Introduction

Experience is the name everyone gives to their mistakes.[1]

Like contracts in ordinary life, treaties have always been an indispensable tool of diplomacy. They date from even before the classical period of Greece, the Egyptian and Hittite kings having concluded a treaty in 1272 BC. After 1815, so many treaties were adopted that Canute-like words of caution were voiced. By 1914, there were already perhaps over 8,000 treaties in force. With the establishment of the League of Nations, the rate of treaty making increased dramatically.[2] Up to July 1944, the League registered another 4,822 treaties, to which should be added those concluded between non-members of the League. Since 1945, over 55,000 treaties have been registered with the United Nations, though this is perhaps only about 70 per cent of all treaties that have entered into force.[3]

So, anyone whose work or interest involves international law needs to know about the law of treaties. In writing this book my purpose has been to meet a long-felt need for a work on the law of treaties that deals with the subject in a comprehensive, up-to-date and practical way. Unlike other aspects of international law, the making and operation of treaties happens every day, and so understanding treaty practice enhances knowledge of the law of treaties. With very few exceptions, international law cannot be practised full-time except in a foreign ministry or an international organisation. Just as with domestic law, legal concepts and rules become truly meaningful only when one has drafted and worked with legal texts. A close involvement in the practice of treaties and the intricate procedures surrounding them leads to a fuller appreciation of their true nature and purpose, strengths and weaknesses.

And now, a sort of confession. The law of treaties is generally not about the substance of treaties (the rights and obligations they create), but about the law governing how treaties are made and operated. In the same way, in domestic law the law of contract deals with the nuts and bolts of contracts, not their substance. The substance is a matter for those who negotiate and conclude the treaty, and is known as 'treaty law'.

[1] Oscar Wilde, *Lady Windermere's Fan*, Act I.
[2] For a short history of treaties since *c.* 250 BC, and in particular the growth of them in the nineteenth century, see C. Tietje, 'The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture', *Ger YBIL*, 42 (1999): 26, 30–5 or, even better, see *AJIL* Supp. (1935): 666.
[3] For the possible reasons, see Chapter 19.

The title of this book could therefore be a bit misleading, but it sounded better to the publisher.

I was very fortunate to have been able to practise international law in a leading foreign ministry. My perspective is therefore that of a practitioner; and this book is very much a distillation of thirty-five years' experience. My aim is to inform the reader about all aspects of the law and practice by collecting the information in one convenient place. Although I have tried to avoid using too many British precedents, necessarily many practical examples are drawn from my personal knowledge and experience or that of my former colleagues. A reviewer of the first edition criticised the book for not always giving citations for an assertion. I try to avoid statements *ex cathedra*. Where I have not given a reference, it is because I am writing *ex experientia* – from experience. When (only once, I think) I assert what the 'better view' is, I am, of course, expressing only an opinion, though one shared by others.

Whenever possible I have used primary sources. I have also tried to present the material in a way that will help to answer questions such as: what *is* an MOU? Where can I find the text of a treaty? Can part of a state make a treaty? When are full powers needed? What is consensus? What does Article 18 really mean? How does 'dualism' work? Can a state withdraw an instrument of ratification? What is the status of treaties in the law of the United States? Can a treaty be 'unsigned'? What does a depositary do? How can Hong Kong enter into treaties? How do I to set about drafting a treaty?

But this is not just a book by a legal practitioner for legal practitioners. Although, hopefully, legal advisers in foreign ministries and international organisations will find it helpful, it has been written with a particular eye to the needs of officials generally. All of them have to deal with treaties. Some will have had legal training; many have not. There are few foreign ministries that have a legal department staffed by professionally qualified, full-time lawyers. Many will have diplomats with varying degrees of legal training, but who will during their career do other jobs with little legal content; and a lot of legal work has to be done by officials with no legal training at all. Inevitably, their work will include treaties.

Although the concepts of sovereignty and jurisdiction are basic to a proper understanding of international law, problems involving them do not arise constantly. But every day a treaty is being drafted, negotiated, concluded, signed, ratified, interpreted and – sometimes – breached. Many ordinary human activities are governed by treaties, although usually without those affected being aware of it. Some activities are possible only because they are authorised by treaties. A vast and complex network of multilateral and bilateral treaties regulates the operation of civil aircraft engaged in international transport.

Although this book does not presume to be an academic work, I hope it will also be useful to writers on, and teachers and students of, international law. Those who deal in specialised international subjects, such as economic law, environmental law, EU law and human rights law, should also find things to interest them. They, as well

as students of politics and international relations, need to have an understanding of the international legal framework within which their field of study operates, of which treaties are an essential part.

Existing works in English on the law of treaties are either out of date, cover only certain aspects of the subject or are largely theoretical. The scholarship and lucid style of McNair's *Law of Treaties*[4] can still be read for its brilliant insights, but relies heavily on precedents from the distant past, and from my country. McNair also published just five years before the draft of what was to become the Vienna Convention on the Law of Treaties 1969 (see Appendix A) emerged from the International Law Commission. O'Connell's *International Law*[5] suffered the disadvantage of being published just after the adoption of the Vienna Convention; and his chapters on treaties rely heavily on judicial decisions rather than the practice of states. Nevertheless, it is a masterly summary of the essentials of the law of treaties, and of problems that are still with us today. Blix's and Emerson's *The Treaty Maker's Handbook*[6] is limited to precedents of treaty forms and clauses, and is now rather dated. Sinclair's *The Vienna Convention on the Law of Treaties*[7] is an essential guide to the negotiation of the Convention, and explains with characteristic clarity the difficult issues that faced the negotiators and how they were dealt with, if not always satisfactorily resolved. But it is not, and does not purport to be, a comprehensive guide. Reuter's *Introduction to the Law of Treaties*[8] is good to read and thought-provoking, but idiosyncratic. The best concise modern guide to the law of treaties is in Jennings' and Watts' 9th edition of *Oppenheim's International Law*,[9] but, although the incomparable footnotes are a valuable source of material, many practical aspects are not covered. I have, however, benefited greatly from it and from *Sinclair*.

As far as possible, this book illustrates law and practice by reference to precedents drawn from about 1975 onwards. Older precedents are cited only if they are still clearly relevant or instructive.

Because of the central role played by the Convention, a good deal of the book is a commentary on it. I know only too well the frustration of trying to find out – especially under pressure – precisely what an article of the Convention means and how it has been applied. So I have included a table, 'Articles of the Convention Cited in the Text', at pages xxiv–xxvii above, which lists where each article is cited.

How to use this book

Unless the context indicates otherwise, references to 'the Convention', 'the Vienna Convention' or 'the 1969 Convention' are to the Vienna Convention on the Law of Treaties 1969; and, unless otherwise indicated, a reference simply to, for example,

[4] 2nd edn, Oxford: Clarendon Press, 1961.
[5] 2nd edn, London: Stevens, 1970.
[6] Dobbs Ferry, NY: Oceana Publications, 1973.
[7] 2nd edn, Manchester University Press, 1984.
[8] 2nd English edn, London: Kegan Paul, 1995.
[9] 9th edition, London: Longmans, 1992.

'Article 18' is to an article of the Convention. The term 'MOU' refers to a non-legally binding instrument, unilateral or multilateral.[10] There is a list of other abbreviations at page xlviii above.

The footnotes and references

The footnotes are for the most part not substantive, but are there to make it as easy as possible for the reader to check a statement or follow up a point by further reading. The footnotes have numerous cross-references, especially to other articles of the Convention. The Convention must be seen as a whole; its articles do not stand alone – there is much interconnection. Whenever possible, for the text of treaties I give references to *United Nations Treaty Series* (UNTS) (in particular the UNTS registration number, which is essential for accessing the text of a treaty easily online) or *International Legal Materials* (ILM). A Glossary of legal terms at page xlvi above, has been included to help those who are not lawyers, or at least not international lawyers.

Emphasis

When words in a quotation are emphasised, the emphasis is mine unless otherwise indicated.

Errors, omissions, comments and material

Inevitably, you will find the occasional error or omission, and no doubt disagree with some of my views. As before, your suggestions and comments, and new material, would be much appreciated, and can be e-mailed to me at home (aiaust@aol.com) or sent to me c/o Cambridge University Press, Publishing Division, Cambridge CB2 8RU, United Kingdom.

[10] For a fuller explanation of the term, see pp. 17–18 below, and Chapter 3.

1

Vienna Convention on the Law of Treaties 1969

The Convention clearly marked the beginning of a new era in the law of treaties.[1]

This book is necessarily devoted largely to the Vienna Convention on the Law of Treaties 1969 ('the Convention'), which contains the body of rules that determine whether an instrument (document) is a treaty, how it is made, brought into force, amended, terminated and operates generally. It is not so concerned with the *substance* of a treaty (the rights and obligations created by it), which is known as 'treaty law'. That is a matter for the negotiating states. For good reason, the Convention has been called 'the treaty on treaties'.[2] Although the Convention does not occupy the whole ground, it covers the most important areas, and is the starting point for any description of the modern law and practice of treaties. Thus, it merits its own chapter. This chapter's other purpose is to define the scope of this book by mentioning briefly those aspects of the law of treaties that the Convention does not deal with.[3] Similarly, the MOU (which is not mentioned explicitly in the Convention) is between two or more states and looks at first sight rather like a treaty, but is *not* a treaty because it is not governed by international law, or, for that matter, any law (see Chapter 3 below).

The UN General Assembly established the International Law Commission (ILC) in 1947 with the object of promoting the progressive development of international law and its codification.[4] The law of treaties was one of the topics selected by the ILC at its first session in 1949 as being suitable for codification. A series of eminent British international legal scholars (Brierly, Hersch Lauterpacht, Fitzmaurice and Waldock) were appointed as (successive) Special Rapporteurs. Their task (which took them some fifteen years) was to draw up a coherent account of the already well-developed customary international law on treaties. In 1966, the ILC adopted a final set of draft articles. The UN Conference on the Law of Treaties considered them in 1966, and in 1968 and 1969. It adopted the Vienna Convention on the Law of Treaties on

[1] *Reuter*, para. 32. Since it is not always easy to find to a treaty, this book gives a lot of numbers under which they were registered in the UNTS.
[2] See R. D. Kearney and R. E. Dalton, *AJIL* (1970): 495–56, for an account of the Conference.
[3] For example, this book does not deal with 'international agreements' between, for example, between a state and a company that is wholly or partly governed by the law of a state: see Art. 3 of the Convention.
[4] For more about the ILC, see *Aust Handbook*, esp. pp. 191–2.

22 May 1969, and the Convention entered into force on 27 January 1980. By the end of 2012, it had only 112 parties out of the 193 states[5] that are members of the United Nations today. Some of the reasons for this will be discussed below.

The full text of the Convention is at Appendix A. A comparative table that relates the Convention articles to the ILC's final draft articles and its commentary on them is in ILM (1969) 714. See also the reference material about the Convention.

Flexibility of the Convention

The Convention is the prime achievement of the ILC. The Convention is now over forty-five years old, but is likely to remain unchanged for many decades to come. It codified, and to some degree developed, the law on treaties as it has evolved through the practice of states. Like the UN Charter, the intelligence of the Convention's drafting has enabled states to continue or to modify their practice without distorting or departing from the rules of the Convention. This is important, since practice has not stood still since 1969. However, the Convention's rules provide a framework that is sufficiently flexible to accommodate such developments. In fact, many of the provisions expressly envisage states departing from the rules of the Convention. For example, Article 7(1) requires the representative of a state to produce full powers in order to adopt the text of a treaty, but then makes an exception that recognises that states often agree to dispense with full powers. This is just one, small, example; in many other places the Convention also acknowledges that states will want to depart from the Convention's rules.[6] The rules are thus largely residual, leaving treaty practice very much in the hands of states – as it should be. The Convention is by no means incapable of coping with the demands of the twenty-first century. For practitioners, for whom the Convention is their 'bible', the Convention does not need mending or, rather, amending. It has proved itself to be a most adaptable tool, well able to deal with the challenges to treaty making presented by the many important developments in international life since 1969. However, although the law of treaties is flexible, it is not always wise to depart from established practice unless it is really necessary.

Scope of the Convention

The Convention does not cover all matters to do with treaties. In particular, it applies only to treaties between states (Article 1).

[5] On states generally, see *Aust Handbook*, ch. 2.
[6] See also Arts 9(2), 10(a), 11, 12(1)(b), 13, 14(1)(b), 15, 16, 17(1), 20(1), (3) and (4)(b), 22, 24, 25, 28, 29, 33(1) and (2), 36(1), 37(1), 39, 40, 41, 44(1), 55–60, 70(1), 72(1), 76–8 and 79(1).

Treaties with or between other subjects of international law

States do not enter into treaties only with other states; they enter into treaties with other subjects of international law, in particular, international organisations; and international organisations enter into treaties with each other. The Convention does not apply to such treaties, which are the subject of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986,[7] which, in effect, applies to those treaties the provisions of the 1969 Convention suitably adapted. Where states that are parties to the 1969 Convention are parties to a treaty to which other subjects of international law, in particular international organisations, are also parties, *as between the states parties* to the treaty, it is the 1969 Convention that applies, not customary international law (Article 3(c)). However, as we will see later in this chapter, the distinction between the rules of the Convention and customary international law is now pretty academic.

International organisations

Since the treaty constituting an international organisation (i.e., its constitution) and a treaty adopted *within* the organisation are concluded by states, the 1969 Convention applies to such instruments, but this is without prejudice to any relevant rules of the organisation (Article 5). Those rules may, for example, govern the procedure by which treaties are adopted within the organisation, how they are to be amended and the making of reservations.[8]

Oral agreements

For reasons of clarity and simplicity, the definition of treaty in Article 2(1)(a) includes only an international agreement that is 'in written form',[9] thus excluding oral agreements.[10] But this does not affect their legal force, or the application to them of any of the rules in the Convention to which they would be subject under international law independently of the Convention, such as customary international law (Article 3(a)). Even today, oral agreements between states are not unknown, though they are extremely rare. The dispute between Denmark and Finland about the construction by Denmark of a bridge across the Store Bælt (Great Belt) was settled in 1992 in a telephone conversation between the Danish and Finnish prime ministers, in which Finland agreed to discontinue its case against Denmark before the International

[7] ILM (1986) 543. [8] See rules for reservations to ILO Conventions.
[9] See Chapter 2 on the definition of treaty.
[10] See Qin Xiaocheng, 'Oral Agreements and Chinese Relevant Practice', *Chinese Journal of International Law*, 4(2) (2005): 415–79.

Court of Justice in return for a payment by Denmark. There is no joint record of the agreement,[11] although US law requires an oral agreement to be reduced to writing by the US Government.

No retrospective effect

The Convention applies only to those treaties that are concluded by states after the date the Convention enters into force for them (Article 4).[12] There is no problem in applying this rule to bilateral treaties. In the case of a multilateral treaty, the Convention will apply to those states that participated in the conclusion of the treaty after the Convention entered into force for them, but not for other states.[13] The Convention entered into force on 27 January 1980. The Law of the Sea Convention 1982 (UNCLOS)[14] was concluded on 10 December 1982. Thus, for those states that were parties to the (Vienna) Convention on that date, its rules will apply as between them with regard to UNCLOS. Article 4 of the (Vienna) Convention provides, however, that the rule against retrospection is without prejudice to the application of any rules of that Convention to which treaties would be subject under international law independently of the Convention. Thus, those rules of the (Vienna) Convention that reflect customary international law apply (but as customary law – see below) to treaties concluded before the entry into force of the (Vienna) Convention, or concluded afterwards but before that Convention entered into force for parties to those treaties.[15] (See the Convention and customary international law.)

State succession, state responsibility and the outbreak of hostilities

For the avoidance of doubt, Article 73 confirms that the Convention does not prejudge any question that may arise concerning a treaty from a succession of states,[16] from the international responsibility of a state[17] or from the outbreak of hostilities between states. Since the Convention does not deal with these matters, they are largely governed by customary international law, and are discussed in later chapters of this book.

[11] But, see ILM (1993) 103; and the *Finnish YBIL*, (1992): 610–13. See also *Eastern Greenland* (*Denmark* v. *Norway*) (1933), *PCIJ Reports*, Series A/B, No. 53, p. 71; 6 AD 95; and R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, Oxford University Press, 1963, p. 254.

[12] For an account of the negotiation of Art. 4, see *Sinclair*, p. 230. See also P. McDade, 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969', *ICLQ* (1986): 499–511; E. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty', *BYIL*, (1988): 75–111.

[13] See *Sinclair*, pp. 8–9.

[14] The acronym by which this important UN Convention is commonly known, even though it may be more accurate pedantically to apply it only to the lengthy negotiations for the Convention.

[15] On the application by the ICJ of Art. 31 of the 1969 Convention to a treaty of 1890, see the note by M. Shaw in *ICLQ*, (2000): 967–8. As to the *Gabčíkovo* case and the Convention, see p. 11 below.

[16] See Chapter 21.

[17] See *Gabčíkovo*, *ICJ Reports* (1997), p. 3, para. 47; ILM (1998) 162; 116 ILR 1.

Bilateral and multilateral treaties

The term 'bilateral' describes a treaty between two states, and 'multilateral' one between three or more states. There are, however, *bilateral* treaties where two or more states form one party, and another state or states the other party. Generally, the Convention does not distinguish between bilateral and multilateral treaties, and Article 60(1) is the only provision limited to bilateral treaties. Articles 40, 41, 58 and 60 refer expressly to multilateral treaties, and the provisions on reservations and on depositaries are relevant only to multilateral treaties.

The Convention and customary international law

The various provisions mentioned above, and the preamble to the Convention, confirm that insofar as questions are not regulated by the Convention, the rules of customary international law continue to apply.[18] Treaties and custom are the main sources of international law. Customary law is made up of two elements: (1) evidence of a substantial uniformity of practice by a substantial number of states; and (2) *opinio juris* – a general recognition by states that the practice is settled enough to amount to a binding obligation in international law.[19] Some multilateral treaties largely codify customary law. But if a new rule of international law created by a treaty is followed in the practice of *non*-parties, it can lead to the evolution of a customary rule which will be applicable as between such non-parties, and between them and the parties.[20] This can happen even before the treaty has entered into force.[21] Although many provisions of the Law of the Sea Convention 1982 (UNCLOS) went beyond mere codification of customary rules, the negotiations proceeded on the basis of consensus, even though the final text was put to the vote. It was therefore that much easier during the twelve years before UNCLOS entered into force in 1994 for most of its provisions to become accepted as representing customary law.[22] This was important since, even by the end of 2012, UNCLOS still had only 162 parties, which did not include Iran or the United States.

[18] See generally, A. Watts, 'The International Court and the Continuing Customary International Law of Treaties', in N. Ando, E. McWhinney and R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, The Hague: Kluwer Law, 2002, pp. 251–66.

[19] For more details, see *Aust Handbook*, pp. 6–8; M. Shaw, *International Law*, 6th edn, Cambridge University Press, 2008, pp. 72–93; R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd edn, Manchester University Press, 1999, pp. 7–12.

[20] See the *North Sea Continental Shelf cases*, *ICJ Reports* (1969), p. 3, paras 70–85; 41 ILR 29.

[21] See H. Thirlway, 'The Law and Procedure of the International Court of Justice', *BYIL*, (1990): 87.

[22] See T. Treves, 'Codification du droit international et pratique des États dans le droit de la mer', *Hague Recueil*, IV, 223 (1990): 25–60; H. Caminos and M. R. Molitor, 'Progressive Development of International Law and the Package Deal', *AJIL*, (1985): 871–90.

An accumulation of bilateral treaties on the same subject, such as investment, may in certain circumstances be evidence of a customary rule.[23]

To what extent does the Convention express rules of customary international law?

A detailed consideration of this question[24] is beyond the scope of this book, but it is not of great concern to lawyers in their day-to-day work.[25] When law of treaties questions arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the Convention, the rules set forth in the Convention are invariably relied upon, even when the states are not parties to it. This author can recall at least three bilateral treaty negotiations when he had to respond to arguments of the other side that relied heavily on specific articles of the Convention, even though the other side had not ratified it. When this happens, the justification for invoking the Convention is rarely made clear.

Whether a particular rule in the Convention represents customary international law is likely to be an issue only if the matter is litigated, and even then the court or tribunal will take the Convention as its starting – and normally also its finishing – point. This is certainly the approach taken by the International Court of Justice, as well as other courts and tribunals, international and national.[26] In *Kasikili/Sedudu Island* (*Botswana* v. *Namibia*),[27] in 1999 the International Court of Justice interpreted and applied an 1890 treaty between Germany and the United Kingdom in accordance with Articles 31 and 32 of the Convention, even though the Convention clearly does not apply retrospectively.[28]

Earlier, in its 1971 judgment in *Namibia (South West Africa) (Legal Consequences for States of the Continued Presence of South Africa)*,[29] the International Court of Justice held that the rules of the Convention concerning termination of a treaty for breach 'may in many respects be considered as codification of existing customary law', and applied Article 60 (termination of a treaty for breach). In 1973, the Court held that Article 52 recognised that treaties concluded by the threat or use of force were void, and that Article 62 (fundamental change of circumstances) reflected, or

[23] See Thirlway, 'The Law and Procedure of the International Court of Justice', p. 86.
[24] See *Sinclair*, pp. 10–24; and *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo* v. *Rwanda*) (Judgment), 3 February 2005, para. 125. *Racke* (1998), 117 ILR 399, esp. paras 19–20 and 25–8.
[25] See p. 155 below, about the time limit for notifying objections to reservations.
[26] Numerous examples, particularly concerning Arts 31 and 32 (interpretation) are to be found in *International Law Reports*: see, e.g., the lengthy entries for the Convention in the ILR Consolidated Table of Cases and Treaties in various volumes.
[27] *ICJ Reports* (1999), p. 1045, para. 18; ILM (2000) 310, 320; 119 ILR 467.
[28] See the note on the case by M. Shaw, *ICLQ*, (2000): 967–8.
[29] *ICJ Reports* (1971), p. 3, para. 94; 49 ILR 2.