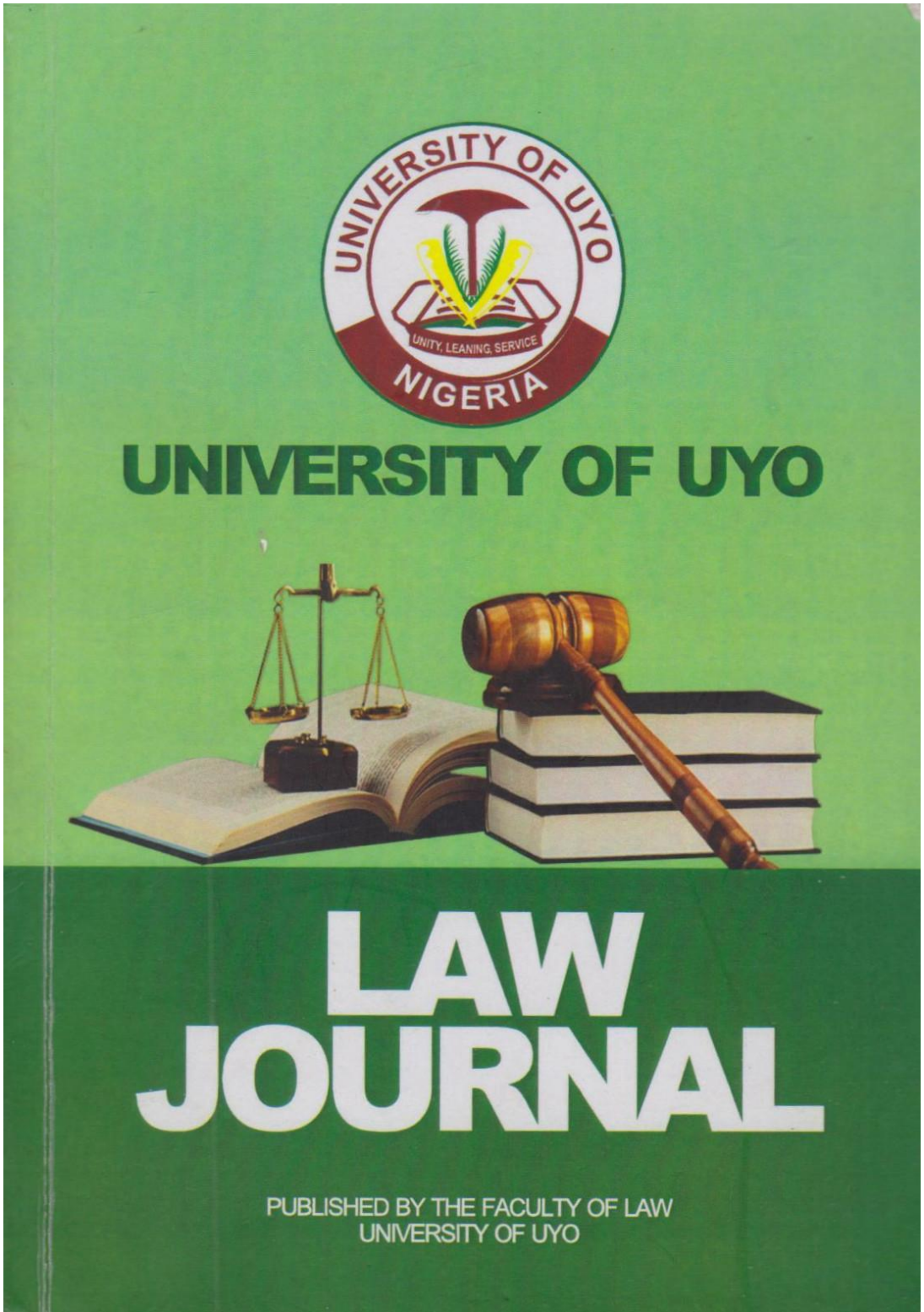

ISSN: 1119-3573

Printed by: DUEWAYS LTD
07038821504

Published by the
Faculty of Law
University of Uyo, Nigeria

INTERNATIONAL INSTITUTIONS AND THEIR TREATY MAKING POWERS: A QUAGMIRE

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Abstract
This Paper examines the treaty making powers of international institutions as embodied in the enabling law, the 1969 Vienna Convention on the Law of Treaties, which spells out how treaties are made, amended, interpreted, operated and terminated. It argues that although international institutions are capable of influencing actions of States to comply with the provisions of Treaties, there are other times when they have minimal influence on State behaviour. It is therefore not in doubt that international institutions continue to exist in very difficult and contentious environments. The Paper however concludes that the adoption of the Convention has strengthened the position of international institutions as regards their treaty-making powers.

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Introduction

International institutions have become an increasingly common phenomenon of international life.[532] The proliferation of International Organisations (IOs), the growth in treaty arrangements among states, and the deepening of regional integration efforts in Europe and in other parts of the world all represent formal expressions of the extent to which international politics has become more institutionalised over time.[533]

Since World War II, both the number and the variety of international institutions operating in the international community have increased.[534] International institutions range from large universal entities with broad political functions, such as the United Nations, to small regional organisations with relatively narrow activities, such as the African Union. Although international institutions differ widely in terms of their membership, functions, powers, and geographical reach, they have a number of common features and face similar problems in terms of their institutional design.[535]

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[532] B Simmons and L Martin, 'International Organizations and Institutions' in W. Calsnaes, T. Kisss, B. Simmons (eds.), *Handbook of International Relations* (2001) 192.

[533] D MacKenzie, *A World beyond Borders: An Introduction to the History of International Organizations*, (University of Toronto Press 2010).

[534] A Duxbury, 'International Organizations' (2018) *Oxford Bibliographies* Available at <http://www.oxfordbibliographies. com/view/document/obo-9780199796953/obo-9780199796953-0011.xml> accessed 15 March 2019.

[535] *Ibid.*

A major difference between 19th and 21st century international law is the prominent position now occupied by international institutions. The size and scope of these institutions vary. They may be bilateral, sub-regional, regional, or global, and may address relatively narrow or very broad concerns. The powers and duties allocated to international institutions also differ widely.

While some international institutions are legally recognised as international actors who may be liable for breaches of international legal obligations, others are not.[536]

1. Understanding International Institutions

Although International Institutions are a central focus of international relations scholarship and policy making efforts around the world, there is no widely accepted definition of what they are. Risse emphasises that there are as many definitions of international institutions as there are theoretical perspectives.[537] However, it is not the intent of this Paper to dwell on the numerous definitions but rather to briefly consider a few broad definitions and eventually adopt a working definition of the term.

The underlying term, 'international institution', has been used over the course of the last few decades to refer to a broad range of phenomena. In the early postwar years, these words almost always referred to formal international organisations (IOs), usually to organs or branches of the United Nations (UN) system.

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[536] 'International Organizations', *Encyclopaedia Britannica* Available at <https://www.britannica.com/topic/international-law/International-organizations> accessed 15 March 2019.

[537] T Risse, 'Transnational Actors and World Politics' in W. Calsnaes, T. Risse, B. Simmons (eds.), *Handbook of International Relations*, (London u.a.: Sage 2002), 605.

The postwar research was largely descriptive and focused almost exclusively on formal international legal agreements, such as the Charter of the United Nations, Security Council resolutions and treaties relating to trade and alliances.[538]

International institutions have been broadly defined as 'behavioural regularities associated with a set of rules, norms and routines' which can either have a formal or informal character. On account of this broad definition, international institutions appear in several different forms, such as international organisations as well as international treaties with divergent conceptual designs, missions and tasks.[539] Simmons and Martin argue that although a range of usages exists, most scholars have come to regard 'international institutions' as sets of rules meant to govern international behaviour.[540]

Mearsheimer provides a useful definition of institutions as 'sets of rules that stipulate the ways in which states should cooperate and compete with each other.'[541] This definition has several advantages. First, it eliminates those parts that lent so much confusion to regimes analysis, and gives room for the analysis of both formal and informal sets of rules, although the difficulty of operationalising informal rules is unavoidable. A second advantage of this definition is that it separates the definition of an institution from behavioural outcomes that ought to be explained.[542]

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[538] *Simmons and Martin* (n 1).

[539] L Ng, 'What is the Main Role of International Institutions? Political, Financial and Humanitarian [540]Perspectives' (Munich, GRIN Verlag 2015).

[541] *Ibid.*

[542] J Mearsheimer, 'The False Promise of International Institutions' (1994/95) 19 (3) *International Security*, 5.

The International Law Commission (ILC) defines international institution as an 'organisation established by a Treaty of other instrument governed by international law and possessing its own international legal personality.'[543] There are also other well-accepted definitions as propounded by Keohane who defines institutions as 'persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations', which makes it impossible to test for the impact of institutions on activities and expectations.[544] Similarly, Rittberger argues that an arrangement should only be considered a regime if the actors are persistently guided by its norms and rules.[545]

Other scholars have employed a wide range of largely non-overlapping conceptions, contributing to a fragmentation of the literature and hindering theoretical cumulation.[546] Duffield asserts that over the years, international institutions of various types - treaties, organisations, regimes, conventions etcetera - have grown greatly in numbers and importance. Indeed, international institutions have frequently been at the centre of leading theoretical debates in the field.[547]

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[543] *Peace Palace Library Newsletter* Available at <https://www.peacepalacelibrary.nl/research-guides/international-organisations-and-relations/international-organizations/> accessed 14 March, 2019.

[544] R Keohane, 'Neoliberal Institutionalism: A Perspective on World Politics in R. Keohane (ed.), *International Institutions and State Power: Essays in International Relations Theory* (Boulder, Westview 2007), 3.

[545] V Rittberger and Z. Michael Zürn, 'Towards Regulated Anarchy in East-West Relations: Causes and Consequences of East-West Regimes' in V. Rittberger (ed.), *International Regimes in East-West Politics* (Pinter Publishers, London; New York 2004).

[546] J Duffield, 'What are International Institutions?' (2007) 9 (1), *International Studies Review*, 1.

[547] *Ibid.*

From the foregoing, it can be deduced that international institutions form an integral part of our daily lives. They are guided by sets of rules to govern relations among members. International institutions are therefore formal bodies created by States and for States to address diverse issues. Whether they are working to build houses for the impoverished people of the world like UN-Habitat does, or working to ensure a standard of health for everyone like the World Health Organization (WHO) does, there is no running away from international institutions. According to Abidin, it is increasingly difficult in today's world to imagine an international system in which the only voices that matter are those of states.[548]

International institutions are made up of International Governmental Organisations (IGOs) which feature supranational powers and International Non-Governmental Organisations (INGOs). An IGO is an organisation with a membership of only States, or governments.[549] Typically, IGOs are important actors in the critical episodes of international politics, with power in mediation, dispute resolution, peace keeping, applying sanctions and others. They also help in managing various key areas of international concern, from global health policy to the monetary policies around the world.[550]

International institutions are usually founded upon a Treaty, or a multilateral Agreement, and consist of more than two States. Member States determine the way in which the organisation is run and vote within the organisation, as well as provide its

[548] S Abidin, 'International Organisations', 2016 *E-International Relations* Available at <https://www.e-ir.info/2016/ 12/30/international-organisations> accessed 16 March 2019.

[549] *Ibid.*

[550] K Abbott and D Snidal, 'Why States Act through Formal International Organizations, (1998) 42 (1) *The Journal of Conflict Resolution*, 3-32.

Funding.[551] A typical example is the United Nations (UN),[552] established in 1945 after the end of the Second World War. The UN presently has an almost universal membership of 193 member states.[553] Other examples of IGOs are The North Atlantic Treaty Organisation (NATO),[554] the World Trade Organisation (WTO), International Criminal Police Organisation (INTERPOL), amongst others. There are also organisations of States in specific regions, such as the European Union (EU), Organisation of American States (OAS),[555] Association of Southeast Asian Nations (ASEAN), the African Union (AU),[556]

[551] International governmental organisations are typically more specific in nature, often dealing with just one particular issue or a specific geographical area. Quite often, the scope of their work is clear from their names, for example the International Criminal Police Organization (INTERPOL). They are issue-based organisations and their members are worldwide. These often emulate elements of the European Union although none features supranational powers. The Commonwealth of Nations for instance, is an organisation whose membership is restricted to former colonies of the United Kingdom. Having been around since 1949, the Commonwealth also has its own permanent Secretariat - See S Abidin, 'International Organisations', 2016 *E-International Relations*, available at https://www.e-ir.info/2016/12/30/international-organisations/, accessed 16 March 2019.

[552] Only states can be members of the United Nations and membership is valued because it confers upon the member state international recognition of its sovereignty. The UN's main mission as an international institution can be summarised by the establishment of permanent cooperation between the representatives of its member states in order to deal with global problems, the development of world peace, the global establishment of democracy and human rights, the ensuring of a stable world economy and the control of all global problems and difficulties in order to integrate the world's issues and interests into the institution. The UN remains the most democratic organ where each member state gets one vote, no matter how big or small, rich or poor - See M. Bertrand, *The Future of International Organizations* available at http://maurice-bertrand.fr/?p=308, accessed 16 March 2019.

[553] *United Nations* website Available at <http://www.un.org/en/sections/about-un/overview/index.html> accessed 16 March 2019.

[554] NATO was created in 1949 by the United States, Canada, and several Western European nations to provide collective security against the Soviet Union. It was the first peacetime military alliance the United States entered into outside of the Western Hemisphere. Great Britain, France, Belgium, the Netherlands and Luxembourg signed the Brussels Treaty in March, 1948. Their Treaty provided collective defense: if any one of these nations was attacked, the others were bound to help defend it - 'North Atlantic Treaty Organisation, 1949', *Office of the Historian* Available at <https://history.state.gov/milestones/1945-1952/nato> accessed 26 March 2019.

[555] The OAS Charter was signed on April 30, 1948.

[556] The African Charter on Human and Peoples' Rights (ACHPR), which forms the normative framework of the African human rights system, was adopted in Nairobi on 27 June, 1981 by the 18th Assembly of Heads of State and Government of the Organisation of African Unity (OAU) and came into force on 21 October 1986.

the Arab League and the Economic Community of West African States (ECOWAS).

International Non-Governmental Organisations are more informal business-like associations that are not operated at the interstate level, but rather are focused on a particular field of interest (human rights, medical care, press freedom, etcetera). INGOS run themselves, set their own priorities, and pursue their own objectives. Examples are International Committee of the Red Cross (ICRC), Amnesty International, Doctors without Borders, Reporters without Borders, Greenpeace, Friends of the Earth, Oxfam International, Save the Children, etcetera.

2. Overview of the Development of International Institutions

In this Paper, an overview of the development of international institution would begin from the traditional development of such institutions in medieval society up until the modern realities. The historical development of international institutions can be traced much earlier than the nineteenth century setting, before the establishment of the League of Nations[557] which preceded the formation of the United Nations in 1945. With the advent of the great universal religions, far more broadly-based systems of world order became possible. One outstanding example was the Islamic empire of the seventh century AD and afterwards.

[557]The League of Nations was an international organisation, headquartered in Geneva, Switzerland, created after
the First World War to provide a forum for resolving international disputes. It was first proposed by President Woodrow Wilson of the United States of America as part of his Fourteen Points plan for an equitable peace in
Europe. - See *The League of Nations, 1920. Office of the Historian* Available at <Https://history.state.gov/milestones/1914-1920/league> accessed 18 March 2019.

Significantly, the body of law on relations between States within the Muslim world (the Dar al-Islam, or 'House of Islam') was much richer than that regarding relations with the outside world (the Dar al-Harb, or 'House of war'). But even with non-Muslim States and nationals, a number of pragmatic devices evolved to permit relations to occur in predictable ways - such as 'temporary' truces (in lieu of treaties) or safe-conducts issued to individuals.[558]

In Biblical times, there were divers forms of alliances between nations. In the Bible, there are accounts of such alliances between Israel and other nations. For instance, Isaiah 19:21 states that, 'In that day Israel will join a three-party alliance with Egypt and Assyria - a blessing upon the earth'. There are also biblical accounts of King Solomon making alliances with foreign nations, particularly Egypt, marrying hundreds of domestic and foreign princesses[560] to cement these ties.[559] Abraham formed an alliance with some of the Canaanitish princes and also with Abimelech.[561] Joshua and the elders of Israel entered into an alliance with the Gibeonites.[562] Solomon on his part formed a league with Hiram.[563] In the subsequent history of the kingdoms of Judah and Israel, various alliances were formed between them and also with neighbouring nations at different times.[564]

[558]M Kadduri, *War and Peace in the Law of Islam* (Johns Hopkins University Press 1955).
[559]I kings 11:1-3.
[560]Genesis 14:13.
[561]Genesis 21:22-32.
[562]Joshua 9:3-27.
[563]1Kings 5:12
[564]'Alliance', *Easton's Bible Dictionary* Available at <https://www.biblestudytools.com/dictionary/alliance/> accessed 17 March 2019.

In pre-colonial African societies, despite the unwritten nature of law in Africa, evidence abound depicting formal relations at the highest governmental levels between the different peoples of West Africa in the pre-colonial period. Smith asserts that there is some evidence of the existence of an inter-states system and that international relations in pre-colonial West Africa were conducted in accordance with customary law, which exhibited broadly similar characteristics over a wide area. Trade and politics, linking the coast, the forest and the savannah, led to the development of diplomacy in the more centrally-organised states.[565] Regrettably, the indigenous system of international relations was affected by two major external influences; Islam and the influence of Western Europe. Although such alliances or institutions are now extinct, they existed nevertheless and made contributions to the present formalised forms of institutions in existence.

In 19th century era, the major purposes that motivated the building of international institutions were the urge to promote coordinated response in an era of growing economic, social and technical interdependence; the recognition of the necessity for moderate conflicts and the political and militating spheres. Also, innovations associated with the rise of industralisation, introduction of new transport and communication systems also stimulated the creation of special purposes agencies designed to facilitate the collaboration of governments in dealing with economic, social and technical problems.[566]

[565]R Smith, 'Peace and Palaver: International Relations in Pre-Colonial West Africa' (1973) xiv (4), *Journal of African History*, 599.
[566]*Duffield* (n 15).

The creation of an international forum for multilateral negotiations came about with the Inter-Parliamentary Union (IPU) in 1889, which is still active today and has membership of 157 national parliaments.[567] The IPU preceded the League of Nations That was created in 1919 after the end of World War 1. The League metamorphosed into the United Nations (UN) after failing to prevent international conflicts between States. Crockett stresses that the legacy of the IPU, the League of Nations, and other early international alliances was not the institutions' effectiveness as an actor, but rather as a forum, for nations to voice their opinions, share ideas, promote dialogue and provide an opportunity to settle disputes peacefully. Thus emerged the United Nations, which to this day remains the largest of all international organisations and the only institution with universal membership.[568]

3. A Brief Historical Development of Treaty Making

The term treaty is used generically to describe a variety of instruments, including Conventions, Agreements, Arrangements, Protocols, Covenants, Charters, and Acts. Treaties are one of the oldest forms of international law and show the relation and agreements that States have. Examples of treaties with great historic importance are the Peace of Westphalia that established Sovereign European States (1648) or the Treaty of Versailles that ended the cold war and led to the establishment of the League of Nations in 1919.[569]

[567]S. Crockett, 'The Role of International Organizations in World Politics' 2012, *EIR* Available at <https://www.e-ir.info/2012/02/06/the-eu-in-foreign-policy-a-military-or-civilian-power/> accessed 14 March 2019.
[568]*Ibid.*
[569]N AlFalasi, *Treaties in International Relations and International Law* Available at <http://www.nassakb.com/treaties-in-international-relations-and-international-law/> accessed 04 April 2019.

Before the Vienna Convention on the Law of Treaties (1969), many treaties were non-binding on members. Alliances were forged between nations without the obligation to be bound by a document, but with the development and the expansion of international law and international presence, especially in the last century, treaties have taken a larger role in international relations. Klabbers emphasises that Constitutions of the earlier international institutions did not contain specific provisions or clauses with respect to treaty-making, with the League of Nations Covenant constituting a prime example.[570]

A treaty is a binding formal agreement, contract, or other written instrument that establishes obligations between two or more subjects of international law (primarily Sovereign States and international organisations). It must be emphasised that an agreement between two or more States will not be a treaty unless those countries intend the document to be binding at international law. The intention to be bound is a key element in treaty making.[571] Since treaties are instruments in written form only, mere word or gesture is not accepted. In essence, a treaty is a voluntary decision to place limitation over a State's sovereignty.[572]

[570] J Klabbers, An Introduction to International Institutional Law' (Cambridge University Press, Cambridge 2002) Available at <https://www.cambridge.org/core/books/an-introduction-to-international-institutional-law/treatymaking-by-international-organizations/2C5F8C86E75A13081BDF0361A89E2BD1> accessed 18 March 2019.

[571] 'Public International Law: Treaties', *The University of Melbourne* Available at <http://unimelb.libguides.com/internationallaw/treaties> accessed 04 April 2019.

[572] *AlFalasi* (n 38).

4.1 The Vienna Conventions in the Making of Treaties

International institutions derive their treaty making power from the 1969 Vienna Convention on the Law of Treaties (VCLT). The VCLT is the main instrument that regulates treaties.[573] The Vienna Convention was established on the 22nd of May 1969 and came into force on 27th January 1980. The VCLT defines a treaty and relates to how treaties are made, amended, interpreted, how they operate and are terminated[574]. It is made up of 85 Articles that relate to the definition, establishment, reservation, application, interpretation, suspension and breach of treaties. After the Vienna Convention, there have been more than 500 international treaties since 1980 to 2014, most of which are either bilateral or multilateral agreements amongst states.[575]

Article 2(1)(a)) of the Vienna Convention defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'[576] An analysis of this definition reveals that the VCLT relates only to treaties concluded between States who are parties to the VCLT, and also to treaties that entered into force after the VCLT came into force in 1980.[577]

[573] The rules concerning treaties between States are contained in the Vienna Convention on the Law of Treaties (1969), and those between states and international organisations appear in the Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations (1986) - M Shaw, 'Treaty International Relations', *Encyclopaedia Britannica*, available at https://www.britannica.com/topic/treaty, accessed 04 April 2019.

[574] 'Law of Treaties 1: What is a Treaty?', *Public International Law, An Introduction to Public International Law for Students* Available at <https://ruwanthikagunaratne.wordpress.com/2013/05/26/law-of-treaties-vienna-convention-on-law-of-treaties-1969/> accessed 04 April 2019

[575] *AlFalasi* (n 38).

[576] 'Public International Law: Treaties', *The University of Melbourne* Available at <http://unimelb.libguides.com/internationallaw/treaties> accessed 04 April 2019.

[577] Article 4 of the VCLT.

Treaties can also be concluded between other subjects of international law, such as between international organisations.[578] Although the VCLT relates only to written treaties, whether it is embodied in a single instrument or more than one instrument, it is noteworthy to state that relevant customary law provisions of the VCLT continue to apply to all treaties, regardless of whether it is codified or not.[579] Repeated State practice establishes customary norms that become international law. While these norms are not written, they play a very important role and form the basis of what becomes written law. For instance, in the Kasikili/Sedudu Island Case, the ICJ held that Article 31 of the VCLT on treaty interpretations reflected customary international law which was applicable despite the fact that both Botswana and Namibia were not parties to the VCLT and the treaty in question entered into force in 1890.[580]

It must be noted that only States that are parties to a treaty are bound by the terms of the treaty. Article 34 of the VCLT clearly provides that a 'treaty (between States) does not create either obligations or rights for a third State without its consent.' This general rule is applicable *mutatis mutandis* to the case of an international institution who is a third party to a treaty between States, since it exists as part of customary international law and as such is applicable to international institution. Such a treaty would be governed by the 1986 Vienna Convention on the Law of Treaties between States and International institutions or between International institutions.[581]

The 1986 Vienna Convention extends the definition of treaties to include international agreements involving international organisations as parties.[582] The rules concerning treaties between States and international organisations or between international organisations themselves appear in the Vienna Convention on the Law of Treaties between States and International Organizations or Between International

[578] *AlFalasi* (n 38).

[579] 'Law of Treaties 1: What is a Treaty?', *Public International Law. An Introduction to Public International Law for Students* Available at <https://ruwanthikagunaratne.wordpress.com/2013/05/26/law-of-treaties-vienna-convention-on-law-of-treaties-1969/> accessed 04 April 2019

[580] *AlFalasi* (n 38).

[581] D Sarooshi, 'Some Preliminary Remarks on the Conferral by States of Powers on International Organizations', (2003) 4 (03) *Jean Monnet Working Paper*, 5.

[582] Organisation for the Study of Treaty Law website Available at <https://www.euclidtreaty.org/what-is-a-treaty/> accessed 07 May 2019

Organizations (1986).[583] The scope of the 1986 Convention is limited to treaties between one or more States and one or more international organisations, and treaties between international organisations. This Convention under its Article 2, defines various key terms - such as ratification, acceptance, approval, accession, reservation, etcetera. The term, 'ratification' means 'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty; while the words, 'acceptance', 'approval' and 'accession' mean in each case 'the international act so named whereby a State or an international organisation establishes on the international plane its consent to be bound by a treaty'. The Convention also defines the word 'reservation' as 'a unilateral statement ... formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.' Additionally, the Convention makes a distinction between a 'contracting State' and 'contracting organization' as follows: (i) a State, or (ii) an international organization, which has consented to be bound by the treaty, whether or not the treaty has entered into force.'

4.2 Types and Forms of Treaties

There are basically two types of Treaties namely, bilateral (between two States) and multilateral (between three or more States) treaty-making.[584]

[583] M Shaw, 'Treaty International Relations', *Encyclopaedia Britannica* Available at <https://www.britannica.com/topic/treaty> accessed 04 April 2019.

[584] E Keene, 'The Treaty Making Revolution of the Nineteenth Century' (2012) 34 (3) *The International History Review*, 475.

In a bilateral treaty, the parties can be two States, or two international institutions, or one State and one international institution. An example of such a treaty is the Extradition Treaty between the Federal Republic of Nigeria and the Government of the Republic of South Africa. This treaty was signed on 28th March 2002 and entered into force on 6th January 2015.[585]

Multilateral treaties are treaties between three or more countries where each party owes the same obligations to all other parties, except to the extent that they have stated reservations. Multilateral treaties address a range of international issues including human rights, terrorism and climate change.[586] Examples are the United Nations Charter and more recently, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, which commits its parties by setting internationally binding emission reduction targets. Multilateral treaties are generally developed under the auspices of international (inter-governmental) organisations such as the United Nations or the International Labour Organisation (ILO).[587]
Although treaties do not need to follow any special form, authors like Slomanson posit that treaties can either be self-executing or non-self-executing. Most bilateral treaties are self-executing and most multilateral treaties are non-self-executing.[588]

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[585] Centre for Laws of Treaties, LawNigeria Available at <http://lawnigeria.com/Treaties/Treaties-Bilateral.php> accessed 07 April 2019.

[586] *Ibid.*

[587] 'Treaty Making Process', *Australian Government Department of Foreign Affairs and Trade* website Available at <https://dfat.gov.au/international-relations/treaties/treaty making-process/pages/treaty-making-process.aspx> accessed 06 April 2019.

[588] W Slomanson, *Fundamental Perspectives on International Law* (St Paul: West Pub., 1990) 356.

Slomanson argues that self-executing treaties are treaties that are immediately binding upon ratification and are immediately incorporated into domestic law when the State consents to the treaty terms at negotiations.[589] Non-self-executing treaties, on the other hand, become binding only through the implementation of legislation, that is, the state government must additionally pass domestic implementing legislation after negotiations have ended. For example, the Iraqi Constitution states that Iraq can only enter into non-self-executing treaties. A treaty must be approved by a two-thirds majority of Iraq's Council of Representatives before it becomes domestic governing law.[590] Ultimately, whether a State chooses to adopt a self-executing theory of treaty implementation or not is its choice. This flexibility in treaty implementation makes an unusual scenario possible. A State could sign a treaty but not ratify it, meaning that the State does not actually consider the treaty to be domestic law. Indeed, Iraq has done so on several occasions, including signing but not ratifying the 1994 Programme of Action of the International Conference on Population and Development.[591]

4.3 Essential Elements of Treaties

The key distinguishing feature of a treaty is that it is binding. For example, whereas the United Nations Charter (1945) created a binding agreement and is thus a Treaty, the Charter of Paris (1990), which established the Organization for Security and Co-operation in Europe is not a binding document as such and therefore not officially a treaty.

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[589] *Ibid.*

[590] Iraqi Constitution, Article 61, Clause 4

[591] *Public International Law: Treaties and International Organizations*, Introduction to the Laws of Kurdistan, Iraq Working Paper Series (Stanford Law School 2016) 14.

Treaties are expected to be executed in good faith, in keeping with the *pacta sunt servanda*,[592] which is arguably the oldest principle of international law. Without this principle, which is explicitly mentioned in many agreements, treaties would be neither binding nor enforceable.[593]

Also, treaties generally follow a fixed plan. The preamble provides the names and styles of the contracting parties and is a statement of the treaty's general objectives. It is usually followed by the articles containing the agreed-upon stipulations. If the treaty is concluded for a definite period, a statement of the period follows; or, if it is in perpetuity, there may be a provision inserted that either party may 'denounce' or give notice to terminate the treaty. Any reservations[594], which alter the treaty's provisions for the concerned state, may then appear; they are followed by an article that provides for the treaty's ratification and for the time and place for the exchange of ratifications. The treaty usually ends with a clause stating that 'in witness whereof the respective plenipotentiaries have affixed their names and seals,' below which are the signatures and indications of the location and the date. 'Additional articles' often are appended and signed by the plenipotentiaries, with the declaration that they have the same force and value as if they had been included in the body of the treaty or convention.[595]

[592]Latin maxim meaning 'agreements must be kept.'

[593]M Shaw, 'Treaty International Relations', *Encyclopaedia Britannica* Available at <https://www.britannica.com/topic/treaty> accessed 04 April 2019.

[594]In the practice of States, it is well established that a State has a capacity, when becoming a party to a treaty, to accept most of the provisions of a treaty or to object, for whatever reasons, to particular provisions of a treaty. This capacity is reiterated by Section 19 of the VCLT 1969 which states that 'a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation' unless the reservation is either prohibited by the treaty or incompatible with its object and purpose, or the treaty permits only specified reservations.

[595]*Ibid.*

All treaties pertaining to international law define when or in which situations they apply. Some treaties apply only in international armed conflicts, while others apply in non-international conflicts. In other words, there is need to qualify the situation in order to decide whether or not the treaty applies in the relevant situation. A treaty must therefore contain a clear definition of what exactly it is that should be prohibited.[596] It is common for Treaties to be classified according to their object, as follows: (1) political treaties, including peace treaties, alliances, territorial cessions, and disarmament treaties; (2) commercial treaties, including tariff, consular, fishery, and navigation agreements; (3) constitutional and administrative treaties, such as the conventions establishing and regulating international unions, organisations, and specialised agencies; (4) treaties relating to criminal justice, such as the treaties defining international crimes and providing for extradition; (5) treaties relating to civil justice, such as the conventions for the protection of human rights, for trademarks and copyright, and for the execution of the judgments of foreign courts; and (6) treaties codifying international law, such as the procedures for the peaceful settlement of international disputes, rules for the conduct of war, and definitions of the rights and duties of States.[597]

Issues bordering on termination or suspension are often spelt out in treaties. For instance, treaties may be terminated or suspended through a provision in the treaty or by the consent of the parties. Termination of a treaty means the end of the operation of a treaty, resulting in depriving all the parties of all the rights, and in releasing them from performing further obligations, under the treaty.[598]

[596]G Nystuen, *Elements of a Treaty on Cluster Munitions*, available at http://www.clusterconvention.org/files/2012/12/ ClusterNystuen.pdf accessed 06 April 2019.

[597]*Ibid.*

[598]E Cannizzaro. *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011)

Most modern treaties contain provisions for their termination or for the withdrawal of a party. A treaty may provide that it shall come to an end automatically after a certain time, or at the occurrence of a particular event. For example, where there is a material breach in a bilateral treaty, the innocent party may invoke that breach as a ground for terminating the treaty or suspending its operation. On the other hand, multilateral treaties may be terminated or suspended by the unanimous agreement of all their parties. A party specially affected by a breach of a multilateral treaty may suspend the agreement as it applies to relations between itself and the defaulting state. In cases where a breach by one party significantly affects all other parties to the treaty, the other parties may suspend the entire agreement or a part of it.[599] Invalidity of a treaty on the other hand, means nullity of a treaty or its particular provisions because of the existence or absence of certain circumstances or conditions affecting its legal status. The VCLT 1969 specifies certain grounds for invalidating treaties, namely: Manifest violation of a provision of fundamental importance of State's internal law regarding competence to conclude treaties; A violation is manifest 'if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.'[600]

[599] *Nystuen* (n 65).

[600] W Abdulrahim, *The Law of Treaties* Available at <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/11-the-law-of-treaties>, accessed 11 May 2019

5. Overview of Treaty-Making Process

Arguably, the need for treaties has increased as the world's interdependence has intensified. Continuing technological innovation, economic globalisation and the growth of transnationalism have resulted in an enormous increase in the frequency and rapidity of global interaction, thereby necessitating the coming together of nations through treaty making. Where a problem cannot be adequately addressed by a country acting alone, acting cooperatively at the international level becomes essential for a country to protect its own interests.[601]

Before embarking on treaty making, each of the following points must appropriately be taken into account: The need that the new instrument is to meet; The existing legal regime, including the extent of its applicability to the perceived problem; Any relevant legislative efforts in other fore; The likelihood of success in developing an instrument, that is, is it foreseeable that the required measure of agreement can be reached on the solution aimed for?; The optimal form for the proposed instrument: treaty, solemn declaration, model law or rule, etcetera; The likelihood that the proposed instrument will be accepted by a sufficient number of significant States; An anticipated time-schedule for the project; The expected costs of formulating and adopting the proposed instrument, both to the IGO or INGO concerned and to the States participating in the process.[602]

[601] *Treaty Making Process*, Australian Government. Department of Foreign Affairs and Trade Available at <https://dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx>, accessed 11 May 2019.

[602] 'Steps in the Treaty-Making Process', *United Nations University website*. Available at <http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee09.htm>, accessed 11 May 2019.

Seemingly, treaty making is almost always a multistage process. The treaty-making process involves three stages namely; negotiation, acceptance and Ratification. The process of negotiation permeates all the procedures relating to the formulation of treaties. In some instances, this process starts even before presentation of the initial draft for consideration. Negotiations may begin before a formal decision to initiate the treaty-making process is taken by the organisation concerned; that decision, therefore, becomes merely an episode in those negotiations.[603] Various representatives of the States, such as the Heads of State, Heads of Government, Minister of Foreign Affairs and Trade, Heads of diplomatic missions, etcetera, have an authority at international law as recognised by Article 7 of the Vienna Convention on the Law of Treaties 1969 to negotiate and adopt or authenticate the text of a treaty. However, for States that adopt the dualist approach, such conduct, and the resulting treaty, does not have effect in the domain of domestic law until incorporated into it by Parliament or the National Assembly of that State. [604] Acceptance of a treaty is expressed through the appendage of a State's signature to the treaty. Signature to any treaty signifies a State's agreement in principle with the terms of the treaty and an intent to become bound by it. It must be noted that upon signing a treaty, a State must refrain from actions that would defeat the object and purpose to the treaty, but is not officially bound by the treaty until ratification.[605]

[603] 'Review of the Multilateral Treaty-Making Process', *United Nations Legislative Series* (New York 1985) pp.23-24.

[604] *What is the Current Treaty Making Process? The Three Stages*, New Zealand Law Commission, Available at <http://www.nzlii.org/nz/other/nzlc/report/R45/R45-2.html, accessed 11 May 2019.

[605] L Barnett, 'Canada's Approach to the Treaty-Making Process', (2008) *Legal and Legislative Affairs Division*, 11-24.

States become bound by the terms of a treaty once such treaty is ratified. However, any discussion on treaty ratification is incomplete without a discussion on implementation. The two processes are *in pari materia* (must be construed together). Treaty implementation is easy with countries like the United States of America which operate according to a monist model. Once Congress ratifies a treaty, it is, in principle, enforceable in US law. For countries like Canada and Nigeria who operate a dualist model, a treaty that has been signed and ratified by the executive arm of government still requires incorporation through domestic law to be enforceable at the national level. Turning international law into domestic law is not a self-executing process in Nigeria because of the limitation placed by Section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Similarly, Canada cannot ratify an international treaty until measures are in place to ensure that the terms of the treaty are enforceable in Canadian law.[606]

6. Effectiveness of the Powers of International Institutions

Although international institutions are saddled with multiple challenges, Magliveras submits that on the whole, they have been efficient institutions showing great signs of effectiveness. International institutions have exhibited a strong ability to carry out their missions successfully: on the whole, they have been more effective than ineffective.

[606] *Ibid.*

Magliveras further argues that 'if international institutions had not been effective, if they had not met their goals, if they had not fulfilled most of the Member States' aspirations, if they had failed to concoct new attitudes, if they had not found solutions to problems, and so on, the majority of international institutions would have become extinct or fallen into disuse.[607]

To put the foregoing argument into perspective, it is important to mention that there were some international institutions established in the aftermath of the Congress of Vienna in 1815 between the victorious powers of the Napoleonic wars. Of particular importance are those international institutions which aimed at institutionalising the cooperation of riparian states along European and African international rivers. The fact that almost two centuries later (and having survived two World Wars as well as other important conflicts) some of these institutions are still alive and well is attributable to the fact that the international institutions in question have shown a considerable level of efficiency in addressing challenges, solving problems and keeping abreast of developments.[608]

[607]K Magliveras, 'Are International Organizations Effective? Some Criteria for Determining Their Efficiency', p. 4 Available at <https://www.academia.edu/3824106/ARE_INTERNATIONAL_ORGANIZATIONS_EFFECTIVE_SOME_CRITERIA_FOR_DETERMINING_THEIR_EFFICIENCY>, accessed 07 April 2019.

[608]*Ibid.*

According to Magliveras, in ascertaining the effectiveness of international institutions, certain factors should be taken into considerations. First, the ever-increasing number of States willing to join international institutions as against the infinitesimal number of those withdrawing. The second consideration flows from the observation that states keep on establishing new international institutions. The third consideration derives from the tendency among States in all parts of the world to abandon bilateral or small group diplomacy and manage their relations through the organs of international institutions. The fourth consideration projects the recent trend where successful 'soft international institutions' have been transformed (or are in the process of being transformed) into 'hard international institutions'[609] in order to maintain their dynamic character, expand their activities and promote an even closer cooperation between their Members.[610]

International institutions have also been effective at mediating conflicts among their members States. In fact, Slobodchikoff posits that not only are regional organisations increasing their success at conflict mediation, they are also evolving into conflict management institutions.

[609]The case in point is the Association of Southeast Asian Nations (ASEAN), which emerged from the five nation Bangkok Declaration in August 1967. Pursuant to the Charter that was concluded 40 years later, ASEAN becomes the centrality as regards the political, economic, social and cultural relations among Members States (now grown to ten). In the new 'hard' ASEAN the chosen legal framework was that of a Community with three separate pillars each operating under a corresponding Council: the Political-Security Community Council, the Economic Political Council and the Socio-Cultural Political Council. Thus, the clear aim was to transform a 'loose' partnership of States from a given geographical region into a 'hard' international institution with a far greater degree of integration and to be endowed with regulatory powers and functions - R Burchill, 'Regional Integration and the Promotion and Protection of Democracy in Asia: Lessons From ASEAN' (2007) 13 *Asian Yearbook of International Law*, 135.

[610]*Magliveras* (n 76) 13.

For instance, the European Union has generally been heralded for creating a peaceful Europe and managing conflicts particularly in the post war years. It also helped to lessen the tension between France and Germany through economic interdependence and succeeded in bolstering the idea that further integration was necessary to achieve peace and stability in Europe.[611] This section of the discourse concludes that although the powers of the international institutions are not absolute, it is deceitful to imagine that international institutions have not played or are not capable of playing active roles in the affairs of State parties. Many nations have been brought to their knees literally because of the biting effects of imposed sanctions by the international community. Sanctions against South Africa years before the end of apartheid regime, and recently, those imposed on North Korea and Iran are clear examples.

7. Limitations on Treaty Making Powers

Generally, there are factors militating against the absolute powers and effective functioning of International Institutions. One of such is the non-binding nature of some treaties. States are at liberty to agree or not to agree to be bound by the laws of a given Treaty. For example, in 2012, Iran threatened to close the Straits of Hormuz,[612] thus affecting petroleum prices globally in a negative way.[613]

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[611] M Slobodchikoff, 'How Effective are International Organizations at Resolving Territorial Disputes Among Members States: A Look at the European Union', (2012) 1 (2), *Studies of Changing Societies: Comparative and Interdisciplinary Focus*, 31

[612] The Straits of Hormuz is a strait that is located by the coast of Oman and Iran. The straits checkpoint has more petroleum going through it than all five petroleum checkpoints in the world combined.

[613] *AlFalasi* (n 38).

Although Iran had signed the United Nations Convention on the Law of the Sea (UNCLOS) treaty, it had never ratified it. In effect, it means that the laws of the treaty do not apply to Iran as the government did not bind it officially.[614]

Other examples include the 2014 Russian intervention over Ukraine's sovereignty in the Crimean Peninsula and the United States' accusation of Syria in the violation of the Chemical Weapons Convention. In both situations, the alleged violators claimed that they did not break any treaty.

The Chemical Weapons Convention is a non-binding treaty, meaning that if broken, the treaty is not a justification for the use of force or military intervention. Russia's recent intervention in Ukraine broke various treaties including the 1997 Treaty of Friendship with Ukraine and the Helsinki Accords. However, neither of the treaties are binding, so no military action could be taken against Russia. In many cases, countries will not face charges if they break a treaty, especially if it is a powerful country such as the United States (US). For instance, although the United States signed the United Nations Convention Against Torture (CAT) in 1994, it still continues to use methods of torture in Guantanamo Bay. Over the last two decades, the US adherence to the Convention's guidelines has been dismal.[615]

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[614] *Ibid.*

J Schulberg, 'The US Is Still Violating the Anti-Torture Treaty it Signed 20 Years Ago' (2014) *The New Republic*.

[615] J Schulberg, 'The US Is Still Violating the Anti-Torture Treaty it Signed 20 Years Ago' (2014) *The New Republic*.

In the Vienna Convention on the Law of Treaties 1969, the rules governing reservations are complex, ambiguous and counterintuitive, thus raising specific difficulties. Unfortunately, there is no life span on reservations. Countries are free to choose how long they would wish to make such reservations. The absence of a lifespan on reservation appears to systematically benefit reserving States and disadvantage non-reserving States. The fact that a reservation is a limitation on the commitment undertaken by a State is unhealthy for international relations as members may choose not to be totally committed to the treaty process.[616] In particular, State reservations to international human rights treaties are an issue of serious concern, since a number of them seem to defy out-rightly the object and purpose of the treaty, thus making its ratification practically moot. [617] There is yet another challenge in the area of enforceability of the terms of the treaty where broken by another State. A look are the events taking place across the globe today reveal that a large number of States are repeatedly violating their international obligations. For instance, Merelli accuses the US of being an unreliable international partner by pulling out of the Iran nuclear deal, the Kyoto Protocol 1997 on limiting gas emissions, the Trans-Pacific Partnership (TPP) and the Paris Climate Accord 2015 on climate change. History is dotted with treaties that the US has signed but not ratified, signed and then unsigned, and even refused to sign after pushing everyone else to sign.[618]

[616] L Helfer, 'Not Fully Committed? Reservations, Risks, and Treaty Design' (2006) 31 (367) *The Yale Journal of International Law*, 368

[617] G Zyberi, 'Assessing the Validity of Reservations to International Human Rights Treaties Through the Lens of the International Court of Justice (2008) 8, *NJCM Bulletin*, 1121

[618] A Merelli, 'It's not Just Trump. The US has always Broken its Treaties, Pacts and Promises' *Quartz* of May 12 2018 Available at <https://qz.com/1273510/all-the-international-agreements-the-us-has-broken-before-the-iran-deal/> accessed 13 May 2019.

In the absence of a global police, States at times act as if they are above the law.[619] Furthermore, the domestication of international treaties is often met with challenge at the domestic level. It becomes clear when revisiting the theories of monism and dualism that the dualist theory poses a performance challenge especially with regard to absolute compliance of States parties with treaty obligations. By the principles of international law and the concept of *pacta sunt servanda*, States are expected to be committed towards respecting the Treaties that they establish.[620] Regrettably, international law does not rule on how the conditions in which legal provisions included in Treaties are to be integrated in the States internal legal system for application by the competent authorities.[621] The errors of the dualist theory represent one of the major limitations on the powers of international institutions.

For States non-parties to a treaty, the treaty is *res inter alio acta*. This has been reflected in numerous cases before the World Court.[622] For example, in the German Interests in Polish Upper Silesia Case, the PCIJ observed that, 'a [treaty] only creates law as between States which are parties[623] to it; in case of doubt, no right can be deduced from it in favour of third parties.

[619] *Enforcement of International Law* Available at <https://www.diakonia.se/en/IHL/The-Law/International-Law1/Enforcement-of-IL/> accessed 13 May 2019.

[620] O Rahim, 'International Treaties and Third Parties' (1995) 6 *EJIL*, 352.

[621] M Brindusa, 'The Dualist and Monist Theories. International Law's Comprehension of These Theories' Available at <http://revcurentjur.ro/old/arhiva/attachments_200712/recjurid071_22F.pdf> accessed 05 March, 2019.

[622] M Fitzmaurice, 'Third Parties and the Law of Treaties' in J Frowein and R. Wolfrum, (2002) 6, *Max Planck Yearbook of United Nations Law*, 37-137

[623] The term 'third party' has been defined by both the 1969 and 1986 Vienna Conventions on the Law of Treaties. For instance, whereas Article 2 (1(h)) of the 1969 Vienna Convention defines 'third State' as a State not party to the treaty, Article 2 (1(h)) of the 1986 Convention defines 'third State' and 'third organisation' as a State or an international organisation not party to the treaty PCIJ Ser. A, No. 7, 28

According to the 1969 Convention, a party to a treaty is 'a State which expressed its consent to be bound ... and for which the treaty is in force.'[624]

Although treaties are not applicable to States not party to them without their consent, under Article 34 of the VCLT, the general rule laid down is in respect of treaties providing for rights of third parties, although such may be conferred on its own or with a duty to exercise a certain obligation. Therefore, parties to a treaty can grant a right to a third party, meaning that third parties can take benefits without a commensurate obligation. This can create instability in the international community as it is unclear who holds the third party accountable where there is a violation or breach of the treaty.[625]

Recommendations

If treaties are to be more effective today, it is recommended that they should hold stronger consequences of violation, especially if they are made with more powerful States. This is because if a powerful State breaks an international law or treaty, it tends to set a precedent amongst smaller States as seen with the United States intervention in Iraq and Russian intervention in Ukraine.[626]

[624]See Article 2 (1(g)). See also Article 2(1(g)) of the 1986 Convention where the text is expressed as follow; 'a party means a State or an international organisation which has consented to be bound by a treaty and for which the treaty is in force.'

[625]M Bertrand, 'The UN as an Organisation: A Critique of its Functioning' (2010) 01 *Opinio Juris*, 35.

[626]*AlFalasi* (n 38).

On the rules of reservation on treaties, there are some treaties, such as the Statute of the International Criminal Court (ICC) vide its Article 120, that specifically prohibit all reservations, thereby giving no room for States to enter a reservation. Because of the challenges associated with reservations, it is recommended that all treaties adopt the ICC format.[627]

For the purpose of enforceability of treaties, Nigeria and other dualist States should adopt a more receptive approach in embracing international Treaties. For such States, an enactment of a domestic legislation with similar provisions helps achieve a normative harmony with the Treaty in question. Specifically, attention must be given to the seeming difficulties associated with the provisions of Section 12 (1)[628] of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the need to fill in the lacunae by way of constitutional amendment. This amendment can be fashioned after Section 2(6) of the 2010 Kenyan Constitution which provides that international Treaties ratified by Kenya are imported as part of the sources of Kenyan law. For instance, the effect of the provisions of Article 11 of the International Convention on Civil and Political Rights which was ratified by Kenya on 1st May, 1972 has become a part of the Kenyan law.[629]

[627]*Ibid*

[628]This Section provides that 'no treaty between the Federation and any other country shall have the force of law except if the treaty has been incorporated into domestic law by the National Assembly'.

[629]B. Musota, 'Monism and Dualism, (2015) *Let's Talk Law*, available at http://bmusota.blogspot.com/2015/09/monism-and-dualism.html, accessed 21 March 2019.

Conclusion

International institutions derive their treaty making power from the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986). These Treaties spell out how treaties are made, amended, interpreted, operated and terminated.[630] Undoubtedly, the coming into force of the 1969 Convention on 27th January, 1980 has helped strengthen the position of international institutions as regards their treaty-making powers.

Although today's treaties do hold a stronger value than they did a century ago, it is not in doubt that international institutions continue to exist in very difficult and contentious environments and at times, have minimal influence on State behaviour. Some treaties lack absolute power because of their non-binding nature on States who remain at liberty to agree or not to agree to be bound by the laws of a given Treaty. Also, rules governing reservations are complex, ambiguous and counterintuitive, thus raising specific difficulties and limitations on the commitment undertaken by States. This approach is unhealthy for international relations.[631]

[630] M Shaw, 'Treaty International Relations', *Encyclopaedia Britannica* Available at <https://www.britannica.com/topic/ treaty> accessed 04 April 2019.
[631] *Helfer* (n 85)

Furthermore, the domestication of international treaties is challenging as international law does not rule on how provisions included in Treaties are to be integrated in the States' internal legal system. For States who adopt the dualist theory, the errors of this theory represent one of the major limitations on the powers of international institutions. In Nigeria, for example, the provisions of Section 12 of the Constitution is clear about the fact that undomesticated international Treaties cannot change any aspect of Nigerian law notwithstanding that Nigeria is a party to such Treaties. The dualist States must adopt a more receptive approach in embracing international Treaties to help strengthen the roles of international institutions in the affairs of State parties.