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BRITISH INFLUENCE ON THE LAW OF TREATIES

Kasey McCall-Smith *

I. INTRODUCTION

The ideal of codification is that law should be embodied in a systematic written form. It is an ideal never completely realizable, because law that is living contains an element of growth and cannot be finally or exhaustively imprisoned in a series of pro-positions however detailed and numerous.¹

The law of treaties is a cornerstone of international law. No matter which field of international law is being examined, the creation, interpretation, application, and dissolution of international agreements are governed by the law of treaties. The rules governing treaty law are laid out in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention).² The Vienna Convention is widely regarded as the consolidation of the customary international rules on the law of treaties.³ This contribution considers the path leading to the creation of the rules that are now broadly accepted as constituting the corpus of the Law of Treaties and examines the British influence on their development. From the initial surveys and efforts by the successive British Special Rapporteurs on the Law of Treaties to codify the rules governing treaties to the creation of a modern ‘field guide’ to treaties by Anthony Aust, no other nation of jurists has consistently shaped the development and understanding of this indispensable field of international law.

From the earliest understandings of the law of treaties it was clear that the binding terms embodied in international agreements were based on ‘the mutual *will* of the nations concerned’.⁴ However, as the number of States grew, the “mutual will” of all negotiating States became more difficult to ascertain. Early in the twentieth century, it was accepted that ‘[t]he society of States is not static; changes are perpetually taking place within it, and the only certain thing about its future is

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¹ J Brierly, ‘The Future of Codification’ (1931) 12 BYIL 1, 2.

² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Almost identical rules are set out in two further conventions: Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3; Vienna Convention Law of Treaties between States and International Organizations or Between International Organizations, UN Doc A/CONF.129/15, 21 March 1986, not yet in force.

³ I Sinclair, *The International Law Commission* (Grotius Publications Ltd 1987), 58.

⁴ G Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe, Book II* (translated by William Cobbett) (1795), 48, emphasis in original.

that it will continue to change.⁵ Along with the constant shifts and growing diversity of the international community came the realisation that treaty negotiation was less about complete agreement and more about subscription to an agreement that was tolerable to all parties. The final agreement often included an equivalent number of wanted and unwanted provisions, depending on the State queried. As suggested by Hersch Lauterpacht, treaties are ‘agreements to disagree’.⁶ If this was a prevailing idea in the early 1900s, the increase in the number of States actively participating in the negotiation of treaties, as well as the number of non-state actors exercising various roles in the development of treaties, certainly multiplies the potential for, and level of, disagreement. Whilst an air of cynicism is attached to the idea of reducing international law to binding ‘disagreements’, the truth that rings through this old adage speaks volumes to the reasons why the rules on treaty law are fundamental to the operation of international law.

A survey of the United Kingdom treaties library prior to 1900 reads not unlike a newspaper today. Marriage agreements,⁷ individual legal actions,⁸ commercial deals,⁹ alcohol trafficking in foreign territories,¹⁰ fisheries arrangements,¹¹ border disputes,¹² extradition of criminals,¹³ treatment of prisoners of war,¹⁴ communications’ regulation,¹⁵ even environmental concerns,¹⁶ among a wide variety of other subjects, are documented in history through the terms of bilateral and

⁵ J Brierly, ‘The Shortcomings of International Law’ (1924) 5 *British Ybk Intl L* 4, 9.

⁶ Though probably not the first to express the concept, Lauterpacht is often credited with the early 1900s articulation of the role of treaties in the international community. See H Lauterpacht, *The Function of Law in the International Community* (1933), 72.

⁷ Contract of Marriage of Philippe, Duke of Orleans, only brother of Louis XIV, King of France, with Henrietta Anne, daughter of Charles I, King of England, Parry’s Consolidated Treaties, 6 CTS 283, 30 March 1661; Treaty between Great Britain and Saxe-Cobourg-Gotha, for the Marriage of Her Majesty Queen Victoria with the Prince Albert of Saxe-Cobourg-Gotha [1840] UKTS 09902; [France] Agreement between the British and French Governments, respecting Mixed Marriages in the United Kingdom between British and French Citizens [1884] UKTS 07602.

⁸ Agreement between the Governments of Great Britain and of New Granada, for the settlement of the claims of Mr Mackintosh [1858] UKTS 09126.

⁹ Notes Between Great Britain and Bulgaria, extending the Commercial Agreement of 1889 to December 31, 1893 [1892] UKTS 06906. Commercial Agreement between Great Britain and Spain [1893] UKTS 10020; Commercial Agreement between Great Britain and Bulgaria [1897] UKTS 8 1897.

¹⁰ International Convention respecting the Liquor Traffic in Africa [1899] UKTS 13 1900.

¹¹ Treaty between Great Britain and the United States of America, relative to Fisheries, Commerce, and Navigation [1854] UKTS 05697.

¹² Final Act fixing the New Turco-Greek Frontier under the Convention of May 24, 1881 [1881] UKTS 04122; Exchange of Notes between the United Kingdom and the United States of America providing for the establishment of a Provisional Boundary between the Dominion of Canada and the Territory of Alaska in the region about the Head of Lynn Canal [1899] UKTS 20 1899.

¹³ Treaty between Great Britain and Germany for the Extradition of Criminals between the Territories of Her Majesty and Certain Dependencies of Germany [1894] UKTS 40 1895.

¹⁴ Convention between Great Britain and France, respecting Prisoners of War [1854] UKTS 07538.

¹⁵ Convention between Great Britain and Persia, relative to Telegraphic Communication between Europe and India [1865] UKTS 04952.

¹⁶ International Sanitary Convention 1892 [1892] UKTS 8 1893; Protocol respecting proposed International Convention for Protection of Wild Birds useful to Agriculture [1895] UKTS 04152.

multilateral treaties. By the turn of the 19th century, the UK had adopted no less than 140 multilateral treaties and more than three times that number in bilateral treaties.¹⁷ Due to the large number of bilateral treaties and the subject matter typically covered by these instruments – friendship, commerce, postal delivery, marriage, etc. – it is difficult to discern any overarching practices. The use of the bilateral treaty more closely relates to what today falls under private international law rather than law recognised as part of the public international legal system.

The focus of the present chapter is the British contribution to the law of treaties; more specifically, to the codification and clarification of the rules focused on the law-making process of multilateral treaties. A palpable British flavour permeates the entire Vienna Convention framework and is easily detected across the three distinct phases in the life of a treaty – adoption/ratification, implementation and termination.¹⁸ To elaborate the British contribution within this framework, the following sections will examine the rules on reservations, interpretation and termination due to a fundamental change of circumstances. These British engineered rules present examples of how the Special Rapporteurs advanced the progressive development of the customary international law rules of treaty law. Before addressing the specific rules, however, section II presents a general introduction to Britain’s role in the development of the law of treaties.

II. INCREASING THE PACE OF INTERNATIONAL LAW CODIFICATION

Sir Robert Jennings, the former President of the International Court of Justice (ICJ) 1991 – 1994, suggested that law-making treaties in the modern sense first appeared around 1815.¹⁹ Consistent UK practice in respect of multilateral treaties at the time is difficult to detect due to the limited number of States engaging in the multilateral system and the seemingly frequent revision or clarification of treaties by virtue of subsequent agreements. Around the mid-20th century, British legal opinion noted that most treaties negotiated in the 19th century or before were made between a relatively small number of States, hence unanimity was almost always achieved.²⁰

¹⁷ Amalgamated number of treaties registered from 1 January 1834 to 31 December 1899. On file with the United Kingdom Treaties Library at <www.bailii.org>. Pre-1834 treaties with Parry’s Consolidated Treaty Series.

¹⁸ These phases broadly track those laid down by the International Law Commission in its development of the draft convention on the Law of Treaties: (1) Conclusion (including entry into force), ILC, ‘Report of the ILC covering the work of its Fourteenth Session’ (1962) UN Doc A/CN.4/148, 160, para 20; (2) Application, effects, modification and interpretation, ILC, ‘Report of the ILC on the work of its Sixteenth Session’ (1964) UN Doc A/CN.4/173, 176, paras 23-24; and (3) termination of treaties. ILC, ‘Second report on the law of treaties’ (1963) UN Doc A/CN.4/157 and Add.1-3, 38, paras 3 *et seq.*

¹⁹ R Jennings, ‘The Progress of International Law’ (1958) 34 BYIL 334, 342.

²⁰ See statement by the UK on the views of Dr Manfred Lachs of Poland during the discussions within the UNGA, *Reservations to the Convention on the Prevention and Punishment of the Crime of*

By the first sitting of the United Nations General Assembly (UNGA) in 1945, the number of States in the international community had greatly increased, from roughly 45 in 1900 to more than 70 at the adoption of the United Nations (UN) Charter.²¹ Decolonization and post-war territorial administration meant a number of State-like entities were poised in the wings to add to this number in the years immediately following the creation of the UN. This phenomenon reduced the chances of reaching unanimity and therefore majority-voting processes were introduced.²² The substantial change in the negotiation status quo drove the UN to advance codification of international law as a matter of importance. In 1946, a 17-member committee was created, which included the UK, and was tasked with studying the codification of international law.²³ The following year, the UNGA adopted the Statute of the International Law Commission (ILC).²⁴ The core of the ILC mandate is the 'promotion of the progressive development of international law and its codification,'²⁵ which is reflected in Article 1 of its Statute. Though the UN's interest in the codification of international law was not novel, having been preceded by multiple public and private efforts,²⁶ the longevity of the ILC and its many successes attests to the necessity for focused attention on codification in light of the evolving international landscape with its increased turn to norm creation through treaties and decreased capacity for unanimity.

A. *The ILC and Codification of the Law of Treaties*

The roots of contemporary treaty law can be traced to the earliest days of the ILC. Indeed the Law of Treaties was adopted as one of the three initial topics for study with a view toward its codification at the first meeting of the ILC in June 1949.²⁷ The following examination accepts as its beginning the implementation of the 1949 ILC decision. However, it is clear that because the ILC project concentrated on clarifying

Genocide, Advisory Opinion, [1951] ICJ 15, 48-76, Reports Pleadings, Oral Arguments, documents, Written Statement of the Government of the United Kingdom, 49 and 54.

²¹ The precise number varies according to which criteria is used to determine the existence of an independent State and does not take into account States that no longer existed as independent States in 1945, for example, those annexed by Russia during the intervening period. See J Crawford, *The Creation of States in International Law* (2006), Annex I.

²² See statement by the UK, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ 15, 48-76, Reports Pleadings, Oral Arguments, documents, Written Statement of the Government of the United Kingdom, 49 and 54.

²³ UNGA Res 94(1) Progressive Development of International Law and its Codification (11 December 1946).

²⁴ UNGA, Res 174 (II), Statute of the International Law Commission (21 November 1947).

²⁵ *Ibid* art 1.

²⁶ M Wood, 'Introductory Note on the Statute of the International Law Commission' <<http://legal.un.org/avl/ha/silc/silc.html>>.

²⁷ The subject of the law of treaties was suggested by the UN Secretariat, UN Doc A/CN.4/31 (1949) and shortly thereafter included in the ILC programme of work, see ILC, 'Report of the ILC' (1949) UN Doc A/CN.4/13.

(rather than creating) the rules of treaty law it necessarily implies that rules on the subject did exist prior to that date. Many of the rules preceding the work of the ILC continued in one form or another, whether as part of the modern general rules of treaty law or as part of regional practice.

As previously noted, a key feature of the ILC mandate focused on the codification of international law. The tempered pace with which the development of the law of treaties took place rested largely with the leaders of the study of the subject. The law of treaties study was repeatedly sidelined for many years due to the urgent need to prioritise other topics, such as Nationality and the Law of the High Seas, being considered by the ILC.²⁸ Thus, it took over a decade to finalise the draft convention on law of treaties that was first presented to the UNGA in 1962.

A simple glance at the historical register of the ILC will identify the British members. But a simple scan of the list does not reveal the extent to which British-trained members contributed to the development of the law of treaties. In this sense, we must look behind the roster and revisit the debates taking place within the ILC at that time, as well as bear in mind who held leadership roles. As with all ILC examinations of law, each project necessitates the appointment of a Special Rapporteur. For the duration of the 17-year project examining the law of treaties, the successive Special Rapporteurs on the Law of Treaties were consistently British: James Brierly,²⁹ Hersch Lauterpacht,³⁰ Gerald Fitzmaurice³¹ and Humphrey Waldock.³² The British hold on the position came as each of the first three successive rapporteurs were elected to the International Court of Justice (ICJ). The four British Special Rapporteurs had spent years as international practitioners, academics and advisers to the UK government and each had published widely on aspects of treaty law prior to their appointment to the ILC. It has been noted that the changes in Special Rapporteurs undoubtedly “bedevilled”³³ the ILC work on the law of treaties, each effecting slight changes to various rules of treaty law and the overall outcome. On the whole, the successive project leaders left a distinctly British impression on the law of treaties.

III. DISTINCT CONTRIBUTIONS TO THE VIENNA CONVENTION ON THE LAW OF TREATIES

²⁸ ILC, ‘ILC Yearbook 1962, vol II’ (1962) UN Doc A/CN.4/148, 159-60.

²⁹ Brierly was appointed the first Special Rapporteur on the Law of Treaties during the first session of the ILC. Report of the ILC on its First Session 12 April – 9 June 1949’ (1949) UN Doc A/CN.4/13, para 21.

³⁰ Lauterpacht succeeded Brierly in 1952 following his election to the ICJ.

³¹ Fitzmaurice succeeded Lauterpacht in 1955 following his election to the ICJ.

³² Waldock succeeded Fitzmaurice in 1961 following his election to the ICJ.

³³ I Sinclair, *The International Law Commission* (Grotius Publications Ltd 1987), 40.

Despite what was ultimately a great success in terms of codification, the creation of the Vienna Convention required the ILC to navigate carefully several particularly controversial aspects of treaty law: the rules on reservations; the rules of interpretation; and the doctrine of fundamental change of circumstances. These are each considered here. Each of these topics were deftly navigated and subtly influenced by the British leadership throughout the ILC's work on the Vienna Convention; yet, each of these subjects continue to present difficulties of application. The initial consideration of reservations will also provide an account of the overall ILC project and the change in Special Rapporteurs. These changes, however, were equally influential in the development of the rules of interpretation and the inclusion of the principle of a fundamental change of circumstances.

A. Reservations

The vast effort put into the development of a treaty text must be considered in light of the rules that breathe life into the text. In other words, States must maintain an awareness of the rules relating to the manifestation of a State's consent to be bound, which ultimately begets the entry into force of a treaty. In the 1950s, the question of entry into force of the UN's first human rights treaty was plagued by the issue of reservations and how these unilateral statements affected treaty relations between existing and new adherents to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).³⁴ Ultimately, the failure of international law to provide a clear answer led the UNGA to seek an advisory opinion from the ICJ on the question of reservations to the Genocide Convention. It also prompted a survey of State practice whereby the ILC was invited to 'study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law.'³⁵ Having been previously seized of the topic of the Law of Treaties, the inclusion of reservations followed naturally, particularly considering the problems associated with the development of norm-creating treaties, as brought to light following the adoption of the Genocide Convention.

The ILC commenced its systematic review of the practice surrounding reservations to multilateral treaties under the supervision of the first Special Rapporteur, James Brierly, who was appointed during the first session of the ILC.³⁶ The ILC's study was limited to multilateral treaties and to those reservations made at the time of signature, ratification or accession. In his first report, Brierly was careful to note that his findings on reservations were tentative pending the final outcome of

³⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

³⁵ UNGA, 'Reservations to Multilateral Conventions' (1950) UN Doc A/RES/478(V).

³⁶ ILC, 'Report of the ILC on its First Session 12 April – 9 June 1949' (1949) UN Doc A/CN.4/13, para. 21.

the ICJ's advisory opinion.³⁷ The preliminary report found an unhelpful "lack of unanimity" among treaty law observers and writers.³⁸ State practice was also unsettled on the matter and it was noted that the existing UN and Pan-American practices were both of recent growth in light of the fact that multilateral conventions were a relatively new phenomenon having only appeared in the latter part of the nineteenth century. Prior to the start of the ILC project, the majority opinion in Britain regarding reservations generally followed the unanimity principle.³⁹ Though this penchant for unanimity undoubtedly imbued Brierly's own view of reservations, he pushed forward with a thorough examination of international practice.

Brierly contended that the ILC's ultimate challenge in developing a rule of general applicability was reconciling the two main principles overshadowing the debate. These were the desirability of maintaining the integrity of the convention and the desirability of the widest possible application, a tension that anticipated the integrity versus universality debate that continues today.⁴⁰ He also observed that '[n]o single rule on the subject of reservations [could] be satisfactory in all cases because treaties are too diversified in character.'⁴¹ The diversity of treaties and the manipulation of treaty effectiveness by reservations had previously been noted by Brierly in relation to the General Act of Geneva 1928, where he commented on the 'absurd little mouse that has been born' in light of the UK "emasculat[i]on" of the Geneva Act through its reservations.⁴²

Brierly reported that the very nature of some treaties, such as the UN Charter, would not accommodate reservations at all because States must become parties on an equal and unqualified basis while conventions establishing 'detailed regulations of a technical or humanitarian character' might allow very narrow or limited reservations.⁴³ Thus the cursory ILC report provided model reservation clauses and also suggested that the ILC would provide 'guidance as to the practice which should be followed...when the text of a treaty is silent on the subject as appropriate in light of the ICJ's impending opinion'.⁴⁴

The ILC's mandate, as indicated by the UNGA, provided that it should give its opinion 'both from the point of view of codification and from that of the progressive development of international law'. Thus, unlike the ICJ, the ILC was not strictly limited to a review of reservations to the Genocide Convention. Brierly therefore

³⁷ Brierly's first report was filed on 6 April 1951 and the *Genocide Opinion* was published the following month on 28 May 1951.

³⁸ ILC, 'Report on Reservations to Multilateral Conventions' (1951) UN Doc A/CN.4/41, reprinted in ILC Yearbook, Vol. II (1951) UN Doc A/CN.4/SER.A/1951/Add.1 (1951), 3, para 8.

³⁹ H Malkin, 'Reservations to Multilateral Conventions' (1926) 7 BYIL 141, 159.

⁴⁰ ILC, 'Report on Reservations to Multilateral Conventions' (1951) UN Doc A/CN.4/41, 3-4, paras 11-13.

⁴¹ *Ibid.*, 4, para 14.

⁴² J Brierly, 'British Reservations to the General Act' (1931) 12 BYIL 132, 133.

⁴³ ILC, 'Report on Reservations to Multilateral Conventions' (n 40), 4, para 15.

⁴⁴ *Ibid.*, para 16.

advocated 'liberty to suggest the practice which it consider[ed] the most convenient for States to adopt for the future'.⁴⁵ In its 1951 report to the UNGA following the delivery of the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Reservations Advisory Opinion)*,⁴⁶ the ILC indicated the difficulty in applying the subjective 'object and purpose test' created by the majority opinion and determined that it was not suitable to apply generally to multilateral conventions due largely to the fact that it was 'reasonable to assume that... parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose'.⁴⁷ This view reflected the dissenting opinion, joined by the British member of the Court, Sir Arnold McNair, which underscored that there was no evidence of an accepted general reservations rule other than that of unanimity.⁴⁸ The intrinsically subjective nature of drawing such distinctions between provisions of a convention seemed, in 1951, an insurmountable obstacle to the application of the object and purpose test, though there was a clear desire to put the onus of providing a detailed, treaty-specific reservation regime on the negotiating States.⁴⁹

Lauterpacht succeeded Brierly in 1952 with the *Reservations Advisory Opinion* still fresh in the mind of the international community. Lauterpacht's primary draft for a general rule on reservations prohibited all reservations except those agreed to by all parties to the treaty.⁵⁰ This rule reflected the preference for integrity of a convention and encapsulated what Lauterpacht viewed as existing law in light of the UN Secretary-General's practice. Lauterpacht's conservative view on reservations would later resonate in his dissenting opinion in the *Case of Certain Norwegian Loans*.⁵¹ However, recognising the ILC's role in the progress of international law, he included alternative draft rules that offered an intermediate solution between the unanimity rule practiced by the Secretary-General and the absolute sovereignty principle advocated by many States. His draft rules provided greater safeguards against States' misuse of power when formulating reservations. These safeguards were evident in the Pan-American approach to reservations and each of Lauterpacht's alternative drafts also proposed a tacit acceptance rule: a

⁴⁵ ILC, 'Report of the ILC to the UNGA on the work of its third session' (1951) UN Doc A/1858, in ILC Yearbook, vol. II (1951) UN Doc A/CN.4/48, 126, para 17.

⁴⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (Advisory Opinion) [1951] ICJ Reports 15.

⁴⁷ ILC, 'Report of the ILC to the UNGA on the work of its third session' (1951) UN Doc A/1858, in ILC Yearbook, vol. II (1951) UN Doc A/CN.4/48, 128, para 24.

⁴⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo [1951] ICJ Reports 15, 31.

⁴⁹ ILC, 'Report of the ILC to the UNGA on the work of its third session' (n 45), para 27.

⁵⁰ ILC, 'Report on the Law of Treaties' (1953) UN Doc A/CN.4/63, reprinted in ILC Yearbook, 1953, vol II (1953) UN Doc A/CN.4/SER.A/1953/Add.1, 91, art 9.

⁵¹ *Case of Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, 34.

State would be deemed to have accepted a reservation if it had not objected within three months.⁵²

Following Lauterpacht's election to the ICJ, the Special Rapporteur mantle was taken up by Fitzmaurice in 1955. Unable to find entirely common ground across the work already completed by his predecessors on the general topic of the Law of Treaties, he developed his own thoughts on the issue. He specifically indicated that the previous work had been far too general in nature and would not suffice to handle situations that tended to arise in practice.⁵³ Fitzmaurice had previous experience addressing the reservations issue as the agent for the UK who submitted its written statement to the ICJ on legal issues surrounding reservations to the Genocide Convention.⁵⁴ The UK position was reflected in his initial report, which upheld the idea that as a fundamental rule, reservations should only be allowed if accepted by all interested States.⁵⁵ Fitzmaurice, like Lauterpacht, also promoted the idea of 'acquiescence *sub silentio*', or tacit acceptance in the absence of an objection within three months of depositing a reservation.⁵⁶ Under his draft articles on reservations, an objection would prevent the reserving State from becoming a party to the treaty unless the reservation was withdrawn; thus, an objection had far greater effect. Fitzmaurice advocated the use of the ICJ or another named international tribunal as a means of settling differences on the permissibility of reservations and his draft articles prohibited all reservations to dispute settlement procedures.⁵⁷

In 1961 Waldock was appointed the fourth and final Special Rapporteur on the Law of Treaties following Fitzmaurice's election to the ICJ. The most overt change to the final product of the ILC study came with the arrival of Waldock. Brierly, Lauterpacht and Fitzmaurice had favoured an expository code on treaties but with Waldock's appointment came the vision that the ILC efforts would culminate in, a draft multilateral convention.⁵⁸ As Waldock immediately noted in his first report, the topic of reservations was 'of special complexity and difficulty' as evidenced by the preoccupation of the ICJ, the ILC, the UNGA and the Organisation of American States (OAS) with the topic for the previous eleven years.⁵⁹ He also noted that, despite limiting its opinion to the specifics of the Genocide Convention, the ICJ had

⁵² ILC, 'Report on the Law of Treaties' (1953) UN Doc A/CN.4/63, reprinted in ILC Yearbook, 1953, vol II (1953) UN Doc A/CN.4/SER.A/1953/Add.1, 91-92.

⁵³ ILC, 'Report on the Law of Treaties' (1956) UN Doc A/CN.4/101, reprinted in ILC Yearbook, vol II (1956) UN Doc A/CN.4/101, 106, para 3.

⁵⁴ Written statement by the UK (January 1951), Pleadings, Oral Arguments, Documents, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Reports 15, 48-76.

⁵⁵ ILC (n 53) art 37(4).

⁵⁶ *Ibid.*, art 39(2).

⁵⁷ *Ibid.*, art 37, para 4.

⁵⁸ ILC, 'Report on the Law of Treaties' (1962) UN Doc. A/CN.4/144, 29-30; I Sinclair, *The International Law Commission* (Grotius Publications Ltd 1987), 40 and 57.

⁵⁹ ILC, 'Report on the Law of Treaties' *Ibid.*, 31.

expressed its general attitude on several issues surrounding reservations in its *Reservations Advisory Opinion* and these should be duly considered in the Commission's work. A few of the general points included: (1) a state cannot be bound without its consent therefore a state cannot be bound to a reservation without its consent; (2) no reservation is valid unless it has been accepted; (3) increased participation in multilateral treaties has presented a variety of practices including tacit acceptance and the admission of a state to a treaty despite an objection to a reservation; (4) the absence of a reservations provision in a treaty does not equate to a prohibition against reservations; (5) the principle of integrity of a treaty is not an express rule of law.⁶⁰

Using these general principles derived from the *Reservations Advisory Opinion* and the views accumulated in the course of the ICJ examination and ILC study up to that point, Waldock quickly set about the task of finalising a draft convention on the Law of Treaties that would include default rules on reservations. The draft articles on reservations ultimately submitted to the UNGA in 1966 abandoned the original conservative British approach to reservations. This departure is evident in the rules adopted as Articles 19-23 of the Vienna Convention, which included further changes following the debate among negotiating States during the two conferences culminating in the the Vienna Convention.⁶¹ In developing the rules guiding reservations, the ILC expanded the ICJ's approach outlined in the *Reservations Advisory Opinion* by taking the Court's tiered system under the object and purpose test and applying it to all multilateral treaties. The change in the views of the ILC that resulted in the shifts in its approaches over the course of the study can be attributed to both the change of rapporteurs and also an appreciation of a change in State preferences.⁶²

B. Interpretation of Treaties

Treaty interpretation is the heart of many international disputes.⁶³ This reality stems from the fact that interpretation is underpinned by the idea that the international community of States comes together to create treaties as a means of managing and giving effect to the reasonable expectations which they have established through negotiation and agreement.⁶⁴ Though State Parties may have shared expectations at

⁶⁰ Ibid., 74-75.

⁶¹ Such as the reversed presumption of admissibility of a reservation which placed the onus on the non-reserving States to formulate an objection in order to prevent a State that has formulated an impermissible reservation from becoming a party to the treaty. See ILC, 'Revised Draft Articles on the Law of Treaties' (1966) UN Doc. A/CN.4/L.117 and Add.1 reprinted in ILC Yearbook, 1966, Vol. II, (1966) UN Doc. A/CN.4/SER.A/1966/Add.1.

⁶² E Swaine, 'Reserving' (2006) 31 YJ IL 307, 314; C Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) 64 BYIL 245, 253.

⁶³ I Brownlie, *Principles of Public International Law* (1966), 487.

⁶⁴ O Lissitzyn, 'Treaties and Changed Circumstances (Rebus Sic Stantibus)' (1967) 61 AJIL 895, 896.

the outset of a treaty, over time new expectations may arise due to domestic developments or changes in external circumstances. There is also the situation where the parties have willingly included ambiguous terms due to the knowledge that they are unlikely to come to a unanimous agreement. In these instances, a State may simply enter into a treaty and trust that its own interpretation will be accepted in the event of a challenge. In a dispute about the functioning of a treaty, therefore, it becomes necessary to determine what the treaty permits. Fine-tuning rules of treaty law to enable such a determination was largely the craftwork of the British.

The existence of distinct rules of treaty interpretation and how they fit into the overall law of treaties vexed each of the Special Rapporteurs both as individual practitioners of international law and in their roles with the ILC. At the time, defining a strict set of rules of interpretation was controversial.⁶⁵ As suggested in the 1961 *South West Africa Cases*, “[t]he notion that there is a clear and ordinary meaning of the word ‘treaty’ is a mirage.”⁶⁶ The ‘mirage’ metaphor might more accurately describe what many jurists thought about distinct rules of interpretation.

ILC commentary documents that Fitzmaurice, Waldock’s immediate predecessor, had formulated six consolidated principles of treaty interpretation.⁶⁷ In 1951, while Legal Adviser to the Foreign Office, Fitzmaurice presented five of these principles which were based on his observations of ICJ jurisprudence and included:

1. principle of actuality (or textuality);
2. principle of natural (and ordinary) meaning;
3. principle of integration;
4. principle of effectiveness;
5. principle of subsequent practice.⁶⁸

At the same time, Fitzmaurice mused over the ‘revolt against the over-elaboration of rules of interpretation’,⁶⁹ with reference to British contemporaries.⁷⁰ A sixth principle was added latterly - the principle of contemporaneity – and all six were incorporated into the draft convention on the law of treaties.⁷¹ Draft Articles 69-71

⁶⁵ I Brownlie, *Principles of Public International Law* (n 63), 502.

⁶⁶ *South West Africa Cases: Ethiopia v South Africa; Liberia v South Africa* (Preliminary Objections) [1962] ICJ Rep 319, separate opinion of Judge Jessup, 387, 402.

⁶⁷ ILC, ‘Report of the ILC on the work of its sixteenth session’ (1964) UN Doc A/CN.4/173, 200, citing G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951-54’ (1957) 33 BYIL 203, 210-12; GG Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points’ (1951) 28 BYIL 1.

⁶⁸ G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice’, *ibid.*, 9.

⁶⁹ *Ibid.*, 2.

⁷⁰ H Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 BYIL 49.

⁷¹ M Fitzmaurice and O Elias, *Contemporary Issues in the Law of Treaties* (Eleven 2005), 219.

were presented by Waldock in 1964.⁷² Notably, the commentary on the articles referenced to previous publications by other British authors, including Brierly and Lauterpacht, regarding doubt as to the existence of technical rules of interpretation in international law at that point in time.⁷³ Waldock himself had struggled with rules of interpretation in relation to the 1951 *Anglo-Norwegian Fisheries Case*,⁷⁴ which he deemed one of the 'boldest and most important judgments pronounced by any international tribunal'.⁷⁵ Despite this reticence, a 'crucible' approach was eventually adopted which delivered not a step-by-step approach to treaty interpretation but a general, holistic approach.⁷⁶ Thus, the establishment of a method of interpretation was ultimately favoured by the British Special Rapporteurs, in order to provide consistent guidance to States.

From the commentary, it appears that the British were a driving force in the inclusion of rules of interpretation though it was not a straightforward addition to the law of treaties project. The rules of interpretation also remain unsettled in many ways as evidenced by the ILC's current study on treaties over time, subsequent agreements and subsequent practice in the interpretation of treaties.⁷⁷

C. *The Doctrine of Fundamental Change of Circumstances*

Within the law of contracts of most domestic jurisdictions there exists the doctrine of fundamental change of circumstances in some form, which allows a party to a contract to be released from its obligations upon a fundamental change of the circumstances that existed at the time the agreement was concluded. This doctrine is reflected in international law and historically was referred to as *rebus sic stantibus*.⁷⁸ It cannot be invoked by a State for a change resulting from its own conduct and the potential change of circumstances must not have been foreseen.⁷⁹ Article 62 of the Vienna Convention is the contemporary embodiment of this principle and exemplifies a further rule of treaty law that was heavily influenced by successive British Rapporteurs.

⁷² ILC, 'Report of the ILC on the work of its sixteenth session' (1964) UN Doc A/CN.4/173, 199-200, citing G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-54' (n 66)

⁷³ ILC, 'Report of the ILC on the work of its sixteenth session' (1964) UN Doc A/CN.4/173, 199, citing A McNair, *Law of Treaties* (OUP 1961); J Brierly, *Law of Nations* (6th edn, OUP 1963); H Lauterpacht, *Rapport a l'Institut de droit international, Annuaire de l'Institut*, (1950) vol 43, 336-74.

⁷⁴ *Anglo-Norwegian Fisheries Case (UK v Norway)* [1951] ICJ Reports 116.

⁷⁵ H Waldock, 'The Anglo-Norwegian Fisheries Case' (1951) 28 BYIL 114.

⁷⁶ ILC, 'Yearbook of the ILC, vol II' (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 219-20; See discussion by R Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015), 10.

⁷⁷ For the most recent report of the Special Rapporteur, see ILC, 'Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (2015) UN Doc A/CN.4/683.

⁷⁸ A Aust, *Modern Treaty Law and Practice* (CUP 2013), 262; M Fitzmaurice and O Elias, *Contemporary Issues in the Law of Treaties* (Eleven 2005), 173; O Lissitzyn, 'Treaties and Changed Circumstances (Rebus Sic Stantibus)' (1967) 61 AJIL 895, 896.

⁷⁹ *Ibid.*, 262-63.

Brierly's interest in the principle existed long before the creation of the ILC, having ruminated over it in 1924 with the recognition that 'State life cannot be compressed within the bonds of perpetually and absolutely binding treaties'.⁸⁰ In *The Law of Nations*, he utilised the *Free Zones*⁸¹ case to highlight that it was a 'right that international law should recognise'.⁸² His support mirrored the British government's unequivocal recognition of the principle. As noted in the British dispute with France over the automatic termination of a number of Anglo-French treaties in the *Nationality Decrees*⁸³ case, *rebus sic stantibus* was a confirmed rule of international law, despite Britain's unwillingness to accept its application in that instance.⁸⁴ Brierly never had the opportunity to address directly the principle within the ILC due to his election to the ICJ, and thus premature departure from the law of treaties project.

It was Fitzmaurice who first introduced *rebus sic stantibus* as part of the growing number of draft articles in 1957, a move that was met with intense debate then and in later discussions of the draft articles.⁸⁵ His draft articles 21-23 on the principle squarely placed it under 'termination and suspension' of a treaty.⁸⁶ He emphasised that the principle granted the right to suspend or terminate by agreement following a fundamental change of circumstance not anticipated at the time the agreement was concluded, and not automatic termination.⁸⁷ Thus Fitzmaurice did not expressly follow the British practice at the time but was exercising the progressive prerogative of the ILC remit. He presented the right to invoke *rebus sic stantibus* as one primarily linked to bi-lateral treaties and only applicable to multilateral treaties when all parties agreed. Brownlie observed that when *rebus sic stantibus* was introduced by the ILC, most British writers were reluctant to accept the doctrine, particularly as a rule of automatic termination.⁸⁸ This included such eminent British scholars as McNair, who firmly placed the doctrine under the general heading of "Interpretation and Application of Treaties".⁸⁹ Brownlie further expounded that the general view at the time of the presentation of the draft articles was that the 'principle is an objective rule of law, applying when certain events exist, yet not terminating the treaty automatically, since one of the

⁸⁰ J Brierly, 'The Shortcomings of International Law' (1924) 5 BYIL 4, 11.

⁸¹ *Free Zones of Upper Savoy and the District of Gex (Switzerland v France)* PCIJ Rep Series A/B No. 46.

⁸² J Brierly, *The Law of Nations* (OUP 1963), 388.

⁸³ *Nationality Decrees issued in Tunis and Morocco*, Advisory Opinion, PCIJ Rep Series B No. 4.

⁸⁴ ILC, 'Yearbook of the ILC, vol II' (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 257, citing *Nationality Decrees issued in Tunis and Morocco* *ibid.*, 187-88.

⁸⁵ ILC, 'Second report on the law of treaties' (1957) UN A/CN.4/107, 32; ILC, 'Second report on the law of treaties' (1963) UN Doc A/CN.4/156 and Add.1-3, 80; ILC, 'Yearbook of the ILC, vol II' (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 258.

⁸⁶ ILC, 'Second Report on the law of treaties' *Ibid.*, 16-7, 32-3.

⁸⁷ *Ibid.*, 32.

⁸⁸ Brownlie, (n 62), 498-99.

⁸⁹ A McNair, *The Law of Treaties* (Clarendon Press 1961), 436-57.

parties must invoke it'.⁹⁰ The tension over whether the doctrine represented a rule of interpretation or termination was a primary sticking point.⁹¹ Thus it seems that Fitzmaurice departed from even the commonly accepted view of British jurists in terms of the applicability of the doctrine of fundamental change of circumstances.

Waldock continued to press for the adoption of the doctrine though many ILC members viewed it as a contravention of *pacta sunt servanda*.⁹² Despite the "threat to the security of treaties"⁹³ posed by *rebus sic stantibus*, Waldock considered its inclusion a 'safety-valve' that was accepted by the majority of States in the operation of international law.⁹⁴ He did, however, depart from Fitzmaurice's approach by framing the principle in negative terms with strict procedural requirements.⁹⁵ Strict procedural requirements associated with the invocation of the principle reflected State practice.⁹⁶ He also extended the right to invoke *rebus sic stantibus* to treaties of a limited duration, a move that was met with broad approval by the other members of the ILC.⁹⁷

Article 62 of the Vienna Convention enshrined the principle of *rebus sic stantibus* in the codified law of treaties without utilising the customary Latin phrase in order to avoid any preconceived doctrinal implications.⁹⁸ The ICJ subsequently described Article 62 as a rule of customary international law in the *Icelandic Fisheries Jurisdiction* case in 1973, though the rule was not applied in the case and debate continues as to its application.⁹⁹ In the face of a range of arguments against inclusion of the principle in the grand project on the law of treaties, the British support of the principle cemented termination due to a fundamental change of circumstances.

IV. FURTHER CONTRIBUTIONS

The contribution of the UK to the development of the law of treaties is identifiable across the pages documenting the development of these widely used rules. It is not an historical edifice, alone, that the UK has built. Few international legal practitioners would be without Aust's *Modern Treaty Law and Practice*, now in its third edition.¹⁰⁰ Aust's successive volumes on the modern manifestations of the law of treaties and the tensions that persist, such as in the field of reservations and

⁹⁰ Brownlie, (n 63), 499.

⁹¹ O Lissitzyn, 'Treaties and Changed Circumstances (Rebus Sic Stantibus)' (1967) 61 AJIL 895.

⁹² ILC, 'Yearbook of the International Law Commission 1963' (1963) UN Doc A/CN.4/SR.694, 142.

⁹³ ILC, 'Second report on the law of treaties' (1963) UN Doc A/CN.4/156 and Add.1-3, 38.

⁹⁴ *Ibid.*, 82; ILC, 'Yearbook of the ILC, vol II' (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 258, para 6.

⁹⁵ *Ibid.*, 39.

⁹⁶ ILC, 'Summary Record of the 696TH Meeting of the ILC' (1963) UN Doc A/CN.4/SR.696, 151.

⁹⁷ *Ibid.*, 156.

⁹⁸ ILC, 'Yearbook of the ILC, vol II' (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 258.

⁹⁹ *Icelandic Fisheries Jurisdiction (United Kingdom v. Iceland (Merits))* 1973 ICJ Reports 3, para. 36. See Aust (n 78), 263.

¹⁰⁰ Aust (n 78).

subsequent State practice, provide a companion for anyone querying contemporary treaty practice.¹⁰¹

Texts designed for the student and practitioner on the subject were for many years dominated by British academics and jurists. The British domination of the law of treaties as a subject of international law was challenged by writings from elsewhere but who borrowed heavily from the British tradition and often cited British works.¹⁰²

V. FINAL OBSERVATIONS

From the development of the Vienna Convention to *Modern Treaty Law and Practice*, the influence of British lawyers on the law of treaties is abundantly clear. A State's ratification and subsequent obligations are manifestly impacted by the rules on reservations. Interpretation of treaties is the crux of a large number of international disputes. Termination of a treaty due to a fundamental change of circumstances remains an option for States when unforeseeable events take place. Though each of these rules is a well-recognised component in an international lawyers toolkit for treaty understanding, each contribution to the law of treaties has been tested time and again in the decades following the drafting of the Vienna Convention. Whatever consternation these rules have caused, no student, academic or practitioner of international law in the UK or abroad could sustain an inquiry into the creation, functioning or termination of a treaty without invoking a rule that was heavily influenced by a British mind.

As wryly characterised by Rosenne, the law of treaties is undoubtedly the clearest example of "lawyers' law".¹⁰³ This label explains the imperative that was the development of the Vienna Convention. Though the final product was the result of almost two decades of debate among a varied ILC membership, the UN Sixth Committee and States, the British leadership in the project inevitably influenced the corpus of the law of treaties just as contemporary British contributions continue to do so.

¹⁰¹ Ibid., 118 et seq and 212-17, respectively.

¹⁰² AE Boyle and C Chinkin, *The Making of International Law* (OUP 2007).

¹⁰³ S Rosenne, 'Codification Revisited After 50 Years' (1998) 2 Max Planck Ybk of UN L 1, 16.