Introduction

The law of treaties has been the subject of an impressive number of studies and each aspect has been thoroughly analysed through doctrinal works and codification projects.[1] So, what can a new study on the law of treaties contribute? What can be added concerning this 'sadly overworked instrument' of international law-making?[2] First of all, many of the studies on the law of treaties date back to the period of its codification or a little bit after. Since that period there have been a series of developments in the treaty-making process that challenge the established rules of the law of treaties. These developments put a strain on the principle of State consent, which underpins the law of treaties, and seek to strengthen the relevance of collective interest,[3] thus leading to the transformation of this field of law.[4] This situation creates a serious tension at the heart of the law of treaties.[5]

It is the element of form that is called to adjust and adapt to this new era of collective interest considerations.[6] The protection of human rights – a field where the beneficiaries of the treaty rules are individuals and groups and not other States – or the protection of the environment, which concerns mankind as a whole, are substantive areas of law reflecting this

[1] For analytic purposes, the terms 'law of treaties' and 'treaty law' are distinguished; see Thirlway, H., 'Treaty Law and the Law of Treaties in Recent Case-Law of the International Court', *in* Craven, M., Fitzmaurice, M. (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties*, Nijmegen, Wolf Legal Publishers, 2005, 7–28, 7.

[2] McNair, A., 'The Functions and Differing Legal Character of Treaties', 11 *BYIL* (1930) 100–118, 101.

[3] The terms 'collective interest' and 'communitarianism' are used interchangeably throughout this book with no semantic difference.

[4] Gowlland, V., 'Law-Making in a Globalized Society', *in* Cardona Llorens, J. (ed.), *Cursos euromediterráneos bancaja de derecho internacional*, Valencia, Tirant lo Blanch, 2009, vol. VIII-IX, 505–661, 578.

[5] Brölmann, C., 'The Limits of the Treaty Paradigm', *in* Craven/Fitzmaurice, *Interrogating the Treaty*, 29–39, 30.

[6] Brunnée, J., '"Common Interest" – Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law', 49 *ZaöRV* (1989) 791–808, 807–8.

new robust communitarian ideal. In these fields the 'overworked' treaty instrument feels increasingly constrained by the relevant treaty rules, which are codified in the three Vienna Conventions that form what we will call the Vienna regime/rules, that is, the Vienna Convention on the Law of Treaties (hereinafter VCLT),[7] the Vienna Convention on Succession of States in Respect of Treaties (hereinafter VCSST)[8] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[9]

In addition to (and perhaps because of) the emergence of a communitarian narrative on the law of treaties, there is a further challenge due to the increased institutionalization of the treaty-making and treaty-functioning process. Nowadays, the inter-State model is allegedly confronted with a constitutionalized environment.[10] The increased centralization of treaty-making and the existence of treaty bodies involved in the life of the treaty constitute a paradigm shift that tests the adapting ability of treaties, which are allegedly based on a contractual/voluntaristic mindset typical of traditional international law.[11]

But even these recent developments have been identified and thoroughly analysed, as we will see. This communitarian narrative argues that the contractual analogy, which represents the traditional image of the law of treaties, is less appropriate or clearly inadequate in dealing with the new phenomena, and thus the traditional rules need to be modified or even discarded. A debate over the degree of the autonomy from or dependence upon the Vienna regime has ensued.[12]

The purpose of this book, however, is not just to recount and systematize the above narrative.[13] This study attempts first and foremost to challenge the basic idea of this narrative, namely, the reference to a 'traditional concept' of treaties and its routine association with the contractual paradigm. The feeling of inevitability that this narrative

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[7] 22 May 1969, 1155 *UNTS*, pp. 331 *et seq*.

[8] 23 August 1978, 1946 *UNTS*, pp. 3 *et seq*.

[9] 21 March 1986, *ILM*, vol. 25, 1986, pp. 143 *et seq*.

[10] Brölmann, 'The Limits', 29.

[11] Merrills, J., 'The Mutability of Treaty Obligations', *in* Craven/Fitzmaurice, *Interrogating the Treaty*, 89–101, 99.

[12] Craven, M., 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', 11 *EJIL* (2000) 489–519, 490–92.

[13] Vanneste, F., *General International Law before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law*, Antwerp, Intersentia, 2010; de Frouville, O., *L'intangibilité des droits de l'homme en droit international. Régime conventionnel des droits de l'homme et droit des traités*, Paris, Pedone, 2004.

radiates is put into question. The idea of the law of treaties as a body of rules exclusively oriented to the preservation and furtherance of egoistical State interests is also scrutinized.[14] Through this process the Vienna rules are then reconstituted. The aim is to revisit the claims of their insufficiency and see whether they manage or fail to accommodate the communitarian anxieties of contemporary international law, and what adjustments are warranted. The result seems surprising at times, since the Vienna rules live up to the demands of the collective interest paradigm and succeed in accommodating some of the communitarian expressions of the current international law discourse. Ultimately, the new narratives that dispute the consensual paradigm prove to be less groundbreaking, although they undoubtedly breathe fresh air into the law of treaties.

The gist of the argument in this book is the following. International law, and the law of treaties in particular, faces a constant tension between subjective and objective constructions. On the one hand, States constitute the main pillars of international law and we need to take into account their will and practice; on the other, States can exist only within a collaborative framework (legal order), which means that sometimes we are forced to 'impose' conduct and rules upon States, or to 'construct' their will on the basis of communitarian ideals. Through this oscillation between deductive and inductive techniques, between statal and communitarian ideals, international law evolves, or pretends to evolve, towards less State autonomy and more cooperation between States.

The law of treaties is one of the domains par excellence in which this tension and evolution is present. Treaties try to find a middle ground between the fact that they originate from the will of States and the reality of a legal community created by them. In the VCLT this tension is expressed by the oscillation between emphasis on the unilateral will of each State and emphasis on the communal will of the contracting parties and on the norms created by the treaty (the *negotium*). The outcome of this tension is a constant balancing between paying tribute to consent and trying to tame it, between imposing formalities in the way the consensual element is expressed and functions within the law of treaties and incorporating caveats that consecrate the residual character and, thus, the flexibility of the Vienna regime. This is all the more so in respect of the rules concerning contracting in and contracting out.

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[14] Rosenne, S. 'Bilateralism and Community Interest in the Codified Law of Treaties', *in* Friedmann, W., Henkin, L., Lissitzyn, O. (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup*, New York, Columbia University Press, 1972, 202–27, 203.

The examples I want to invoke highlight the constant dilemma between respecting and sidelining/constructing State will. The relevant Vienna rules try to contain this tension. They seek, for instance, to restrain the ways in which intention to be bound is manifested through an enumeration of the means for expression of consent to be bound; or they try to circumscribe the right to make reservations through the regime of objections by the other States and the reference to the object and purpose; or they aspire to balance between the prohibition of unilateral denunciation and the exceptions based on the intention of the parties and the object and purpose of the treaty in the case of withdrawal, and so on. So, a first element of analysis will concern a critical appraisal of the Vienna regime rules themselves.

Our analysis will then focus on the communitarian narrative challenging the 'traditional' law of treaties. This narrative proposes – openly or implicitly – another conceptual and regulatory framework for the apprehension and resolution of the relevant problems that will apply to specific categories of treaties. The communitarian challenge has taken various forms and has intensified over the past decades. It aspires to radically review both the concept of treaty and the rules on the law of treaties, as they are codified in the Vienna regime.

As far as the concept of treaty is concerned, a new category of treaties has emerged, which creates primarily objective and non-reciprocal obligations for States, cannot be analysed into a bundle of bilateral relations and has as its addressees or beneficiaries individuals or the international community as a whole, and not States. There is, however, a certain difficulty in defining precisely this category of treaties as well as the consequences that flow from its exceptional character. The repeated attempts at treaty classification have showcased the impossibility of using a specific criterion in order to classify treaties. More importantly, the attempt to delineate this new category of treaties speaks volumes about our misconceptions with regard to the 'traditional' treaty concept.

As far as the rules on the law of treaties are concerned, the action of challenging takes either the form of departure from the existing legal framework and proposals for a different regime (a sort of *lex specialis*), or that of enriching the Vienna rules, allegedly filling their gaps and clarifying their ambiguities. In the first case, we can mention the controversies surrounding the legal regime applicable to reservations and perhaps also the way the rules on withdrawal are construed. In the second, we can point to the 'flexibilization' of the rules on expression of consent to be bound, and the doctrine of automatic succession.

Current challenges, however, push the tension a step further. Through the institutionalization of treaty regimes and the confident emergence of a

claim for more robustly taking into account, in the drafting and functioning of the rules on the law of treaties, both the values underlying these specific types of treaties and the substantive rules of those treaties, the usual tension between contractualism and communitarianism takes a different twist. The separation between the form of treaty-making (*instrumentum*) and the norms produced (*negotium*), or the distinction between subjective and objective tests in the law of treaties, becomes extremely tenuous.

Monitoring mechanisms and various treaty bodies not only complete the process of marginalization of bare State will – a process that had already been implemented to a certain extent through the Vienna regime – but also suggest that the communal aspect of those treaties should be conceptualized differently: the activity and survival of these mechanisms should be placed at the centre of the treaty life. One of the tasks this book takes on is to examine whether the discourses of challenge radically depart from the existing VCLT rules. My impression is that frequently the new discourses do not radically depart from the existing rules; they usually fill in the gaps of the Vienna regime and try to clarify some ambiguous points. The great challenge, however, of current developments seems to be the effort both to reduce the importance of the other contracting parties' reactions to unilateral State actions within treaty regimes, and to replace these reactions with the opinions and actions of the competent treaty monitoring bodies.

In addition, the place of formalism in the law of treaties will be examined. Treaty theory is predicated on formalism, introduced in the first place to increase the certainty and stability of State will and its manifestations and create an appearance of objective and apolitical treatment of the relevant legal controversies. At the same time, treaty law theory tries to constantly fight the scourge of formalism, namely, the attachment to rigid rules and formalities in the law of treaties. The latter's 'flexibilization' is treated as a sign of maturity of the international system and as an inevitable consequence of treaty institutionalization. In this framework, the means for the expression of consent to be bound are further loosened and a series of doctrines (automatic succession, prohibition of withdrawal, severability doctrine, tacit amendment) are put forward which dispense with the idea that changes in the treaty regime are produced by a clear manifestation of a State's consent.

Nevertheless, the insistence on 'flexibilization' of the consensual paradigm has led to a certain move back towards formalism, whether this is an insistence on the fulfilment of specific formalities, a return to a vain search for the discovery of the 'original' consent of a State party or the rigid sanctification of specific values and legal solutions. The result is a

constant oscillation between departing from formalities and established processes for contracting in and out, and returning to a rigid formalism when doubts about contracting in or out become too difficult to manage. This can be seen, for instance, in the way international lawyers welcome and yet at the same time worry about 'flexibilization' in the field of expression of consent to be bound, or require a notification of succession while arguing that succession is automatic. Thus, sometimes the outcome of these developments is the coupling of communitarian values and interests and the institutional elaboration of treaty regimes with a rigid posture in relation to specific treaty problems. The more communitarian our narrative becomes, the more urgent the need is to recompense for the departure from consent through increased formalization. In the field of reservations, for example, the elaboration of a new, more community-oriented regime, coupled with a formalistic attachment to the concepts of invalidity and severability, denies any role to the dialectic processes that develop in the margins of the reservations conundrum.

The result is to challenge the – undoubtedly imperfect – balance achieved by the Vienna rules. However, the radical shift towards communitarianism in all its forms (institutionalization, flexibility or lack of consent, increased influence of the treaty substance, devaluation of State parties' reactions in favour of a nebulous community will) cannot be welcomed in an unqualified way. At the legal level, the arguments employed for the shift are sometimes contradictory or obscure, or heavily contextualized, as I will demonstrate. They are also one-sided in the sense that they completely ignore the contractual and consensual aspect of every treaty.

In reality, the concept of treaty and the rules on the law of treaties as exemplified in the Vienna regime might not necessarily be inadequate or too formalistic/contract-oriented – or their ambiguity might be the best we can get. First, it might be that our reconstruction of the concept of treaty and the Vienna rules is defective. The idea here is to show both the weaknesses and the insufficiencies of the Vienna rules, as well as their virtues. We want to argue that through its flexibility and its (imperfect) balance between individual and communitarian ideals, the Vienna regime might be reflecting the duality of the treaty concept. There are, however, some issues in the current juncture that might not be resolved by the Vienna regime; the question is then what kind of solutions we want for these issues, and whether full-fledged solutions are possible in the first place.

In addition to this, the strategy of imposing a new regime because of overriding communitarian values might be putting the cart before the horse, since it rests on the dubious premise that there are indeed some

communitarian values and ideas that are commonly shared by the international legal community and which inevitably lead to the creation of a new framework for the analysis of the rules on the law of treaties. Often, however, these narratives do not examine if there is really an agreement on these values at the political level that can be reflected in the rules on the law of treaties. The challenging narratives' automatic focus on this latter body of rules deprives us of the possibility to examine in the first place the political underpinnings of the ideals invoked and to question whether they are really shared by the various members of the international community. In the end, forcing substantive rules on States through a new treaty-making process is a bad idea since it decreases the effectiveness of treaties and depreciates their utility as a tool for persuasion and compliance.

Moreover, the gradual institutionalization of treaty regimes is also not bereft of problems. The treaty institutions and monitoring mechanisms bring with them their own interests. These interests usually coincide with the values and purposes of the relevant treaties, and their action is a genuine effort to further them. Nevertheless, this is not always the case. First, treaty bodies adopt specific positions concerning the idea of human rights, the environment or disarmament, to name but a few areas in which such change has been observed. My purpose is to provide a glimpse of this posture through the legal arguments employed by those organs and the doctrinal views accompanying them. Second, these mechanisms have inevitably internalized a sense of self-preservation, which is not necessarily in line with the furtherance of the values and purposes of the treaties that they are mandated to uphold. It is not a coincidence that these organs have frequently downplayed the legal value of the reaction of other contracting parties vis-à-vis the actions of their co-contractors within the relevant treaty regime. It might be that they consider the stance of the other contracting parties as antagonistic to their authority. Such an attitude, however, might lead to a radical transformation of treaty regimes, where the participatory element, the element of a treaty community consisting of the contracting States, completely disappears in the meanders of the struggle for more influence on the part of the institutional bodies and their supporters in legal academia, thus rendering treaty implementation ineffective.

Ultimately, treaties, despite their communitarian evolution, remain an instrument, a law-making technique that is defined by a dual hypostasis: a contractual one, which gives to State consent an important role; and a communal one, which searches for the views of a more or less abstract collectivity. There is, unfortunately, no solution to this incongruous coupling. Both the nature of treaties and the rules on the law of treaties

suffer due to this paradox, but they also become richer and more encompassing. Conversely, the pretension that current challenges give rise to a solution to be found in the prioritization of collective interests is no more than a chimera; the controversies over the legal novations they put forward are telling. The lesser of two evils will be to continue business as usual, that is, to combine the legal activity of the monitoring bodies with the views of the contracting parties, or to continue oscillating between 'flexibilization' of the consensual paradigm and proceduralization of the treaty regime. For that purpose, the encouragement of a dialectic routine (*dialogue réservatoire*, *dialogue successoral*, *dialogue dénonciateur*) might be an option worth further considering. This routine not only helps us clarify, to some extent, cases of legal controversy, but might also encourage States to participate more actively in the evolution of the treaty regime, thus enhancing the democratic element within it.

This book focuses on the way in which the consensual paradigm is challenged in the cases of entering and opting out of treaty obligations. The choice of case studies is based on their utility in demonstrating the above points and their interconnection. This study does not comprehensively deal with other issues related to the functioning of the consensual paradigm in the law of treaties. For instance, the current challenges surrounding the consensual element in treaty interpretation are not explored. This is because the Vienna regime does not include a series of analytical rules with regard to interpretation. Articles 31 and 32 are simply a guide on the limits of interpretation. Besides, the guidelines on interpretation are metarules, in the sense that they are employed at a further level than the secondary rules concerning the creation, continuity and termination of treaties which are the object of this study.[15] In the same vein, issues concerning treaties and third parties, or obstacles for the domestic implementation of treaty rules, are left outside the scope of this study, which does not purport to cover all the challenges to the consensualist paradigm.

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The book is separated into six main chapters. In Chapter 1, I will present the theoretical premises upon which this study is based. While I follow a critical approach, it is more accurate to state that critical theory is invoked and manipulated in order to substantiate my point, rather than

[15] Klabbers, J., 'Law-Making and Constitutionalism', *in* Klabbers, J., Peters, A., Ulfstein, G. (eds), *The Constitutionalization of International Law*, Oxford, Oxford University Press, 2009, 81–125, 105.

pursued in an orthodox way. In Chapter 2, I will explore the emergence of the 'traditional' concept of treaty and its rules through a series of different discursive strategies. I will also try to challenge some of the established ideas concerning this concept and suggest the adoption of a more flexible approach with regard to the treaty concept and the rules on the law of treaties. Chapter 3 focuses on the gradual 'flexibilization' of the expression of consent to be bound in the law of treaties. There, I will attempt to show that international treaty law constantly oscillates between informal and formal solutions in an effort to establish an adaptable, yet legally certain juridical regime. Chapters 4 and 5 deal with two case studies concerning withdrawal from and succession to public order treaties. In both cases the communitarian challenges to the consensual paradigm are evident. Chapter 6 tries to combine the challenges analysed in the three previous case studies, namely the issues of formalism and communitarianism, through the presentation of the most controversial aspect of the law of treaties, namely the law of reservations. In the Conclusion, besides systematizing the gist of this book's thesis, I will also offer further avenues for research on the topic.