The Obligation not to Defeat the Object and Purpose of a Treaty in Light of Article 18 of the Vienna Convention on the Law of Treaties and New Developments

By

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DECLARATION

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ABSTRACT

Article 18 of the Vienna Convention on the Law of Treaties (VCLT) imposes an obligation on States not to defeat the object and purpose of a treaty prior to its entry into force when: (a) it has signed the treaty or; (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. It is the only rule of positive international law which imposes certain restraints on the conduct of States in the procedure of becoming parties to treaties. However, the contours of the provision are blurred. Within the current international legal discourse, there are several high-profile developments in the law of treaties which are capable of raising questions under Article 18 VCLT and which have not previously been critically addressed by scholars, practitioners or international courts or tribunals.

Through a combination of doctrinal and qualitative empirical legal research, this thesis provides a comprehensive analysis of the content and status of the obligations of States in the process of becoming party to a treaty under Article 18 VCLT. In undertaking this analysis, the thesis addresses the following sub-questions: a) what is the legal origin of Article 18 VCLT; b) what is the notion of the object and purpose of a treaty; c) how does Article 18 VCLT apply in relation to the notion of the 'object and purpose' of a treaty; d) what is the threshold of 'defeating' the object and purpose of a treaty; e) what is the temporal scope of Article 18 VCLT; f) what is the legal nature of Article 18 VCLT and what are the consequences of a violation of this provision; g) how is Article 18 VCLT positioned within the framework of typologies of treaties; and h) is there a potential 'reversal' of Article 18 when a State has deposited its instrument of withdrawal from a treaty? To this end, the thesis addresses core issues of treaty practice and advances theoretical and practical ramifications of relevance for scholars, international judges, practitioners, and legal advisors of foreign ministries of States.

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ABBREVIATIONS

ABGB	*Allgemeines bürgerliches Gesetzbuch*
ACHR	American Convention on Human Rights
AG	Advocate General
AJIL	American Journal of International Law
AO	Advisory Opinion
ARIEL	Austrian Review of International and European Law
ARSIWA	ILC Articles on Responsibility of States for Internationally Wrongful Acts
Art	Article
BGB	*Bürgerliches Gesetzbuch*
BIT	Bilateral investment treaty
BVerfGE	Bundesverfassungsgerichts
BWMC	International Convention for the Control and Management of Ships' Ballast Water and Sediments
BYIL	British Yearbook of International Law
Cambridge LJ	Cambridge Law Journal
CanYBIL	Canadian Yearbook of International Law
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women

CFI	Court of First Instance
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COPs	Conferences of the Parties
CRC	Convention on the Rights of the Child
CTBT	Comprehensive Nuclear Test Ban Treaty
CUP	Cambridge University Press
CWC	Chemical Weapons Convention
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA Agreement	Agreement on the European Economic Area
EIA	Environmental Impact Assessment
EJIL	European Journal of International Law
EPIL	Encyclopaedia of Public International Law
ETS	European Treaty Series
EU	European Union
EWHC	England and Wales High Court
GATT	General Agreement on Tariffs and Trade
GC	Grand Chamber
GYIL	German Yearbook of International Law

HILJ	Harvard International Law Journal
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
Ibid	ibidem
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICLQ	International Community Law Review
ICRW	International Convention for the Regulation of Whaling
ICSID	International Centre for the Settlement of Investment Disputes
IEL	International Environmental Law
ILA	International Law Association
ILC	International Law Commission
ILDC	International law in Domestic Courts
ILM	International Legal Material
ILO	International Labour Organisation
IMO	International Maritime Organisation
Int'l & Comp LQ	International and Comparative Law Quarterly

IO	International Organisation
ITLOS	International Tribunal for the Law of the Sea
IUU fishing	Illegal, Unreported and Unregulated Fishing
IWC	International Whaling Commission
LJIL	Leiden Journal of International Law
MARPOL	International Convention for the Prevention of Pollution from Ships
MEAs	Multilateral Environmental Agreements
MOPs	Meetings of the Parties
MPEPIL	Max Planck Encyclopaedias of International Law
NILR	Netherlands International Law Review
NordicJIL	Nordic Journal of International Law
NYIL	Netherlands Yearbook of International Law
OAS	Organisation of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
OUP	Oxford University Press
Para	paragraph
PCA	Permanent Court of Arbitration

PCIJ	Permanent Court of International Justice
RBDI	Revue Belge De Droit International
RdC	Recueil des Cours de l'Académie de Droit International de la Haye
Res	Resolution
SOLAS	International Convention for the Safety of Life at Sea
SRFC	Sub-Regional Fisheries Commission
TEU	Treaty of the European Union
TFTP Interim Agreement	Agreement between the EU and the USS on the Processing and Transfer of Financial Messaging Data from the EU to the US for Purposes of the Terrorist Finance Tracking Program
TPP	Trans-Pacific Partnership Agreement
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States

VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations
WHO	World Health Organisation
WTO	World Trade Organisation
YIEL	Yearbook of International Environmental Law
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

International Convention for the Control and Management of Ships' Ballast Water and Sediments (adopted 13 February 2004, entered into force 8 September 2017) 55544 UNTS

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Regional

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123

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Allgemeines bürgerliches Gesetzbuch

Germany
Bürgerliches Gesetzbuch

France
Code Civil

Italy
Codice Civile

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1. INTRODUCTION

1.1 Background

Treaties nowadays predominate the international legal landscape and play a prevalent role in the construction of international law and the governance of international affairs. Yet, the conclusion and bringing into force of treaties is an exceedingly challenging task for States. Although the treaties binding on States emanate from their own will,[1] a State's decision to become a party to a treaty generally entail a number of complex compromises.[2] In fact, by concluding and joining treaties, States must come to terms on matters which may be politically sensitive and economically draining. Poor treaty practice during this treaty making procedure may have serious consequences for the international community as a whole,[3] especially in a time which has witnessed several incidents exhibiting distrust in global governance.[4]

Imagine for instance if a State has demonstrated its commitment to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[5] by signing and expressing its consent to be bound by the treaty, but before the treaty enters into force with respect to that State, it allows the continued overfishing of and trade in endangered species. Such conduct would have devastating effects for biodiversity, cause mistrust in the goodwill amongst States and jeopardise the stability of their international relations. To avoid this paradox, there is a provision in place under the Vienna Convention on the Law of Treaties

[1] *S.S. Lotus* (*France v Turkey*) (1927) PCIJ Ser A, No 10 at 8.
[2] E. W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59(1) BYIL 75, 77-78.
[3] Including States, international organisations, individuals, non-governmental organisations, and businesses.
[4] Examples include, to mention a few, the United Kingdom's withdrawal from the European Union (EU), the United States' withdrawal from and re-accession to the Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 54113 UNTS 3156, the United States' withdrawal from the World Health Organisation (WHO), Turkey's withdrawal from the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210, South Africa's purported withdrawal from the Rome Statute (Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 91, and Japan's withdrawal from the International Whaling Commission (IWC).
[5] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

(VCLT)[6] which seeks to ensure that States do not engage in conduct which defeats the object and purpose of a treaty pending its entry into force.[7] Article 18 VCLT reads as follows:[8]

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
> (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Within the current international legal discourse, there are further several high profile developments in the law of treaties which are capable of raising questions under Article 18 VCLT and which have not yet been comprehensively addressed by legal scholars or practitioners.[9] This thesis therefore offers a valuable contribution by analysing those developments and exemplifying how State practice and recent developments may impact the obligation under Article 18 within the broader framework of the law of treaties and international law. It analyses what implications those developments have for both the theory and practice of States in their international legal affairs,[10] and adds new dimensions to proper treaty practice under Article 18 VCLT by relying on a variety of examples from recent State practice on pertinent issues of international law.

The first situation pertains to the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT).[11] The CTBT, as of 2022, has 183 contracting or signatory States but is yet to enter into force.[12] What are the obligations of those signatory or contracting States pending the entry into force of the CTBT? As the treaty is not yet binding and effective, States do not have to comply with the individual provisions of the treaty. However, could a signatory or contracting State for instance conduct a nuclear weapon test explosion pending the entry into force of the treaty, or would

[6] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[7] This duty can be posed analogously to the duty to comply with provisional measures in order not to prejudice the final judgment.
[8] For an overview, see Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 244.
[9] In scholarship, hypothetical scenarios are frequently relied upon when discussing Article 18 VCLT, see further chapter 4 of this thesis.
[10] The contribution and originality of this thesis is further explained in greater detail under section 1.3 of this chapter.
[11] Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996) (CTBT) (yet to enter into force).
[12] It should be mentioned that it is doubtful that the treaty will ever attain the required number of ratifications in order to enter into force.

such conduct defeat the object and purpose of the CTBT, in violation of Article 18 VCLT? If such conduct does amount to a breach of Article 18, what consequences would the violation entail under international law?

A second example is China's conduct in relation to the International Covenant on Civil and Political Rights (ICCPR).[13] China signed the ICCPR on 5 October 1998 but is yet to ratify the treaty. As a party to the VCLT and signatory to the ICCPR, China is bound by Article 18 VCLT to refrain from conduct which defeat the object and purpose of the ICCPR. However, China's human rights records are facing growing international scrutiny. Since the 1989 Tiananmen Massacre, there are several instances evidencing its continued suppression on civil and political rights. Examples include measures to severely restrict the MeToo movement,[14] the revelation of the internment camps for the Uyghur Muslim population in Xinjiang,[15] arbitrary deprivation of liberty,[16] and forced disappearance of lawyers and civil rights defenders.[17] This conduct has triggered international outcry and raises questions of whether China is complying with its obligations under Article 18 VCLT or whether it is in fact defeating the object and purpose of the ICCPR.

A third example concerns States' conduct in relation to certain pending environmental treaties, for instance when the Doha Amendment was pending to the Kyoto Protocol.[18] The Kyoto Protocol commits industrialised countries to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. In its Annex B, the Kyoto Protocol sets binding emission reduction targets for 37 industrialised countries and the EU over the five-year

[13] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[14] See Margaret K. Lewis, 'Why China Should Unsign the International Covenant on Civil and Political Rights' (2020) 53(1) Vanderbilt Law Review 131.
[15] In August 2022, the Office of the UN High Commissioner for Human Rights (OHCHR) published a report on what China refers to as the Xinjiang Uyghur Autonomous Region (XUAR). The OHCHR concluded that 'serious human rights violations' against the Uyghur and 'other predominantly Muslim communities' have been committed. The report is available here: https://news.un.org/en/story/2022/08/1125932 (last accessed 31 January 2023).
[16] See Letter by the UN High Commissioner for Human Rights to the Chinese Foreign Minister, 29 April 2019, available at https://lib.ohchr.org/HRBodies/UPR/Documents/Session31/CN/LetterChina.pdf (last accessed 31 January 2023).
[17] See https://www.hrw.org/news/2017/07/07/china-709-anniversarylegal-crackdown-continues (last accessed 19 January 2023). See further Eva Pils, *Human Rights in China: A Social Practice in the Shadows of Authoritarianism* (Polity 2017) and Hualing Fu and Han Zhu, 'After the July 9 (709) Crackdown: The Future of Human Rights Lawyering' (2018) 41 Fordham Int'l L.J. 1135.
[18] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

period 2008–2012 (the first commitment period). The Doha Amendment to the Kyoto Protocol was adopted for Kyoto Protocol Annex B parties for a second commitment period, 2013-2020.

However, the entry into force of the Doha Amendment was a slow process. Only as of 28 October 2020 had 147 States deposited their instrument of consent to be bound, whereby the threshold of 144 instruments of acceptance for entry into force was achieved. The Amendment finally entered into force on 31 December 2020. In order to ensure that the object and purpose of the Doha Amendment was still intact at the time of its entry into force, what where the obligations of States which had deposited their instruments of acceptance prior to 31 December 2020 under Article 18 VCLT?

The fourth and last example relates to the Paris Agreement, and in particular the practice of the United States (US) in this regard. Whereas President Trump's withdrawal took effect on 4 November 2020, one of President Biden's first executive orders was to re-join the agreement. On 20 January 2021, President Biden signed the instrument expressing the US' consent to be bound by the Agreement and deposited it with the United Nations (UN) Secretary-General. In accordance with Article 21(1)(3) of the Paris Agreement, it entered into force on the thirtieth day after the date of deposit. Thus, only during a short period of time – 4 November 2020 to 20 January 2021 – did the US not have any legal obligations in relation to the Paris Agreement.[19] From 20 January 2021 and 30 days onwards, the legal obligations derived from Article 18 VCLT, whereas the obligations subsequent to this date and prior to 4 November 2020 derived from the treaty itself.

However, what would the consequences for the US have been if President Trump notified the other States parties of the US' withdrawal, and subsequently put in place a practice or policy which clearly defeated the object and purpose of the Paris Agreement? Furthermore, what if, later on, there is a change in the sitting government and the new President – Biden – once again signs and expresses the US' consent to be bound by the treaty? Would Article 18 automatically have been violated by virtue of the former President's practice so that the new President would have had to eradicate such a policy prior to the deposit of the new signature and/or instrument of consent to be bound? In other words, can Article 18 – despite hinging on the negative

[19] In this regard, it might also be of interest to consider the legal implications of treaty signature after a State has effectively withdrawn from the treaty. A signature can never be physically removed (see further chapter 8), and the withdrawing State's signature will still be listed. What are the effects of such a signature? Can it under any circumstances impose obligations on States? The question is further examined below, but the answer seems to be that a State which has effectively withdrawn from a treaty has also made its intention clear not to become party to the treaty under Article 18(a) VCLT, rendering the interim obligation inapplicable.

connotation of '... to *refrain* from acts which would defeat…'[20] – under any circumstances require States to take certain positive action?

As previously mentioned, these scenarios are illustrative of pioneering developments in the law of treaties whose relevance for the obligations of States in the treaty-making procedure has not been comprehensively examined in scholarship or addressed by international courts or tribunals. The application of Article 18 VCLT in relation to these situations is not obvious or clear-cut. As can be understood from the wording of the provision, the obligation not to defeat the object and purpose of a pending treaty is of an interim nature. The underlying principle is not that signed treaties are binding, but rather that 'fundamental fairness requires a State to refrain from undermining an agreement on which another State is relying'.[21]

Hence, whereas treaties do generally not have any legal effect prior to their entry into force,[22] Article 18 entails certain effects for States that have signed a treaty or expressed their consent to be bound by a treaty by stressing that such States 'have placed certain limitations upon their freedom of action'.[23] In a similar vein, it should be emphasised that the principle of good faith is not only relevant for the performance of treaty obligations as codified in Article 26 VCLT,[24] but permeates the whole law of treaties – ranging from negotiations, conclusion, interpretation, breach and termination – and inspired the adoption of Article 18 VCLT.[25] That said, the notion of good faith remains elusive and it is not well-established what precise role it plays in relation to Article 18 VCLT.[26]

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[20] See Article 18 VCLT (emphasis added).

[21] Robert F. Turner, 'Legal Implications of Deferring Ratification of SALT' (1981) 21 VaJInt'l L 747, 777. See also SB Crandall, *Treaties: Their Making and Enforcement* (2nd edn, John Byrne & Company 1916) 343; commentary to Draft Article 3, J.L. Brierly, *Second Report: Revised Articles of the Draft Convention* (1951)YILC, Vol II, UN Doc. A/CN.4/SER.A/1951/Add.1; Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263, 267-68, 284; *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (1929) PCIJ Series A, No 23 at p 20; *North Sea Continental Shelf case* (Federal Republic of Germany/Netherlands) ICJ Rep 1969 p 3, at 25-26.

[22] With the exception of the treaty's final clauses and treaties which are applied on a provisional basis, see Brierly (n 21) 70, 73; Tariq Hassan, 'Good Faith in Treaty Formation' (1981) 21(3) VaJIntlL 443; Paul Gragl and Malgosia Fitzmaurice, 'The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699, 702.

[23] Arnold McNair, *Law of Treaties* (OUP 1961) 199. See further Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2016) 115; Werner Morvay, 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force: Commentaries on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 27 ZaöRV 451; Rogoff (n 16) 284.

[24] 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

[25] As such, the principle of good faith applies during the phase of creating rights and obligations for States as well, see Kolb (n 23) 34; Tariq Hassan, 'The Obligation to Negotiate in Good Faith: A Genesis of a General Principle of Law' S.J.D Thesis (unpublished) written for the Harvard Law School (1979) 1-2.

[26] The principle of good faith, whilst being one of the 'basic principles governing the creation and performance of legal obligation', is 'not in itself a source of obligation where none would otherwise exist', see *Border and Transborder Armed Actions case* (*Nicaragua v Honduras*) (Jurisdiction and Admissibility) ICJ Rep 1988 p 69,

Furthermore, by incorporating the word 'defeat', Article 18 sets a high threshold,[27] and does in and of itself not require a State to comply with the substantive provisions of a pending treaty.[28] Article 18 must accordingly not be confused with situations in which signatory States, or States that have expressed their consent to be bound by a treaty not yet in force, are obliged to respect certain provisions of the relevant treaty,[29] or even the object and purpose of certain treaty provisions.[30] Instead, Article 18 protects the notion that, from the date of signature or expression of consent to be bound, a State may not, 'without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed' at the time the treaty was signed or consented to.[31]

This is not least important given the fact that a multi-stage treaty making process can be a lengthy procedure which requires the investment and involvement of considerable resources.[32] In such circumstances, Article 18 sets out certain obligations for those States that have committed themselves in a formal way to a treaty but are not yet bound by it.[33] Thus, the provision seeks to strike a balanced compromise between the commitment to honour the act of signing and/or expressing consent to be bound by the treaty and the possibility for States to review the treaty at the domestic level before it becomes binding upon them.[34]

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para 94. However, the principle of good faith can add precision to, concretise, and define a vague conventional or customary rule such as Article 18, see Kolb (n 23) 6-8, 30.

[27] Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 29.

[28] Rogoff (n 21) 267-68; Mark E. Villiger, *1969 Commentary on the Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 248; Curtis A Bradley, 'Treaty Signature' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 208. This is not a controversial note because otherwise the actual act of ratification would serve little, if any, purpose.

[29] For instance, as would be the case if a treaty or part of a treaty is applied provisionally under Article 25 VCLT. See in this regard Andrew Michie, 'The Provisional Application of Treaties in South African Law and Practice' (2005) 30(1) South African Yearbook of International Law 6; Second Report on the Provisional Application of Treaties by Juan Manuel Gómez-Robledo, Special Rapporteur, UN Doc A/CN.4/675 para 65.

[30] Pointed out by Jan Klabbers, 'How to Defeat the Object and Purpose of a Treaty: Toward Manifest intent' (2001) 34 VandJTransnat'l 283; and Anneliese Quast Mertsch, 'Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 313. For an opposite view, see Dörr 'Article 18' (n 8) 256; Villiger (n 28) 248-49.

[31] Crandall (n 21) 344.

[32] A prime example being the lengthy process of the attempt to codify the law of the sea, leading to the adoption in 1982 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 14 November 1994) 1833 UNTS 3. For multilateral treaties, it is not uncommon that the treaty will enter into force upon an explicitly stipulated number of ratifying States, and/or after a certain amount of time has elapsed. This can take a significant period of time.

[33] Dörr, 'Article 18' (n 8) 243. See also Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moïse Mbengue, 'Article 18' in Oliver Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol I (OUP 2011) 370.

[34] See Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, MUP 1984) 43; Boisson de Chazournes, La Rosa and Moïse Mbengue (n 33) 392; Rogoff (n 21) 271; Paul V. McDade, 'The Interim Obligation Between Signature and Ratification of a Treaty' (1985) NILR 5, 11; Dörr, 'Article 18' (n 8) 244-45.

However, as will be seen below, the drafting history of Article 18 VCLT was not a straightforward process and the members of the International Law Commission (ILC) found it rather difficult to agree on a common approach to the provision's formulation. One of the most debated issues concerned the legal character of the interim obligation: whereas the first Special Rapporteur J.L. Brierly considered the obligation to be of a moral rather than legal character,[35] the successive Special Rapporteurs Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, albeit from slightly different viewpoints, adopted a contrary approach by emphasising that the interim obligation was a legal obligation under international law.[36]

Today, the legal nature of Article 18 – being either a legal or moral – is still not clear-cut and depending on its legal classification under international law, the consequences of a breach will differ.[37] If, on the one hand, Article 18 imposes a legal obligation under international law, a breach would constitute an internationally wrongful act and entail the international responsibility of the wrongdoing State.[38] If, on the other hand, Article 18 is viewed as a mere moral obligation, the international responsibility of the State will not be triggered by a transgression of the provision but can nevertheless involve significant political and/or economic repercussions.[39] This raises yet further difficulties of *locus standi*; who can invoke the responsibility of the wrongdoing State?[40]

Other controversial aspects relating to Article 18 VCLT include its ambiguously phrased language, its precise scope and content,[41] the uncertainties relating to its temporal aspects, how

[35] Brierly (n 21) 70, 73.
[36] See Special Rapporteur Sir Hersch Lauterpacht, Report of the Law of Treaties, YILC, Vol II (1953) UN Doc AICN.4/Ser.A/ 1953/Add.1 at 108; Sir Gerald Fitzmaurice, *Law of Treaties* (1956) YILC, Vol II, UN Doc AICN.4/SER.A/1956/Add.1 104, 113; Sir Humphrey Waldock, *First Report on the Law of Treaties* (1962)YILC, Vol II, UN Doc AICN.4JSER.A/I962Add.1, 27, 46. It should nevertheless be emphasised that Special Rapporteur Fitzmaurice adopted a very cautious approach to the interim obligation by phrasing it in qualified terminology.
[37] See further below.
[38] See Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II (Part Two), Supplement No. 10 (A/56/10), chp.IV.E.1.
[39] As can, of course, a violation of Article 18 VCLT as a legal obligation under international law.
[40] Would this be other States parties to the treaty (if in force), contracting States, and/or signatory States?
[41] Note that the thesis does not address issues relating to the principle *pacta tertiis nec nocent nec prosunt,* e.g., rights or obligations upon third States to a treaty. For a description of said maxim, see for instance Aron X. Fellmeth and Maurice Horwits, *Guide to Latin in International Law* (OUP 2009) at 212, 252. As early as in the 1926 *Certain German Interests in Polish Upper Silesia* case, the PCIJ unequivocally stated that 'a treaty only creates as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States', see *Germany v Poland* (1926) PCIJ Series A, No 7 at p 29. Although it has been maintained that third party rights and obligations involve a wide range of treaty issues, including a State's obligation not to frustrate the object and purpose of a treaty prior to its entry into force, Article 18 VCLT is an autonomous obligation under international law and should not be confused with the very few existing exceptions to the principle *pacta tertiis*. Thus, the *pacta tertiis* rule and the interim obligation under Article 18 VCLT continue to form two distinct legal issues, not least because *pacta tertiis* concerns the rights and obligations of third States *vis-á-vis* States parties to a treaty in force. The VCLT regime defines a third State as 'a State not a party to the

to identify the object and purpose of a treaty, the threshold set by the word 'defeat', and how it is positioned within the realm of typologies of treaties.[42] With respect to the latter, it has been argued in scholarship that the drafters of the VCLT seem to have been 'solely' inspired by and based their thinking upon contractual thinking.[43] Whilst there is nothing in the explicit wording that would preclude the application of Article 18 to law-making treaties, there is, however, concern that in relation to such treaties, certain State conduct that would be grossly incompatible with the spirit of the treaty and accordingly demonstrate the need for the treaty would not *ipso facto* defeat its object and purpose and lead to a violation of Article 18 VCLT. Klabbers, for instance, uses the example of a State that has signed or ratified an anti-torture convention pending its entry into force:

> the citizens of a state that has signed or ratified the anti-torture convention may legitimately expect to remain free from torture pending the convention's entry into force. One cannot seriously maintain, however, that a single act of torture defeats the object and purpose of the treaty concerned. In fact, if anything, such an act … serves only to underline the importance of the convention.[44]

This necessitates an analysis of whether a certain type of treaty may warrant an 'adjusted' application of Article 18 in order for the provision to preserve its *effet utile*,[45] akin to the plea which calls for a special legal regime of reservations to human rights treaties given the unique character of such treaties.[46]

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treaty' (Article 2(1)(h)). Thus, within the meaning of the VCLT, a 'third State' is not only 'a State which is wholly stranger to the treaty but also a State which participated in the drafting and of the treaty but has yet not signed it', see Alexander Proelß, 'The Personal Dimension: Challenges to the *pacta tertiis* rule' in Christian Tams, Antonios Tzanakopoulos and Andreas Zimmerman (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014) 223 (emphasis added). See further Michael Waibel, 'The Principle of Privity' in Bowman and Kritsiotis (n 30); David J Bederman, 'Third Party Rights and Obligations in Treaties' in Hollis (n 28) 329.

[42] See Morvay (n 23) 456; Rogoff (n 21) 263; Joni S Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo Wash J Int'l L & Econ 71, 73; Klabbers (n 30); Villiger (n 28) 247; de Chazournes, La Rosa and Moïse Mbengue (n 33) 383; Catherine Brolmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 NordicJIL 383, 396; Bradley (n 27) 215; Davis S Jonas and Thomas Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 VandJTransnat'l L 565, 568; Palchetti (n 27); Dörr, 'Article 18' (n 8) 245, 258; Gragl and Fitzmaurice (n 22) 699.

[43] See Charme (n 42) 99; Klabbers (n 30) 287, 290; *Summary Records of the 788th Meeting*, Extract from the YILC (1965) Vol I, UN Doc. A/CN. 4/SR788, Statement by Mr Ago at para 61 and Statement by Mr Tunkin at para 67. See also Rogoff (n 21) 263; de Chazournes, La Rosa and Moïse Mbengue (n 33) 370; Bradley (n 28) 215.

[44] Klabbers (n 30) 293.

[45] We will, however, come back to the particular example of the prohibition of torture and its potential implications as a norm *ius cogens*, hence already binding in a non-derogatory fashion under the general *corpus* of international law.

[46] See e.g., *Reservations to the Convention on Genocide* (Advisory Opinion) ICJ Rep 1951, p 15. For a general overview, see also Brolmann (n 42); *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Articles 74-75) Inter-American Court of Human Rights (Advisory Opinion) (1982) para 29; Christine M. Chinkin, 'Human Rights' in Bowman and Kritsiotis (n 30) 511.

1.2 Research Question

Article 18 VCLT has at several occasions been criticised for establishing an opaque and enigmatic rule and the underlying misconceptions and outstanding uncertainties relating to the provision are multiple.[47] This thesis therefore provides a comprehensive analysis of the content and status of the obligations of States in the process of becoming party to a treaty under Article 18 of the Vienna Convention on the law of Treaties. In undertaking this analysis, the thesis addresses the following sub-questions:

a) what is the legal origin of Article 18 VCLT;
b) what is the notion of the object and purpose of a treaty;
c) how does Article 18 VCLT apply in relation to the notion of the 'object and purpose' of a treaty;
d) what is the threshold of 'defeating' the object and purpose of a treaty under Article 18 VCLT;
e) what is the temporal scope of Article 18 VCLT;
f) what is the legal nature of Article 18 VCLT and what are the consequences of a violation of this provision;
g) how is Article 18 VCLT positioned within the framework of typologies of treaties; and
h) is there a potential 'reversal' of Article 18 when a State has deposited its instrument of withdrawal from a treaty?

Those questions provide an orderly analysis of particular elements of Article 18 VCLT from past to present and contribute to defining the precise content of the obligations of States in the process of becoming party to treaties in a systematic and holistic manner.

1.3 Contribution

This thesis makes an important and original contribution to international law scholarship and the practice of States in four different ways. First, the thesis fills gaps in existing scholarship.[48] Despite the underlying uncertainties and controversies relating to Article 18, it has thus far only been the subject of limited academic research and much of current scholarship is today, in light of recent developments, out of date.[49] Furthermore, although the most recent authoritative texts offer well-rounded overviews and introductions to the interim obligation under Article 18 VCLT, they are typically written in the form of brief commentaries and do as such lack

[47] See above.
[48] It should be noted that no comprehensive study has been written on the interim obligation.
[49] See e.g., Turner (n 21); Rogoff (n 21); Hassan (n 22); Morvay (n 23); Palchetti (n 27); Klabbers (n 30); Sinclair (n 34); Charme (n 42); Jonas and Saunders (n 42).

comprehensive analytical depth.[50] Those texts also put heavy reliance on the *travaux préparatoires*, are primarily descriptive and conventional, and do not venture to consider the application of Article 18 in relation to contended and contemporary issues in the law of treaties.[51]

Secondly, this thesis elucidates how States can enhance their reliance on Article 18 VCLT in practice and how its function and purpose can be further clarified and reinforced in international relations. As noted above, academic scholarship analysing the theoretical and practical parameters of Article 18 is sparse, diplomatic practice on the provision is inconclusive and inconsistent, and the provision is rarely relied on in legal proceedings. In the few instances it has been invoked by the parties to a dispute or discussed by a court or tribunal, the argumentation or analysis is often underpinned by certain misconceptions.[52] Accordingly, the contours of the provision remain blurred.[53] This may inhibit States and/or their representatives to invoke and rely on Article 18 in their international legal affairs with other States. Hence, the important purpose of the provision to ensure that the ultimate objective of a pending treaty is still intact at the time of its entry into force risks not being utilised in practice due to the fact that there is no coherent and holistic understanding of the scope and content of Article 18.[54]

This thesis therefore subjects Article 18 VCLT and its opaqueness to further research and fills a gap in the law of treaties by clarifying questions that concern core aspects of treaty practice and explaining how legal practitioners can enhance the utilisation of this provision in practice. The lack of considered research in this area means that the thesis has the potential of offering a valuable resource to practitioners who advise and litigate on matters of treaty law, as well as

[50] See e.g., Dörr, 'Article 18' (n 8); de Chazournes, La Rosa and Moïse Mbengue (n 33). One exception is offered by Gragl and Fitzmaurice (n 22).
[51] Ibid.
[52] See e.g., *Tecmed SA v Mexico*, ICSID Case No ARB(AF)/00/02, Award of 29 May 2003.
[53] Rogoff notes that (although dating back to 1980) that there has rarely been any case-law undertaking a thorough examination of the obligation established under Article 18 VCLT, see Rogoff (n 21) 263. In 1991, Charme noted (discussing the application of Article 18 VCLT in judicial practice) that '[s]ince 1969, neither a court nor a tribunal has decided a case directly on point', see Charme (n 42) 83. As of today, there still seems to be an absence of any coherent or intricate evaluation of Article 18 VCLT by a court or tribunal, but the leading case dates back to *Megalidis v Turkey* decided in 1928, where an Turkish-Greek Mixed Arbitral Tribunal held that 'already with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation to do nothing which may injure the treaty by diminishing the importance of its clauses', see 8 *Recueil des Décisions des Tribunaux Mixtes* 386, partly translated in 4 *Annual Digest of Public International Law Cases* 395. Furthermore, Rogoff (n 21) at 288-89 states that the primary legal materials on which Article 18 is based are fragmentary and ambiguous, that 'no international tribunal has ever provided an analysis of the principle or given it more than the most cursory treatment', and that State practice is fragmentary and inconclusive.
[54] See e.g., de Chazournes, La Rosa and Moïse Mbengue (n 33) 370.

to judicial – both national and international – institutions who interpret and apply the law of treaties.[55]

Thirdly, in existing law of treaties scholarship, there is a lack of studies which incorporate empirical observations on States' policies or practises in relation to the interim obligation.[56] As mentioned above, in addition to being exclusively doctrinal, much of existing scholarship is primarily descriptive and conventional. Accordingly, there is a need for a more nuanced understanding of Article 18 VCLT which incorporates diplomatic practice of States and their policies in relation to the interim obligation. By relying on a combination of doctrinal and empirical studies, this thesis offers a more rich, innovative, and theoretically and practically enlightening evaluation of the interim obligation, taking into account recent high-profile developments in international law. The empirical data enrich the qualitative aspects of the thesis and add nuances to the doctrinal findings by allowing the thesis to examine factors that go beyond previous doctrinal work. To this end, the incorporation of doctrinal and empirical legal research provides a means to understand the interrelation between theory and practice on aspects relating to Article 18 within the broader framework of the law of treaties and international law.

Fourth and last, the thesis fulfils an important purpose of great relevance for the practice of States by clarifying a means which can contribute to preserve the stability of international relations and protect the efforts undertaken by States in concluding and joining treaties. The international community has recently witnessed several high-profile incidents which weaken and undermine the stability and effectiveness of international relations.[57] The law of treaties has in itself been said to form a special area of international law as it is in constant change and development.[58] In addition, because Article 18 VCLT lies at the interface between law and politics, the provision is prone to be effected by the competing forces of stability and change as States freely, at any time they believe suit, have the option to terminate any obligation imposed on them under Article 18 VCLT at the potential forfeiture of another signatory or

[55] Especially in relation to investment treaties, human rights treaties, and environmental law treaties.
[56] Exceptions include Quast Merch (n 30), analysing the provisional application of treaties.
[57] See examples mentioned above, i.e., the UK's withdrawal from the EU, the United States' withdrawal from and re-accession to the Paris Agreement, the United States' withdrawal from the WHO, Turkey's withdrawal from the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence, and South Africa's purported withdrawal from the Rome Statute.
[58] See for instance the introducing words by Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 1. Mention can also be given to the importance of the role played by treaties as a source of law, or source of obligations, of international law, see Sinclair (n 34) 1; Brolmann (n 42) 398.

contracting State, which, quite legitimately so, may rely on that State's signature or instrument of consent pending the entry into force of the relevant treaty at hand.[59]

However, by elaborating on the proper scope of Article 18, this thesis demonstrates that through, for instance, rapid changes in sitting governments, a State cannot change its international commitments by any means it sees fit. Accordingly, the thesis has a global importance on both theoretical and practical issues which pertain to a wide range of legal professionals, including legal advisers in foreign ministries and international organisations, legal practitioners, representatives of States, and national and international judges.

1.4 Methodology and Research Methods

This thesis offers a doctrinal and practical guide to Article 18 VCLT by employing a two-fold methodology; doctrinal and non-doctrinal reasearch methodologies.[60] First, the thesis employs a doctrinal legal research methodology by analysing the existing sources of international law as recognised in Article 38 of the Statute of the International Court of Justice (ICJ Statute), which include: i) international conventions; ii) international custom as evidence of a general practice accepted as law; iii) the general principles of law recognised by civilised nations; and iv) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[61]

It is committed to a systematic exposition of the complete regulatory framework of international law relevant for Article 18 VCLT and defines the state of the law, evaluates its adequacy and explains areas of difficulty and controversy. It does so through a temporal

[59] See the wording of Article 18(a) VCLT: '... until it shall have made its intention clear not to become a party to the treaty'. Likewise, as will be seen below, it seems to be the general approach that withdrawal of an instrument of ratification pending the entry into force of the treaty would have the same legal effect as withdrawal of signature, see Aust (n 58) 110. Typical examples include the 'unsigning' of the Rome Statute by the United States in 2002, see Press Statement, 'US Signs 100th Article 98 Agreement' (3 May 2005) available at http://www.state.gov/r/pa/prs/ps/2005/45573.htm (last accessed 15 July 2022). This is further analysed in chapter 5.

[60] Methodology in research is the systematic method to resolve a research problem through data collection using various techniques, providing an interpretation of data gathered and drawing conclusions on the basis of the research data. Legal research methodologies in particular aim at exploring a legal problem, describing legislation, explaining or interpreting legal issues and concepts, and addressing and exploring unsettled legal questions or issues. Research methods are the techniques employed to achieve those objectives, see Philip Langbroek and others, 'Methodology of Legal Research: Challenges and Opportunities' (2017) 13(3) Utrecht Law Review 1; Tom R Tyler, 'Methodology in Legal Research' (2017) 13(3) Utrecht Law Review 130; René Brouwer, 'The Study of Law as an Academic Discipline' (2017) 13(3) Utrecht Law Review 41. See also Sundhya Pahuja, 'Methodology: Writing about how we do research' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar 2021).

[61] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031 (ICJ Statute) Article 38(1).

continuity by initially tracing the origin of the provision, scrutinising the work of the drafters and the *travaux préparatoires*, and subsequently by delving into legal scholarship, State practice and case law that ranges from early stages to recent developments. As such, it explains a segment of law – Article 18 VCLT – as a part of broader regulatory framework – the law of treaties – and makes coherent how Article 18 VCLT fits within the normative system of international law.[62]

Notably, the thesis expounds the practical functioning and working of Article 18 within different spheres of international law by shedding light on some of the most illustrative and representative examples, most typically within human rights law, non-proliferation law, and environmental law. Those representative examples were chosen on the basis of the three main reasons: i) those are typical areas of international law and treaties in constant motion, having witnessed significant developments and key milestones in recent years; ii) those areas are categorical for being governed by multilateral treaties. Given that Article 18 VCLT is more likely to be of relevance to multilateral treaties,[63] it was logical for the thesis to turn its main focus to such treaties; and iii) multilateral treaties naturally have a higher number of participants. Some treaties discussed and exemplified have even reached close to global participation. This enabled the thesis to encompass an extensive geographical ambit and to capture cross-geographical nuances.

As mentioned above, there are few academic comprehensive and recent publications on Article 18 VCLT. Case-law – especially international – relating to the provision is very sparse, and State practice fragmentary and inconclusive. By merely employing a doctrinal methodology and scrutinising the sparse existing law and scholarship on Article 18 VCLT, the thesis would not have been able to answer the research question(s) in a sufficiently comprehensive and multidimensional manner. The limited availability of legal sources entailed by following a strict doctrinal research methodology therefore made it necessary to employ a non-doctrinal methodology to assess the utility of a law from a practical point of view. The non-doctrinal research adopts a multiplicity of research methods. The thesis thus seeks to establish a viable legal science and close the doctrinal gaps by recourse to a multi-layered compound of

[62] For considerations on a doctrinal legal research, see Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83; Terry Hutchinson, 'Doctrinal Research' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017). For an explanation of 'doctrine', see Trischa Mann, *Australian Law Dictionary, South Melbourne* (OUP 2010) 197.

[63] As mentioned above, many multilateral treaties require a minimum number of State parties in order to enter into force. This can be a lengthy procedure, and the treaty will in such circumstances be pending for a longer time than a bilateral treaty, which only requires the participation of two States.

empirical, comparative, and internal research methods.[64] To this end, it encompasses several techniques of non-doctrinal data collection.

The qualitative empirical data was collected by the use of a questionnaire. The intention was to gather information from practitioners working with the conclusion of treaties on whether their respective States have any formal policies in place aimed at ensuring compliance with Article 18 in the treaty-making process. The intention was further to learn from the experience of practitioners of examples where they might have had recourse to Article 18 in practice, as well as to identify any potential gaps between the doctrinal understanding of Article 18 VCLT and its practical application across different jurisdictions.

The questionnaire included a formal set of questions. The questions addressed issues which do not find a straightforward answer in scholarship, such as: i) the legal nature of Article 18; ii) how a State should make its intention clear not to become a party to a pending treaty; iii) whether the withdrawal of an instrument of ratification is in any case lawful under Article 18(b) VCLT; iv) whether there is a difference in the extent of obligations imposed by Article 18(a) and 18(b) respectively; and v) whether Article 18 can apply to provisionally applied treaties under Article 25 VCLT.

The questionnaire was sent by email to the relevant ministries in charge of treaties and/or legal advisors of the 25 States in the interest group. Those 25 States were chosen on the basis of the following criteria: a) equitable geographical representation; and b) the contact details to legal advisers of ministries for foreign affairs available within the author's network. As such, the interest group included States with different legal heritage, cultures and approaches to international law and went beyond European and American perspectives. Ensuring equitable geographical representation enabled the thesis to capture cross-sectional variations of States' various practises and approaches in international law.[65]

[64] For a general description of a multi-method research, see Laura Beth Nielsen, 'The Need for Multi-method Approaches in Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

[65] For an overview and analysis of international comparative law, see e.g. Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds), *Comparative International Law* (OUP 2018); Martti Koskenniemi, 'The Case for Comparative International Law' (2009) 20 Finnish Yearbook of International Law; O.V. Zadorozhnyi, 'On the Question of Comparative International Law or on the Comparative Method of Research in the Science of International Law' (2016) 11 J. Comp. L. 85; Emilia Justyna Powell, 'Comparative International Law and the Social Science Approach' (2021) 22 Chi. J. Int'l L. 147; O.O. Merezhko, 'The Idea of Comparative International Law' (2016) 11 J. Comp. L. 92.

In an attempt to increase the response rate, the questionnaire was strictly limited to a formal set of six questions, addressing the most pertinent issues only. Participants were given the option to indicate whether their responses were given in a personal or institutional capacity and to specify the level of confidentiality they felt appropriate with regard to the information provided. Although an answer will never be entirely free from bias, the choice of staying anonymous endeavoured to 'eliminate' biases to the farthest extent possible, hence seeking to ensure guarantees of neutrality. The full version of the questionnaire is attached in Annex I.

As the questionnaire was only circulated to a limited number of States and the response rate was relatively low,[66] the data collected did not make it possible to identify general patterns or claim evidence of State practice. However, this was not the ultimate objective of this thesis, and as the questionnaire was circulated for qualitative purposes only, the collected data could complement the doctrinal findings, be used to identify gaps between the doctrinal and practical apprehension of Article 18, form the basis for further speculations and discussions, and shed light on examples from contemporary practice which identify challenges and/or tendencies in the practical application of Article 18 VCLT. As such, States' factual understanding of the provision made it possible for more in-depth considerations of the problems and issues identified in scholarship.[67]

The thesis also incorporates elements of a comparative method by analysing and comparing domestic (and EU) case-law on Article 18 VCLT. A comparative approach to international law can constitute a source of guidance to use conceptions from or find inspiration for the application of an international rule within national legal systems. As such, the comparative component effectively enables the thesis to analyse the interaction of norms of international law with those of individual national legal systems.[68] In including the most demonstrable cases on issues relating to the interim obligation from various jurisdictions and legal systems,[69] the thesis sought to be as exhaustive as possible in analysing a range of relevant domestic (and EU) case-law.

[66] The questionnaire was circulated to 25 participants, of which 8 submitted replies.
[67] For a general overview, see Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (OUP 2014).
[68] Zadorozhnyi (n 65) 84-86.
[69] As previously mentioned, case-law on Article 18 is sparse, and the author has, to its knowledge, included the most pertinent cases. Jurisdictions include those of the Netherlands, Latvia, Chile, and Germany.

Lastly, the thesis has a practical dimension and reaches its conclusion through a process of internal logic.[70] An internal method is practical and decision-oriented rather than theoretical, with the purpose of interpreting sources of law in a manner which create results which are serviceable for practical tasks within a particular legal order.[71] The purpose is as such to bridge the gap between the fixed and unchanging source of law on the one hand, and changing social and technological circumstances, moral convictions, and knowledge on the other.[72] The aim with employing the internal method was particularily to develop the understanding of the legal situation on and application of Article 18 VCLT in international law (as a distinct legal order) in practice by identifying the internal legal implications of the rule and to unravel the purpose and hidden meaning of the provision in practice.[73]

Furthermore, the thesis is situated within a positivist legal framework. It adopts as a starting point the concept of a treaty and the treaty instrument as being based on a contractual notion 'which hinges on the precepts of freedom of contract and consent as the basis of obligation'.[74] As such, treaties may not be viewed as creating 'law' per se but rather as creating obligations.[75] That said, it is today generally accepted that treaties may be law-making in the sense that they are statutory rather than contractual and accordingly have to be accommodated as such by the law of treaties. This conception, however, raises further points for consideration: States may also be under the duty to perform legal obligations of a normative or law-making nature existing outside the positivist legal framework and to which they did not explicitly consent. The most prominent examples are obligations *ius cogens*, *erga omnes* (*partes*), and should a State not be able to prove its status as a persistent objector,[76] customary international law. Identical obligations may also be incorporated into a treaty, but a typical treaty stipulates additional obligations next to the 'core' ones (such as, for instance, the prohibition of torture).[77]

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[70] I.e., a system of practical reasoning that involves the application of a logical set of steps based on applying the law to a factual scenario to reach a decision.
[71] Richard L. Schwartz, 'Internal and External Method in the Study of Law' (1992) 11(3) Law and 179.
[72] Ibid 189.
[73] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995) 239.
[74] Brolmann (n 42).
[75] Law-making treaties stipulate 'integral obligations' (that is, they have to be performed as such and in their entirety), and they establish a regime 'towards all the world rather than towards particular parties'. Such treaties can be contrasted to the 'reciprocal' or 'concessionary' obligations of a contract treaty, which provides for 'a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually'. Treaties containing interdependent obligations entail that one party's performance is dependent on the performance of all other States parties. In other words, the cooperation of all States parties is absolutely necessary for the functioning of the treaty. See Second Report on the Law of Treaties by Sir Gerald Fitzmaurice, UN Doc. A/CN.4/107, YILC 1957, Vol. II, p. 54; Fitzmaurice, Third Report of the Law of Treaties, Commentary to Article 188, p 20, 41.
[76] See further James A. Green, *The Persistent Objector Rule in International Law* (OUP 2016).
[77] See Klabbers (n 30).

Whereas the creation of treaties and the commitment to treaty obligations essentially lie at the core of this thesis, this is only insofar a secondary treaty rule – defining the obligation of States once a treaty has been signed or consented to – is concerned. Accordingly, the thesis adopts as a starting point a positivistic approach: the limitation to *treaties* – positive international law – is explicitly set out in the wording of Article 18 VCLT itself. Certain parallel obligations may coexist and/or coincide to the extent that they are codified in treaties or have crystallised into customary international law, but Article 18 is inapplicable to these separate co-existing obligations outside the ambit of the positivist legal framework. Accordingly, the separate issue of States' consent to non-treaty rules and the source of obligations of international law are as such outside the scope of this thesis and have been extensively addressed elsewhere.[78]

1.5 Outline

The thesis takes the reader through an orderly and systematic analysis of particular elements of Article 18 VCLT from past to present. The roadmap is therefore dictated by the various sub-research questions as outlined above, and each and every chapter contributes to clarifying and defining particular aspects of the precise content and status of Article 18 VCLT.

Chapter 2 traces the legal origin of Article 18 VCLT and examines the drafting history of the provision. It assesses in particular the rationale behind the adoption of the provision, and whether the ILC drew any analogies to private law in this regard. This is important in order to comprehensively understand what objectives the drafters sought to protect by adopting Article 18 VCLT, and how a potential counterpart to this rule operates on a private law level. Besides addressing potential private law analogies to the Roman legal system itself, it is confined to the following civil legal systems that have been influenced by and are based upon concepts deriving from the Roman legal tradition:[79] the French *Code Civil*; the Italian *Codice Civile;* the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch* (ABGB)); and the German Civil Code (*Bürgerliches Gesetzbuch* (BGB)). It also analyses if private law analogies can be made with common law systems, such as the legal systems of the United States (US), Canada, and England and Wales.

[78] See eg Lawrence B. Evans, Harry Pratt Judson and William I. Hull, 'The Primary Sources of International Obligations', Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917) Vol. 5, The Status of Resident Aliens in International Law (APRIL 27-29, 1911) 257; Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and Company 1927) 84-85; Albert Bleckmann, 'General Theory of Obligations under Public International Law' (1995) 38 German Y.B. Int'l L 26.
[79] See in general FH Lawson, *A Common Lawyer looks at the Civil Law* (University of Michigan Law School 1953).

Chapter 2 also distils the most important events and discussions in the drafting history of Article 18 VCLT, both within and outside the ILC. It starts with the Havana Convention on Treaties, the subsequent Harvard Draft Convention on the Law of Treaties and lastly the ILC Draft Convention on the Law of Treaties, including the meetings and conferences of the ILC. This chapter also discusses the customary status of Article 18 VCLT in light of recent developments in international law and contemporary practice of States. It outlines and explains issues which were contentious and debated at the time of drafting the provision. Subsequent chapters then draw on chapter 2 and assess to what extent those issues have been resolved or are still debated today.

As the very application of Article 18 VCLT and the determination of whether a State has breached this provision is premised on having knowledge of what the object and purpose of a given treaty is, the thesis proceeds in its chapter 3 to analyse the particular element of the object and purpose of a treaty in relation to Article 18 VCLT. The chapter starts by elucidating some general considerations on the procedure of identifying the object and purpose of a treaty and whether this is a binary or unitary notion. It subsequently addresses the application of Article 18 in relation to the object and purpose of a treaty. In particular, it analyses whether Article 18 refers to the overarching object and purpose of a treaty as a whole or if it can be viewed as referring to the object and purpose of individual treaty provisions should such be identifiable.

Having outlined how Article 18 applies to the object and purpose of a treaty in chapter 3, the thesis in chapter 4 takes the reader through the next constitutive element of Article 18 and offers an analysis of the threshold of 'defeating' such object and purpose of a treaty. It discusses relevant 'tests' that have been advanced in literature and case-law to determine whether certain conduct defeats the object and purpose of a treaty, such as: i) the 'essential elements test'; ii) the 'impossible performance test'; iii) the 'manifest intent test'; and iv) the '*status quo* test'. It offers a comprehensive analysis of these tests and demonstrates how their application in practice is problematic in relation to contemporary examples.

Chapter 4 also analyses the (alleged) negative nature of Article 18, only requiring States to refrain from certain conduct defeating the object and purpose of a treaty. It specifically analyses if States can ever be under a duty to undertake positive measures under the threshold of 'defeat'. Lastly, chapter 4 examines if there is a difference in the threshold of 'defeat' under Article 18(a) and Article 18(b) VCLT respectively, or whether the two sub-paragraphs impose the same level of obligation in each and every case.

The thesis in chapter 5 analyses the temporal elements and scope of Article 18 VCLT to precisely determine when and under what circumstances the provision applies. It discusses first how a State can make its intention clear not to become a party to the relevant treaty under Article 18(a) VCLT by surveying recent practice of States in this regard. It subsequently examines what constitutes 'unduly delayed' under Article 18(b) VCLT. In addition, Article 18(b), in contrast to Article 18(a), is silent on the legal consequences of revoking an instrument of ratification or accession. This chapter assesses such practice under Article 18(b) VCLT and whether the conclusion varies depending on the treaty at hand, for instance if the treaty is silent on the right of withdrawal.

Having outlined how Article 18 applies in relation to the object and purpose of a treaty in chapter 3, clarified the threshold of defeating the object and purpose of a pending treaty in chapter 4 and defined the temporal scope of application of the provision in chapter 5, chapter 6 turns to the legal nature and character of Article 18. Analysing the precise legal nature and normative force of Article 18 is important in order to assess the next constitutive element of Article 18 VCLT; the consequences of breaching the provision. The chapter examines in particular what role of the principle of good faith plays in relation to Article 18 and examines how and to what extent this principle shapes the interim obligation. It also examines the potential role of other ancillary good faith principles, such the doctrine of abuse of rights and the principle of estoppel, and what the implications of non-compliance with Article 18 are.

Chapter 7 then seeks to explain the position of Article 18 within the framework of typologies and analyses if Article 18 applies in a different fashion depending on the type of treaty at hand. The chapter particularily examines if treaty typologies add any value as a legal analytical tool *vis-a-vis* Article 18. It includes discussion and analysis on the typology of treaties and the potential special regime of certain law-making treaties, as well as the implications of norms *ius cogens* and *erga omnes (partes)* in the context of Article 18 VCLT.

Lastly, chapter 8 takes the reader through some present aspects of Article 18 by shedding light on two contentious issues which have largely been discarded by existing international scholarship (and case law). It firstly analyses if there is a potential 'reversal' of Article 18 when a State has deposited its instrument of withdrawal from a treaty, and what the implications of a treaty signature after treaty withdrawal are. It secondly discusses some institutional aspects of Article 18, in particular situations where a State has not signed a pending treaty but is obliged

under the rules of the relevant international organisation to submit the treaty to parliament for consideration of ratification.

Chapter 9 concludes the thesis by summarising its findings, answering the research question and proposing some further avenues for research.

2. INTERNATIONAL LAW COMMISSION AND THE DRAFTING HISTORY OF THE RATIONALE BEHIND THE ADOPTION OF ARTICLE 18 VCLT

2.1 Introduction

It was early recognised that the law of nations 'is but private law "writ large". It is an application to political communities of those legal ideas which were originally applied to relations between individuals'.[1] It is, from a generic point of view, uncontested that recourse to domestic law analogies have influenced the development of some spheres of international law,[2] and some scholars 'accept domestic law analogies as a normal process of legal reasoning'.[3] Others posit that the different functions between municipal law and international law are too weighty to render any analogy between them permissible.[4] The dangers involved are fortified by the tendency on part of many scholars 'to resort to notions peculiar to their own municipal law' and 'the fact that not every relation between states has its counterpart in private law'.[5] Accordingly, not all private law concepts are suitable for the international legal order. Domestic law analogies can therefore be deceptive as they 'are premised on the existence of sufficient similarities between the problems that domestic and international law need to address'.[6]

Thus, the question of how far analogy is permissible between the rules of two significantly different systems of law, at the outset governing fundamentally different subjects, is an intricate one which does not lend itself to a straightforward answer. It is nevertheless apparent that the International Law Commission (ILC) had recourse to private law analogies when drafting the VCLT.[7] In a similar vein,[8] scholars agree that principles of domestic law, not uncommonly developed within the framework of Roman law and the main features of the Western legal

[1] T.E. Holland, *Studies in International Law and Diplomacy* (1898) 152.
[2] Not least the law of treaties, which has been shaped by analogies to domestic law of contracts, see An Hertogen, 'The Persuasiveness of Domestic Law Analogies in International Law' (2018) 29(4) EJIL 1127, 1129; Mohammad Shahabuddeen, 'Municipal Law Reasoning in International Law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) 90-91.
[3] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and Company 1927) 84-85; Shahabuddeen (n 2) 100-2; Hertogen (n 2) 1129.
[4] Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 425, 433-34; Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Reasoning' (2002) 294 *Recueil des Cours* 265, 275.
[5] Shahabuddeen (n 2) 92.
[6] Hertogen (n 2) 1128.
[7] One good example is the *rebus sic stantibus* principle, perfectly recognised in the private law of nations and today codified in Article 62 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[8] It has been stated that the role played by domestic law analogies in relation to general principles of law under Article 38(1) of the Statute of the International Court of Justice is not always clear, see Shahabuddeen (n 2) 92.

heritage,[9] frequently serve as a source of inspiration for international courts and tribunals when contemporary international law fails to provide a satisfactory solution.[10]

At first sight, Article 18 VCLT resembles certain concepts embedded in private law. This chapter therefore analyses whether the adoption of Article 18 VCLT was inspired by analogy to certain private law concepts or not. This is particularly helpful in order to understand: i) the rationale behind the adoption of this provision on the international level; ii) what the drafters aspired to achieve in this regard; and iii) how a potential counterpart to this rule operates on a private law level. Besides addressing the Roman legal system itself, it is confined to the following civil legal systems that have been influenced by and are based upon concepts deriving from the Roman legal tradition:[11] the French *Code Civil*; the Italian *Codice Civile;* the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch* (ABGB)); and the German Civil Code (*Bürgerliches Gesetzbuch* (BGB)). It also analyses if parallel concepts can be traced in certain common law systems, such as the legal systems of the United States (US), Canada, and England and Wales.

It does not give a comprehensive overview of the law of obligations of said legal systems but seeks to elucidate whether any analogies of the requirement of good faith in the formative stages of a treaty can be drawn to theories of pre-contractual liability apparent in private law and – if so – what the ensuing implications are.[12] The second part of this chapter distils the most important events and discussions in the drafting history of what later became the interim obligation under Article 18 VCLT. It sheds light on issues that were particularly pertinent during the debates, and which are still pertinent to this day. As those issues are further discussed and exemplified throughout the thesis, this chapter serves as a foundational chapter for subsequent chapters.

Lastly, this chapter examines the customary character of Article 18 VCLT, both in light of the *travaux préparatoires* and contemporary diplomatic practice of States. As the chapter unfolds the discussions during the drafting procedure of Article 18 VCLT, it is – naturally – at times of

[9] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (n 3) 9.
[10] Ibid 7-9; Hersch Lauterpacht, 'General Rules of the Law of Peace' in Elihu Lauterpacht (ed), *International Law, Being the Collected Papers of Hersch Lauterpacht* (CUP 1970) 242-44. Early English actors also supported the authority of Roman law as a source of international law, see e.g., Arthur Duck, *De Usu et Authoritate Juris Civilis Romanorum in Dominiis Principum Christianorum* (1653); Sir Robert Wiseman, *The Law of Nations: or, the Excellency of the Civil Law, above all other Human Laws whatsoever. Shewing of how great use and necessity the Civil Law is to the Nations* (1656) 60-65; William Oke Manning, *Commentaries on the Law of Nations* (1839) vi; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (OUP 1991) 146ff, 159.
[11] See in general FH Lawson, *A Common Lawyer looks at the Civil Law* (University of Michigan Law School 1953).
[12] See in this regard Harry P. deVries, *Civil Law and the Anglo-American Lawyer* (Oceana Publication 1976) 367, and the French and German cases cited at pp 367-68.

a descriptive nature. However, the chapter is necessary in order to fully appreciate the basis upon which Article 18 was drafted, to clarify the content of Article 18 from a theoretical point of view and to add precision to the status of the obligation in the current international relations between States.

2.2 Private Law Analogies of Article 18 VCLT

2.2.1 The Interim Obligation and *Culpa in Contrahendo*

Before the reach of the final formulation of the interim obligation as it appears in the 1969 VCLT,[13] Article 15 of the Draft Convention on the Law of Treaties explicitly referred to an obligation to refrain from acts tending to frustrate the object of a proposed treaty when a State, *inter alia*, had agreed to enter into mere negotiations for the conclusion of the treaty.[14] At the first session of the Vienna Conference, the delegates nevertheless voted to delete this paragraph.[15] The VCLT is accordingly silent on the question of obligations of negotiating States in pre-contractual relationships. In this regard, however, an analogy has been drawn to the domestic theory of *culpa in contrahendo*.[16]

The concept *culpa in contrahendo* implies 'fault in conclusion of a contract'.[17] The principle entails a duty to negotiate with care and prudence and not to lead a negotiating party to act to his detriment before the final conclusion of a contract. It is inextricably linked to the idea of *bona fide.*[18] The rationale of the concept lies in the fact that in the course of negotiations, parties are entering into a quasi-contractual relationship, which in and of itself gives rise to certain pre-contractual rights and obligations.[19] Accordingly, under *culpa in contrahendo*, a party would be

[13] See Article 18 VCLT.
[14] See Article 15(a) of the Draft Articles on the Law of Treaties, Text adopted by the ILC at its eighteenth session, in 1966, YILC 1966, Vol II, UN Doc A/CN.4/SER. A/1966/Add. The relevant part read as follows: 'A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when: (a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress'.
[15] See *United Nations Conference on the Law of Treaties, First Session 26 March - 24 May 1969*, 20th meeting of the Committee of the Whole (Extract from the Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole) UN Doc A/CONF.39/C.1/SR.20 at p 106.
[16] Originally developed by the German jurist Rudolf von Jhering, *Culpa in Contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 4 (1861).
[17] Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009) 70. For an overview of the concept, see Steven A Mirmina, 'A Comparative Survey of CULPA in Contrahendo, Focusing on Its Origins in Roman, German, and French Law as Well as Its Application in American Law' (1992) 8 Conn J Int'l L 77.
[18] Thomas A-J McGinn, *Obligations in Roman Law: Past, Present, and Future* (University of Michigan Press 2013) 26-27, 86-88.
[19] Reinhard Zimmerman, *Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 244; McGinn (n 18) 88.

held liable for damage caused by fault and blameworthy conduct in the course of negotiating a contract.[20]

Culpa in contrahendo has become a well-established feature of the German law of obligations, although originally developed by case-law outside the BGB.[21] It is today explicitly mentioned in § 311(2) of the BGB and imposes an obligation of good faith in the course of negotiations.[22] In contrast to the BGB, the Austrian ABGB neither contains a clause establishing an obligation of good faith during negotiations nor a generic clause on good faith in the performance of contractual duties. Nevertheless, it has been emphasised that any 'deceitful or negligent act committed by the offeree in the course of negotiations, which creates the false impression with the offeror that the contract will be certainly concluded, may result in the offeree's liability for pre-contractual fault'.[23]

Thus, *culpa in contrahendo* has nowadays become an accepted contract law principle which is frequently applied by Austrian domestic courts.[24] Hence, during the course of contract negotiations, the parties owe each other a duty to act honestly, sincerely and in good faith.[25] Moreover, the Italian *Codice Civile* gave early statutory recognition to an obligation to negotiate in good faith.[26] The notion of *culpa in contrahendo* is also evident in the French law of obligations.[27] In 2016, the French *Code Civil* included an explicit provision for fault in the formation of the contract, codifying a tendency in case-law to refer to a requirement of good faith in pre-contractual negotiations.[28]

[20] Tariq Hassan, 'The Principle of Good Faith in the Formation of Contracts' (1980) 5 Suffolk Transnat'l LJ 1, 5.
[21] Zimmerman, *Law of Obligations: Roman Foundations of the Civilian Tradition* (n 19) 245.
[22] Hassan, 'The Principle of Good Faith in the Formation of Contracts' (n 20) 6.
[23] William Posch, *Contract Law in Austria* (Wolters Kluwer 2015) 69.
[24] Friedrich Kessler and Edith Fine, '*Culpa in Contrahendo*, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study (1964) 77(3) Harvard Law Review 401, 406; Posch (n 23) 78-81.
[25] Posch (n 23) 77.
[26] Article 1337 of the Italian *Codice Civile*, enacted in 1942, stipulates that '[t]he parties, in the conduct of negotiations and the formation of the contract, shall conduct themselves according to good faith', see M. Beltramo, G.E. Longo and J.H. Merryman (translators), Italian Civil Code (Oceana Publications 1969) at p 346.
[27] Kessler and Fine (n 24) 406.
[28] Barry Nicholas, *The French Law of Contract* (2nd edn, OUP 1992) 70; Jan Smits and Caroline Calomme, 'The Reform of the French Law of Obligations' (2016) 23 MJ 6, 1040, 1042, 1044; Soléne Rowan, 'The New French Law of Contract' (2017) 66(1) OCLQ 805, 807, 812. See also a decision of the *Chambre Commerciale of the Cour de Cassation* in 1972, Com. 20.3.1972, JCP 1973.II.17543; deVries (n 12) 367 and the French and German cases cited at pp 367-68; Lawson (n 11) 171-73 and the cases cited therein; Ruth Sefton-Green, 'Formation of Contract: Negotiation and the Process of Agreement' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing 2017) 60.

Whereas the doctrine of *culpa in contrahendo* is fairly well-established in civil law systems, it is rather unknown in common law countries.[29] That said, good faith is not entirely absent in the formative contractual stages in common legal systems,[30] but US and English case-law has developed a trend to apply notions of good faith in the course of contract formation as well.[31] For instance, a conceptual source of a similar obligation to honour promises given in the course of negotiations in good faith is based on the idea of promissory estoppel.[32] This is 'an equitable concept under which promises are upheld in order to prevent injustice to the promisee'.[33] Under this concept, a party cannot arbitrarily break off a promise to negotiate or rescind a promise unsupported by consideration,[34] but must proceed to negotiate a contract or uphold a promise in good faith.[35]

The doctrine has been applied in certain American case-law,[36] but also in England[37] and Canada.[38] In English law, the doctrine of promissory estoppel has featured most prominently within the context of promises to accept part-payments of debt unsupported by consideration.[39] It prevents a party to revoke such a promise when: i) the agreement to give up the balance is clearly established through evidence; ii) the debtor has established that the creditor has agreed to give up his right on a permanent basis; and iii) it is inequitable for the creditor to go back on his promise to accept part payment of the debt. Outside the purview of part-payments of debt, promissory estoppel can prevent the promisor from revoking a promise when: i) the promise is

[29] Kessler and Fine (n 24) 401; Lalive, 'Negotiations With American Lawyers - A Foreign Lawyer's View' (1966) International and Comparative Law Center, Negotiating and Drafting International Commercial Contracts 1, 7.
[30] See Grant Gilmore, *The Death of Contract* (Ohio State University Press 1974) 56.
[31] See cases analysed by Hassan, 'The Principle of Good Faith in the Formation of Contracts' (n 20) 20-30, in particular *Esso Petroleum Co. Ltd. v Mardon* [1975] 1 ALL E.R 203 and *Helms v Duckworth*, 249 F.2d 482, 485-86 (D.C. Cir. 1957).
[32] Kessler and Fine (n 24) 408.
[33] Tariq Hassan, 'The Obligation to Negotiate in Good Faith: A Genesis of a General Principle of Law' S.J.D Thesis (unpublished) written for the Harvard Law School (1979) 35.
[34] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329; *Central London Property Trust v High Trees House* [1956] 1 All E.R 256.
[35] Hassan, 'The Obligation to Negotiate in Good Faith: A Genesis of a General Principle of Law' (n 33) 12.
[36] Hassan, 'The Principle of Good Faith in the Formation of Contracts' (n 20) 35, referring inter alia to *Schmidt v McKay*, 555 F.2d 30, 36 (2nd Cir. 1977) and *Hoffman v Red Owl Stores Inc*., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). See also Nihi Cohen, 'Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1995) 29; Joseph M. Perillo, *Contracts* (7th edn, West Academic Publishing 2014) 227-247.
[37] See *Central London Property Trust* (n 34) 256; *Collier* (n 34) 1329; *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm). See also G.H. Treitel, *An Outline Of the Law of Contract* (6th edn, OUP 2004) 47-49.
[38] G.H.L. Fridman, *The Law of Contract in Canada* (6th edn, Carswell 2011) 120-135. In has also been introduced in a number of other commonwealth countries such as Nigeria, New Zealand, India and Australia, see Hassan, 'The Principle of Good Faith in the Formation of Contracts' (n 20) 37; IC Saxena, 'The Twilight of Promissory Estoppel in India: A Contrast with English Law, (1974) 16(2) Journal of the Indian Law Institute 187, 188.
[39] *D & C Builders Ltd v Rees* [1965] EWCA Civ 3.

clear and unambiguous; ii) the promisee altered his or her position in reliance on the promise; and iii) it is inequitable for the promisor to renege on the promise after reliance.[40]

Some scholarly opinion posits that Article 18 VCLT seeks to protect similar notions as the ones protected by *culpa in contrahendo*.[41] This is evidenced by the fact that the drafters resorted to the doctrine when construing the interim obligation, although it required substantial amendment in order for the concept to efficiently operate in the sphere of international law.[42] This is also regardless of the fact that the interim obligation diverges from the classical notion of *culpa* in several ways, one of which is the fact that *culpa* targets the stage of negotiations of the contract, whereas the interim obligation commences at signature or ratification and thus targets conduct subsequent to negotiations.[43]

As previously stated, Article 15(a) of the Draft Convention on the Law of Treaties introduced a good faith obligation of States that participated in the negotiations of a treaty not to frustrate or prejudice its purposes. Yet, this provision was subsequently voted for deletion due to lack of sufficient legal basis for codification.[44] That said, during the discussions within the ILC, some members were not against including a provision on obligations of good faith during the course of treaty negotiations. In fact, it was believed that participation in negotiations entailed a clear duty to act honestly with due consideration for the interest of the all negotiating parties but such obligation was most favourably to appear in a different context.[45] The drafters might therefore have been inspired by the theory of *culpa in contrahendo* when construing the interim obligation and the interim obligation might even be viewed as akin to *culpa* in a broad sense so as to guarantee notions of fairness and *bona fides* in all stages of the formation of a treaty.

Nevertheless, the fact cannot be disregarded that under the current regime of international law, a State does not assume any obligations under Article 18 VCLT until it at least signs the treaty adopted as a result of the negotiations. In other words, the interim obligation is not triggered by mere participation in the negotiations of the treaty but commences (at the earliest) after the act of signing a treaty. The delegates at the Vienna Conference deliberately bypassed the opportunity to endorse the complete concept of *culpa* when they voted to delete sub-paragraph (a) of Draft

[40] Ibid.
[41] Joni S Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 George Washington Journal of International Law and Economics 71, 93.
[42] Ibid 94.
[43] Ibid 96-97.
[44] Vienna Diplomatic Conference, 19th meeting, p 106 para 47.
[45] See e.g., Statement by Mr Reuter, Summary record of the 789th meeting, Extract from the YILC (1965) Vol I, UN Doc A/CN.4/SR.789, para 19.

Article 15.[46] In effect, this means that the interim obligation and the domestic concept of *culpa* target different stages in the formation of a contract or treaty.[47]

This is not to ignore the similarity between the concepts insofar one of the objectives of Article 18 is to ensure that the delicate balance reached in the course of negotiating the treaty is not frustrated pending the entry into force of the treaty. However, to reiterate, this obligation solely applies to States that have signed or consented to be bound by the treaty. Thus, Article 18 is silent on notions of fairness and good faith in the actual negotiation of the treaty. It is not until the terms have been adopted as a result of these negotiations that the provision is triggered and protects the integrity of the treaty from abusive conduct that would risk defeating its object and purpose.

2.2.2 Article 18 VCLT and *la Theorie de L'Abus des Droits*

Another theory of pre-contractual liability apparent in domestic contract law in which the interim obligation has said to be rooted is the principle of abuse of right, prohibiting the abusive exercise of a party's rights.[48] Whereas *culpa* deals specifically with contracts, the concept of abuse of rights covers a wide range of legal areas.[49] The *theorie de l'abus des droits* originally developed in French jurisprudence but is not explicitly embodied in the *Code Civil*.[50] It is today recognised in several legal systems.[51]

Within French scholarship, 'abusive exercise has in general been taken to mean unreasonable exercise…'.[52] The following can be cited as examples of conduct which may amount to an abuse of rights: i) exercise of a right with intent to harm; ii) exercise of a right without any legitimate and serious interest; iii) exercise of a right against *bonos mores* (good customs), or moral rules, or good faith; and iv) exercise of a right contrary to the aims on account of which the right is

[46] Edward T. Swaine, 'Unsigning' (2003) 55(5) Stanford Law Review 2061, 2071.
[47] See Martin A Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities' (1994) 16(1) Michigan Journal of International Law 141, 146. This is further supported by the fact that an independent obligation to act in good faith in the course of treaty negotiations may now exist as a matter of customary international law. Support for this view may be found in arguments expressed by dissenting judges in early cases. For instance, as was stated by one of the judges in the *Lighthouses Case*: '[c]ontracting parties are always assumed to be acting honestly and in good faith', see *Lighthouses Case between France and Greece* (1934) PCIJ Ser. A/B, No 62, Separate Opinion of Judge *ad hoc* Séfériadés at 47.
[48] Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities' (n 47).
[49] Albert Mayrand, 'Abuse of Rights in France and Quebec' (1974) 34(5) Louisiana Law Review 993, 1004-06.
[50] Hassan, 'The Principle of Good Faith in the Formation of Contracts' (n 20) 9; Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263, 292.
[51] Eg Austria, Belgium, Germany, Italy, Japan, Mexico, Netherlands, Poland, Sweden, Switzerland, and Turkey, see Hassan, 'The Obligation to Negotiate in Good Faith: A Genesis of a General Principle of Law' (n 33) 59.
[52] M.S. Amos, 'Abusive Exercise of Rights According to French Law' (1900) 2(3) Journal of the Society of Comparative Legislation 453.

conferred.[53] In French contract law, the concept of abuse of rights applies in pre-contractual stages, as well as in the execution of, withdrawal from, and termination of the contract.[54] Even in English law, a trend, although phrased in cautious terminology, has developed to recognise that contractual rights should be exercised with a notion of reasonableness.[55]

During the drafting process of Article 18, the question was raised whether the notion of abuse of right should be introduced into the explicit text of the provision.[56] It has likewise been stressed that the interim obligation 'has a firm theoretical basis in the general principle of abuse of rights'.[57] Article 18 can admittedly be viewed as embodying the idea that a State cannot legitimately exploit a signed or ratified treaty by abusing its position as a signatory and/or contracting State but not yet being a party thereto. For instance, in the context of a signatory State, the principle of abuse of right implies a duty on part of that State not to abuse its discretion to ratify the signature. As such, the interim obligation can be viewed as partly hinging on the idea of the concept of abuse of rights. To this end, Article 18 can be viewed as extending this principle to the law of treaties by prohibiting signatory or contracting States from exercising a right in a fraudulent manner, without any legitimate and serious interest, or against good faith pending the entry into force of the treaty.

2.2.3 Article 18 and Obligations to be Subsequently Performed

Article 18 may also be viewed as a parallel concept to a private law contract which establishes mutual obligations to be fulfilled at a later time.[58] Sales agreements that involve a time period between the conclusion of the sales agreement and the time of delivery of the object are generally a prime example in this regard. Within Roman law, in case of failure to safeguard and deliver the object, a typical claim would be based on implications of good faith: the claiming party would 'have to establish the fact of the purchase and then show that, according to the

[53] Hassan, 'The Principle of Good Faith in the Formation of Contracts' (n 20) 11.
[54] Ibid 12-13.
[55] This does thus far however not include pre-contractual circumstances, see Hassan, 'The Principle of Good Faith in the Formation of Contracts' (n 20) 13-14.
[56] ILC, Summary Record of the 86th meeting, Extract from the YILC, Vol I (1951) UN Doc A/CN.4/SR.86, paras 115-18; Summary record of the 644th meeting, Extract from the YILC (1962) Vol I, UN Doc A/CN.4/SR.644, para 16.
[57] Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (n 50) 288-89.
[58] Already during the seventeenth century, the Dutch jurist and scholar Hugo Grotius noted that '[i]f ownership shall not pass immediately the seller will be under obligation to give possession according to contract', see Hugo Grotius, *On the Law of War and Peace: De Jure Belli ac Pacis* (1625), Book II, Chapter XII 'On Contracts' at para XV.

implications of good faith as settled by juristic interpretation, something or other is indeed owing'.[59]

Per analogy to international law, this raises the question of what obligations a seller State owes towards a buyer State when the goods are not delivered immediately upon conclusion of the treaty.[60] Within Roman law, under the standard of care of *bonus paterfamilias* (the good head of a family), the seller is to answer for the safe custody of the object until delivery,[61] with the exception of damage caused by *force majeure*.[62] Similar obligations to ensure the conditions of the object subject to transfer can be found in the ABGB,[63] the Italian *Codice Civile*,[64] as well as in French law. Article 1197 of the French *Code Civil* stipulates that the 'obligation to deliver a thing entails an obligation to look after it until delivery, taking all the care of a reasonable person in doing so'.[65]

Furthermore, § 242 of the BGB provides that '[t]he debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage'.[66] The seller of an object is obliged to deliver the object free from material and legal defects.[67] In addition, it has been argued that good faith in relation to an 'implied secondary obligation' entails a duty to 'refrain from anything which might impair the purpose of the contract. Thus, the debtor is under an obligation to do what he can do to secure the promised performance'.[68]

Accordingly, – and specifically in the context of bilateral sales agreements – the obligations incumbent on a seller prior to delivery of the object as evident in the private law of nations might have inspired the drafters when formulating the interim obligation. The burden of this obligation is to maintain the *status quo* of the condition of an object as it existed at the time of concluding the agreement and does not cover responsibility for damages or loss caused by *force majeure*.

[59] Peter Birks, *The Roman Law of Obligations* (OUP 2014) 65-66.
[60] Ibid 78.
[61] Ibid 78-79.
[62] Ibid 79, 94, emphasising that 'the risk passes where the agreement is complete, not when the *res* is delivered'.
[63] See Article 1061 of *Das österreichische ABGB — The Austrian Civil Code* (translated by Peter Andreas Eschig and Erika Pircher-Eschig) (LexisNexis 2013): 'The seller is obliged to duly keep the asset safe until the time of the transfer and to hand it over to the purchaser in accordance with the provisions which have been provided above'.
[64] Article 1177 of the Italian *Codice Civile* stipulates that '[t]he obligation to deliver a specified thing includes the obligation to safeguard it until delivery'. Article 1178 provides that '[w]hen the object of the obligation is the delivery of things specified only as to kind, the debtor shall deliver things not below average in quality', see Beltramo, Longo and Merryman (n 26) 314.
[65] See Article 1197.
[66] See the German Civil Code as amended to January 1, 1992, Translated by Simon L. Goren (Fred B. Rothman & Co 1994) at p 41.
[67] See § 433 of the BGB.
[68] Werner F Ebke and Bettina M Steinhauer, 'The Doctrine of Good Faith in German Contract Law' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (OUP 1995) 178-81.

Imagine, for instance, the following scenario: States X and Y conclude an agreement, under whose terms State Y is to transfer certain objects to State X. Before the agreement enters into force, State Y, being the possessor State, destroys the objects subject to transfer under the agreement, or fails to take reasonable steps to safeguard its condition. As ownership did not pass immediately, was State Y under an international obligation to give possession according to the agreement? Has Y failed in its duty owed towards X?

Parallel to the idea of obligations to be subsequently performed in private law, it would appear that State Y was under an obligation to keep the objects safe and in good condition until delivery to State X. This logic also resembles some of the examples given in the context of drafting the interim obligation, for instance situations where a treaty provided that one signatory was to deliver a certain quantity of a forest or a mine to another signatory but whilst ratification was still pending, the State undertaking the engagement destroyed the forest or mine so that performance of the agreement was no longer possible.[69]

2.2.4 Anticipatory Breach

Lastly, a potential analogy to the idea of anticipatory breach in private contract law may be envisaged. Anticipatory breach essentially takes place when one party informs the other that he intends not to perform his obligations under a contract before performance is due. Before a breach actually takes place, the innocent party may then immediately terminate the contract and claim damages.[70] The notion of anticipatory breach is premised on the idea that when a contract provides for a promise for future conduct, a party's refusal to perform the agreement – renouncement of the contract – entails liability for breach of contract. Furthermore, a contract for future conduct constitutes an implied promise that, in the meantime, neither party will prejudice the performance of that promise.[71] In order to rely on termination as a result of an anticipatory breach, there must be a *clear* case of a refusal to perform contractual obligations such that it goes to the *root* of the contract. The refusal must be *absolute*, meaning that the renunciation cannot be conditional on some circumstance occurring or remaining.[72]

Accordingly, per analogy, it might be possible to view the underlying rationale of Article 18 VCLT as protecting other signatory and contracting States from dealing with the consequences

[69] *Harvard Draft Convention on the Law of Treaties,* Supplemented to 29 AM. J. IntlL 653 (1935), Commentary to Article 9, at 781-82.
[70] *Hochster v De La Tour* (1853) 2 E&B 678.
[71] Ibid.
[72] *The Hermosa*, 57 F.2d 20 (9th Cir. 1932).

of a fundamental breach of the treaty as if it was in force. As such, a State signing or expressing its consent to be bound by a treaty is simultaneously making an implied promise that, pending the entry into force of the treaty, it will not prejudice the performance of the treaty once in force. Furthermore, the analogy would in essence entail that the 'root' – resembling the object and purpose – of the treaty will remain intact pending its entry into force. Under the anticipatory breach analogy, only clear, absolute, and unequivocal conduct which frustrates the very root of the pending treaty would entail a violation of Article 18 VCLT.

2.3 The Drafting History of the Interim Obligation

The codification of the law of treaties and the subsequent adoption of the 1969 VCLT was a lengthy process and has broadly speaking been considered to be an impressive achievement of the ILC. As has been emphasised above and will be further demonstrated below, however, the drafting history of Article 18 VCLT sheds light on some divergent opinions among the ILC members as to the theoretical and practical justification of the obligation in international law. This section is devoted to the drafting history of what later became Article 18 VCLT, both within and outside the work of the ILC, and includes an analysis of the material which formed the basis for its formation.

2.3.1 The Interim Obligation Prior to the Vienna Convention on the Law of Treaties

2.3.1.1 Havana Convention on Treaties

Early attempts to codify the law of treaties included the 1928 Havana Convention on Treaties, which encompassed certain generally accepted principles of international law and contained 20 provisions addressing various aspects of the law of treaties.[73] The Havana Convention did not explicitly address the issue of obligations in the period between signature and entry into force of a treaty but Article 5 of the Convention merely provided that treaties do not have legal effect prior to their entry into force.[74] This point was further emphasised in Article 8 of the Convention, stipulating that unless some other date has been agreed upon through an express provision, treaties become effective from the date of exchange or deposit of ratification. These provisions support the view that treaties have no legal force prior to their entry into force. One can only speculate about the reasons for not including any express provision regulating the period of time

[73] Adopted by the Sixth International Conference of American States at Havana, February 20, 1928, 'Appendix 1: Convention on Treaties', AJIL 29 (1935): 1205-7.
[74] Article 5 of the 1928 Havana Convention read as follows: 'Treaties are obligatory only after ratification by the contracting States, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself'.

between signature or expression of consent to be bound by the treaty and its entry into force. In essence, however, this might imply that the drafters of the Havana Convention did not envisage any such obligations incumbent on States during said period, or they would have included a provision to this effect.

2.3.1.2 Harvard Draft Convention on the Law of Treaties

A few years later, in 1935, a Draft Convention on the Law of Treaties was drawn up by a Harvard Research Group. In contrast to the Havana Convention, the Harvard Draft did include a provision addressing the effects of treaties prior to their entry into force. Article 9 read as follows:

> Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.[75]

The Commentary to this provision recognised that prior to its ratification, the engagements stipulated in a treaty are inchoate.[76] This is because if it were to be otherwise, the rule laid down in Draft Article 8, e.g. that signing a treaty does not entail any obligation to subsequently ratify that treaty,[77] would serve no purpose.[78] It was accordingly held that 'in the absence of a contrary provision in the treaty itself, there is no legal obligation ... upon any signatory to perform the stipulations of a treaty until it has completed all the steps necessary to bring the treaty into force with respect to it'.[79] Only in exceptional cases and special circumstances could good faith require a State to refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult in case it later ratifies the treaty.[80] As the commentary noted:

> [i]t is believed that when a duly authorised plenipotentiary signs a treaty on behalf of his State, the signature is not a simple formality devoid of all juridical effect and involving no obligation whatever, moral or legal, on the part of the State whose signature the treaty bears … once a treaty has been signed on its behalf, [States] are

[75] *Harvard Draft Convention on the Law of Treaties* (n 69).
[76] Ibid 779.
[77] Article 8 of the Harvard Draft Convention reads as follows: 'The signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty'.
[78] *Harvard Draft Convention on the Law of Treaties* (n 69) 779.
[79] Ibid 780.
[80] Ibid.

> not, if they observe good faith, entirely free to act as if the treaty had never been signed.[81]

Signing a treaty means that other signatories have the right to presume that the signature was seriously given and that the State, pending ratification, 'will not adopt a policy which would render ratification useless or which would place obstacles in the way of the execution of the provisions of the treaty' once in force.[82] The Research Group did not deem it possible to draw a precise line and distinguish between what was required under international law and what was required by the principle of good faith. However, whilst they recognised that the duty of good faith lies at the basis of international relations,[83] Article 9 did not in and of itself give rise to a legal duty under international law.[84]

2.3.2 The Drafting of the Provision by the International Law Commission

2.3.2.1 Special Rapporteur J.L. Brierly

At its first session in 1949, the ILC listed the topic 'Law of Treaties' as suitable for codification and appointed Mr Brierly as Special Rapporteur for the subject.[85] In his second report, he proceeded on the work of the Harvard Research Group on Article 9 of their Draft Convention and adopted said provision to the letter in his draft Article 7. He made one important remark: in his opinion, this provision stated a moral rather than legal obligation.[86] He did not embark on the obligation in depth in his subsequent third report, where he however stated that:

> [a] certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between signature of a treaty on their behalf, and its ratification, that would render ratification by other States superfluous or useless. This material is, however, of too fragmentary and inconclusive a nature to form the basis of codification.[87]

One member, Mr Amado, thought Article 7 was superfluous and proposed to delete it. Brierly supported such deletion,[88] especially as it was not the task of the Commission to codify

[81] Ibid.
[82] Ibid 780-81.
[83] Ibid 781.
[84] Ibid.
[85] See UN Doc A/CN.4/13 + Corr.1–3, paras 16-21.
[86] J.L. Brierly, *Second Report: Revised Articles of the Draft Convention,* YILC, Vol II (1951) UN Doc A/CN.4/SER.A/1951/Add.1.
[87] J.L. Brierly, *Third Report: Articles Tentatively Adopted by the Commission at the Third Session with Commentary Thereon,* YILC Vol II (1952) UN Doc A/CN.4/SER.A/1952/Add.1.
[88] ILC, Summary Record of the 86th meeting, Extract from the YILC, Vol I (1951) UN Doc A/CN.4/SR.86, paras 111-12.

international ethics or refer to moral principles that States should observe.[89] In contrast, Mr Cordova was of the view that the principle was sound and that the obligation involved was both moral and legal.[90] Mr Yepes emphasised that the interim obligation was a legal one which had basis in international jurisprudence, State practice, and the writings of legal scholars.[91] Other members, like Mr Sandström and Mr Spiropoulos, were hesitant as to the vague formulation of the provision.[92] On vote, it was decided to delete Article 7.[93]

2.3.2.2 Special Rapporteur Sir Hersch Lauterpacht

Special Rapporteur Brierly was succeeded by Special Rapporteur Sir Hersch Lauterpacht. In his first report, he formulated the interim obligation in its relevant parts as follows:

> 2. [S]ignature, or any other means of assuming an obligation subject to subsequent confirmation, has no binding effect except that it implies the obligation, to be fulfilled in good faith:
> (b) To refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed.[94]

Is it evident from the designation of this provision that he viewed simple signature as entailing two distinct legal consequences: Article 5(2)(a) provided for a procedural obligation, whereas Article 5(2)(b) framed an obligation of a substantive character. Rapporteur Lauterpacht referred to Article 5(2)(b) as an obligation to refrain from actions intended to deprive the treaty wholly or in part of its effectiveness and to deceive the other party and emphasised that this was a legal obligation under international law. In his view, the purpose of the rule was to 'prohibit action in bad faith deliberately aimed at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration'.[95] It referred to actions that were intended, and not merely calculated, to impair the value of an undertaking signed.[96] Accordingly, he did not agree with the conclusions drawn by Brierly and the Harvard Research Group, e.g. that the material supporting any potential codification of the obligation was

[89] ILC, Summary Record of the 87th meeting, Extract from the YILC, Vol I (1951) UN Doc A/CN.4/SR.87, para 44.
[90] ILC, Summary Record of the 86th meeting (n 88) para 126.
[91] ILC, Summary Record of the 87th meeting (n 89) paras 46-48.
[92] Ibid paras 51-52.
[93] Ibid p 42.
[94] Article 5, Special Rapporteur Sir Hersch Lauterpacht, Report of the Law of Treaties, YILC, Vol II (1953) UN Doc AICN.4/Ser.A/ 1953/Add.1, at 109-10.
[95] Ibid.
[96] Ibid.

of too fragmentary and inconclusive a nature, but judicial practice evidenced a complete and manifest legal basis for the interim obligation.[97]

2.3.2.3 Special Rapporteur Sir Gerald Fitzmaurice

In 1955, Sir Gerald Fitzmaurice was appointed Special Rapporteur to continue the work of Lauterpacht.[98] Rapporteur Fitzmaurice's theme is overall more detailed and specific than the ones of his predecessors. His first report addressed the legal effects of signature,[99] ratification, acceptance, and approval. Article 30(1), on the legal effects of signature considered as a concluding act only, stipulated in its relevant parts that a concluding signature:

> (c) May involve an obligation for the government of the signatory State, pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty.

Article 33 – relating to legal effects of ratification – stipulated in its relevant parts:

> 2. In the case of ratifications given prior to coming into force, the ratifying State, while bound by the treaty *in posse*, is not yet under any duty to carry it out ... In such circumstances the ratifying State is, however, under a general duty of good faith, pending the coming into force of the treaty—and provided this is not unreasonably long delayed—to take no action calculated to impede its eventual performance, or to frustrate its objects.

Article 33 was held to apply *mutatis mutandis* to the legal consequences of accession and acceptance.[100] Special Rapporteur Fitzmaurice did not embark on either provision in depth. In the commentary to Article 30, he simply stated that the reasons for sub-paragraph 1(c) were cogently advanced by Special Rapporteur Lauterpacht in his first report. He fully endorsed those reasons but deemed it desirable 'to state the proposition in question in somewhat cautious and qualified terms'.[101] This is probably why he employed the terminology 'may' in both provisions,

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[97] Ibid.
[98] Report of the ILC Covering the Work of its Seventh Session 2 May - 8 July 1955, Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), Extract from the YILC, Vol II (1955) UN Doc. A/CN.4/94, at p 42.
[99] Rapporteur Fitzmaurice introduced a distinction between 'concluding' signature and 'operative' signature, see Article 28(2) of his first report, Sir Gerald Fitzmaurice, Special Rapporteur, Report on the Law of Treaties, Extract from the YILC, Vol II (1956), UN Doc A/CN.4/101, Article 17(1). Concluding signature is subject to ratification or acceptance (thus equivalent to simple signature), whereas operative signature is precisely operative by not requiring subsequent ratification (hence equivalent to definitive signature).
[100] Sir Gerald Fitzmaurice, Report on the Law of Treaties (n 99) Articles 35 and 36.
[101] Ibid p 122.

giving emphasis to his somewhat hesitative approach to the interim obligation. Due to lack of time, the Commission was unable to enter upon a full discussion of the report.[102]

2.3.2.4 Special Rapporteur Sir Humphrey Waldock

Rapporteur Fitzmaurice was succeeded by Special Rapporteur Sir Humphrey Waldock. During the preceding years the Commission had largely been occupied by other topics and the reports presented to it by the first three Rapporteurs were not duly considered by the members. However, a decision taken by the Commission in 1961 marked a change in its approach; it was decided that Rapporteur Waldock was to prepare draft articles on the law of treaties intended to form the basis for a convention.[103] In contrast to his colleagues, Waldock devoted far more attention to the interim obligation and relevant formulas appeared in Articles 5, 9 and 12 of his first report. Article 5 read in its relevant parts:

> 3. Nothing contained in paragraph 2 of this article shall ... affect any obligation that a State participating in the drawing up of a treaty may have, under general principles of international law, to refrain for the time being from any action that might frustrate or prejudice the purposes of the proposed treaty, if and when it should come into force.

As seen, this provision goes far beyond what had been anticipated by previous Rapporteurs by stipulating that even the participation in the negotiation of a treaty may impose an obligation on States to refrain from any action that might frustrate or prejudice the purposes of the proposed treaty. Article 9(2), in its relevant parts, stipulated that:

> (c) The signatory State, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance.

A similar obligation was held to apply in cases where the signature was not subject to ratification, and the treaty is to enter into force upon a future date.[104] Lastly, Article 12, relating to the legal effects of ratification, stated in its relevant parts that:

> 3. Pending the entry into force of a treaty and provided always that its entry into force is not unreasonably delayed, a ratifying State, although not bound by the treaty

[102] Report of the ILC on the Work of its Eighth Session, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), Extract from the YILC, Vol II (1956) UN Doc. A/CN.4/104 at 301.
[103] See UN Doc A/4843 at para 39.
[104] See Article 9(3)(b)(i).

> itself, is subject under general international law: (b) To refrain from any action calculated to frustrate the objects of the treaty or to impede its eventual performance.

Accession and acceptance was said to have the same legal effects as those stated in Article 12.[105] Article 5 was discussed by the ILC at its 642nd meeting. Mr Jiménes de Aréchaga believed it was unlikely that 'positive international law imposed any specific or general obligations upon states which had participated in the negotiation or the adoption of the text of a treaty'.[106] Mr Padilla Nervo expressed concern that paragraph 3 might not always correspond to what was politically possible. It would be unwise for the Commission to establish rules that were politically unrealisable.[107]

Article 9(2)(c) was discussed at the 643rd-646th meetings. Mr Castrén found that paragraph 2 served a useful purpose, although it was phrased in a vague manner.[108] Mr Liu stated that it was important to retain the gist of the provision in order to give proper meaning to the act of signature.[109] It was decided, on proposal by Mr Amado, that Article 9 be referred to the Drafting Committee to prepare a more precise text of the provision.[110] During its 647th meeting, the ILC discussed the provisions of Article 12, but at this point rapporteur Waldock had redrafted the Article and opted for not retaining the gist of Article 12(3) as all the provisions relating to the rights and obligations of States pending the entry into force of a treaty were to be regulated by one provision.[111] This was later drafted in Article 19 by the Drafting Committee, which read as follows:

> 1. A state which takes part in the negotiation, drawing up or adoption of a treaty is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.
> 2. Pending the entry into force of a treaty and provided always that such entry into force is not unduly delayed, the same obligation shall apply to the state which, by signature, ratification, accession, acceptance or approval has established its consent to be bound by the treaty.[112]

[105] Ibid Articles 15 and 16.
[106] Ibid para 41.
[107] Ibid para 74.
[108] Summary record of the 644th meeting, Extract from the YILC (1962) Vol I, UN Doc A/CN.4/SR.644, para 12.
[109] Summary record of the 645th meeting, Extract from the YILC (1962) Vol I, UN Doc A/CN.4/SR.645, para 26.
[110] Ibid at pp 98-99.
[111] Summary record of the 647th meeting, Extract from the YILC (1962) Vol I, UN Doc A/CN.4/SR.647, paras 87-88.
[112] Summary record of the 661st meeting, Extract from the YILC (1962) Vol I, UN Doc A/CN.4/SR.661, p 12.

In the final report, this provision appeared as Article 17, and was subsequently circulated to Governments for their observations.[113] The observations by Governments were duly considered by Waldock in his fourth report. A common theme of criticism among the Governments was the extensive scope of the provision, placing an obligation on States that participated in mere negotiations of the treaty, not yet having even signed it.[114] Rapporteur Waldock agreed with these observations. As the object(s) of a treaty cannot be finally defined until its text has been adopted, he particularly believed that:

> it may not be justifiable to fix a negotiating State with an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty unless it positively associates itself with those objects by signing the text or otherwise giving its vote to the adoption of the text. Politically and morally it is certainly desirable that negotiating States should be able to have a feeling of mutual confidence that they will not so act during the period of the negotiations as to frustrate the performance of the obligations which they may ultimately undertake towards each other.[115]

Waldock accordingly suggested to delete the words 'negotiation, drawing up or adoption of a treaty' from Article 17(1).[116] At the 788th meeting, rapporteur Waldock therefore proposed the following formulation:

> 1. Prior to the entry into force of a treaty: a) A State which has signed the treaty subject to ratification, acceptance or approval is under an obligation of good faith to refrain from acts calculated to frustrate its objects unless such State shall have notified the other signatory States of the renunciation of its right to ratify or, as the case may be, to accept or approve the treaty;
> b) A State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty is under the same obligation, unless the treaty is subject to denunciation and that State shall have notified the other States concerned of its withdrawal from the treaty.[117]

[113] UN Doc A/CN.4/148, paras 18-19. 31. The following Governments submitted replies: Afghanistan, Australia, Austria, Burma, Cambodia, Canada, Czechoslovakia, Denmark, Finland, Iraq, Israel, Jamaica, Japan, Jordan, Luxembourg, Madagascar, Malaysia, Netherlands, Nigeria, Pakistan, Poland, Portugal, Senegal, Sudan, Sweden, Syria, Turkey, Uganda, United Kingdom, Tanzania, and the United States.
[114] See e.g., the observations by Australia, Finland, Japan, Poland, Sweden, and the United Kingdom in the fourth report of Waldock, Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Extract from the Yearbook of the International Law Commission 1965 ,vol. II, UN Doc A/CN.4/177 and Add.1 & 2, pp 43-44.
[115] Waldock fourth report (n 114) 44.
[116] Ibid.
[117] Summary record of the 788th meeting, Extract from the YILC (1965) Vol I, UN Doc A/CN.4/SR.788, para 1.

2.3.2.5 The Vienna Diplomatic Conference on the Law of Treaties

The first session of the United Nations Conference on the Law of Treaties was convened in 1968 with more than 100 participating States. The second session was convened in 1969 and on 22 May 1969, the conference adopted the Vienna Convention on the Law of Treaties. After some revision of the provision made by the Drafting Committee, Draft Article 15, which was discussed at the first session, stipulated that:

> A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:
> (a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;
> (b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;
> (c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

The commentary made clear that 'this obligation begins at an earlier stage when a State agrees to enter into negotiations for the conclusion of a treaty. *A fortiori*, it attaches also to a State which actually ratifies, accedes to, accepts or approves a treaty if there is an interval before the treaty actually comes into force'.[118]

At the first session, the Finnish delegate pointed out that the reason for the amendment from the previous version, i.e. that the wording 'calculated to' was replaced by the words 'tending to',[119] of the text 'was to confine the obligation of good faith to cases where the rule *pacta sunt servanda* might have wider application'.[120] The difficulty with sub-paragraph (a) was that it called for the use of subjective criteria to determine what acts that would tend to 'frustrate' the object and purpose of a treaty and this provision was too far-reaching as it was too early to identify the object of a treaty until its content was known.[121] A general view among the delegates was indeed that sub-paragraph (a) laid down a new principle of international law beyond the scope of codification.[122] In contrast, it was believed that sub-paragraphs (b) and (c) were sound rules of international law.[123]

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[118] Draft Articles on the Law of Treaties with Commentaries at 202.
[119] See Summary record of the 892nd meeting, Extract from the YILC (1966) Vol II, UN Doc A/CN.4/SR.892, para 96.
[120] United Nations Conference on the Law of Treaties, First Session (26 March-24 May 1968) UN Doc A/CONF.39/11, 19th meeting, p 97 para 2.
[121] Ibid.
[122] Ibid pp 97-106.
[123] Ibid. Some delegates, including the Netherlands, strongly opposed this, see p 99 para 32.

The United Kingdom (UK) delegate proposed to delete the whole of Article 15 as the obligation was difficult to formulate and State practice did not offer sufficient guidance.[124] The Japanese delegation supported the UK's proposal.[125] Whilst many representatives did express concern about the controversial nature of the interim obligation, especially as to how to determine when a State has engaged in conduct that would frustrate the object and purpose of a treaty, the UK's proposal was rejected. The Conference nevertheless voted to delete sub-paragraph (a) of the provision.[126]

At a later point, the wording 'acts tending to frustrate the object of a proposed treaty' was substituted with 'acts which would defeat the object and purpose of a treaty'. Although rapporteur Waldock had earlier explained that the formula 'acts tending to frustrate the object and purpose of a treaty' was based on a well-founded notion in English law which 'meant that the treaty was rendered meaningless by such acts and lost its object',[127] it was clarified that this was 'a purely drafting change, made in the interest of clarity'.[128] The word 'purpose' was added to 'object' in the interest of unifying the convention, because the expression 'object and purpose' was frequently used in other provisions.[129] At the second session, the Polish delegate pointed to the fact that Article 15(a) (previously 15(b)) was too restrictive as States could make their intention to be bound by a treaty by other means than signature. His proposal for the insertion of the words 'or has exchanged instruments constituting a treaty' was accordingly adopted.[130] Article 15 was subsequently approved.[131]

2.4 Customary Status of Article 18 VCLT

The customary status of Article 18 VCLT was, during the drafting history, initially contentious. Whereas the first Special Rapporteur Brierly pointed out that '[a] certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between signature of a treaty on their behalf, and its ratification, that would render ratification by other States superfluous or useless', this material was, however, 'of too fragmentary and inconclusive

[124] Ibid p 97 para 9.
[125] Ibid p 98 para 20.
[126] Ibid p 106 para 47.
[127] Ibid p 104 para 26.
[128] Ibid p 361 para 101.
[129] Ibid.
[130] Vienna Diplomatic Conference, Second Session, p 29 paras 25-26.
[131] Vienna Diplomatic Conference, First Session, 19th meeting, p 361 para 105; Vienna Diplomatic Conference, Second Session, p 29 para 26.

a nature to form the basis of codification'.[132] Special Rapporteur Lauterpacht held an opposite view and stressed that judicial practice evidenced a manifest legal basis of the interim obligation and was as complete as could possibly be asked for.[133] The following Rapporteur Fitzmaurice did not take any clear stance on the matter, although he, albeit in a cautious manner, in principle agreed with the proposition of Lauterpacht.[134]

The work of the last Special Rapporteur Waldock and the subsequent discussions at the Vienna Diplomatic Conference marked a change by clearly supporting the view that the interim obligation had solid basis in general international law.[135] This view is also supported by the fact that the participants at the Vienna Conference ultimately voted to delete participation in negotiations under subparagraph a) of Article 15 of the Draft Convention as it was unlikely that 'positive international law imposed any specific or general obligations upon states which had participated in the negotiation or the adoption of the text of a treaty'.[136] There was accordingly insufficient legal basis to actually impose a legal obligation on States that merely took part in the negotiations of the treaty.[137] Thus, a general view among the delegates was indeed that sub-paragraph (a) laid down a new principle of international law beyond the scope of codification, being too rigorous.[138] However, it was believed that sub-paragraphs (b) and (c) – today Article 18(a) and (b) VCLT – were sound rules of international law.[139]

The early drafters might have been justified in questioning the customary character of the interim obligation. In contrast to legislation – which is conscious and deliberate – the creation of custom is unconscious,[140] and requires the existence of consistent and general State practice and *opinio juris*.[141] It is, on the one hand, doubtful whether there existed, prior to the adoption

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[132] J.L. Brierly, *Third Report: Articles Tentatively Adopted by the Commission at the Third Session with Commentary Thereon,* YILC Vol II (1952) UN Doc A/CN.4/SER.A/1952/Add.1. Other members disagreed. Mr Yepes, for instance, emphasised that the interim obligation was a legal one which had basis in international jurisprudence, State practice, and the writings of legal scholars, see ILC, Summary Record of the 87th meeting, Extract from the YILC Vol I (1951) UN Doc A/CN.4/SR.87, paras 46-48.
[133] Rapporteur Lauterpacht, Report of the Law of Treaties (n 94) 110.
[134] Rapporteur Fitzmaurice, Report on the Law of Treaties (n 99) 122.
[135] See e.g., Report of the ILC on the Work of its Eighth Session, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), Extract from the YILC, Vol II (1956) UN Doc. A/CN.4/104 at 301.
[136] See e.g., Summary Record of the 642nd meeting, Extract from the YILC (1962) Vol I, UN Doc A/CN.4/SR.642, para 41.
[137] Waldock fourth report (n 114) 44.
[138] United Nations Conference on the Law of Treaties, First Session (26 March-24 May 1968) UN Doc A/CONF.39/11, 19th meeting pp 97-106.
[139] Ibid.
[140] See Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston 1966) 440.
[141] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) ICJ Rep 1969 p 3.

of the VCLT, long established and widespread practice which supported the existence of a customary interim obligation. On the other hand, there was certain, albeit sporadic, State practice which relied on such an obligation. For instance, on 22 January 1903, the text of a treaty concerning the Panama Canal was signed between the US and Colombia. The treaty was eventually ratified by the US, but the Senate of Colombia rejected ratification.

In a communication to the US, Colombia on 23 December 1903 declared that 'the congress of Colombia, which is vested, according to our laws with the faculty or power to approve or disapprove the treaties concluded by the government, exercised a perfect right when it disapproved the ... convention'.[142] In reply, the US Secretary of State stated that:

> it is … a familiar rule that treaties, except where they operate on private rights, are, unless it is otherwise provided, binding on the contracting parties from the date of their signature, and that in such a case the exchanging of ratifications confirms the treaty from that day. This rule necessarily implies that the two governments, in agreeing to the treaty through their duly authorised representatives, bind themselves, pending its ratification, not only to oppose its consummation but also to do nothing in contravention of its terms.[143]

The obligation to refrain from acts which would defeat the object and purpose of a pending treaty was also included in express clauses of early treaties. For instance, Article 38 of the General Act of Berlin (1885) provided that '[e]n attendant les Puissance signataires du présent Acte Générale s'obligent à n'adopter aucune mesure qui serait contraire aux dispositions du dit Acte'.[144] The Protocol to the Convention for the Control of Trade in Arms and Ammunition stipulated that:

> [a]t the moment of signing the Convention … the undersigned Plenipotentiaries declare in the name of their respective Governments that they would regard it as contrary to the intention of the High Contracting Parties and to the spirit of the Convention that, pending the coming into force of the Convention, a Contracting Party should adopt any measure which is contrary to its provisions.

Lastly, Article 19 of the Washington Treaty for the Limitation of Naval Armament (1922) provided that 'the United States, the British Empire and Japan agree that the *status quo* at the time of the signing of the present Treaty, with regard to fortifications and naval bases, shall be maintained in their respective territories and possessions specified hereunder'.[145] The inclusion

[142] Appearing in Kelsen (n 140) 467.
[143] Papers relating to the Foreign Relations of the United States, 58th Congress, 2d Session, House of Representatives, Document No 1, 285, 299, appearing in Kelsen (n 140) 467.
[144] 165 CTS 485, 502.
[145] 25 LNTS 201, 209.

of explicit provisions may suggest that there was State practice and *opinio juris* in favour of the existence of a customary interim obligation already prior to the adoption of the VCLT. In any case, within the current discourse of international law, the majority view among scholars is that Article 18 today embodies a rule of customary international law.[146] Even if the rule at the time of the preparatory work of the VCLT was one of progressive development rather than settled practice,[147] the interim obligation is now viewed as having crystallised into customary law as a consequence of its unanimous adoption by states at the Vienna Conference and its incorporation in Article 18.[148]

Indeed, given the fact that the drafters intentionally and deliberately made law by incorporating the interim obligation in the VCLT and the VCLT now has been in force for over four decades, it appears that Article 18 today has a corresponding rule in general international law.[149] For instance, a letter (although not representative of the position of all States) sent on 6 May 2002 by the US (which is not a party to the VCLT) to the UN Secretary-General stated that 'the United States does not intend to become a party' to the Statute of the International Criminal Court (ICC) and that, '[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000'.[150] Thus, '[s]ince the United States is not a party to the Vienna Convention, this indirect reference to Article 18 may be regarded as an implicit recognition that this provision reflects customary international law'.[151] It has likewise been suggested that 'it was exactly to avoid any obligations under the law of treaties (as opposed to the Rome Statute itself) flowing from this interim obligation that may have prompted the act of

[146] Charme (n 41) 77; Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 221; Curtis A Bradley, 'Treaty Signature' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 213.

[147] Dörr (n 146) at 221 writes that '[c]onsidering that State practice and international jurisprudence prior to the drafting of the VCLT was sparse and incoherent, the inclusion of Art 18 in the Convention was, at the time, very much an act of progressive development, rather than a codification of pre-existing customary law'. Shabtai Rosenne, *Developments in the Law of Treaties*, 1945–1986 (CUP 1989) 149 notes that 'article 18 … is in many circles regarded as highly controversial, at least with regard to the question of whether it is declaratory of customary international law or innovative'. Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, MUP 1984) at 43 notes that Art 18 'in all probability constitutes at least a measure of progressive development'. Some scholars, including Werner Morvay, 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force: Commentaries on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 27 ZaöRV 451, 458, and Charme (n 41) 76–85, however, insist on its customary law character already in the 1960s.

[148] Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 25. See also L. Boisson de Chazournes, A.-M. La Rosa, and M.M. Mbengue, 'Article 18' in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités* (Bruylant, 2006) vol. I, 594.

[149] Palchetti (n 148) 26.

[150] Letter from J.R. Bolton to K. Annan, 6 May 2002, available at http:// www.freerepublic.com/focus/news/678762/posts (last accessed 15 July 2022).

[151] Palchetti (n 148) 26.

unsigning'.[152] Another evidence that the US in particular considers Article 18 VCLT to constitute a rule of customary international law can be found in a report of the Secretary of State, noting that 'Article 18 [VCLT] sets forth rules governing the obligations of States not to defeat the object and purpose of a treaty prior to its entry into force ... [and] ... is widely recognized in customary international law'.[153]

There are, however, opinions that challenge the customary status of Article 18. For instance, it has been stressed that Article 18 'in all probability constitutes at least a measure of progressive development',[154] 'goes further than customary law would appear to go',[155] and is '"highly controversial" due to its perceived departure from customary international law'.[156] Furthermore, in response to the questionnaire circulated to participants, one respondent wrote that since it is 'not a party to the Vienna Convention on the Law of Treaties of 23 May 1969', it 'does not have an official view on the interpretation of [A]rticle 18 of the Vienna Convention. The Ministry of Foreign Affairs will therefore not reply to your questionnaire'. This answer inevitably suggests that the interim obligation is not a rule of customary international law as there is nothing that indicates, to the knowledge of the present author, that this State would be able to prove its status as a persistent objector to the rule laid down in Article 18 VCLT.

However, it is not the purpose of this chapter to make an exhaustive claim as to the customary status of Article 18 VCLT as this would go beyond the scope of the present study but rather to shed light on some recent trends that challenge the presumed customary status of Article 18 VCLT. That said, it is inevitable to remember the following three points: i) the majority of drafters during the Vienna Diplomatic Conference agreed that Article 18 corresponds to a rule of customary international law; ii) the majority of scholars agree that Article 18 today is a rule of customary international law; and iii) States which are not parties to the VCLT have accommodated their behaviour in a way which complies with the stipulations of Article 18 VCLT, which – presumably – they would not have done should Article 18 not also constitute a rule of customary international law.

2.5 Concluding Remarks

[152] Dino Kritsiotis, 'The Object and Purpose of a Treaty's Object and Purpose' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 269-271.
[153] Department of State Bull. 684, 685 (1971) (Report of the Secretary of State), Exec. Doc. No. L., 92d Cong., 1st Sess. at 2 (1971).
[154] Sinclair (n 147) 42-44.
[155] Daniel Patrick O'Connell, *International Law* (Stevens & Sons 1965) 223.
[156] Rosenne (n 147) 149.

As can be seen from the outline of the drafting history of Article 18 VCLT, it is undeniable that the moral nature of the obligation as initially stressed by the Harvard Research Group and Rapporteur Brierly was abandoned by the subsequent rapporteurs as all of them emphasised that the interim obligation was a legal one with sufficient basis in international law. Likewise, although the customary status of Article was initially contentious, the majority of contemporary views of States and scholars suggest that Article 18 has crystallised into a rule of general international law. There is also an evident shift in what today would be understood by the phrasing 'to refrain from acts which would defeat the object and purpose of a treaty' under Article 18.

The Harvard Group and Rapporteur Brierly maintained a focus on acts that would render performance of the treaty impossible or more difficult when in force. Rapporteur Lauterpacht centred his attention on acts intended to substantially impair the values of an undertaking signed, to deprive the treaty of its effectiveness, and to deceive the other parties. Rapporteur Fitzmaurice referred to action calculated to impair or prejudice the objects of a treaty, whereas the last Rapporteur Waldock focused on action that tended to frustrate the purposes of the treaty.

Ultimately, the main features which are retained in the formula under Article 18 protect the integrity of the treaty, the interests of the other parties, and the ability of a State to perform the stipulations of the treaty once in force. In this context, it might be said that Article 18 draws upon certain techniques employed in domestic legal regimes, because just as Rapporteur Waldock indeed explained, this notion is well-founded in English law, and entails a duty not to engage in actions which would deprive a treaty (as the international counterpart to a contract) of its object by rendering it meaningless.

Article 18 may also be viewed as partly borrowing from three other concepts embedded in domestic legal regimes in this context: the theory of abuse of rights, contracts containing obligations to be subsequently performed, and the idea of anticipatory breach. The existence of similarities between the problems that both legal domains seek to address[157] may suffice to render analogy permissible, perhaps even appropriate, in this regard and the drafters might well have been inspired by these notions when construing the interim obligation.

[157] I.e., to safeguard the interest of all parties in the formation of treaties or contracts, to protect them from harmful conduct by other parties, and to ensure notions of good faith throughout the whole procedure of entering into contractual relations.

Furthermore, it is significant that the Harvard Group, as well as Rapporteurs Waldock and Lauterpacht, did not address any legal consequences of participation in the negotiations of a treaty but solely focused on the legal effects of signature. However, whereas Rapporteur Fitzmaurice explicitly stated that participation in negotiations did not entail any obligations with respect to the subject matter of the treaty, Rapporteur Waldock adopted a fundamentally different approach by introducing an obligation on part of negotiating States to refrain from action that might frustrate or prejudice the purposes of the treaty. As seen above, this obligation was not retained in the final version of Article 18 due to its far-reaching nature.

Accordingly, the concept of *culpa in contrahendo*, as the domestic counterpart to the obligation to negotiate a treaty in good faith, has a wider construct than the interim obligation, which is not triggered by mere negotiations but commences at the earliest with signature. This fundamental distinction between the concepts renders analogy between them unwarranted and it is not unlikely that the theory of abuse of rights has been a more influential and useful analogy in the development of the interim obligation than *culpa in contrahendo*.

Yet, this is not to disregard the distinct functions of international and domestic law respectively, or to treat the interim obligation synonymously with the domestic theory of abuse of rights. Contractual dealings between States is a multifaceted phenomenon which may be confronted by challenges that would never occur on a domestic plane. International law thus needs to accommodate the dynamic and unique nature of the law of treaties and the various areas in which States may co-operate by virtue of international relations and agreements.

Whilst embodying the gist of the theory of abuse of rights, and perhaps even the concept of anticipatory breach, Article 18 VCLT may be viewed as having pursued a broader path by offering a more comprehensive and flexible function than to solely protect States from the abusive exercise of rights by other States and prevent a breach of a treaty's 'root' pending its entry into force. The focus of Article 18 is also on the integrity of the treaty by vindicating its effectiveness and ensuring that its object and purpose is still intact and achievable at the time of its entry into force. As such, 'analogy does not have more force than international law gives it'.[158] An analogy can result in positive international law, such as a rule like Article 18 VCLT, but then its status results from the formal source of international law in which it becomes

[158] Hertogen (n 2) 1148.

incorporated – the VCLT itself – rather than from the reasoning by analogy from domestic law.[159]

[159] Ibid.

3. OBJECT AND PURPOSE OF A TREATY IN RELATION TO ARTICLE 18 VCLT

3.1 Introduction

Identifying the object and purpose of a treaty is an arduous task. It is therefore somewhat curious that whilst the VCLT repeatedly avails itself of the notion of the 'object and purpose' of a treaty – the formula occurs in no less than seven provisions – the Convention does not in itself contain any provision as to how to identify the object and purpose of a treaty.[1] The *travaux préparatoires* likewise shed little light on this expression.[2] As such, it is unsurprising that the application of provisions referring to the treaty's object and purpose has proven to be a multifaceted problem. The application of Article 18 is no exception: when applying either subparagraphs a) or b) of the provision, the first step is to identify the object and purpose of a treaty and the second step to determine when certain conduct would defeat the object and purpose of the treaty.

Accordingly, a treaty's object and purpose lies at the very core of Article 18 VCLT as the provision defers itself to conduct which would thwart this very object and purpose of the treaty. However, the very wording 'object and purpose ' remains complex, ambiguous, and enigmatic: it presupposes as a starting point that the object and purpose of a treaty can be reduced to one single nucleus which is inherent to each and every treaty. This proposition is elusive and is perhaps only conceivable for treaties with a narrow focus. To add to this complexity, the notion of the object and purpose of a treaty has a dynamic element: it is itself not a fixed and static one but can develop as experience is gained in the operation of the treaty.[3]

This chapter analyses the meaning of the notion of the object and purpose of a treaty in the context of Article 18, whereas subsequent chapter 4 deals with the ensuing and closely linked

[1] Articles 18, 19, 20, 31, 33, 41 and 58 VCLT. Notably, Article 60(3)(b) refers to the 'object *or* purpose of the treaty' (emphasis added). It should be highlighted that the commentaries to the International Law Commission (ILC) Draft Convention on the Law of Treaties (Draft Articles on the Law of Treaties, Text adopted by the ILC at its eighteenth session, YILC, 1966, Vol II, UN Doc A/CN.4/SER. A/1966/Add) neither contained any definition of the object and purpose of a treaty.

[2] Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3(1) ARIEL 311, 320-1; Alain Pellet, 'Article 19' in Oliver Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol I (OUP 2011) 446-7.

[3] Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and other Treaty Points' (1957) 33 BYIL 203, 208.

issue of the threshold and meaning of 'defeating' a treaty's object and purpose.[4] The first part of this chapter examines the meaning of the notion of the object and purpose of a treaty, how it is to be identified and whether it is to be treated as a unitary or binary concept. The second part of this chapter examines how Article 18 VCLT applies in relation to the object and purpose of a treaty. This has to a large extent been overseen in existing scholarship and no comprehensive and detailed assessment has been provided thus far. Thus, this chapter covers a wide array of cutting-edge issues in the law of treaties relating to the object and purpose of a treaty by examining if Article 18 can apply to the object and purposes of individual treaty provisions, or if the scope of Article 18 is confined the overarching telos of a treaty as a whole.

3.2 Meaning of 'Object and Purpose' of a Treaty

It has been argued that the expression 'object and purpose' is 'a term of art without a workable definition',[5] not least since there is no established method as to how to identify the object and purpose of a treaty. There is little doubt, however, that the phrasing 'object and purpose of the treaty' has the same meaning within all provisions in which it occurs in the VCLT,[6] although it remains somewhat unclear with respect to Article 60(3)(b) – defining the concept of a material breach of a treaty – which refers to the 'object *or* purpose' of the treaty. Some scholars,

[4] The question of the object and purpose of a treaty in the context of reservations to or interpretation of a treaty has already received extensive attention in scholarship, see e.g., Belinda Clark, 'The Vienna Convention Reservations Regime and The Convention on Discrimination Against Women' (1991) 85(2) AJIL 281-321; William Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 CanYBIL 39; Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties* (Brill Nijhoff 1995); Vesna Crnic-Grotic, 'Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties' (1997) 7 Asian Yearbook of International Law 141; Rosalyn Higgins, 'Human Rights: Some Questions of Integrity' (1989) 15(2) Commonwealth Law Bulletin 598; Ulf Linderfalk, 'On the Meaning of the Object and Purpose Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19' (2003) 72 Nordic J Int'l L 429; Jan Klabbers, 'Some Problems Regarding the Object and Purpose of a Treaty' (1997) 8 FinnishYBIL 138-160; Dino Kritsiotis, 'The Object and Purpose of a Treaty's Object and Purpose' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018). For some selected case-law on the matter, see *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Rep 1951 p 15; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection (Judgment) ICJ Rep 1996 p 814, para 28; *Land Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* (Judgment) ICJ Rep 1998 p 318, para 98; *LaGrand (Germany v United States)* (Judgment) ICJ Rep 2001 p 502, para 102; *International Status of South West Africa* (Advisory Opinion) ICJ Rep 1950 p 139; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgment) ICJ Rep 1986 p 138, para 275; *Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) ICJ Rep 1999 p 1045, para 43.

[5] David S Jonas and Thomas N Sanders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 VandJTransnat'lL 565.

[6] Pellet (n 2) 447; Mark E. Villiger, *1969 Commentary on the Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 248; Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 232; ILC Report, Fifty-ninth session (7 May - 5 June and 9 July - 10 August 2007), UN Doc A/62/10, 68.

without further analysis or discussion, count Article 60(3)(b) as one of the examples of the object *and* purpose formulation,[7] whereas others are hesitant to adhere to such a view.[8]

The matter is opaque and perhaps even somewhat artificial.[9] However, given the fact that the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) in some instances have distinguished between the concept of the 'object' and the 'purpose' of a treaty respectively,[10] combined with the fact that the drafters were mindful to deploy the 'object *and* purpose' (rather than simply 'object') formula with respect to Article 18 in the interest of unifying the terminology deployed in the VCLT,[11] the use of different conjunctions seems deliberate and might consequently entail that these notions are to be treated distinctly.[12]

Some treaties will contain one or few provisions which explicitly provide(s) for the object and purpose of the treaty. Examples include Article 1 of the Charter of the United Nations (UN Charter),[13] Article 1 of the Convention on Biological Diversity (CBD),[14] and Article 1 of the World Health Organisation (WHO) Constitution.[15] Such treaties generally cause little trouble in the identification of a treaty's object and purpose. However, it is treaties with a broad focus

[7] Jonas and Sanders (n 5) 659; Joni S Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo Wash J Int'l L & Econ 71; Thomas Giegerich 'Article 60' in Dörr and Schmalenbach (n 6) 1031-35; Villiger (n 6) 730-751; Buffard and Zemanek (n 2) 321; Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moïse Mbengue, 'Article 18' in Oliver Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol I (OUP 2011) 383.

[8] See e.g. Kritsiotis (n 4) 237-8.

[9] Kritsiotis notes that this, quite possibly, could have been a drafting error, above at 298.

[10] Eg in *Chorzow Factory* (Germany v Poland) (Judgment) (1927) PCIJ Series A no 9, p 24 This logic, which is further elaborated upon below, derivatives from the distinction in French public law between '*l'objet*' and '*le but*', 'which denotes the reasons for establishing the "*l'objet*" in the first place', see Paul Gragl and Malgosia Fitzmaurice, 'The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699, 709; Buffard and Zemanek (n 2) 315, 326; Malgosia Fitzmaurice, 'The Whaling Convention and Thorny Issues of Interpretation' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill 2014) 58-9.

[11] It will be recalled that Draft Article 15 referred to the 'object' of a treaty, but the drafters wanted to use a uniform language throughout the VCLT and voted to include the 'object and purpose' formula in Article 18, see United Nations Conference on the Law of Treaties, First Session (26 March-24 May 1968) UN Doc A/CONF.39/11, p 361 para 101.

[12] See also Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (n 4) 145. However, Reuters has stated that the terminology 'object or purpose' is exceptional and is as such not an indication of the existence of a distinction between notions of 'object' and 'purpose' in international law, see Paul Reuter, ''Solidarit´e et divisibilit´e des engagements conventionnels' in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989) 623–634, 628.

[13] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031.

[14] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

[15] That is 'the attainment by all peoples of the highest possible level of health', see Constitution of the World Health Organisation (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185.

that aggravate the identification procedure. For such treaties, guidance is usually sought in the 'spirit'[16] or 'ethos'[17] of the treaty. Those notions are generally external or 'unbound' to the text of the treaty,[18] although it has been argued that '[t]he object and purpose of a treaty cannot be a concept existing independently of any of its terms'.[19]

Such argument is based on the general rule of interpretation under Article 31 VCLT, pursuant to which the text of the treaty shall be interpreted, *inter alia*, in light of its object and purpose. However, this induces a complex circularity between the text of a treaty and its object and purpose. On one hand, the object and purpose of a treaty is understood through a lens of its explicit text. On the other hand, when illuminating the proper meaning of a treaty's text, one is dictated by its object and purpose. In effect, this – paradoxically enough – entails that 'the object and purpose of a treaty [is] to be determined in light of its object and purpose'.[20]

That said, it is undisputed that the object and purpose formula is broadly confined to the reasons for the conclusion of a treaty and its essential goals, or, in order words, the very *raison d'être* of the treaty and the goals that the drafters sought to achieve.[21] It has also been argued that '[t]he term object and purpose refers to the specific ends a treaty seeks and also the logic and the normative character of the rights and obligations the treaty creates to attain those ends'.[22] Nevertheless, it is contested whether the 'object and purpose' is to be treated as referring to a single phenomenon or not. Some argue that the *travaux préparatoires* of the VCLT support the view that the concept is unitary in nature,[23] whereby the two elements are interdependent and

[16] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) ICJ Rep 1950 p 220; Kritsiotis (n 4) 238. See also Martin A. Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32(2) Maine Law Review 263, 269, 299. See however Gardiner, who is hesitant, or cautious, to the use of the spirit of a treaty as it 'may suggest a nebulous formulation of what animates the treaty', Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 214.
[17] Kritsiotis (n 4) 238, referring to Arnold Pronto and Michael Wood, *The International Law Commission 1999-2009* (Vol IV: Treaties, Final Draft Articles and Other Materials) (OUP 2011) 742; Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Divergence and Expansion of International Law (Finalised by Marti Koskenniemi), UN Doc A/CN/4/L/682 (13 April 2006) p 141, para 277.
[18] Although Kritsiotis (n 4) notes that it has been stated that the object and purpose of a treaty is 'intrinsic' to the text of the treaty, at 238, referring to Case A 28 *Federal Reserve Bank of New York v Bank Markazi* (2000) 36 Iran-US Claims Tribunals Rep 5, para 58.
[19] *Military and Paramilitary Activities in and Against Nicaragua* (n 4) Dissenting Opinion of Judge Jennings at 542.
[20] Schabas (n 4) 48.
[21] Villiger (n 6) 248; Jonas and Sanders (n 5) 565.
[22] Jonas and Sanders (n 5) 588.
[23] Klabbers, 'Some Problems Regarding a Treaty's Object and Purpose' (n 4) 147-8.

mutually reinforcing.[24] The German, Austrian and English legal systems also seem to treat the 'object and purpose' as a 'joint notion', expressing the overall aim of the treaty.[25]

In contrast, some have favoured a binary approach. It has been argued that '[i]n ordinary language, the two words object and purpose are perfectly synonymous'.[26] However,

> [i]n the language of international law it is used for referring to two different phenomena … Hence, by 'the object and purpose' of a treaty we shall understand, firstly, the rights and obligations to which a treaty gives expression – its normative content; second, the state (or states) of affairs envisaged by the parties to be attained by applying the treaty – in some camps referred to as the *telos* (or *teloi*) of the treaty.[27]

This distinction, occasionally embraced by the ICJ,[28] derives from 'a stream of French doctrine … [which] gives special attention to the distinction between object and purpose of a treaty'.[29] According to French doctrine, 'the term "objet" indicates ... the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty's purpose, and this purpose is, in turn, the general result which the parties want to achieve by the treaty'.[30] Within international law, the meaning of these terms may be clarified in the following way: 'the term "purpose" indicates the aim which is to be achieved by the treaty, while "object" refers to the legal position created for the parties by the provisions of the treaty as a whole, its subject-matter'.[31] Another explanation of the concept in international law hinges upon this binary notion: the 'object' 'refers to the subject matter subjected to regulation, for example, the environment, air services, or financial matters … The "purpose" refers to the aim of the norm, for example the sustainable protection of some natural resources, the extension of air services, the curbing of inflation, and so on'.[32]

The practice of international courts and tribunals provides little assistance when attempting to discern the meaning of the expression 'object and purpose' and it has been stated that the ICJ

[24] Boisson de Chazournes, La Rosa, and Mbengue (n 7) 387; Villiger (n 6) 427.
[25] Buffard and Zemanek (n 2) 325.
[26] Linderfalk (n 4) 433.
[27] Ibid 433-4.
[28] See further below.
[29] Buffard and Zemanek (n 2) 325.
[30] Ibid 326.
[31] Ibid 332.
[32] See Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2016) 145.

'proceeds often by simple affirmations and, when it shows itself anxious to justify its position, it follows an empirical approach'.[33] Nevertheless, certain elements that have been resorted to in the identification of a treaty's object and purpose can be singled out. In *Diversion of Water from the Meuse*, the PCIJ had recourse to the preamble of an 1863 Treaty between Germany and Belgium to identify the purpose of the treaty.[34] Similarly, the ICJ referred to the preamble of a treaty in order to establish its object and purpose in *Rights of Nationals of the United States of America in Morocco*[35] and in the *Territorial Dispute*.[36]

Resort to the preamble of a treaty to elucidate its 'chief object' was made already in 1932 by Arbitrator Borel in an award between Sweden and the United States concerning the allegedly illegal detention of certain vessels.[37] In its much quoted *Golder v UK* judgment, the European Court of Human Rights (ECtHR) also stated that 'the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed', whereby it proceeded to adduce the right of access to court and, in particular, the principle whereby a civil claim must be capable of being submitted to a judge. It did so *inter alia* in light of the preamble of the European Convention on Human Rights (ECHR),[38] which was considered to enshrine the principle of the rule of law.[39]

In a 1980 Advisory Opinion, the ICJ deduced the object of an agreement between the World Health Organisation (WHO) and Egypt from the title, preamble and text of the agreement.[40] In *Norwegian Loans*, strong emphasis was placed on the title of the treaty: '[t]he purpose of the Convention in question is that indicated in its title, that is to Say "the Limitation of the Employment of Force for the Recovery of Contract Debts"'.[41] In an arbitral award between

[33] Pellet (n 2) 448 (footnote omitted).
[34] *Diversion of Water from the Meuse (Netherlands v Belgium)* (1937) PCIJ Series A No 70, p 13.
[35] *Rights of Nationals of the United States of America in Morocco* (*France v United States of America*) (Judgment) ICJ Rep 1952 pp 196-7.
[36] *Libya v Chad* (Judgment) ICJ Rep 1994, pp 25-6. See also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) ICJ Rep 2002, p 625, para 51.
[37] *The Kronprins Gustaf Adolf and the Pacific (Sweden v United States of America)* Award of 18 July 1932, reported in 6 Annual Digest 372, at 374-7.
[38] (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (ECHR).
[39] *Golder v UK*, App no 4451/70 (ECtHR, 21 February 1975) particularly para 34.
[40] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) ICJ Rep 1980, p 73, para 38.
[41] *Case of Certain Norwegian Loans (France v Norway)* (Judgment) ICJ Rep 1957, p 9, 24.

Ireland and the UK, the arbitral tribunal referred to specific treaty provisions and the treaty preamble to identify the 'main purpose' and the 'objectives' of the OSPAR Convention.[42]

Furthermore, in the controversial dispute between Australia and Japan in the *Whaling* case,[43] concerning Japan's continued pursuit of a large-scale program of whaling under its Japanese Whale Research Program, the interpretation of the object and purpose of the International Convention for the Regulation of Whaling (ICRW)[44] was material to the pleadings of both States.[45] Their respective arguments were primarily based on an analysis of the ICRW's Preamble, as well as on the contributions of the Resolutions of the International Whaling Commission (IWC) concerning the interpretation of the ICRW. Australia and New Zealand emphasised the Preamble's sustainable conservation approach, the value of whales to future generations, the effective recovery of whale stocks, and the focus on a preservationist approach in resolutions adopted by the IWC subsequent to the adoption of the ICRW.[46] Japan, on its side, emphasised its right to regulate scientific whaling and particularly underlined the last paragraph of the Preamble, which refers to the 'proper conservation of whale stocks' and to making 'possible the orderly development of the whaling industry'.[47]

The ICJ paid little regard to the parties' respective arguments and analyses. It identified the object and purpose of the ICRW by referring to the preamble of the Convention, read in conjunction with specific treaty provisions, in particular Article VIII, paragraph 1, as this provision was considered to form an integral part of the Convention.[48] The Court was of the view that the preamble of the ICRW indicates that the 'Convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation'.[49] Importantly, the Court stated that 'amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by

[42] *Dispute Concerning Article 9 of the OSPAR Convention (Ireland v United Kingdom of Great Britain and Northern Ireland)* PCA, Final Award of 2 July 2003, Case no 200-03, paras 125-129.
[43] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) ICJ Rep 2014 p 226.
[44] International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.
[45] For an analysis, see Malgosia Fitzmaurice, *Whaling and International Law* (CUP 2015).
[46] Memorial of Australia, 9 May 2011, available at https://www.icj-cij.org/public/files/case-related/148/17382.pdf (last accessed 15 July 2022) paras 2.16-2.18; Written observations of New Zealand, 4 April 2013, available at https://www.icj-cij.org/public/files/case-related/148/17386.pdf (last accessed 15 July 2022).
[47] Counter-Memorial of Japan, 9 March 2012, available at https://www.icj-cij.org/public/files/case-related/148/17384.pdf (last accessed 15 July 2022) paras 6.2-6.13.
[48] *Whaling in the Antarctic* (n 43) paras 55-58.
[49] Ibid para 56.

the Convention, but cannot alter its object and purpose'.[50] Thus, the Court confirmed that the object and purpose of a treaty can be extracted from the treaty's preamble, together with its text as a whole, and the provisions constituting an integral part of the treaty. Whereas surrounding circumstances and subsequent legal developments may shed light on the object and purpose of a particular convention and may accordingly facilitate the procedure of identifying a particular treaty's object and purpose, they cannot in and of themselves alter the very object and purpose of a treaty.

Moreover, in *Military and Paramilitary Activities in and against Nicaragua*, the ICJ, when examining the claim that the United States had deprived the Treaty of Friendship, Commerce and Navigation between the US and Nicaragua of 21 January 1956 of its object and purpose, stated that:

> it does consider that there are certain activities of the United States which are such as to *undermine the whole spirit* of a bilateral agreement directed to sponsoring friendship between the two States parties to it … Any action less calculated to serve the purpose of 'strengthening the bonds of peace and friendship traditionally existing between' the Parties, stated in the Preamble of the Treaty, could hardly be imagined.[51]

The Court also, albeit implicitly, referred to the title of the treaty and in particular the nature of commitments implied in a treaty of friendship and commerce.[52] In *Oil Platforms*, the Court identified the object and purpose of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran of 15 August 1955 through a combination of the title of the treaty, its Preamble and an introductory provision which 'must be regarded as fixing an objective in light of which the other treaty provisions are to be interpreted and applied'.[53] In the boundary dispute around *Kasikili/Sedudu Island*, the Court adduced from a specific treaty provision which demonstrated 'the major concern of each contracting party' at the time of the conclusion of the treaty, the object and purpose of the

[50] Ibid.
[51] *Military and Paramilitary Activities in and against Nicaragua* (n 4) para 275 (emphasis added).
[52] Ibid para 276.
[53] *Oil Platforms* (n 4) paras 27-28.

Anglo-German Agreement of 1890.[54] This object and purpose of the treaty was also implied in the *travaux préparatoires*.[55]

The perhaps most cited case in the context of a treaty's object and purpose is however the 1951 *Advisory Opinion on Reservations to the Genocide Convention*, concerning the legal consequences of reservations to the Genocide Convention.[56] The Court stated that the Convention was manifestly adopted for a purely humanitarian and civilising purpose and was held to pursue two objects: i) to safeguard the very existence of certain human groups; ii) to confirm and endorse the most elementary principles of morality.[57] Moreover, the Court argued that:

> [i]t is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those *high purposes* which are the *raison d'être* of the convention.[58]

The Court did not dwell on the matter as to why it understood the words 'object' and 'purpose' to form two separate ideas, how they are distinct, or how they might interrelate. More significantly, it also failed to explain how it discovered the purpose and two objects of the Convention, or how these were different from the 'high purposes' which are the *raison d'être* of the Convention. The approach of the majority, establishing the object and purpose test for the validity of reservations, was criticised by four dissenting judges who had difficulty in seeing how the new rule could work:

> When a new rule is proposed for the solution of disputes, it should be easy to apply and calculated to produce final and consistent results … What is the 'object and purpose' of the Genocide Convention? To repress genocide? Of course; but is it more

[54] *Kasikili/Sedudu Island* (n 4) para 43.
[55] Ibid para 46. For resort to the *travaux préparatoires* when identifying the object and purpose of a treaty, see also *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) (Judgment) ICJ Rep 1994, p 6 para 55; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004, p 179, para 109.
[56] *Reservations to the Convention on Genocide* (Advisory Opinion) ICJ Rep 1951, p 15.
[57] Ibid.
[58] Ibid (emphasis added).

> than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter.[59]

However, the ICJ more recently in *Gambia/Myanmar* confirmed that the 'Genocide Convention "was manifestly adopted for a purely humanitarian and civilizing purpose", since "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality"',[60] but did again not explain how it arrived at these objects.

The distinction between the 'object' and the 'purpose' of a treaty has been maintained by the ICJ in other cases. In the *Case Concerning Border and Transborder Armed Actions,* the Court stated that '[s]uch a solution would be clearly contrary to *both the object and the purpose* of the Pact', implying that the two elements are separate.[61] In the *Whaling case,* the Court deduced from the preamble of the ICRW that 'the Convention pursues the *purpose* of ensuring the conservation of all species of whales while allowing for their sustainable exploitation'.[62] In an interesting passage, the Court subsequently stated that the:

> *objectives* of the ICRW are further indicated in the final paragraph of the Preamble, which states that the Contracting Parties 'decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.[63]

In this case, the Court seemingly distinguished between the 'purpose' (singular) and the 'objectives' (plural) of the treaty, however, it also referred to the 'object and purpose' of the ICRW as a composite notion.[64]

As seen from the above, the object and purpose formula remains inherently abstract and ambiguous. Its application in practice is prone to creating unpredictable outcomes as the identification of what constitutes a treaty's object and purpose to a considerable extent depends

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[59] Ibid, Joint Dissenting Opinion by Judges Guerrero, McNair, Read, and Hsu Mo, at p 44.
[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* Order of Provisional Measures, 23 January 2020, para 69, available at https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf (last accessed 15 July 2022).
[61] *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) (Judgment) ICJ Rep 1988, p 69, para 46 (emphasis added). This was also confirmed by the *travaux préparatoires.*
[62] *Whaling* (n 43) para 56 (emphasis added).
[63] Ibid (emphasis added).
[64] See in this regard Fitzmaurice, 'The Whaling Convention and Thorny Issues of Interpretation' (n 10) 59.

on subjective understandings prompted by intuition.[65] This has resulted in specific attempts to put forward a method of identifying a treaty's object and purpose. One such method entails a two-step procedure. First,

> a *prima facie* assumption of the object and purpose of a treaty must be formed by having recourse to the title, preamble and, if available, programmatic articles of the treaty. This assumption must *then be tested in a second stage against the text of the treaty* and all other available material and, if necessary, adjusted in the light of that test.[66]

Another method suggests that two criteria are relevant for ascertaining the object and purpose of a treaty: first a functional criterion for determining the purpose, emphasising the ends pursued by the treaty in question; and secondly, 'a material criterion for determining the objective, focusing on the body of norms that has to be established in order to realise that purpose'.[67] Furthermore, the International Law Commission (ILC) has clarified that when seeking to identify the object and purpose of a treaty, one should do so in good faith, taking into account the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty, the circumstances of its conclusion and subsequent practice of State parties.[68]

Admittedly, there is no conclusive understanding as to how to understand the expression 'object and purpose' of a treaty, but an evaluation is dependent on the particular attributes and circumstances of the relevant treaty at hand. What can be concluded, however, is that a textual approach asks what intention is manifested by the text of the treaty, whereas a subjective approach asks what was in the minds of the drafters of the treaty and what they hoped to achieve with it.[69] International courts and tribunals, although not entirely consistent in their approaches, generally resort to a treaty's title, preamble, *travaux préparatoires* and introductory provisions which may be regarded as equipping the treaty with its principal theme and objective when seeking to identify the object and purpose of a treaty.

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[65] Christian Walter, 'Article 19' in Dörr and Schmalenbach (n 6) 264-5.
[66] Buffard and Zemanek (n 2) 333 (emphasis in original).
[67] Boisson de Chazournes, La Rosa, and Mbengue (n 7) paras 32–33.
[68] Guideline 3.1.5.1, Guide to Practice on Reservations, Adopted by the ILC at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 75). The report appears in *Yearbook of the International Law Commission* (2011) UN Doc A/CN.4/SER.A/2011/Add.1, vol II, Part Two.
[69] Jonas and Sanders (n 5) 580-1.

The ambiguous character of the object and purpose formula and the potential problems posed thereto should nevertheless not be overstated but its abstract nature might in fact be indispensable for the effective functioning of the treaty. As noted in the preliminary comments to this chapter, the notion of a treaty's object and purpose is not an entirely fixed or static one but has a dynamic element. It can broadly be viewed as referring to the ultimate objectives, aims and goals that the drafters endeavoured to achieve, but in light of gained experience in the operation of the treaty and societal, economic, and technological developments within the treaty's subject area, it is precisely the fluid contours of the object and purpose formula that enables the treaty to accommodate such developments.[70]

3.3 Application of Article 18 VCLT to the Object and Purpose of a Treaty

It has been postulated that '[s]ince treaties often have many purposes, Article 18 will also refer to the object and purpose of *individual* treaty rules'.[71] Furthermore, it has been claimed that the:

> effectiveness of Article 18 would be diminished if the interim obligation would always be confined to protecting a single overarching *telos* of the treaty as a whole. For treaties that clearly pursue more than one purpose, it must be possible to define a variety of interim obligations. In essence, therefore, Article 18 must be taken to refer to the object and purpose of individual treaty provisions, if such can be identified.[72]

A careful reading of this argument unveils that it is twofold: first, for treaties that clearly pursue more than one purpose, it must be possible to define a variety of interim obligations and secondly, if such can be identified, Article 18 can also apply to the object and purpose of individual treaty provisions. Before dwelling into the question of whether Article 18 can apply to the object and purpose of individual treaty provisions, it is first necessary to clarify the question of whether a treaty can pursue several objects and purposes regardless the fact that the VCLT repeatedly refers to the 'object and purpose' formula as one single nucleus. This matter has briefly been touched upon above but in order to properly answer the question of

[70] See in this regard the oral pleading by Australia in the *Whaling* case, pleading by Professor Laurence Boisson de Chazournes, 2013/7 translation, Wednesday, 26 June 2013 at 10 am, http://www.icj-cij.org/docket/files/148/17440.pdf, para 69. As the ICJ pointed out in the case however, 'amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the Convention but cannot alter its object and purpose' at para 56.
[71] Villiger (n 6) 249 (emphasis in original).
[72] Dörr (n 6) 256.

whether Article 18 can operate to establish a variety of interim obligations by virtue of treaties pursuing multiple objects and purposes, a more thorough examination is warranted.

3.3.1 Article 18 as Defining a Variety of Interim Obligations

In *Rights of Nationals of the United States in Morocco*, the ICJ referred to the 'purposes and objects' of the relevant convention:

> [t]he purposes and objects of this Convention were stated in its Preamble in the following words: 'the necessity of establishing, on fixed and uniform bases, the exercise of the right of protection in Morocco and of settling certain questions connected therewith …'.[73]

As such, the ICJ clearly supported the view that a treaty can pursue more than one object and purpose, although it should simultaneously be borne in mind that the preamble of this convention made explicit a plurality of objects and purposes. In its *Advisory Opinion on Reservations to the Genocide Convention*, the Court also attested to the fact that a treaty can pursue more than one object and purpose by referring to the two objects of the Genocide Convention to safeguard the very existence of certain human groups and to confirm and endorse the most elementary principles of morality.[74] As discussed above, the Court also referred to the 'high purposes' – plural – which are the *raison d'être* of the Convention.[75]

The UN Charter is an illustrative example in this regard.[76] Per its preamble recitals, it is possible to detach some of the aims of the UN: to save succeeding generations from the scourge of war;[77] to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained;[78] to ensure that armed force shall not be used save in the common interest;[79] and to employ international machinery for the promotion of the economic and social advancement of all peoples.[80]

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[73] *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (Judgment) ICJ Rep 2004, p 12 at 196.
[74] *Genocide* (n 4) 23-24.
[75] Ibid.
[76] For the original analysis, see Kritsiotis (n 4) 279-80.
[77] First preamble recital.
[78] Third preamble recital.
[79] Seventh preamble recital.
[80] Eight preamble recital.

In addition, Article 1 sets out the 'purposes' of the UN to maintain international peace and security, to take effective collective measures for the prevention and removal of threats to the peace, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character. Thus, the preamble of the UN Charter as well as its Article 1 set out the purposes of the Charter in the sense that it refers to the aim of the norm which is to be achieved by the treaty: the preservation and maintenance of international peace and security, and the enjoyment of fundamental rights of freedoms for all. As such, the UN Charter is a typical example of a treaty that clearly pursues a variety of objects and purposes and this in particular because the treaty itself per its preamble and integral provisions expressly enumerates a plurality of objects and purposes.

It is, however, not entirely clear how Article 18 applies in relation to treaties such as the UN Charter that clearly pursue a range of objects and purposes. This is perhaps well demonstrated by a 2003 dissenting opinion in an arbitral award between Ireland concerning access to information under Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).[81] The dissenting judge, within the same paragraph, first referred to the obligation on part of the UK to refrain from acts that would defeat the objects and purposes of the Aarhus Convention (plural),[82] before concluding that 'to a limited extent it may be said that the Vienna Convention [Article 18] has the effect that the United Kingdom is bound' by the 'object and purpose' of the Aarhus Convention pending ratification (singular). The judge reached this conclusion without explaining further why and/or how to distinguish between the plural and singular notions of a treaty's object and purpose respectively.[83]

The *travaux préparatoires* offer little support to clarify this issue, although Special Rapporteur Fitzmaurice in his first report referred to the interim obligation as an obligation not to take any action calculated to impair or prejudice the *objects* of the treaty.[84] Likewise, Special Rapporteur

[81] Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (adopted 22 September 1992, entered into force 25 March 1998) 2354 UNTS 67.
[82] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.
[83] *Dispute Concerning Article 9 of the OSPAR Convention* (n 42) p 70, para 13.
[84] Article 30(1)(c), Sir Gerald Fitzmaurice, Special Rapporteur, Report on the Law of Treaties, Extract from the YILC, Vol II (1956), UN Doc A/CN.4/101,

Waldock referred to the obligation in good faith to refrain from any action calculated to frustrate the *objects* of the treaty or to impair its eventual performance.[85]

Those positions need not necessarily be affirmative of the premise that Article 18 can apply in a way to define a multiplicity of interim obligations – after all this terminology was not retained in the final version of the VCLT – but they may nevertheless be indicative of the fact that Article 18 is flexible enough to accommodate a variety of a treaty's objects and purposes. If a treaty as a whole clearly, that is beyond doubt, pursues several objects and purposes, it might be helpful for the application of Article 18 to be viewed as capable of imposing a variety of interim obligations, or, in the alternative, as imposing a multifaceted interim obligation which encompasses all of the treaty's objects and purposes, in order not to compromise the effective functioning of the treaty and to ensure that its ultimate rationale is still intact at the time of its entry into force.

3.3.2 Article 18 as Applying to the Object and Purpose of Individual Provisions

Turning to the question of whether Article 18 can be conceived as capable of applying to the object and purpose of individual treaty provision, it should first be clarified that it is indeed possible to identify the object and purpose of individual treaty provisions. In *Jadhav*, the ICJ, when interpreting Article 36 of the Vienna Convention on Consular Relations (VCCR)[86] stated that '[t]he object and purpose of the Vienna Convention [VCCR] as stated in its preamble is to "contribute to the development of friendly relations among nations"'.[87] In an interesting passage, the Court went on to establish the 'purpose' of this specific treaty provision, which, as indicated in its introductory sentence, is

> to 'facilitat[e] the exercise of consular functions relating to nationals of the sending State'. Consequently, consular officers may in all cases exercise the rights relating to consular access set out in that provision for the nationals of the sending State. It would run counter to the *purpose of that provision* if the rights it provides could be disregarded when the receiving State alleges that a foreign national in its custody was involved in acts of espionage.[88]

[85] Article 9(2)(c), Sir Humphrey Waldock, Special Rapporteur, First Report on the Law of Treaties, Extract from the YILC, Vol II (1962).
[86] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.
[87] *Jadhav (India v Pakistan)* Judgment, ICJ Rep 2019, p 418, para 74.
[88] Ibid (emphasis added).

In effect, what the Court did was to first identify the overarching *telos* of the VCCR as a whole by having recourse to the preamble of the Convention, and then secondly to establish the purpose of the very treaty provision subject to interpretation.

In *Case Concerning US Diplomatic and Consular Staff in Tehran* the ICJ reasoned as follows:

> [t]he very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Art. XXI, par. 2 of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by peaceful means.[89]

Thus, not only did the Court refer to 'the very purpose' of the treaty as a whole, but also to the 'whole object' of a specific treaty provision. Moreover, in his dissenting opinion in *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Judge Anzilotti referred to the object of a part of a treaty: '[i]n my view there can be no doubt that Part XIII of the Treaty of Versailles has for its object the regulation of the employment of manual workers'.[90]

Thus, it is in certain circumstances possible to identify the object and purpose of individual treaty rules (or part of treaty). If the object and purpose of an individual treaty provision has been established, is Article 18 applicable to the object and purpose of this very treaty provision? Practice and writings are sparse in this regard. In a joint legal opinion, James Crawford, Philippe Sands and Ralph Wilde examined the lawfulness of so called 'Article 98 Agreements', which essentially are bilateral non-surrender agreements concluded between the US and a State signatory or party to the Rome Statute of the International Criminal Court (ICC). They reached the conclusion that a signatory to the Rome Statute,[91] in order to comply with Article 18 VCLT, 'should avoid entering into a bilateral non-surrender agreement which may not be compatible

[89] *United States Diplomatic and Consular Staff in Tehran* (Judgment) ICJ Rep 1980, p 3, para 54.
[90] *Interpretation of Convention of 1919 concerning Employment of Women during Night*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50, dissenting opinion of Judge Anzilotti.
[91] Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 91.

with the ICC Statute *and its Article 98*'.[92] This was in particular since the conclusion of a bilateral non-surrender agreement by a signatory to the ICC Statute prevented that State from performing its obligations to the ICC and to other State parties to the ICC Statute. Rather than determining whether the effects of an Article 98 Agreement would defeat the object(s) and purpose(s) of the Rome Statute, the authors focused on whether the contested conduct would run counter to the purpose and hinder performance of a *specific provision* of the pending treaty.

Furthermore, in scholarship, several tests have been advanced so as to ascertain under what circumstances the interim obligation would be breached. They all adopt various approaches to what kind of conduct that would deprive a treaty of its object and purpose,[93] but the common denominator among the majority of those tests is that they tend to focus on individual provisions of the relevant treaty. One such test is known as 'the essential element test', which entails that States must comply with the essential, i.e., most important, provisions of the treaty.[94]

Another such test, known as 'the impossible performance test' and which inspired the joint legal opinion in the *Matter of Bilateral Agreements Sought by the United States*, focuses on State conduct that would render performance of the treaty provisions impossible or more difficult when in force.[95] The *status quo* (or facilitation) test seeks to preserve the *status quo* at the time of signature. Under the first step of this test, the question is whether a State has transgressed (acted contrary to) one or more obligations under the provisions of the pending treaty.[96] Again, focus is on conduct in relation to specific treaty provisions.

The logic of those tests, seeking to facilitate the noble task of determining when certain conduct defeats the object and purpose of a pending treaty, is appealing and this is for good reasons. It shifts the focus from the delicate task of identifying a treaty's object and purpose, which, in

[92] *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute,* joint legal opinion by James Crawford, Philippe Sands and Ralph Wilde, 16 June 2003, paras 53-55 (emphasis added).
[93] These tests are more thoroughly elaborated upon in chapter 4.
[94] Buffard and Zemanek (n 2) especially at 331-32.
[95] See *Harvard Draft Convention on the Law of Treaties,* Supplemented to 29 AJIL 653 (1935) 781-82; (*Summary Records of the 788th Meeting*, YILC (1965) UN Doc. A/CN. 4/SER. A/1965, 87, 92; Sir Gerald Fitzmaurice, Special Rapporteur, Report on the Law of Treaties, Extract from the YILC, Vol II (1956), UN Doc A/CN.4/101; Sir Humphrey Waldock, Special Rapporteur, First Report on the Law of Treaties, Extract from the YILC, Vol II (1962).
[96] Jonas and Saunders (n 5) 603-8.

many instances, is frustratingly evasive. It concretises and gives normative meaning to the interim obligation and the sort of conduct it proscribes. It enhances the stability of international relations between States by regulating their conduct, to a certain extent, in accordance with the explicit stipulations of a treaty before it becomes binding upon them. This may, *prima facie*, promote the values of a signed undertaking and smooth the way for the application of the interim obligation in practice, thus fulfilling the purpose of vindicating the effectiveness of Article 18.

However, the fact cannot be disregarded that this point of view is inconsistent with the plain language of Article 18 itself and yields contrary results thereto.[97] Whereas there is sufficient evidence in case-law and scholarship to support the perception that a treaty can pursue a plurality of objects and purposes – thereby justifying the preposition that Article 18 can impose a variety of interim obligations should a treaty clearly pursue several objects and purposes – the wording of Article 18 and the *travaux préparatoires* fail to suggest that the provision would apply to the object and purpose of individual treaty provisions. The same holds true for the object and purpose of part of a treaty. Special Rapporteurs Fitzmaurice and Waldock might have referred to the obligation not to frustrate or impair the 'objects' of a treaty,[98] but nowhere in the preparatory materials is it evident that the drafters envisaged that Article 18 applies to the object and purpose of individual treaty provisions. Thus, the scope of the provision remains confined to the overarching object(s) and purpose(s) of a treaty as a whole.

Of course, specific treaty provisions can set out the object and purpose of the treaty (its objectives) and a typical example includes, mentioned above, Article 1 of the CBD and Articles 1 and 2 of the UN Charter. What is clear, however, is that such provisions, whilst fixing the theme and *motif* of the treaty, do not generally account for any substantial operative obligations to be imposed on States parties. Instead, these provisions, in the words of the ICJ, are to be regarded as fixing an objective in light of which the other treaty provisions are to be interpreted and applied. Once a treaty's object(s) and purpose(s) has been identified through a combination of all relevant elements, the principal question to be asked is whether certain conduct would

[97] It has been argued that 'the text of Article 18 of the Vienna Convention clearly resists any attempt to break up the object and purpose of a treaty into the objects and purposes of smaller parts of the treaty', see Jan Klabbers, 'How to Defeat the Object and Purpose of a Treaty: Toward Manifest intent' (2001) 34 VandJTransnatlL 283, 291; Anneliese Quast Mertsch, 'Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention' in Bowman and Kritsiotis (n 4) 313.
[98] As is familiar, this was not retained in the final version.

remove these guarantees as the principal aims and objectives of the treaty, not if the conduct of a State thwarted the object and purpose of individual treaty provisions prior to the entry into force of the treaty. This is in particular because the latter position is akin to requiring compliance with specific stipulations of a treaty before it becomes operative; something which is not envisaged by Article 18 VCLT as the provision only applies to the object and purpose of a treaty as a whole.

To exemplify, the ICJ proclaimed in *Jadhav* that the object and purpose of the VCCR is to 'contribute to the development of friendly relations among nations'. For the relevant treaty provision subject to interpretation – Article 36 VCCR – the ICJ subsequently held that the object and purpose of this provision is to facilitate the exercise of consular functions relating to nationals of the sending State. The object and purpose of the VCCR contra the object and purpose of Article 36 VCCR are significantly different: the former is more generic; the latter is more specific. In the context of Article 18, the sort of conduct required with regard to the overarching object and purpose of the VCCR as a whole compared to the sort of conduct required by the object and purpose of Article 36 VCCR per se is, again, significantly different.

It is not plausible that Article 18 would apply in a manner which also requires States to refrain from acts that would defeat the object and purpose of facilitating the exercise of consular functions relating to nationals of the sending State as this is remarkably more onerous than the obligation not to defeat the ultimate objective of the VCCR to contribute to the development of friendly relations among nations. Thus, it appears that whereas Article 18 in certain circumstances may be viewed as imposing a variety of interim obligations when the relevant treaty clearly pursues several objects and purposes, it is not applicable to the object and purpose of individual treaty provisions, even if such can be identified. In fact, the specific stipulations of a treaty are inchoate prior to the entry into force of the treaty and other from the treaty's final clauses[99] and the possibility of provisional application, a treaty's substantive provisions will not have any effect until the entry into force of the treaty should they not constitute an element to be taken into consideration when defining the overarching *telos* of the treaty as a whole.

[99] See Article 24(4) VCLT.

The matter of applying Article 18 to a pending treaty's object(s) and purpose(s) has likewise proved puzzling from an additional perspective in domestic case-law. A judgment regarding a Latvian education law reviewed certain acts of the Parliament of Latvia, which on 5 February 2004 had adopted amendments to the Education Law in Latvia.[100] These amendments provided that at least three-fifths of the classes in all secondary schools financed by the state for pupils of minority nationalities were to be taught in the Latvian language. Members of Parliament (MPs) objected to the amendments, claiming, *inter alia*, that they violated Article 18 VCLT as they defeated the object and purpose of the Framework Convention for the Protection of National Minorities,[101] which Latvia had signed on 11 May 1995 but not yet ratified.[102] Accordingly, one of the core issues was whether the requirement for the substantial use of the Latvian language in secondary state-financed schools defeated the object and purpose of the Framework Minority Convention pending its entry into force in Latvia.

The Court was of the view that the essence of Article 18 VCLT is 'to serve as a guarantee so that ratification of the contract does not become senseless, for example, in case if the object of the agreement ceases to exist'.[103] In this vein, owing to the principle of good faith, it pointed out that Article 18 VCLT does not oblige States to implement the 'liabilities of a signed' but not yet ratified treaty'.[104] In the end – without detailed analysis or further explanation – the Constitutional Court held that the adoption of the amendments did not constitute conduct which would defeat the object of the signed Framework Minority Convention. The Court stated that the aim of the Convention was '*not* to exclude determination of proportions of languages of instruction at ethnic minority schools and establish the right of representatives of ethnic minorities to acquire education only in the native language'.[105] However, it did not explain what the object and purpose of the Convention actually is.

As such, the Court framed the object and purpose of the 1995 Framework Convention in a remarkably narrow manner, or, more accurately, the Court seemed not to have identified the object and purpose of the Convention at all. This can hardly be viewed as a satisfactory application of Article 18 VCLT: in order to properly determine if certain conduct defeats the object and purpose of a pending treaty, the very starting point for any application of Article 18

[100] Latvia, Constitutional Court, Re Latvia Education Law, 13 May 2005, Oxford Reports on International Law in Domestic Courts, ILDC 190 (LV 2005).
[101] Framework Convention for the Protection of National Minorities (adopted 1 February 1995) ETS 157.
[102] Latvia, Constitutional Court, Re Latvia Education Law (n 102) paras F1-F2.
[103] Ibid.
[104] Ibid.
[105] Ibid (emphasises added).

is to identify the object(s) and purpose(s) of the treaty. The Court utterly failed to do so, and its assessment of Article 18 is accordingly unsatisfactory.

3.4 Concluding Remarks

The notion of the 'object and purpose' of a treaty remains ambiguous. With no definition of this concept in the VCLT, an evaluation of the concept is dependent on the particular attributes and circumstances of the relevant treaty at hand. International courts and tribunals generally resort to a treaty's title, preamble, *travaux préparatoires* and introductory provisions which may be regarded as equipping the treaty with its principal theme and objective when seeking to identify the object and purpose of a treaty. Given the conclusions of the ILC, recourse may also be given to the circumstances of the conclusion of the treaty and subsequent practice of State parties.

The question of how Article 18 applies to the concept of a treaty's object and purpose likewise remains complex – a point which has been evidenced by certain underlying misconceptions and shortcomings in existing scholarship. However, this chapter has untangled some of those misconceptions and uncertainties by clarifying the proper application of Article 18 to a treaty's object(s) and purpose(s). It has shown that whereas Article 18 applies to the overarching *raison d'être* of the treaty as a whole, the provision may be viewed as capable of imposing a variety of interim obligations, or, in the alternative, as imposing a multifaceted interim obligation which encompasses all of the treaty's objects and purposes should a treaty as a whole clearly pursue a plurality of objects and purposes.

In contrast, this chapter has also illustrated that the wording of Article 18 and the *travaux préparatoires* fail to suggest that the interim obligation would in any case apply to the object and purpose of individual treaty provisions, but the scope of Article 18 remains confined to the overarching object(s) and purpose(s) of a treaty as a whole. A different conclusion would clearly negate the text of the provision and contradict the intent of the drafters.

4. THRESHOLD OF 'DEFEATING' THE OBJECT AND PURPOSE OF A PENDING TREATY

4.1 Introduction

Once a treaty's object and purpose has been established, the first sentence of Article 18 VCLT incorporates a rather uneasy expression by obliging States to refrain from acts which would '*defeat*' this object and purpose of the treaty.[1] There are several difficulties with this terminology – some of which have received very limited attention by legal scholars and practitioners – which render the practical application of Article 18 complex. For instance, the word 'defeat' is not used elsewhere in the VCLT, and Article 18 does not design any criteria as to when a State has 'defeated' the object and purpose of a treaty. Whereas it is generally agreed that by incorporating the word 'defeat', Article 18 sets a high threshold,[2] this approach is not always consistent. In fact, the word 'defeat' is repeatedly substituted with 'incompatible with', 'not consistent with', or 'contrary to' in scholarship and case-law.[3] This tendency is

[1] Emphasis added. See further e.g. Werner Morvay, 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force: Commentaries on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 27 ZaöRV 451, 456; Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263; Paul McDade, 'The Interim Obligation Between Signature and Ratification of a Treaty' (1985) NILR 5; Joni S Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo Wash J Int'l L & Econ 71, 73; Edward T Swaine, 'Unsigning' (2003) 55 Stan.L.Rev 2061, 2071; Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 247; Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moïse Mbengue, 'Article 18' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 383; Curtis A Bradley, 'Treaty Signature' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 215; Davis S Jonas and Thomas Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 VandJTransnat'l L 565, 568; Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 26; Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 245, 258; Paul Gragl and Malgosia Fitzmaurice, 'The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699.

[2] See e.g., SB Crandall, *Treaties: Their Making and Enforcement* (2nd edn, John Byrne & Company 1916) 343; Arnold McNair, *Law of Treaties* (OUP 1961) 199; Palchetti (n 1) 29; Rogoff (n 1) 267-68; Bradley (n 1) 208.

[3] See e.g., Boisson de Chazournes, La Rosa and Moïse Mbengue (n 1) 371 (emphasis added), stating that '[t]his would in turn create 'an obligation for the signatory State … to refrain from acts contrary to the object and purpose of a treaty ...'. See also Parliamentary Assembly of the Council of Europe, Resolution 1300, 'Risks for the Integrity of the Statute of the International Criminal Court' (25 September 2002) at para 10 ('states must refrain from any action which would not be consistent with the object and the purpose of a treaty'). Others have stated that Article 18 'obliges the signatory State not to *jeopardize*' the objective and goal of a pending treaty, see Maurice Kamto, 'Article 8' in Corten and Klein (n 1) 176 (emphasis added). Cf Anneliese Quast Mertsch, 'Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018). Cf *Peru Agricultural Products* case, Report of the Panel (2014) WT/DS457/R, para 7.91: Article 18 VCLT 'does not require a signatory to comply with the terms of a treaty which it has not yet ratified, and does not even require the signatory not to act in a manner inconsistent with that treaty. The only obligation is to refrain from acts which would prevent it from being in a position to comply with the treaty once the latter enters into force or which would invalidate the object and purpose of the treaty'.

problematic as it reduces the threshold set by Article 18 to the core of Article 19 VCLT, stipulating that a reservation to a treaty is invalid if merely incompatible with – but not defeating – the object and purpose of a treaty. This chapter accordingly builds on chapter 3 and analyses what sort of conduct reaches the threshold of 'defeating' the object and purpose of a treaty.

Furthermore, there are certain traditional views which argue that Article 18 – hinging on the negative connotation 'to refrain' – is an exclusively negative obligation which does not require States to take any positive action.[4] For instance, it has been argued that 'it is not possible to say that a State should take positive measures in order to further the object and purpose of the treaty …'.[5] However, this viewpoint does not take into consideration the question of obligations of conduct and, in particular, the requirement to exercise due diligence as a standard of obligations of conduct.[6] From a general point of view, the duty to exercise due diligence requires States to take all appropriate steps and measures in order to prevent harm.[7] Although there is no general principle of due diligence in international law, failure on part of a State to comply with this standard can ascribe legal responsibility to it. This chapter demonstrates how State practice and recent developments on the due diligence requirement in certain representative areas of international law may impact the obligation under Article 18 within the broader framework of the law of treaties.[8]

Lastly, the plain language of Article 18 fails to address the (potential) distinction between States which have *signed* (not as a means of expressing consent to be bound under Article 11 VCLT) and States which have *consented to be bound by* a pending treaty. It has for instance been suggested that for a contracting State which has expressed its consent to be bound by a treaty under Article 18 lit b, 'it seems natural to expect that its behaviour is to a greater extent oriented towards the content of the treaty than for signatory States under lit a'.[9] Accordingly, since in relation to Article 18(b) the State has already done everything necessary for the treaty

[4] See e.g., UNGA, Document A/62/10: Report of the ILC on the work of its fifty-ninth session, YILC (2007) UN Doc A/CN.4/SER.A/2007/Add.l (Part 2) at 67.
[5] Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2016) 44.
[6] See Timo Koivurova, 'Due Diligence', Max Planck Encyclopaedia of Public International Law (2010), Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law.
[7] For an overview, see Koivurova (n 6).
[8] This chapter does not seek to give a comprehensive assessment of all obligations of due diligence in international law – which is beyond its scope – but merely to discuss and exemplify how the concept of due diligence can impose positive obligations on States under Article 18 in certain circumstances. For a comprehensive overview, see Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).
[9] Dorr (n 1) 299.

to enter into force, this chapter lastly delves into the question of whether there is an implicit difference in the extent of obligations imposed by Article 18(a) and Article 18(b) VCLT respectively.

4.2 Meaning of 'Defeat'

4.2.1 Obligation of Ratification?

It has long been recognised that signing a treaty imposes certain rights on signatory States,[10] but the question of what obligations a signature or expression of consent to be bound imposes on a State pending the entry into force of the treaty is less clear. As a preliminary point, the signing of a treaty entails no obligation to subsequently ratify the treaty (or express consent to be bound in any other manner). As such, expression of consent to be bound after a treaty signature may legitimately be withheld for any reason.[11] There are, however, certain recent trends in the diplomatic practice of States which support the view that by signing a treaty, a State *aims* to subsequently become a party to the treaty,[12] and *aims* to shorten the time period between signature and ratification of a treaty.[13] Likewise, in response to the questionnaire included in this thesis, one participant noted that a 'State should not sign a treaty, if it does not have the intention, after the domestic procedure for approval of the treaty is terminated, to become a party to the treaty'. Another response noted that although

[10] *Reservations to the Convention on Genocide* (Advisory Opinion) ICJ Rep 1951, p 28, where the ICJ recognised, without delving on question of the legal effects of signing an international treaty, the right of State signatories to formulate objections to reservations made by a party to a treaty. These objections 'which have themselves a provisional character … would disappear if the signature were not followed by ratification, or they would become effective on ratification'. It is not clear for how long such observational status is valid should the signature not be followed by ratification.

[11] Rogoff (n 1) 267. See also Article 8 of the *Harvard Draft Convention on the Law of Treaties,* Supplemented to 29 AJIL 653 (1935); Bradley (n 1) 208; Edward T. Swaine, 'Unsigning' (2003) 55(5) Stanford Law Review 2061, 2068; Dorr (n 1) 227. In his dissenting opinion in *Mavrommatis Palestine Concession case,* judge Moore stated that the 'doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past', *Greece v UK* (1924) PCIJ Ser A, no 2. The right to refuse ratification (as well as the content of the interim obligation) was at issue in the early case of *Ignacio Torres v the United States,* decided in 1871, see J. B Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party,* Vol IV (Govt. Printing Office 1898) 3798-3801, iv, pp 3798-3803. An overview of the case can be found in McNair (n 2) 200.

[12] Which seems to be the position of the UK's treaty practice, see Jill Barett and Robert Beckman, *Handbook on Good Treaty Practice* (CUP 2020) 207, writing that the 'practice of the UK is not to sign a treaty subject to ratification unless it has a firm intention of ratifying'.

[13] A review of State practice conducted by the Netherlands suggests that Article 18 establishes a 'semi-commitment' to aim to shorten the time period between signature and ratification of a treaty, see R.C.R. Siekmann, 'Review of the Multilateral Treaty-Making Process' (1981) 12 Netherlands Yearbook of International Law 216, 221-22. This chapter does not dwell on the meaning of the expression 'semi-commitment' or the legal nature of such, which is rather discussed in chapter 6.

> there is no obligation for a State to become a party to a treaty it has signed, it seems to be contrary to the principle of good faith to sign a treaty without seriously considering becoming a party. It also means that when a treaty is signed, becoming a party should be guaranteed in a timely manner.

Accordingly, whereas there is no legal obligation of a State to express its consent to be bound by a treaty which it has signed, these responses are supportive of the view that a signatory State should, for reasons of good faith, intend and aim to become a party to the treaty. These responses are as such, although by no means being representative of a general viewpoint of all States, reminiscent of the fact a treaty signature is a legal act under international law which should be seriously given with due regard for honesty and sincerity of intention.

4.2.2 Examples from Drafting History and Case-law of Conduct Defeating the Object and Purpose of a Treaty

During the drafting history of the interim obligation, various drafters focused on exemplifying what sort of conduct would amount to defeating the object and purpose of a pending treaty. For instance, when the Harvard Research Group drafted its convention on the law of treaties in 1935, it gave six examples of certain obligations imposed by virtue of signature of or expression of consent to be bound by a treaty and under which circumstances the interim obligation would be regarded as 'being ignored'. These examples included the following:

1. A treaty contains an undertaking on the part of a signatory that it will not fortify a particular place on its frontier or that it will demilitarize a designated zone in that region. Shortly thereafter, while ratification is still pending, it proceeds to erect the forbidden fortifications or to increase its armaments within the zone referred to.
2. A treaty binds one signatory to cede a portion of its public domain to another; during the interval between signature and ratification the former cedes a part of the territory promised to another State.
3. A treaty binds one signatory to make restitution of certain property to the other signatory from which it has been wrongfully taken, but, while ratification is still pending, it destroys or otherwise disposes of the property, so that in case the treaty is ratified restitution would be impossible.
4. A treaty concedes the right of the nationals of one signatory to navigate a river within the territory of the other, but the latter soon after the signature of the treaty takes some action which would render navigation of the river difficult or impossible.
5. By the terms of a treaty both or all signatories agree to lower their existing tariff rates, but while ratification of the treaty is pending one of them proceeds to raise its tariff duties.

6. A treaty provides that one of the signatories shall undertake to deliver to the other a certain quantity of the products of a forest or a mine, but while ratification is pending the signatory undertaking the engagement destroys the forest or the mine, or takes some action which results in such diminution of their output that performance of the obligation is no longer possible.[14]

Within the ILC, Special Rapporteur Lauterpacht, in his first report on the law of treaties, construed the interim obligation as an obligation to refrain from acts which would deprive the other parties of the benefits hoped to be achieved by the treaty. He referred to the following example: if one State, having undertaken a duty to cede certain territory to another State, in the time interval between signature and ratification alienated all public property of the State which would have passed to the recipient State under the rules of State succession, the ceding State would have violated the interim obligation.[15]

One member of the ILC gave a similar example: if a treaty 'provided for the cession by a State of installations owned by it in the territory of another State' or 'relat[ed] to the return by a State of works of art formerly taken from the territory of another State', there would be a violation of the signing obligation if the State destroyed the installations or works of art prior to ratification.[16] A last example included a situation of when a group of States had signed a treaty calling for a reduction of their armed forces, and one of the States increased their armed forces between the time of signature and ratification, there would be a violation of an obligation 'not to invalidate the basic presumption of the agreement'.[17]

The common denominator amongst these examples is their observance of the high threshold set by Article 18: only conduct that clearly defeats and is not merely incompatible with the object and purpose of a treaty pending its entry into force will constitute a violation of the interim obligation. As such, conduct must thwart the very *raison d'etre* of the treaty. Under no circumstances – a not uncommon misconception – does the interim obligation require States to comply with the individual provisions of a pending treaty.[18] This misconception was

[14] Harvard Research Draft with commentaries (n 11) 781-82.
[15] Special Rapporteur Sir Hersch Lauterpacht, Report of the Law of Treaties, YILC, Vol II (1953) UN Doc AICN.4/Ser.A/ 1953/Add.1, at 110.
[16] Remark by Robert Ago, YILC, vol I (1965) UN Doc A/CN.4/SER.A/1965 87, 92.
[17] Remark by Manfred Lachs, YILC, vol I (1965) UN Doc A/CN.4/SER.A/1965 87, 97. See also Robert F. Turner, 'Legal Implications of Deferring Ratification of SALT' (1981) 21 VaJInt'l L 747, 777.
[18] See further chapter 3. See also Bradley (n 1) 214. For instance, Professor Georgios Gerapetritis, in the context of an agreement reached in the dispute between Greece and the former Yugoslav Republic of Macedonia concerning the name of the latter, argued that 'by signing the agreement, the Greek Prime Minister … would be binding Greece to the obligations under the Convention irrespective of its (domestic) ratification by the Greek Parliament, which only serves to introduce the treaty into domestic Greek law. This would expose Greece to international responsibility'. The piece in which the argument was advanced in available in Greek, translation

particularly evident in the *Miguel Angel Sandoval Case,* where the Santiago Court of Appeal relied on Article 18 VCLT to set aside an amnesty law which prevented the criminal prosecution of State agents who were suspected of being involved in the forced disappearance of a Chilean national.[19]

The Court based its judgment on the existence of an international obligation to prosecute and punish crimes against humanity irrespective of the existence of an Amnesty Law. The obligation to prosecute and punish was held to derive in particular from the Inter-American Convention on the Forced Disappearance of Persons,[20] which had been signed but not ratified by Chile. The Court invoked Article 18 VCLT as authorising the Court to apply certain provisions of the Convention. On this basis, the Court concluded that to let a forced disappearance go unpunished would amount to defeating the object and purpose of the Inter-American Convention, in contradiction with Article 18 VCLT.[21] Hence, in practice the Court seems to have been relying on obligations under substantive provisions of the Convention.[22] However, as Chile had merely signed the Convention, it is uncontested that it had no obligation to actually apply the provisions pending its entry into force. The Court therefore seems to have embraced a too extensive application of Article 18 VCLT.

Another example of where a Court alluded to a too far-reaching application of Article 18 can be found in a 2003 order by the Federal Constitutional Court in Germany.[23] The case concerned a complaint of Mr. G, appealing his extradition from Germany to India due to risks of facing

provided by Antonios Tzanakopoulos, 'Here Comes the Name Again: Treaty Making at the Epicenter of the Greek Debate over the agreement with the former Yugoslav Republic of Macedonia', 16 June 2018, available at https://www.ejiltalk.org/here-comes-the-name-again-treaty-making-at-the-epicenter-of-the-greek-debate-over-the-agreement-with-the-former-yugoslav-republic-of-macedonia/#more-16277 (last accessed 15 July 2022). To claim that a violation of a provision of the treaty before it enters into force is tantamount to arguing that the treaty becomes operative upon signature and not expression of consent to be bound. Only through the provisional application of a treaty under Article 25 VCLT can a State violate individual treaty provisions prior to the actual entry into force of the treaty.

[19] Chile, Court of Appeals of Santiago, Miguel Angel Sandoval Case, 5 January 2004. For a summary and commentary of the decision see X. Fuentes, Oxford Reports on International Law in Domestic Courts, ILDC 394 (CL 2004).

[20] 1994 Inter-American Convention on the Forced Disappearance of Persons, OAS Treaty Series No 68, 33 ILM 142.

[21] Fuentes (n 19).

[22] Article 3 reads as follows: 'The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined'. Article 7 provides that: '[c]riminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations'.

[23] Federal Constitutional Court (Germany) 108 BVerfGE 129, 140-41 (2003).

torture. The Constitutional Court rejected his complaint and stated that there was no 'considerable probability' for the appellant to be in specific danger of torture.[24] In reaching this conclusion, the Court took into consideration the fact that an extradition treaty had been signed between Germany and India. Although the treaty had not yet been ratified, the fact that it had been concluded diminished a possible danger to the complainant because there were certain legal obligations for India which arose from the signature.[25] This is because from the signature followed an obligation not to defeat the object and purpose of the extradition treaty, which India would do if it did not comply with minimum human rights standards.[26]

Accordingly, torture and inhuman treatment of 'persons that were extradited to India before the treaty's entry into force would contradict the treaty because by such practice, the creation of a stable bilateral relation in judicial assistance and extradition matters, which the conclusion of the treaty is supposed to achieve, would be prevented'.[27] Furthermore, from a functional point of view:

> the extradition treaty's legal obligations thus take the place of the assurance that is given if no treaty exists. Such assurance of the compliance with the minimum human rights standards in criminal proceedings or of humane conditions of imprisonment cannot, as a general rule, be requested if a treaty exists because this would assume that the other party is in breach of contract.[28]

Thus, it seems like the signed extradition treaty formed the material basis for granting the appellant's extradition as the Constitutional Court concluded that should India subject the appellant to torture or inhuman treatment, it would defeat the object and purpose of the pending extradition treaty, in violation of Article 18 VCLT.

Undoubtedly, the Constitutional Court put heavy reliance on the signed but unratified extradition treaty. The legal obligation not to defeat the object and purpose of the extradition treaty was put on a par with the receipt of diplomatic assurances in cases where no extradition treaty between the sending and the request party exists. The Court argued that such diplomatic assurances of compliance with minimum human rights standards cannot be requested if an extradition treaty exists because this would assume that the other party is in breach of the agreement. If India were to subject the claimant to torture or other ill-treatment, the parties

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.

would not have undertaken the effort to negotiate, conclude and sign the treaty in the first place.[29]

However, in effect, the Court failed to assess whether the contested conduct would amount to defeating the object and purpose of a pending treaty. The Court should therefore have asked the following question: 'would a rejection of the extradition request have defeated the object and purpose of the extradition treaty between Germany and India to create a stable bilateral relation in judicial assistance and extradition matters pending the entry into force of the treaty'? The answer seems to be no. In particular, Germany had not adopted a *carte blanche* attitude to arbitrarily reject all extradition requests from India. If the relevant authorities would reach the conclusion that a request cannot be complied with on the basis of an assessment of the relevant individual's circumstances at the case at hand, it is highly doubtful that refusing extradition would be so substantially severe so as to thwart the stable bilateral relation between the two States in judicial assistance and extradition matters.

4.2.3 'Tests' to Determine the Existence of a Violation

In scholarship, it is possible to single out four different 'tests' which have been advanced to facilitate the procedure of determining when certain conduct defeats the object and purpose of a treaty pending its entry into force. These tests are known as: i) the 'essential elements test'; ii) the 'impossible performance test'; iii) the 'manifest intent test'; and iv) the '*status quo* test'. Under the 'essential elements test',[30] Article 18 should be applied as prohibiting States from violating the essential goals of the treaty.[31] In essence, this test entails that the signatory or contracting State must not comply with every part of the treaty but only with its most important, i.e., essential, parts.

This is a rather simplified and unelaborated attempt to determine when a State has violated the interim obligation. For instance, what are the essential parts of a treaty and how are they to be identified? By endeavouring to reduce the object and purpose to specific rules incorporated in the treaty at hand, this test is undeniably similar to the problems induced by the task of identifying the object and purpose of a treaty and gives no indication as to when a State, through its acts (and/or omissions), has violated those 'essential elements'.

[29] Ibid.
[30] Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3(1) ARIEL 311, 331-32.
[31] Ibid.

The next test, which probably has found most approval among legal scholars and judges, is the 'impossible performance test'. This test entails that a State has defeated the object and purpose of a treaty by engaging in conduct which would render subsequent performance of the treaty impossible, meaningless, or significantly more difficult.[32] As seen above, most examples by the Harvard Research Group and the ILC focused on conduct that would render future performance of the treaty impossible or more difficult, whereby the treaty itself would become nugatory.[33] Several scholars have also favoured this approach.[34]

The advantage with the 'impossible performance test' is that it meets the high threshold under Article 18 VCLT by signalling that only conduct that renders performance of the treaty impossible, meaningless, or considerably more difficult amounts to a violation of Article 18.[35] The problem, as advanced in scholarship, with the impossible performance test lies in the fact that it is less suited to law-making treaties in comparison to treaties of the contractual nature.[36] As seen above, many examples of the Harvard Research Group and the ILC focused on bilateral contractual relations.

Moreover, example 5 (which does not necessarily involve a bilateral treaty relation) of the Harvard Draft Convention – relating to the lowering of tariffs – stands at odds with the impossible performance test. This is because if 'one State suddenly raised its tariffs prior to ratification, this would not render it impossible or meaningless for the State, upon ratification, to lower its tariffs to the levels manifestly intended during negotiations'.[37] This in turn raises the question of whether a State that raised its tariffs prior to ratification or entry into force of the treaty has actually violated the interim obligation or not. Whereas it might have altered the

[32] See Jonas and Saunders (n 1) 598 f.
[33] Harvard Research Draft with commentaries, pp 781-82; remarks by Robert Ago (n 16); remarks by Manfred Lachs (n 17).
[34] Crandall (n 2) 344 (from the date of signature, a State may not, 'without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed at the time the treaty was signed'); McNair (n 2) (who believed it to be correct that 'one party must not, pending ratification, do anything which will hamper any action that may be taken by the other party if and when the treaty enters into force'); Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 119 ('The state must therefore not do anything which would prevent it being able fully to comply with the treaty once it has entered into force'); Villiger (n 1) 249 ('A State's act will defeat the treaty's object and purpose if it renders meaningless subsequent performance of the treaty, and its rules'); Bradley (n 1) 215 ('the signing obligation appears to have been designed to ensure that one of the signatory parties, typically in bilateral arrangement, does not change the *status quo* in a way that substantially reduces either its ability to comply with its treaty obligations after ratification or the ability of the other treaty parties to obtain the benefit of the treaty'); Rogoff (n 1) 297 ('a signatory state may do these acts whose consequences would not render provisions of the treaty impossible of performance when the treaty enters into force').
[35] Jonas and Saunders (n 1) 599.
[36] Gragl and Fitzmaurice (n 1) 710.
[37] Jonas and Saunders (n 1) 599-600.

status quo underpinning the signature or expression of consent to be bound by the treaty, it is not impossible, pointless or significantly more difficult for that State to lower the tariffs and perform the treaty if and when in force.[38]

The next test – the manifest intent test – has been advanced as a response to the unsuitability of the impossible performance test in relation to treaties of a law-making character.[39] The 'manifest intent test' is designed in the following way:

> if behaviour seems unwarranted and condemnable, it may be assumed to have been inspired by less than lofty motivations and ought to be condemned, regardless of whether anyone's legitimate expectations are really frustrated or can reasonably be said to have been frustrated, regardless of actual proof of bad faith.[40]

Thus, it is not necessary to prove that a State has acted in bad faith in the assessment of whether there has been a violation of Article 18 VCLT or not.[41] Furthermore, it has been argued that since the test relies on the perceptions of the 'outer observable world', it is more objective than the bad faith test.[42] That said, it has simultaneously been argued that the difference between the tests is not one of bad faith *versus* manifest intent as even for bad faith, practitioners must rely on objective evidence through a State's external manifestations of such bad faith. Rather, the difference lies in the standard of proof. Under the bad faith test, the interim obligation would be violated if certain actions, objectively, *are* unwarranted and condemnable,[43] whereas for the manifest intent test, Article 18 would be violated by actions that merely *seem* unwarranted and condemnable.[44]

Nevertheless, the manifest intent test has certain shortcomings. It is inevitably difficult to apply as it still hinges upon the assessment of the subjective intention of the relevant State by entailing that if behaviour seems unwarranted and condemnable, it may be *assumed* to have been inspired by 'less than lofty motivations and ought to be condemned'.[45] It raises the issues of whom is to make the assessment of whether the behaviour seems unwarranted and condemnable – i.e. the

[38] The issues of typology of treaties is addressed by chapter 7.
[39] As Klabbers put it, 'instead of defeating the object and purpose of a law-making convention, any behaviour irreconcilable with it, prior to its entry into force, actually serves to emphasize the desirability of its entry into force', see Jan Klabbers, 'How to Defeat the Object and Purpose of a Treaty: Toward Manifest intent' (2001) 34 VandJTransnatlL 283, 286.
[40] Ibid 330.
[41] In this regard, it may also be recalled that the drafters eventually opted to remove the word 'calculated' from the formulation of draft Article 18 as there was no need to prove that a State acted in bad faith.
[42] Klabbers (n 39) 305.
[43] Ibid 330.
[44] Ibid.
[45] Ibid.

other signatory and/or contracting States, States parties, negotiating States, or an international court or tribunal – and whether an objective, uniform and consistent set of criteria is identifiable in this regard. Furthermore, if an international court or tribunal is to be tasked with this issue, it may be borne in mind that aside from urging that bad faith is never to be presumed, the ICJ (as well as its predecessor) has been hesitant to address this matter.[46]

The last test is the *status quo* or facilitation test. This test has been advanced on the premise that the interim obligation 'appears to have been designed to ensure that one of the signatory parties, typically in a bilateral arrangement, does not change the *status quo* in a way that substantially reduces either its ability to comply with its treaty obligations after ratification or the ability of the other treaty parties to obtain the benefit of the treaty'.[47] To this end, a 'workable test for the interim obligation must facilitate treaty review procedures within states, and it must do so with a clear and objective standard'.[48] The facilitation test accordingly 'seeks to assist domestic treaty review by preserving the *status quo* at the time of signature'.[49]

The test is composed of two questions. The first question asks whether a signatory State has transgressed one or more provisions of the pending treaty or not. A State has transgressed a pending treaty when acting contrary to the obligations that the treaty would impose if and when in force.[50] According to the scholars advancing the test, the choice of using the terminology 'acting contrary to' is informed and deliberate as the treaty is not yet in force and can accordingly not be breached in a legal sense.[51] The second question asks if the transgressing action was 'new', or if it was part of a pattern that existed prior to signature. If the transgressing action is part of the relevant State's existing pattern at the time of signature, there has been no violation of Article 18.[52] To exemplify:

> if two states with mutually imposed tariffs of 20 % sign a treaty agreeing to lower their tariffs to 10 %, it would not be a violation of Article 18 if one or both states maintain the existing 20 % tariff until ratification. Although the 20 % tariff would transgress the treaty's text, Article 18 would not prohibit this transgression because

[46] Both the PCIJ and the ICJ have established in a number of cases that bad faith is never to be presumed, see e.g., *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (1926) PCIJ Series A, No 7; *Dispute regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (Judgment) ICJ Rep 2009 p 267, para 150; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), Jurisdiction and Admissibility (Judgment) ICJ Rep 1984, p 437, para 101. See also Steven Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40, 50.
[47] Bradley (n 1) 215.
[48] Jonas and Saunders (n 1) 603.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.

> it began prior to signature. By contrast, if a state raised its tariffs above 20 %, it would violate Article 18 because the transgression would be new; it would alter the *status quo* in a manner contrary to the treaty.[53]

The facilitation test maintains the legal *status quo* from one viewpoint only: States 'may not move away from eventual compliance, but they are permitted to move toward it'.[54] Allegedly, this test is more advantageous than the essential element test as it does not seek to break down the object and purpose of a treaty into specific treaty provisions but its main focus centres on the notion and idea of 'defeat'.[55] From a conceptual point of view, the facilitation test also accommodates domestic treaty review by balancing two variables:

> The first variable measures the weight of the obligation imposed on a state at the time of signing a treaty. Ideally, this variable would be as low as possible. That way, a state would not accrue any significant obligations until the state's government approves those obligations … The second variable measures the degree to which signature aligns expectations between states. Ideally, this variable will be high because each signatory state will be capable of a more accurate accounting of the costs and benefits of a new treaty when it can rely on other signatories to act in a predictable way and not contrary to the goals of the treaty.[56]

The first variable is important because it reinforces the principle of consent. Indeed, in many States, legislative approval is necessary in order for the executive branch to bind the State by a treaty.[57] However, three comments should be made. First, facilitating and accommodating domestic treaty review is not the only purpose of Article 18 VCLT but this provision also protects the integrity of a pending treaty by ensuring that its rationale is still pertinent at the time of its entry into force, as well as protecting the interest and legitimate expectations of other signatory and/or contracting States.[58] The scholars adhering to the facilitation test seem to disregard the second subparagraph of Article 18 VCLT,[59] and for which the purpose of protecting the integrity of a pending treaty may be even more important.[60] Instead, their focus is primarily, if not exclusively, on situations in which a State has signed but not yet consented to be bound by a treaty. This raises the question of whether the facilitation test serves any

[53] Ibid 604.
[54] Ibid (emphasis in original).
[55] Ibid.
[56] Ibid (footnote omitted).
[57] See Duncan B Hollis et al, *National Treaty Law and Practice* (2005) 161, 258-60, 323-4, 419-21, 544-47, 733-4. Parliamentary approval is needed in France, China, Germany, Japan, Russia, the United States and the United Kingdom. In other States, such as Austria, parliamentary approval is not necessary,
[58] Rogoff (n 1) 271; McDade (n 1) 11; Dörr (n 1) 244-45.
[59] See Jonas and Saunders (n 1) 571, 594-596, 603-5, 606.
[60] See further below.

purpose in relation to cases where the relevant State has not only signed but also expressed its consent to be bound by the pending treaty, whereby the treaty, presumably, has already been given legislative approval and is to enter into force with respect to that State within the foreseeable future.

Secondly, the inconsistent use of language by the authors advancing the test and the ensuing low threshold is problematic. Supposedly, one of the advantages with the facilitation test is that it avoids the abstract notion of the object and purpose formula but this notwithstanding, the authors continuously speak of not acting contrary to the *goals* of the pending treaty without indicating what those goals are or how they can be identified. In addition, the principal focus of the test is whether a State has transgressed one or more of the *provisions* of the pending treaty and, if so, whether the transgression action was new or part of an existing pattern within the State.

In practice, does this test not set a too low threshold, because by substituting 'defeat the object and purpose' with 'new behaviour that transgresses one or more of the provisions' of the pending treaty, is a State supposed not to act against *any* of the provisions of the treaty – a quite onerous obligation discordant with the high threshold of Article 18 – or do the authors in fact have in mind the provisions that are relevant for the fulfilment of the treaty's essential *goals*, ie the provisions which, in the words of the ICJ, most be viewed as fixing an objective in light of which the other provisions of the treaty should be interpreted?[61]

Thirdly and lastly, this test carries the peril of adventuring the imposition of uniform obligations of States under the one and same treaty regime. For instance, if a State that does not practice the death penalty signs a treaty prohibiting the imposition of the death penalty, it would violate Article 18 VCLT if it introduced the death penalty prior to ratification or during the time interval between ratification and the entry into force of the treaty. In contrast, a State which is already practising the death penalty would not be in violation of Article 18 if it continued to do so until the entry into force of the treaty.[62] This creates ambivalent and double standards for States under Article 18 VCLT and consolidates the ambiguity and blurriness of the provision. Furthermore, it may also trigger a feeling of unfairness and disparity for other

[61] See chapter 3.
[62] Jonas and Saunders (n 1) 606.

signatory or contracting States: why should their current state of domestic law determine the degree and extent of obligations imposed under an international treaty?[63]

Moreover, it has been suggested that a 'certain parallelism exists between the situations falling within the scope of the prohibition contained in Article 18 and the situations in which a state party to a treaty, by its unilateral conduct, creates such conditions that enable the other parties to suspend or terminate the treaty'.[64] The problem with relying on such a parallelism lies in the fact that conduct constituting a violation of Article 18 concerns prohibited conduct in relation to a pending treaty, whereby the treaty itself cannot be violated. Instead, if certain conduct reaches the threshold of defeating the object and purpose a treaty, the wrongdoing State has breached Article 18 VCLT but not the pending treaty itself. In contrast, the grounds for termination given a State's unilateral conduct concerns conduct which breaches an existing treaty. Caution is therefore called for in drawing such parallel.

That said – to exemplify the parallel – consider for instance the following scenario: States X and Y conclude a treaty, under whose terms State Y is to transfer certain objects to State X. Before the treaty enters into force, State Y, being the possessor State, destroys the objects subject to transfer under the treaty. Has State Y defeated the object and purpose of the treaty? The relevance in drawing a certain parallel to grounds for termination of treaties lies in the fact that after the entry into force of said treaty, this example would potentially be capable of raising an issue under Article 61 VCLT, which relates to the termination of or withdrawal from a treaty.

According to Article 61 VCLT a party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.[65] As such, a State will violate Article 18 VCLT if it causes the permanent disappearance or destruction of an object which is indispensable for the execution of the treaty as the object and purpose of the treaty would no longer be intact.

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[63] On the relationship between international law and domestic law, see David Sloss, 'Domestic Application of Treaties' in Hollis (n 1); David Thor Bjorgvinsson, *Intersection of International Law and Domestic Law: a Theoretical and Practical Analysis* (Edward Elgar 2015).

[64] Palchetti (n 1) 30.

[65] According to subparagraph (b), impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from, or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

A parallel ground to Article 62 VCLT can also be envisaged. This provision lays down that a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty, unless a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. To this end, Article 18 VCLT could be breached if a State, through its unilateral conduct, has caused a fundamental change of circumstances and those circumstances constituted an essential basis of the State's signature or expression of consent to be bound by the treaty, and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty once it enters into force.[66]

Lastly, it may be asked whether, under certain circumstances, a violation of Article 18 would occur when a State engages in conduct which would amount to a 'material breach' within the meaning of Article 60 VCLT.[67] Analogy between these two provisions is suggested by the fact that, under Article 60, a 'material breach' is defined as 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. This formula clearly resembles the essence of Article 18 and is akin to the 'essential elements test'.[68] Ultimately, there is no all-encompassing solution. As mentioned above, relying on a parallelism between the prohibition in Article 18 and the situations in which a state party to a treaty through its unilateral conduct creates such conditions that enable the other parties to suspend or terminate the treaty is problematic as the former concerns prohibited conduct in relation to a pending treaty, whereby the treaty itself cannot be violated.

Furthermore, none of the tests discussed can possibly be adequately applied to each and every instance of when a State has potentially defeated the object and purpose of a pending treaty. Alluding to a one-test approach serves to discredit the general starting point that unlike cases be treated differently, ignores the peculiarities of the relevant treaty and circumstances at hand and disregards the nature of the obligations involved, which must be given due consideration and regard. That said, the drafters of Article 18 were favourable of an impossible performance

[66] Ibid.
[67] Ibid.
[68] Ibid.

standard. This is most likely not incidental. Such an approach protects the integrity of a pending treaty and allows the domestic authorities to review it before it becomes binding and effective within a State's legal order. The 'impossible performance' test is also compatible with the high threshold of 'defeat' in the sense that it does not require States to comply with the individual provisions of a pending treaty but rather ensures that future performance of the treaty is not rendered impossible or pointless.

In other words, it ensures that a State is actually in a position to act on its legal act, i.e., the signature or expression of consent to be bound, once all steps have been undertaken and the treaty eventually becomes operative. It avoids the issue of proving bad faith or manifest intent, for which there is no extensive developed guidance from any international court or tribunal, as well as the noble task of identifying the 'essential parts' of a treaty. Although the *status quo* test undoubtedly can be a useful guiding tool in many cases, it does likewise not offer a suitable or comprehensive solution to each case but must be applied with concern for the circumstances of the case at hand in order not to allow domestic law to dictate the terms of that State's international commitments.

4.2.4 Approaches of International and EU Courts and Tribunals

Even with due regard to various tests seeking to define the interim obligation, the contours of Article 18 remain blurred. Case-law relating to the interim obligation is notoriously sparse and even in cases where the interim obligation has been of some relevance, the pleadings of the parties and the courts' evaluation of Article 18 VCLT are often tainted by misconceptions. For instance, in the *Case Concerning Certain German Interests in Polish Upper Silesia,* decided by the PCIJ in 1926, the issue concerned the legality of a transfer of property by Germany. This property was located in territory that Germany was required to cede to Poland, and it was transferred to a corporation specifically formed for the purpose of acquiring the property.

Poland denied the legality of the transfer, relying on Article 256 of the Treaty of Versailles. This provision laid down that powers to which German territory was ceded shall acquire all property situated therein. The Treaty of Versailles was signed by Germany on 28 June 1919 and ratified on 20 January 1920. The agreement of sale for the transfer of the property entered into force on a date between signature and ratification. On the facts, the PCIJ upheld the legality of the transfer as not violating Article 256 of the Treaty of Versailles, stating that:

> Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.[69]

The Court did not make any explicit pronouncement on the interim obligation but did nevertheless imply that if Poland had proven that Germany did in fact abuse its rights pending the entry into force of the treaty, the outcome of the case might have been different. In the Court's view, however, the treaty did not even after ratification impose such an obligation of good faith on part of Germany to refrain from making that sort of transfer, as the transfer fell within the normal administration of the State. It simply observed that it 'need not consider the question whether, and if so, how far, the signatories of a treaty are under an obligation to abstain from any action likely to interfere with its execution when ratification has taken place'.[70] It should be noted that this case was decided prior to the commencement of the drafting procedure of the interim obligation. The examples given by the Harvard Research Group and the ILC seem to suggest that today, the conduct on part of Germany would amount to a violation of Article 18 VCLT.

In *Megalidis*, a Greek claimant sought the return of certain items taken forcibly from him by Turkish authorities. This occurred on 14 August 1923. The claimant relied on provisions of the Treaty of Lausanne, which had been signed by Turkey on 24 July 1923 and would enter into force on 6 August 1924. Article 65 of the Treaty provided that:

> Property, rights and interests which still exist and can be identified in territories remaining Turkish at the date of the coming into force of the present Treaty, and which belong to persons who on the 29th October, 1914, were Allied nationals, shall be immediately restored to the owners in their existing State.

A Turkish-Greek Mixed Arbitral Tribunal held in 1928 that this seizure of the Greek national's property was a violation of international law and concluded that 'already with the signature of a treaty and before its entry into force there exists for the parties an obligation to do nothing which may prejudicial to the treaty by diminishing the significance of its provisions…'.[71] In addition, as seen in chapter 3, Crawford, Sands and Wilde in a joint legal opinion reached the

[69] PCIJ Series A, no 7, pp 30, 39-40.
[70] Ibid.
[71] *A.A. Megalidis v Turkey*, Reported in Annual Digest 1927-28, p 395.

conclusion that a signatory or contracting State to the Rome Statute,[72] in order to comply with Article 18 VCLT, 'should avoid entering into a bilateral non-surrender agreement which may not be compatible with the ICC Statute and its Article 98',[73] because the conclusion of a bilateral non-surrender agreement by a signatory to the ICC Statute would prevent that State from performing its obligations to the ICC and to other State parties to the ICC Statute. In other words, by so refraining, the signatory or contracting State would avoid a situation where it was unable to perform its obligations under the Rome Statute once binding and effective on that State.

Guidance can, albeit cautiously, be sought from *Military and Paramilitary Activities in and against Nicaragua*, decided by the ICJ in 1986.[74] The main distinctive feature of the case is that it concerned the obligation not to defeat the object and purpose of a treaty *after* its entry into force. This does however not necessarily preclude that some constructive lessons and pointers can be drawn from the case. As a matter of fact, dissenting judge Fleischhauer in *Gabcikovo-Nagymaros* was of the view that the obligation not to defeat the object and purpose of a treaty pending its entry into force *a fortiori* applies to a treaty after its entry into force. As such a State is not free to engage in acts that are designed to frustrate the very object of a treaty in force.[75]

Without embarking on whether this position *ipso facto* entails that the content of the interim obligation pending a treaty's entry into force is synonymous with the content of the obligation not to defeat the object and purpose of a treaty after its entry into force, it suffices to emphasise that some of the observations by the ICJ may serve as useful guidance and indicate certain practical components to take into consideration when determining whether a State has defeated the object and purpose of a treaty or not.

Nicaragua brought a claim challenging certain actions committed by the US, including: (i) the laying of mines in Nicaraguan ports, its international water and territorial sea; (ii) the supply of funds for military and paramilitary activities by the contras in Nicaragua, which had attacked

[72] Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 91.
[73] *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute,* joint legal opinion by James Crawford, Philippe Sands and Ralph Wilde, 16 June 2003, paras 53-55.
[74] *Military and Paramilitary Activities in and against Nicaragua* (n 46).
[75] *Gabcikovo-Nagymaros Project* (Hungary v Slovakia) (Judgment) ICJ Rep 1997 p 7, dissenting opinion of judge Fleischhauer at p 206.

Nicaraguan villages, oil deports, airports, and storage facilities; and (iii) the cessation of economic aid, for instance a 90 percent reduction in the sugar quota for United States imports from Nicaragua and a general trade embargo declared on Nicaragua. One of Nicaragua's claims was not based on a violation of a specific treaty provision, but that the US, through its conduct, had deprived the Treaty of Friendship, Commerce and Navigation, signed between the two States on 21 January 1956, of its object and purpose and emptied it of any real content. In particular, Nicaragua claimed that the existence of such an obligation, implicit in *pacta sunt servanda*, was not imposed by the treaty itself, but rather existed under customary international law.

Nicaragua was successful in its claim and the ICJ concluded that the US had committed acts 'calculated' to deprive the Treaty of Friendship, Commerce and Navigation of its object and purpose. As a preliminary remark, the Court argued that an act cannot be said to be calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act had been foreseen in the treaty itself. Thus, if it had been expressly agreed that the treaty 'shall not preclude' certain acts, engaging in such acts would not constitute an act which defeats the treaty's object and purpose.[76] Moreover, the Court held that:

> as a matter of customary international law, it is not clear that the existence of such a far-reaching rule is evidenced in the practice of States. There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.[77]

Whereas the Court was 'unable to regard all the acts complained of in that light', it was of the opinion that there were certain activities of part of the US which did undermine the whole spirit of the bilateral agreement, whose aim was to further the friendly relations between the two States. These activities included the direct attacks on ports and oil installations and the mining of Nicaraguan ports.[78] Furthermore, while the acts of economic pressure were less flagrantly in contradiction with the purpose of the Treaty, the Court reached a similar conclusion with respect to these acts.

[76] *Military and Paramilitary Activities in and against Nicaragua* (n 46) para 272.
[77] Ibid.
[78] Ibid para 275.

It held that a State is not bound to continue particular trade relations any longer than it sees fit in the absence of a treaty commitment or other specific legal obligation but where there exists such a commitment of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination as the general trade embargo imposed on Nicaragua will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty (in force). The cessation of economic aid could be regarded as such a violation only in exceptional circumstances. In contrast, the 90 per cent cut in the sugar import quota did not go so far as to constitute an act calculated to defeat the object and purpose of the Treaty of Friendship.[79]

The ICJ to some extent focused its reasoning on bad faith and the subjective intention of the US by referring to acts that were 'calculated to defeat', 'calculated to deprive' and 'directed to defeating' the treaty's object and purpose. It is also possible to discern from the Court's reasoning an implication that a myriad of acts, with a varying degree of severity, are capable of reaching the threshold of defeating the object and purpose of a treaty. The common denominator among these acts, irrespective of the intention on part of the US, is that they all, objectively, served to sever the friendly relations between the two States and hence detached the Treaty of Friendship of any genuine content or purpose. Whereas acts involving physical violence more rigorously rendered the treaty nugatory and thwarted its object and purpose, even some economic acts, including the blanket ban on economic aid and a general trade embargo, could, given the circumstances of the case, reach the threshold of defeating the object and purpose of the treaty.

At the same time, the Court reinforced the perception that the obligation not to defeat the object and purpose of a treaty is an elevated one which sets a high standard; only actions that amounted to a complete nullification of the economic relations between the two States amounted to a violation of the obligation not to defeat the object and purpose of a treaty. An interesting, yet speculative point as the Court did not directly address it, is whether the Court would have laid down an even higher standard should the Treaty of Friendship not have been in force. That said, if the Court's reasonings was to be applied analogously to a pending treaty, it would seem that in circumstances involving a treaty of friendship, a signatory or contracting State would defeat the object and purpose of the treaty in violation of Article 18 VCLT if it

[79] Ibid para 276.

engaged in acts of physical violence and undertook economic actions amounting to a complete nullification of the economic relations between the wrongdoing State and the other signatory and/or contracting States prior to the entry into force of the treaty.

EU courts have also had the opportunity to assess the application of Article 18. As a preliminary note, however, it should be emphasised that the issue of treaty relations between Member States and the European Communities/Union is governed by the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLTIO),[80] and not the 1969 VCLT. The 1986 VCLTIO is yet to enter into force. However, Article 18 of the 1986 Convention is in essence a verbatim formulation of the wording of Article 18 of the 1969 VCLT, and courts have repeatedly referred to both provisions in their judgments.[81]

The perhaps most frequently cited EU case in relation to the interim obligation is *Opel Austria*,[82] in which the applicant, supported by the Republic of Austria, applied for the annulment of Council Regulation (EC) No 3697/93 of 20 December 1993 withdrawing tariff concessions in accordance with Article 23(2) and Article 27(3)(a) of the Free Trade Agreement between the Community and Austria. The regulation introduced a 4.9% duty for F-15 car gearboxes produced by General Motors Austria. The applicant, Opel Austria, was the sole producer of F-15 gearboxes, and had exported them to the EC Community since 1993.

On 13 December 1993, the EC Council and Commission had approved the Agreement on the European Economic Area (EEA Agreement), which *inter alia* granted the removal of tariff concessions, by adopting Decision 94/1. The EEA Agreement would enter into force on 1 January 1994. On the same day, that is 13 December 1993, the Communities deposited its instruments of approval. On 20 December 1993, the Council adopted the contested regulation.

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[80] Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (adopted 21 March 1986).

[81] This is with the exception that Article 18 of the 1986 VCLTIO also imposes the interim obligation on international organisations, and not only States, after having signed or consented to be bound by a treaty. The provision reads as follows: 'A State or an international organisation is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) that State or that organisation has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organisation shall have made its intention clear not to become a party to the treaty; or (b) that State or that organisation has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'. See also Case T-115/94, *Opel Austria GmbH v Council*, 1997 E.C.R. 11-39; CFI (*Greece v Commission*, T-231/04 (2007) ECR II-63; Opinion of Advocate General Sharpston, delivered on 1 July 2010 (1), Case C-508/08, *European Commission v Republic of Malta*.

[82] *Opel Austria* (n 81).

The applicant raised ten pleas in support of its claim for annulment, one of which is of relevance for the present chapter: the infringement of the obligation under public international law not to defeat the object and purpose of a treaty pending its entry into force. One issue under his plea also alleged that the Council had deliberately backdated the issue of the Official Journal of the European Communities in which the contested regulation was published. The applicant and the Republic of Austria relied on Article 18 VCLT and claimed that by adopting the contested regulation after the parties had deposited their instruments of ratification of the EEA Agreement, the Commission had violated the interim obligation as free movement of goods is not only a central aim of the EC Treaty but also one of the principal objectives of the EEA Agreement.[83]

The Court held first that the principle of good faith is a rule of customary international law whose existence is recognised as such by the PCIJ and ICJ,[84] and is therefore binding on the Community. This principle is codified in Article 18 VCLT.[85] Secondly, the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations, which forms part of the Community legal order.[86] In a situation where the:

> Communities have deposited their instruments of approval of an international agreement and the date of entry into force of that agreement is known, traders may rely on the principle of protection of legitimate expectations in order to challenge the adoption by the institutions, during the period preceding the entry into force of that agreement, of any measure contrary to the provisions of that agreement which will have direct effect on them after it has entered into force.[87]

In this connection, the Court found that by adopting the contested regulation on 20 December 1993 when it knew with certainty that the EEA Agreement would enter into force on 1 January 1994, the Council knowingly created a situation in which two contradictory rules of law would co-exist: the contested regulation on one hand, which re-established a 4.9% import duty on F-15 gearboxes produced by the applicant, and Article 10 of the EEA Agreement on the other hand, which prohibits customs duties on imports and any charges having equivalent effect. Consequently, the Court concluded that the contested regulation could not be regarded as

[83] Ibid para 50.
[84] Eg in the judgment of 25 May 1926, *German interests in Polish Upper Silesia*, PCIJ, Series A, No 7, pp. 30 and 39.
[85] *Opel Austria* (n 81) paras 90-91.
[86] Ibid para 93, referring e.g., to Case 112/77 *Töpfer v Commission* [1978] ECR 1019 para 19.
[87] Ibid para 94.

Community legislation which is certain and foreseeable. The Council had accordingly infringed the principle of legal certainty.[88]

Concerning the alleged backdating of the issue of the Official Journal in which the contested regulation was published, the applicant maintained that, although the issue of the Official Journal in which the contested regulation was published was dated 31 December 1993, it was in fact published on 11 or 12 January 1994. It argued that the Council had deliberately backdated the issue with the intention to create the impression that the regulation entered into force before the EEA Agreement.[89] The Council contested the claim that it deliberately backdated the publication, but the reason for the late availability was the large number of acts adopted by the institutions at the end of December, which have to be published at the end of each calendar year.[90]

The Court rejected this explanation. According to written replies from the Publications Office to questions put by the Court, the Official Journal of 31 December 1993 was not made available to the public at the head office of the Publications Office in all the official languages of the Community until 11 January 1994.[91] The Court also stated that it appeared that the Council sent the contested regulation to the Publications Office on 3 or 4 January 1994; that the covering letter instructed the Publications Office to publish the regulation in the Official Journal for 1993; that the Council confirmed that instruction when telephoned by the Publications Office; and that the latter received the full regulation by fax on 6 January 1994.[92] The Court also noted that several measures adopted by the Council in December 1993 were published in the 1994 edition of the Official Journal.[93] The Court was accordingly confident that the Council deliberately backdated the issue of the Official Journal in which the contested regulation was published,[94] and thereby infringed the principle of legal certainty.[95]

It appears that the Court shifted its attention 'from the good faith of the community in the period between signature and the entry into force to the principle of legitimate expectation of the economic operators, which, it claimed, was the community law equivalent of the international

[88] Ibid para 125.
[89] Ibid para 43.
[90] Ibid para 47.
[91] Ibid para 127.
[92] Ibid para 128.
[93] Ibid para 129.
[94] Ibid para 131.
[95] Ibid paras 132-33.

law principle of good faith of the signatory state'.[96] In other words, rather than relying on Article 18 of the 1969 VCLT (and 1986 VCLTIO) as a rule of customary international law, it extracted a general principle of community law from this provision.[97] Consequently, the final judgment of the Court did not address the claim based on Article 18 VCLT as invoked by Opel Austria, but rather rested on general principles of EU law.

It is somewhat unfortunate that the Court shifted its focus from the interim obligation to the principle of good faith and protection of legitimate expectations as this might have been an archetypal case for clarifying the contours of Article 18 VCLT. Instead, the Court in a certain sense bypassed the opportunity to conclude that conduct such as adopting a regulation which is directly discordant with a pending free trade agreement will amount to conduct which defeats the object and purpose of such agreement and will typically constitute a violation of Article 18 VCLT (and Article 18 VCLTIO).

It is also of interest to consider to what extent considerations of bad faith had an impact on the Court's finding that the principle of legal certainty, as a corollary of the principle of good faith and legitimate expectations, codified in Article 18 VCLT, had been breached. As seen above, there is no need to prove that a State or other actor under international law has acted in bad faith in order to establish a violation of Article 18 VCLT. However, the fact that the Council deliberately backdated the publication of the contested regulation so that it would look like it was adopted prior to, and not after, the deposit of the instrument of ratification of the EEA Agreement might – speculatively – suggest that the Council was aware that the adoption of the regulation could cast doubts on its compatibility with the interim obligation and the principles stemming therefrom, and the Court picked up on this by concluding that the deliberate backdating was contrary to the principle of legal certainty.

4.2.5 Article 18 VCLT in Relation to Contemporary Examples

Undoubtedly, a variety of approaches to the application of Article 18 and the assessment of a breach can be singled out in case-law and scholarship, all with different outlooks, focal points, and theoretical and practical justifications. In the current international legal order, there are several examples of conduct in relation to certain treaties which are capable of raising questions

[96] Pieter Jan Kuijper, 'Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law', in Jan Wouters, André Nollkaemper, and Erika de Wet (eds), *The Europeanisation of International Law* (Asser Press 2008) 87, 94 et seq.
[97] Ibid.

of compliance with Article 18 VCLT. The first example – as mentioned in chapter 1 – concerns conduct of signatory and/or contracting States to the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT).[98] The CTBT, as of 2023, has 183 contracting or signatory States, but is yet to enter into force.[99] What are the obligations of those signatory or contracting States pending the entry into force of the CTBT? Could a signatory or contracting State for instance conduct a nuclear weapon test explosion pending the entry into force of the treaty, or would such conduct defeat the object and purpose of the CTBT, in violation of Article 18 VCLT?

In applying the interim obligation under Article 18 VCLT, the first task is to identify the object and purpose of the relevant treaty in order to ascertain whether certain contested conduct defeats this object and purpose. Preambular paragraphs 5,6, 9 and 10 of the CTBT recognise 'the need for continued systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons' and that 'the cessation of all nuclear weapon test explosions and all other nuclear explosions, by constraining the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons, constitutes an effective measure of nuclear disarmament and nonproliferation in all its aspects'. Moreover, the Preamble recognises that 'this Treaty could contribute to the protection of the environment',[100] and that the treaty's objective is 'to contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament and therefore to the enhancement of international peace and security'.[101]

Article 1 of the CTBT, entitled 'basic obligations', may be regarded as fixing the objective of the treaty,[102] and provides that:

> 1. Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.
> 2. Each State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.

Accordingly, the preambular stipulations, together with the title of the treaty and the objective fixed by Article 1, suggest that the object and purpose of the CTBT is threefold: the ban of

[98] Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996) (CTBT).
[99] The likelihood of its entry into force is doubtful.
[100] CTBT Preamble recital 9.
[101] CTBT Preamble recital 10.
[102] Such provisions may be considered when identifying the object and purpose of a treaty, see further chapter 3.

nuclear test explosions, nuclear disarmament and the enhancement of international peace and security, and environmental protection. Thus, does a nuclear test explosion pending the entry into force of the CTBT defeat this object and purpose? During the general debate of the Second Conference on Facilitating the Entry Into-Force of the CTBT, the Minister for Foreign Affairs of Malta suggested that by virtue of Article 18 VCLT, signatory or contracting States to the CTBT cannot conduct nuclear tests explosions as this would defeat the object and purpose of the treaty.[103]

Furthermore, in response to the questionnaire included in this thesis, one participant noted that since Article 18 VCLT stipulates that States which have signed a treaty are obliged to refrain from any act which would defeat the object and purpose of a pending treaty, 'it is safe to say that the CTBT has, already in the present situation, played a certain deterrence function against nuclear testing'. Therefore ' it is safe to say that the nuclear weapon states that have acceded to, or joined, this treaty [CTBT] are no longer allowed to conduct nuclear tests under the Treaty Law Treaty'. These approaches appear to be correct, because

> once a State has conducted a nuclear weapon test explosion, the *status quo* at the time of signature would fundamentally have been altered. There can be no restitution of the three elements drawn from the preamble of the CTBT. By virtue of the test, the testing State would be acquiring the knowledge either to improve its existing nuclear weapons (if it were a nuclear-weapons State) or to acquire nuclear weapons (if formerly a 'non-nuclear-weapons State'). The cumulative effect resulting from the heat and radiation of the blast would have affected the environment nearly permanently, in human terms. The consequences of the testing could be even more severe if the test triggered a series of earthquakes, a spate of testing by other States or a renewed nuclear arms race.[104]

Prima facie, although this argument has been advanced in a manner resembling the *status quo* test,[105] the above line of reasoning is not a practical application of this test. Instead, it focuses on the circumstances existing at the time of signature and/or expression of consent to be bound and conduct that would alter such circumstances, be it environmental conditions and/or the obtainment of knowledge regarding nuclear weapons. In contrast, through an application of the *status quo* test, a State would only have violated the interim obligation and defeated the object and purpose of the CTBT if it, at the material time, was a non-nuclear-weapon State and started

[103] Statement of the Honourable Dr. Joe Borg, Minister of Foreign Affairs of Malta, Conference on Facilitating the Entry into Force of the CTBT, 11 Nov. 2001, quoted in Masahiko Asada, 'CTBT: Legal Questions Arising from Its Non-Entry-into-Force' (2002) 7 J. Conflict & Sec. L. 85, 100.
[104] Elias Olufemi and Lisa Tabassi, 'Disarmament' in Bowman and Kritsiotis (n 3) 590-1 (footnote omitted).
[105] See above.

to carry out test explosions subsequent to signature and/or expression of consent to be bound. A nuclear-weapon State which already carries out test explosions – the risks of double standards being particularly evident – would on the other hand not defeat the object and purpose of the CTBT if it continued to conduct test explosions pending the entry into force of the treaty, regardless the fact that that State would significantly alter the circumstances existing at the time of signing or expressing consent to be bound by the CTBT.

Moreover, the reasoning above also implies that the manifest intent test could potentially be applied as a State, most likely, would carry out the testing and acquire knowledge to either improve existing nuclear weapons, or to acquire nuclear weapons. As this seems unwarranted and condemnable to the outer observable world, a State would, by conducting a test explosion, have violated the interim obligation under Article 18 VCLT. Moreover, under the essential elements test, it seems like a State would have violated the interim obligation if it carried out a nuclear weapon test explosion pending the entry into force of the CTBT.

Article 1 of the Convention may – speculatively – be regarded as constituting an 'essential part' of the treaty and lays down that '[e]ach State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control'. It also stipulates that '[e]ach State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion'. By carrying out an explosion, a State would fail to comply with this provision, which in turn would trigger a violation of Article 18 VCLT (under the logic of 'the essential elements test').

Interestingly, the impossible performance test might, although not necessarily, yield the same result. If a State carries out nuclear test explosions pending the entry into force of the CTBT, there is nothing that prevents it from stopping testing once the treaty is operative. On the other hand, presuming that a State would use its acquired knowledge to improve existing nuclear weapons or acquire new ones, it might render performance of the treaty more difficult once in force as it becomes more burdensome for that State to achieve nuclear disarmament.[106] In addition, should the State have caused permanent or irreparable damage to the environment

[106] The question may also be asked how one 'unlearns' acquired knowledge.

pending the entry into force of the treaty, it may also be or at least significantly more difficult for that State to perform the obligations of the CTBT once in force.[107]

Thus, it appears that signatories or contracting States to the CTBT would violate Article 18 VCLT if they were to conduct nuclear tests pending the entry into force of the CTBT. Some nuclear States – which prior to having signed the CTBT did carry out nuclear testing – have indeed refrained from doing so since their signature. These include: the US, who signed the CTBT on 24 September 1996 and carried out its last nuclear test on 23 September 1992; the UK, who signed the CTBT on 24 September 1996 and carried out its last test on 26 November 1991; France, having signed the CTBT on 24 September 1996 and carried out its last test on 27 January 1996; and China, who also signed the treaty on 24 September 1996 and carried out its last nuclear test on 29 July 1996.[108]

It therefore seems that those nuclear States – although not fully bound by the terms of the treaty – are complying with their interim obligation under Article 18 VCLT to not defeat the object and purpose of the CTBT by refraining to carry out nuclear test explosions. This also means that if States like North Korea (having carried out several test explosion between 2006-2017),[109] and India and Pakistan (having carried out their lasts nuclear test explosions in 1998),[110] had at the very minimum signed the CTBT when it opened for signature in 1996, they would have breached the obligation not to defeat the object and purpose of the CTBT pending its entry into force, in violation of Article 18 VCLT.[111] The potential implications of non-compliance with and consequences of breaching Article 18 are further discussed in chapter 6.

There are further situations in international law which are capable of raising questions of compliance with Article 18 VCLT. China's conduct in relation to the International Covenant on Civil and Political Rights (ICCPR) is a prime example in this regard.[112] China signed the ICCPR on 5 October 1998 but is yet to ratify the treaty. China has also not made its intention clear not to become a party to the ICCPR.[113] As a party to the VCLT since 1997, China is

[107] For a similar view, see Turner (n 17) 764.
[108] See https://www.armscontrol.org/factsheets/nucleartesttally (last accessed 19 January 2023).
[109] Ibid.
[110] Ibid.
[111] Importantly, those States have not signed the CTBT and are therefore not bound by Article 18 VCLT to refrain from conduct which would defeat the object and purpose of the treaty.
[112] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[113] On the contrary, China stated in its 2018 National Report submitted as part of the Universal Periodic Review (under the United Nations Human Rights Council) process that it continued to prepare for ICCPR ratification), see Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: China, 1 14, U.N. Doc. A/HRC/WG.6/31/CHN/1 (Nov. 6, 2018), para 14.

therefore under a continuing duty under Article 18(a) VCLT to refrain from conduct which would defeat the object and purpose of the ICCPR. However, as mentioned in chapter 1, China's human rights records are facing growing international scrutiny. There are several instances evidencing China's continued suppression of fundamental civil and political rights, including measures to significantly restrict the MeToo movement,[114] the persecution and oppression of the Uighur Muslim population in Xinjiang,[115] arbitrary deprivation of liberty,[116] and forced disappearance of lawyers and civil rights defenders.[117]

Amnesty International has for instance reported that the Uyghur Muslim community is facing grave persecution in China. An estimated one million Muslim people are being held at camps in Xinjiang, although the Chinese government denies their existence by describing them as 'transformation-through-education centres'. Amnesty however labels those as 'detention camps for torture' and 'brainwashing of anyone suspected of disloyalty'. It also reports of verbal abuse, food deprivation, solitary confinement and beatings, as well as of deaths inside the facilities.[118]

Furthermore, in August 2022, the Office of the UN High Commissioner for Human Rights (OHCHR) concluded that 'serious human rights violations' against the Uyghur and 'other predominantly Muslim communities' have been committed. This include restrictions on religious freedom and the rights to privacy and movement.[119] The report also outlined that Chinese Government policies in the region have 'transcended borders', separating families, 'severing' contacts and producing 'patterns of intimidations and threats' against the wider Uyghur diaspora who have spoken out about conditions.[120] China has even been accused of committing crimes against humanity and possibly genocide against the Uyghur population

[114] See Margaret K. Lewis, 'Why China Should Unsign the International Covenant on Civil and Political Rights' (2020) 53(1) Vanderbilt Law Review 131.
[115] Adrian Zenz, 'Thoroughly reforming them towards a healthy heart attitude': China's political re-education campaign in Xinjiang' (2019) 38 CentAsianSurv 102; Stephanie Nebehay, '1.5 million Muslims could be detained in China's Xinjiang' (2019), available at https://reut.rs/2GuOwmf (last accessed 19 January 2023).
[116] See 'Chinese Experts Worried About Liu Xia's Health', UN Office High Commissioner of Human Rights (4 July 2018), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23322&LangID=E (last accessed 19 January 2023).
[117] See 'On "709" Anniversary, Legal Crackdown Continues' (2017) Human Rights Watch, available at https://www.hrw.org/news/2017/07/07/china-709-anniversarylegal-crackdown-continues (last accessed 19 January 2023).
[118] See https://www.amnesty.org.uk/chinas-uighur-muslims-truth-behind headlines?utm_source=google&utm_medium=grant&utm_campaign=BRD_AWA_GEN_dynamic-search-ads&utm_content=&gclid=Cj0KCQiA8aOeBhCWARIsANRFrQHMVqVMVX0P8Mg4hVmQ5-sMkb9Q5TmnNgjosdCneP1527Wlga9xpiMaAi0DEALw_wcB (last accessed 19 January 2023).
[119] The report is available at https://news.un.org/en/story/2022/08/1125932 (last accessed 31 January 2023).
[120] Ibid.

following reports that China has been forcibly mass sterilising Uyghur women to suppress the population, separating children from their families, and attempting to break the cultural traditions of the group.[121]

Furthermore, 2015 witnessed the '709 Crackdown' in China – so named for the start of when Chinese police rounded up and interrogated about 300 rights lawyers, legal assistants, and activists across the country.[122] Police in Beijing for instance detained human rights lawyer Wang Quanzhang in August 2015, being charged with 'subversion of state power'.[123] There are reports that Wang was tortured with electric shocks in detention.[124] Furthermore, human rights lawyer Jiang Tianyong went missing in November 2016, and was later charged with subversion. In March 2017, Jiang appeared on state TV to 'confess' his fabrications of torture of another lawyer to 'smear the Chinese government'.[125] Chinese authorities also continue to harass lawyers who represent the 709 lawyers and activists, severely restricting their freedom of expression and threatening to revoke their lawyers' licenses.[126]

Those are just a few examples of conduct which have triggered international outcry, and which raise questions of whether China is complying with its obligations under Article 18 VCLT or whether its conduct does in fact defeat the object and purpose of the ICCPR. The Human Rights Committee (HRC) has defined the object and purpose of the ICCPR:

> to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.[127]

The Preamble further recognises that 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are

[121] See https://www.bbc.co.uk/news/world-asia-china-22278037 (last accessed 19 January 2023).
[122] See Hualing Fu, 'The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State' (2018) 27 JContempChina 554.
[123] See https://www.hrw.org/news/2017/07/07/china-709-anniversary-legal-crackdown-continues (last accessed 19 January 2023).
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Covenant on Civil and Political Rights General Comment 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. GAOR, Hum. Rts. Comm., 52d Sess., U.N. Doc. CCPRIC/21/Rev.1/Add.6 (Apr. 11,1994) para 7.

created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'.[128]

By targeting, severely discriminating and arbitrarily depriving groups a people of their civil and political rights on the basis of their religious belief in the case of the Uyghur community, targeting, silencing and arbitrarily detain and imprison civil rights lawyers and activists in a campaign to intimidate and silence those who sought to work within China's legal system to effect positive change in their society and pursue legal redress undermine the rule of law and erode any conditions whereby everyone may enjoy his civil and political rights on an equal basis. China is intentionally intimidating and silencing those who are working to promote observance of the rule of law and basic civil and political rights. Its conduct is therefore a clear frustration of the object and purpose of the ICCPR to establish a legal framework for human rights by defining certain civil and political rights, whereby a convincing claim can be made that China is breaching its obligation under Article 18(a) VCLT to refrain from conduct which defeats the object and purpose of the ICCPR.

The last example concerns States' conduct in relation to certain pending environmental treaties, in this case the Doha Amendment[129] to the Kyoto Protocol.[130] In short, the Kyoto Protocol operationalises the United Nations Framework Convention on Climate Change (UNFCC) by committing industrialised countries to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. In its Annex B, the Kyoto Protocol sets binding emission reduction targets for 37 industrialised countries and the EU. Overall, these targets add up to an average 5 per cent emission reduction compared to 1990 levels over the five-year period 2008–2012 (the first commitment period). The Doha Amendment to the Kyoto Protocol was adopted for Kyoto Protocol Annex B parties for a second commitment period, 2013-2020.

The entry into force of the Doha Amendment was slow. Only as of 28 October 2020, 147 Parties had deposited their instrument of consent to be bound, whereby the threshold of 144 instruments of acceptance for entry into force of the Doha Amendment was achieved. The amendment finally entered into force on 31 December 2020. What were the obligations of States which had deposited their instruments of acceptance prior to 31 December 2020?

[128] Preamble recital 4.
[129] Doha Amendment to the Kyoto Protocol (adopted 8 December 2012), entered into force 31 December 2020)
[130] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

The object and purpose of the Doha Amendment can be construed in two ways:

> One view would be that the UNFCCC, the Kyoto Protocol and the Doha Amendment all pursue the ultimate objective defined by the UNFCCC: to avoid a 'dangerous' climate change scenario. In this approach, the interim obligation … would boil down, at most, to a vague obligation not to make a 'dangerous' climate change scenario unavoidable.[131]

This approach, however, fails to take into account the specific telos of each climate change treaty. The Kyoto Protocol's ultimate objective is to impose restrictions on GHG emissions during the first commitment period, whereas the *raison d'etre* of the Doha Amendment is to impose additional restrictions during the second commitment period. Accordingly, the entry into force of the Doha Amendment would be rendered meaningless if it became impossible for States Parties to achieve their maximum assigned amount GHG emissions once the Doha Amendment entered into force. Thus, in order not to defeat the object and purpose of the Amendment pending its entry into force, those Parties that had accepted it must have remained capable of achieving their GHG emissions target during the second commitment period at the time of the entry into force of the Amendment.[132]

In this context, delayed action to reduce emissions would become increasingly problematic as a State party would not only need to significantly accelerate the process of negotiating, adopting and implementing necessary measures, but also counterbalance its higher emissions in the first years of the second commitment period by further decreasing its emissions. At some point, a State party would become practically incapable of complying with its target if it had not already taken appropriate steps prior to the entry into force of the Amendment.[133] Thus, in order not to defeat the object and purpose of the Doha Amendment pending its entry into force in December 2020, States that had accepted the Doha Amendment would have been required to be able to ensure until January 2021 that their emissions during the second commitment period did not exceed their assigned amount.[134]

4.3 Duty of Care in Relation to Article 18

[131] For the original analysis, see Benoit Meyer, 'The Curious Fate of the Doha Amendment', EJIL: Talk! 4 May 2020, available at https://www.ejiltalk.org/the-curious-fate-of-the-doha-amendment/ (last accessed 26 August 2021).
[132] Ibid.
[133] Ibid.
[134] This essentially meant that States would have needed to take action to comply with the provision of the Doha Amendment even pending its entry into force.

In scholarship, there is a clear tendency to support the view that Article 18 is a duty of abstention, which does not impose any obligation on States to take positive action.[135] For instance, it has been argued that 'it is not possible to say that a State should take positive measures in order to further the object and purpose of the treaty, or remove obstacles to the proper implementation of the treaty ... '.[136] However, this view fails to take into consideration the question of duty of care and obligations of conduct, which – from a general point of view – require States to take all appropriate steps and measures in order to prevent harm.

Obligations of conduct impose on States an obligation to do the best they can in furtherance of a specific goal, but without the guarantee that this goal will be reached. In other words, it imposes the duty on States to take positive action in the endeavour to realise a desired objective.[137] The expressions used vary from one treaty to another ('take all measures', 'all appropriate measures to protect', 'do everything possible', 'do everything in its power')[138] but one particularly frequently employed standard of obligations of conduct which will serve as an illustrative example for this section is the requirement to exercise due diligence.[139]

Due diligence obligations can be separated into two overlapping types: procedural obligations and obligations relating to a State's institutional capacity.[140] Obligations of the procedural type typically involve to report and notify certain incidents and/or risks to other States, monitor certain situations, consult other States and to carry out risk assessments.[141] The second type of due diligence obligation – relating to States' institutional capacity – may oblige States 'to take legislative or administrative safeguard measures',[142] for example to enact criminal law

[135] J.P. Cot, 'La bonne foi et la conclusion des traites', RBDI, 1968, 155; Corten and Klein (n 1) 398; Kolb (n 5) 44; Villiger (n 1) 249. The ILC has stated that '[i]t is *unanimously* accepted that article 18, paragraph (a), of the Convention does not oblige a signatory state to respect the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound', see UNGA, Document A/62/10: Report of the ILC on the work of its fifty-ninth session, *Yearbook of the ILC* (2007) UN Doc A/CN.4/SER.A/2007/Add.l (Part 2) at 67 (emphasis added).
[136] Kolb (n 5) 44.
[137] Constantin P Economides, 'Obligations of Means and Obligations Of Result' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010) 372.
[138] Ibid 378. It has however been argued that 'it seems simplistic to qualify due diligence as an obligation of conduct'. 'Due diligence may sometimes but not always be both: an obligation of conduct and an obligation to guarantee a result', see Anne Peters, Heike Krieger, and Leonhard Kreuzer, 'Due diligence: the risky risk management tool in international law' (2020) 9(2) CILJ 121, 130. See also Nicolas de Sadeleer, 'The principles of prevention and precaution in international law: two heads of the same coin?' in Panos Merkouris and Malgosia Fitzmaurice (eds), *Research Handbook on International Environmental Law* (2nd edn, Edward Elgar 2021).
[139] Koivurova (n 6).
[140] Peters et al, 'Due diligence: the risky risk management tool in international law' (n 138) 121.
[141] See e.g., Tom Sparks and Anne Peters, 'Transparency Procedures (Monitoring, Reporting, Verification)' in Jaqueline Peel and Lavanya Rajamani (eds), *Oxford Handbook of International Environmental Law* (OUP 2020).
[142] Peters et al, 'Due diligence: the risky risk management tool in international law' (n 138) 125.

provisions as sanctions.[143] Due diligence is pervasive across numerous areas of international law,[144] including human rights law,[145] international environmental law,[146] trade law,[147] health law,[148] economic law,[149] cyber law,[150] tax law,[151] and anti-terrorism law.[152] That said, the requirement to exercise due diligence is not in itself a general principle of international law but can be read through a lens of a primary rule of international law.[153]

It is clear from case-law of international courts and tribunals that the requirement to exercise due diligence requires States to take appropriate measures to prevent hostile and criminal activities from taking place (and potentially harming other actors) within its territory. For instance, in the much-cited *Corfu Channel* case,[154] the ICJ stated that:

> [t]he obligations incumbent upon the Albanian authorities consisted in notifying … the existence of a minefield in Albanian territorial waters and in warning the

[143] Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68 ICLQ 1041, 1048-9.
[144] Peters et al, 'Due diligence: the risky risk management tool in international law' (n 138) 121.
[145] See further below. It features prominently in the 2011 Istanbul Convention Against Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210), Article 5(1)–(2). Another example relates to the prohibition of torture. The prohibition of torture is an obligation of result. But to ensure this right, States need not only refrain to inflict torture (or other ill-treatment reaching the *de minimis* threshold), but also to adopt efficient legislation that criminalises torture, enables prosecution of perpetrators of acts of torture, and set up mechanisms for investigating allegations of acts torture etc. These latter activities, which call for positive action, fall under the category of obligations to *protect* individuals from being subjected to torture, and calls for a due diligence approach, see Economides (n 137) 379.
[146] See further below.
[147] For an overview, see Markus Krajewski, 'Due Diligence in International Trade Law' in Peters et al (n 8). Elements of due diligence in existing international trade agreements include 'obligations to cooperate, to negotiate in good faith, to notify measures which could be harmful to other countries, to take the effects of measures on other countries' economies into account, and to address the activities of private parties which may have such negative effects on other countries', see Krajewski at 312-13.
[148] See Arts 5–7 of the WHO's International Health Regulations (2005) on surveillance, notification and information-sharing, and Art 13 on public health response capacity: International Health Regulations (adopted 23 May 2005, entered into force 15 June 2007) 2509 UNTS 79. See Gian Luca Burci, 'The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations Fit for Purpose?' (EJIL:Talk!, 27 February 2020) available at www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/ (last accessed 15 July 2022); Antonio Coco and Talita de Souza Dias, 'Prevent, Respond, Cooperate: States' Due Diligence Duties Vis-à-Vis the Covid 19 Pandemic' (2020) 1 Journal of International Humanitarian Legal Studies 1.
[149] Aniruddha Rajput, 'Due Diligence in International Investment Law: From the Law of Aliens to Responsible Investment' in Krieger et al (n 8) 273. In economic law, full protection clauses typically require States 'to take all reasonable measures'.
[150] Antonio Coco and Talita de Souza Dias, 'Cyber Due Diligence: A Patchwork of Protective Obligations in International Law' (Applying International Law in Cyberspace: Protections and Prevention, Oxford Institute for Ethics, Law and Armed Conflict, Online, 18–19 May 2020); Eric Talbot Jensen, 'Due Diligence in Cyber Activities' in Krieger et al (n 8) 252.
[151] Reuven Avi-Yonah and Gianluca Mazzoni, 'Due Diligence in International Tax Law' in Krieger et al (n 8) 302.
[152] Inger Österdahl, 'Due Diligence in International Anti-Terrorism Law: Developments in the Resolutions of the UN Security Council' in Krieger et al (n 8) 234.
[153] Peters et al, 'Due diligence: the risky risk management tool in international law' (n 138) 121.
[154] *Corfu Channel case* (Judgment) ICJ Rep 1949 p 4. British warships were struck by naval mines in the international highway of the Corfu Strait in an area south-west of the Bay of Saranda, being in Albanian territorial water. This incident resulted in loss of life and personal injuries, as well as damage to the vessels.

> approaching British warships of the imminent danger to which the minefield exposed them.[155]

Having failed to fulfil this due diligence obligation, the responsibility of Albania for internationally wrongful acts was triggered.[156] Due diligence also requires States to take appropriate measures to protect the premises of a diplomatic mission from protesters,[157] and to employ all means reasonably available to them to prevent grave crimes of international law.[158] With respect to the latter, the ICJ in *Bosnia Genocide* recognised that a State will incur international responsibility if acting negligently. If harm has occurred irrespective of the State's diligence, it will not be held responsible for an internationally wrongful act.[159] In particular, Court stressed that it was:

> the obligation of States parties ... to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power … [160]

Accordingly, a violation of the obligation to prevent crimes against humanity results from omission, negligence and the failure to adopt suitable measures.[161]

In light of the obligation on part of States to exercise due diligence, can the position that Article 18 is a pure negative obligation of abstention be challenged, or can Article 18 only be feasibly construed as a negative obligation taking the form of a prohibition?[162] If so, what specific obligations does the requirement to act with due diligence impose on States under Article 18 VCLT in certain representative areas of international law? Within the field of international

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[155] Ibid p 22.
[156] Ibid.
[157] *United States Diplomatic and Consular Staff in Tehran* (*United States v Iran*) (Judgment) ICJ Rep 1980, p. 3. In the *Tehran Hostages* case, in which a group of militant students occupied the US embassy in Tehran and held members of the US diplomatic staff as hostages. The ICJ found that 'the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion' (para 63). This inaction of the Iranian Government constituted a clear and serious violation of Iran's obligations under the provisions of Articles 22(2) and 29 of the Vienna Convention on Diplomatic Relations (VCDR) to protect the diplomatic premises and the inviolability of the person of a diplomatic agent of the US from damage (para 67).
[158] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) ICJ Rep 2007, p. 43.
[159] See also Peters et al, 'Due diligence: the risky risk management tool in international law' (n 138) 127.
[160] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Rep 1951 p 15, para 430.
[161] Ibid para 432.
[162] Economides (n 137) 371-72. Negative obligations or obligations of abstention all belong to the category of obligations of result.

environmental law (IEL),[163] the ICJ has recalled that the principle of prevention has its origins in due diligence and it is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[164] This principle entails a duty on part of a State to 'use all the means at its disposal' in order to avoid causing significant damage to the environment of another State.[165] The Court has also confirmed that the institutional obligations of due diligence entail 'not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators'.[166]

Furthermore, the requirement to exercise due diligence may impose the procedural obligation to carry out an environmental impact assessment (EIA).[167] If the EIA confirms that there is a risk of significant transboundary harm, the State 'planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk'.[168]

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[163] Typical examples of due diligence in IEL include the principle of prevention, for instance recognised in Principle 21 of the 1972 Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972) and Principle 2 of the Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I. Other examples include the precautionary principle, recognised in Stockholm Principles 6, 7, 15, 18, and 24 and Rio Principles 11, 14, 15 and 17. For an overview, see Jutta Brunnée, 'The Stockholm Declaration and the Structure and Processes of International Environmental Law' in T. Dorman (ed), *The Future of Ocean Regime Building: Essays in Tribute to Douglas M. Johnston* (Kluwer Law 2008) 41-62; Alexandre Kiss, 'The Rio Declaration on Environment and Development' in L. Campiglio, L. Pineschi, D. Siniscalco and T. Treves (eds), *The Environment after Rio: International Law and Economics* (Martinus Nijhoff 1994) 55. Furthermore, Article 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities requires States to 'take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof', appearing in Report of the ILC, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10).

[164] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment) ICJ Rep 2010 p 14 para 101.

[165] Ibid.

[166] Ibid para 197. As there was 'no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence' or that its actions 'had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river', the Court concluded that Uruguay had not breached its obligations under Article 41 of the 1975 Statute (para 265).

[167] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) ICJ Rep 2015 p 665 paras 104, 153.

[168] Ibid para 104. Furthermore, in the Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) Case no 17, 11 February 2011, the Seabed Dispute Chamber of ITLOS examined the content of a due diligence obligation 'to ensure' certain obligations of States Parties to UNCLOS with respect to the sponsorship of activities in the Area. The Chamber stated that '[t]he sponsoring State's obligation "to ensure" is … an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result', see paras 110-11.

Accordingly, having recourse to the IEL standard of due diligence in relation to Article 18 VCLT, the requirement to exercise due diligence can require States to take positive action in order to avoid causing, for instance, irreparable harm to the environment which would in fact alter the *status quo* upon which a treaty was signed or ratified and render future performance of that treaty impossible, meaningless, or significantly more difficult. This can include to: i) 'use all the means at its disposal' in order to avoid causing significant damage to the environment of another State';[169] (ii) adopt appropriate rules and measures, and ensure a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party;[170] (iii) ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an (*ex-ante*) environmental impact assessment;[171] and (iv) if the environmental impact assessment confirms that there is a risk of significant transboundary harm, to notify and consult in good faith with the potentially affected State in order to prevent or mitigate that risk.[172]

To exemplify, the question may be posed whether a signatory or contracting State to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[173] can legitimately allow the continued overfishing of and trade in endangered species pending the entry into force of the treaty, or whether that State has to take positive measures to abandon such conduct prior to the entry into force of CITES in order not to defeat its object and purpose. The answer seems to favour the latter approach. If a State allows the overfishing to continue unchecked until the treaty enters into force, certain species may disappear and could never be restored or 'resuscitated' by the treaty's future entry into force. As such, by failing to take positive action to protect endangered species, a State may *de facto* defeat the object and purpose of CITES to safeguard threatened species pending the entry into force of the treaty.[174]

Similarly, in response to the questionnaire included in this thesis, one participant noted that:

> the purpose of Article 18 is that once a treaty has been signed, it should not be acted upon in such a way that it loses its meaning before it is ratified. In the case of the Convention on Migratory Species of Birds, if we were to actively capture migratory

[169] *Pulp Mills* (n 164) para 101.
[170] Ibid para 197.
[171] *Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River* (n 167) paras 104, 153.
[172] Ibid para 104.
[173] Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES).
[174] Corten and Klein (n 1) 400.

> birds, the bird resources that we are trying to protect under the Convention would be in danger of dying out or being greatly reduced. I think that the purpose of Article 18 is that we should not do that. Incidentally, as I said earlier, even if we have not ratified the Convention, we're still protecting migratory birds under our existing domestic laws, so in that sense, I said that there would be no problem of violation of Article 18.

As such, 'to refrain' can thus require a positive action of due diligence to protect certain species from extinction. In other words, Article 18 can under certain circumstances impose an obligation to adopt measures aimed at ensuring that the treaty's fundamental object and purpose is not defeated, without the State having to apply the obligations set out in the treaty to the letter.[175]

In relation to human rights treaties, the requirement to exercise due diligence may impose an obligation on States under Article 18, having for instance signed and/or consented to be bound by the Genocide Convention, to employ all means reasonably available to them to prevent genocide so far as possible. Responsibility would then be incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.[176] States may also be obliged to protect individual human rights from grave and severe interference by non-State actors, and a violation of a human right by a non-State entity may trigger a State's international responsibility where it has manifestly failed to act with due diligence in taking reasonable measures to prevent and the non-State actor. For treaties involving international health law, Article 18 may impose a duty to take all appropriate responses to particularly severe threats to public health,[177] such as notifying and sharing information with other States.[178]

That said, as noted above, there is no general, overarching rule of due diligence, but the starting point is the identification of a primary rule, whereby the due diligence requirement contained therein is put in operation in a flexible manner depending on the relevant circumstances and

[175] Ibid 400-01.
[176] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 158) para 430.
[177] The prominent example being the COVID-19 outbreak.
[178] See Articles 5–7 of the WHO's International Health Regulations (2005) on Surveillance, Notification and Information-sharing, and Article 13 on public health response capacity: International Health Regulations (adopted 23 May 2005, entered into force 15 June 2007) 2509 UNTS 79. See David Fidler, 'COVID-19 and International Law: Must China Compensate Countries for the Damage?' (Just Security, 27 March 2020) available at www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/ (last accessed 15 July 2022); A Coco and T de Souza Dias, 'Prevent, Respond, Cooperate: States' Due Diligence Duties *Vis-à-Vis* the Covid 19 Pandemic' (2020) 1 Journal of International Humanitarian Legal Studies 1.

facts of the situation at hand,[179] and constitutes an effective and flexible tool in specific areas of international law. This is not to suggest that States must comply with the individual provisions of a pending treaty (other than rules existing as a matter of customary international law) but to exercise their due diligence requirement, States must manifest in a reasonable manner that they do not allow for the continuance of activities that carries the risk of significantly and materially cause damage to the environment, such as the complete eradication of certain species, or to prevent the commitment of grave violations of fundamental rights or to cooperate in matters relating to severe threats to public health.

This might include steps such as informing itself, both factually and legally, of foreseeable aspects of any anticipated procedure or course of action, and to take appropriate and timely measures to address them. There is, perusal, no general and all-encompassing standard, but the stringency of the due diligence obligation imposed must be contingent on the circumstances of the case at hand.[180] What can be concluded, however, is that the obligation in all cases must be appropriate and proportionate to the risk of damage involved, mindful of the fact the treaty is, after all, not yet in force.

4.4 Extent of Obligations: Article 18(a) *vis-a-vis* Article 18(b) VCLT

Article 18(a) and Article 18(b) VCLT target two fundamentally different steps in the treaty making procedure. Whereas Article 18(a) is devoted to situations when a State has formally accepted the terms of a negotiated treaty, but has yet not expressed its consent to be bound by the treaty, Article 18(b) addresses scenarios in which the relevant State has expressed its consent to be bound by the treaty and pending the entry into force of that treaty.[181] Such situations are not least common with respect to multilateral treaties, which not uncommonly include final clauses stipulating that the treaty will enter into force upon an explicitly stipulated number of ratifying States, and/or after a certain amount of time has elapsed.[182]

[179] McDonald (n 143) 1048-9.
[180] For example, as the ILC has correctly noted, activities which may be considered ultrahazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance, see ILC Draft Articles on Hazardous activities, commentary to Article 3, para 11.
[181] The VCLT defines a contracting State as 'a State which has consented to be bound by the treaty, whether or not the treaty has entered into force', see Article 2(1)(f) VCLT.
[182] See e.g., Gragl and Fitzmaurice (n 1) 705.

The question has been raised whether Article 18(b) would require a higher degree of conduct oriented towards the content of a treaty than Article 18(a).[183] This is in particular because with respect to Article 18(b), the State has already done everything necessary for the treaty to enter into force, wherefore 'it seems natural to expect that its behaviour is to a greater extent oriented towards the content of the treaty than for signatory States under lit a: at this final stage of the conclusion of the treaty, the sovereign freedom of action of States deserves much less protection than, for example, under lit a'.[184]

Such a position is not implausible. Both 'signature and ratification are *actes juridique*, but expression of consent to be bound is a more prominent manifestation of the will of the state to be bound by the stipulations of the relevant treaty'.[185] This does not culminate in a *status quo* where signing a treaty is a vacant act devoid of any legal consequences – a State is still bound not to defeat the object and purpose of the treaty signed[186] – but it serves to accentuate the fact that by expressing consent to be bound by the treaty, it will, typically (although not invariably) become binding on that State on a settled date.[187] As seen above, the same does not apply for signing a treaty (should it not be a definitive signature, ie a method of expressing consent to be bound under Articles 11 and 12 VCLT), because subsequent ratification is a voluntary act at the discretion of the signatory State; there are no guarantees that the treaty will one day become binding and effective with respect to the relevant State.

As a matter of fact, by having expressed its consent to be bound by a treaty, a State has taken a fundamentally more significant step in expecting compliance with and indeed performance of the relevant treaty regime in the foreseeable future. In other words, with certain evident exceptions, compliance with the treaty's provisions is sooner, rather than later, inevitable. The State has undertaken all available and necessary legal steps for the treaty to become effective, which is materially different from merely signing a treaty.[188] Accordingly, it is not unreasonable that a contracting State, i.e., a State that has expressed its consent to be bound by the treaty,

[183] Dorr (n 1) 253.
[184] Ibid 299.
[185] DP O'Connell, *International Law*, Vol I (Stevens and Sons 1970) 222.
[186] As noted above, the responses by States to the questionnaire indicated that they view signatures as constituting an important act in international law which should be seriously given.
[187] In the context of multilateral treaties, there is however a reasonable degree of foreseeability with respect to the entry into force of a treaty with respect to a certain State. For treaties not in force, it is common to include a provision stipulating that the treaty will enter into force upon a specified number of ratifications. For ratifying or acceding States to treaties in force, it is common practice that the treaty specifies at what time it becomes operative with respect to the new State party, for instance after a number of months.
[188] Exceptions of lengthy into force procedures include the CTBT, which opened for signature on 10 September 1996 and is yet to enter into force. In accordance with Article XIV of the Treaty, it will enter into force after all 44 States listed in Annex 2 to the Treaty have ratified it.

would enjoy a lesser degree of freedom of action than a mere signatory State pending the entry into force of the treaty.

This particularily holds true in the context of treaties which have already entered into force and when a State accedes to that treaty. In such circumstances – as the treaty has already obtained the minimum requirement of contracting States – is entry into force most likely a certainty (should not the acceding State withdraw its instrument of accession prior to it becoming effective). In addition, the acceding State ought to have insight as to the operation and functioning of the treaty thus far and be able to gain a clearer idea of what object and purpose and desirable aims the treaty aims to achieve and protect. Such an acceding State should therefore be able to determine with more clarity and certainty what sort of conduct is expected from it under Article 18 VCLT in relation to such treaty. If, for example, State C accedes to the European Convention on Human Rights (ECHR),[189] which has been in force for close to 70 years, State C would be able to inform itself of the challenges faced by the operation of the ECHR in practice, what sort of conduct have been deemed lawful versus unlawful under the scope of the treaty, how the treaty has been interpreted and applied in light of societal and technological developments, and how the European Court of Human Rights has defined the object and purpose of the treaty.

Although the plain language of Article 18 fails to support any difference in extent of obligations under sub-paragraph (a) and (b) respectivley, it is of interest to take into account – per analogy – the reasoning of the ICJ in its *Advisory Opinion on Reservations to the Genocide Convention* in this regard. The Court stated that by signing a treaty, the signatory State possesses the right to formulate objections to reservations. These objections would be of a provisional character, and 'would disappear if the signature was not followed by ratification, or the objections would become effective on ratification'.[190]

Thus, this reasoning implies that if a signatory State take the next step and ratifies the treaty, it would possess the *unqualified* right of formulating objections to reservations, regardless of whether the treaty has entered into force with respect to the relevant State or not, but the status of the State is contingent on expression of consent to be bound. Accordingly, just as the regime regulating the right to formulate objections to reservation is dependent on the status of the relevant State – being a signing or contracting State – the degree of conduct oriented towards

[189] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 April 1950, entered into force 3 September 1953) 2889 UNTS 213).
[190] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (n 160) at 28.

the object and purpose under Article 18 VCLT may also be conditioned on the status of the relevant State, being either a signatory or contracting State.

The position that signatory States may enjoy a higher degree of freedom of action than contracting States may be illustrated by the following example, advanced by Morvay, of a treaty on the non-proliferation of nuclear weapons:

> Suppose that both States A and B, which are neighbouring States and are involved in serious disputes with each other, have signed the treaty subject to ratification. While State A is ready to ratify the treaty, ratification by State B becomes more and more doubtful, since State B has better chances to succeed in producing nuclear weapons than State A. It is submitted that State A should under such circumstances have full freedom of action not to delay its own production of nuclear weapons without having to make the intention clear not to become a party of the treaty, since it may still prefer ratification of the treaty by both States. A similar situation would exist if, in the case of the treaty releasing seized property in exchange for a sum of money, State A begins to sell the seized property only in order to urge State B no longer to delay its decision as to the ratification of the treaty.[191]

Thus, whereas it might be within the discretion of a signatory State to continue its production of nuclear weapons or to sell seized property, it is highly questionable whether this is a desired solution for contracting States to a treaty, especially given the fact that the purpose of Article 18 itself is to protect the stability of relations between States in the formative stages of a treaty, to protect the integrity of a negotiated and concluded treaty, and to facilitate treaty making procedures on a domestic level. It is inescapable that a higher degree of conduct in line with the treaty regime is expected from contracting States in comparison to signatory States. After all, contracting States are in a considerably different situation to signatory States, and it seems logical and persuasive that this distinct position should manifests itself in some way.

There are also claims in case-law to this effect. In *Opel Austria*,[192] as recalled above, the applicant claimed that by adopting a regulation imposing tariff concessions after the parties had deposited their instruments of ratification of the EEA Agreement, the Commission had violated the interim obligation as free movement of goods was one of the principal objectives of the Agreement. Interestingly, the applicant argued that 'between the signature of the EEA Agreement and its entry into force the Community was bound to refrain from taking any measure which might jeopardize the attainment of the object and purpose of the Agreement'.[193]

[191] Morvay (n 1) 460-1.
[192] *Opel Austria GmbH v Council* (n 81).
[193] Ibid para 80.

That obligation 'should have played an even more important role' after all the Contracting Parties had expressed their consent to be bound by the Agreement.[194] The Court did not address this argument.

Furthermore, in responses to the questionnaire included in this thesis, one participant was of the view that '[s]ince, in the hypothesis covered by art. 18(b) VCLT, the State has accomplished the last step to become party to the treaty, a higher degree of conduct towards the content of the treaty may be required than in cases covered by art. 18(a) VCLT'. Moreover, the following may be observed. It has been argued that nothing under Article 18 requires States to 'remove obstacles to the proper implementation of the treaty which have occurred in the meantime without the State being responsible for these events'.[195] This observation is limited to events that the State is not responsible for, and as seen above, a State might have to change its domestic policy concerning, for instance, overfishing of endangered species pending the entry into force of a treaty protecting such species.

Moreover, for certain events that can be attributed to the State, a contracting State, in order not to torpedo the object and purpose of a pending treaty, may need to actively promote the future implementation of the treaty by removing significant obstacles, for which it is responsible, in order to guarantee the forthcoming implementation. Such obligation reasonably attaches to a contracting State only, because by having expressed its consent to be bound, that State has accepted and agreed to the terms and conditions of the treaty and can in many cases foresee the time at which the treaty will be finally operative. In contrast, by merely signing a treaty, there is no degree of foreseeability of its entry into force, and it would be a too stringent obligation should Article 18(a) VCLT also require signatory States to remove obstacles to the treaty's potential future application, because there are in reality no guarantees that the treaty will actually need to be implemented by the signing State.

The foregoing may be exemplified by a scenario where a State that has both signed and ratified an anti-torture convention. First of all, it should be clarified that the scope of Article 18 is limited to *treaties*. The provision does not apply to customary international law, but pending the entry into force of a treaty, States are still under a duty to comply with rules of customary international law.[196] As the prohibition of torture is a rule of customary international law (and a norm *ius cogens*), this means that a State even after having signed and/or ratified and anti-

[194] Ibid.
[195] Kolb (n 5).
[196] Villiger (n 1) 248.

torture convention and before the entry into force of such treaty is still obliged to refrain from acts of torture under rules of customary international law.

However, an anti-torture convention generally entails a broader scope of obligations: States must not only refrain from engaging in acts of torture but must also take appropriate measures to proactively forestall the occurrence of torture. As such, it is insufficient to merely intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irreparably harmed, but States are obliged to put in place all those measures that may pre-empt the perpetration of torture. As held by the European Court of Human Rights (ECtHR) in *Soering v UK*, States have the duty to immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.[197] Thus, not only is the object and purpose of an anti-torture treaty to suppress torture and punish perpetrators of such atrocities but to do so, the State need effective policies and legislation in place that prohibits torture, and enables the police to effectively investigate allegations of torture capable of leading to the identification and punishment of those responsible. In this vein, it has been stated in the context of signatories to the Rome Statute that:

> apart from art 18 signatory states are under a duty of good faith to examine the text of the statute with the aim to determine its definitive position towards it. And if they decide to ratify, they must take the necessary steps to be able to meet their obligations on the date the Statute comes into force in relation to them.[198]

In an analogous manner, if a State has decided to ratify an anti-torture convention, it might well be the position that that State needs to take certain positive measures and start amending or drafting certain domestic policies that facilitates the entry into force of the treaty in order to further the object and purpose of such treaty and be able to comply with it on the day of its entry into force. To reiterate, this observation is advanced exclusively with respect to a State that has in fact consented to be bound by the treaty and not merely signed it, wherefore there is a higher degree of probability that it will eventually become binding and operative on that State. In this context, it is in practice most likely easier to define the scope and content of the interim obligation for a contracting State to a treaty in force – in contrast to the content of the interim obligation of a contracting State to a treaty not in force – because a treaty in force has already acquired its required number of States parties, meaning that there is an additional layer

[197] *Soering v UK* App no 14038/88 (7 July 1989).
[198] Alain Pellet, 'Entry into Force and Amendment of the Statute' in Antonio Cassese, Paula Gaeta and James Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 152.

of guarantee that the treaty will, on a given date, become effective and binding on the contracting State.

4.5 Concluding Remarks

Seeking to define the contours of Article 18 VCLT is not an easy task, and the ambiguous terminology of the provision makes its application in practice difficult. It is close to impossible to establish a general 'test' to be used when ascertaining whether certain conduct defeats the object and purpose of a pending treaty. It is also questionable whether such a test is really suitable and conceivable in practice, especially as the assessment of whether a treaty's object and purpose has been defeated is dependent on the nature of the relevant treaty at hand, its subject matter, the circumstances surrounding its conclusion, and recent developments and the current state of international law.

However, this chapter has closed a significant gap in international law scholarship and the practice of State and international courts and tribunals by deciphering what is expected from States under Article 18 VCLT and what conduct would amount to 'defeating' the object and purpose of a treaty. First, it can be said with certainty that Article 18 does not entail a duty to subsequently express consent to be bound by a signed treaty, or an obligation to refrain from conduct which is merely incompatible with or contrary to the object and purpose of the treaty, but its threshold is high.

As seen above, the drafters of the interim obligation were favourable of an 'impossible' or 'meaningless' performance standard, whereby a State has defeated the object and purpose of a pending treaty in violation of Article 18 when engaging in conduct which would render subsequent performance of the treaty impossible, meaningless, or significantly more difficult. Secondly, in applying the interim obligation, the standard is objective and the issue of bad faith irrelevant. Contested conduct must, for instance, completely nullify any friendly or economic relations between States, or torpedo the very need and reason for the treaty in the first place, for example by overfishing or severely failing to protect endangered species to the extent that those species are extinct by the time of the entry into force of the treaty.

Furthermore, this chapter challenges the position in scholarship that Article 18 VCLT is a pure negative obligation of abstention. The requirement to exercise due diligence can in relation to Article 18 – a primary rule of international law – impose an obligation on States to take positive measures in order not to thwart the object and purpose of a treaty and to ensure that they are in

a position to perform the treaty once in force. This proposition is still consistent with the high threshold of Article 18: the desired results and objectives of the treaty regime do not by any means need to be achieved or fulfilled but *de minimis*, States must employ reasonable and appropriate means to seek to prevent significantly severe or irreparable damage so that the treaty's ultimate rationale is still achievable at the time of its entry into force. A violation of Article 18 would then occur if the State manifestly fails to take the appropriate and proportionate steps of due diligence.

In addition, it is important to emphasise that the requirement to exercise due diligence under Article 18 only requires States not to act negligently (as the opposite word to 'diligently'),[199] and, responsibility will only ensue if, as a result of acting negligently, harm occurs. For instance, in *Costa Rica v Nicaragua*, a lack of diligence in the absence of material harm was not sufficient to establish international responsibility, but harm actually has to occur.[200] Accordingly, Article 18 will only be breached when a State has acted negligently and harm occurred, and harm alone is not sufficient to trigger State responsibility. This means that, from a functional point of view, the due diligence standard narrows down the State's responsibility to negligent behaviour causing harm and/or damage under Article 18 VCLT.[201]

Lastly, this chapter has illustrated the implicit difference in the extent of obligations imposed by Articles 18(a) and 18(b) respectively and has shown that for a State which has expressed its consent to be bound by a pending treaty, its conduct can legitimately be expected to be more orientated towards the object and purpose of a treaty than for a State which has merely signed the treaty. This is because by having expressed its consent to be bound by a treaty, a State has taken a fundamentally more significant step in expecting compliance with, and indeed performance of, the relevant treaty regime in the foreseeable future.

Accordingly, it is not unreasonable that a State which has expressed its consent to be bound by the treaty would enjoy a lesser degree of freedom of action than a mere signatory State pending the entry into force of the treaty. At the same time, it is important to bear in mind that the questions of exercising due diligence in relation to Article 18 and the potential difference in the scope of obligations under Articles 18 lit a and b respectively have thus far not been a

[199] For an in-depth analysis, see Samantha Besson, *La due diligence en droit international*', De L'academie de Droit International De La Haye (Brill 2021).
[200] *Costa Rica/Nicaragua* (n 141) paras 117-18, 217. *Mutatis mutandis*, by reasoning of the ICJ's judgment in *Bosnia Genocide*, a State cannot be held responsible for violating Article 18 VCLT if damaged did in fact never occur.
[201] Peters et al, 'Due diligence: the risky risk management tool in international law' (n 112) 127.

frequent tenet in the diplomatic practice of States and it remains to be seen whether there will be any future developments or clarification by an international court or tribunal in this regard.

5. TEMPORAL ASPECTS OF ARTICLE 18 VCLT

5.1 Introduction

The temporal scope of treaties and international obligations is a matter of great practical importance for States: for reasons of foreseeability, the temporal scope of States' obligations must be clearly defined, or, at the very minimum, definable. States themselves ought to know from what point in time a certain obligation is effective and binding, as well as when a certain obligation ceases to apply. The same holds true for other contracting and signatory States to the treaty. In order for them to regulate their international relations accordingly, there must be transparency as to the question of what obligations bind other States. States must likewise be able to hold legitimate expectations that another State will abide by its obligations once effective. Therefore, it is rather surprising that the temporality of treaty obligations is a fairly unexplored phenomenon in international law, which has not been addressed to any appreciable extent in scholarship or in the case-law of international courts and tribunals.[1]

The temporal difficulties relating to Article 18 VCLT are no exception. According to Article 18 lit a, the interim obligation applies until the signatory State has made its intention clear not to become a party to the treaty. According to Article 18 lit b, the interim obligation applies to a State that has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. However, Article 18 does not prescribe how a State can make its intention clear not to become a party to the relevant treaty at hand. This issue has recently sparked controversies in the international practice of States.

Neither does the provision designate any formula indicating when the entry into force of a treaty is unduly delayed, or what elements to take into consideration in this assessment. These questions have not been exhaustively discussed in scholarship or judicial practice, and State practice remains fragmentary in this regard. This chapter therefore offers a valuable contribution by clarifying – on the basis of a range recent examples from the practice of States – how a State can make its intention clear not to become a party to the treaty under Article 18(a) VCLT and when the entry into force of a treaty is considered to be unduly delayed under Article 18(b).

[1] Don W Greig, *Intertemporality and the Law of Treaties* (British Institute of International and Comparative Law 2001) 1.

Furthermore, Article 18(b), in contrast to Article 18(a), is silent on the legal consequences of revoking the instrument triggering the interim obligation, for instance the revocation of an instrument of ratification or accession. This begs the question of under what circumstances, if any, a State can terminate the interim obligation under Article 18(b) VCLT by revoking an instrument expressing consent to be bound by the treaty. This matter has seemingly caused a bifurcated approach amongst States and international law scholars but is, as mentioned, not covered by Article 18 VCLT itself. This chapter therefore offers new dimensions to proper treaty practice under Article 18(b) by combining theory and practice and elucidating the precise circumstances under which an instrument of consent to be bound is revocable pending the entry into force of a treaty.

5.2 Article 18(a) VCLT

According to Article 18(a) VCLT, a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty, until it shall have made its intention clear not to become a party to the treaty. Article 18(a) thus targets situations where a State has formally agreed to the terms of a negotiated and concluded treaty but has yet not expressed its consent to be bound by the treaty.[2] This necessitates an explanation of the various types of signatures in order to further understand what kind of signature Article 18(a) covers. By 'signature' is understood the sort of legal action which creates a provisional status of the relevant State in relation to the treaty.[3] It is material to distinguish such signature from initialling or signature *ad referendum* within the meaning of Article 10(b) VCLT. Initialling and signature *ad referendum* relate to the authentication of the text of a treaty and do not fall under the scope of Article 18(a) VCLT.

Article 18(a) does neither cover 'definitive' signature as a means of expression of consent to be bound by a treaty under Articles 11 and 12 VCLT. Instead, 'signature' within the paradigm of Article 18 covers both final and simple signatures. Whereas final signature approves and authenticates the text of the treaty, simple signature is signature subject to ratification.[4]

[2] An interesting development in this regard is the Comprehensive Agreement on Investment between the European Union and its Member States, of the one part, and the People's Republic of China, of the other part, which is currently been finalised, see https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS_BRI(2021)679103_EN.pdf (last accessed 15 July 2022).

[3] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Rep 1951 p 15, 28.

[4] Paul Gragl and Malgosia Fitzmaurice, 'The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699, 703.

Likewise, it must be pointed out that Article 18(a) does not cover the exchange of instruments referred to in Article 13 VCLT, i.e. as a means of expressing consent to be bound, but applies to the exchange of instruments which is also subject to ratification.[5] That said, should the treaty not enter into force immediately, Article 18(b) would apply to definitive signature under Article 12 VCLT and exchange of instruments under Article 13 VCLT.

In the case a State has signed a treaty, Article 18(a) also provides for the sovereign right of every State not to ratify a treaty it has signed: States are at any time free to make their intention clear not to become a party to a treaty.[6] It is in fact not uncommon that States do not want to ratify treaties they have signed,[7] although the signature might entail a (moral) duty to consider the decision of ratification or rejection of the treaty in good faith.[8] Once a State decides not to become a party to the treaty by rejecting its ratification, this is sometimes referred to as 'unsigning' a treaty. However, this terminology is not entirely correct from a legal point of view; a signature cannot be 'deleted' or 'withdrawn' but the relevant State would typically still be listed as a signatory to the treaty, albeit with a note indicating its notification of the intention not to become a party to the treaty.[9]

As mentioned above, Article 18 is silent on the means through which a State can make its intention clear not to become a party to the treaty. This might create certain difficulties in practice, compromise the notion of transparency in international law and jeopardise the principle of legitimate expectations as it might not always be obvious when a State has made its intention clear not to become a party to the treaty and extinguished its obligations under Article 18(a) VCLT. The issue was not subject to much discussion during the drafting of the provision, although the French delegation at the first Vienna Diplomatic Conference stated that the most obvious way for a State to make its intention clear not to become a party to the treaty was precisely by defeating its object and purpose.[10] However – as has been pointed out

[5] Ibid.
[6] See further chapter 4.
[7] The US, Burundi, Philippines and Sudan have all signed the Rome Statute and then subsequently made their intention clear not to become a party to the treaty.
[8] See chapter 4.
[9] For instance, the US is still listed as a signatory to the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.
[10] *United Nations Conference on the Law of Treaties, First Session 26 March - 24 May 1969*, 20th meeting of the Committee of the Whole (Extract from the Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole) UN Doc A/CONF.39/C.1/SR.20, Statement by the French Delegation, p 100 para 45.

elsewhere – this preposition was heavily criticised for being unworkable in practice, rendering the very purpose of Article 18 VCLT meaningless.[11]

The issue is further complicated by the fact that there is no uniform and consistent State practice in this regard, practice even varying with respect to the one and the same State. For instance, the practice of the US – having a long history of signed but unratified treaties – is an illustrative example in this regard.[12] When the Reagan administration announced in 1987 that it had no intention of ratifying the First Additional Protocol to the Geneva Conventions – which President Carter had signed in 1977 – President Reagan sent a message to the Senate, in which he stated that the Protocol was 'fundamentally and irreconcilably flawed'. Given that the problems related thereto could not be remedied through reservations, President Reagan would not submit it to the Senate.[13]

A more formal means was employed in relation to the Rome Statute of the ICC. When the US wanted to make its intention clear not to become a party to the Rome Statute, which it had signed in 1999, it sent a formal note to the UN Secretary-General as the treaty depositary.[14] The letter stated that 'the United States does not intend to become a party to the treaty', and that '[a]ccordingly, the United States has no legal obligations arising from its signature'.[15] The same day, an Administration official stated that the Administration's actions were 'consistent with the Vienna Convention on the Law of Treaties', presumably Article 18(a) VCLT.[16] Similarly, in July 2019 the Trump Administration sent a letter to the UN Secretary General stating 'that the United States does not intend to become a party to the [Arms Trade Treaty].

[11] Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 251.
[12] Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) Harvard International Law Journal 309. These include the International Covenant on Economic, Social, and Cultural Rights (signed in 1977); the American Convention on Human Rights (signed in 1977); the Convention on the Elimination of All Forms of Discrimination Against Women (signed in 1980); and the Convention on the Rights of the Child (signed in 1995). They also include important environmental treaties such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed in 1998); the Rio Convention on Biological Diversity (signed in 1993); and the First and Second Additional Protocols to the Geneva Conventions (signed in 1977). For a current list of pending treaties, please see https://www.state.gov/treaties-pending-in-the-senate/ (last accessed 15 July 2022).
[13] Bradley (n 12) 311.
[14] See Letter from John R. Bolton, Under Secretary for Arms Control & Int'l Sec., US Department of State, to Kofi Annan, Secretary General, United Nations (May 6, 2002), available at www.state.gov/r/pa/prs/ps/2002/9968.htm (last accessed 15 July 2022).
[15] Ibid.
[16] Marc Grossman, Under Secretary for Political Affairs, US Department of State, Remarks to the Centre for Strategic and International Studies (May 6, 2002), available at http://www.state.gov/p/us/rm/9949.htm (last accessed 15 July 2022).

Accordingly, the United States has no legal obligations arising from its signature on September 25, 2013'.[17]

A further example relates to the Trans-Pacific Partnership Agreement (TPP) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the US. The US had signed the agreement on 4 February 2016. However, the US subsequently wanted to make its intention clear not to become a party to the TPP, wherefore the US Trade Representative sent a letter on 30 January 2017 to both the depositary and all other signatory States to the treaty, stating that it 'does not intend to become a party' to the Agreement.[18]

Whereas the US notification of its intention not to become a party to the Rome Statute, the Arms Trade Treaty and the TPP was done in an adequately formal manner, this has not precluded inconsistencies in its practice with respect to other treaties. An illuminative example is its practice in relation to the Kyoto Protocol. Whereas the Bush Administration repeatedly had expressed opposition to the treaty, it never sent a formal notice to the Secretary-General to renounce it.[19] It is not clear why the Administration chose not to do so, as it later did in relation to the Rome Statute and the TPP, and several commentators requested an action to this effect.[20]

In response to such requests, the Under Secretary of State for Global Affairs, Paula Dobriansky, noted that 'President Bush and this administration have made clear on numerous occasions that the Kyoto Protocol is fatally flawed and that the United States will not participate in it'.[21] She also stated that '[w]e have gone to considerable lengths, internationally, over the past year to make our position with respect to the Kyoto Protocol clear and unambiguous'.[22] However, for purposes of legitimate expectations and foreseeability, it seems preferable that the US would have sent a notification to the treaty depositary so that other signatory and contracting States would have been made sufficiently aware of the US' position.

[17] 'President Trump "Unsigns" Arms Trade Treaty After Requesting Its Return from the Senate' (2019) 113 AmJInt'L 813, 816.
[18] See www.ustr.gov.
[19] Bradley (n 12) 312. See also Christopher Horner and Iain Murray, 'Why the United States Should Remove Its Signature from the Kyoto Protocol' (2004), available at http://www.globalwarming.org/2004/09/29/why-the-united-states-should-remove-its-signature-from-the-kyoto-protocol/ (last accessed 15 July 2022).
[20] See e.g., Bradley (n 12) 312; Horner and Murray (n 19).
[21] Letter from Paula Dobriansky, Under Secretary for Global Affairs, US Department of State, to Christopher Horner, Counsel, Cooler Heads Coalition (May 14, 2002), available at http://www.cei.org/gencon/003,03044.cfm (last accessed 15 July 2022).
[22] Ibid.

In particular, to avoid ambiguities, other States ought to know from what point in time the US was considered to have made its intention clear not to become a party to the treaty. Was it for instance from the very first time opposing the Kyoto Protocol, or rather after a period of having consistently and repeatedly opposed it? It is also doubtful whether States can be expected to keep a track of other States' statements and announcements in relation to all treaties they have signed. This is in particular because the assessment of from what point in time they can reasonably be considered to have been aware of another State's intention is dependent on the individual circumstances of each and every State. Particular regard should be given to factors which might make them unable to, or even in a more difficult position to, monitor the acts of other States, such as a small foreign ministry or civil unrest or tensions within that State.

Another interesting yet puzzling example is the US practice in relation to the Comprehensive Nuclear Test Ban Treaty (CTBT),[23] which the US was the first State to sign in 1996. When the US Senate refused to ratify the Treaty in 1999,[24] the US subsequently declared that it had no intention of becoming a party to the treaty. It did so by having the Secretary of State, Madeleine Albright, send a letter to several foreign ministers, including States like China and Russia.[25] In the letter, Albright however wrote that 'I want to assure you that the United States will continue to act in accordance with its obligations as a signatory under international law'.[26] What is remarkable, moreover, is that the US stayed a member of the Preparatory Commission, which sought to promote the entry into force, as well as the provisional application of the CTBT.[27]

Whereas the US thus declared that it did not intend to ratify the treaty, it is questionable whether it intended to actually terminate its obligations under Article 18(a), but rather seemed to reaffirm its commitments as a signatory to the CTBT. Even if the intention not to ratify was also intended to extinguish the US' obligations under Article 18(a), it is questionable whether the US' expressed its intention in a sufficiently clear manner. By remaining a member of the Preparatory Commission, did not the US simultaneously demonstrate its commitment to

[23] Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996) (CTBT).
[24] By vote of 51-48.
[25] See Masahiko Asada, 'Article 18 (VCLT) Obligations and the CTBT' in Treasa Dunworth and Anna Hood (eds), *Disarmament Law: Reviving the Field* (Routledge 2020); Dorr (n 20) 228.
[26] See Asada (n 25); 'The Imperial Presidency', Washington Times, 5 November 1999.
[27] See Andrew Michie, 'The Provisional Application of Arms Control Treaties' (2005) 10 Journal of Conflict and Security Law 345, 369-70.

promote the entry into force of the treaty, especially given the fact that the US is one of the listed States in Annex II to the Treaty?[28]

By only sending a letter to some, but not all, contracting or signatory States, and not least by omitting to send a letter to the treaty depositary, how would these other States have been made aware of this intention? Thus, the question is whether the US statements were sufficiently clear for the US to terminate its interim obligation under Article 18(a) VCLT. It seems more advisable that the US, in order to terminate the interim obligation in a sufficiently unambiguous manner, should have notified all the other signatory and contracting States, or, at the very minimum, the treaty depositary, just as it did in relation to the Rome Statute, the Arms Trade Treaty and the TPP Agreement.[29]

Sending a formal note to the treaty depositary as a means of making an intention clear not to become a party to a treaty has been embraced by some other States. The Sudan, having signed the Rome Statute on 8 September 2000, wanted to make its intention clear not to become a party to the treaty and communicated a notification to the UN Secretary-General, as the treaty depositary, to this effect on 26 August 2008. The Sudan in particular wrote that 'Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000'.[30] A similar course of action was taken by the government of Israel on 28 August 2002, informing the Secretary-General that:

> in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, … Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as

[28] Annex II lists 44 States that must ratify the Treaty in order for it to enter into force, and the US is one of those States.

[29] The reasons for the variations in the practice of making the intention clear not to become a party to the Treaty are merely speculative, but Bradley informs us that the issue 'relates in part to the fact that the executive branch has multiple audiences. In signalling its intent not to be bound by a treaty, the executive branch must consider both an international audience consisting of, in particular, the other treaty parties, and a domestic audience consisting of interest groups and their supporters in Congress who favor or oppose the treaty. At times, the executive branch may attempt to suggest to the other treaty parties that it has no intention of ratifying, while leaving the matter somewhat ambiguous in order to avoid the domestic fallout associated with clear disavowal of the treaty. This fallout can emanate from both supporters of the particular treaty and opponents of other treaties who may demand similar disavowals', Bradley (n 12) 312 (footnote omitted).

[30] Text available at https://treaties.un.org/doc/Publication/UNTS/Volume%202533/v2533.pdf (last accessed 15 July 2022).

> expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[31]

Thus, notwithstanding certain varieties, the most common and indeed preferable practice for a State to make its intention clear not to become a party to the treaty seems to be to send a notification to the treaty depositary. It would then, in theory, be the duty of the depositary to communicate this notification to other contracting and signatory States,[32] and the interim obligation under Article 18(a) would cease to apply on the date of deposit of such notification, not at the date it was communicated to other States.[33] Sometimes, as was the US practice in relation to the TPP Agreement, a State might itself notify all other signatory or contracting States of its intention not to become a party to the treaty, although this might in practice be a more conceivable option for treaties involving a limited number of States parties or signatories. Vice versa, a notification to the depositary seems more suitable in circumstances where a treaty has attained a close to universal reach of signatures or ratifications.

Indeed, in response to the questionnaire, one participant observed that 'in our opinion a communication (to the partner(s) or the depositary for instance) should suffice'. Another respondent noted that since the law of treaties does not provide for clear rules as to how a State can make its intention clear not to become a party to the treaty it has signed, a formal procedure does not seem necessary as long as other parties to the treaty are made aware of the intention through statements and/or notification by the depositary of the treaty. There is as such support for the proposition that the most clear and reliable way of making the intention clear not to become a party to the treaty is to notify the depositary, who would communicate this to other States.

However, it is not clear what is covered by the word 'partner(s)', i.e., whether this would include both signatory and contracting States, or whether it only refers to States which have expressed their final consent to be bound by the treaty and for which the treaty is in force, or, in other words, a party to the treaty. Furthermore, it is the view of the present author that the latter State's response is too limited by only referring to other States 'parties' being made aware

[31] See https://treaties.un.org/Pages/showActionDetails.aspx?objid=0800000280025a4e&clang=_en (last accessed 15 July 2022).
[32] See Article 78 VCLT.
[33] See *Case Concerning Right of Passage over Indian Territory* (Preliminary Objections) (Judgment) ICJ Rep I957, p 125, at 146; *Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (Judgment) ICJ Rep 1998, p 275, at 22.

of the intention not to become a party to the treaty, but signatory and contracting States ought to be communicated such an intention too.

First, it seems under Articles 78 and 79 VCLT that the duties of the depositary would include to communicate such relevant information to States parties *and* States entitled to become parties. Secondly, because Article 18 VCLT pertains to pre-contractual obligations in relation to signatory and contracting States to a treaty, it is reasonable to expect that information regarding another signatory's position and obligation under Article 18(a) in relation to the treaty is of relevance not only to State parties but also for signatory and contracting States. Imagine, in addition, if the treaty has not yet entered into force and there are not yet any States parties. It seems paradoxical that the depositary would not communicate a notification of an intention of not becoming party to a treaty to any State in such circumstances, but the logical response would be to communicate it to signatory and contracting States.

Other means of making an intention clear not to become a party to the treaty than a notification to the depositary are of course also available with one important caveat; such intention must be communicated with some degree of formality and through a sufficiently public channel. This is not least because since the State has, by signing the treaty, expressed its acceptance of the treaty in a formal manner, the State should likewise express its intention not to become a party to the treaty in a similar fashion.[34] This notion was supported already in early variants of the interim obligation. In fact, the Harvard Research Group, in the Commentary to Article 9 of the Harvard Draft Convention, noted that '[i]ndeed, good faith might require it to refrain from taking such action until it has *formally notified the other signatory* that it will not proceed to ratification'.[35]

The requirements of formality and publicity are necessary for matters of legal certainty, reliability, and predictability in international law.[36] It seems unlikely that, for instance, informal means such as implied conduct, would satisfy a rigid observance of formality and publicity; if the intention is not publicly given but is allegedly implied through conduct exclusively taking place on an internal level, how can other contracting or signatory States reasonably be aware of this intention? The main issue is, as has been recognised, 'one of fair dealing: the intention not to ratify should be openly stated and not channelled through some "perfidious acts"

[34] Dorr (n 11) 251; *North Sea Continental Shelf Cases (Germany v Denmark/Germany v the Netherlands)*) ICJ Rep 1969 p 3, 219, 233-35, Dissenting Opinion of Judge Lachs.
[35] *Harvard Draft Convention on the Law of Treaties,* Supplemented to 29 AM. J. IntlL 653 (1935) 780 (emphasis added).
[36] Dorr (n 11) 251.

torpedoing the object and purpose of the common enterprise'.[37] Thus, the interim obligation under Article 18(a) ceases to apply when the State has notified to the other signatory and contracting States its intention not to become a party to the treaty.

Only under certain very narrowly defined circumstances would implied conduct be sufficient to express such intention and it has to be stated in an open and unambiguous manner.[38] One example might include, although it remains problematic as noted above, the practice of the US in relation to the Kyoto Protocol. However, this is only because of the open and public nature of certain statements and because the Bush administration *repeatedly* expressed opposition to the treaty with the view of, internationally, making its position with respect to the Kyoto Protocol clear and unambiguous. Yet, the difficulty remains to determine from what date the State has openly and finally made its intention clear not to become a party, wherefore formal notifications directly to other signatory or contracting States or to the treaty depositary remain preferable.

5.3 Article 18(b) VCLT

Signature has historically played a very important role in the treaty making procedure. Today, however, most multilateral treaties specify that they will enter into force upon an explicitly required number of ratifications or accessions. Ratification and accession (or other means of expressing consent to be bound) are thus crucial events in bringing the treaty into force.[39] As outlined above, the interim obligation under Article 18 lit b is triggered by the deposit of an instrument expressing the State's consent to be bound by the treaty and applies as long as the entry into force of the relevant treaty is not unduly delayed.[40] However, Article 18, or the VCLT

[37] Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2016) 44.
[38] Ibid (emphasis added).
[39] Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263, 267.
[40] The purpose of the process to express consent to be bound is to establish a formal procedure whereby a treaty becomes finally binding and operative upon a State. Classical means to express consent to be bound are enumerated in Article 11 VCLT and include signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or 'any other means if so agreed'. In the field of international environmental law, with the increasing sense of urgency in addressing environmental problems, the ensuing emergence of Multilateral Environmental Agreements (MEAs) and the need to ensure the efficient and flexible management of such, certain 'new' methods of expressing consent to be bound have evolved. They include so-called 'enabling clauses' which allow subsequent decisions of Conferences of the Parties (COPs) to safeguard the effective functioning of the treaty, non-compliance procedures initiated by COPs, and 'opting-out' (or tacit acceptance) procedures. By way of summary, the 'opting-out' or tacit acceptance procedure can be described in the following way: an act is adopted by a majority vote under the auspices of the relevant international organisation, whereby a member State is automatically considered to be bound by the act unless it explicitly objects to it and, accordingly, avoids it (e.g., 'opts-out' from the adopted act). The functions and powers of COPs include the following: (a) the powers of decision of the amendment and modification of convention and the adoption of new protocols; (b) the decision making and resolution powers; (c) supervisory powers; (d) interpretative powers; (e) powers in respect

itself, does not define what 'unduly delayed' is and this expression and indeterminate criterion has caused certain problems in practice.

There were some attempts in the drafting history of Article 18 to specify certain temporal indicators to guide the examination of whether the entry into force of a treaty had been unduly delayed or not. For instance, Special Rapporteur Waldock suggested that a period of ten years was a reasonable amount of time.[41] Argentina, Ecuador and Uruguay proposed a time limit of 12 months.[42] However, none of these suggestions were approved and Article 18(b) ultimately remains silent on the matter. Scholarship nowadays agrees that whether the entry into force of a treaty is unduly delayed or not is dependent upon the particular circumstances of the treaty at hand and must be determined given the nature of the subject matter of the treaty, its complexity, the number of signatory, contracting or States parties, the length of the treaty negotiations, and the amount of political controversy surrounding the operation of the treaty.[43] Given the fact that multilateral treaty making procedures are complex and time consuming endeavours, periods up to five years do not appear to reach the threshold of unduly delay.[44]

One of the most commonly cited examples in the context of delayed entry into force is the CTBT. The CTBT was adopted in 1996 but is yet to enter into force.[45] As of June 2022, 184

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of establishing of non-compliance mechanisms, see Louise Kathleen Camenzuli, 'The Development of International Environment Law at the Multilateral Environmental Agreements' Conference of the Parties and its Validity' (2007) Available at https://www.iucn.org/downloads/cel10_camenzuli.pdf, 8 (last accessed 15 July 2022). See also Annecoos Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements' (2009) 31 Mich. J. Intl. L. 23. Practice and decisions of COPs, non-compliance procedures and 'opting-out' procedures may very well, though depending on the particular circumstances at hand, fall under the chapeau of 'or other means so agreed' under Article 11 VCLT, but the critical question if whether acts of COPs can ever be classified as acts of treaty-making (rather than law-making), and under what circumstances (if so) they constitute a new treaty to which Article 18 VCLT could apply. The question goes beyond the scope of the present thesis and decisions and acts of COPs are therefore excluded from the discussion of what other means of expressing consent Article 18 VCLT applies to. For a further analysis of COPs/MOPs, see Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) LJIL 1; Robin Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 AJIL 623.

[41] Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Extract from the YILC 1965 ,vol. II, UN Doc A/CN.4/177 and Add.1 & 2 at p 45.

[42] United Nations Conference on the Law of Treaties, First Session 26 March - 24 May 1969, 20th meeting of the Committee of the Whole (Extract from the Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole) UN Doc A/CONF.39/C.1/SR.20 at p 131, para 164.

[43] Dorr (n 11) 254.

[44] Gragl and Fitzmaurice (n 4) 706.

[45] The treaty will enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in Annex 2 to the Treaty (those are: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Democratic People's Republic of Korea, Egypt, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Mexico, Netherlands, Norway, Pakistan, Peru, Poland, Republic of Korea, Romania, Russian Federation, Slovakia, South Africa, Spain,

States have signed the Treaty. Amongst those States, 168 States have deposited their instruments of ratification.[46] Writing in 2023, when some 27 years have passed since the adoption of the treaty, the pressing question is whether the entry into force of the CTBT should be considered to be unduly delayed, or whether contracting States, by virtue of Article 18(b) VCLT and given the particular circumstances of the CTBT, still are bound not to defeat the object and purpose of the treaty?

The answer to this question is typically answered in the affirmative.[47] Reasons for this include the fact that the treaty has a built-in mechanism in its Article XIV, paragraph 3, which addresses such delay. The provision requires the UN Secretary-General to convene a Conference of the States that have deposited their instruments of ratification to assess the situation and to decide on further measures to be taken in this regard. Such a conference has been requested on a biennial basis since 1999.[48] Moreover, the General Assembly continues to adopt resolutions which seek to promote the entry into force of the treaty. Such resolutions, supported by the positive votes of almost all UN member States, are adopted annually.[49] The 2017 resolution read as follows:

> Pending the entry into force of the CTBT, we [the ratifying States] reaffirm our commitments, as expressed in the conclusions of the 2010 NPT Review Conference, and call on all States to refrain from nuclear weapons test explosions or any other nuclear explosions, the development and use of new nuclear weapon technologies and any action that would undermine the object and purpose and the implementation of the provisions of the CTBT.[50]

Taken together, these factors surrounding the particular circumstances of the CTBT suggest that the entry into force of the treaty is not unduly delayed, and that the contracting States' obligation under Article 18(b) VCLT not to defeat the object and purpose of the CTBT remains effective. In other words, it cannot be said that it has fallen into desuetude and that the interim obligation has ceased to exist.

Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zaire).

[46] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-4&chapter=26 (last accessed 15 July 2022).

[47] Gragl and Fitzmaurice (n 4) 706; Lisa Tabassi and Olufemi Elias, 'Disarmament' in Michael Bowman and Dino Kritsiotis, *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 593.

[48] See e.g., Masada (n 25).

[49] See e.g., UN General Assembly Resolution of 4 December 2017, UN Doc A/RES/72/70 (180 in favour; one vote against by North Korea; abstentions by India, Mauritius, Syria, and the United States).

[50] CTBTO Doc CTBT-Art.XIV/2017/6 (20 September 2017), Annex, para 5.

Another interesting examples of treaties whose entry into force might (or might not) be unduly include a variety of BITs. For instance, the Argentina-New Zealand BIT was signed (in this instance, as a means of expressing consent to be bound) on 27 August 1999 but is over 20 years later yet to enter into force.[51] In contrast to the CTBT, there is no mechanism in place to promote the entry into force of BITs like the Argentina-New Zealand one. Given that over 20 years have passed since the expression of consent to be bound and there is little to indicate that either Party has taken steps to prepare for the entry into force of the treaty, it seems that the duty under Article 18(b) VCLT to create favourable conditions for greater economic cooperation for the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors have ceased to exist given that the entry into force of the BIT between the States is unduly delayed. The same reasoning also applies for instance to the Chile-New Zealand BIT, which was consented to on 22 July 1999 but is yet to enter into force.[52]

A question which has thus far not been discussed in scholarship is how we justify the incorporation of the 'unduly delayed' element under Article 18(b) VCLT, which, in many circumstances, furnishes a much more short-lived interim obligation than the one fixed under Article 18(a) VCLT. For instance, whereas the US signed the Convention on the Prevention and Punishment of the Crime of Genocide in 1948,[53] it did not ratify the Convention until 1989, some forty-one years later. What is curious is that the interim obligation, which was triggered by the US' signature, applied throughout 41 years, and lasted some 90 days after the deposit of the instrument of ratification.[54]

There is no rule of desuetude of a treaty signature, i.e. there is no rule whereby the implications of signature would lapse and become unenforceable by a long habit of non-enforcement or lapse of time. Thus, if the interim obligation can apply for an indeterminate period of time under Article 18 lit a (unless the State makes its intention clear not to become a party to the

[51] In accordance with Article 14(1) of the BIT, the Contracting Parties shall notify each other in writing when the constitutional requirements for the entry into force of this Agreement have been fulfilled. This Agreement shall enter into force on the thirtieth (30th) day from the date of the later notification. Thus, since the domestic arrangements are separate from the issue of consent to be bound on the international level, it is the very signature which constitute expression of consent to be bound.

[52] For an overview of pending BITs, see https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties#a0 (last accessed 19 January 2023).

[53] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[54] Article VIII of the Genocide Convention lays down that any ratification effected subsequent to the entry into force of the treaty shall become effective on the ninetieth day following the deposit of the instrument of ratification.

treaty), why should the interim obligation in theory not also apply for an indeterminate period of time in relation to Article 18 lit b, where a State has even more evidently manifested its commitment to the treaty and deposited an instrument of consent to be bound by the treaty?[55]

The CTBT can also serve as a typical example of this logic. Presuming that the entry into force of the CTBT is considered to be unduly delayed, States which fall under the scope of Article 18(b) would no longer be obliged not to defeat the object and purpose of the treaty. In contrast, States which have merely signed the treaty – a less weighty action under the law of treaties – and thus fall under the scope of Article 18(a) VCLT, would still be obliged not to defeat the object and purpose of the CTBT. This line of reasoning poses a quite inconceivable situation in the law of treaties and begs the question of why an act which exhibits a less serious commitment to a treaty should entail a more long-standing obligation oriented towards the object and purpose of a treaty than an act which demonstrates a more serious and final commitment to the treaty.

5.4 'Unratification'

The withdrawal of an instrument of expression of consent to be bound prior to the entry into force of a treaty, 'unratification', is not governed by the VCLT. As established above, Article 18(a) VCLT gives a State the discretionary right to terminate the legal effects of a simple signature by making its intention clear not to become a party to the treaty. An unresolved issue is whether Article 18(b) provides for a mirroring right of States to revoke an instrument of ratification prior to the entry into force of the treaty. This option is not explicitly envisaged by Article 18 lit b, but the prevalent scholarly opinion supports the view that withdrawal of the consent to be bound is possible under, and is as such not a violation of, Article 18 VCLT.[56]

It is argued that this reasoning is clearly consistent with Article 24 VCLT: an instrument expressing consent to be bound is not operative until the very day a treaty enters into force and only from that date is the State legally bound thereto. Until then, the State has the freedom of

[55] On the question of the difference in extent of obligations under Article 18(a) and 18(b), see chapter 4.

[56] See Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 110, who writes that withdrawal of an instrument of ratification would have the same legal effect as withdrawal of signature. See also Gragl and Fitzmaurice (n 4) 706-07; Kolb (n 43) 53; and Mark E. Villiger, *1969 Commentary on the Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 251, writing that one can assume 'that, as in para. (a), a State may make its intention clear to withdraw from its obligations to refrain from defeating acts under Article 18 either by express statement or through implied conduct'.

action to revoke the instrument of ratification.[57] One relatively recent example of a revocation of ratification is the withdrawal by Malaysia of its consent to be bound by the Rome Statute. Malaysia submitted its instrument of accession on 4 March 2019. In accordance with Article 126(2) of the Statute, Malaysia would formally have become a party to the International Criminal Court (ICC) on 1 June 2019. However, on 5 April 2019, Prime Minister Tun Dr Mahathir Mohamad announced the withdrawal of the instrument of accession and Malaysia never became a party to the Statute.[58]

The revocation of an instrument of ratification pending the entry into force of a treaty has historically caused few objections from other contracting States.[59] Furthermore, the general practice of the UN is to still count the original ratification as 'effective'. If the relevant instrument of ratification was the last required ratification to bring the treaty into force and the ratification is subsequently withdrawn, the UN will still consider the required number of ratifications to be satisfied.[60] Others, however, do not take the issue as lightly. Rosenne has stated that 'once given, a State's consent to be bound cannot be withdrawn unless a reasonable period elapses without the treaty entering into force'.[61] This implies that only when the entry into force of the treaty is considered to be unduly delayed can a State 'revoke' its instrument of deposit of ratification. Furthermore, it was stated by one respondent to the questionnaire that 'the withdrawal of an instrument – *insofar as it should be acceptable* – expressing the State's consent to be bound prior to the entry into force of the treaty means, unless otherwise stated, that the State expresses its intention not to become a party to the treaty anymore'.[62]

Another respondent argued that the law of treaties does not provide for clear rules with regard to the withdrawal of an instrument of ratification prior to the entry into force of a treaty. The

[57] Dörr (n 11) 244. This view was also expressed during the Vienna Diplomatic Conference, when the Ukrainian delegate referred to 'the sovereign right of a State to withdraw from the treaty at any time before it finally became binding', see Vienna Diplomatic Conference, Official Records, 19th Meeting (n) at p 100.
[58] See e.g., https://www.coalitionfortheicc.org/news/20190412/malaysia-backtracks-accession-rome-statute (last accessed 15 July 2022).
[59] There were no objections when Greece withdrew its instrument of acceptance pending the entry into force of the Convention on the Intergovernmental Maritime Organization in 1952, or when Spain withdrew its instrument of accession, deposited on 29 July 1958, to the Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats on 2 October 1958, before the entry into force of the convention. Likewise, in 1999 Italy revoked its instrument of ratification of the Fish Stocks Convention, and Luxemburg followed suit in 2002.
[60] See Summary of Practice of the Secretary General as the Depositary of Multilateral Treaties, UN Doc Srr/LEG/7/Rev.1, para 157. See generally also Kolb (n 43) 53; Aust (n 61) 171; Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moïse Mbengue, 'Article 18' in Oliver Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol I (OUP 2011) 636.
[61] Rosenne, EPIL 4 (2000) 935.
[62] Emphasis added.

VCLT does likewise not contain any provisions on this matter. Hence, such withdrawal is not envisaged under Article 18(b) VCLT. Furthermore, although 'State practice does provide for some examples, the withdrawal of an instrument prior to entry into force cannot be considered customary law'. Given this situation, a withdrawal of an instrument of ratification will lead to the treaty not entering into force for the State that withdraws its instrument if: a) the depositary notifies the other 'parties' thereof; and b) these 'parties' do not object to the withdrawal.

Accordingly, the withdrawal of an instrument of consent to be bound pending the entry into force of the treaty is a complicated issue to which there is no straightforward answer. Whether such withdrawal may, under any circumstances, constitute a violation of Article 18 depends on the language and provisions of the treaty itself. A logical distinction might be drawn between, on the one hand, treaties that contain a clause providing for unilateral withdrawal and, on the other hand, treaties that do not provide for unilateral withdrawal.

Support for this view may be found in the drafting history of Article 18 VCLT. Article 33(1) of Special Rapporteur Fitzmaurice's first report stated that '[r]atification which, once given, cannot, as such, be withdrawn, has the effect of making the ratifying State a presumptive party to the treaty, if the latter is not yet in force, and an actual party if it is, or as soon as it comes into force'.[63] In the commentary to this provision, Rapporteur Fitzmaurice emphasised that ratification places the State in a position that it has finally accepted the treaty – a position from which it cannot withdraw.[64]

This provision was not retained but in the responses by governments discussing Rapporteur Waldock's fourth report, a delegate on part of Finland raised the issue of including an express provision allowing for the revocation of an instrument of ratification or accession, especially as it would be anomalous if a treaty provided for the right of denunciation but a ratifying State was unable to withdraw its ratification in the time period before the entry into force of the treaty.[65] Waldock agreed and was of the opinion that effect to such possibility should be given in the draft provision. Nevertheless, any such provision was not included in subsequent draft formulations and Article 18 is, as familiar, silent on the matter.

However, if the starting point would be that a State may only legitimately revoke an instrument expressing consent to be bound under Article 18(b) VCLT if the treaty itself envisages a right

[63] Sir Gerald Fitzmaurice, Special Rapporteur, Report on the Law of Treaties, Extract from the YILC, Vol II (1956), UN Doc A/CN.4/101, Article 33.
[64] Ibid.
[65] Special Rapporteur Waldock, Fourth Report on the Law of Treaties (n 41) at p 43.

of unilateral withdrawal, this begs the question of if a treaty is silent on termination and withdrawal, can a State still revoke its consent by an analogous application of Article 56 VCLT? Article 56 concerns denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation, or withdrawal, and reads as follows:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
> 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Thus, if the treaty itself is silent on the issue, a State can only unilaterally withdraw from the treaty if it is established that the parties intended to admit such possibility, or if it can be implied by the nature of the treaty. A twelve-months' notice period shall always apply. Furthermore, Article 54 VCLT lays down that the termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States. Accordingly, if a State cannot revoke its instrument of consent to be bound in accordance with the treaty itself, it appears that a State can only revoke its instrument of ratification after having obtained the consent of the other parties and there is no objection from other State parties and the other contracting States are consulted.

Two examples are of particular interest in this regard: the International Covenant on Civil and Political Rights (ICCPR),[66] and the CTBT. The ICCPR does not contain any provision regarding its termination and does not provide for unilateral denunciation or withdrawal. Thus, withdrawal or denunciation can only be made if it is established that the parties intended to admit the possibility of denunciation or withdrawal, or if the right of denunciation or withdrawal may be implied by the nature of the treaty.[67] It has been argued that since the drafters omitted a provision to this extent, they 'deliberately intended to exclude the possibility

[66] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[67] See Article 56 VCLT.

of denunciation'.[68] Moreover, it has been recognised that it 'is not certain it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation'.[69]

Thus, how should States react if a State decides to ratify or accede to a treaty like the ICCPR, whose drafters did not envisage the possibility of withdrawing from the treaty and whose nature does not imply a right to do so, subsequently changes its mind and revokes the instrument of ratification or accession? Ratification has the effect of making the ratifying State a presumptive (contracting) Party to the relevant treaty. It would be disruptive for legal certainty, the stable treaty relations, the trust and goodwill amongst the treaty beneficiaries and the treaty machinery as a whole should it be possible for States to go back on its commitment to become a State party to the treaty. Accordingly, it is questionable whether a revocation of consent to be bound would be legitimately acceptable under Article 18(b) under circumstances like these.

Another – yet hypothetical – example relates to the CTBT. Annex II to the Convention lists a number of 44 States that need to ratify the Convention in order for it to enter into force. Although unilateral withdrawal, under certain circumstances, is allowed under the text of the Convention,[70] the question remains how the position would be should be required States (however unlikely) finally have submitted their instruments of ratification but pending the entry into force of the treaty – 180 days after the date of deposit of the instruments of ratification by all States listed in Annex II – one of the listed States withdraws its instrument of ratification.[71] The core question is whether such conduct reaches the threshold of violating Article 18 VCLT. Although Article 18 does protect stability and trust in treaty relations and a withdrawal of consent would undermine the legitimate expectations of other contracting parties that the CTBT would finally enter into force, it is important to remember that the provisions of the CTBT provides for some, although very narrowly defined, possibilities of unilateral withdrawal.

Therefore, in order for a State to be viewed as having breached Article 18(b), a more manifest and severe transgression of the treaty objective, such as an actual testing carried out by a signatory or contracting State, may be required.[72] On the other hand, if the last State of the

[68] Human Rights Committee, General Comment No 26 on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights (1997), UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1.
[69] Ibid.
[70] Article IX reads: 'Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests'.
[71] See Article XIV of the CTBT.
[72] This example was explored in depth-in chapter 4.

required 44 ones finally deposits its instrument, the revocation of an instrument expressing consent to be bound would be incredibly devastating to the treaty regime and the aims hoped to be achieved through the operation of the treaty. Since it is difficult to see why a State would withdraw such consent only after the required number of ratifications have been achieved but not prior to this, it also seems like a revocation would be in contradiction with the principle of good faith, and, not least as mentioned above, jeopardise the legitimate expectations of other signatory and contracting States that the CTBT will after all enter into force.

5.5 Concluding Remarks

The temporal issues relating to Article 18 VCLT are many and complex. First, the formulation of Article 18(a), as mentioned above, reflects the right of States to make their intention clear not to become a party to a treaty. However, the fact that the provision is silent on how a State should indicate its intention not to become a party to the treaty, coupled with the fragmentary and inconsistent State practice in this regard, has caused certain problems and uncertainties in practice. This chapter has demonstrated that although States seems to be free under Article 18(a) to indicate its intention not to become a party to the treaty through its implicit conduct, a State should, in order to conform with proper treaty practice under Article 18(a) and for purposes of foreseeability, legitimate expectations and stability in international law, preferably send a notification of its intention to the treaty depositary, or – if the treaty involves a limited number of contracting parties – to *all* signatory and contracting States.

This approach is particularly favourable in order to avoid uncertainties as to from *what point in time* a State has made its intention clear not to become a party to the treaty and freed itself from the interim obligation under Article 18 lit a: States may not always possess the resources to monitor other States' statements and announcements in relation to all treaties they have signed. It is therefore close to impossible to determine *when* a State is reasonably to be considered as having been made aware of another State's intention – manifested through its implied conduct – not to become a party to the treaty. Other means are not precluded by the wording of Article 18(a) itself, but in deploying less formal means, States ought to be particularly careful that all other signatory and contracting States are openly communicated such an intention with some degree of formality and through a sufficiently public channel, mindful that not all States might closely follow that State's internal statements, actions and policies.

Secondly, this chapter has shed light on the difficulties in determining when the entry into force of a treaty is 'unduly delayed' under Article 18(b) VCLT. Given the great varieties of purposes that treaties pursue on the international level and the fact that they have a range of underlying different philosophies and objectives, a single uniform approach seems undesirable in this regard. Accordingly, the assessment of whether the entry into force of a treaty is unduly delayed or not is dependent upon the particular circumstances of the treaty at hand and must be determined given the nature of the subject matter of the treaty, its complexity, the number of signatories, contracting or States parties, the length of the treaty negotiations, and the amount of political controversy surrounding the operation of the treaty.

Thirdly, this chapter has closed certain gaps in the law of treaties by adding nuances to the question of the legitimacy of the practice to revoke an instrument of consent to be bound prior to the entry into force of a treaty. Mindful that this is not governed by Article 18 itself and is as such not prohibited by the VCLT, some fragments of the *travaux préparatoires* clearly support the preposition that an instrument of consent to be bound – once deposited – cannot as such be withdrawn.[73] It is regrettable that the issue was not discussed in greater detail by the ILC, but this chapter questions the preposition that such practice should be acceptable in relation to treaties which contain no provision on the right to unilateral withdrawal, and – by their very nature – are not subject not unilateral treaty withdrawal. In such circumstances, by analogy to Articles 54 and 56 VCLT, a State can only revoke its instrument of consent if none of the other contracting States object (i.e., albeit implicitly, consent),[74] the State wishing to revoke its consent can prove that the parties intended to admit such possibility, or if it can be proven that such a right can be implied by the nature of the treaty.

This approach strikes a balanced compromise between stability and sovereignty in international treaty law: the expression of consent to be bound is after all a legal act under international law which should be seriously given and changes in government or other changes in circumstances, including political and financial, do not affect a State's duty to comply with its international obligations.[75] Accordingly, when a treaty does not allow for unilateral withdrawal, it would be disruptive for legal certainty, the stability of treaty relations, the trust and goodwill amongst the

[73] See above.
[74] See further Malgosia Fitzmaurice and Agnes Rydberg, 'Article 54' in *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, OUP, to be published, available on file with the author).
[75] See also Article 27 VCLT. This is with the exception of Articles 61 and 62 VCLT.

treaty beneficiaries and the treaty machinery as a whole should it be possible for States to go back on its status as a presumptive party and its commitment to sooner rather than later becoming an actual party to the treaty. That said, as noted in the introduction, the temporal aspects relating to Article 18 are complex and ambiguous, and the lack of coherency in the practice of States is evident. These temporal issues are still in the stage of progressive development, and it remains to be seen how State practice will unfold in response to future events.

6. LEGAL NATURE OF ARTICLE 18 VCLT AND THE ROLE OF GOOD FAITH

6.1 Introduction

The conceptual justification of Article 18 VCLT was early considered to rest on good faith as a fundamental principle of international law.[1] The notion of good faith in the fulfilment of treaty obligations has indeed existed from the earliest formulations of international law,[2] and it is uncontested that good faith is an essential concept which forms the basis for the law of treaties. The principle is embodied in Article 26 VCLT – codifying the principle *pacta sunt servanda* – and entails that every treaty in force with respect to a State should be performed by that State in good faith. That said, the principle of good faith permeates the whole of the law of treaties – from formation and interpretation to breach, termination, and withdrawal – and can in many instances be used to add precision to conventional rights and obligations.[3]

However, whilst being of great conceptual importance, the content of good faith is elusive and does not lend itself to precise legal definition. Notwithstanding the elevated emphasis on good faith in the *travaux préparatoires* of Article 18 VCLT, it is not clear what precise role the principle plays *vis-a-vis* the interim obligation. This chapter accordingly assesses what function the principle of good faith has in relation to Article 18 VCLT, what role and significance international courts and tribunals have attributed this principle in interpreting and applying the interim obligation, and to what extent good faith has informed the content of Article 18 VCLT. It also examines the potential function of two ancillary good faith principles; the doctrine of abuse of rights and the principle of estoppel.

Elucidating the commission of good faith in relation to the interim obligation is necessary in order to define and concretise the scope and content of Article 18 VCLT and to appreciate the normative force of the provision. As such, this chapter ventures to consider the contentious issue of the legal character of Article 18 VCLT. To this end, it also assesses the issue of consequences of non-compliance with and breach of the provision. This chapter is therefore of both conceptual and practical importance as it clarifies theoretical questions which to this day

[1] See the discussion in chapter 2.
[2] See Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, Book III, Ch XXI (1646) at 832-44 (Francis Kelsey translating, 1925).
[3] See also Robert Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' (2006) 53 NILR 1, 19; Joseph Crampin 'Treaty Withdrawal and Recalcitrant States' (2020) 9(2) Cambridge International Law Journal 225; Tariq Hassan, 'Good Faith in Treaty Formation' (1981) 21 Va J Int'L 443.

have remained unanswered but could prove useful in bilateral and multilateral negotiations as well as in the management of peaceful dispute settlement procedures involving alleged violations of Article 18 VCLT.

6.2 Good Faith in International Law

It is a long-established practice of international law that States are free to choose what treaty obligations to commit themselves to.[4] Only once they have voluntarily committed themselves to certain conventional rules are they legally bound to honour those commitments in good faith.[5] The VCLT designates a specific provision to this effect. Article 26, entitled '*pacta sunt servanda*', provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. The third preamble recital of the VCLT notes that 'the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized'. *Pacta sunt servanda* has been described as 'the most important principle of international law',[6] and a 'fundamental principle of the law of treaties'.[7]

Good faith imposes an obligation on States parties to act 'honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others' when performing conventional rules.[8] Good faith also excludes 'arbitrariness, capriciousness, contradiction, unreasonableness and absurdity' in the performance of treaties.[9] It places an obligation on every State party to apply the treaty in a reasonable way,[10] and to give the treaty

[4] The Permanent Court of International Justice held in the *Lotus* case that 'the rules of law binding upon States … emanate from their own free will', 1927 PCIJ Ser A, No 10 at 8.
[5] Sir Gerald Fitzmaurice, 'The General Principles of Law Considered From the Standpoint of the Rule of Law: General Course' (1957-II) 92 Recueil des Cours de l'Académie de Droit International 3, 40.
[6] Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia University Press 1990) 62; Vattel, *Le Droit De Gens* (1883) (Edward Ingraham translating, AMS Press 1982), ch. 12, para 163.
[7] Commentary to Article 23, Draft Convention on the Law of Treaties, p 211, para 1. See also Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' (1964), YILC vol 2, A/CN.4/167 and Add.1–3, 8, para 2; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (reprinted CUP 1987); Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017).
[8] Cheng (n 7) 130. See also Georg Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 Recueil des Cours de l'Académie de Droit International 191.
[9] GDS Taylor, 'The Content of the Rule Against Abuse of Rights in International Law' (1971–1972) 46 BYIL 323, 331. See also Ulf Linderfalk, 'Good Faith and the Exercise of Treaty-Based Discretionary Powers' (24 May 2016). Available at SSRN: https://ssrn.com/abstract=2783644 or http://dx.doi.org/10.2139/ssrn.2783644.
[10] Salmon, 'Article 26: *Pacta sunt servanda*' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 679.

equitable effects.[11] The principle furthermore protects legitimate expectations stemming from deliberate conduct.[12]

Good faith is widely considered to constitute a general principle of international law of fundamental importance.[13] For instance, the ICJ emphasised in the *Nuclear Tests Case* and the *Border and Transborder Armed Actions case* that '[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'.[14] However, notwithstanding the pivotal role played by good faith within the international legal discourse, the ICJ has simultaneously confirmed that good faith 'is not itself a source of obligation where none would otherwise exist'.[15] This inevitably begs the question of whether good faith can take the form of both a principle and a rule of international law, or, in other words, if the principle of good faith is in and of itself enforceable as a primary rule of international law. The answer entails significant practical ramifications for States in their international affairs. If good faith is not a means or rule of decision making, States cannot directly rely on the principle itself to claim a breach of international law but would have to confide in a conventional or customary primary rule of law.[16]

The distinction between a rule and a principle of international law is not subject to straightforward definition.[17] In his Hague Academy Lecture in 1957, Sir Gerald Fitzmaurice stated that:

> [b]y a principle, or general principle, as opposed to a rule ... is meant chiefly something which is not itself a rule, but which underlies a rule, and explains or

[11] See Fourth report on the Law of Treaties by Mr. G. Fitzmaurice, Special Rapporteur, Extract from the YILC, 1959 ,vol. II, UN Doc A/CN.4/120, 42.

[12] Kolb has argued that the main normative content of good faith 'is the protection of legitimate expectations. In this sense, the principle requires some kind of conduct, or at least attaches consequences to some type of conduct', see Kolb, *Good Faith in International Law* (n 7) 15-20.

[13] Steven Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 41; Martins Paparinskis, 'Good Faith and Fair and Equitable Treatment in International Investment Law' in A Mitchell, M Sornarajah, and T Voon (eds), *Good Faith and International Economic Law* (OUP 2015); Robert Kolb, *La bonne foi en droit international public* (Presses Universitaires de France 2000); Hugh Thirlway, *The Law and Procedure of the International Court of Justice* (OUP 2013) 9–66, 1111–42; Ress, 'The Interpretation of the Charter' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary,* vol I (2nd edn, OUP 2002) 13, 19; Robert Kolb, 'Article 2(2)' in Simma et al 166, 169; M. Kotzur, 'Good Faith (Bona Fides)' (2009) 4 EPIL 508, 511; J.F. O'Connor, *Good Faith in International Law* (Dartmouth 1991) 120-124; Crampin (n 3) 233; Schwarzenberger (n 8) 290.

[14] *Nuclear Tests Case* (*Australia v France*) ICJ Rep 1974 p 253 para 46; *Border and Transborder Armed Actions case* (*Nicaragua v Honduras*) (Jurisdiction and Admissibility) ICJ Rep 1988 p 69 para 94.

[15] *Border and Transborder Armed Actions case* (n 14) para 94.

[16] See also Andrew D Mitchell, *Legal Principles in WTO Disputes* (CUP 2007).

[17] Some favour a complete rejection of principles as a source of law as they deviate from the consensual international legal order, not least positivistic scholars, see AP Serene, *Diritto internazionale*, vol I (Milan 1956) 156. Naturalist scholars have been more sympathetic to general principles as a source of law, see e.g., A Vredross, *Die Quellen des universellen Volkerreschts* (Freiburg 1973) 120-25.

> provides a reason for it. A rule answers the question 'what': a principle in effect answers the question 'why'.[18]

Following this categorical statement, it seems – when looking at the operations of the good faith principle – that the principle itself does not answer the question 'what'. Rather, good faith is a fundamental principle which explains the underlying rationale for certain other rules and is accordingly primarily concerned with the question 'why'. It is from the principle of good faith that other primary rules of international law directly related to honesty, fairness and reasonableness derive, such as the *pacta sunt servanda* rule, the obligation to settle disputes in good faith, to negotiate in good faith, not to frustrate the object and purpose of a treaty pending its entry into force, and to exercise rights in good faith.[19] Accordingly, the principle of good faith may not be a means of decision making in and of itself but would rather underlie various primary rules by providing reasons for their existence. As such, instead of answering what the obligations placed on a State are, the principle of good faith can guide a State's behaviour as to how conventional or customary rights and obligations are to be exercised.[20]

Some, however, afford a more significant role to the principle of good faith. Kolb has argued that good faith can have a normative function in the sense that the principle can complement customary and conventional rules by filling potential gaps. Thus, if any rule in treaty or custom is lacking, general principles of law, including good faith, 'can serve as the last possible pillar on which to erect a legal reasoning so as to discover some auxiliary rule'.[21] For instance, when:

> the conduct of one state infringes on a legitimate interest of another state, or creates some damage to that other state, but no norm of international law expressly prohibits this course, there is the possibility of looking at the matter through the lens of some principle, e.g. good faith, abuse of rights, proportionality, or the principle that a state may not allow the use of its territory in a way that breaches the rights of other states.[22]

Good faith 'therefore tends to create specific norms which will transport and operationalise its main legal idea in the various subject areas of law'.[23] To this end, good faith is 'normative under the limb of the possibility of its direct application as an obligation-creating norm'.[24]

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[18] Gerald Fitzmaurice, 'The General Principles of International Law considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours de l'Académie de Droit International 7.
[19] O'Connor (n 13) 118–19. Accordingly, good faith 'may serve to develop the law, to fill gaps within the law, to elaborate new rules or to sustain a deductive conclusion', see Kolb, *Good Faith in International Law* (n 7) 5.
[20] Reinhold (n 13) 58.
[21] Kolb, *Good Faith in International Law* (n 7) 5-6.
[22] Ibid 8.
[23] Ibid 23.
[24] Ibid 31.

Similarly, international investment tribunals might have gone further than the ICJ – having declined to treat good faith as a means of decision making[25] – to apply good faith as a primary rule of international law.[26] The core of the argument is that when international investment tribunals apply fair and equitable treatment standards, they are in essence applying concretisations of good faith.[27] Investment treaties frequently make provisions for the obligation to provide fair and equitable treatment to foreign investment,[28] and the rule of fair and equitable treatment clearly hinges on aspirations of good faith.[29] An overview of case-law of international investment tribunals elucidates that those tribunals have articulated the content of the rule of fair and equitable treatment by directly drawing upon good faith and its chief component of respect for legitimate expectations.[30]

However, at the same time, good faith has consistently been described as an *element* of the primary obligation of fair and equitable treatment, whereby investment tribunals in no instances have applied the principle of good faith as a means of decision-making in and of itself. Instead, the judgments are decided on the basis of the rule of fair and equitable treatment as a primary rule – a means of decision making – of international law.[31] Good faith has for instance been particularised as an element of fair and equitable treatment by giving effect to requirements of non-arbitrariness,[32] non-discrimination,[33] due process,[34] transparency,[35] and protection of expectations.[36]

[25] Good faith 'is not itself a source of obligation where none would otherwise exist', see *Border and Transborder Armed Actions case* (n 14) para 94.
[26] Kolb, *Good Faith in International Law* (n 7) 244-46.
[27] Ibid.
[28] The rule of fair and equitable treatment is the obligation that investment treaty tribunals are most likely to find to have been breached, see Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2014) xliii.
[29] See below.
[30] *Tecnicas Medioambientales TECMED SA v México* (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) paras 154–55; Robert Kolb, *La bonne foi en droit international public* (Presses Universitaires de France 2000) 143–53.
[31] *TECO Guatemala Holdings LLC v Guatemala* (Award) (ICSID Arbitral Tribunal Case No ARB/10/17, 19 December 2013) para 456, stating that 'a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard [of fair and equitable treatment] was breached'.
[32] *Elettronica Sicula SpA (ELSI)* (*US v Italy*) (Judgment) ICJ Rep 1989 p 15, paras 123–30.
[33] *Cargill v Mexico* (Award) (ICSID Additional Facility, Case No ARB(AF)/05/2, 18 September 2009) paras 296–305.
[34] Ibid.
[35] *TECMED* (n 30) para 154.
[36] Paparinskis, 'Good Faith and Fair and Equitable Treatment in International Investment Law' (n 13); *Waste Management v US* (II) (Final Award) (ICSID Additional Facility, Case No ARB(AF)/00/3, 30 April 2004) para 98.

Hence, in the context of international investment arbitration, good faith informs structures of reasoning and interpretation in relation to the application of a primary rule of international law. The principle plays a very important role in articulating the precise scope and content of the rule of fair and equitable treatment as a rule directly related to honesty, fairness, and reasonableness. In other words, good faith has been applied as an 'indirect' source of law, used for framing, underpinning, and informing the particular primary rule of fair and equitable treatment but is not applied as a primary rule of international law in and of itself. Hence, investment tribunals seem to conform with the position of the ICJ not to treat good faith as a source of obligation where none would otherwise exist. There is no absence of a primary conventional rule – in this case the rule of fair and equitable treatment – and only in the presence of the fair and equitable treatment rule have investment tribunals applied good faith to inform the content of a primary rule of international law.

6.3 Good Faith and Article 18 VCLT

6.3.1 Referrals to Good Faith in the *Travaux Préparatoires*

As mentioned above, although the text of Article 18 VCLT itself omits any explicit reference to the principle of good faith, the drafting history of the provision clearly conveys that good faith inspired the very adoption of Article 18. For instance, Article 9 of the Harvard Draft Convention on the Law of Treaties,[37] which was later adopted by Special Rapporteur Brierly in his second report on the law of treaties,[38] made explicit reference to good faith by stipulating that:

> [u]nless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, *good faith* may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.

Likewise, Draft Article 5 of the subsequent Special Rapporteur Lauterpacht's first report stipulated that 'signature, or any other means of assuming an obligation subject to subsequent confirmation, has no binding effect except that it implies the obligation, *to be fulfilled in good*

[37] *Harvard Draft Convention on the Law of Treaties,* Supplemented to 29 AM. J. IntlL 653 (1935).
[38] Article 7, J.L. Brierly, *Second Report: Revised Articles of the Draft Convention,* YILC, Vol II (1951) UN Doc A/CN.4/SER.A/1951/Add.1.

faith: … (b) To refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed'.[39] The approach changed slightly in the subsequent report of Special Rapporteur Fitzmaurice. In his draft Article 30(1), relating to the legal effects of signature, there was no mention of good faith.[40] In contrast, the legal effects of ratification, acceptance, or approval, was believed to entail a '*general duty of good faith*, pending the coming into force of the treaty … to take no action calculated to impede its eventual performance, or to frustrate its objects'.[41]

The principle of good faith also appeared in early draft provisions formulated by Special Rapporteur Waldock. Article 9(2) of his first report provided that a signatory State 'shall be under an obligation in *good faith* to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance'. The corresponding obligation derived from the legal effects of ratification did not mention good faith.[42] Mention to good faith remained in the subsequent reports, both in relation to signature and ratification.[43]

Explicit mention of good faith was later abolished in Article 15 of the Draft Convention on the Law of Treaties as discussed at the Vienna Diplomatic Conference. However, this notwithstanding, rapporteur Waldock explained during the first session of the Vienna Diplomatic Conference that the Commission had deleted any express referral to good faith as it believed the matter was self-evident.[44] Thus, whereas good faith is not explicitly referred to in the final text of Article 18 VCLT, the *travaux préparatoires* reveal that good faith was a momentous incentive for the drafters and representatives at the Vienna Diplomatic Conference when construing the interim obligation under Article 18 VCLT.

6.3.2 Good Faith in the Application of Article 18 VCLT

In scholarship, it is consistently emphasised that Article 18 VCLT is the codification of an obligation to act in good faith during the formative stages of treaties.[45] For instance, it has been

[39] Article 5, Special Rapporteur Sir Hersch Lauterpacht, Report of the Law of Treaties, YILC, Vol II (1953) UN Doc AICN.4/Ser.A/ 1953/Add.1, at 109-10 (emphasis added).
[40] Signature '[m]ay involve an obligation for the government of the signatory State, pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty', Sir Gerald Fitzmaurice, Special Rapporteur, Report on the Law of Treaties, YILC, Vol II (1956), UN Doc A/CN.4/101, Article 30(1)(c).
[41] Ibid Articles 33, 35 and 36 (emphasis added).
[42] Ibid Article 12(3)(b).
[43] See e.g., Summary record of the 661st meeting, YILC (1962) Vol I, UN Doc A/CN.4/SR.661, p 12; Summary record of the 788th meeting, YILC (1965) Vol I, UN Doc A/CN.4/SR.788, para 1.
[44] Vienna Diplomatic Conference, first session, p 104 para 28.
[45] Joni S Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo Wash J Int'l L & Econ 71, 95; Paul Gragl and Malgosia Fitzmaurice, 'The

noted that the 'interim obligation laid down in Art 18 is basically an obligation of good faith, thus an explicit manifestation of the general principle of good faith, which is inherent in the law of treaties, and indeed in the whole of international law'.[46] This view is also consistent with some contemporary views of States on Article 18 VCLT. In a response to the questionnaire included in this research, one participant submitted that '[i]n our view art. 18 VCLT is a concretization of the principle of good faith, in particular the prohibition of inconsistent behavior (*venire contra factum proprium*) and is to this extent legally binding'.

International courts and tribunals have likewise noted that the interim obligation is an embodiment of the principle of good faith. In the early *Megalidis* case, a Greek claimant sought the return of certain items taken forcibly by Turkish authorities from him and relied on a treaty that had been signed but was not yet binding on Turkey. A Turkish-Greek Mixed Arbitral Tribunal held in 1928 that this seizure of the Greek national's property was a violation of international law, concluding that:

> already with the signature of a treaty and before its entry into force there exists for the parties an obligation to do nothing which may be prejudicial to the treaty by diminishing the significance of its provisions … This … amounts to a manifestation of good faith.[47]

In *Tecmed SA v Mexico,* the claimant referred to Article 18 VCLT and claimed that Mexico, by granting Tecmed a one-year permit to operate a landfill site, had acted contrary to the interim obligation and breached its obligations under the Mexico-Spain bilateral investment treaty (BIT) pending the entry into force of the Treaty. When examining this argument under Article 18 VCLT, the tribunal stated that it:

Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699, 707; Crampin (n 3) at 235, writing that '[m]any other rules within the VCLT are codifications of good faith. Examples include Article 18, which codifies the requirement not to frustrate the object and purpose of a treaty in the period between signature and ratification'; Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2018) at 43, writing that the 'main issue under Article 18 is one of good faith'; Reinhold (n 13), writing that '[t]he element of good faith in treaty formation is found in Art. 18 VCLT. This article protects the legitimate expectations of the other participants in the treaty-making process, and is therefore based on good faith'; Linderfalk, 'Good Faith and the Exercise of Treaty-Based Discretionary Powers' (n 9); Hassan (n 3) 448; Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) at 247, writing that Article 18 'gives concrete and normative meaning to the principle of good faith by protecting legitimate expectations which relations of this type generate among States'; Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) at 29, writing that the rule laid down in Article 18 is closely linked to the obligation to act in good faith.

[46] Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 220. See also I. I. Lukashuk, 'The Principle *Pacta Sunt Servanda* and the Nature of Obligation Under International Law' (1989) 83(3) AJIL 513.

[47] *A.A. Megalidis v Turkey*, Reported in Annual Digest 1927-28, p 395.

> shall take into account the principle of good faith … in its *particular manifestation embodied in Article 18* … with respect to the Respondent's conduct between … the date on which the Agreement was signed by the Contracting Parties – and the date of its entry into force.[48]

In an interesting passage, the tribunal sought to ascertain what sort of conduct would reach the threshold of defeating the object and purpose of a treaty, reasoning as follows:

> Writings of publicists point out that Article 18 [VCLT] … does not only refer to the intentional acts of States but also to conduct which falls within its provisions, which need not be intentional or manifestly damaging or fraudulent to go against the principle of good faith, but merely negligent or in disregard of the provisions of a treaty or of its underlying principles, or contradictory or unreasonable in light of such provisions or principles.[49]

The tribunal is correct in asserting that the contested act does not need to be intentional or fraudulent to be prohibited by Article 18.[50] The tribunal might also be correct that not only intentional or manifestly damaging or fraudulent but 'merely negligent' conduct, conduct disregarding the 'provisions of a treaty or of its underlying principles' or 'contradictory or unreasonable' acts in 'light of such provisions or principle' may go against good faith. It would however be a mistake to *ipso facto* equate such conduct with a breach of Article 18 VCLT. As previously outlined in this thesis, the scope of the provision does not extend to conduct which disregards or contradicts the individual provisions of a pending treaty but refers to conduct which would defeat the object(s) and purpose(s) of a pending treaty as a whole.[51]

At the same time, because Article 18 is so clearly an embodiment of the principle of good faith, it seems paradoxical that conduct inconsistent with good faith would under any circumstances be tolerated under Article 18. Therefore, the tribunal should have been clearer in outlining that the core of the matter is what consequences the contested conduct had for the treaty's object and purpose. Negligence – i.e. failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances – does perhaps not always stem from bad faith conduct but could result from genuine actions and/or omissions too, which should not *ipso facto* entail a breach Article 18 VCLT.[52]

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[48] *Tecmed* (n 30) para 70 (emphasis added).
[49] Ibid para 71.
[50] See chapter 4.
[51] See chapter 3.
[52] Although, as mentioned in chapter 4, negligent conduct can amount to a breach of Article 18 VCLT depending on the severity of the consequences for the object and purpose of the treaty.

The tribunal in *MCI Power Group LC and New Turbine Inc v Ecuador* might therefore have taken a more preferable approach by adopting a narrower understanding of Article 18 VCLT. The claimant argued that Ecuador had defeated the object and purpose of the Ecuador-US BIT when it interfered with MCI Power's power plants pending the entry into force of the BIT. This was rejected by the tribunal, which nevertheless pointed out that Article 18 VCLT is an application of the principle of good faith.[53]

The Court of Justice of the European Union (CJEU) has also indicated that Article 18 is an explicit codification of the principle of good faith.[54] Thus, there is considerable authority supporting the view that Article 18 VCLT is a manifestation of the principle of good faith and requires States to conduct themselves in accordance with good faith standards when observing the obligation not to defeat the object and purpose of a treaty pending its entry into force. This, in turn, calls on the question of how good faith concretes and informs the precise content of the interim obligation.

As previously emphasised in this thesis, Article 18 strikes a balance between stability and flexibility in international relations. It seeks to make compatible the competing forces of protecting the integrity of a pending treaty and the need for States to maintain flexibility in the international treaty making procedure, whilst also maintaining the trust between signatory and/or contracting States. These objectives hinge on elements of good faith, legitimate expectations, and fair dealings. In other words, the principle of good faith underlies the very motivation of Article 18 and can effectively explain the reason for the very inclusion of the provision in the VCLT itself. The principle can fill gaps in the application of Article 18 and guide and limit States in exercising their sovereign rights and obligations pending the entry into force of a treaty.

Furthermore, the principle incorporates considerations of equity and reasonableness in pre-contractual dealings. As such, by means of good faith, Article 18 ensures that signatory and/or contracting States have a duty to act honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others pending the entry into force of a treaty. By the same vein, good faith under Article 18 VCLT operates to exclude any arbitrary, capricious, absurd, discriminatory, and unreasonable behaviour pending the entry into force of a treaty. Importantly, good faith also fortifies the elements of certainty and predictability in the

[53] *MCI Power Group LC and New Turbine Inc v Ecuador*, ICSID Case ARB/03/6, 31 July 2007 para 114.
[54] T-231/04 *Greece v Commission* [2007] ECR II-63, paras 85–86.

application of the interim obligation by prohibiting inconsistent behaviour. It prevents States from drawing advantages from their own wrongdoing or disloyal conduct, regardless of the actual intention of the relevant State. As such, the principle of good faith in the application of Article 18 can take both a substantive and regulatory role to define, shape, concretise, and provide solid form and basis for more specific obligations incumbent on States pending the entry into force of a treaty and which bolster the object and purpose of the treaty.

6.3.3 Good Faith in the Interpretation of Article 18 VCLT

As noted in the introduction, good faith underpins the whole of the law of treaties, including their interpretation.[55] The principle of treaty interpretation in good faith has been codified in Article 31 VCLT, which, in its paragraph 1, stipulates that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. In this regard, 'good faith in interpretation operates through specific canons and the overall approach to interpretation'.[56] Interpretation of treaties in good faith incorporates the concept of *ut res magis valeat quam pereat* and requires a standard of reasonableness and effectiveness in interpretation.[57]

This in turn calls for an interpretation enabling the treaty to have 'appropriate effects'.[58] Good faith is also said to help bring into effect a non-abusive result of any treaty interpretation process.[59] It controls the exercise of treaty rights and performance of obligations and helps to determine the scope of treaty obligations.[60] In a similar vein, it has been argued that the principle of good faith serves to limit the exercise of any discretion conferred under Articles 31-32 VCLT on part of the interpreter.[61]

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[55] For an overview, see Crampin (n 3). See also Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 119; ILC, 'YILC 1966, Volume 11' (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 119; Alison Slade, 'Good Faith and the Trips Agreement: Putting Flesh on the Bones of the Trips Objectives' (2014) 63 Int'l & Comp LQ 353, 361.

[56] Paparinskis (n 13) 6; Thirlway (n 13) 270, 1129–30. See also Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 155–57, 167-81.

[57] Gardiner (n 56)167–181; Reinhold (n 13) 61.

[58] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' [1966] II YILC, UN Doc A/CN.4/SER.A/1966/Add.1 112, 219 para 6.

[59] Yaseen, 'L'interprétation des traits d'après la Convention de Vienne sur le droit des traités', Recueils des cours, Vol. 151 (1976), p. 1, 23.

[60] Crampin (n 3) 234; Georg Schwarzenberger, 'Myths and Realities of Treaty Interpretation' (1969) 22 Current Legal Problems 205, 215–216; James Fawcett, 'The Legal Character of International Agreements' (1953) 30 British Yearbook of International Law 381, 397.

[61] Ulf Linderfalk, 'What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics' (2018) 78 ZaöRV 1, 9-10. See also Gardiner (n 56) 155, 167-81; *Application of the Interim Accord of 13 September 1995* (*The Former Republic of Macedonia v Greece*) ICJ Rep 2011 p 644, at paras 127-138.

Thus, when the application of Article 18 to the object and purpose of a pending treaty confers discretion upon the relevant State, an interpreter can construe Article 18 so as to ensure that the discretion is not exercised unreasonably or arbitrarily and that due regard is paid to the interest and legitimate expectations of other signatories or State parties.[62] The interpreter might use good faith and the principle of effectiveness to concretise the object(s) and purpose(s) of the pending treaty and to help identify and choose the interpretation which would lead to the most appropriate effects in each and every case. This might not least be useful in the context of applying the interim obligation *vis-a-vis* treaties protecting community interests, which typically pursue broad and general aims phrased in sweeping language.[63]

The interpreter might also emphasise legitimate expectations, reasonableness, and predictability elements of good faith in turning to the broader system of international law. This bolsters the predictability of the treaty regime and, not least, safeguards the legitimate expectations of other treaty partners regardless of the intentions of the acting State.[64] Lastly, it might be possible to look at the use of good faith in the interpretation of the interim obligation by analogy to the *contra proferentem* rule, which, in its domestic application, entails that any clause considered to be ambiguous should be interpreted against the interests of the party that requested that the clause be relied upon.[65] Thus, if any party seeks to exclude responsibility for a potential breach of Article 18 by invoking another rule or principle of international law, a good faith interpretation of Article 18 could be undertaken by interpreting that rule or principle against the interest of the State seeking to rely on it.

6.4 Abuse of Rights and Article 18 VCLT

6.4.1 Abuse of Rights in International Law

The performance of treaty obligations may also be subject to the control of other good faith principles of international law.[66] For instance, good faith has been said to operate to prevent

[62] For an overview of the role of good faith in the exercise of discretionary treaty powers, see Linderfalk, 'Good Faith and the Exercise of Treaty-Based Discretionary Powers' (n 9).
[63] See Villiger (n 45) 247; Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moïse Mbengue, 'Article 18' in Corten and Klein (n 10) 383; Catherine Brolmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 NordicJIL 383, 396.
[64] A similar approach has been taken by an investment tribunal, see *Tecmed* (n 30) paras 154–55.
[65] *Canada Steamship Lines Ltd v R* [1952] AC 192.
[66] See e.g., Schwarzenberger (n 8) 148; Ulf Linderfalk, 'Treaty Abuse – Why Criticism of the Doctrine is Unfounded' (2018) 9 Journal of International Dispute Settlement 254, 260ff; Crampin (n 3) 239; Ian Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law' (1995) 255 Recueil des Cours de l'Académie de Droit International 21, 36 and 42–44.

the abuse of treaty rights,[67] which requires States to exercise rights *bona fide* and reasonably.[68] The essence of the doctrine is that no State should harm another when exercising its own rights.[69] An abuse of right might occur when: i) 'a State exercises its rights in such a way that another State is hindered in the exercise of its own rights and, as a consequence, suffers injury'; ii) a 'right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused'; and iii) the arbitrary exercise of its rights by a State, causing injury to other States but without clearly violating their rights'.[70]

The question of whether the prohibition of abuse of rights – just like the principle of good faith – forms a general principle of international law is contested.[71] During the drafting of the Statute of the Permanent Court of International Justice (PCIJ), one member of the Committee of Jurists referred to this principle when attempting to define the general principles of law within the meaning of the preceding provision to Article 38 of the ICJ Statute.[72] Some scholars have also concluded that the principle can be found in the domestic legal system of a majority of civil law countries and is as such enforceable in and of itself.[73]

The opposite plea argues that the doctrine cannot be regarded as constituting an accepted primary source of international law. For instance, in a recent study, Paulson argues that the principle is very rarely (if ever) applied as a rule of decision-making. In the instances it is, adjudicators expose themselves to allegations of unpredictability and even arbitrariness.[74] Thus, the doctrine of abuse of rights is too nebulous to serve as a general principle of international law.[75]

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[67] Crampin (n 3) 234; Schwarzenberger (n 8) 148.
[68] See e.g., WTO, United States: Section 211 Omnibus Appropriations Act of 1998 - Report of the Panel (6 August 2001) WT/DSl76/R (US-Section 211), para 8.57.
[69] Alexandre Kiss, 'Abuse of Rights' (2006) Max Planck Encyclopaedia of Public International Law para 2.
[70] Ibid paras 4-6.
[71] Ibid.
[72] A Ricci-Busatti in Permanent Court of Justice: Advisory Committee of Jurists (ed), *Procès Verbaux of the Proceedings of the Committee* (Van Langenhuysen Brothers 1920) 314–15.
[73] Kiss (n 69) para 9; Schwarzenberger (n 8) 150-52; N Politis 'L*e problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*' (1925) 6 RdC 1–121, translation by Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263, 292. Lauterpacht also supports the view that the principle of abuse of rights is a general principle of international law, see Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 286–306.
[74] Jan Paulson, *The Unruly Notion of Abuse of Rights* (CUP 2020) 131-34
[75] Ibid. See also Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing' in Michael Byers (ed), *The Role of Law in International Politics: Essays in international Relations and International Law* (OUP 2000) 207, 212- 221.

This chapter does not seek to make any definitive conclusions as to the primary rule character of the abuse of rights doctrine. It suffices to mention that the doctrine of abuse of rights has been invoked, and sometimes, accepted, by international courts and tribunals.[76] In *Trail Smelter*, the arbitrators established the no-harm principle in the context of transboundary pollution: no State has the right to use or permit the use of their territory in a manner as to cause injury in or to the territory of another State.[77] The tribunal however stressed that the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.[78] In *Corfu Channel*, the ICJ stated that 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' is a general and well-recognised principle of international law.[79]

Furthermore, the principle was at issue in *Equatorial Guinea v France*.[80] Equatorial Guinea maintained that France had, *inter alia*, breached its obligation to respect the principles of the sovereign equality of States and non-interference in the internal affairs of another State by permitting its courts to initiate criminal legal proceedings against the Second Vice-President of Equatorial Guinea for alleged offences which, even if they were established, would fall solely within the jurisdiction of the courts of Equatorial Guinea and by allowing its courts to order the attachment of a building belonging to the Republic of Equatorial Guinea and used for the purposes of that country's diplomatic mission in France.

France rejected the Court's jurisdiction, *inter alia* on the ground that 'Equatorial Guinea's claim seeks to consolidate an abuse of rights'. France referred to 'abuse of rights' as 'a necessary corollary of the principle of good faith', and maintained that Equatorial Guinea's conduct to insist on the immunity of the Vice President was an abuse of rights.[81] France also argued that Equatorial Guinea had 'suddenly and unexpectedly' transformed a private residence into premises of its mission and had appointed 'its owner', Mr Obiang Mangue, 'to increasingly eminent political positions' as the French investigation proceeded, with the objective to shield Mr Obiang Mangue and the premises from the pending criminal

[76] See e.g., Free *Zones of Upper Savoy and District of Gex* (*France v Switzerland*) (1932) PCIJ (ser.A/B) No 46, para 225.
[77] *Trail smelter case* (*United States v Canada*) 16 April 1938 and 11 March 1941 Volume III pp 1905-1982 at 1164-65.
[78] Ibid.
[79] *Corfu Channel case (United Kingdom v Albania)* (Merits) ICJ Rep 1949 p 4, 22.
[80] *Immunities and Criminal Proceedings* (*Equatorial Guinea v France*) (Preliminary Objections) ICJ Rep 2018 p 292.
[81] Ibid paras 139-41.

proceedings.[82] Thus, by claiming diplomatic protection under Article 22 of the Vienna Convention on Diplomatic Relations (VCDR) for the disputed building as 'premises of its mission', Equatorial Guinea abused its rights under the VCDR to the detriment of the rights of France as a receiving State.[83]

On the merits, the Court omitted to address the claim regarding abuse of rights. Judge Sebutinde in a separate opinion made it expressly clear that the issue of abuse of rights should have been addressed in the judgment itself. He argued that there was little doubt that in seeking to divest himself of the ownership of the disputed building, Mr Obiang Mangue acted under pressure of the criminal proceedings against him in France. It could however not be said that when Equatorial Guinea availed itself of its right to bring this case before the Court, it did so 'in an arbitrary manner in such a way as to inflict upon France an injury which cannot be justified by a legitimate consideration of the Applicant's own advantage'. A finding of abuse of rights would therefore have served to further undermine the strained relations between the two States. In his view, the Court should accordingly have made an express finding that France had not proved the Applicant's alleged abuse of rights.[84]

6.4.2 Abuse of Rights and Article 18 VCLT

During the drafting process of Article 18, the question was raised whether the notion of abuse of rights should be introduced into the explicit text of the provision.[85] The issue is complex and when the fundamental basis of Article 18 has been discussed, the questions of good faith and abuse of rights have been left undecided.[86] That said, some have linked the principle of abuse of rights to good faith and claimed that Article 18 VCLT is a provision prohibiting the abuse of rights.[87] Article 18 can indeed be viewed as partly giving effect to the doctrine of abuse of rights. The provision for instance embodies the idea that a State cannot legitimately exploit a signed treaty by abusing its discretion to ratify the signature (Article 18(a)), or, in relation to Article 18(b) VCLT, express its consent to be bound by a treaty but, pending the entry into force of the treaty, abuse the fact that it is not yet legally bound by the individual provisions of

[82] Ibid.
[83] Ibid para 151.
[84] *Immunities and Criminal Proceedings* (*Equatorial Guinea v France*) (Merits) (2020), Separate Opinion of Judge Sebutinde, paras 32-39.
[85] ILC, Summary Record of the 86th meeting, YILC, Vol I (1951) UN Doc A/CN.4/SR.86, paras 115-18; Summary record of the 644th meeting, YILC (1962) Vol I, UN Doc A/CN.4/SR.644, para 16.
[86] Paul V. McDade, 'The Interim Obligation Between Signature and Ratification of a Treaty' (1985) NILR 5, 18 and 27.
[87] Hassan (n 3) 448. Rogoff is however perhaps most prominent in this regard, arguing that the interim obligation 'has a firm theoretical basis in the general principle of abuse of rights', see Rogoff (n 73) 272.

the treaty in a manner which is contrary to the rights of other States. As such, the doctrine of abuse of rights controls the discretionary right to ratify a signed treaty so that the signed treaty is not exploited and abused by the signatory State to the detriment of other signatory and/or contracting States.[88]

This idea was, if even implicitly, evident in the reasoning of the PCIJ in *Case Concerning Certain German Interests in Polish Upper Silesia*. The case related to the issue of the legality of a transfer of property by Germany. This property was located in territory that Germany was required to cede to Poland. It was transferred to a corporation specifically formed for the purpose of acquiring the property. Poland opposed the legality of the transfer, relying on Article 256 of the Treaty of Versailles. This provision stipulated that 'powers to which German territory is ceded shall acquire all property situated therein belonging to the German empire'. The Treaty of Versailles was signed by Germany on 28 June 1919 and ratified on 20 January 1920. The contract of sale for the transfer of the property entered into force on a date between signature and ratification.[89] The PCIJ upheld the legality of the transfer as not violating Article 256 of the Treaty of Versailles, stating that:

> Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.[90]

As such, this passage concretises the notion of the theory of abuse of rights. If Poland had proven that Germany did in fact abuse its rights, the outcome of the case might have been different. In the Court's view, however, not even after ratification did the Treaty impose such an obligation of good faith to refrain from alienating the property, as the transfer fell within the normal administration of the State.[91]

Utilising the doctrine of abuse of rights in relation to Article 18 may also be particularly helpful in relation to water resources, which are often shared by States. Treaties widely provide for the equitable use of such resources. For instance, Article 2(2)(c) of the Helsinki Convention on the

[88] See also Reinhold (n 13) 59; JM Jones, *Full Powers and Ratification: A study of the development of treaty-making procedure* (CUP 1946) 89.
[89] *Certain German interests in Polish Upper Silesia (Germany v Poland)* (Merits) (1926) PCIJ Series A no 7.
[90] Ibid para 58.
[91] Ibid para 93.

Protection and Use of Transboundary Watercourses and International Lakes[92] stipulates that the parties shall take all appropriate measures 'to ensure that transboundary waters are used in a reasonable and equitable way'.[93] Thus – approaching the issue on the basis of an internal method by interpreting Article 18 VCLT in a manner which render water resource treaties practically fit for use and serviceable in international law – it may be particularily helpful to have recourse to the doctrine of abuse of rights in assessing whether signatory or contracting States have respected the object and purpose of such treaties by ensuring that transboundary waters can be used in a reasonable and equitable way once the treaty enters into force. Likewise, the doctrine of abuse of rights can be particularly helpful in balancing the exercise of the legitimate rights and interest of other States signatories and parties to the relevant treaty to the extent that the injury suffered by the aggrieved State does not exceed the benefit resulting for another State from the enjoyment of its own right(s).[94]

6.5 Estoppel and Article 18 VCLT

6.5.1 Estoppel in International Law

The last aspect of good faith in international law as discussed by this chapter is the principle of estoppel.[95] Resting on notions of good faith and consistency,[96] there is authority supporting the position that estoppel is a general principle of international law, although the question – unexpectedly – remains contested.[97] Under the principle of estoppel, 'a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards, or attribute rights to the former party in reliance upon such representations or conduct'.[98]

The legitimate reliance of one State on the conduct of another precludes this State from acting contrary to its representations. If the State then acts contrary to this representation, it is acting without good faith and therefore in contravention of international law.[99] Thus, estoppel

[92] Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269.
[93] See also Kiss (n 69) para 18.
[94] Rogoff (n 73).
[95] For an overview, see Reinhold (n 13) 53.
[96] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 421; IC MacGibbon, 'Estoppel in International Law' (1958) 7 ICLQ 468, 471; YILC, Vol 2 (1953) A/CN.4/63 (per SR Lauterpacht) 144; Derek Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' (1957) 33 BYIL 176; 'Principles as Sources of International Law (with Special Reference to Good Faith)' (n 3) 1–36.
[97] Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Sources of Law' (n 5) 1; MacGibbon (n 96).
[98] Reinhold (n 13) 54; YILC, Vol 2 (1963). A/CN.4/SER.A/1963/ADD.1 (per Special Rapporteur Waldock) 40.
[99] Reinhold (n 13) 54; Cheng (n 7) 144; Bowett (n 96) 193 f.

safeguards predictability and consistency in international relations.[100] The principle requires a clear statement of fact made towards the other party, leading that party to change its position to its detriment or to the advantage of the party making the statement.[101] The typical effect of the doctrine is that, under such requirements, a representing party is precluded, i.e. estopped, from successfully adopting different, subsequent statements on the same issue, without regard to their truth and accuracy.[102]

The ICJ has discussed the principle of estoppel on several occasions.[103] In the *North Sea Continental Shelf* case, the question was raised as to whether the 1958 Geneva Convention on the Continental Shelf was binding for all the parties in the case. The Federal Republic of Germany had signed but not ratified the Convention. Denmark and the Netherlands argued that the Convention had become binding on Germany because, by its conduct and public statements, Germany had unilaterally assumed the obligations of the Convention. The Court found that, other than by formal accession, a State is not likely to be presumed to have become bound by a treaty, and 'that only a very definite, very consistent course of conduct' could have binding effects upon a non-party.[104] The ICJ linked these requirements to estoppel:

> Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evidenced acceptance of that régime, but also had caused Denmark and the Netherlands, in reliance on such conduct, detrimentally to change position or suffer prejudice.[105]

In the *Temple of Preah Vihear* case, concerning the delimitation of an area situated between Cambodia and Thailand and which included the Temple of Preah Vihear, a 1904 Treaty had been signed by present day Cambodia and present-day Thailand. The delimitation of the area was to be performed by a mixed Commission, which produced a map in 1907 and posited the Temple in Cambodian territory. Thailand however subsequently maintained that it possessed

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[100] MacGibbon (n 96) 468–513.
[101] Bowett (n 96) 176–202; Thomas Cottier and Jörg Paul Müller 'Estoppel' in *Max Planck Encyclopaedia of Public International Law*, edited by Rüdiger Wolfrum (North-Holland 2003).
[102] Cottier and Müller (n 101) para 1.
[103] Barcelona Traction Case (Case concerning the Barcelona Traction, Light and Power Co Ltd [New Application: 1962] (Belgium v Spain) (Preliminary Objections) ICJ Rep 1964 p 6 at 24–25; *Temple of Preah Vihear* (*Cambodia v Thailand*) (Merits) ICJ Rep 1962 p 6, concerning the effect of lack of protest to territorial claims on title; *Nottebohm Case* (Second Phase) (*Liechtenstein v Guatemala*) ICJ Rep 1955 p 4.
[104] *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgment) ICJ Rep 1969 para 28.
[105] Ibid para 30.

the area surrounding the Temple and took control of the site. In addressing Cambodia's claim, the ICJ relied, *inter alia*, on estoppel and concluded that Thailand had not objected to the delimiting map in a timely manner. Cambodia was deemed to have impliedly relied upon the non-objection by Thailand, and Thailand was therefore estopped from raising any objections to the original delimitation at the present time, having not made declarations to that effect before.[106]

6.5.2 Estoppel and Article 18 VCLT

Seeking to elucidate the proper practical scope of Article 18 by recourse to an internal method, the principle of estoppel – an aspect of good faith – can operate in relation to Article 18 VCLT in a manner which contributes to safeguarding the continuance, predictability, and stability of relations between States pending the entry into force of a treaty. In particular, estoppel can operate to ensure that Article 18 prohibits a State from contradicting a clear statement of fact made towards other States parties or signatories, leading that party to change its position to its detriment or to the advantage of the State making the statement.

This may be particularly relevant in circumstances when a State has made clear and consistent representations that it will ratify a signed treaty. If a State then, to its detriment, relies on this representation and changes in position in reliance on it, the State making the statement would be estopped from contradicting the statement, should the statement have been made consistently. This may be viewed as amounting to 'ratification by conduct', which deviates from the classical means of expressing consent to be bound under Article 11 VCLT.[107] In fact, it has been recognised that States which have merely signed a treaty sometimes apply the treaty, often over a prolonged period of time, and are thereafter estopped from pleading that the treaty is not binding on them.[108] As has been argued:

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[106] *Temple of Preah Vihear* (n 103).

[107] There are some instances in which a State has been deemed to have ratified a treaty by reason of its conduct. For instance, a treaty would be impliedly ratified by the ratification of a later agreement which presupposed the applicability of the former (*Union of India v Sukumar Sengupta* (1990) 92 ILR 570) and when executing an agreement containing a specific clause for a substantial period of time (*PM Eisemann and V Coussirat-Coust'ere*, Repertory of International Arbitral Jurisprudence, vol III (Dordrecht 1991) 1052-53 (in this case an arbitration clause), when a treaty was concluded in violation of procedural provisions of municipal law but no argument of illegality had been raised for many years and the contract was duly executed (*Sandine International v Papua New Guinea arbitration*, 1998, 117 ILR 562-63, para 11.1-11.2), or when a State suddenly discovers that a treaty which it thought had been ratified turned out not to have been formally consented to, the agreement is viewed as ratified by conduct if applied for a prolonged period of time (*Loan Agreement Case* (*Italy v Costa Rica*) Arbitral Tribunal RIAA vol 25 pp 36-37).

[108] Kolb, *Good Faith in International Law* (n 7) 43.

> If a [S]tate applied a treaty for a prolonged time-span, and thereby created legitimate expectations that it considers the treaty applicable, and also reaped advantages from the application of the treaty, it cannot be allowed to plead at its discretion that the treaty had not been validly ratified.[109]

The issue is very much one of good faith, legitimate expectations, and reasonableness. If State A through consistent conduct – statements of fact – have led State B to change its behaviour in reliance on such conduct and State A later changes its position to the detriment of State B or to its own benefit, Article 18 VCLT, by embodying the principle of estoppel as a necessary corollary of the principle of good faith, could operate to prevent such behaviour. As seen above, this was a core issue in the *North Sea Continental Shelf* case, meaning that had the Federal Republic of Germany after having signed the 1958 Geneva Convention on the Continental Shelf by means of consistent representations unilaterally assumed the obligations of the Convention, Germany would – through the operation of estoppel under Article 18 VCLT – be estopped from claiming that it had not expressed its formal consent to be bound by that treaty.

The question was also at issue in *Greece v Commission*, where the Hellenic Republic brought an action for annulment of the act of 10 March 2004 by which the Commission proceeded to recovery by offsetting of sums due from the Hellenic Republic following its participation in building projects for the diplomatic mission of the Commission and several Member States in Abuja.[110] The question was whether the Hellenic Republic had consented to both an initial and additional memorandum setting out the State's financial obligations. Article 15(1) of the initial memorandum stipulated that '[i]f a partner decides to withdraw from the [Abuja II] project by not signing the [additional memorandum], the terms of this Memorandum of Understanding, including the financial obligations referred to in Articles 12 and 13, will cease to apply to the withdrawing partner'.

On 10 June 1998, a payment order was sent by the Commission to the Hellenic Republic, which was not paid. On 9 December 1998, the additional memorandum was signed, but not ratified, by the Hellenic Republic.[111] On 22 June 2000, the permanent Steering Committee decided to adopt a new project approach ('Abuja Light'). The representative of the Hellenic Republic indicated his agreement with the project, subject to the approval of his superiors. On 29 June 2000, the Commission asked for an official reply. After a second reminder dated 14 September

[109] Ibid 49-50.
[110] CFI (*Greece v Commission*, T-231/04 (2007) ECR II-63.
[111] Ibid paras 30-34.

2000, the Commission sent a letter to the Hellenic Republic, stating that a failure to respond would be understood as a withdrawal from the project.[112] The Greek authorities subsequently informed the Commission that they were unable to give a formal answer regarding the Abuja Light project. Consequently, the Commission responded that it had asked the architects to proceed with the redesign of the Abuja II project without including the Hellenic Republic.

On 11 October 2002, the Commission notified the Hellenic Republic of the outstanding debit notes regarding the Abuja I and Abuja II projects. As the Hellenic Republic had failed to pay by that deadline, the Commission enforced recovery of the amounts in question, although the Hellenic Republic never ratified the additional memorandum.[113] However, the Court pointed out that the Hellenic Republic did not deny that it acted as a full participant in the Abuja II project for more than six years, from 18 April 1994 to 30 September 2000. It took part in that project for almost two years after the signature of that memorandum in December 1998. Even after receiving the Commission's letters regarding the Abuja Light project, the Hellenic Republic did not formally withdraw from the project.

Furthermore, in deciding to draw up detailed plans before the additional memorandum was finalised, the partners went further than the preliminary phases, thereby necessarily concluding an implied agreement to carry out the project. Furthermore, the Hellenic Republic never conducted itself in any way as to give rise to doubts as to its participation. It was only during the summer of 2000 that the Hellenic Republic conveyed some reservations with regard to its continued participation, which led the Commission to conclude that it had withdrawn from the project.[114] Accordingly, from April 1994 to September 2000, the Hellenic Republic, by its conduct, consistently let the other partners understand that it was continuing to participate in the Abuja II project and conducted itself as a full participant in the project. It let the other parties understand that it accepted and approved of the undertakings made by the Commission on behalf of the partners. Thus, it led the other participating partners to expect that it would continue to fulfil its financial obligations in relation to the Abuja II project.[115]

[112] Ibid paras 35-36.
[113] Ibid paras 55-58.
[114] Ibid paras 93-95.
[115] Ibid paras 88-91.

Interestingly, the Court seemed to have deemed the additional memorandum operative from the very first day at which the Hellenic Republic started conducting itself as a party in the project as a whole, not after a 'prolonged period of time' and until the day the Republic for the first time expressed doubt as to its status as a participant. As such, it therefore seems like there would be no interim period for Article 18(b) to apply as 'ratification' and entry into force essentially took place at the same point in time.[116]

The only conceivable way in which Article 18(b) could apply in relation to expression of consent through ratification by conduct would be if there is a time interval between the day at which the act of ratification is deemed to have been expressed and the day of the entry into force of the treaty. The principle of estoppel could thereby operate to ensure that States are prevented from claiming that they have not consented to the relevant treaty and would ot be obliged to respect its object and purpose pending its formal entry into force. However, it is doubtful how likely it is for such a scenario to arise in practice as the very ratification itself essentially is expressed through executing or complying the treaty which has not been formally ratified, which inevitably entails that it is already operative and effective at the time of expression of consent.

6.6 Binding Nature of Article 18 VCLT

The binding nature of Article 18 VCLT is often presented as a clash between moral and legal aspirations. Indeed, the exact nature of the interim obligation has been controversial from the very beginning. Its origins lie in Article 9 of the Harvard Draft Convention on the Law of Treaties, whose comment clearly stated that this provision did 'not envisage a legal duty … under international law'.[117] The primary reason for the moral nature of the interim obligation was that non-performance of Article 9 would produce no legal consequences under international law because no legal obligation existed in the first place.[118] Likewise, the first Special Rapporteur Brierly concluded that even the modest obligation referred to in the Harvard Draft was moral rather than legal in nature as the material supporting even the narrow interim

[116] That said, it might still be of relevance to apply the interim obligation under Article 18(a) VCLT if the relevant agreement has been signed.
[117] Harvard Draft Convention on the Law of Treaties (n 37) 781.
[118] Ibid.

obligation was 'of too fragmentary and inconclusive a nature to form the basis of codification'.[119] Early writers, such as McNair, Rosenne and Kelsen, adhered to this view.[120]

The subsequent codification work was marked by a change in Rapporteur Lauterpacht's approach, who believed that the interim obligation was of a legal nature.[121] This was neither questioned by the subsequent Rapporteurs Fitzmaurice and Waldock,[122] nor during the Vienna Diplomatic Conference. This brief illustration of the development of Article 18 VCLT shows that the earliest formulations of the provision underwent considerable discussion and modification. Hence, since the 1953 Lauterpacht draft, there is a general agreement that the interim obligation has been considered to constitute a legal and not merely moral obligation under international law.[123] Contemporary views of scholars and States confirm this position.[124] It therefore seems like the interim obligation as today contained in Article 18 VCLT has undergone considerable change and is at present viewed as a legal obligation under international law.

Nevertheless, two questions remain in this regard: i) does the fact that Article 18 VCLT is a concretisation of good faith undermine the normative force of the obligation; and ii) does the vague and ambiguous language of Article 18 impair the legitimacy and compellingness of the provision?[125] To start with the latter question, the language of Article 18 is indeed couched in an aspirational manner, for instance through the use of the word 'should'. In the cases in which the application of Article 18 VCLT has been considered, courts and tribunals have never decided a case by strictly imposing the interim obligation. Never has Article 18 VCLT itself been regarded as violated. Instead, courts and tribunals might have considered an argument

[119] (1952) YBILC, vol II, 54.
[120] Arnold McNair, *Law of Treaties* (OUP 1961) 204. Kelsen was of the view that '[a] signatory State, although not obliged to ratify the treaty, is not allowed to oppose the treaty's consummation and is obliged to do nothing in contravention of the terms of the treaty. These obligations are hardly more than moral in character', see Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston 1966) 466-67. Rosenne argued that Article 18 'is more exhortatory than normative', see Rosenne, 'Vienna Convention on the Law of Treaties', in R. Bernhardt (ed), *Encyclopaedia of Public International Law* (North Holland Publishing Company 1984) vol. VII 532.
[121] (1953) YBILC, vol II, 110.
[122] (1962) YBILC, vol II, 110; G Fitzmaurice, First Report on the Law of Treaties (n 11).
[123] Gragl and Fitzmaurice (n 45) 703.
[124] 'Once viewed as a moral admonition, this obligation has come increasingly to be regarded as legal in nature' see Rogoff (n 73) 271; 'A simple signature may nevertheless trigger some legal obligations, stemming either from the VCLT or customary international law', see Curtis A Bradley, 'Treaty Signature' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 211.
[125] See chapter 1.

relying on Article 18 but have relied on a different rule for the actual decision, only stating the interim obligation as *dicta*.[126]

Furthermore, going back to the former question, it has already been established that the adoption of Article 18 was inspired by the principle of good faith. The interim obligation may therefore be viewed as 'potentially normative' but 'soft' in character because it articulates a 'principle' rather than a 'rule'. Thus, even if the obligation is a legal duty under international law, to what extent does the fact that it was inspired by good faith – which is not a rule or means of decision-making of international law – affect its normative force? In this regard, it has persuasively been argued that the extent to which good faith underpins a primary rule of international law does not necessarily affect its normative force.

As Frank points out, the question is whether States are compelled to obey the rule or not, not whether a rule of law is binding. It is accordingly the State's perception of a rule as legitimate that dictates its willingness to comply with it.[127] Even though uncertain and vague, a rule that is perceived as just, fair and/or reasonable will exert a stronger pull toward compliance.[128] Hence, the main issue is not whether the explicit language of Article 18 is sufficiently precise or clear to be legally compelling or whether its strong traces of good faith weaken its normative force. The critical question is rather one of perception; is Article 18 VCLT perceived as a just, sound, and fair rule of international law?[129]

In this regard, it would seem that for the very reason that Article 18 is based on good faith (effectively targeting conduct which is arbitrary, abusive, unreasonable, capricious, and deceitful) the provision would presumably be perceived as sound and just. States would accordingly be expected to manifest a willingness to obey by the interim obligation and would feel compelled to do so.[130] Hence, just because good faith is not in itself an enforceable primary rule of international law does not mean that Article 18 VCLT – rooted in good faith – is not a means of decision-making or does not constitute a primary rule of international law. Article 18 is a positive rule of international law. The gist of Article 18 embodies and formulates a rule

[126] One can only speculate about the reasons for this, but one possible reason could presumably relate to the complex and difficult nature of Article 18 and the uncertainties relating thereto. See further Rogoff (n 73) 272.
[127] Thomas Franck, *The Power of Legitimacy among Nations* (OUP 1990) 3-49. Weil, however, argues that rules that are imprecise are not really compelling, and would therefore fall under the 'soft law' category: '... [i]t would seem better to reserve the term "soft law" for rules that are imprecise and not really compelling, since sublegal obligations are neither "soft law" nor "hard law": they are simply not law at all …', see Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413.
[128] Franck (n 127) 76-85.
[129] Ibid.
[130] See also Charme (n 45) 105-08.

which is indispensable to the effective functioning of treaty regimes and the stability of the international legal order. It generates normativity as there is a component of 'ought'.

Good faith thus concretises a legal rule in Article 18 VCLT which was deliberately drafted. In other words, the interim obligation of Article 18 VCLT is a concretisation of good faith captured in a primary rule of international law. It is important to be mindful of the structural difference between the different sources of good faith obligations; good faith as part and parcel of Article 18 – a primary rule of international law – and good faith as a principle, which without being accompanied with or embraced by a primary rule is not in and of itself enforceable. Article 18 is therefore not a mere synonym to the independent principle of good faith. Just like the rule of fair and equitable treatment is capable of being enforced in itself, there was a conscious effort on part of the VCLT drafters to include Article 18 as a primary rule of international law into a binding treaty. A different conclusion would serve to contradict the intentions of the drafters and contemporary viewpoints of States and scholars.

In fact, the interim obligation is a rule fundamental to the stability of international relations. It has never been couched in non-binding terms by international courts and tribunals and as mentioned, scholars and State practice today agree that the rule is legally enforceable. Good faith in the form of a general principle is construed as a duty with no corresponding right. In contrast, good faith as part and parcel of the obligation contained in Article 18 VCLT takes the form of a duty with a corresponding right. A signatory and/or contracting State owes a duty to other signatory and/or contracting States not to defeat the object and purpose of a pending treaties and in case of breach, other States have the right to insist on compliance.

6.7 Consequences of Breach of Article 18 VCLT

The previous section has concluded that the fact that Article 18 is rooted in the principle of good faith and is phrased in a vague manner does not necessarily affect its compellingness as a legally binding and enforceable obligation under international law. Hence, as Article 18 constitutes a legally binding primary rule of international law (in comparison to viewing the obligation as a mere moral abomination), a breach of the provision would necessarily trigger the wrongdoing State's international responsibility, just like a breach of an obligation of fair and equitable treatment gives rise to general secondary rules of State responsibility.[131] The

[131] See Article 1 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA): 'Every internationally wrongful act of a State entails the international responsibility of that State'. According to Article 2, there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of

State responsible for the internationally wrongful act would then be under an obligation to cease that act, to offer appropriate assurances and guarantees of non-repetition,[132] and to make full reparation for the injury caused by the internationally wrongful act.[133] Importantly, the finding of responsibility would be based on a violation of Article 18 VCLT as such, and not on a breach of the pending treaty.

Indeed, in *Military and Paramilitary in and against Nicaragua*, the ICJ found that certain actions of the US were such as to defeat the object and purpose of a Treaty of Friendship, Commerce and Navigation concluded between the parties in 1956.[134] The US accordingly incurred responsibility for a violation of customary international law. The question may be posed whether there are any differences in legal consequences for a breach of the obligation not to defeat the object and purpose of a treaty in force and the object and purpose of a pending treaty (i.e., a treaty not yet in force). The answer seems to be negative. In *Nicaragua*, the US had defeated the object and purpose of the 1956 Treaty – being in force – and accordingly incurred responsibility for a violation of customary international law as a means of decision making. In the context of breaches defeating the object and purpose of a treaty not yet in force, the responsibility would be incurred based on a conventional primary rule of international law; Article 18 VCLT. A breach of this provision accordingly constitutes a wrongful act.

Moreover, outside argumentation in the context of a court case, Article 18 VCLT could potentially be utilised during negotiations with another State trying to argue that the acts of the latter are not necessarily in line with the interim obligation under Article 18. However, participants to the questionnaire noted that examples from practice of bilateral and multilateral negotiations concerning a potential dispute settlement of a violation of Article 18 are – if existent – notoriously sparse.[135] Participants also questioned how legally solid and effective such an argumentation would be in practice as Article 18 expresses a rather general obligation. Furthermore, there is as such no enforcement mechanisms in international law, and no mandatory way of enforcing a judgment against another State. Hence, to turn the provision into an effective legal tool capable of changing behaviour of other States (outside the context of a court case) and/or promoting your State's view in a given matter seems rather difficult.

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the State. Article 12 clarifies that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character'.

[132] ARSIWA Article 30.

[133] ARSIWA Article 31.

[134] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), Jurisdiction and Admissibility (Judgment) ICJ Rep 1984, p 437, paras 272-76.

[135] In fact, no examples of such negotiations could be given.

Accordingly – and without going into the question of the effectiveness of the system of international law – if sanctions are in theory available but in practice difficult to successfully enforce, how is compliance with the interim obligation and Article 18 VCLT to be ensured? A State may consider itself to be under an obligation to make reparation only if it admits that it has committed a wrongful act, that is to say, if there is an agreement of the States concerned in this respect.[136] However, as just noted above, negotiations are perceived as potentially difficult and ineffective, whereby such an agreement may not be reached. In such situations, another State could potentially request the wrongdoing State to cease the conduct, inform about the appropriateness of the conduct and make its expectations clear that abstention (or even positive conduct) is expected.[137]

Indeed, in this context, the importance of non-legal aspects of the consequences of non-compliance with Article 18 should not be underestimated. In fact, nothing

> contributes more to the glory of nations and their rulers than complete and perfect good faith … Therefore, since not only nations, but also in particular their rulers, ought to desire that they be worthy of fame, and do nothing which can diminish or weaken it, nations therefore and their rulers ought to take care to be full of faith, steadfast and persistent. Nothing destroys the reputation of a nation or of the ruler of a nation among outside nations more than treachery.[138]

There might hence not be a formal finding of breach and for instance a duty to pay reparations and guarantee non-repetition of the conduct. However, the wrongdoing State might be induced to cease the contested conduct if there are accusations of non-compliance which might damage that State's international reputation. After all, failing to comply with good faith is damaging for that State's international reputation and might as such have an impact on that State's existing and future international relations.

Social science research indeed suggests that accusations can change an accused's behaviour.[139] Furthermore, research has shown that public accusations of international law violations, most often in the human rights context, has led certain accused States to conform with – or at least reduce their deviation from – international law.[140] The exact result and consequences of

[136] Kelsen (n 120) 466-67.
[137] Ibid.
[138] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1934) p 194.
[139] Pawson, 'Evidence and Policy and Naming and Shaming' (2002) 23 Policy Studies 211.
[140] Koliev, 'The Politics of Leverage in International Relations: Name, Shame, And Sanction' (2015) 91 International Affairs 1168, 1169; Beutz Land, 'Networked Activism' (2009) 22 Harvard Human Rights Journal 205, 208.

'naming and shaming' might vary across different spheres of international law,[141] but accusations of non-compliance may still fulfil the purpose of enhance enforcement of international obligations. It may also aim at defensive or deterrent effects on the accused State.[142]

In the context of Article 18, accusations could take the form of: i) attribution (attributing contested conduct to a particular State or States); ii) exposure (disclosing the potential wrongdoing to third parties); and iii) condemnation (signalling disapproval of the potential breach of Article 18).[143] As such, public exposure or revelation of the bad behaviour ('naming') seeks to impose reputational damage and/or moral discomfort ('shaming') on the bad actor, thereby inducing a change in that behaviour to pull towards compliance with Article 18 VCLT.[144]

There is also a preventative aspect of breaching Article 18: conduct which defeats a treaty's object and purpose even before the entry into force of the treaty and the establishment of the contractual bond between the States parties may damage the State's international reputation and its ability to conduct negotiations and conclude further treaties in the future.[145] Thus, the non-legal implications of non-compliance with Article 18 include less faith in your State as a trustworthy and stable treaty partner. The fear of the reputational implications of non-compliance can hence induce a higher rate of Article 18 compliant conduct.[146]

For instance, if other signatory and contracting States to the ICCPR would want to condemn China's conduct and make a claim that it is breaching the interim obligation under Article 18(a) VCLT by defeating the object and purpose of the ICCPR, they could – other than pursuing legal proceedings – make public accusations of non-compliance. This could take the form of attribution, exposure, and condemnation of the wrongful conduct. This will be damaging for China's human rights record and reputation on the international level, which might in turn have implications for China's potential to become party to future human rights treaties. Furthermore,

[141] See further Martha Finnemore and Duncan B Hollis, 'Beyond Naming and Shaming: Accusations and International Law in Cybersecurity' (2020) 31 EJIL 969.
[142] Ibid.
[143] Ibid 973-74.
[144] Ibid 973-74, 978.
[145] Rivka Weill, 'Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters' (2012) 45 VandJTransnat'lL1381, 1425.
[146] See further Dothan, Shai, 'Social Networks and Nonlegal Sanctions: Compliance with International Courts', forthcoming in Björn Dressel, Raul Sanchez Urribarri and Alexander Stroh-Steckelberg (eds), *Informality and Judicial Institutions: Comparative Perspectives*, Forthcoming iCourts Working Paper Series, no. 314, Available at SSRN: https://ssrn.com/abstract=4318071 or http://dx.doi.org/10.2139/ssrn.4318071.

in order to stress the intolerance of China's conduct and to clearly emphasise that it is reprehensible under Article 18(a) VCLT, States could call for the expression China's formal intention not to become party to the ICCPR. As pointed out by Lewis, this would tell the 'Chinese leadership that the international community condemns the worsening conditions for civil and political rights and highlight that China's signature is illusory'.[147] This would also deprive China of the right to object to reservations made by other States,[148] and – most importantly – convey the message that China is not a worthy and dignified signatory of the ICCPR.

6.8 Concluding Remarks

Article 18 VCLT is so clearly the result of good faith considerations in the treaty-making procedure: it is beyond doubt that the principle of good faith underpins the interim obligation and is part and parcel of Article 18 VCLT. This chapter has demonstrated that good faith therefore informs the content of Article 18 by incorporating considerations of equity and reasonableness in pre-contractual dealings. As such, by means of good faith, Article 18 VCLT ensures that signatory and/or contracting States have a duty to act honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others pending the entry into force of a treaty. Good faith likewise excludes any arbitrary, capricious, and discriminatory behaviour pending the entry into force of a treaty.

The precise influence of good faith on the interim obligation under Article 18 might take different shapes depending on the relevant context. In the context of treaty interpretation, an interpreter might use good faith to concretise the object(s) and purpose(s) of the pending treaty and to help identify the interpretation which would lead to the most appropriate effects in each case. Good faith in the interpretation of Article 18 VCLT could also be scrutinised to allow the most far-reaching effects of the interim obligation, particularly in treaties involving particularly sensitive matters and which might have taken a long time to negotiate and conclude.

In the context of ancillary good faith principles, the theory of abuse of rights can operate to ensure that a State is prohibited from exploiting a signed treaty by abusing its discretion to ratify the signature (Article 18(a)), or, in relation to Article 18(b) VCLT, express its consent to be bound by a treaty but, pending the entry into force of the treaty, abuse the fact that it is not

[147] Margaret K. Lewis, 'Why China Should Unsign the International Covenant on Civil and Political Rights' (2021) 53 Vanderbilt Law Review 131.
[148] See above.

just yet legally bound by the provisions of the treaty in a manner which is contrary to the rights of other States.

Similarly, estoppel can operate to ensure that Article 18 prohibits a State from contradicting a clear statement of fact made towards other States parties or signatories, leading that party to change its position to its own detriment or to the advantage of the State making the statement. This may be particularly relevant in circumstances when a State has made clear and consistent representations that it will ratify a signed treaty and other States have altered their positions in reliance on those representations to their detriment or to the advantage of the State making the statement.

Furthermore, this chapter has demonstrated that the good faith nature of Article 18 VCLT and the vagueness of its language does not necessarily affect its compellingness. Contemporary views of scholars and States confirm the legally binding nature of Article 18 VCLT. Even though couched in uncertain and vague language, Article 18 – because being based on good faith – ought to be perceived as just and reasonable by States and will as such exert a stronger pull towards compliance. Article 18 VCLT therefore promises more than the principle of good faith on its own. As a primary rule of international law and by analogy to the fair and equitable treatment rule in investment arbitration, Article 18 is capable of being enforced as a means of decision making in and of itself and does as such distinguish itself from the general principle of good faith.

Lastly, this chapter has rebutted the viewpoint that a breach of Article 18 VCLT would not entail any legal consequences on the international level. It has demonstrated how States can utilise the provision during negotiations concerning a potential dispute settlement of a violation of the interim obligation. Because the provision is a means of decision making, it does not escape the application of ARSIWA. A failure to comply with the duty not to defeat the object and purpose of a pending treaty – both in its conventional and customary form – would constitute an internationally wrongful act and trigger the wrongdoing States' international responsibility.

However, in order to turn Article 18 VCLT into an effective tool in dispute settlement management in a way which impacts the behaviour of a wrongdoing State and/or promotes the interest(s) of your State, non-judicial avenues might be considered. By for instance exercising pressure – political, financial, or otherwise – unilateral and/or multilateral efforts might induce a State to cease contested conduct and comply with its interim obligation under Article 18

VCLT and might prove more efficient than a formal finding of a violation of Article 18 by an international court or tribunal.

7. ARTICLE 18 VCLT AND TYPOLOGIES OF TREATIES

7.1 Introduction

One perennially debated question in the law of treaties is whether the application of the VCLT to certain categories of treaties, first and foremost law-making treaties, is 'inappropriate' given the alleged 'special character' of such treaties. The main reason and justification for such differentiation is that the contractual underpinnings of the law of treaties does not accommodate the characteristics of treaties which aspire to protect the interests of the international community at large, which law-making treaties generally do.[1] This debate has not least been evident in the context of interpretation of and reservations to human rights treaties,[2] but the application of Article 18 VCLT to law-making treaties has also merited some attention. In fact, some scholars have criticised the drafters of the provision for having been solely inspired by and based their work upon contractual thinking when construing the interim obligation.[3] This would potentially mean that a certain type of treaty (typically treaties embodying norms of a

[1] This has not least been the situation as concerns the rules on reservations to treaties and has particularly caused scholars to debate whether special rules are needed insofar reservations to human rights treaties are concerned. See also Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96(4) AJIL 833; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) EJIL 483; Second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur, Extract from the YILC, (1996) vol II(1) UN Doc A/CN.4/477 & Corr.1 & 2 and Add.1 & Corr.1-4; Malgosia Fitzmaurice, *Whaling in International Law* (CUP 2015).

[2] See further below.

[3] See e.g. Joni S Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo Wash J Int'l L & Econ 71, 99. Klabbers explicitly argues that the drafters exclusively based their work on contractual treaties, see Jan Klabbers, 'How to Defeat the Object and Purpose of a Treaty: Toward Manifest intent' (2001) 34 VandJTransnatlL 283 287, 290, writing that 'the interim obligation has *always* been premised on contractual thinking, and its specific formulation in Article 18 of the Vienna Convention has been inspired by *purely* contractual notions' and that 'the interim obligation has always been conceived as contractual in nature and has been drafted in its present form *exclusively* with contractual exchanges in mind' (emphasis added). During the drafting process, Mr Ago explained that the Commission had mainly been thinking of bilateral treaties when drafting the provision, and Mr Tunkin expressed concerns about the fact that since the applicability of Draft Article 17 to multilateral treaties may vary widely, the Drafting Committee would be well advised to consider bilateral treaties separately from multilateral treaties, *Summary Records of the 788th Meeting*, Extract from the YILC (1965) Vol I, UN Doc. A/CN. 4/SR788, Statement by Mr Ago at para 61 and Statement by Mr Tunkin at para 67. See also Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263; Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moïse Mbengue, 'Article 18' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentar*y (OUP 2011) 370; Bradley, 'Treaty Signature' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, OUP 2020) 215; Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 258.

'higher order')[4] may call for an 'adjusted' application of Article 18 VCLT in order for the interim obligation to preserve its *effet utile*.[5]

Yet, treaties are typically of a dual nature and do rarely, if ever, contain either exclusively contractual or law-making provisions. Hence, it may not be useful to identify 'special rules' which would allegedly apply to 'law-making' treaties only.[6] If, however, a pure division between contractual and law-making treaties is adopted, this poses the question of how Article 18 is positioned within such categorisation. This chapter draws on treaties in which the majority of provisions are 'law-making' (integral) and analyses how Article 18 VCLT is positioned in relation to such treaties.

To this end, this chapter explains the position of Article 18 VCLT within the broader framework of the classification of treaties and assesses if such typology adds any value as a legal analytical tool *vis-a-vis* Article 18 VCLT. It includes a discussion and analysis on: (i) typologies of treaties and to what extent this is reflected in the VCLT; (ii) the potential special regime of certain law-making treaties, with a particular emphasis on human rights treaties; and (iii) the implications of norms *ius cogens* and *erga omnes (partes)* in relation to Article 18 VCLT.

7.2 Typology of Treaties

7.2.1 General Typologies of Treaties

Typologies of treaties have long been used as an analytical tool in the law of treaties and scholars have debated the matter in length.[7] However, it should be noted at the outset that the classification of treaties is a complex question. There is no uncontested and conclusive typology of treaties. Furthermore, none of the classifications advanced in scholarship reflect

[4] Typically, law-making treaties, which are sometimes also referred to as 'normative treaties'.
[5] For a debate, see Werner Morvay, 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force: Commentaries on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 27 ZaöRV 451, 456; Rogoff (n 3) 263; Paul V. McDade, 'The Interim Obligation Between Signature and Ratification of a Treaty' (1985) NILR 5; Charme (n 3) 73; Klabbers (n 3); Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009); 247; Laurence Boisson de Chazournes, La Rosa and Moïse Mbengue (n 3) 383; Catherine Brolmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 NordicJIL 383, 396; Bradley (n 3) 215; Davis S Jonas and Thomas Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 VandJTransnat'l L 565, 568; Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011); Dörr (n) 245-258; Paul Gragl and Malgosia Fitzmaurice, 'The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699.
[6] See further below.
[7] See Brolmann, 'Law-Making Treaties: Form and Function in International Law' (n 5) for an overview.

the whole of treaty practice.[8] This chapter is therefore not exhaustive in addressing all typologies of treaties or treaty obligations but rather seeks to enhance our understanding as to how certain treaty typologies may or may not have an impact on the application of Article 18 VCLT.

Different treaty typologies distinguish treaties on the basis of varying features.[9] One of the perhaps most commonly employed typology of treaties is the one between law-making treaties and contractual treaties.[10] The distinction between *traites lois* and *traites contrats* was introduced by the third Special Rapporteur Fitzmaurice in his second and third reports on the law of treaties. He introduced a general division of obligations into three categories: reciprocal obligations, integral obligations, and interdependent obligations. This division was discussed by the International Law Commission (ILC) in depth. 'Reciprocal', 'concessionary' or 'contractual' treaty obligations provide for 'a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually'.[11]

They are based on *do ut des* and establish synallagmatic rights and obligations between States. This category includes either bilateral or multilateral treaties, the core of which is that they are

[8] Malgosia Fitzmaurice and Panos Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (CUP 2020) 116.

[9] Arnold McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 BYbIL 100, distinguished between treaties 'having the character of conveyances'; contractual treaties; law-making treaties (comprising both 'constitutional international law' and 'ordinary international law') and 'treaties akin to charters of incorporation', that is, constitutive treaties of international organisations at 110-12. Law-making treaties were divided into two sub-categories: a) treaties creating international constitutional law; and b) treaties creating or declaring ordinary international law. Constitutional treaties were these treaties which create international organs and general rules, as well as 'those multilateral treaties which from time to time settle the political affairs of a group of countries in a particularly solemn and semi-dictatorial fashion which likens the arrangement to a governmental act imposed from above upon the parties affected, rather than to a voluntary bargain between them' (at 112). These constitutional treaties 'create a kind of public law transcending in kind and not merely in degree the ordinary agreements between states' (at 112). Each category also attached different legal consequences. For instance, treaties of cession, having the character of conveyances, would not be affected by hostilities but would survive war, and the rebus sic stantibus doctrine would not apply to law-making treaties in the same way as it would to contractual treaties (at 110). Thus, it is evident from McNair's classification that he was primarily mindful of the normative effect, but to some extent also the form, of the relevant treaty at hand, see Catherine Brolmann, 'Typologies and the "Essential Judicial Character" of Treaties' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 82. For questions of global constitutionalism and the constitutionalisation of international law as governing interactions within states and having developed into a coherent legal system governed by systemic, constitutional principles, see e.g., Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009); Cedric Ryngaert, Ramses Wessel, Denise Prévost, D. et al., 'Global Constitutionalism: Editorial Introduction' (2019) 66 Neth Int Law Rev 66, 191.

[10] Which is also of primary focus in this chapter.

[11] Third Report on the Law of Treaties by Sir Gerald Fitzmaurice, UN Doc. A/CN.4/115, YILC 1958, Vol. II, p. 27, Article 18 para. 2.

based on a reciprocal exchange of rights, obligations, and benefits. Examples include treaties establishing customs unions. Multilateral treaties of the contractual type can be reduced to a compilation of bilateral, state-to-state relations 'providing for a mutual interchange of benefits between the parties'.[12] Examples include treaties such as the 1961 Vienna Convention on Diplomatic Relations.[13]

Integral obligations establish general obligations aimed at the entire community of States. This category of treaties involve:

> undertakings to conform to certain standards and conditions, or … any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty . . . so that the obligation is of a self-existent character, requiring an absolute and integral obligation and performance under all conditions.[14]

Thus, integral obligations are self-existing, inherent, and non-contractual, and the obligation is directed towards all the world rather than towards particular parties. Such obligations do not lend themselves to differential application but must be applied integrally.[15] Examples of treaties stipulating integral obligations are human rights treaties, such as the Genocide Convention.[16] All obligations *ius cogens* and *erga omnes* (*partes*) are integral obligations.[17] Lastly, Special Rapporteur Fitzmaurice singled out a class of interdependent obligations. Treaties containing interdependent obligations entail that one party's performance is dependent on the performance of all other States parties. In other words, the cooperation of all States parties is absolutely

[12] The notion of a multilateral treaty as 'bundles of bilateral rights and obligations' was introduced in Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (1989) 821-22.
[13] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 June 1964). See for instance Fitzmaurice, Third Report of the Law of Treaties, Commentary to Article 188, p 20, 41 (n 11).
[14] Second Report on the Law of Treaties by Sir Gerald Fitzmaurice, UN Doc. A/CN.4/107, YILC 1957, Vol. II, p 31.
[15] See Brolmann, 'Law-Making Treaties: Form and Function in International Law' (n 5) 388-89.
[16] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15. The Court was particularly mindful of the 'objects' of the Genocide Convention, noting that '[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality'. The Court further held that in situations involving treaties like the Genocide Convention, 'the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention'.
[17] *Erga omnes* obligations are obligations which are owed towards the international community as a whole. They are the concern of all States because of the importance of the nature of the obligations involved, which means all States have a legal interest in their protection. *Erga omnes partes* obligations are collective obligations, binding on a group of States and established in a common interest.

necessary for the functioning of the treaty. The most commonly cited example of the class of interdependent treaties are disarmament treaties.[18]

Fitzmaurice attached two important legal consequences to the distinction between reciprocal and integral treaties: one as concerns the termination and suspension of treaties due to a material breach of the treaty and one as concerns conflict between treaties.[19] Treaties of the reciprocating type could be suspended or terminated as a result of a material breach by the other party. In contrast, integral treaties could not be terminated or suspended by other parties as a result of a material breach by one party to the treaty because the normative force of the obligation is inherent and absolute and is not dependent on a corresponding performance by other States parties to the treaty.

Interdependent treaties could be terminated in their entirety by the other parties should a material breach occur. This was due to their character, requiring performance of all parties as a condition for the functioning of the treaty.[20] As concerns conflict of treaties, later treaties conflicting with a previous one of the reciprocal type were not deemed to be null and void.[21] In contrast, any subsequent treaty concluded *inter se* by a few but not all parties to an integral treaty and conflicting directly in substance with the earlier integral treaty was, to the extent they conflicted, null and void.[22] A later treaty which conflicted directly in substance with the earlier interdependent treaty would likewise be, to the extent they conflicted, null and void.[23]

Typologies can also be singled out on the basis of form, normative effect and content.[24] Form typologies include the ones based on the participation to (laterality) and designation of a treaty.[25] The normative effect typologies include the ones based on normative force and on regulatory function. The normative force typology comprises two polar types: treaties creating objective regimes on the one hand and treaties creating subjective regimes on the other.[26] The

[18] See Second Report on the Law of Treaties by Gerald Fitzmaurice (n 14) 16; Third Report on the Law of Treaties by Gerald Fitzmaurice (n 11) 20.
[19] Ibid. For an analysis, see Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907.
[20] Second Report on the Law of Treaties by Gerald Fitzmaurice (n 14) 16; Third Report on the Law of Treaties by Gerald Fitzmaurice (n 11) 20. See also Fitzmaurice and Merkouris (n 8) 117-19.
[21] Second Report on the Law of Treaties by Gerald Fitzmaurice (n 14) 16; Third Report on the Law of Treaties by Gerald Fitzmaurice (n 11) 20. The subsequent Special Rapporteur Waldock did not pursue the typology introduced by Fitzmaurice.
[22] Ibid.
[23] Ibid.
[24] Brolmann, 'Typologies and the "Essential Judicial Character" of Treaties' (n 9) 85.
[25] Ibid.
[26] Ibid 85-89.

regulatory function typology comprises three types: constituent or constitutive treaties of international organisations; contract treaties; and law-making treaties.[27] Lastly, the content typologies hinge on substantive areas of international law and on implicit claims of hierarchy.[28]

7.2.2 Recognition of Treaty Typologies in the VCLT

The question of to what extent the VCLT recognises and accommodates various typologies of treaties is not straightforward. As a preliminary mark, it should be noted that the VCLT is sparse in singling out different categories of treaties (or typologies of treaty obligations).[29] Having said that, it has also been recognised that law-making treaties to some extent are implicitly acknowledged by the VCLT framework and that the effects of Fitzmaurice's typology has 'left traces' in the VCLT.[30] In fact, the VCLT does in some, albeit few, instances in and of itself envisage a special regime for certain categories of treaties, particularly insofar the termination and suspension of a treaty as a result of a material breach and conflict of treaties are concerned.

Starting with the form typology, Article 60 VCLT on termination or suspension of a treaty recognises laterality as a factor by stipulating that a material breach of a *bilateral* treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. As concerns *multilateral* treaties, a material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part. It also allows the other parties to terminate the treaty: (i) in the relations between themselves and the defaulting State; or (ii) as between all the parties.[31] A party specially affected by the breach may invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State,[32] and, interestingly, any party other than the defaulting State may:

> invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material

[27] Ibid 90.
[28] Ibid 85. Another interesting but less frequently discussed typology asks if we can distinguish between treaties on the basis of consideration as for law-making treaties, in contrast to contractual treaties, 'there is no consideration given between the States in exchange for the undertaking of obligations', see Daniel Moeckli and Nigel White, 'Treaties as Living Instruments' in Bowman and Kritsiotis (n 9) 162 ff. This distinction is not addressed in the current contribution.
[29] Again, the ILC had taken the decision to centre its attention on the form rather than the substance of the treaty.
[30] Pauwelyn (n 14).
[31] See Article 60(1)(2)(a) VCLT.
[32] Article 60(2)(b) VCLT.

> breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.[33]

Thus, as envisaged by Special Rapporteur Fitzmaurice,[34] Articles 60(1) and 60(2)(b) VCLT maintain 'strict reciprocity in the relation between the defaulting State and the State that is "specially affected" by the breach'.[35] However, in regard to other States parties, the VCLT adds a requirement of 'radically changed' positions related to the normative effects of the treaty.[36]

Turning to the normative effect typology, and particularily the regulatory function element, this is recognised in the contact of conflict and modification of treaties. Article 41(1)(b) VCLT, confirmed by the reference in Articles 30 and 58(1)(b) VCLT, stipulates that no *inter se* modification or suspension is allowed if this changes the effectuation of rights and obligations for the other States parties to the treaty. It has been argued that since this would 'always be the case in a treaty with integral or interdependent obligations (which are, after all, *erga omnes partes*)', law-making treaties are set aside from Article 41(1)(b) VCLT.[37] Furthermore, Article 60(2)(c) affords the right to invoke unilateral suspension of the treaty between itself and the breaching party if the treaty is of such nature (i.e., containing integral or interdependent obligations) that the breach were to fundamentally change treaty performance by the other parties.[38]

In addition, the type of treaty that creates *normative hierarchy based on its content* – that is the treaty which conflicts with norms *ius cogens* – is also addressed by the final version of the VCLT. Article 53 recognises that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. In line with Article 64 VCLT, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Interestingly, Fitzmaurice had originally proposed that *all* integral treaties conflicting directly in substance with an earlier integral treaty

[33] Article 60(2)(c) VCLT.
[34] As set out above, Fitzmaurice was of the view that treaties of the reciprocating type could be suspended or terminated as a result of a fundamental breach. In contrast, integral treaties could not be terminated or suspended by other parties as a result of a material breach by one party to the treaty as the juridical force of the obligation is inherent and absolute and is not dependent on a corresponding performance by the other parties to the treaty. Interdependent treaties could be terminated in a case of fundamental breach in their entirety by the other parties.
[35] Brolmann, 'Typologies and the "Essential Judicial Character" of Treaties' (n 9) 85-86.
[36] Ibid.
[37] Ibid 89-90.
[38] Article 60(2)(c) VCLT; Brolmann, 'Typologies and the "Essential Judicial Character" of Treaties' (n 9) 90-97).

was, to the extent they conflicted, null and void,[39] but the consequences of nullity in the VCLT is strictly limited to treaties conflicting with peremptory norms of international law.

The one type of treaty (provisions) set apart based on *content* in the Vienna Convention is found in Article 60(5), concerning 'the protection of the human person contained in treaties of a humanitarian character'. Article 60(5) provides that a material breach of one party of provisions relating to the protection of the human person contained in treaties of a humanitarian character gives no right to the other parties, not even in their contractual relations with the wrongdoing State, to terminate the treaty. This is because all parties' obligations under such treaties are self-existent and integral.[40] This exception to the rule in Article 60 on the termination or suspension of the operation of a treaty as a consequence of its material breach serves to save individuals from the 'entirely inappropriate negative application of the principle of reciprocity'.[41] From the *travaux préparatoires,* it is evident that the provision covers both human rights treaties and humanitarian treaties.[42]

As can be seen from the above, there are some tendencies to give effect to the distinct features of certain typologies of treaties within the VCLT. That said, with the exception of Article 60(5), the VCLT framework shows little recognition of the typological distinction between law-making and contractual treaties as introduced by Special Rapporteur Fitzmaurice but applies to all treaties regardless of their form and particular designation.[43] Thus, the VCLT framework shows little recognition of the typological distinction between law-making and contractual treaties.

Furthermore, as mentioned above, a strict and inflexible division of treaties and obligations is difficult to uphold in practice. There is no clear-cut line between the two categories of law-making treaties and contractual treaties. In fact, a treaty is almost never entirely law-making or entirely contractual, but in most cases, there is a mixture or variety of categories of obligations;

[39] Second Report on the Law of Treaties by Gerald Fitzmaurice (n 14) 16; Third Report on the Law of Treaties by Gerald Fitzmaurice (n 11) 20.
[40] Brolmann, 'Law-Making Treaties: Form and Function in International Law' (n 5) 388-89.
[41] Ibid 89.
[42] Bruno Simma and Christian Tams, 'Article 60 (1969)' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentar*y (OUP 2011) 1367–1368. Chinkin argues that human rights treaties are referred to 'indirectly' in Article 60(5) VCLT as a 'humanitarian exception to the general rule on the consequences of material breach', Christine Chinkin, 'Human Rights' in Bowman and Kritsiotis (n 9) 511.
[43] See Articles 1 and 2 VCLT.

some contractual and some integral.[44] This means that 'we are technically dealing with several typologies simultaneously',[45] and any treaty is thus likely to belong to more than one category,[46] whereby it is not possible to single out a special rule which would apply to law-making treaties only.

7.3 Article 18 and Treaty Typologies

7.3.1 Discussion in the *Travaux Préparatoires*

The drafters of Article 18 VCLT have been criticised for failing to give any considerable thought to conduct which would amount to defeating the object and purpose of the category of law-making treaties as compared to a treaty of a reciprocal nature.[47] It is generally agreed that the interim obligation:

> appears to have been designed to ensure that one of the signatory parties, typically in a bilateral arrangement, does not change the *status quo* in a way that substantially reduces either its ability to comply with its treaty obligations after ratification or the ability of the other treaty parties to obtain the benefit of the treaty.[48]

Consequently, as conduct inconsistent with the treaty pending the entry into force of a law-making treaty, for instance a human rights treaty, is not likely to alter the pre-contractual *status quo* at the time of signature or ratification, the argument is that the interim obligation has little or no function in relation to law-making treaties.[49] The following example has been advanced in support of such approach:

> the citizens of a state that has signed or ratified the anti-torture convention may legitimately expect to remain free from torture pending the convention's entry into force. One cannot seriously maintain, however, that a single act of torture defeats the object and purpose of the treaty concerned.[50]

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[44] See for instance Reuter, who has recognised that 'distinctions . . . like the one between law-making and contractual treaties, have been shown to be rather inaccurate and irrelevant', Paul Reuter, *Introduction to the Law of Treaties* (Kegan Paul 1995) 35.
[45] Brolmann, 'Typologies and the "Essential Judicial Character" of Treaties' (n 9) 84.
[46] Ibid.
[47] See e.g., Klabbers (n 3); Charme (n 3) 99.
[48] Bradley (n 3) 215. See also Klabbers (n 3).
[49] Ibid. See also Dorr (n 3) at 258, writing that '[g]iven the high threshold for the obligation to actually be violated, the interim obligation is bound to have little relevance with regard to treaties which embody a non-contractual, overarching, multi-faceted regime, such as treaties on human rights or environmental protection, that is unlikely to be undone by conduct simply inconsistent with it. This standard, it is submitted, may be applied both to treaties of a more contractual nature and to those of a law-making character, even though in the latter case it may be hard to imagine that an objective treaty regime is actually rendered meaningless by the actions of a single State, or even a group of States'.
[50] Klabbers (n 3) 293.

Thus, rather than amounting to a violation of the interim obligation, conduct inconsistent with a law-making treaty pre-ratification merely 'serves only to underline the importance' of the relevant treaty at hand.[51] There are additional difficulties in construing a well-defined interim obligation in relation to law-making treaties; as integral 'obligations are never quite complied and done with … the breach of their "object and purpose" is not readily established either'.[52]

The idea that Article 18 VCLT was to apply first and foremost to contractual treaties was not expressly addressed by the drafters, who rather paid some attention to the distinction between *multilateral* and *bilateral* treaties. According to Mr Ago, it was difficult to accept the idea that between the time when a multilateral treaty was adopted, or even negotiated, and the time when it was ratified, a single State could commit acts which frustrated the 'objects' of such a treaty. Instead, when drafting the interim obligation, 'the Commission had been thinking mainly of bilateral treaties'.[53] Moreover, Mr Tunkin advised the Drafting Committee 'to consider bilateral treaties separately from multilateral treaties, because the obligations set out in article 17 [adopted as Article 18] certainly applied to the former for States taking part in the negotiations leading up to the adoption of a text, but applicability to the latter might vary widely according to the circumstances'.[54]

It has been claimed that while 'speaking in terms of bilateral treaties, what Mr. Ago clearly had in mind was not the bilateral form, but the underlying contractual exchange'.[55] Mr Tunkin also 'seemed to have in mind the underlying structure of the agreement-contractual versus normative-rather than its outward manifestation'.[56] There is, however, little that conclusively proves that both Mr Ago and Mr Tunkin really had the distinction between law-making and contractual treaties (i.e. the normative effect distinction) and not bilateral and multilateral treaties (i.e. the form distinction) in mind. Although the statement by Mr Ago to some extent might have rested on concerns of the nature of a multilateral treaty, the statement by Mr Tunkin does not pertain to the nature of the relevant treaty at hand. It rather relates to the applicability of the interim obligation in practice as it would apply in a different fashion to multilateral treaties compared to bilateral treaties in the sense that it is certain that the two parties to a

[51] Ibid.
[52] Brolmann, 'Law-Making Treaties: Form and Function in International Law' (n 5) 396.
[53] Summary Records of the 788th Meeting (n 3) at 92, statement by Mr Ago.
[54] Ibid 93 (Statement of Mr Tunkin).
[55] Klabbers (n 3) 311.
[56] Ibid.

bilateral treaty participated in its negotiation and much less certain that all States parties participated in the negotiation of a multilateral treaty.

However, as seen in chapter 2, the Commission eventually decided to drop the reference to *negotiations* in the final formulation of Article 18 VCLT. Consequently, the interim obligation is only triggered by either signature or expression of consent to be bound and is as such equally applicable to both bilateral and multilateral treaties.[57] Mr Tunkin's statement essentially proclaims that for treaties which are open to States which did not participate in the negotiation of the treaty – something that typically occurs in the context of multilateral treaties but rarely, if ever, occurs in the context of bilateral treaties – it would make sense to distinguish between the two types of treaties (bilateral and multilateral).

However, since participation in negotiations finally was deleted from the scope of the interim obligation and since both bilateral and multilateral treaties can be subject to signature and/or expression of consent to be bound, a differential treatment of multilateral treaties was no longer of relevance. It has also been recognised that the application of Article 18 to exclusively bilateral treaties would contravene both the expressed and implied intent of the drafters. Indeed, had the drafters envisaged such distinction, they would presumably have introduced it in the plain language of the provision itself.[58] Instead, the distinction between the two forms of treaties was never pursued and the explicit formulation of Article 18 VCLT does not provide for any special treatment or differentiation of multilateral treaties.

7.3.2 Application of Article 18 VCLT to Law-making Treaties

As established above, treaties are generally of a dual nature and the explicit wording of Article 18 does not distinguish between different typologies of treaties. However, if a strict division is upheld, this triggers the question of how Article 18 is positioned within the framework of treaties which contain primarily law-making provisions. There are above all two difficulties in applying Article 18 to law-making treaties: i) since law-making treaties typically pursue broad and general aims, defining the object and purpose of a law-making treaty is difficult, whereby the assessment of whether the object and purpose of a law-making treaty has been defeated is equally difficult; and ii) contested conduct does not typically alter the pre-contractual *status quo* of a law-making treaty at the time of signature or expression of consent to be bound, which

[57] Although in practice, it is not uncommon for bilateral treaties to enter into force immediately upon definitive signature.
[58] Charme (n 3) 99-100; Gragl and Fitzmaurice (n 5) 700.

was a central tenet throughout the *travaux préparatoires*. Thus, compliance with the treaty once in force is not rendered impossible, meaningless, or significantly more difficult, implying that even gross and severe transgressions of a law-making treaty's object and purpose would not entail a violation of Article 18 VCLT.[59]

However, as established in chapter 3, Article 18 applies to the object(s) and purpose(s) of a treaty *as a whole*, and not to individual treaty provisions. If Article 18 thus is indivisible, can we even talk in terms of a potential special regime of law-making treaties in relation to the interim obligation,[60] or the implications of non-standard characteristics of human rights treaties? Such division does not make much sense in practice as Article 18 is concerned with the whole object and purpose of a treaty from a holistic point of view, not particular treaty provisions.[61]

Even if a law-making treaty, for instance such as the Genocide Convention (being of a human rights/humanitarian character), in some cases can be bilateralisiable and construed as a set of reciprocal treaty relations between States,[62] it is the 'object and purpose' of the treaty that should be the guiding test, and not a 'word-by-word analysis of the treaty's provisions'.[63] Factors to take into consideration include whether the contracting States have any interests of their own,[64] if one can speak of individual advantages or disadvantages to States, or whether a perfect contractual balance between rights and duties can be pursued.[65] If the conclusion is reached that a treaty was adopted for community interests without the relevance of individual advantages or disadvantages to States, it is the high ideals which occasioned the very existence of the treaty which will provide the starting point for the assessment of whether certain conduct is contestable under Article 18 VCLT or not.

Furthermore, it is doubtful whether a special regime of certain categories of treaties, such as those containing norms *ius cogens* and/or *erga omnes*, adds any value as an analytical tool in relation to Article 18 because in practice, the effects of such differentiation may be nominal. Article 18 VCLT does not apply to rules of customary international law, and rules *ius cogens*

[59] See Klabbers (n 3) 293-94.
[60] In some cases, law-making treaties can even be bilateralisiable and can be construed as a set of reciprocal treaty relations between States, implied by the ICJ's reasoning in the *Advisory Opinion on Reservations to the Genocide Convention* (n 22).
[61] There might of course be differing views.
[62] Implied by the ICJ's reasoning in the *Advisory Opinion on Reservations to the Genocide Convention* (n 16)
[63] *Advisory Opinion on Reservations to the Genocide Convention* (n 16) 21; Gragl and Fitzmaurice (n 5) 713-14.
[64] *Advisory Opinion on Reservations to the Genocide Convention* (n 16) 21.
[65] Ibid.

and *erga omnes* have customary status.[66] Thus, States awaiting the entry into force of a treaty are still obliged to abide by any provisions in the treaty which codifies or incorporates customary international law.[67] For instance, if a State signs or ratifies the Torture Convention and then subsequently, pending the entry into force of the Convention, engages in acts of torture, those acts will constitute a breach of a norm *ius cogens*, a rule *erga omnes*, and a rule of customary international law.[68] Hence, there seems to be little practical need to discuss whether an adjusted application of Article 18 VCLT *vis-a-vis* norms of a higher order is necessary in this regard, but the finding of a breach of such a norm of higher order may suffice.

In this regard, it might be more useful to situate Article 18 in the framework of obligations of conduct in relation to law-making treaties. Although signatory and/or contracting States do not have to comply with the provisions of a pending treaty, they have to – *de minimis* – employ reasonable and appropriate means to prevent significantly severe or irreparable damage, be it towards individuals, to the environment, or to the international community of States pending the entry into force of the treaty. This might include taking certain prohibitive measures, such as notifying and consulting with other States, and investigating and analysing foreseeable risks of any anticipated project or policy. A violation of Article 18 would then occur if the State manifestly fails to take the appropriate and proportionate steps of due diligence. Hence, in order not to torpedo the object and purpose of a pending law-making treaty, States may need to actively promote the future implementation of the treaty by removing significant obstacles, for which it is responsible, to its forthcoming implementation.

For example, in the context of the prohibition of torture, an anti-torture convention generally entails a broader scope of obligations than the core prohibition of torture under customary international law; States must effectively forestall the occurrence of torture. As such, it is insufficient to merely intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irreparably harmed, but States are obliged to put in place all those measures that may pre-empt the perpetration of torture.[69]

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[66] Ibid.

[67] Villiger (n 5) 248. See also Article 53 VCLT.

[68] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (New Application: 1962) Preliminary Objections (second Phase) (1970) paras 33-34; *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Judgment) ICJ Rep 2012 p 422 paras 68-69.

[69] As held by the ECtHR in *Soering v UK*, States have the duty to immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring, see *Soering v United Kingdom* App no 14038/88 (ECHR 7 July 1989).

Thus, not only is the object and purpose of an anti-torture treaty to suppress torture and punish perpetrators of such atrocities, but to do so, States need effective policies and legislation in place that enable the police to effectively investigate allegations of torture which are capable of leading to the identification and punishment of those responsible. Thus, to render the interim obligation effective and meaningful in relation to certain law-making treaties, it may be analytically valuable and useful to look at contested conduct under Article 18 through a lens of obligations of conduct and whether the relevant State has taken reasonable and appropriate means to prevent significantly severe or irreparable damage.

This line of reasoning is evident in *Öcalan v Turkey*, where the applicant was initially sentenced to death, but following amendments in the Turkish Constitution, his sentence was changed to life imprisonment. The applicant brought a claim under Article 2 of the ECHR, protecting the right to life. The ECtHR rejected the applicant's claim and held that since Turkey had signed Protocol 6, which prohibits death penalty in peace time, non-implementation of the capital punishment was an act of keeping up with its obligations as a State signatory to the Protocol, having the obligations, under Article 18 VCLT, to refrain from acts which would defeat the object and purpose of the Protocol.[70]

Accordingly, even for conduct which would not alter the *status quo* at the time of signature or ratification – the enforcement of a death penalty would not change the pre-contractual *status quo* on which Protocol 6 was signed by Turkey – compliance with Article 18 VCLT might come into question if the conduct would manifestly undermine or be in gross contradiction to (i.e. defeat), the very *raison d'être* of the pending treaty, as the infliction of the death penalty in times of peace would defeat the object and purpose of a pending protocol which prohibits precisely this penalty.

There is one last avenue of reconceptualising the interim obligation in relation to treaties containing mainly law-making provision, advanced by way of analogy to the 'severance' regime of reservations to human rights treaties.[71] According to the severability approach, if an

[70] *Öcalan v Turkey* App no 46221/99 (ECHR, 12 March 2003) paras 185-86. See also *Clarification of Paragraph 5 of Operative Part of Constitutional Court Resolution* No 3-P, 19 November 2009 No 1344-O-R, para 4.3 in Oxford Reports on International Law in Domestic Courts (2009).

[71] There is a not uncommon plea to treat human rights treaties differently from the general 'bulk' of treaties. The main reason for this is that such treaties create regimes befitting a legal community, which stands at odds with the originally contractual arrangement of a treaty in international law. For instance, Higgins claims that human rights treaties, having a special nature, fall into a 'special category', see Rosalyn Higgins, 'Some observations on the Inter-Temporal Rule in International Law' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer 1996) 174. Furthermore, the judges in the ICJ's *Advisory Opinion on Reservations to the Genocide Convention* did not hesitate to emphasise the 'high

purposes' that the Genocide Convention seeks to achieve, in which the contracting States have no interest of their own, but merely a common interest to accomplish those *high purposes* which are the *raison d'être* of the Convention (*Reservations to the Convention on Genocide* (n 22) 21). The Dissenting Opinion of Judge Álvarez went further and argued that the Genocide Convention belonged to a category of 'multilateral conventions of a special character', which 'must be interpreted without regard to the past, and only with regard to the future' (Dissenting Opinion of Judge Álvarez at 51). It has also been argued that the 'legalisation and judicialisation of international human rights have founded arguments that human rights constitutes a sub-discipline of international law' (Chinkin (n 48) 511), a 'distinct jurisprudential phenomenon' (Lea Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements' (2006) 77 BYbI 163, 164) or a 'special law' (Chinkin (n 48) 511; This has caused concerns about fragmentation of international law, see in particular International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (2006); M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden JIL 553, 579. It has also been argued that the VCLT is premised on 'empty' and 'amoral' notions 'where States have reciprocal dealings only with other States', 'where there are no people hurt by States' actions'. Human rights lawyers therefore 'make claims for the supremacy of the special law of human rights as the basis of an embryonic global or regional constitutional order that challenges accepted principles of general international law such as State consent and State responsibility' (Chinkin (n) at 512, referring to the European Court of Human Rights (ECtHR), describing the European Convention on Human Rights (ECHR) as the 'constitutional instrument of European public order': *Loizidou v Turkey* (ECtHR) (Preliminary Objections), Appl. No. 15318/89, 23 March 1995 (paragraph 75) and *Al-Skeini v UK* (ECtHR, GC), Appl. No. 55721/07, 7 July 2011 (paragraph 141). See also *Case Concerning Ahmadou Sadio Diallo: Republic of Guinea v Democratic Republic of the Congo* (2010) ICJ Rep 639, at p 756 (paragraph 84 of Separate Opinion of Judge Cançado Trindade) arguing that '[t]he interpretation and application of human rights treaties have indeed been guided by considerations of a superior general interest or ordre public which transcend the individual interests of Contracting Parties'; *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination: Georgia v Russian Federation* (Preliminary Objections) (2011) ICJ Rep 70, at p 281 (paragraph 87 of Dissenting Opinion of Judge Cançado Trindade); *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) ICJ Rep 2012 p 422 (paragraph 49 of Separate Opinion of Judge Cançado Trindade). Furthermore, human rights treaties are 'inspired by higher shared values' (Chinkin (n 48) 516, relying *inter alia* on *Case of the 'Mapiripán Massacre' v Colombia* (IACtHR) (Merits, Reparations and Costs), 15 Sept. 2005) and 'embody essentially objective obligations' (See Chinkin (n 48) 516; *Hilaire v Trinidad and Tobago* (IACtHR) (Preliminary Objections) Ser. C No. 80, 1 Sept. 2001 (paragraph 94). They are of a 'constitutional' and non-reciprocal nature (Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 742; Daniel Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law— No Need for the Concept of Treaty Sui Generis' (2010) 79 Nordic Journal of International Law 245, 254). Human rights treaties have also been said to possess a unique character since they regulate the internal order within the State and its behaviour towards its citizens (Rudolf Bernhardt, 'Thoughts on the Interpretation of Human Rights Treaties' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymann 1998) 65- 66), and commonly establish treaty monitoring bodies (Alain Pellet, Special Rapporteur, 'Second Report on Reservations to Treaties (13 June 1996) UN Doc A/CN.4/447/add.1 para 68. See also Chinkin (n) 515; Brilmayer (n 60) 164; A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2001) at 12, writing that human rights treaties 'restrict the power of governments over their own citizens. That is their function'). See further Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11(3) European Journal of International Law 489, 491-93; L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1995); J. P. Gardner (ed), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (British Institute of International & Comparative Law 1997); R. Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent' (2002) 96 AJIL 531; I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff 2004); Bruno Simma 'Reservations to human rights treaties. Some recent developments' in G Hafner (ed), *Liber Amicorum, Professor Ignaz SeidlHohenveldern in honour of his 80th birthday* (Kluwer 1998) 659-682; William Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 Canadian Yearbook of International Law 39.

impermissible reservation is formulated, the author State will be bound by the treaty without the benefit of the reservation. Thus, the main difficulty with the severability school is that it invalidates the reservations without impacting on the expression of consent to be bound by the treaty.[72] Regardless, several human rights courts and bodies have been advocates of the severability approach and rejected the application of the VCLT's provisions on reservations to human rights treaties, relying on the special character of human rights treaties.[73] To this end, several human rights adjudicative bodies have given themselves the competence to determine the admissibility of reservations.[74]

As has previously been pointed out in scholarship, human rights treaty monitoring bodies, together with the highest organs of other law-making treaties, could be empowered to decide on whether contested conduct of a State does in effect violate Article 18 VCLT. These bodies could have the mandate to condemn ('sever') any actions which are deemed to defeat the object and purpose and purpose of a pending treaty, just like human rights treaty monitoring bodies can sever impermissible reservations to human rights treaties.[75] This would enable human rights treaty monitoring bodies to situate human rights treaties in an objective framework independent of the view of States.[76] This also applies to other treaties establishing monitoring bodies, such as disarmament treaties and multilateral environmental agreements.[77]

However, as has been noted, 'such an approach could only be applicable to treaties that have already entered into force (as it presupposes that the monitoring body has been established), and it would therefore have only a quite limited scope of application'.[78] Practically speaking,

[72] Kasey L McCall-Smith, 'Severing reservations' (2014) 63(3) ICLQ 599.
[73] See Chinkin (n 42) 527; HRC General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para 17.
[74] See e.g., *Belilos v Switzerland* (n 71) para 60. For an analysis of the case, see I Cameron and F Horn 'Reservations to the European Convention on Human Rights: the *Belilos* Case' (1990) 33 GYIL 69. See also *Loizidou v Turkey* (n 71); HRC General Comment No. 24, para 17; *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* , Inter-American Commission on Human Rights, Advisory Opinion, Advisory Opinion OC-2/82, IACHR Series A no 2; *Restrictions to the Death Penalty* (*Arts. 4(2) and 4(4) American Convention on Human Rights*), Inter-American Commission on Human Rights, Advisory Opinion No. OC–3/83 of Sept. 8, 1983.
[75] Gragl and Fitzmaurice (n 5) 716.
[76] Ibid 715-16.
[77] Elias and Tabassi write that disarmament treaties have been comprehensively drafted in the form of self-contained regimes with the treaty itself establishing, in particular: the specific mechanism for monitoring and determining compliance; the specific means for dispute resolution; specific sanctions for noncompliance; required circumstances for withdrawal; procedures for amendment, including fast-track 'changes'; and other specific procedures which will apply to the exclusion of general international law. From that perspective, it may be contended that the VCLT system has little left to offer, see Elias and Tabassi, 'Disarmament' in Bowman and Kritsiotis (n 9).
[78] Ibid.

it could only be applicable to acceding States, when the treaty regime is up and running. That said, the application of Article 18 VCLT in the context of human rights treaties (and other law-making treaties establishing monitoring bodies) and the assessment of contested conduct could be left to the discretion of the monitoring bodies which they create. Realistically, this is a particularily suitable option in light of the expert knowledge and experience possessed by those bodies. They can as such make their evaluation on a case-by-case basis, whilst maintaining an objective and transparent approach and would enable the interim obligation to adapt to situations involving normative instruments.

7.4 Article 18 VCLT and *Locus Standi*

Categories of norms may also have implications within the wider framework of State responsibility and particularly within the context of standing in case of a breach of Article 18 VCLT. This is in particular as treaties which set out *ius cogens* and *erga omnes (partes)* obligations – as is the case for many law-making treaties – have implications for the concept of 'injured State' and *locus standi* in the law of State responsibility.[79] *Erga omnes* obligations are obligations which are owed towards the international community as a whole. They are the concern of all States because of the importance of the nature of the obligations involved, which means all States have a legal interest in their protection. They result from the principles and rules concerning the basic rights of the human person and include the outlawing of acts of aggression, the prohibition of genocide, the prohibition of torture, and the protection from slavery and racial discrimination.[80]

Erga omnes partes obligations are collective obligations, binding on a group of States and established in a common interest.[81] The correlation between *erga omnes* and *erga omnes partes* obligations sometimes overlap. For example, obligations stemming from regional or universal human rights treaties would have *erga omnes partes* effect towards other States parties to that particular treaty. They might also have *erga omnes* effect to the extent that they have been recognised as rules of customary international law.

The issue of *locus standi* in invoking the international responsibility of a State in cases involving *erga omnes* (*partes*) violations is regulated by Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The provision

[79] Brolmann, 'Typologies and the "Essential Judicial Character" of Treaties' (n 9) 95.
[80] *Barcelona Traction* (n 68) paras 33-34.
[81] *Questions relating to the Obligation to Prosecute or Extradite* (n 68) paras 68-69.

stipulates that any 'State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole'. As such, Article 48(1) deals with collective obligations. Multilateral treaties setting out such collective obligations 'must transcend the sphere of bilateral relations of the states parties'.[82] Their main purpose is 'to foster a common interest, over and above any interests of the states concerned individually'.[83]

The ICJ has confirmed that even States which are not directly affected by contested conduct have standing to invoke the responsibility of another State for breaching norms *erga omnes* (*partes*). For instance, in relation to the prohibition of torture, the ICJ has argued that all State parties to the Convention against Torture[84] have a common interest in compliance with the obligation to prevent acts of torture and to initiate prosecution by the State on whose territory an alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All States parties thus have a 'legal interest' in the protection of these 'obligations *erga omnes partes*'.[85]

Similarly, in relation to the prohibition of genocide, the ICJ has confirmed that in light of the high ideals which inspired the Genocide Convention, and in view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity.[86] This common interest implied that the obligations in question are owed by any State party to all the other States parties to the Convention.[87] Any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.[88]

[82] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10) at p 118 para 6.
[83] Ibid.
[84] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[85] *Questions relating to the Obligation to Prosecute or Extradite* (n 68) paras 66-70.
[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v Myanmar*) (request for the Order of Provisional Measures) (Order of 20 January 2020) paras 39-42.
[87] Ibid.
[88] Ibid paras 41-42.

In relation to Article 18 VCLT, the same logic as advanced above seems to apply. If a State wants to claim that another State's breach of an *erga omnes* (*partes*) norm simultaneously defeats the object and purpose of a pending treaty, that State can argue that the duty under the interim obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group, or the obligation breached is owed to the international community as a whole.[89] In other words, there is no need to illustrate that the claiming State has been *specially* affected or that the breach is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

In practice, furthermore, it should be borne in mind that *erga omnes* (*partes*) obligations typically exist as a matter of customary international law independent of their conventional existence. If a State has allegedly defeated the object and purpose of a pending treaty containing norms *erga omnes* (*partes*) obligations by breaching such norms and the other contracting or signatory States cannot bring a claim on the basis of the pending treaty itself, they still have the possibility of bringing a claim on the basis of a breach of customary international law itself. That way, an international court or tribunal would be able to assess the conduct against the very standard of the rule itself (albeit under customary international law) and would also be able to determine whether such conduct simultaneously defeats the object and purpose of the pending treaty.

7.5 Concluding Remarks

Although the issue of classification of treaties is complex, treaty typologies have long been used as an analytical tool in the law of treaties. At the outset, it is, however, questionable how useful treaty typologies are in practice. As noted above, a treaty is almost never entirely law-making or entirely contractual but is likely to belong to more than one category at the same time. This is perhaps why the primary reason for why the final product of the VCLT does not – to a large extent – reflect the typological distinction between law-making and contractual treaties. The only occasion at which a certain type of treaty is set apart (on the basis of its content) is found in Article 60(5), concerning the (im)possibility of terminating or suspending human rights treaties and humanitarian treaties as a result of their material breach.

[89] Article 48 ARSIWA.

That said, if a strict categorisation is upheld, there are, as mentioned above, two main difficulties in applying Article 18 to the category of so-called law-making treaties: i) given the high threshold of the interim obligation, the task of establishing when the object and purpose of a law-making treaty, often pursuing broadly and generally formulated aims, has been defeated is puzzling; and ii) contested conduct does not typically alter the pre-contractual *status quo* – a central tenet throughout the *travaux préparatoires* – of a law-making treaty at the time of signature of or expression of consent to be bound. Thus, compliance with the treaty once in force is not rendered impossible, meaningless, or more difficult, but contested conduct merely manifests the very need for the treaty in the first place.

The foregoing does however not suggest that it is impossible to define a well-designed interim obligation in relation to law-making treaties. Hence, the scholarly criticism directed at the drafters for failing to give any considerable thought to conduct which would amount to defeating the object and purpose of a law-making treaty as compared to a treaty of a reciprocal nature seems misplaced. It is, after all, the object and purpose formula that should be the starting point for any assessment, not an inflexible division as to the treaty's categorisation. Furthermore, in contrast to Article 60(5) VCLT, there is no explicit differentiation between certain categories of treaties referred to in the language of Article 18 VCLT. It appears, therefore, that treaty typologies would add little value as a legal analytical tool *vis-a-vis* Article 18 VCLT.

The only characteristic shared by certain types of treaties, as also recognised by the ILC and which may warrant a reconceptualisation of Article 18, is the category of treaties which establish treaty monitoring bodies. Such bodies could be bestowed the mandate to decide on whether contested conduct of a State does in effect violate Article 18 VCLT. These bodies could have the mandate to condemn ('sever') any actions which are deemed to defeat the object and purpose and purpose of a pending treaty, just like human rights treaty monitoring bodies can sever impermissible reservations to human rights treaties.

The question of *locus standi* in relation to conduct involving breaches of norms *ius cogens* and *erga omnes* (*partes*) as contained in pending treaties seems perfectly aligned with the general framework of international law in this regard. If a State wants to claim that another State's violation of an *erga omnes* (*partes*) norm simultaneously defeats the object and purpose of a pending treaty, there is no need to illustrate that the claiming State has been *specially* affected

or that the breach is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

8. ARTICLE 18 VCLT IN LIGHT OF CONTENTIOUS AND EMERGING ISSUES

8.1 Introduction

Scholars have consistently emphasised the vagueness, impreciseness, and ineffectiveness of Article 18 VCLT and this thesis has sought to bridge some of the gaps and perplexity relating to the interim obligation. That said, certain unsettled questions remain. This chapter surveys some contentious and emerging issues of relevance to Article 18 VCLT and sheds light on matters which have been discarded by existing international law scholarship but which are of practical importance for States in their international legal affairs.

To this end, it draws on high profile examples of State practice on topical and timely questions of international law. The points addressed are as follows: a) the potential 'reversal' of Article 18 in the treaty exit procedure; and b) the institutional aspect of Article 18 VCLT, particularily in scenarios where a State has not signed a pending treaty but is obliged under the rules of the relevant international organisation to submit the treaty to parliament for consideration of ratification.

8.2 'Reversal' of Article 18 VCLT

The question of whether the obligation under Article 18 VCLT can be said to mirror or resemble a somewhat 'reversed' or 'inverted' version of Article 18 VCLT when States have withdrawn from a treaty has not yet been fully examined by international law scholars. The question is essentially one of whether the interim *pre*-contractual obligations of States in any way analogous to the interim *post*-contractual obligations of States, and what the implications of the treaty signature after a State's treaty withdrawal are in this regard.

Unilateral treaty withdrawal lies at the oscillation point between stability and sovereignty in international law, and in essence, both pre-and post-commitment to the treaty, at least during some time, requires States to manifest respect for the treaty's integrity and ultimate rationale and objective. Termination of and withdrawal/denunciation from a treaty is governed by several provisions of the VCLT. Article 54 lays down that the 'termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States'. Article 56 provides that:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

A State may also invoke a material breach of the treaty as a ground for termination,[1] the impossibility of performing a treaty if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty,[2] and a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties.[3] Article 70 VCLT lays down that unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the provisions of the VCLT releases the parties from any obligation further to perform the treaty and does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

Just like good faith permeates Article 18 VCLT, good faith is central to treaty withdrawal. To this end, the ICJ in its *WHO–Egypt Advisory Opinion* stated that the VCLT's withdrawal provisions '[c]learly … are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty'.[4] Furthermore, in *Nicaragua*, the Court held that for treaties containing no withdrawal clause, good faith implies, by analogy to Article 65 VCLT, that withdrawal only can take effect after a reasonable period of time.[5] Thus, it has been argued that good faith can supplement the VCLT rules on termination in several ways and that norms of reasonableness follow from the notion of good faith within *pacta sunt servanda*.[6] This can, as for instance was the situation the *Gabčíkovo–Nagymaros* case, require the

[1] Article 60 VCLT.
[2] Article 61 VCLT.
[3] Article 62 VCLT.
[4] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) ICJ Rep 1980 p 73, para 7.
[5] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) ICJ Rep 1984 p 392, paras 60-63.
[6] See Joseph Crampin 'Treaty Withdrawal and Recalcitrant States' (2020) 9(2) Cambridge International Law Journal 225.

mitigation of the negative consequences that might result from the withdrawing State's departure.[7]

Furthermore, when a State withdraws from a treaty and this withdrawal becomes effective, this does not remove the actual signature of the treaty. Does this signature have any implications for the obligations of States when they have effectively withdrawn from a treaty? One interesting example in this regard is the US' practice in relation to the Paris Agreement. Whilst President Trump's withdrawal took effect on 4 November 2020, one of President Biden's first executive orders was to re-join this agreement.[8] On 20 January 2021, President Biden did indeed sign the instrument to re-join the Paris Agreement and deposited it with the UN Secretary-General. In accordance with Article 21(1)(3) of the Paris Agreement, it entered into force on the thirtieth day after the date of deposit by the US. Thus, only during a short period of time – 4 November 2020 to 20 January 2021– did the US not have any legal obligations in relation to the Paris Agreement. From 20 January 2021 and 30 days onwards, the legal obligations derived from Article 18 VCLT, whereas the obligations post this date and prior to 4 November 2020 derived from the treaty itself.

In this context, however, it is of interest to consider the following situation: imagine if a Head of State (as President Trump did) decides to withdraw from a treaty. Subsequent to the notification of withdrawal, that Head of State put in place a practice or policy which clearly defeats the object and purpose of the relevant treaty. Then, there is a change in the sitting government, and the new Head of State (President Biden) – before or after the withdrawal is effective – reverses the policy of the former Government and signs (and perhaps expresses its consent to be bound by) the treaty which the former Head of State had withdrawn from.

In order to keep up with its Article 18 obligations, the new Head of State would have to eradicate such practice even before the new signature of expression of consent to be bound is deposited. Furthermore, States are – following *Gabčíkovo–Nagymaros* – obliged to, in good faith, mitigate the consequences of the withdrawal.[9] It appears unconvincing that a practice or

[7] Ibid. *Gabcikovo-Nagymaros Project* (Hungary v Slovakia) (Judgment) ICJ Rep 1997 p 7, para 109.

[8] See https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-co.nverging-crises/ (last accessed 15 July 2022).

[9] In accordance with Article 28 of the Paris Agreement, at any time after 'three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary. 2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal'.

policy which would clearly defeat the object and purpose of the treaty does nothing else than aggravating such consequences. Accordingly, there might be an implied duty following the obligation to obligation to mitigate the effects of withdrawal not to defeat the object and purpose of the treaty subject to withdrawal. On the one hand, this would mean that the US, even between 4 November 2020 (withdrawal becomes effective) to 20 January 2021 (President Biden deposits instrument of accession), would be obliged not to defeat the object and purpose of the Paris Agreement to, *inter alia*, establish an 'effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge',[10] guided by the 'principle of equity and common but differentiated responsibilities',[11] and taking 'full account of the specific needs and special situations of the least developed countries with regard to funding and transfer of technology'.[12] On the other hand, such reasoning is tantamount to arguing that there is a permanent duty on States not to defeat the object and purpose of any treaty, regardless of whether they have signed and/or expressed their consent to be bound by such treaty.

Another interesting example in this regard is President Biden's executive order to rescind President Trump's denunciation of the World Health Organisation (WHO) Constitution. The US ratified the WHO Constitution based on an understanding that it could terminate its membership on a one-year notice. Thus, while the US formally declared its intention to withdraw on 6 July 2020, this would only take effect on 6 July 2021.[13] However, on 21 January 2021, President Biden rescinded this notification of withdrawal, which never became effective. The letter sent to the UN Secretary-General as the treaty depositary read as follows:

> This letter constitutes a retraction by the Government of the United States of the letter dated July 6, 2020, notifying you that the Government of the United States intended to withdraw from the World Health Organization (WHO), effective July 6, 2021. The United States intends to remain a member of the World Health Organization. The WHO plays a crucial role in the world's fight against the deadly COVID-19 pandemic as well as countless other threats to global health and health security. The United States will continue to be a full participant and a global leader

[10] Preamble recital 4.
[11] Preamble recital 3.
[12] Preamble recital 6.
[13] See https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/ (last accessed 15 July 2022).

> in confronting such threats and advancing global health and health security. Please accept, Excellency, the assurances of my highest consideration.[14]

Such a unilateral right of revocation seems compatible with Article 68 VCLT, which provides that a notification of termination (as provided for in Article 67(2) VCLT) 'may be revoked at any time before it takes effect'. Thus, in contrast to the example of the Paris Agreement, there was no need for Biden to re-join the organisation, and the relevance of Article 18 VCLT never came into play. That said, as seen above, departing States have at the very minimum a good faith duty to mitigate the effects of withdrawal, which may or may not be posed analogously to the obligation not to defeat the object and purpose of the treaty subject to withdrawal.

Did the US comply with this obligation? It has been concluded that the Trump administration's threat of withdrawal severely threatened the overall funding of the WHO, which led other States to pledge to compensate for the shortage.[15] The Trump administration also tried to foul existing cooperation with the WHO, including to block contact between WHO officials and US officials.[16] Furthermore, the administration stopped paying annual fees due to the WHO some time prior to its official notification of withdrawal (in April 2020).

It is doubtful whether this conduct is compatible with a good faith obligation to mitigate the consequences of withdrawal, and failure to meet financial obligations have consequences under the text of the Constitution.[17] As such, in pre-contractual circumstances, such conduct might also be challenged under Article 18 VCLT. In this very instance, however, it is doubtful whether the US' conduct was severe enough to reach the threshold of the interim obligation and defeat the object and purpose of the WHO Constitution.[18]

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[14] See https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/letter-his-excellency-antonio-guterres/ (last accessed 15 July 2022).

[15] Some States might nevertheless have had a self-interest in doing so. See also https://www.vox.com/2021/1/20/22238609/biden-inauguration-paris-climate-deal-world-health-organization (last accessed 15 July 2022).

[16] See https://www.vox.com/2021/1/20/22238609/biden-inauguration-paris-climate-deal-world-health-organization (last accessed 15 July 2022).

[17] Article 7 of the Constitution lays down that: If a Member fails to meet its financial obligations to the Organization or in other exceptional circumstances, the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.

[18] The Preamble recognises that: 'Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and States. The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger. Healthy development of the child is of

A last illustrative (yet hypothetical) example in this regard particularly highlighting the role of treaty signature following a treaty withdrawal is the US' relationship with is the United Nations Educational, Scientific, Cultural Organization (UNESCO).[19] President Trump withdrew from the UNESCO Constitution in 2017, accusing the organisation of harbouring 'anti-Israel bias',[20] but the stable relation had already been diminished in 2011 when President Barack Obama stopped paying its dues as a means to protect against Palestine's full membership in the Organisation.[21] President Biden has not, at the time of writing, made any formal move to re-join the UNESCO Constitution. If President Biden would want to re-join the treaty, the relevant prerequisites are laid down in Article XV, which regulates the entry into force of the treaty. This provision stipulates that:

> 1. This Constitution shall be subject to acceptance. The instruments of acceptance shall be deposited with the Government of the United Kingdom.
> 2. This Constitution shall remain open for signature in the archives of the Government of the United Kingdom. Signature may take place either before or after the deposit of the instrument of acceptance. No acceptance shall be valid unless preceded or followed by signature.

Thus, the only condition for accession – in addition to the deposition of an instrument of acceptance – is signature. If Biden re-joins the treaty, would the US have to both submit an instrument of ratification and sign it? In other words, by withdrawing from the treaty, did Trump also withdraw the 1946 signature? If not, has a State, by departing from a treaty, also made its intention clear not to be bound by the treaty, or is the signature with certain legal effects even post-withdrawal? In other words, is the signature still valid and effective, capable of triggering the interim obligation under Article 18 lit a VCLT?

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basic importance; the ability to live harmoniously in a changing total environment is essential to such development. The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health. Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people. Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures'.

[19] The US joined UNESCO at its founding but later withdrew in 1984 because of a growing disparity between US foreign policy and UNESCO objectives. President Ronald Reagan accused UNESCO of corruption and ideological bias towards the Soviet Union based on 'extraneous politicization' and 'endemic hostility toward the institutions of a free society', see https://hir.harvard.edu/the-united-states-must-rejoin-unesco/ (last accessed 15 July 2022). After almost twenty years of absence, the United States re-joined the organization in October 2003. In announcing that the US would re-join UNESCO, President George W. Bush stated that as a 'symbol of our commitment to human dignity, the United States will return to UNESCO. This organization has been reformed and America will participate fully in its mission to advance human rights and tolerance and learning', see https://2009-2017.state.gov/p/io/unesco/usunesco/index.htm (last accessed 15 July 2022).

[20] See https://hir.harvard.edu/the-united-states-must-rejoin-unesco/ (last accessed 15 July 2022).

[21] Ibid.

The logical answer to these questions would suggest that a treaty withdrawal also implies the States intention to be become/remain a party to the treaty, hence terminating any legal effects of Article 18(a) VCLT. On the other hand, a signature cannot, as seen previously, be physically 'removed', and terminology like 'unsigning' is fictitious. This does however not mean that the signature still has the potential to set the interim obligation in motion subsequent to withdrawal or denunciation, and there are some examples from practice to support this standpoint. The Government of the United Kingdom is the treaty depositary of the UNESCO Constitution. As has been explained by Her Majesty's Treaty Department, the UK was a party to the UNESCO Constitution, depositing its instrument of acceptance on 20 February 1946.

It withdrew from the treaty with effect from 31 December 1985 but re-joined on 1 July 1997. The re-joining was made by another instrument of acceptance, but there was no record of a second signature. The same holds true for the withdrawals and subsequent re-acceptances of Singapore and the US. Their respective re-acceptances were not preceded or followed by a second signature, but there is also no evidence to suggest that they ever considered themselves, in the time period between withdrawal and re-acceptance, to be bound by Article 18(a) VCLT by virtue of their respective signatures.

Moreover, for States that decide to join the treaty today or in the future, it is not certain that Article 18(a) will be relevant at all as the signature can be made after the deposit of an instrument of acceptance. Only if a State signs the treaty prior to accepting it will Article 18(a) be triggered. There might however be room for Article 18(b) VCLT. Article XV, subparagraph 3, stipulates that '[t]his Constitution shall come into force when it has been accepted by twenty of its signatories. Subsequent acceptances shall take effect immediately'. However, this paragraph must be read in light of subparagraph 2, which lays down that '[n]o acceptance shall be valid unless preceded or followed by signature'.

Thus, if a State has signed the treaty prior to the deposit of its instrument of acceptance, the acceptance will be effective as soon as deposited, and there would be no time span for Article 18(b) to apply (although Article 18(a) will apply in the time period between signature and the deposit of acceptance). In contrast, if a State has not signed the treaty prior to the deposit of its instrument of acceptance, it seems like Article 18(b) VCLT could apply in the time period between the deposit of the acceptance and the State's signature of the treaty, providing that the acceptance is still treated as perfected expression of consent to be bound under Article 11 VCLT.

To conclude, the implication of the treaty signature after a State's withdrawal from a treaty is its ability of being acted upon several times in the context of a State re-joining a treaty it has previously withdrawn from. In those circumstances, the State can rely on its old signature, but it does not mean that that signature puts in motion a sort of permanent obligation under Article 18 VCLT not to defeat the object and purpose of a treaty a State as signed and become a party to at some point in time but has subsequently withdrawn from. There is however a good faith duty on part of States when withdrawing from treaties to mitigate the effects of the withdrawal. This duty may be viewed as corresponding with the content of Article 18 VCLT in the sense that conduct which clearly defeats the object and purpose of treaty objectively seem to aggravate rather than mitigate the effects of withdrawal, but it is not an actual application of Article 18 VCLT once a State's withdrawal has become effective.

8.3 Institutional Aspect of Article 18 VCLT

The question of the institutional aspects of Article 18 are several, some of which have been discussed elsewhere.[22] The current section considers the scenario where a State has not signed a pending treaty but is obliged under the rules of the relevant international organisation to submit the treaty to parliament for consideration of ratification. Are States – in an institutional context – in any circumstance in an analogous situation of having signed a treaty, although no physical signature has been formally given? In other words, in order to uncover the proper scope of Article 18 VCLT by recourse to an internal method, does the provision apply in an altered manner in an institutional context?

This was at issue in the *Dutch Seamen's Welfare Foundation v Minister of Transport case*.[23] The Minister of Transport, Public works and Water Management had informed the Rotterdam Seamen's Welfare Foundation that it would not receive any further subsidy from 1 January

[22] Paul Gragl and Malgosia Fitzmaurice, 'The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699, at p 712 discuss the example of EU law and the Member States' obligation to transpose directives within a given time frame. In a very similar fashion to signed treaties, Member States are under no obligation to adopt the relevant measures before the transposition deadline (Case 148/78 *Ratti* [1979] ECR I-1629). However, 'as the Court of Justice Such a detrimental effect can be avoided if the Member States take those measures that are "necessary to ensure that the result prescribed by the directive is achieved at the end of that period"' (Case C-129/96 *Inter-Environnement Wallonie* [1996] ECR I-74011, para 45). Although the Court does not consider this obligation to be a rigid 'stand-still' obligation (M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 179) as Member States retain the right to transpose directives in stages, this 'effectively amounts to a "ratcheting-up" and moving towards the desired object of the EU has clarified, they must nonetheless "refrain from taking any measures liable seriously to compromise the result"' (Case C-129/96 *Inter-Environnement Wallonie* para 49).
prescribed

[23] *Dutch Seamen's Welfare Foundation v Minister of Transport case Council of State*, Netherlands (2005) NYIL 38, 2007, p 498.

2005 onwards. The Foundation objected to this decision, arguing that the withdrawal of funding defeated the object and purpose of the pending 1987 International Labour Organisation (ILO) Convention Concerning Seafarer's Welfare at Sea and in Port, which had been signed by the Netherlands.

The claim failed. The Court pointed out that the text of the ILO Convention was adopted by the ILO Conference on 8 October 1987. However, the Constitution of the ILO does not provide for separate signatures of ILO Conventions by individual Member States but only for their ratification.[24] Accordingly, the Convention could not be said to have been signed by the Netherlands.[25] A situation referred to in Article 18(a) VCLT can therefore not occur in relation to ILO conventions – not being individually signed by Member States – but only in relation to situations referred to under Article 18(b) VCLT.[26]

In essence, the judgment assumes that Article 18(a) VCLT does not apply to treaties which are not subject to signature.[27] This reasoning triggers a pressing question: what if Member States, by virtue of their membership, are deemed to be in an analogous position of having signed adopted ILO conventions so that there is an implied duty not to defeat the object and purpose of such conventions? Within the ILO, conventions and recommendations are drawn up by representatives of governments, employers and workers, and are adopted at the annual ILO Conference. In this context, Article 19(5) addresses the obligations of Member States in case a convention is adopted, and lays down the following:

> (a) the Convention will be communicated to all Members for ratification;

[24] See Article 19(5) of the ILO Constitution, which reads as follows: 'Obligations of Members in the case of a convention … (a) the Convention will be communicated to all Members for ratification; (b) each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action; (c) Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them; (d) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention; (e) if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention'.

[25] *Dutch Seamen's Welfare Foundation v Minister of Transport case Council of State* (n 23) para 2.3.1.

[26] Ibid.

[27] For instance, to treaties which are subject to accession.

> *(b) each of the Members undertakes that it will,* within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, *bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action*;
> […].[28]

Conventions and recommendations are drawn up by representatives of governments, employers and workers and are adopted at the annual International Labour Conference.[29] This Conference has a tripartite composition; each Member State sends four delegates to the Conference: two from the government, and one each from the trade unions and the employers' organisations.[30] As such, it follows that every Member State is involved in the adoption of new ILO conventions.

In light of the drafting history of Article 18 VCLT, it seems somewhat unorthodox that Member States must submit an adopted convention to their government for consideration of ratification but are not required to comply with the interim obligation not to defeat the object and purpose of the pending convention. This is in particular because a central theme in the *travaux préparatoires* was that the interim obligation does not give rise to any duty whatsoever on part of States to ratify the treaty, or even, in good faith as particularly suggested by Special Rapporteur Lauterpacht, to submit the convention to the Government for consideration of ratification. As the ILO Constitution requires States to submit an adopted convention to the Government for a decision on ratification, how can the integrity of such convention be protected if the Member States, awaiting the decision of the Government whether or not to ratify the convention, do not have the obligation not to defeat its object and purpose? If the Government subsequently votes in favour of ratification, how will the treaty be implemented if the State – lawfully – has already taken action which defeats the very object and purpose of the treaty?

The present author is cautious that this does not equal arguing that States are obliged not to defeat the object and purpose of a treaty merely because they participated in the drawing up of the treaty. This is particular since negotiations were clearly deleted from the scope of Article 18 during the drafting procedure. It rather seeks to explore whether States, in some

[28] See Article 19 of the ILO Constitution (emphasis added).
[29] Ibid.
[30] See Article 3 of the ILO Constitution.

circumstances, can be deemed to be in an analogous position of having signed a treaty by virtue of their membership in a particular organisation, such as the ILO, so that the application Article 18(a) VCLT can be 'implied' under such circumstances.

As practice is sparse, the circumstances of the relevant situation at hand and the nature of the relevant convention (and perhaps organisation) will be the guiding factors. In this connection, and for the reasons established above, it might be helpful to distinguish between organisations where the constitutional instrument imposes a duty on Member States to submit an adopted treaty to the Government for consideration of ratification (such as the ILO), and organisations whose constitutional instrument does not impose any duty on States whatsoever (other than the obligation under customary international to conduct itself in good faith in the negotiations of treaty) when a convention has been adopted.

8.4 Concluding Remarks

Adapting the application of Article 18 VCLT to contentious developments in international law and international treaty practice is not easy, especially as there is an absence of examples of States practice seeking to rely on the interim obligation *vis-a-vis* certain contentious events. This chapter has shed light on how Article 18 can be of relevance to certain aspects of international law which have not been fully examined previously. First, this chapter has analysed the implications of a treaty signature after a State's withdrawal from a treaty. Although the signature is still physically valid and displayed after a State's withdrawal, this chapter has argued that the withdrawal terminates the effect of the signature in the sense that the signature is not capable of setting (or maintaining) in motion the interim obligation under Article 18(a) VCLT.

That said, States are under a duty of good faith to mitigate the effects of their withdrawal. This chapter takes the position that this duty corresponds with the gist of Article 18 VCLT in the sense that conduct which defeats the object and purpose of the treaty subject to withdrawal exacerbates rather than mitigates such effects. The most important implication of the treaty signature after withdrawal is that the signature is capable of being acted upon should a State decide to re-join a treaty it has previously left: in such circumstances – should the rules of the treaty require a signature followed by expression of consent to be bound – a State does not have to sign the treaty a second time but would be able to rely on its previous signature.

Secondly, in the context of the institutional aspects of Article 18 VCLT, this chapter has argued that if a State has not signed a treaty, but the constitutive treaty of an international organisation requires Member States to submit a new treaty for consideration of ratification, States are under an implied duty not to defeat the object and purpose of the pending treaty. This duty would terminate of the Government votes against ratification or would continue in force if ratification is accepted. If it were to be otherwise, there would be no checks on the conduct of States in the interim period of awaiting the decision of the Government whether or not to ratify the convention. If the Government subsequently votes in favour of ratification, the treaty's future implementation could be impossible or significantly more difficult it a State – lawfully – has taken action to defeat the object and purpose of the pending treaty.

9. CONCLUSION

It is remarkable that a rule of such fundamental importance for the international legal relations between States has operated in a legal limbo for over 50 years since its adoption and been dismissed for being more exhortatory rather than normative.[31] As noted in the introduction of this thesis, the conclusion and bringing into force of treaties are notoriously challenging and sensitive matters for States. That said, most – if not all – States will typically have to conclude and become parties to at least some treaties in order to maintain effective international relations and remain relevant players in today's international legal and political landscape.[32]

Article 18 of the Vienna Convention on the Law of Treaties (VCLT) is the *only* rule of positive international law which imposes certain restraints on the conduct of States in the procedure of becoming parties to treaties by ensuring that their efforts are not thwarted in the interim period between the adoption and entry into force of a treaty. The provision therefore plays a vital role in the stability of pre-contractual dealings of States and promotes the goodwill and trust amongst them. Without the existence of Article 18 VCLT, there would simply be no legal safeguards in place to ensure that the object and purpose of treaties is still intact at the time they become binding and effective.[33]

There are, however, facets of the interim obligation under Article 18 VCLT which were neither thoroughly considered at the time of drafting the provision nor which have not been clarified by subsequent scholarship, State practice or case-law, but which are inherently capable of raising pressing and thorny questions. As a matter of fact, case-law relating to Article 18 VCLT is remarkably sparse. Very rarely has the provision been directly relied upon by an international court or tribunal in settling a dispute. In the few cases the provision has been adduced by the parties and considered by a court or tribunal, their reasonings have often been premised on certain underlying misconceptions. In addition, State practice – insofar it can be said to exist – is fragmentary and inconclusive. Lastly, prior to this thesis, much of current scholarship was out of date and lacked comprehensive critical and analytical depth.

This thesis has addressed these shortcomings and offered an important, valuable and innovative contribution. It has done so by elucidating the precise contours of Article 18 VCLT,

[31] Shabtai Rosenne, 'Vienna Convention on the Law of Treaties' in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* (North Holland Publishing Company 1984) vol VII, 532.
[32] Although the decision to conclude treaties is an attribute of State sovereignty, see *S.S. 'Wimbledon' UK et al. v Germany* (1923) PCIJ Series A No.1.
[33] It may be recalled that Article 26 VCLT, which imposes a duty on States to perform their treaty obligations in good faith, is limited to treaties in force. Pending treaties do hence not fall within the scope of *pacta sunt servanda*.

demonstrating how States can uniformly utilise this provision in their international legal affairs with other States (and/or international organisations), and illustrating how Article 18 VCLT can be applied to recent and pioneering developments in modern day treaty practice within the broader framework of international law.

It has also demonstrated what implications those developments have for both theory and practice of States in their international legal affairs. To this end, the thesis has added new dimensions to treaty practice under Article 18 VCLT by relying on a variety of examples from recent State practice and a combination of doctrinal and qualitative empirical legal studies, coupled with an internal method. It therefore has the potential of having a practical impact by providing clear and comprehensive guidance of proper treaty practice within the meaning of Article 18 VCLT for State officials, representatives of international organisations and representatives of foreign ministries of States.

The thesis has in particular provided answers to the questions of what the legal character, scope, and content of Article 18 VCLT is. To this end, it has closed several significant gaps by:

a) clarifying the legal basis of the provision;
b) explaining how Article 18 VCLT applies to the notion of the object and purpose of a treaty;
c) assessing what sort of conduct amounts to 'defeating' the object and purpose of a treaty;
d) defining the temporal ramifications of Article 18 VCLT;
e) explaining the role of the principle of good faith in relation to Article 18, assessing the legal nature of the provision and examining what consequences a violation thereof incur;
f) illustrating how Article 18 is positioned within typologies of treaties; and
g) examining the implications of treaty signature after a State's withdrawal from a treaty.

Chapter 2 addressed the legal basis of the provision and demonstrated that Article 18 can be said to draw upon certain features of the private law of contracts by partly borrowing from three domestic concepts: a) the theory of abuse of rights; b) contracts containing obligations to be subsequently performed; and c) the idea of an anticipatory breach. The provision has, however, pursued a broader path than these domestic concepts by offering a more comprehensive and flexible function than to solely protect States from the abusive exercise of rights by other States and prevent a breach of a treaty's 'root' pending its entry into force. This is particular since the focus of the provision is also on the integrity of the treaty by vindicating its effectiveness and ensuring that its object and purpose is still intact and achievable at the time of its entry into

force. In addition, chapter 2 challenged previous arguments in international law scholarship by explaining that Article 18 cannot be said to borrow from the principle of *culpa in contrahendo* as the domestic counterpart to the obligation to negotiate a treaty in good faith. The stipulations of Article 18 VCLT do not apply to mere treaty negotiations but commences at the earliest with signature. *Culpa in contrahendo* therefore has a wider construct than the interim obligation under Article 18 VCLT.

Furthermore, chapter 2 made a significant contribution by clarifying that Article 18 VCLT exists both in its conventional as well as customary form. Already at the time of drafting the provision there was an opinion amongst the special rapporteurs and the members of the International Law Commission (ILC) that the obligation as finally contained in Article 18 VCLT had considerable basis in general international law. That said, even if we adhere to the view that the rule was rather one of progressive development than one of codification, it seems at present to have crystallised into a rule of customary international law and is as such binding on all States with the exception of persistent objectors.[34] This seems to be the viewpoint of the majority of scholarly opinion. In addition, the tendency on part of States which are not parties to the VCLT to still regulate their behaviour to align with Article 18 also attest to this, as – presumably – they would not have done should the provision not also exist in its customary form.

Chapter 3 explained how Article 18 applies in relation to the notion of a treaty's object and purpose. It demonstrated that Article 18 *never* applies to the object and purpose of individual treaty rules, which was not envisaged by the drafters and would contradict the explicit text of the provision but is confined to the object and purpose of a treaty as a whole. There are, however, a myriad of treaties in the current international legal landscape which pursue multiple objects and purposes and there seems to be nothing in the text of the provision or the *travaux préparatoires* which would prevent a flexible application of Article 18 to accommodate the full set of objectives pursued by a given treaty.

For instance, the Comprehensive Nuclear Test Ban Treaty (CTBT) has a threefold objective, which draws on both maintenance of peace and security, the elimination of nuclear weapons and nuclear test explosions, as well as environmental protection. Likewise, human rights treaties are prototypical treaties pursuing a broad range of objectives, ranging from recognition

[34] To the knowledge of the present author, there are no known persistent objectors to the rule contained in Article 18 VCLT.

of dignity, equality and diversity, as well as respect for political, civil, cultural, social and economic rights.[35] Thus, it appears that Article 18 in certain circumstances may be viewed as defining a multifaceted interim obligation which can give emphasis to one or more objectives set out by a treaty, provided that such are clearly identifiable by virtue of having recourse to the treaty's title, preamble, introductory provisions, and the *travaux préparatoires*.

Chapter 4 critically assessed the threshold of 'defeat' and what sort of conduct is required from States under the provision. This chapter therefore carries significant theoretical and practical ramifications for international treaty law and is of great importance for foreign ministries of States and legal advisors. It also offers nuanced and comprehensive guidance for States and their foreign offices as to what good treaty practice entails within the meaning of Article 18 VCLT. Chapter 4 in particular demonstrated that the threshold of the duty not to defeat the object and purpose of a pending treaty is high. By incorporating the word defeat, Article 18 sets a high threshold and should not be confused with an obligation to comply with the actual substance and provisions of a treaty.[36] In fact, the specific stipulations of a treaty are inchoate prior to the entry into force of the treaty, and other from the treaty's final clauses and the possibility of provisional application, a treaty's substantive provisions will not have any effect until the entry into force of the treaty should they not constitute an element to be taken into consideration when defining the overarching *telos* of the treaty as a whole.

From a general point of view, therefore, chapter 4 shows that Article 18 does include an obligation not to do anything which would invalidate the basic purpose of a treaty, affect a State's ability to fully comply with it once in force, or render its entry into force completely meaningless. The drafters of the provisions were favourable of an impossible performance standard, but flexibility is called for in this regard. As such, the assessment of whether a treaty's object and purpose has been defeated is dependent on the nature of the relevant treaty at hand, its subject matter, the circumstances surrounding its conclusion, and recent developments and the current state of international law.

Put in a context, in practice, the provision may take the form an obligation to do nothing which may be prejudicial to the treaty as recognised in *Megalidis v Turkey*. In the context of friendship treaties, acts of severe physical violence – such as direct attacks on important public sector

[35] See e.g., the Preambles of the ICCPR, ICESCR, ACHR, ACHPR, and ECHR.
[36] The only way to give effect to a treaty before its official entry into force is by agreeing on the provisional application of the treaty.

facilities and the laying of mines – as well as grave economic repercussions – such as general trade embargos – will normally constitute a violation of the obligation not to defeat the object and purpose of a Treaty of Friendship, which was demonstrated by *Military and Paramilitary Activities in and against Nicaragua*. Even if said case concerned conducting defeating the object and purpose of a treaty in force, this line of reasoning is still compatible with the high threshold of Article 18 VCLT as acts of severe physical violence and serious economic sanctions objectively serve to significantly sever the friendly relations between two or more States and would hence detach a treaty of friendship of any genuine continuous content or purpose.

Chapter 4 also put forward arguments of importance for the treaty practice of States in the current international law discourse by looking at the application of Article 18 through a lens of due diligence. It challenged the old and somewhat outdated view that Article 18 is a mere obligation of abstention by arguing that in certain circumstances, States may – in order to comply with their due diligence obligations – have to take certain positive actions. This view is admittedly quite limited to treaties which perform specific functions, such as protecting and promoting community interests.

The chapter particularly drew on multilateral environmental agreements as a representative group of treaties containing obligations of conduct in this regard. In relation to environmental law treaties, due diligence under Article 18 calls for a duty on part of States to use all the means at their disposal in order to avoid causing significant and irreparable damage to the environment which would: i) render future entry into force of an environmental law treaty meaningless, impossible or significantly more difficult; ii) alter the *status quo* upon which a treaty was signed or ratified; and iii) significantly impair a State's ability to perform the treaty once in force.

On a more detailed level, and in accordance with settled case-law of the International Court of Justice (ICJ), it can involve a positive duty to: i) adopt appropriate rules and measures, and ensure a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party;[37] (ii) ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an (*ex-ante*)

[37] *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (Judgment) ICJ Rep 2010 p 14, para 197.

environmental impact assessment;[38] and (iii) if the environmental impact assessment confirms that there is a risk of significant transboundary harm, to notify and consult in good faith with the potentially affected State in order to prevent or mitigate that risk.[39]

A violation of Article 18 would then occur if the State manifestly fails to take the appropriate and proportionate steps of due diligence. Importantly, chapter 4 showed that the requirement to exercise due diligence under Article 18 only requires States not to act negligently (as the opposite word to 'diligently'), and responsibility will only ensue if, as a result of acting negligently, harm occurs. In other words, a lack of diligence in the absence of material harm was not sufficient to establish international responsibility, but harm actually has to occur. Accordingly, Article 18 will only be breached when a State has acted negligently, and harm occurred. If a State has acted diligently and harm still occurs, there will be no violation of Article 18 VCLT.

Lastly, chapter 4 added potential new dimensions to the proper application of Article 18 by suggesting that there might be a difference in the extent of obligations imposed by Article 18(a) and 18(b) respectively. The plain language of Article 18 fails to address the (potential) distinction between States which have signed and States which have consented to be bound by a pending treaty. Since Article 18(a) and Article 18(b) VCLT target two fundamentally different steps in the treaty making procedure, Article 18(b) would require a higher degree of conduct oriented towards the content of a treaty than Article 18(a). This is in particular because with respect to Article 18(b), the State has already done everything necessary for the treaty to enter into force.

By expressing consent, a treaty will, typically (although not invariably) become binding on that State on a settled date. In other words, compliance with the treaty's provisions is sooner, rather than later, inevitable. The State has undertaken all available and necessary legal steps for the treaty to become effective, which is materially different from merely signing a treaty because

[38] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) ICJ Rep 2015 p 665, paras 104, 153.

[39] Ibid para 104. This is particularly feasible given the fact that the precautionary approach, the preventative principle, and the obligation to conduct an EIA are now rules of customary international law and constitute composite elements of the general obligation of due diligence. Accordingly, in applying Article 18, States are still obliged to comply with their environmental obligations under customary international law, irrespective of whether the same obligations are codified in the pending treaty and in relation to which Article 18 is currently applied.

subsequent ratification is voluntary, whereby there are no guarantees that the treaty will one day become binding and effective. Again, this line of reasoning is not covered by the wording of the provision itself but some support for this position can be found in scholarship and case-law.

Chapter 5 elucidated questions of great significance for the temporal aspects of Article 18 and clarified questions of core treaty practice which until today have remained unclear. The temporal issues in the application of Article 18 are many and complex. Because they have previously remained unsettled, fragmentary practice of States has developed in this regard. The chapter therefore closes significant gaps in treaty practice and offers a ground-breaking practical contribution by clarifying – on the basis of a range of recent examples from the practice of States – how the temporal difficulties posed by Article 18 can be overcome in practice. There are, in particular, **three** such difficulties as discussed by chapter 5:

First, Article 18(a) stipulates that a State can terminate its interim obligation at any point by making its intention clear not to become a party to the treaty. However, the provision omits to define how a State can make such an intention clear. In addition, the issue is ambiguous as it is also one of subjectiveness: what is clear to one State might not be as clear for another. Chapter 5 clarified that in order to comply with proper treaty practice under Article 18 VCLT when making their intention clear not to become a party to a signed treaty, States should employ a certain degree of formality and preferably send a notification of its intention to the treaty depositary, or – if the treaty involves a limited number of contracting parties – to *all* signatory and contracting States. The issue is one of foreseeability and legitimate expectations and by sending a note to the treaty depositary, other States will clearly know from *what point in time* a State has made its intention clear not to become a party to the treaty and freed itself from the interim obligation under Article 18 lit a. Other States can then adjust their behaviour and expectations accordingly.

Other means, such as implied conduct, are not precluded by the wording of the provision itself but are more doubtful to satisfy the requirements of formality, transparency, and publicity. Accordingly, only under certain very narrowly defined circumstances would implied conduct suffice to express an intention not to become a party to the treaty, and in each and every case, implied conduct has to take place through a public channel and demonstrated in an unambiguous manner. One of the few existing – if not the only – archetypal examples of this is the US practice in relation to the Kyoto Protocol, but this is only because of the open and

public nature of certain statements, the Bush administration *repeatedly* expressing its opposition to the treaty with the view of, internationally, making its position with respect to the Kyoto Protocol clear and unambiguous. Yet, the difficulty remains to determine from what date the State has openly and finally made its intention clear not to become a party, wherefore – to reiterate – formal notifications directly to other signatory or contracting States or to the treaty depositary remain preferable.

Secondly, Article 18(b) specifies that it applies insofar the entry into force of a pending treaty is not unduly delayed but does not designate any formula indicating when the entry into force of a treaty is unduly delayed, or what elements to take into consideration in this assessment. Attempts to fix a time limit – ranging from 12 months to 10 years – were rejected during the drafting negotiations. The assessment of whether the entry into force of a treaty is unduly delayed or not is accordingly dependent upon the particular circumstances of the treaty at hand and must be determined given the nature of the subject matter of the treaty, its complexity, the number of signatory, contracting or States parties, the length of the treaty negotiations, and the amount of political controversy surrounding the operation of the treaty.[40] The entry into force of the CTBT, which opened for signature in 1996, can for instance not be said to be unduly delayed for States which have deposited their instruments of consent to be bound by the treaty. Therefore, under Article 18(b) VCLT – given the particular features of the CTBT and its built-in mechanism which addresses delays in its entry into force – States are still bound not to defeat the object and purpose of the CTBT until the day (should it happen) the treaty finally becomes effective.[41]

Thirdly, chapter 5 offered new reflections as to when a State legitimately can revoke an instrument expressing consent to be bound pending the entry into force of the treaty. The matter has given rise to a bifurcated approach amongst States and international law scholars but is not addressed by the text of Article 18 VCLT itself. Some of the drafters were nevertheless clear on the issue. In their view, an instrument of consent to be bound, once deposited, could not be withdrawn. It is unfortunate that the matter was not further clarified in the *travaux préparatoires*. In modern times, the revocation of instruments expressing consent pending the

[40] Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 254.
[41] The treaty has a built-in mechanism in its Article XIV, paragraph 3, which addresses such delay. The provision requires the UN Secretary-General to convene a Conference of the States that have deposited their instruments of ratification to assess the situation and to decide on further measures to be taken in this regard. Such a conference has been requested on a biennial basis since 1999.

entry into force of the treaty seems to have caused few objections amongst States. This chapter nevertheless challenged the position that a revocation of an instrument of consent to be bound pending the entry into force of a treaty is in each case legitimate. It has demonstrated that the matter should not be taken as lightly in relation to treaties which contain no provision on the right to unilateral withdrawal, and – by their very nature – are not subject not unilateral treaty withdrawal.[42]

In such circumstances, by analogy to Articles 54 and 56 VCLT, chapter 5 argued that a State can only revoke its instrument of consent if none of the other contracting States object (i.e., albeit implicitly, consent), the State wishing to revoke its consent can prove that the parties intended to admit such possibility, or if it can be proven that such a right can be implied by the nature of the treaty. This approach strikes a balanced compromise between stability and sovereignty in international treaty law. The expression of consent to be bound is after all a legal act under international law which should be seriously given and changes in government or other changes in circumstances, including political and financial, do not affect a State's duty to comply with its international obligations. Accordingly, when a treaty does not allow for unilateral withdrawal, it would be disruptive for legal certainty, the stability of treaty relations, the trust and goodwill amongst the treaty beneficiaries and the treaty machinery as a whole should it be possible for States to go back on its status as a presumptive party and its commitment to sooner rather than later becoming an actual party to the treaty.

Chapter 6 addressed the role of good faith in relation to Article 18 and showed that the drafting history of the provision clearly conveys that good faith inspired the very adoption of Article 18 itself. Although the text of Article 18 VCLT itself omits any explicit reference to the principle of good faith, international courts and tribunals have likewise noted that the interim obligation is an embodiment of the principle of good faith.[43] Very importantly, chapter 6 also firmly demonstrated that Article 18 VCLT is a legal and not merely moral obligation under international law. The alleged moral nature of the interim obligation as initially stressed by the Harvard Research Group and the First Special Rapporteur on the Law of Treaties was quickly abandoned by the subsequent rapporteurs and the members of the ILC. Hence, the important

[42] A prime example being the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[43] *A.A. Megalidis v Turkey*, Reported in Annual Digest 1927-28, p 395; *Tecmed SA v Mexico*, ICSID Case No ARB(AF)/00/02, Award of 29 May 2003 para 70 (emphasis added); *MCI Power Group LC and New Turbine Inc v Ecuador*, ICSID Case ARB/03/6, 31 July 2007 para 114; T-231/04 *Greece v Commission* [2007] ECR II-63, paras 85–86.

role played by good faith in relation to Article 18 does not have an impact on the legally enforceable nature of the provision.

Moreover, Article 18 has never been couched in non-binding terms by international courts and tribunals and as mentioned previously, scholars and State practice today agree that the rule is legally enforceable. Good faith in the form of a general principle is construed as a duty with no corresponding right. In contrast, good faith as part and parcel of the obligation contained in Article 18 VCLT takes the form of a duty with a corresponding right. A signatory and/or contracting State owes a duty to other signatory and/or contracting States not to defeat the object and purpose of a pending treaties. In case of breach, other States can insist on compliance. Chapter 6 hence showed that Article 18 is not a mere synonym to the independent principle of good faith, but there was a conscious effort on part of the VCLT drafters to include Article 18 as a primary rule of international law into a binding treaty.

Chapter 6 also demonstrated that the good faith nature of Article 18 VCLT and the vagueness of its language does not necessarily affect its compellingness. Contemporary views of scholars and States confirm the legally binding nature of Article 18 VCLT. Even though couched in uncertain and vague language, Article 18 – because being based on good faith – ought to be perceived as just and reasonable by States and will as such exert a stronger pull towards compliance. Article 18 VCLT therefore promises more than the principle of good faith on its own. As a primary rule of international law and by analogy to the fair and equitable treatment rule in investment arbitration, Article 18 is capable of being enforced as a means of decision making in and of itself and does as such distinguish itself from the general principle of good faith.

The precise function that the principle of good faith has in relation to Article 18 VCLT is difficult to define, not least because the very concept of good faith in and of itself is elusive. It can be said, however, that good faith informs structures of reasoning and interpretation in relation to the application of Article 18 as a primary rule of international law and plays a very important role in articulating the precise scope and content of the interim obligation in a content specific case. Good faith can fill gaps in the application of Article 18 and guide States in exercising their sovereign rights and obligations pending the entry into force of a treaty. In particular, the principle incorporates considerations of equity and reasonableness in pre-contractual dealings.

As such, chapter 6 made clear that by means of good faith, Article 18 ensures that signatory and/or contracting States have a duty to act honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others pending the entry into force of a treaty. Importantly, good faith also fortifies the elements of certainty and predictability in the application of the interim obligation by prohibiting inconsistent behaviour. It prevents States from drawing advantages from their own wrongdoing or disloyal conduct, regardless of the actual intention of the relevant State. When interpreting the provision, good faith can ensure that Article 18 is construed so as to ensure that any discretion on part of States is not exercised unreasonably or arbitrarily, and that due regard is paid to the interest and legitimate expectations of other signatories or State parties.[44]

It may also be appropriate to apply Article 18 through a lens of other principles which hinge on good faith aspirations. The principle of estoppel can operate to ensure that Article 18 prohibits a State from contradicting a clear statement of fact made towards other States parties or signatories, leading that party to change its position to its detriment or to the advantage of the State making the statement. This may be particularly relevant in circumstances when a State has made clear and consistent representations that it will ratify a signed treaty. If a State then, to its detriment, relies on this representation and changes in position in reliance on the statement, the State making the statement would be estopped from contradicting it.[45] The theory of abuse of rights can operate to ensure that a State is prohibited from exploiting a signed treaty by abusing its discretion to ratify the signature (Article 18(a)), or, in relation to Article 18(b) VCLT, express its consent to be bound by a treaty but, pending the entry into force of the treaty, abuse the fact that it is not just yet legally bound by the provisions of the treaty in a manner which is contrary to the rights of other States.

Lastly, and very importantly, chapter 6 demonstrated that since Article 18 is a legally binding obligation under international law, a transgression of the provision would entail the wrongful State's international responsibility under ARSIWA. The chapter has great practical implications for foreign offices and practitioners by explaining how States can overcome the vague language of Article 18 to turn it into an effective legal tool, promote their view and utilise

[44] For an overview of the role of good faith in the exercise of discretionary treaty powers, see Ulf Linderfalk, 'Good Faith and the Exercise of Treaty-Based Discretionary Powers' (24 May 2016). Available at SSRN: https://ssrn.com/abstract=2783644 or http://dx.doi.org/10.2139/ssrn.2783644.
[45] See further chapter 8.

the provision during negotiations concerning a potential dispute settlement of a violation of the interim obligation. There are other means than judicial avenues capable of changing behaviour of other States. By for instance exercising pressure – political, financial, or otherwise – unilateral and/or multilateral efforts might induce a State to cease contested conduct and comply with its interim obligation under Article 18 VCLT and might prove more efficient than a formal finding of a violation of Article 18 by an international court or tribunal.

Chapter 7 illustrated that Article 18 does not distinguish between different categories of treaties in its practical application. Not only is it not possible to firmly categorise a treaty into a separate typology – a treaty is almost never entirely law-making or entirely contractual but is likely to belong to more than one category at the same time – but the wording of the provision itself does not envisage a special treatment for a certain type of treaty, which, for instance, Article 60(5) – concerning the (im)possibility of terminating or suspending human rights treaties and humanitarian treaties as a result of their material breach – does.

Accordingly, treaty typologies would add little value as a legal analytical tool *vis-a-vis* Article 18 VCLT. It might be a challenging task to apply the provision to treaties pursuing very broad and general aims, such as human rights treaties, but it does not necessarily forestall a proper application of Article 18 to such treaties. For instance, whereas inflicting torture on an individual pending the entry into force of a convention prohibiting torture might not necessarily alter the *status quo* upon which the treaty was signed or ratified, the ICJ in *Military and Paramilitary in and against Nicaragua* simultaneously recognised that severe physical violence could amount to defeating the object and purpose of a treaty of friendship. *Mutatis mutandis*, the infliction of torture appears to defeat the object and purpose of a treaty prohibiting the very practice of torture. Chapter 7 also showed that the only characteristic shared by certain types of treaties which may warrant a slightly different approach in the application of Article 18 is the category of treaties which establish treaty monitoring bodies. Such bodies could be bestowed the mandate to decide on whether contested conduct of a State violates Article 18 VCLT or not.

Chapter 8 offered insights on aspects of Article 18 which have not been exhaustively examined by scholarship. Firstly, the chapter analysed the implications of a treaty signature after a State's withdrawal from a treaty. Although the signature is still physically valid and displayed after a State's withdrawal, the withdrawal terminates the effect of the signature in the sense that the signature is not capable of setting (or maintaining) in motion the interim obligation under

Article 18(a) VCLT. That said, the duty of States to mitigate the effects of their withdrawal. This chapter takes the position that this duty corresponds with the gist of Article 18 VCLT in the sense that conduct which defeats the object and purpose of the treaty subject to withdrawal exacerbates rather than mitigates such effects. The most important implication of the treaty signature after withdrawal is that the signature is capable of being acted upon should a State decide to re-join a treaty it has previously left: in such circumstances a State does not have to sign the treaty a second time but would be able to rely on its previous signature.

Secondly, in the context of the institutional aspects of Article 18 VCLT, chapter 8 demonstrated that if a State has not signed a treaty, but the constitutive treaty of an international organisation requires Member States to submit a new treaty for consideration of ratification, States are under an implied duty not to defeat the object and purpose of the pending treaty. If it were to be otherwise, there would be no checks on the conduct of States in the interim period of awaiting the decision of the Government whether or not to ratify the convention.

In answering the research questions, the thesis examined some of the most representative cases which have been of most relevance in defining the contours of Article 18 and demonstrated how – in instances where a certain court's understanding of the provision has been misconceived – a more persuasive application would have taken place. In fact, an overview of case-law developed by international, national and EU courts and tribunals unfortunately yields little guidance as to the parameters to consider when applying the interim obligation and determining what sort of conduct amounts to defeating the object and purpose of a treaty.

In addition, courts and tribunals have embraced very divisive interpretations of Article 18 VCLT. There was ultimately no uniform understanding of how the provision applies in practice. This thesis has provided answers to these shortcomings. The practical and theoretical ramifications advanced provide guidance to judges, scholars, representatives of States, and legal advisors of foreign offices. The thesis as such offers support to relevant practitioners to better understand what sort of conduct is expected from their States in the course of becoming parties to treaties and how they can successfully adduce Article 18 VCLT in relation to other States' potential non-compliance.

By incorporating empirical observations on States' policies or practises in relation to Article 18 VCLT, the thesis has sought to advance a more nuanced and practically feasible apprehension

of the provision to be readily workable in practice.[46] It has shaped the theoretical underpinnings of Article 18 in light of contemporary practice of States and concretised how the application of the provision can and should operate in practice. Accordingly, and because the issue of becoming party to treaties is virtually something which concern each State in the international community as a whole, this thesis has carried weight at a global level on both theoretical and practical issues which pertain to a wide range of actors, including States, legal advisers in foreign ministries and international organisations, legal practitioners, representatives of States, and national and international judges.

There are certain further unaddressed questions which may lend themselves to future consideration, but which are not strictly relevant to the scope of the thesis. For instance, within the European Union (EU) legal order, States may be required to take positive action to comply with certain legal standards even before treaty negotiations have been concluded, i.e. even before a treaty has been signed or consented to.[47] In fact, when becoming new EU Members, States will have to fulfil what is known as the 'Copenhagen criteria'.[48] The threshold of compliance with the Copenhagen criteria and requirements for EU membership is not low, and *de facto*, new EU Member States, even prior to the commencement of and during negotiations,

[46] Yet being mindful of the modest number of respondents.

[47] For an overview of the relationship between EU law and international law, see Jan Wouters et al., *International Law: A European Perspective* (Bloomsbury 2018). For an overview of treaty law and EU law, see Giuseppe Pascale and Sara Tonolo (eds), *The Vienna Convention of the Law of Treaties: The Role of the Treaty on Treaties in Contemporary International Law* (Edizioni Scientifiche Italiane 2022). The criteria for accession to the EU are provided for in Article 49 of the Treaty of European Union (TEU). Article 49 TEU also refers to additional 'conditions of eligibility agreed upon by the European Council [which] shall be taken into account'. These conditions were codified in 1993, when the EU acknowledged the membership prospect of central and east European countries. According to what have become known as the 'Copenhagen criteria', EU membership requires the candidate country to demonstrate: (i) the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; (ii) the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; and (iii) the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union, see Presidency Conclusions, Copenhagen European Council, 21–22 June 1993. Further on the Copenhagen criteria, see Marise Cremona, 'Accession to the European Union: Membership Conditionality and Accession Criteria' (2001) 25 Polish Yearbook of International Law 219; Frank Hoffmeister, 'Earlier Enlargements' in Andrea Ott and Kirstyn Inglis (eds) *Handbook on European Enlargement* (Springer 2002) 90; Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Bloomsbury 2004) 17; Christophe Hillion, 'Accession and Withdrawal in the Law of the European Union' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 127-128; Steven Blockmans, 'Raising the Threshold for further EU Enlargement: Process, and Problems and Prospects' in Andrea Ott and Ellen Vos, (eds) *Fifty Years of European Integration—Foundations and Perspectives* (TMC Asser 2009).

[48] On the latest formulation of the accession procedure: eg the amendments proposed to Art 57 on the 'Conditions and procedure for applying for Union membership' at the European Convention on the future of Europe: http://european-convention.europa.eu/EN/amendments/amendments7b33 (last accessed 15 July 2022).

have to comply with the same legal standards as required after the accession has become effective.[49]

As treaty negotiations are not covered by the scope of Article 18 VCLT, this example is not strictly relevant to the present thesis. However, this example is demonstrative of the fact that within some international organisations, there might be a desire to regulate the behaviour in negotiating treaties and impose certain measures which limit their freedoms in this procedure. Within the EU, ensuring that potential new Member States must take positive action to bring their laws in policies in line with EU standards even before the treaty has been concluded act as a layer of guarantee that negotiations are genuine and sincere and that neither party will take action to thwart the effort of the other. To reiterate, however, treaty negotiations are strictly outside the scope of limitations imposed by Article 18 VCLT and are to this end irrelevant for the purposes of the present study.

Article 18 is – no doubt – a rule of international law which in many ways is perplexing from both a theoretical and practical point of view. Given the uncertainties which have surrounded the provision since its very adoption, this thesis is hopefully a welcomed contribution for not only scholars and academics but also for States and representatives of foreign offices, representatives of international organisations who work with the conclusion and entry into force of treaty, judges, as well as legal advisers who advise and litigate on matters of the entry into force of treaties. The thesis has exposed the opaqueness of Article 18 to thorough research and particularly elucidated how:

- States can enhance their reliance on this provision in practice;
- the function and purpose of Article 18 can be further reinforced in international relations and;
- Article 18 VCLT can be turned into an effective legal tool in dispute settlement procedures between States, be it within or outside the context of legal means of dispute settlement procedures.

[49] See also Robert A Feldman and C. Maxwell Watson, 'Enlarging the EU: Accession Requirements and the Central European Candidates' in International Monetary Fund, *Into the EU: Policy Frameworks in Central Europe* (IMF 2002); Phedon Nicolaides, 'Negotiating Effectively for Accession to the European Union: Realistic Expectations, Feasible Targets, Credible Arguments' (1998) 1 EIPASCOPE 1.

Hence, whereas the practice on Article 18 has up until this point been very fragmentary and inconclusive, future treaty practice will hopefully witness a more uniform and consistent development in this regard.

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APPENDIX A

Questionnaire on the Obligation not to Defeat the Object and Purpose of a Treaty Prior to its Entry into Force

Part I:
Article 18 of the Vienna Convention on the Law of Treaties

1. **The Character of Article 18 VCLT:**

Do you consider Article 18 VCLT to be a legally binding obligation under international law? If no, please explain how you understand the legal nature and character of Article 18 VCLT.

2. **The Role of Good Faith:**

In your opinion, what role does the principle of good faith play in relation to Article 18 VCLT? Please give the reasons for your answer.

3. **Making Intention Clear not to Become a Party to the Treaty:**

To your knowledge, is a formal procedure necessary for a State to make its intention clear not to become a party to the treaty under Article 18(a) VCLT (sometimes referred to as of 'unsigning')? If not, please indicate your opinion on how a State can make its intention clear not to become a party to the treaty under Article 18(a) VCLT.

4. **Withdrawal of Instrument of Ratification:**

In your opinion, is the withdrawal of an instrument expressing the State's consent to be bound prior to the entry into force of the treaty envisaged under Article 18(b) VCLT? Please explain.

5. **Extent of Obligations:**

Is there any difference in terms of the extent of the obligations imposed by Article 18(a) and Article 18(b) VCLT respectively, e.g. would Article 18(b) require a higher degree of conduct towards the content of the treaty than Article 18(a)? If yes, please explain.

6. **Article 18 VCLT and the provisional application of treaties:**

Does the application of Article 18 VCLT extend to the provisional application of treaties under Article 25 VCLT, or is there a certain sense of exclusivity between said provisions? Please explain.

Part II:

Miscellaneous

1.Confidentiality and Anonymity:

The information provided will remain anonymous. If you so wish, your specific institutional affiliation will not be mentioned. Please indicate below if this is the case. All further requests you may have concerning confidentiality will be respected.

2. Categorisation of the information provided:

For the purposes of analysing the information provided, could you kindly specify whether your responses are personal or institutional?

Thank you for your participation. Your time, expertise and experience are very much appreciated.