

# 1. Theoretical background

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## I. A CRITICAL APPROACH TO (INTERNATIONAL TREATY) LAW

This study adopts a critical approach in the sense that it not only presents the various doctrinal problems surrounding the concept of treaty and the paradigm of State consent in the law of treaties, but also attempts to highlight the project behind the evolution and the current state of the treaty concept and the consensualist paradigm. According to critical approaches, law, like every other field of social science, is based on a series of conceptual dualities.<sup>1</sup> In each duality, the analysis leads to a certain choice between antithetical poles. A critical approach assesses the discourse leading to the establishment of the two poles and of their hierarchical relationship. It tries to highlight the relativity of the constructed bifurcations and hierarchies, in the sense that very often the discourse leading to the affirmation of the one pole can equally lead to the affirmation of the other one, or a property ascribed to one idea can also be true of a contrary one.<sup>2</sup> In the end, the hierarchical preference established by a certain discourse is reversed and the opposite line of reasoning seems equally possible.<sup>3</sup> This book doesn't try to establish a new hierarchy; it rather attempts to highlight, through the deconstruction of the existing ones, their ideological biases and the fact that other readings of the relationship between the two poles might be possible.<sup>4</sup>

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<sup>1</sup> Dalton, C., 'An Essay in the Deconstruction of Contract Doctrine', 94 *Yale Law Journal* (1985) 996–1114, 1007.

<sup>2</sup> Balkin, J.M., 'Deconstructive Practice and Legal Theory', 96 *Yale Law Journal* (1987), 743–86, 744.

<sup>3</sup> Culler, J., *Framing the Sign: Criticism and Its Institutions*, Oxford, Blackwell, 1988, 141.

<sup>4</sup> Balkin, 'Deconstructive Practice', 762.

### **A. The Fundamental Tension between the Self and the Community**

According to critical approaches, the legal science is permeated by a fundamental tension between the self as an autonomous being and the completion in its fullness of his/her identity through socialization.<sup>5</sup> This basic quandary between autonomy and socialization is equally present in international legal discourse.<sup>6</sup> As David Kennedy notes, States

find in socialization both the source of their identity and a threat to their existence ... Their identity as sovereign states with legitimate and respected internal authority depends upon their participation in an international society which is not compatible with that sovereign authority. They cannot be both internally absolute and externally social ... The quandary for states results from contradictory visions of group association: as a necessary reference point for self awareness and identification and as the greatest threat to national existence.<sup>7</sup>

This tension is not something exceptional. At the most abstract level, law itself continuously confronts the dilemma between autonomy and community. Its existence is secured by a constant oscillation between a claim of autonomous existence,<sup>8</sup> where law is presented as self-referential, in the sense that the concepts of validity or authority determine which norms are legal norms and at the same time are determined themselves by reference to valid law,<sup>9</sup> and by a reference to extralegal values as law's foundation in order to boost its effectiveness.<sup>10</sup>

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<sup>5</sup> Unger, R.M., *Knowledge and Politics*, New York, Free Press, 1976, 65–7.

<sup>6</sup> In the case of international law, the point of reference is the State, not the individual. Despite this difference, the same tension is reproduced with regard to States; Kennedy, D., 'Theses about International Legal Discourse', 23 *GYIL* (1980) 353–91, 361.

<sup>7</sup> *Ibid.*, 361–2.

<sup>8</sup> Fish, S., 'The Law Wishes to Have a Formal Existence', in Fish, S., *There's No Such Thing as Free Speech and It's a Good Thing, Too*, New York, Oxford University Press, 1994, 141–79, 141.

<sup>9</sup> Perez, O., 'Law in the Air: A Prologue to the World of Legal Paradoxes', in Perez, O., et al. (eds), *Paradoxes and Inconsistencies in the Law*, Oxford, Hart, 2006, 3–39, 18 and 22.

<sup>10</sup> Kedar, N., 'The Political Origins of the Modern Legal Paradoxes', in Perez et al. (eds), *ibid.*, 101–17, 102.

## B. The Binary and Transformational Character of the Tension

The structure of international legal arguments aims at concealing this fundamental tension between the self and the other, between autonomy and community. But in reality, the tension stemming from this fundamental and irresolvable contradiction robustly resurfaces at different levels of doctrinal analysis each and every time. This repetitive movement is qualified as both binary and transformational. It is binary in the sense that 'each level is exclusively occupied by two mutually exclusive possibilities which never exist without each other'.<sup>11</sup> The impossibility of mutual exclusiveness means that the structure of the international legal argument constantly oscillates between the two extremes, trying to balance and supposedly accommodate both of them. The argumentative strategy is also transformational, not only in the sense of reappearance of the fundamental opposition at other levels and in varied binary guises, but also in the sense that 'each pole of the binary opposition seems to contain its opposite ... so that we may speak of one being transformed into the other'.<sup>12</sup> Consequently, the new poles represent both a linear evolution vis-à-vis the basic contradiction, and an exchange of positions, where the initial presupposition can be turned on its head and each new position can be presented as the outcome of the other pole.

Moving from abstract analysis to a more tangible example, international law and the law of treaties offer a discursive framework, where we can observe a metamorphosis of the fundamental contradiction into a set of new opposing ideas. For instance, in the law of treaties the tension between the self and the other (between individualism and community) takes the form of a tension between intention and formalities. The linear analysis traditionally equates the self and autonomy with the 'will theory'<sup>13</sup> in contract law,<sup>14</sup> or a consensual approach in the law of treaties,<sup>15</sup> where the contract is conceived 'as a realm of unadulterated

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<sup>11</sup> Kennedy, 'Theses', 364.

<sup>12</sup> *Ibid.*, 364–5.

<sup>13</sup> Gordley, J., 'Contract', in Cane, P., Tushnet, M. (eds), *The Oxford Handbook of Legal Studies*, Oxford, Oxford University Press, 2003, 3–20, 3 and 8.

<sup>14</sup> Feinman, J.M., 'Critical Approaches to Contract Law', 30 *UCLA Law Review* (1983) 829–60, 831–2.

<sup>15</sup> Abi-Saab, G., 'Cours général de droit international public', 207 *RdC* (1987-VII) 9–463, 424.

self-interest and pure calculation'.<sup>16</sup> On the opposite side of the spectrum, the ideal of community is usually associated with the existence of formalities in the law of treaties because the identification of the self with desire leads to an automatic positioning of constraints to desire as a means for the furtherance of community objectives.<sup>17</sup> Formalities, so the argument goes, restrain sovereign will and enhance legal certainty;<sup>18</sup> hence the view that they uphold legal expectations and express a communitarian reading of the law of treaties.

But these two linear constructions (self/autonomy – intention versus other/community – formalism) cannot be sustained upon closer scrutiny. We can easily observe a reversal of positions and a transformation that implicates crossing linkages, where formalism, for example, can also be associated with autonomy, and egotism and consensualism with a communitarian discourse. It is not a coincidence, for instance, that formalities in the law of treaties are described both as restraint to State will *and* as an 'emblematic instance of the performance of sovereignty'.<sup>19</sup> And conversely, the doctrine of legal expectations is squarely based on party intentions. Thus, we can see that (1) the opposite poles are interrelated and (2) their invocation can give varied results at other levels of analysis.

## II. BINARY AND TRANSFORMATIONAL ANALYSIS IN THE LAW OF TREATIES

This simplistic presentation serves as a background for the analysis of the contemporary challenges to the consensual paradigm in the law of treaties. In this field, the basic tension between individualism and communitarianism takes multiple shapes. Doctrinal analysis on the law of

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<sup>16</sup> Unger, R.M., *The Critical Legal Studies Movement*, Cambridge MA, Harvard University Press, 1986, 86.

<sup>17</sup> Fish, S., *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Durham NC, Duke University Press, 1989, 11 *et seq.*

<sup>18</sup> Bos, M., 'Will and Order in The Nation-State System: Observations on Positivism and Positive International Law', in Macdonald, R.St.J., Johnston, D.M. (eds), *The Structure of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague, Martinus Nijhoff, 1983, 51–78, 76; Kennedy, D., 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* (1976) 1685–778, 1688.

<sup>19</sup> Orford, A., 'A Jurisprudence of the Limit', in Orford, A. (ed.), *International Law and Its Others*, Cambridge, Cambridge University Press, 2006, 1–31, 14.

treaties develops at three levels.<sup>20</sup> Before elaborating on each level, however, a caveat is necessary. Much of the following analysis is inspired by similar theoretical developments in contract law. This raises the question of the appropriateness of municipal law analogies in international law and, more particularly, in the law of treaties. Yet the question here is not whether a domestic law analogy approach should be adopted and reproduced in the international realm. In other words, there is no intention to uncritically use rules or jurisprudential solutions from the law of contracts. Our purpose is rather to employ the lessons drawn from critical approaches to contract law doctrine in the field of the law of treaties.

Having clarified this point, we can now analyse the three levels within which the doctrinal discourse concerning the law of treaties unfolds.

### A. The Tension between Egotism and Cooperation/Community

The first level of analysis gives shape to the basic tension between the self and the other that we have already described. According to this idea, the discipline of law is faced with a constant tension – inherent also in the international legal order – between the satisfaction of egotistical needs and the need to cooperate with others, between individualism and socialization.<sup>21</sup> In treaty theory this juxtaposition takes the form of an opposition between individualistic and communitarian narratives and reflects the need to privilege the satisfaction of either individualistic or collective interests.<sup>22</sup> On the one hand, individualism in the law of treaties expresses and is expressed by the ideals of State autonomy and contractual freedom, where State will constitutes the main point of reference. The expression of consent to be bound is one of the cornerstones of the contractual relationship and the relative effect of international agreements is one of the basic principles of the law of treaties.<sup>23</sup> Individual consent is thus entrenched in the treaty machinery.<sup>24</sup>

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<sup>20</sup> Dalton, 'An Essay', 999–1000.

<sup>21</sup> Kratochwil, F., 'Is International Law "Proper Law"?', 69 *Archiv für Rechts- und Sozialphilosophie* (1983) 13–46, 19 and 21.

<sup>22</sup> Raftopoulos, E., *The Inadequacy of the Contractual Analogy in the Law of Treaties*, Athens, HIFL, 1990.

<sup>23</sup> Article 34 of the VCLT; *Case of the Free Zones of Upper Savoy and the District of Gex* (France v. Switzerland), Judgment of 7 June 1932, PCIJ, Series A/B, No. 46, 96 *et seq.*, 141.

<sup>24</sup> Brölmann, C., 'Law-Making Treaties: Form and Function in International Law', 74 *NJIL* (2005) 383–404, 398.

On the other end of the spectrum, communitarianism resorts to arguments about good faith, legitimate expectations and collective will.<sup>25</sup> An exclusive focus on State will would signify that the binding nature and application of treaties could fall prey to the egoistical interests of each State. For that reason, whether or not a treaty is binding is linked to arguments of justice and collective volition. In this framework, State will is relegated to the background: while it is considered the vehicle for the creation of the treaty bond,<sup>26</sup> after this it is replaced by the collective will of the contracting parties,<sup>27</sup> and the law of treaties is directed towards the fulfilment of the collective interests of the parties (and more generally of the international community).

The above analysis presents the two poles of the tension as independent from one another: one points towards the unilateral will of a State, and the other towards a collective will or the will of the international community. We can have either one or the other. But the strict separation between the two proves itself to be both unworkable and impossible. Take the focus on consent, for instance. First of all, an unconditional emphasis on consent might lead to the implementation of treaty terms that are unfair.<sup>28</sup> Moreover, a belief in the force of State will presupposes a consensus on specific values. For example, a focus on bare State volition reflects a universal agreement on a conception of rules existing outside of any social context, having a technical and standard character, typical of a 'positive spirit' based on objective observation, deductive methodology and realism.<sup>29</sup> Consequently, a consensualist approach to the law of treaties might be based on an idea of sociopolitical cohesion in the international legal order or of a neutral methodology that does not exist in reality.

Furthermore, it is impossible to create an image of the self, of State will, as completely detached and independent from and uninfluenced by the sociopolitical environment in which it takes shape. There can be no absolute freedom, and constraints on State will are not external to it but

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<sup>25</sup> Koskenniemi, M., 'Introduction', in Koskenniemi, M. (ed.), *Sources of International Law*, Aldershot, Ashgate/Darmouth, 2000, xi–xxviii, xiv.

<sup>26</sup> *Case of the S.S. 'Wimbledon'*, Judgment of 17 August 1923, PCIJ, Ser. A, No. 1, 15 *et seq.*, 25.

<sup>27</sup> Pellet, A., 'The Normative Dilemma: Will and Consent in International Law-Making', 12 *AYIL* (1988–89) 22–53, 33.

<sup>28</sup> Craven, M., 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', 11 *EJIL* (2000) 489–519.

<sup>29</sup> Jouannet, E., 'A Century of French International Law Scholarship', 61 *Maine Law Review* (2009) 83–131, 93.

internalized and inherent to it.<sup>30</sup> So what is perceived as autonomy incorporates community. International lawyers find themselves particularly exposed to the incompleteness of each extreme. The effort to explain the binding nature of treaties exclusively through reference to the consent of the parties is constantly challenged by the observation that in certain contexts consent appears irrelevant.<sup>31</sup> If anything, consent alone cannot explain the treaties' binding character unless we follow 'an infinite logical regression of States consenting to consent'.<sup>32</sup> Thus, any reference to the autonomy of State volition constantly requires its coupling with a communitarian narrative.

The same applies for collective interests. Any pretension that these are formed without reference to State consent cannot be sustained without ultimately resorting to such consent to avoid irrelevance or delegitimization. What constitutes community interest entails, at least partially, an allusion to the views of individual State parties and the building up of a 'probabilistic picture from their response'.<sup>33</sup> Any idealistic reference to common values that the international community deems it necessary to preserve,<sup>34</sup> or to the object and purpose of the treaty as an element independent from State consent, is open to accusations of subjectivism and naturalism. Thus a return to a consensualist line of reasoning is indispensable.

The result is a feeling of suspension of the legal discourse between the two extremes, of a constant oscillation that both reinforces and relativizes the authority of every rule and of every legal argument concerning the law of treaties.<sup>35</sup>

The juxtaposition between individualistic and communitarian narratives is also transformational, in the sense that what is considered as egoistical might be communitarian and vice versa. The dilemma between *pacta sunt servanda* (Article 26 of the VCLT) and the exception of *rebus*

<sup>30</sup> Fish, *Doing*, 11–12.

<sup>31</sup> Craven, M., 'What Happened to Unequal Treaties? The Continuities of Informal Empire', 74 *NJIL* (2005) 335–82, 361.

<sup>32</sup> Hollis, D.B., 'Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law', 23 *Berkeley Journal of International Law* (2005) 137–74, 142.

<sup>33</sup> Craven, 'Legal Differentiation', 505–6.

<sup>34</sup> Cançado Trindade, A.A., 'International Law for Humankind: Towards a New *Jus Gentium* (II)', 317 *RdC* (2005) 9–312, 59.

<sup>35</sup> Koskenniemi, M., 'What Should International Lawyers Learn from Marx', in Marks, S. (ed.), *International Law on the Left: Re-examining Marxist Legacies*, Cambridge, Cambridge University Press, 2008, 30–52, 40–41.

*sic stantibus* (Article 62 of the VCLT) is illustrative of the transformational character of the initial tension. The consensual versus justice arguments are characteristically present in the debate about the rule/exception relationship between *pacta sunt servanda* and *rebus sic stantibus*. While the *pacta sunt servanda* principle is coated in consensual language,<sup>36</sup> it is also coupled with the requirement of good faith,<sup>37</sup> where considerations of justice might warrant the enforcement of *pacta sunt servanda* even when consent was withdrawn. So, we can reverse the relationship between the two principles by considering the rule of *pacta sunt servanda* as an emanation of justice-based views,<sup>38</sup> as a higher norm, which is set aside by *rebus sic stantibus*, this latter being recast into consensual language through the view that it constitutes an implied clause included in every treaty.<sup>39</sup> Ultimately, both consent and community can be invoked in an interchangeable way to substantiate a claim in favour of treaty respect or treaty revision.

The following example from the *Gabčíkovo-Nagymaros* case aptly highlights the way the arguments of consent and fairness were used to advocate treaty continuity and how they could also be invoked in order to modify or terminate the treaty relationship.<sup>40</sup> In this case, the International Court of Justice (hereinafter ICJ) was confronted with a Danube River Dam project agreement, with which neither party had fully complied for a long period. The agreement was repudiated by Hungary only, while Czechoslovakia pursued a provisional solution (called 'Variant C'), which effectively put an end to the idea of a joint construction of the dam in Danube. The Court reached the conclusion

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<sup>36</sup> *Fitzmaurice I, ILCYb* (1956), vol. II, 104 *et seq.*, 107: 'Article 4. Ex Consensu advenit vinculum: The foundation of the treaty obligation is consent, coupled with the fundamental principle of law that consent gives rise to obligation. For the obligations to exist, consent must be true consent ...'.

<sup>37</sup> Harvard Law School, *Research in International Law*, 'Draft Convention on the Law of Treaties', 29 *AJIL* (1935), Supplement, 988 [hereinafter *Harvard Draft* (1935)]; Salmon, J., 'Article 26', in Corten, O., Klein, P. (eds), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article*, Bruxelles, Bruylant, 2006, vol. I, 1075–116, 1093–7.

<sup>38</sup> de Visscher, C., 'Contribution à l'étude des sources du droit international', 14 *Revue de droit international et de législation comparée* (1933), 3<sup>e</sup> série, 395–420, 398; Lavalley, R., 'About the Alleged Customary Nature of the Rule *Pacta Sunt Servanda*', 33 *ÖZöRV* (1982) 9–28, 27–8.

<sup>39</sup> Brierly, J.L., 'Some Considerations on the Obsolescence of Treaties', 11 *Transactions of the Grotius Society* (1926) 11–20, 15.

<sup>40</sup> Fitzmaurice, M., 'The *Gabčíkovo-Nagymaros* Case: The Law of Treaties', 11 *LJIL* (1998) 321–44, 341–2.

that the agreement was still in force and the parties had to ‘find an agreed solution within the co-operative framework of the Treaty’.<sup>41</sup> To explain its insistence on treaty preservation, the Court put forward the principle of *pacta sunt servanda*. The problem was that both parties had breached the treaty, thus rendering its full implementation obsolete without substantial modification. Consequently, both State will (through the means of specific conduct) and considerations of effectiveness and fairness pointed towards treaty termination.

Nevertheless, the Court, using precisely the same elements – that is, an argument based on consent and one based on justice – found that the treaty was still in force. More specifically, it observed that it

would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at a great cost over a period of years, might be unilaterally set aside on grounds of reciprocal noncompliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.<sup>42</sup>

The Court construed intent not in the sense of the common intent but in that of Czechoslovakia’s unilateral intent to continue the treaty (despite Czechoslovakia’s non-compliance with it), and added an argument about the (un)fairness of the suggested termination.<sup>43</sup> We can see here that arguments about consent can be valid for *pacta sunt servanda*, which seems part of a communitarian ideal, whereas arguments about fairness are valid for *rebus sic stantibus*, which is usually conceived as part of an individualistic approach to international law.<sup>44</sup> In reality, both *pacta sunt servanda* and *rebus sic stantibus* can be argued equally from a consensual and a justice perspective. The phenomenon of transformation that we have analysed above finds its full realization in this analysis.

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<sup>41</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, *ICJ Reports* (1997), 7 *et seq.*, 78 (§142).

<sup>42</sup> *Ibid.*, 68 (§114).

<sup>43</sup> Thirlway, H., ‘The Law and Procedure of the International Court of Justice 1960–89. Supplement, 2006: Part Three’, 77 *BYIL* (2006) 1–82, 64.

<sup>44</sup> Koskeniemi, M., ‘The Legacy of the Nineteenth Century’, in Armstrong, D. (ed.), *Routledge Handbook of International Law*, London, Routledge, 2009, 141–53, 151.

## **B. The Fluctuation between Esoteric and Constructed Intent**

The tension between individualism and communitarianism is reproduced when conceptualizing State intent in the law of treaties. Here the main challenge is whose knowledge should count when determining whether and which conventional obligations have been undertaken.<sup>45</sup> In this framework, international legal discourse oscillates between esoteric and constructed intent, the latter being premised on formalities and/or the other State's reliance on the external manifestation of will. The discourse initially focused on bare (esoteric) State intent, only to then try to tame and circumscribe it by insisting that only communicated intent matters.<sup>46</sup> In this way, the subjectivism of intent is allegedly replaced by references to form and expectations in an effort to objectify the research on State volition.<sup>47</sup> The result is a vague insistence on the importance of State will with a concomitant admission regarding the impossibility of law being based exclusively on bare will,<sup>48</sup> since this would render law a simple apology of State volition.<sup>49</sup>

The main discursive juxtaposition in this area develops between intent, on the one hand,<sup>50</sup> and form, on the other.<sup>51</sup> On the one hand, focus on intent embodies the ideals of self-assertion and autonomy, and puts forward a belief that there is an automatic technique for the assertion of conventional obligations based on the observation of what a State

<sup>45</sup> Dalton, 'An Essay', 997.

<sup>46</sup> Tomuschat, C., 'International Law: Ensuring the Survival of Mankind on the Eve of the New Century. General Course on Public International Law', 281 *RdC* (1999) 9–438, 310.

<sup>47</sup> Atiyah, P.S., *Promises, Morals and Law*, Oxford, Clarendon Press, 1981, 15.

<sup>48</sup> Widdows, K., 'On the Form and Distinctive Nature of International Agreements', 7 *AYIL* (1976–77) 114–28, 128.

<sup>49</sup> Koskenniemi, M., *From Apology to Utopia: The Structure of International Legal Argument* (reissue with new epilogue), Cambridge, Cambridge University Press, 2005, 312.

<sup>50</sup> In the framework of this book, the terms 'intention' and 'consent' are used interchangeably unless otherwise indicated. For an analysis of the terms, see Fitzmaurice, M., 'Non-Compliance Procedures and the Law of Treaties', in Treves, T., et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, The Hague, TMC Asser Press, 2009, 453–81, 455.

<sup>51</sup> Virally, M., 'Panorama du droit international contemporain. Cours général de droit international public', 183 *RdC* (1983-V) 9–382, 187.

willed.<sup>52</sup> All of the same focus on intent also signifies law's sacrifice to egoistical unilateralism and an uncontrolled subjectivism.<sup>53</sup> On the other hand, recourse to form is presented as a remedy to the defects of bare consensualism. Form means that in a conventional relationship we focus on the manifestation of will, and its communication to the other parties. Hence the understanding that form enhances the communicative aspect of treaty law and embeds a feeling of objectivity and legal certainty.<sup>54</sup>

But this juxtaposition is not as neat as it first appears. What is constructed as unilateral and subjective (State will) cannot be maintained in its pure form – if there is a pure form.<sup>55</sup> A focus on bare will deformalizes the law. The intention of one party is invoked against the intention of the other party(-ies). The structure of the legal argument takes the shape of 'my intention against your intention'. But the intentions might diverge to such an extent that it might be impossible to identify a so-called shared intention.<sup>56</sup> Thus, what we end up with is an indeterminate legal discourse, where the recourse to State volition is both impossible and unfair.<sup>57</sup> Will is thus constructed through 'a reasonable interpretation on the basis of the treaty text ("normal meaning"), its object and purpose and subsequent party behaviour, arguing these as best evidence of consent'.<sup>58</sup> So, the discovery of the 'real' substance of State will remains beyond reach and the discourse on the law of treaties remains formal despite heavily referring to the consensual element.<sup>59</sup>

Yet the recourse to form cannot dispense with State will and subjectivism altogether. First, various authors suggest that formalities are a

<sup>52</sup> Kennedy, D., 'International Law and the Nineteenth Century: History of an Illusion', 65 *NJIL* (1996) 385–420, 398.

<sup>53</sup> Lauterpacht, H., *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, 189.

<sup>54</sup> Lachs, M., 'Some Reflections on Substance and Form in International Law', in Friedmann/Henkin/Lissitzyn, *Transnational Law*, 99–112, 101.

<sup>55</sup> Kennedy, D., 'Legal Formalism', in Smelser, N.J., Balter, P.B. (eds), *International Encyclopedia of the Social & Behavioral Sciences*, Amsterdam, Elsevier, 2001, 8634–8, 8634.

<sup>56</sup> Greig, D., 'Treaties: Some Final Reflections', in Craven/Fitzmaurice, *Interrogating the Treaty*, 233–70, 261.

<sup>57</sup> Koskenniemi, M., 'The Limits of International Law: Are there Such?', in Koufa, K. (ed.), *Might and Right in International Relations*, XXVIII *Thesaurus Acroasium* (1999), Thessaloniki, Sakkoulas, 19–50, 42.

<sup>58</sup> Rosenne, S., "'Consent" and Related Words in the Codified Law of Treaties', in Bastid, S., et al. (eds), *Mélanges offerts à Charles Rousseau*, Paris, Pedone, 1974, 229–48, 247.

<sup>59</sup> Koskenniemi, 'Introduction', xiii–xiv.

consecration par excellence of the autonomy of will. According to this view, a certain formalism in the conventional obligation does not constitute an external restraint but rather a safeguard for State will.<sup>60</sup> Form is presented as the most appropriate way of determining intention with certainty.<sup>61</sup> Second, were the form to be considered an objective element external to State intention, this construction would be undermined by a constant need to have recourse to the consensual element. As Balkin stresses, '[e]xplicit promises are binding because they manifest intent, but the objective manifestation of intent in an explicit promise is only binding because it acts as a signifier for presence ([of] the promisor's actual will or intent)'.<sup>62</sup> What is avoided in the first place (subjectivism) erupts again both through an inescapable invocation of 'real will' in order to enhance the legitimacy of the form and also because the form cannot deliver what it has promised, that is, an objective technique of contractual obligation-making.<sup>63</sup> Third, in the juxtaposition between intention and form, the latter might give voice to the expectations created to the other contracting parties. Form is thus frequently invoked as auxiliary evidence of the state of mind of the other contracting parties. It is thus not surprising that both formality and informality can be recast into consensual language.<sup>64</sup>

The oscillation between esoteric intention and external manifestations can be nicely observed in the International Law Commission's (hereinafter ILC) discussion over the elements that determine whether we are in front of a binding or a non-binding agreement. This was a pertinent question since, according to Hersch Lauterpacht – one of the ILC's Special Rapporteurs on the law of treaties – one of the essential elements of the definition of treaties was that they 'intended to create legal rights and obligations'.<sup>65</sup> The question then was raised whether 'bindingness' should be determined by reference to party intentions or rather to some (formal) criteria external to State will. For Lauterpacht, the decisive

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<sup>60</sup> Rozakis, C., 'Treaties and Third States: A Study in the Reinforcement of the Consensual Standard in International Law', 35 *ZaöRV* (1975) 1–40, 13 (fn 34).

<sup>61</sup> Kamto, M., 'La volonté de l'état en droit international', 310 *RdC* (2004) 9–428, 116.

<sup>62</sup> Balkin, 'Deconstructive Practice', 769.

<sup>63</sup> Bederman, D.J., *The Spirit of International Law*, Athens, University of Georgia Press, 2002, 164.

<sup>64</sup> Kennedy, D., 'The Sources of International Law', 2 *American University Journal of International Law and Policy* (1987) 1–96, 33.

<sup>65</sup> Article 1 in *Lauterpacht I, ILCYb* (1953), vol. II, 90 *et seq.*, 90.

criterion was the parties' intent irrespective of the form or the designation employed if only 'intention to assume an obligation was reasonably clear'.<sup>66</sup> But since a controversy over the binding nature of an international agreement arises when there is an ambiguity or a disagreement between the contracting parties over their respective intentions (to be bound or not), and in order to avoid an overtly apologetic argument, Lauterpacht ended up constructing intention through an external element. More precisely, he admitted that 'intentions must be implied from the fact of the formality of the instrument'.<sup>67</sup> Nevertheless, the recourse to form did not necessarily resolve the controversies over the binding nature of an international agreement. According to Lauterpacht, there existed formal international instruments solemnly declared or signed that were by nature statements of policy, thus creating a certain ambiguity over their legal character.<sup>68</sup> In these cases, intention returned via the backdoor, being determined this time by reference to a series of formalistic criteria, such as the content, the form, 'the terms, the designation and the history of the instrument in question'.<sup>69</sup>

One can easily observe from the above passages the constant oscillation between form and intent and their inescapable interdependence as a method for stabilizing the international legal discourse on the elements determining the binding nature of an international instrument.<sup>70</sup> Such a stabilizing effect, however, cannot be but a mirage, as is highlighted by the ILC's final decision to exclude any reference to intent in the definition of the term 'treaty'.<sup>71</sup>

Another characteristic example that involves a juxtaposition and intermingling of intent and form (as a means for constructing intent) was the *Qatar v. Bahrain case* before the ICJ.<sup>72</sup> In this case, the ICJ found itself confronted with the question of whether the minutes of a meeting could be considered a binding international agreement (giving rise to an obligation to submit the entire dispute to the Court). The Court decided

<sup>66</sup> Ibid., 101–2.

<sup>67</sup> *Lauterpacht II, ILCYb* (1954), vol. II, 123 *et seq.*, 112 (§11).

<sup>68</sup> *Lauterpacht I*, 95–7.

<sup>69</sup> Ibid., 98.

<sup>70</sup> Koskenniemi, *From Apology*, 176–7.

<sup>71</sup> *Waldock IV, ILCYb* (1965), vol. II, pp. 3 *et seq.*, 12 (§6) (explaining the reasons for the deletion); §6 of the commentary to Article 2 of the *Draft Articles on the Law of Treaties with Commentaries*, in ILC Report (18th session), *ILCYb* (1966), vol. II, 187 *et seq.*, 189 [hereinafter *ILC Final Draft (1966)*].

<sup>72</sup> *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahrain), Decision on Jurisdiction and Admissibility (1st phase) of 1 July 1994, *ICJ Reports* (1994), 112 *et seq.*

to completely disregard the Bahraini reference to the so-called esoteric intent of its minister, who was arguing that he had never intended to bind his State by this text. It focused instead on the objective element of the text's allegedly committing language and the signature on the minutes as sufficient proofs of the existence of intent to be bound by both parties.<sup>73</sup>

The Court's attitude of openly preferring the textual evidence to the expressed (subsequent to the signing) intention of one party, and the doctrinal reaction thereto, show how the element of consent can be both juxtaposed to and embodied by the form of the agreement. For instance, Christine Chinkin argues that the Court's exclusive focus on objective considerations displaces the primacy of consent in the law of treaties,<sup>74</sup> thus juxtaposing form to consent, while Sir Ian Sinclair opposes to this reading a counterargument that '[t]he consent of the party concerned (Bahrain) is expressed in the signature by its Foreign Minister of the Doha Minutes'<sup>75</sup> – thus equating consent with the formality of the signature of the Doha Minutes. Here we can see a series of discursive strategies which set the elements of form and intention either in opposite positions or together.

Moreover, the Court's argument that the textual evidence overrides the (subsequent) intent implies that if intent were taken into account, the binding nature of the agreement could fall prey to the shifting allegations of one of the parties – to its subjective determination – and thus be subject to manipulation. Nevertheless, the fairness reflected in this line of reasoning, which enhances and legitimizes the privileging of the objective elements over intent, can be easily reversed. What if, for example, the *Qatar v. Bahrain* case was not over a Memorandum concerning the submission of a case to the ICJ and was instead about a much more serious issue (such as one that impacted upon human lives), and the alleged agreement was plainly unequal, heavily favouring one party at the

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<sup>73</sup> Ibid., 121–2 (§27). And the Court concludes that 'nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question' (ibid., 122 (§28)).

<sup>74</sup> Chinkin, C., 'A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States', 10 *LJIL* (1997) 223–47, 224.

<sup>75</sup> Salmon, J., Sinclair, I., 'Special Features of the *Qatar v. Bahrain Case* before the ICJ/Affaire de la délimitation maritime et des questions territoriales entre Qatar et Bahreïn. L'arrêt de la CIJ du 16 mars 2001', in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Napoli, Scientifica, 2003, vol. II, 1167–242, 1175.

expense of the other?<sup>76</sup> Would the Court then admit with the same ease that the language of the agreement could trump the intention of the weak party upon whom this agreement was being imposed?<sup>77</sup>

This constant oscillation between form and intent, communication and autonomy – or between objective and subjective – both stabilizes the international legal argument and undermines its authority and construction. While legal discourse shifts frequently towards formalities in order to find a way out of the nebulous concept of bare will, it usually ends up dressing the recourse to form in consensual language.<sup>78</sup>

### C. The Problem of Content: Treaty as *Negotium* versus Treaty as *Instrumentum*

The third tension in the law of treaties relates to the conceptualization of the treaty either as *negotium* or as *instrumentum*.<sup>79</sup> This distinction has been a common way of systematizing and analytically presenting the concept of treaty and the nature of the relevant rules.<sup>80</sup> The concept of treaty reflects both the process of treaty-making (*instrumentum*) and the substance of the produced rules (*negotium*). But there seems to be a certain tension between the two: the first represents the formal aspect of the treaty, the second the material one. Preference for one or the other aspect seems to lead to different perspectives on the treaty concept and the treaty rules. Reference to the *instrumentum* seems to signify a preference for the abstract and the formalistic,<sup>81</sup> for the idea of uniform rules, and supposedly focuses on an objective and apolitical technique for

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<sup>76</sup> Chemillier-Gendreau, M., 'Le droit international entre volontarisme et contrainte', in *L'évolution du droit international. Mélanges offerts à Hubert Thierry*, Paris, Pedone, 1998, 93–105, 102.

<sup>77</sup> Salmon, J., 'Le droit international à l'épreuve au tournant du XXIème siècle', in Cardona Llorens, J. (ed.), *Cursos euromediterráneos bancaja de derecho internacional*, Valencia, Tirant lo Blanch, 2002, vol. VI, 35–363, 74.

<sup>78</sup> Pound, R., 'The Role of the Will in Law', 68 *Harvard Law Review* (1954) 1–19, 14.

<sup>79</sup> Reuter, P., 'The Operational and Normative Aspects of Treaties', 20 *Israel Law Review* (1985) 123–36, 123.

<sup>80</sup> Kelsen, H., 'La théorie juridique de la convention', 10 *Archives de philosophie du droit et de la sociologie juridique* (1940) 33–76, 35. For a slightly different distinction, see Dehaussy, J., 'Les traités', in *Jurisclasseur de droit international*, 1958, Fasc. 12-A, §1.

<sup>81</sup> Carty, A., *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester, Manchester University Press, 1986, 78.

rule-making, that is, on a series of procedural desiderata.<sup>82</sup> Reference to the *negotium*, on the contrary, allegedly stresses the normative diversity and richness of international law, but also involves the risk of fragmentation and an ad hoc approach to the law of treaties, the risk of the creation of multiple regimes which overlap and conflict with each other and, ultimately, the risk of undermining the objectivity and authority of international law. The tension is also reproduced at more specific levels. For instance, the focus on the procedure seems to overemphasize the contractual and consensual traits of the treaty concept,<sup>83</sup> while the focus on the content reflects the communitarian aspect.

This sharp opposition between the process and the product lies at the heart of much of the controversy around the treaty concept and treaty rules. If one follows the accounts of international lawyers on the evolution of the treaty concept, one would assume that between these two opposite ideals, the law of treaties is decidedly oriented towards the process, the *instrumentum*. And, admittedly, a focus on the procedure of treaty-making instead of the produced rules offers the universal legitimacy and scientific patina for which international law has vied.<sup>84</sup> Indeed, the ILC dedicated its codification work on the law of treaties to the process of treaty-making,<sup>85</sup> while leaving aside the question of the treaty content's impact thereon.<sup>86</sup>

But in legal discourse, this choice in favour of form continuously confronts the need to take into account the substance of the treaty rules. The more the process of treaty-making became uniform through successive layers of codification of the relevant procedural rules, the more the norms produced varied. As a result, the uniform application of the general rules on the creation and functioning of treaty that was once taken for granted turns out to be much more contested. The usual contestation is that the *instrumentum* taking the shape of a contract

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<sup>82</sup> Skouteris, T., *The Notion of Progress in International Law Discourse*, Cambridge, CUP/TMC Asser Institute, 2009, 108 (page numbers refer to the PhD version).

<sup>83</sup> Brölmann, 'Law-Making Treaties', 384.

<sup>84</sup> Skouteris, *The Notion*, 107.

<sup>85</sup> ILC Report (2nd session), *ILCYb* (1950), vol. II, 380–81 (§§159–62); *Brierly I*, *ILCYb* (1950), vol. II, 222 *et seq.*, 225 and 228 (§9 and 30).

<sup>86</sup> Chinkin, C., *Third Parties in International Law*, Oxford, Clarendon Press, 1993, 138.

cannot sufficiently accommodate the particularities of specific normative categories of rules (*negotiae*).<sup>87</sup>

As a result, the sharp distinction between form/procedure (*instrumentum*) and substance/content (*negotium*),<sup>88</sup> and the subsequent hierarchization of form as the rule and substance as the exception, tends to be relative: the exception resurfaces again and again in the codification effort and its presumed taming in the VCLT might be just an illusion.<sup>89</sup> First of all, the view that the content plays no role in the current construction of the treaty concept and its rules is self-defeating. By accusing the current normative constellation on the law of treaties of being too anchored to contractualism, international law scholars indirectly admit that the treaty-making process *is* influenced by a substantive ideal, in this case the contract-like substantive content of some treaties.

Furthermore, the Vienna regime itself can accommodate in multiple ways the specificities of certain types of treaties.<sup>90</sup> On the one hand, the rules of the Vienna regime have in their vast majority a residual character, which means that they are elastic enough.<sup>91</sup> Various techniques, such as the ‘unless otherwise provided’ or the ‘unless otherwise agreed’ caveat,<sup>92</sup> the ‘any other means’ exception,<sup>93</sup> and the reference to the object and purpose,<sup>94</sup> allow a certain flexibility in the application of the Vienna

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<sup>87</sup> McNair, ‘The Functions’, *passim*; Jessup, P.C., *A Modern Law of Nations: An Introduction*, New York, The Macmillan Company, 1948, 123–56; and more recently, Brölmann, ‘The Limits’, 30–31.

<sup>88</sup> Combacau, J., ‘Légiférer par voie de traité? Remarques sur le mode conventionnel de production de règles internationales’, *Cahiers du Conseil constitutionnel*, No. 17, 3.

<sup>89</sup> Gowlland, ‘Law-Making’, 566.

<sup>90</sup> Chinkin, *Third Parties*, 138.

<sup>91</sup> Heymann, M., ‘Unity and Diversity with Regard to International Treaty Law’, in Zimmermann, A., Hofmann, R. (eds), *Unity and Diversity in International Law*, Berlin, Duncker & Humblot, 2006, 217 et seq., 239; Kohen, M., ‘Comment’, in Zimmermann/Hofmann, 241.

<sup>92</sup> See, for instance, Articles 16, 20§3, 28, 36§1 of the 1969 Vienna Convention; Articles 39§1, 44§1, 55, 70 of the 1986 Vienna Convention; Articles 10§3, 22§3, 29 of the 1978 Vienna Convention.

<sup>93</sup> Article 11 of the 1969 Vienna Convention.

<sup>94</sup> Articles 18, 19(c), 20§2, 31§1, 41§1(b)(ii) of the 1969 Vienna Convention; Articles 58§1(b)(ii), 33 of the 1986 Vienna Convention; Articles 15, 17§2, 27§5, 30§2(a) of the 1978 Vienna Convention.

rules. On the other hand, the Vienna regime includes special provisions for specific groups of treaties.<sup>95</sup>

Finally, the construction of a series of 'sectoral' regimes, where the focus is on the content of the produced treaty rules, does not completely do away with the general regime of the VCLT. International lawyers speak of a partial separation from the general regime and highlight the interrelation between the general and the sectoral.<sup>96</sup> Consequently, the two opposites of the discursive juxtaposition (process/content) prove themselves to be dependent on each other and each include the other in their identity: the process cannot be perceived without recourse to the content, and the content inescapably refers back to the process.

This particular tension between process and content is directly related to the previous opposing schemes. As already observed, the formalism of the treaty process creates a feeling of objectivization when we deal with the treaty concept and treaty law in their traditional forms. The *negotium*, on the contrary, is recast in subjective colours: it can take different shapes and is based on subjective values which can lead to a manipulation of international law. But this is not necessarily so. Focus on the *instrumentum* is associated with the contractual paradigm and overemphasizes the consensual element in the law of treaties.<sup>97</sup> Reference to substance, on the other hand, stresses communitarian or constitutional values. One can see through this prism the transformational nature of this tension.

Ultimately, through the constant oscillation and transformation of the theoretical constructions on the law of treaties and the hyperbolic expression of the extremes which renders 'natural' their exclusion,<sup>98</sup> international legal scholarship on the topic manages 'to present itself as both concrete-scientific and autonomously constraining'.<sup>99</sup> This ambivalence helps to accommodate various discursive strategies on the treaty concept and the law of treaties, but '[t]he result is a discourse of evasion which constantly combines that which it cannot differentiate and emphasizes that which it can express only by hyperbolic exclusion'.<sup>100</sup>

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<sup>95</sup> See, for instance, Article 60§5 of the 1969 Vienna Convention and Article 11 of the 1978 Vienna Convention.

<sup>96</sup> Cançado Trindade, A.A., 'International Law for Humankind', 77; Fitzmaurice, M., 'International Environmental Law as a Special Field', 25 *NYIL* (1994) 181–226, 194.

<sup>97</sup> Brölmann, 'Law-Making Treaties', 384.

<sup>98</sup> Kennedy, 'The Sources', 95.

<sup>99</sup> Koskenniemi, 'Introduction', xv.

<sup>100</sup> Kennedy, 'The Sources', 95.

### III. CRITIQUE OF THE HISTORICAL RECONSTRUCTION OF (INTERNATIONAL) LAW

A further aspect of critical analysis merits some attention.<sup>101</sup> One of the basic themes of critical approaches to law has been the idea that in legal discourse the past is misrepresented in order to give to the present a more positive image, and to the renewal thesis a feeling of a real break from it. The critique here is twofold. On the one hand, it stresses how firmly international legal discourse is based on the way in which the past is read.<sup>102</sup> On the other, the use of a historical narrative constitutes both a merely epidermic examination of past views and legal constructions and a strategy of manipulation and distortion of them.<sup>103</sup> This observation draws heavily from Nietzsche's and Foucault's attacks on what has been called the 'philosophical and historical defects of historicism'.<sup>104</sup> According to this critique, history cannot be described in terms of a linear development. The triptych of origin, descent and emergence that permeates the historical narrative gives the two scholars' analyses a different twist, where disparity and chance, derisiveness and irony, the vicissitudes of history and the focus on the hidden motives, sentiments and linkages form an equally important set of elements that needs to be taken into account in this narrative. More importantly, this school of thought not only criticizes the way the past is invoked and reconstructed, but also highlights the fact that the past is reread and rewritten for ideological or other purposes.<sup>105</sup>

In international law the ideological biases behind a discourse of renewal are substantiated through a claim that each new theory/view creates in the image of the past its alter ego, which is then rejected. The sole purpose of this strategy is to present the shift towards the new ideas

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<sup>101</sup> For both aspects of deconstruction analysed in this chapter, see Venzke, I., 'Post-Modern Perspectives on Orthodox Positivism', in Kammerhofer, J., d'Aspremont, J. (eds), *International Legal Positivism in a Post-Modern World*, Cambridge, Cambridge University Press, 2014, 182–210, 195.

<sup>102</sup> This backward-looking tendency of international law has earned it the accusation of being a conservative force; see Schachter, O., 'The Nature and Process of Legal Development in International Society', in Macdonald/Johnston, *The Structure*, 745–807, 753.

<sup>103</sup> Kennedy, D., 'The Disciplines of International Law and Policy', 12 *LJIL* (1999) 9–133, 83 *et seq.*

<sup>104</sup> Douzinas, C., *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, London, Taylor & Francis, 2007, 26.

<sup>105</sup> Craven, M., *The Decolonization of International Law: State Succession and the Law of Treaties*, Oxford, Oxford University Press, 2007, 18.

as the evident path to be followed.<sup>106</sup> As one of the sharpest observers of this attitude has put it, '[i]n the efforts of renewal, the old is presented as artificial and fragmented, while the new appears natural and universal'.<sup>107</sup> The look to the past constitutes an element of legitimization or delegitimization of specific ideas and concepts.<sup>108</sup> But none of the new representations of the reality are more truthful than the old or competing ones. In addition to this, any reconstruction of the other or old ones using our own/current conceptual tools is probably flawed.<sup>109</sup> The result is a biased representation, put forward as 'the way things are'.<sup>110</sup>

But how do these thoughts relate to the topic of this study? Within the framework of oscillation between antithetical poles in the legal discourse on the treaty concept and the law of treaties that we have explored above, the discourse of renewal should appear as moving forward from autonomy to community.<sup>111</sup> This is primarily achieved through the use of a renewal narrative, where the old is linked to individualism, intention and formalism, and the new is presented as communitarian, flexible and substance-oriented.<sup>112</sup> It is through successive doctrinal constructions employing the above technique that the treaty concept and the relevant law-of-treaties rules have been shaped and ultimately codified in the Vienna regime. And it is through a similar reconstruction of the past and demonstration of the present and the future that we find ourselves confronted with regard to the contemporary challenges to the consensual paradigm in the law of treaties.<sup>113</sup> But, in reality, the waves of doctrinal

<sup>106</sup> Gordon, R., 'Historicism in Legal Studies', 90 *Yale Law Journal* (1981) 1017–87, 1055.

<sup>107</sup> Koskenniemi, M., 'Miserable Comforters: International Relations as New Natural Law', 15 *EJIR* (2009) 395–422, 396.

<sup>108</sup> Collins, R., 'Classical Legal Positivism in International Law Revisited', in Kammerhofer/d'Aspremont, *International*, 23–49, 28–9.

<sup>109</sup> Kennedy, 'The Disciplines', 92; Berman, N., 'In the Wake of Empire', 14 *American University International Law Review* (1998–99) 1521–54, *passim*.

<sup>110</sup> Boyle, J., 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', 26 *HILJ* (1985) 327–60, 329.

<sup>111</sup> Kennedy, 'International Law and the Nineteenth Century', 387; Combacau, J., 'Les réactions de la doctrine à la création du droit par les juges en droit international public', in *La réaction de la doctrine à la création du droit par les juges. Association Henri Capitant des amis de la culture juridique française*, Paris, Economica, 1982, 392–405, 402.

<sup>112</sup> Kennedy, D., 'A New Stream of International Law Scholarship', 7 *Wisconsin International Law Journal* (1988) 1–49, 38.

<sup>113</sup> Koskenniemi, 'Miserable Comforters', 406–7.

renewal are no more than a new vocabulary;<sup>114</sup> they do not radically depart from the existing doctrinal tradition.<sup>115</sup>

The misrepresentation of the past (that is, traditional types of treaties, old sources of international law, old constructions of the consensualist paradigm) is illustrated at each and every step of this study and constitutes the basis for shedding light on the bias of the discourse of renewal. In Chapter 2, the concept of treaty is reconstructed through a constant juxtaposition between paradigms of tradition and renewal in the fields of treaty classification, the sources doctrine and the essential traits of the treaty instrument. In the subsequent chapters, the misrepresentation of the past takes the form of an assault against the Vienna rules. In this way, the claims of renewal are challenged so that a richer understanding of the workings of treaties is reached.

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<sup>114</sup> Koskeniemi, M., 'The Politics of International Law – 20 Years Later', 20 *EJIL* (2009) 7–19, 11.

<sup>115</sup> Kennedy, 'Legal Formalism', 8635; Kennedy, D., 'When Renewal Repeats: Thinking against the Box', 32 *NYUJILP* (2000) 335–500, 340–47 and 400–401.