The European Journal of International Law Vol. 24 no. 4

Book Reviews

Duncan B. Hollis (ed.). ***The Oxford Guide To Treaties***. Oxford: Oxford University Press, 2012. Pp. lxviii + 804. £125.00. ISBN 9780199601813.

In the words of editor Duncan Hollis, *The Oxford Guide to Treaties* 'is a big book' (at vii). Yet, it is relatively small and accessible considering its ambition to 'explore treaty questions from theoretical, doctrinal, and practical perspectives' (at 4).

The *Guide* stands out from its potential competitors in several ways. To start with, it is an edited volume, not a single scholar's work, such as Anthony Aust's *Modern Treaty Law and Practice*. Secondly, it is not rigidly focused on the Vienna Convention on the Law of Treaties (1969) (VCLT) (unlike the commentaries reviewed by Christian Djeffal in this issue), even though it certainly takes the treaty of treaties seriously. By contrast to those works that dissect the VCLT from beginning to end, Hollis' approach allows for consideration of issues important for modern treaty-making but not covered by the VCLT, including treaty-making by subjects of international law other than states, alternatives to treaties, normative fragmentation, the role of NGOs, and the domestic application of treaties. Moreover, as Hollis rightly points out in his introduction, many of the VCLT's provisions 'leave a false impression of actual practice' (at 3). Thirdly, the *Guide* contains a worthwhile final section with sample treaty clauses, which serve as illustrations to the individual chapters, as well as providing creative or innovative examples to those who work with treaties.

The book starts with a treatment of 'Foundational Issues', followed by 'Treaty Formation', 'Treaty Application', 'Treaty Interpretation', and 'Avoiding or Exiting Treaty Commitments'. Some contributors are full-time practitioners, and many of the contributing academics have some or more experience in practice. Most chapters are meticulous stabs at the assigned topic, but at the same time are fluently written, well-structured, and accessible. Often they are no mere descriptions of doctrine, displaying a thorough knowledge of developments – recent and in the past – as well as analysing the consequences of ongoing uncertainties and anomalies. For example Swaine's Chapter 11 on Treaty Reservations is a lucid and detailed account, dissecting the debate between 'permissibility' and 'opposability' advocates and resulting uncertainties.

Considering the *Guide*'s combined theoretical, doctrinal, and practical ambitions – 'it would be a mistake to characterize this book as some sort of practitioner's manual'(at 7) – it could have benefited from a more outspoken theoretical or normative stance. While Hollis suggests that more attention should be paid to the *functions* of treaties regarding the question of how treaties are defined and (differently) regulated – more on this below – this is not a consistently recurring theme in other parts of the book. Primarily the *Guide* contains doctrine and practice, but – and this is perhaps how Hollis' insistence on the theoretical dimension should be understood – shows awareness 'of the theories that generated a particular treaty law' (at 7).

To emphasize the importance of treaty law Hollis states in the introduction that 'treaties dictate the content of international law, from trade to the environment, from human rights to aviation' (at 8). Without doubt he is correct that treaties are the most important formal source of adopted international law. But whether it is true that their contents dictate the fields they cover is a different question. In human rights, for example, one of the most important instruments recently adopted was the UN Guiding Principles on Business and Human Rights. As regards trade law, negotiations in the WTO have been stuck for 20 years already, so that WTO law-making mainly takes the form of TBT Committee decisions and Appellate Body

judgments. In international criminal law, both substantive and procedural law have been shaped primarily by the judges of the international criminal courts. In the field of aviation most UK air services agreements are 'supplemented by confidential MOUs' (at 58). In the area of environmental protection, many treaties are mere frameworks within which states cooperate to adopt instruments in non-treaty form, such as decisions of the Conference of the Parties, developing much of the substantive rules of the regime. One theme of this review will be to explore to what extent the *Guide* takes into account such developments, and considers the future role of treaties and how to preserve or strengthen it. Some contributors do mention these challenges to (the law of) treaties, but only a few address them innovatively.

Section I of the *Guide* covers Foundational Issues, with 'foundational' denoting issues related to treaty-*making* (at 4).

Hollis (Chapter 1 'Defining Treaties') undertakes the difficult task of defining treaties in an original, refreshing way. Definitions of a concept can be constitutive (by listing essential elements of a concept) and this is the way international lawyers usually go about defining treaties. But definitions can also be differential (by noting relationships and differences with other concepts) or functional (by pointing out what a concept does or how it works) (at 11). Hollis suggests further fine-tuning the treaty concept for different contexts in which it operates: international law, domestic law, and international relations.

It is through this approach that Hollis forwards some cautious criticism of the law of treaties and the VCLT. He criticizes that Article 2(1)(a) VCLT is exclusively constitutive and does not differentiate the treaty from other agreements, perpetuating the difficulty in distinguishing treaties from other international agreements. From a functional perspective, he notes that the functions fulfilled by modern treaties vary widely – in terms of *how* treaties regulate, *what* they regulate, and *who* enforces them. The 'singularity of the treaty concept', he argues, does not acknowledge this growing diversity and is particularly 'ill-suited to dealing with multi-stakeholder issues' and public goods (at 43). Treaty-specific compliance mechanisms, for instance, are situated entirely outside the law of treaties, which results in the law of treaties losing relevance for growing parts of treaty practice. For each of the three aspects – the how, what, and who – Hollis suggests disaggregation of the treaty along functional lines (at 40, 41, 43). He cautiously suggests 'defining treaties by what they do' (at 36) and potentially developing specialized treaty law to deal with the differences in treaty functions.

Because the themes introduced in this chapter are indeed foundational and compelling issues, one wishes they had been explored further. First, it would have been worthwhile to dig deeper into the comparative effectiveness of different types of treaties and also other types of instruments. By giving a functional account of what treaties are, Hollis raises but does not answer the question whether (certain types of) treaties fulfil these functions effectively, and if non-treaty instruments would perform the same functions better. The practical ambitions of the *Guide*, aiming to 'better inform those who actually work with treaties' (at 7), would have benefited from such an examination.

Secondly, many of the 'definitional' issues stipulated in this chapter actually could be restated as normative issues. Thus it could be asked whether states should be allowed to dispose of major global issues in non-binding agreements of uncertain impact, and why they do this in the first place. Hollis' 'dissaggregation' argument is on target, but to what alternative framework should it lead? These are difficult questions. Yet to maintain the attractiveness to states of legal instruments over non-legal ones, they will have to be addressed. Otherwise practitioners will continue to choose non-legal alternatives to treaties to coordinate their policies.

The author of *Modern Treaty Law and Practice*,[1] Anthony Aust, in Chapter 2 discusses one of the alternatives to treaty-making: the Memorandum of Understanding (MOU), or 'political agreement'. He defines the MOU as an instrument or agreement 'concluded between states

[1] A. Aust, *Modern Treaty Law and Practice* (2nd edn, 2007). As the *Guide* suggests (at 4, n. 16), that work is 'fairly well earmarked in academic circles'.

which they *do not intend to be governed by international law'* (at 47–48). As the seasoned executive advisor that he is, he expresses worries that ministries other than Foreign Affairs are extensively entering into MOUs, yet often unaware of the dangers this may bring about – such as drafting that results in a confusing mix of treaty and MOU language (at 64). With these dangers in mind, the chapter aims to draw out the distinctions between a treaty and an MOU, clarifying the benefits as well as some of the drawbacks in using MOUs.

Aust's treatment of MOUs provides a rich account of this type of alternative instrument. There are, however, other types of non-treaty instruments, which either present alternatives to a treaty or are intimately connected to treaty-making. For instance, post-treaty instruments (PTIs), as I suggest they may be labelled, are instruments adopted by consensus or a large majority of the treaty parties within a forum (Conference of the Parties) created by treaty. Such PTIs determine the meaning of treaty provisions and thus are evidence that the contents of a treaty are hardly ever conclusive. Exemplary of this development is the Kyoto Protocol, which required the negotiation of the three-fingers-thick post-treaty Marrakesh Accords before the Parties knew what was and was not expected of them.

The issue of PTIs is adequately addressed in the *Guide*'s section on Treaty Application (though arguably it should rather have been treated as a foundational issue). In Chapter 17, Geir Ulfstein approaches PTIs from the broader perspective of 'Treaty Bodies and Regimes'. Treaty bodies are organs established by treaty but lacking the status of a formal international organization. Ulfstein notes that 'treaty law does not have much to say about treaty bodies' competences, … the legal status of their decisions, or … international legal personality' (at 428). In an earlier work, Ulfstein and his co-author Robin Churchill had argued that, due to their self-governing nature, COPs should be regarded as *ad hoc* IOs and that hence to some extent the law of international organizations should apply to their activities as a complement to the law of treaties.[2] Now Ulfstein acknowledges that the conscious choice of states not to establish a formal IO is hard to reconcile with applying institutional law.

Both institutional law and treaty law are thus – intentionally – kept at bay from governing treaty bodies and their lawmaking activities. Through this strategy powerful states attempt to keep their grip on the decision-making process in COPs. When not complied with, PTIs are subject only to a treaty regime's compliance body, over which the COP's powerful members wield control as well, and about which neither treaty law nor the law of state responsibility has much to say.[3] Therefore Ulfstein wonders if 'treaty bodies may be charged with contributing to a deformalization of international law' and may upon analysis 'be seen as less accountable than traditional IOs' (at 429).

One of the reasons for the recourse to PTIs and MOUs is the static character of treaties and the difficulty of formal amendments. These aspects of treaties also receive skilful attention (Jutta Brunnée, Chapter 14 'Treaty Amendments'). Brunnée points out that Articles 39–41 VCLT were phrased broadly and contain only residual procedural rules. Most treaties contain their own amendment procedures, and particularly multilateral treaties display an 'infinite range of variations' (at 365). As Brunnée emphasizes, the design of amendment procedures is premised on a balance between stability and dynamism. Treaties on subject matters requiring dynamism (such as environmental protection) in particular contain all sorts of smart constructions to facilitate amendment, such as 'opt-out' mechanisms, or multiple amendment procedures for different

[2] Churchill and Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *AJIL* (2000) 623, at 658–659 (arguing that treaty bodies are 'ad hoc IGOs' to which international institutional law should be applied as a supplement to the law of treaties).

[3] Sand, 'Institution-Building to Assist Compliance with International Environmental Law: Perspectives', 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (1996) 774.

parts of a treaty. One implication of such constructions is that they 'shift powers to executive decision-making in domestic systems that require legislative approval for formal international commitments' (at 362). Yet, even these techniques frequently prove too rigid in practice to preclude recourse to the post-treaty instruments discussed above. Taken together, the chapters by Ulfstein and Brunnée support claims for the need for further development of legal instruments that are more dynamic than amendments, but provide more legal certainty and formal procedures than the practice of post-treaty instruments within treaty bodies.

The section 'Who Can Make Treaties' also contains a number of noteworthy contributions. Tom Grant's Chapter 5 'Other Subjects of International Law' provides useful basic information on the possibility of legal agreements with federal units, indigenous peoples, external territories, insurgent groups, and private actors as parties. It insightfully includes a short section on responsibility, which may often be incurred not by the 'other subject', but by the state to which its conduct is attributable.

Grant's concluding remark that the (international) *obligations* of 'other subjects' have not grown 'in complete symmetry' with their (international) *rights* (at 148) might have deserved more attention, especially as regards private actors. He notes that Bilateral Investment Treaties (BITs) frequently grant rights to private investors to institute arbitral proceedings against the host state. Yet he does not mention that the BITs may also lead to a reduction of investors' obligations, as corporations can often refer to these treaties to exonerate themselves from their obligations deriving from the domestic legal system of the host state.[4] No similar option for nationals of the host state exists to take refuge to an international forum to seek justice, e.g., if the domestic authorities fail to act to protect their rights *vis-à-vis* a foreign multinational. More generally, *authorizing* private parties by way of a treaty goes back to at least 1923, as Grant explains (at 142–143). By contrast, creating *duties* for private parties through an international agreement is still thought of by many as an unwise idea.[5] This debate should not be dominated by doctrinal arguments. As Grant himself remarks, 'the willingness of other parties [i.e., states] to conclude an international agreement is at least as consequential as general rules announcing who can (or cannot) do so' (at 143).

Kal Raustiala (Chapter 6 'NGOs in International Treaty-Making'), provides a detailed account of NGOs as – very visible – participants in treaty processes (including negotiation and implementation). Their rise to the treaty stage has been entrenched by norms of IOs on transparency that facilitate NGO participation. A recent factor that has propelled the activities of NGOs even further is the blurring of international and domestic issues. As a result of this development it is no longer only pro-international, progressive NGOs such as Greenpeace and Human Rights Watch who fly all over the world to diplomatic and follow-up conferences, but also their more inward looking, conservative counterparts such as the US-based National Rifle Organization. Then there are the so-called 'GONGOs',[6] NGOs sponsored by authoritarian governments. In other words, the whole spectrum of lobbyists one would expect in domestic capitals has shifted towards where the power is.

Raustiala does not steer away from the million-dollar question: how much influence on the content of treaties do NGOs really have and by what means, considering their lack of a formal vote? He argues that the *visible* flurry of activity must be distinguished from NGOs' *actual* significance. His core proposition in this debate is that NGOs are significant, precisely because they

[4] See, e.g., PCA, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (PCA Case No. 2009–23), 'Third Interim Award on Jurisdiction and Admissibility', 27 Feb. 2012.

[5] Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *AJIL* (2007) 819; Knox, 'Horizontal Human Rights Law', 102 *AJIL* (2008) 1. For opposite views see Weissbrodt and Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *AJIL* (2003) 901.

[6] GONGO stands for 'Government-Organized NGOs': Naim, 'What is a GONGO?', *Foreign Policy,* 18 Apr. 2007, at 96.

'often serve the interests of governments' (at 164).[7] Although they need each other – NGOs are major information suppliers and political legitimators – 'states still largely control the terms of the relationship' (at 164). In particular in the final stages, when decisions are made, states retreat into a 'proliferation of working groups and informal meetings' (at 168–169) to which NGOs do not have access. Limiting the role of NGOs in this way may actually address to some extent the growing legitimacy concern with NGO involvement.

Richard Gardiner's general chapter on treaty interpretation (Chapter 19) is one of the chapters where one would prefer instantly to revert to the author's monograph.[8] Compounding such a vast topic in one short chapter forces him to break off each section at just the moment when things are getting interesting. In that sense, Catherine Brölmann (Chapter 20 'Specialized Rules of Treaty Interpretation: International Organizations') and Başak Çali (Chapter 21 'Specialized Rules of Treaty Interpretation: Human Rights') were given more manageable tasks. Both take nuanced views and do not over-emphasize the 'special' characteristics of interpretation in these two areas. As Çali remarks, Article 31 VCLT is so generally phrased that it would be absolutely impossible to characterize a method of interpretation as being situated outside that Article's scope. In any field of international law, she argues, interpreters will have to grapple with and make their peace with it. In human rights, the result emerging from interpretory practice is a dominating role for the principle of effectiveness.

According to Brölmann, the rules of interpretation for IOs should be seen 'not as a separate regime, but rather as a version of the VCLT-framework to which additional or supplementary approaches have emerged' (at 508–509). A central part of her argument is nonetheless that in interpreting constitutive treaties, the practice and instruments of the IO are gaining more and more weight over the practice and intentions of the constitutive agreement's original drafters, the member states. Also the act of interpreting is increasingly performed by the IO's (judicial) organs.

The theoretical (sub-)ambition of the book would have called for including a more theoretically oriented, more critical contribution on interpretation. There is too much theoretical rethinking going on as regards law-making by interpretation to be disregarded.[9]

Section 6, the final section of the *Guide*, contains sample treaty clauses ordered by topic. Thousands of treaties, MOUs, and subsequent agreements in the worldwide web are only a mouse click away. Are practitioners really in need of such a paper database? Hollis is well aware that he cannot aim for completeness. His aim is broader: '[w]hat the current set of sample clauses *does* offer is a different lens for understanding the earlier explanations of treaty law and practice' (at 652). Indeed, many of the sample clauses also figure as examples in the individual chapters, and each set of clauses is preceded by a short introduction by Hollis, with references to the relevant chapters.

The clauses section clearly has no normative ambition. It does not attempt to pass judgment on the merits of certain clauses. This is generally not problematic, but one wonders whether the inimitable title 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests' should really be in here as an example of innovative law-making. The same goes for the infamous Article 2 of the UNFCCC. State representatives are smart enough to come up with such concoctions. They do not need further stimulation.

The Oxford Guide to Treaties fills some important voids. Rather surprisingly, a comprehensive book on treaties did not exist hitherto, and its ventures beyond the VCLT lead it to explore some

[7] This is a position that Raustiala has long held: see also Raustiala, 'The 'Participatory Revolution' in International Environmental Law', 21 *Harvard Envt'l L Rev* (1997) 537.

[8] R.K. Gardiner, *Treaty Interpretation* (2007).

[9] E.g., M. Koskenniemi, *From Apology to Utopia* (2nd edn, 2005), at 333–344; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012).

of the more thrilling aspects of treaty law. The *Guide* forms an excellent starting point for further research on such grand topics as interpretation, while some chapters on the narrower issues are so complete that the practitioner will find all she needs. Since a consistent theoretical or normative hook for the contributors on which to hang their evaluations is lacking, the *Guide* does not rise much above the sum of its parts. Yet these parts are highly valuable, providing a useful point of (first) reference for both practitioners and academics.

Individual Contributions

Duncan Hollis, Introduction;
Duncan B Hollis, Defining Treaties;
Anthony Aust, Alternatives to Treaty-Making: MOUs as Political Commitments;
Olufumi Elias, Who Can Make Treaties? International Organizations;
Marise Cremona: Who Can Make Treaties? The European Union;
Thomas Grant, Who Can Make Treaties? Other Subjects of International Law;
Kal Raustiala, NGOs in International Treaty-Making;
George Korontzis, Making the Treaty;
Curtis A. Bradley, Treaty Signature;
Robert E. Dalton, Provisional Application of Treaties;
Arancha Hinojal-Oyarbide and Annebeth Rosenboom, Managing the Process of Treaty Formation-Depositaries and Registration;
Edward T. Swaine, Treaty Reservations;
Syméon Karagiannis, The Territorial Application of Treaties;
David J. Bederman, Third Party Rights and Obligations in Treaties;
Jutta Brunnée, Treaty Amendments;
David Sloss, Domestic Application of Treaties;
Gerhard Hafner and Gregor Novak, State Succession in Respect of Treaties;
Geir Ulfstein, Treaty Bodies and Regimes;
Christopher J. Borgen, Treaty Conflicts and Normative Fragmentation;
Richard Gardiner, The Vienna Convention Rules on Treaty Interpretation;
Catherine Brölmann, Specialized Rules of Treaty Interpretation: International Organizations;
Basak Çali, Specialized Rules of Treaty Interpretation: Human Rights;
Jan Klabbers, The Validity and Invalidity of Treaties;
Bruno Simma and Christian Tams, Reacting against Treaty Breaches;
Malgosia Fitzmaurice, Exceptional Circumstances and Treaty Commitments;
Larry Helfer, Terminating Treaties.

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doi:10.1093/ejil/cht076