional. Consequently, while it would doubtless be prudent to maintain a watching brief with regard to the potential impact of unilateral undertakings upon the on-going viability of the international law of treaties, calls for a fundamental overhaul of the existing law on this ground alone seem at this stage to be unconvincing.

These considerations point strongly to the conclusion that the principal question marks that hover over the modern law of treaties must stem from the doubts, if any, that must be entertained with regard to its *internal* coherence in the light of the vast array of different kinds of instrument for which it has to cater. Yet, here again, there is scope for questioning the extent to which the legal regime is actually undermined by this undeniable diversity. It is true that there are certain provisions of the Vienna Convention that are designed to secure exceptional treatment for particular categories of instrument, but the firm impression to be drawn from a preliminary survey of these provisions is surely how *few* of them there are rather than how many.[33] Furthermore, they share the tendency to provoke a degree of doubt as to whether the Vienna Convention is genuinely strengthened by their inclusion or whether they might not better have been drafted in modified form (or even, perhaps, excluded altogether).

In particular, it is open to question whether these exceptions were, or should rightly have been, intended to serve a genuinely *categorical and definitive* purpose or whether they are not rather of an essentially *indicative* or *illustrative* character. To take the most obvious example, Article 60(5) VCLT provides that the rules set out in the first three paragraphs of that article to govern the termination or suspension of treaties on account of breach

> do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

[33] *Supra* n. 16.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-10052-7 — Conceptual and Contextual Perspectives on the Modern Law of Treaties
Edited by Michael J. Bowman , Dino Kritsiotis
Excerpt
More Information

Although it is commonplace to see this provision explained as one designed to provide a custom-fit and exclusive safeguard for the self-evidently unique category of human rights treaties,[34] it might be argued in response that neither the desirability nor the feasibility of applying the provision in that way is easily established. In the first place, there may be a considerable difficulty in determining where the precise boundary should be drawn between that particular category and cognate types of treaty designed for the protection of the human person, such as those more usually designated as international humanitarian law,[35] labour law or investment law.[36] There are, moreover, additional categories of treaty – environmental instruments come most readily to mind – which seek to protect an array of interests, including but not necessarily limited to those of humankind. Finally, there are still others, of which treaties for the protection of animal welfare represent an example, where the principal interests at stake are ostensibly not those of humans at all and yet very obviously not those of States either and where the exception provided by Article 60(5) VCLT might be judged to have at least a tenable claim for applicability.[37] Indeed, this provision seems in truth to encapsulate a rule that should arguably be applicable to *any* commitment that has been undertaken by States not in defence of their individual interests as key international actors with a material well-being of their own but rather as a form of 'trustee' for the fundamental moral needs and interests of some non-State entity or of the international community itself, conceived in its broadest sense. Since it is not drafted in terms which are *either* definitively exclusive or explicitly exemplary, it is presumably

[34] See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (1971) ICJ Rep. 16, at p. 47 (paragraph 96).

[35] Itself a term in contention: see the contribution to this volume of Hampson at pp. 538–577 (Chapter 17).

[36] For discussion of this issue, see the contribution to this volume of Chinkin at pp. 509–537 (Chapter 16).

[37] It should be acknowledged that some might seek to uphold a clear distinction of principle between human rights and these other areas of policy concern, on the grounds of there being a greater element of normative reciprocation in all the latter: that is to say, that while States cannot be expected to take on environmental or animal welfare commitments unless other States are prepared to do likewise (so as to avoid incurring a competitive disadvantage), human rights reflect absolute values and are therefore not 'tradable' in this way. Many others, however, would doubtless see all these matters as being fundamental moral imperatives and on that account reject the applicability of the competitive advantage argument in any of these cases.

© in this web service Cambridge University Press www.cambridge.org