



VALERIO DE OLIVEIRA MAZZUOLI

THE LAW OF TREATIES

A COMPREHENSIVE STUDY OF THE **1969**
VIENNA CONVENTION AND BEYOND

Foreword

PAULO PINTO DE ALBUQUERQUE

Judge of the European Court of Human Rights



THE LAW OF TREATIES



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*So bene che è merito d'un libro il dar la
volontà di sapere più di quello che insegna.*

(MANZONI, Alessandro. *Opere varie*, vol. I,
Milano, 1845, p. 487).

Foreword

(to the First Brazilian Edition)

Dr. Valerio de Oliveira Mazzuoli has published a new title that is added to his long and impressive list of works on Public International Law. This new work is a thematic monograph on the Law of Treaties. The author in the context of this work elaborates on the general theory of treaties following the pattern established by the Vienna Convention on the Law of Treaties of 1969. As a result thereof, the work deals with the procedure of formation, conclusion, formulation of reservations and amendments of international treaties, as well as the entry into force and termination of international acts. Moreover, in a separate part of the work, the author also addresses specific issues related to treaties as set forth in the 1986 Vienna Convention *itself*. The work concludes with the analysis of the procedure for the conclusion of international treaties, and the solutions of the conflicts which may arise between treaties and domestic law under the 1988 Brazilian Constitution. In addition to a refined compilation of bibliographic references, this work contains the most relevant conventional instruments regarding the law of treaties, a table showing the current *status* of the 1969 Vienna Convention amongst the States having ratified it, as well as the *Guide* of the International Law Commission of the United Nations (2011) to Practice on Reservations to Treaties.

Undoubtedly, this is a fundamental work for the Portuguese-speaking world in the field of public international law academic writing. It stands alongside the most valuable contributions made by French, Italian, Anglo-Saxon and German legal scholars. The reasons for this are threefold: firstly, this work does not sidestep discussions of the most sensitive and intractable dogmatic issues of Public International Law relating to international treaties. The author analyses these problems both from a static and a dynamic perspective, asserting his personal positions based upon solid arguments. Secondly, this work constitutes an updated commentary on the entire Vienna Convention on the Law of Treaties. It should also be noted that this is the first Brazilian work of this sort whereby the Convention is analysed in its entirety, after its ratification by the Brazilian government in 2009. *Last but not least*, thirdly, it should be stated that this work

stands out as a result of the ideology that reflects the dogmatic options chosen by the author. Following other works already published and, especially, his brilliant doctoral thesis, the author adopts a clearly favourable stance on international law, conceiving the law of nations as a “dialogue of sources”, which basically reflects the value of a true “dialogue of differences”. The final line of argument regarding the jurisdictional control of conventionality and supra-legality of municipal law puts the finishing touch on a robust dogmatic thinking, which in an immaculate Cartesian logic concludes that “unconventional constitutional norms” exist.

At a time where mankind faces up to significant political, economic and social challenges, international law academic writings become of utmost importance for conventional boundaries of States’ action to be pondered over, defined and determined. Treaties at large and, in particular, international treaties on human rights constitute the most progressive source of current Public International Law. On the one hand, the scope of international treaties has been enlarged to encompass any subject matter domain, as evidenced, for instance, by the treaties adopted by Council of Europe, which amount to more than two hundred instruments. On the other hand, treaties have been construed and applied by a wide variety of international tribunals and similar bodies of a quasi-judicial nature as though they were a “living body of law” (*corps vivant*) in the words of the European Court of Human Rights. Given that treaties constitute bodies endowed with a life of their own, and independent of the will of the States, they can be subject to a continuously updated and teleological interpretation, which in turn circumscribes the discretion of Signatory States to determine and rule upon their provisions, while at the same time they can be adapted to the new circumstances of the political and social life of the peoples.

This commendable work of Dr. Valerio de Oliveira Mazzuoli reflects the immense scientific wealth inherent in all international treaties, fully warranting the dogmatic approach adopted by the author in analysing this subject matter in a stand-alone work.

Strasbourg, September 2011.

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appointed by the Council of Europe

Information to the Readership

This English edition faithfully reflects the 2nd edition of this book published in Portuguese in May 2014 by the century-old publishing house, *Editora Forense*.

I prepared this edition with great enthusiasm, with a view to addressing every single aspect of the Law of Treaties as it stands today. Furthermore, my purpose was to write this book in the most didactic fashion, subjecting it to any in-depth and scientifically rigorous analyses that may have been necessary. Overall, I focused on examining the very *essence* of each issue under analysis, always linking theory to practice. Furthermore, I organized the entirety of theory of treaties (especially with regard to the formation, continuance in force and termination of international acts) mirroring the 1969 Vienna Convention on the Law of Treaties.¹ Special consideration was given (which pervades throughout the text) to the *Brazilian* practice relating to the conclusion of treaties; moreover, an entire part of the book deals with the procedural steps that must be complied with according to the Brazilian constitution in order to conclude treaties and the ensuing conflicts that may arise between treaties and domestic law.

After several years of working on this book, I feel that I was able to carry out an original study on the theory and practice of treaties, which is also capable of providing practical answers to recurring issues, especially in the current historical context.

The interpretation carried out, with respect to the articles of the Vienna Convention, reflects my own convictions as it could not have been otherwise. Thus, on all topics dealt with throughout this book I expressed my personal understanding, which will be noticed *at first sight* by any attentive

¹ Throughout the book, reference is made to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 (particularly, with respect to *common* issues with the 1969 Vienna Convention). Furthermore, an entire part of the book (Part IV) deals with the 1986 Vienna Convention, without addressing the *theory* of treaties, since in this work such an analysis is carried out only in connection with the 1969 Convention (the study of which is practically used in its entirety to understand the 1986 Conventions, after some minor adjustments). As mentioned Part IV only deals with specific *issues* regarding the 1986 Vienna Convention.

reader. The generous bibliography consulted, which was gathered in various parts of the world and in the most diverse occasions, made me realize that scholarly writings, in general, address some topics from *a widely accepted* perspective, while other topics give rise to a great disparity of opinions and views that goes well beyond reasonable bounds... Nevertheless, in this book, I follow my own line of thought, which sometimes falls in with the majority of legal writers, although very often it carves out its own path, which diverges from what the majority of legal scholars may have elaborated on a particular matter.² In short, I have always believed that an author should be accountable for his/her own work, and in this context it should be no different.

Throughout the tables in this book, distinct fonts were inserted in order to either show *peculiarities* about the topic under consideration, or draw attention to a particular *quote* from an author, that is deemed to be important in a given context, or sometimes *set examples* of specific issues that are being dealt with in that part of the book. Furthermore, I added in the first three *Annexes*, which are placed at the end of the book, the official versions of the three conventions governing the study carried out in this work. In the fourth *Annex* I included the current table (officially published by the United Nations) of the 1969 Vienna Convention on the Law of Treaties, where the number of States that has ratified it can be verified, together with the interpretative statements or reservations that have been made, as well as the objections to the reservations raised by several States. The fifth and last *Annex* contains the *Guide* of the International Law Commission of the United Nations (2011) to Practice on Reservations to Treaties.

Lastly, it should be noted that this book is particularly useful not only for law students and practitioners, but also International Relations scholars, diplomats, consular officers, stakeholders involved in commercial activities, political scientists, sociologists, researchers in related fields, etc.

To conclude, I should thank the *GEN Group* for its on-going commitment in the publication of this work, and in particular, Oriene Pavan, Giselle Tapai and Henderson Fiirst, who contributed to the publication of this work without delay. Furthermore, a special thanks goes to Diego Luis Alonso for translating this work into English. Without their contribution, this edition would certainly not have been possible.

São Paulo, January 2016.

THE AUTHOR

² Let us take, by way of example, the subject matter dealt with in Chapter 2, Part III on “Defects in Consent in International Acts”.

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Abbreviations and Acronyms Used

Add.	–	Addendum
ADECON	–	Ação Declaratória de Constitucionalidade [Declaratory Action of Constitutionality]
ADIn	–	Ação Direta de Inconstitucionalidade [Direct Action of Unconstitutionality]
ADPF	–	Arguição de Descumprimento de Preceito Fundamental [Allegation of Disobedience of a Fundamental Precept]
ALADI	–	Latin American Integration Association
Art.	–	article
Arts.	–	articles
BIICL	–	British Institute of International and Comparative Law
Cf.	–	Confront/compare
Ch.	–	Chapter
cit.	–	cited earlier
coord.	–	coordinator(s)
DAI	–	Divisão de Atos Internacionais do Ministério das Relações Exteriores [International Acts Division of the Ministry of Foreign Affairs]
Doc.	–	Document
ed.	–	editing/editor
Ed.	–	Editora [Publishing House]
eds.	–	editors
e.g.	–	<i>exempli gratia</i> (for example)
<i>et all.</i>	–	and others
etc.	–	<i>et cetera</i>
fasc.	–	fascicle
GATT	–	General Agreement on Tariffs and Trade
HC	–	<i>Habeas Corpus</i>
ibidem	–	same page(s)
ICC	–	International Criminal Court
ICJ	–	International Court of Justice
ICJ Reports	–	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
idem	–	same book/work
i.e.	–	<i>id est</i> (that is)

- ILC – International Law Commission
- ILO – International Labour Organization
- IMF – International Monetary Fund
- j. – judged in
- LINDB – Lei de Introdução às Normas do Direito Brasileiro [Law of Introduction to Brazilian Law Rules]
- Mercosur – Common Market of the South
- MOUs – Memorandum of Understandings
- MRE – Ministério das Relações Exteriores [Ministry of Foreign Affairs]
- NATO – North Atlantic Treaty Organization
- OAS – Organization of American States
- op. cit.* – *opus citatum* (in the work cited)
- org. – organizer
- orgs. – organizers
- p. – page/pages
- RE – Recurso Extraordinário [Extraordinary Appeal]
- Res. – Resolution
- RTJ – Revista Trimestral de Jurisprudência [Quarterly Review of Jurisprudence]
- SCJ – Superior Court of Justice (of Brazil)
- SFC – Supreme Federal Court (of Brazil)
- t. – tome
- UN – United Nations
- UNESCO – United Nations Educational, Scientific and Cultural Organization
- vol. – volume
- vols. – volumes
- WHO – World Health Organization
- WTO – World Trade Organization

Introduction

Since the establishment of Public International Law as an autonomous discipline, *treaties* have become the most important subject matter. No public international law scholar has ever denied that this is the source *par excellence* of the law of nations, there being nowadays no other set of norms deemed to be more important than a treaty.³ It is not difficult to realize that there exists a true *primacy of treaties* when the usage of a treaty is compared to that of any other international acts in writing, such as an *agreement* or a *Memorandum of Understanding* between foreign Powers. Said otherwise, all States (and international organizations also) agree that the legal instrument called *treaty* continues to be the *general rule* at an international level, where they aim at setting a specific norm or a body of norms, which effectively regulates their relationship. The astonishing growth of the *United Nations Treaty Series* clearly reflects this fact, demonstrating – beyond all doubt – the significant role played by treaties nowadays.⁴

Unlike municipal law, which has multiple mechanisms to set out legal norms, the means used by International Law to establish rights and obligations amongst States or international organizations are relatively simple. If compared to municipal law, international law is “much more

³ See Remiro Brotons, Antonio. *Derecho internacional público*, vol. 2 (*Derecho de los tratados*). Madrid: Tecnos, 1987, p. 28; Dupuy, Pierre-Marie. *Droit international public*, 7. ed. Paris: Dalloz, 2004, p. 257; De La Guardia, Ernesto. *Derecho de los tratados internacionales*. Buenos Aires: Ábaco, 1997, p. 33; and Crawford, James. *Brownlie's principles of public international law*, 8. ed. Oxford: Oxford University Press, 2012, p. 30.

⁴ In this respect, see Cançado Trindade, Antônio Augusto, Reavaliação das fontes do direito internacional público ao início da década de oitenta, *Revista de Informação Legislativa*, ano 18, n.º 69, Brasília: Senado Federal, jan./mar. 1981, p. 103-113; and Fleischhauer, Carl-August, The United Nations treaty series, in Dinstei, Yoram (ed.), *International law at a time of perplexity: essays in honour of Shabtai Rosenne*. Dordrecht: Martinus Nijhoff, 1989, p. 131-148. For further information on the increasing development of treaties, see Remiro Brotons, Antonio, *Derecho internacional público*, vol. 2, cit., p. 28; and Dinstei, Yoram. The interaction between customary international law and treaties, *Recueil des Cours*, vol. 322 (2006), p. 261.

restricted in regard with the norm-setting mechanisms”,⁵ but it is not less true that the latter is *more secure than the former*. Furthermore, international norm setting through the conclusion of treaties is also *a more practical mechanism*. Whilst under municipal law there are specific provisions (set out in National Constitutions) to regulate certain specific matters, under the law of nations, subject-matters of the most varied kinds (provided that their objects are *licit*) are regulated by means of the same legal instrument, that is, a *treaty*. Hence, Joseph Nisot’s teaching to the effect that treaties are “la source la plus certaine du droit international”.⁶ It is true that the above statement could seem nowadays rather obvious, except for the fact that Brazil waited for more than 40 years in order to ratify the Vienna Convention on the Law of Treaties, since its signing (that took place at the United Nations Conference on the Law of Treaties, in the Austrian Capital) on 23 May 1969.⁷

Primacy of the legal instrument – *treaty* – still remains over *customs*, which governed the law of nations throughout human history until the beginning of the twentieth century.⁸ This assertion is confirmed by the conclusion of the 1969 Vienna Convention itself, which recognized in its *Preamble*, “the fundamental role of treaties in the history of international relations” (*first recital*), “the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems” (*second recital*) and, particularly – with respect to the *primacy* of treaties over customs –, “that the rules of customary international law will continue to govern questions *not regulated* by the provisions of the present Convention” (*eighth recital*).⁹ The common denominator among such

⁵ Shaw, Malcolm N. *Direito internacional*. Transl. by Marcelo Brandão Cipolla (*et all.*). São Paulo: Martins Fontes, 2010, p. 670.

⁶ Nisot, Joseph. A propos du projet de la Commission du Droit International des Nations Unies relative au droit des traités, *Revue Générale de Droit International Public*, n.º 2, Paris (1967), p. 312.

⁷ See Annex IV.

⁸ See Guggenheim, Paul. Contribution à l’histoire des sources du droit des gens, *Recueil des Cours*, vol. 94 (1958-II), p. 36-53.

⁹ The eighth recital was a result of the proposed amendment submitted by Switzerland regarding the *draft articles* of the 1969 Conference Drafting Committee, with the support of Brazil. The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, both concluded prior to the 1969 Vienna Convention on the Law of Treaties, contain an identical recital in their respective Preambles: “... the rules of customary international law continue to govern matters not expressly regu-

recitals is the underlying truth, i.e. the legal instrument – *treaty* overrides customary law as far as *certainty* is concerned. So much so, the matters until then governed exclusively by customary rules are at present (almost all of them) regulated by treaties. Therefore, treaties have been used in order to regulate a great variety of matters, ranging from the exploration of outer space, the establishment of rules governing intellectual property, the protection of living marine resources, the regulation of investments or the effective carrying out of an extradition process.

The conclusion of the Vienna Convention on the Law of Treaties constituted the most significant step in the codification process of contemporary international law, particularly, taking into account the relevance of the subject dealt with, concerning (since the entry into force of the Convention, on 27 January 1980) any and every treaty.¹⁰ Moreover, at a time when governance of the international society is almost exclusively ruled by the conclusion of treaties, the continuance in force of the 1969 Convention represents a safe harbour for the international players regarding the great variety of issues that nowadays are being discussed in the international arena. In the case of Brazil, the ratification of the Convention that took place on 25 September 2009 marks the definitive entry of this country (albeit late) into this *new era* that the international society is going through, and national academic writings shall support these new developments.

Nevertheless, like any other human work, the 1969 Vienna Convention is not exhaustive. In fact, some issues were not dealt with in the Convention, e.g., the effects of treaties in the event of succession of States and under the state of war; furthermore, issues related to treaties concluded between States and international organizations or between international organizations themselves were not addressed either. The Convention, however, did address other matters, but not in a satisfactory manner, such as, especially, the institution of reservations to treaties. In this particular case, some provisions of the Convention had to be left aside many times – although, in a very careful way – in order to acquire a better understanding of the issue concerned, which should be read together with the guidelines laid out in the Guide of the ILC (2011) (see Part II, Cap. 2, below).

lated by the provisions of the present Convention”. For a comprehensive commentary on the Preamble of the Convention, see Villiger, Mark E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden: Martinus Nijhoff, 2009, p. 43-52.

¹⁰ See Nascimento e Silva, Geraldo Eulálio do. *Conferência de Viena sobre o Direito dos Tratados*. Brasília: MRE, 1971, p. 5.

It should be noticed that here the analysis of the Law of Treaties – or the *theory of treaties*, as it is also known – is carried out in strictly *formal* terms. Its understanding does not relate, *a priori*, to the object or purpose of any particular agreement, that is, the *content* of a certain norm. The present research deals with any and every treaty, covering the *whole* of the international acts (either bilateral or multilateral ones) concluded by and between States and/or international organizations. Certainly, from time to time, reference will be made to a specific *type* of treaty, such as, a peace treaty, a friendship treaty, an arbitration treaty, a cooperation treaty, an extradition treaty, a navigation treaty, and so forth. Throughout this work, special consideration will occasionally be given to treaties dealing with the protection of human rights, including conventions for the protection of civil and political rights, and economic, social and cultural rights, as well as those conventions dealing with labour and environmental rights.¹¹ However, this book has not been contrived to make the reader believe that those instruments shall be analysed *in particular* or in their *material* aspects. Such an analysis would go far beyond the scope of the Law of Treaties.¹²

The present study basically examines (a) how States or intergovernmental organizations negotiate, (b) which are the organs responsible for these negotiations, (c) how a conventional text is adopted, (d) what the form to ensure the authenticity of the text is, (e) how contracting parties express their consent to be bound by an agreement, (f) how a treaty (and its provisional application) enters into force (g) how a treaty is incorpo-

¹¹ This book, however, carries out neither an in-depth study of the *incorporation* and the *hierarchy* of human rights treaties into the Brazilian legal system, nor the techniques for resolving disputes arising between such treaties and domestic law, since such a study was already conducted by: Mazzuoli, Valerio de Oliveira, *O controle jurisdicional da convencionalidade das leis*, 2. ed. (reviewed, updated and extended), São Paulo: Revista dos Tribunais, 2011; and by Mazzuoli, Valerio de Oliveira, *Tratados internacionais de direitos humanos e direito interno*, São Paulo: Saraiva, 2010. The first work discusses the hierarchical prevalence of human rights treaties (as far as constitutional law is concerned) in the Brazilian legal system, as well as the means to control the conventionality (be it the diffuse manner, be it the concentrated one) of municipal laws; the second work, in turn, proposes a (new) method of solving the contradiction between international human rights law and municipal law, based upon what Erik Jayme called (in his Hague Academy Course in 1995) “dialogue of sources”.

¹² See Mello, Celso D. de Albuquerque. *Curso de direito internacional público*, vol. I, 15. ed. (reviewed and extended). Rio de Janeiro: Renovar, 2004, p. 212. In his view: “Treaties can only be defined through their formal aspect, since any and all matters can be regulated by means of international conventional norms”.

rated into the national legal order, (h) what the defects capable of nullifying the consent to be bound by a treaty or the treaty itself are, (i) what the effects of an agreement on the contracting parties or third parties are, and (j) how international acts are terminated.

In addition to these strictly *international* aspects of the theory of treaties, there also exist other aspects related to the *internal* legal systems, to which due consideration will be given, as could not be otherwise, from a *Brazilian* legal system perspective. The latter subject examined throughout Part V of the this book, which begins (Ch. 1) by dealing with the Brazilian constitutional procedural steps for the conclusion of treaties, and ends by addressing the resolution (Ch. 2) of conflicts that may arise between a treaty and a municipal norm, at which point the issue of jurisdictional control of conventionality of domestic laws will also be addressed.

Part I

General Theory of Treaties