Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

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A. Purpose and Function

Due to their far-reaching international and national legal capacities, States are capable of concluding agreements with all types of legal entities, ie with other States and with Non-States actors (eg international organizations, corporations, NGOs, individuals; → Art 3 MN 19–72). Therefore, the sole purpose of Art 1 is to limit the scope of the VCLT ratione materiae to interstate treaties and – in view of the potential diversity of signatories – ratione personae to States alone.¹

To fully appreciate the limited scope of the VCLT as a whole, other provisions of the Convention have to be taken into account as well, namely, Art 1 must be read in conjunction with Art 2 para 1 lit a, which restricts the scope of the Convention ratione materiae to treaties in written form which are governed by international law. Constituent instruments of international organizations fulfill these prerequisites and therefore fall comfortably within the scope of the VCLT (→ Art 5 MN 5–7). However, even if the Convention applies to all international interstate treaties, it does not cover every situation. According to Art 73, the VCLT does not address the fate of treaties in the event of State succession, State responsibility and interstate hostilities. The limitation of the Convention ratione temporis is laid down in Art 4, which answers the question of the Convention having retroactive application in the negative. Assuming that the Convention is applicable to a particular treaty, the autonomy of its parties may non etheless prevail in certain areas: many rules of the Convention are residual in character, ie they come into play under the condition that the particular treaty does not “otherwise provide” (eg Arts 22, 77), or it is not “otherwise agreed” by the parties (eg Arts 22, 37), or a different intention is not “otherwise established” (eg Arts 12, 14, 15, 16).² As a rule, the Convention explicitly labels provisions as residual. If not, the provision is mandatory

²Sinclair 6; for detail see also → Art 5 MN 15–20.
(eg Art 53) provided that the residual character cannot be otherwise established (contextual interpretation or travaux préparatoires, eg Art 30 paras 3–5).

Art 3 lit c clarifies that the Convention’s application to a multilateral treaty is not to be questioned for the mere fact that – alongside at least two States Parties to the VCLT – other subjects of international law are also party to said treaty. Unspoken but congruously, the same is true when States not party to the VCLT participate in a multilateral treaty. From all this, it follows that one treaty concluded between different subjects of international law can be ruled by up to three different legal regimes: (1) the treaty relation between parties to the VCLT is governed by that Convention; (2) the treaty relation with and among participating international organizations is governed by the VCLT II, provided that the parties involved are parties to that Convention; (3) treaty relations other than those mentioned, eg treaty relations with the Sovereign Order of Malta, the ICRC or with States not parties to the VCLT are governed by customary international law (→ Art 4 MN 4–6). Prima facie, this potential multitude of applicable treaty law, all of which could be applied to one and the same treaty, seems to contradict any concept of uniform application. However, the fragmentation of treaty relations is somewhat alleviated by the congruency of most substantive rules of the aforementioned regimes.

B. Historical Background and Negotiating History

During most stages of the negotiating process, the scope of the Convention had not been laid down in a separate article, but rather had been derived from the definition of ‘treaty’ (→ Art 2 para 1 lit a). When the ILC discussed the very first SR report on the law of treaties, prepared by SR Brierly in 1950, it was agreed that treaties to which international organizations were parties would be included in its studies.

3See eg the 1989 Postal Convention with Austria öBGBl No 447/1989 and the 1979 Postal Agreement between the Philippines and the Sovereign Order of Malta 1195 UNTS 411; the latter appears to have been mistaken by the Treaty Section of the UN Office of Legal Affairs to be a treaty between the Philippines and the Republic of Malta which explains why it was – contrary to the Secretary-General’s practice – registered and included in the UNTS (cf also → Art 3 MN 45).
4See eg the 2006 Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons Deprived of Liberty Pursuant to the Jurisdiction of the ICC, ICC Official Journal ICC-PRES/02-01-06.
6For a detailed analysis, see ibid 786–801.
7Brierly I 223–248.
However, by definition, treaties to which entities other than States and international organizations are parties should be excluded.\textsuperscript{9} When proposing this demarcation, SR Brierly not only had clear Non-States entities such as churches, companies or cities in mind, but also component units of federal States, assuming that these components do not possess the attributes of a State.\textsuperscript{10} Brierly’s understanding of the term ‘State’, though, remained vague (Draft Art 2: “A State is a member of the community of nations”).\textsuperscript{11}

Enhancing Brierly’s developing findings, his successor SR Lauterpacht removed the term “international organization” and replaced it with “organization of States”\textsuperscript{12} in order to point out that “States only – acting either individually or in association – are the normal subjects of [...] international law”.\textsuperscript{13} With regard to component units of federal States or protectorates, SR Lauterpacht advocated an all-embracing understanding of the term “State” for the purpose of his definition clause (Draft Art 1), leaving it to the subsequent capacity provision\textsuperscript{14} (Draft Art 10\textsuperscript{15}) to pragmatically resolve “borderline cases”.\textsuperscript{16} It was SR Waldock who finally proposed in 1965 to limit the scope of the Convention to treaties concluded between States\textsuperscript{17} It was the understanding of the ILC that the term ‘State’ means a ‘State for the purposes of international law’,\textsuperscript{18} i.e. a formally independent and thus sovereign State.\textsuperscript{19}

Some States, and most of all the United States, felt that the limitation “took into account neither the development of international law during the twentieth century nor the growth of the activities of international organizations”.\textsuperscript{20} India and the USSR, on the other hand, pointed out that including treaties between international organizations under the scope of the Convention would complicate

\textsuperscript{9}Brierly I 223, Draft Art 1 lit c: “The term ‘treaty’ does not include an agreement to which any entity other than States or international organizations is or may be a party.” The wording closely follows Art 1 lit c of the 1935 Harvard Draft Convention on the Law of Treaties.

\textsuperscript{10}Brierly I 229.

\textsuperscript{11}With regard to component units of federal States, the proposed litmus test was the existence of an “international personality” (Brierly I 229).

\textsuperscript{12}Lauterpacht I 90.

\textsuperscript{13}Ibid 94.

\textsuperscript{14}See also Brierly III 50.

\textsuperscript{15}Lauterpacht I 92, Draft Art 10: “An instrument is void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties.”

\textsuperscript{16}Lauterpacht I 95.

\textsuperscript{17}Waldock IV 10; see the discussion and decision of the ILC [1965-I] YbILC 9–16; critical: PK Menon The Law of Treaties between States and International Organizations (1992) 17, 18.

\textsuperscript{18}Final Draft, Commentary to Art 1, 187 para 4.

\textsuperscript{19}China (Taiwan) proposed at the UN Conference to add a definition of State to mean “a sovereign State”. The proposal was rejected by the Drafting Committee on the basis of the lack of necessity for such a definition (UNCLOT III 112); the proposed definition relies on Art 4 Harvard Draft.

\textsuperscript{20}UNCLOT I 11 para 3.
and delay the drafting process. By and large, it was finally agreed that treaties between international organizations had special characteristics and therefore should be considered separately by the ILC. The compromise was flanked by the understanding that the thematic limitation of the Convention does not prejudice treaty law governing treaties concluded between other subjects of international law (→ Art 3). Art 1 was eventually adopted by the Vienna Conference with 98 votes to none.

C. Elements of Article 1

I. Treaties

7 → Art 2 MN 3–36

II. States

8 By not defining it in Art 2, the VCLT takes the most fundamental term ‘State’ for granted. This approach is quite common when drafting multinational treaties.

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21 UNCLT I 12 para 7, 13 para 26.
22 See the VCLT II.
23 See the Resolution of the Vienna Conference relating to Art 1, UNCLT II 178, annexed to the Final Act of the Conference, UNCLT III 285:

“The United Nations Conference on the Law of Treaties,
Recalling that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,
Taking note that the Commission’s draft articles deal only with treaties concluded between States,
Recognizing the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,
Cognizant of the varied practices of international organizations in this respect, and
Desirous of ensuring that the extensive experience of international organizations in this field be utilized to the best advantage,
Recommends to the General Assembly of the United Nations that it refers to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations.” (footnote omitted)
24 UNCLT II 3 para 14.
25 For a broad definition, see Brierly I 229 (Draft Art 2 lit a); cf also Fitzmaurice I 107 (Draft Art 3).
since the legal problems linked to the diffuse concept of \textit{sovereignty} \textsuperscript{27} and the recognition of \textit{statehood} \textsuperscript{28} would, without doubt, needlessly burden the codification process. \textsuperscript{29} Upon closer examination, however, the determination of sovereignty and statehood can be neglected in the context of Art 1 since the issue is actually resolved by Art 81. Accession to the VCLT is dependent upon the outcome of the \textit{UN’s admission process} (Art 4 UN Charter) or the decision on membership taken by the specialized agencies and international organizations mentioned in Art 81 (so-called ‘Vienna formula’ \textsuperscript{30}). \textsuperscript{31} As an example in this regard, the \textit{Holy See} – a member of various \textit{UN} specialized agencies \textsuperscript{32} – has been party to the VCLT since 1969. The Holy See is a subject of international law but does not fit comfortably within the criteria for statehood. \textsuperscript{33} The \textit{Byelorussian and Ukrainian Soviet Socialist Republics}, founding members of the United Nations \textsuperscript{34} and parties to the VCLT since 1986, exemplify that even component units of federal States (\textsuperscript{!}Art 3 MN 20) may fall within the scope of Art 1 by virtue of Art 81. In the context of the VCLT II, it is remarkable that the then dependent territory of \textit{Namibia} was expressly allowed access despite its lack of sovereignty (Art 84 VCLT II). \textsuperscript{35}


\textsuperscript{29}See the controversial debate of the ILC within the framework of the Draft Declaration on the Rights and Duties of States [1949] YbILC 61–68.

\textsuperscript{30}In contrast to the ‘all States formula’, applied eg by the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid 1015 UNTS 243; see 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 79.

\textsuperscript{31}The statement of the Final Draft, Commentary to Art 5, 192 para 4 that the term “State” is used with the same meaning as in the UN Charter, the ICJ Statute, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations – treaties which do not define the term – must be seen in the light of Art 81 VCLT.

\textsuperscript{32}For example the World Intellectual Property Organization; see UNGA Res 58/314, 1 July 2004, UN Doc A/RES/58/314 for an overview of the international engagements of the Holy See.


\textsuperscript{34}As the Ukrainian SSR lacked the characteristics of statehood in an international legal sense, it was agreed on by the UN Founding Conference that statehood (Art 4 UN Charter) was not a constitutive feature for founding members, irrespective of the wording of Art 3 UN Charter, \textit{U Fastenrath} in Simma Art 3 MN 6.

\textsuperscript{35}Namibia was internationally represented by the UN Council for Namibia until its independence in 1990.
The cases mentioned illustrate that the VCLT consciously avoids a dogmatic view regarding the question of statehood and sovereignty. On the contrary: if the requirements of Art 81 are met, access to the Convention stipulates that all parties are *ipso iure* considered ‘States’ exclusively within the framework and for the purpose of the Convention. Consequently, all provisions of the Convention are applicable to all parties, regardless of any doubts concerning the latter’s independence, sovereignty or statehood.36

Some treaties appear in form to be concluded between natural persons, *e.g.* the *heads of State*. The practice of concluding treaties between heads of State is principally a historical phenomenon, with roots in monarchic traditions. To this extent, the appearance of ‘His/Her Majesty’ as the party to the treaty is a relic of the ancient practice of identifying the person who was the head of State as the State itself.37 Such practice does not contradict the modern concept of a State as a judicial person acting through its organs.38

Though the concept of ‘State’ has no constitutive function within the framework of the Convention, it can be of certain importance within the realm of *customary treaty law*. Whereas Non-States Parties to the VCLT may have recourse to all provisions of the Convention in order to make visible respective rules of customary treaty law, other entities short of statehood must exercise restraint in this regard, *e.g.* in the context of Art 6 (“capacity to conclude treaties”) or Art 7 para 2 (“representation”).

An indication for the statehood of entities with ambiguous international status is provided by the practice of registration by the UN Secretary-General with regard to those multilateral treaties which limit the participation to “any State” (so-called ‘*all States formula*’39). Self-governing territories (or States *in statu nascendi*) such as Palestine,40 Somaliland (Awdal Republic)41 or the Turkish Republic of Northern Cyprus42 cannot invoke this formula to achieve participation in multilateral treaties

36But see Argentina’s declaration upon ratification of the VCLT 1155 UNTS 502: “The application of this Convention to territories whose sovereignty is a subject of dispute between two and more States, whether or not they are parties to it, cannot be deemed to imply a modification, renunciation or abandonment of the position heretofore maintained by each of them.”


38See *e.g.* the 1952 Exchange of Notes Constituting an Agreement Giving Effect to the Convention of 31 March 1931 between His Majesty, in Respect of the United Kingdom, and the Federal President of the Republic of Austria, Regarding Legal Proceedings in Civil and Commercial Matters 236 UNTS 245.

39For reference, see note 30.


41In 1960 Somaliland, a former British colony, joined the former Italian Somalia to form the Somali Republic. Somaliland declared its independence in 1991 and requested recognition by the African Union in December 2005. The subject of State secession is still a matter of ongoing conflict and hampers the international recognition as an independent State.

due to the ongoing political ambivalence within the international community as to whether these entities should be recognized as ‘States’. The practice of admission of international organizations, however, can produce a domino effect with regard to treaty access on the basis of the ‘all State formula’ which perfectly matches the effects of the ‘Vienna formula’ (→ MN 8). The Secretary-General, for example, had refused the Cook Islands’ application for access to certain multilateral treaties containing ‘all States clauses’ by referring to the non-sovereign status of the islands.43 However, after the WHO approved the Islands’ membership in 1984 following Art 6 of its Constitution (“States”), the Secretary-General considered that the Cook Islands could henceforth be included in the ‘all State formula’ of other multilateral treaties.44

Selected Bibliography


considered the attempt to create and present the TRNC as being “legally invalid”: it called for the withdrawal of the declaration of independence and asked all countries not to recognize the new republic.

43 Cf UNGA Res 2064 (XX), 16 December 1965, UN Doc A/RES/2064 (XX) on the not-yet-sovereign status of the Cook Islands; see also [1979] UNJYB 172.
44 For reference see note 30.
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