RELUCTANT GRUNDNORMEN: ARTICLES 31(3)(C) AND 42 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES AND THE FRAGMENTATION OF INTERNATIONAL LAW

Jan Klabbers*

Introduction

The law of treaties, as laid down in the 1969 Vienna Convention on the Law of Treaties, has a somewhat ambivalent relationship with externalities, including history and time. The most obvious example of this ambivalence is, as far as its relation to history goes, the discrepancy between the rules on interpretation (consigning a treaty’s drafting history to the proverbial dustbin, not even including it as part of the context of a treaty), and the circumstance that international lawyers typically, when confronted with interpretative difficulties, have recourse to the drafting history of the provision in question; and where they do not have recourse to the travaux préparatoires, it will usually only be because of an awareness as to how a phrase was intended or has been applied in the past.¹

If the use of travaux préparatoires provides a convenient example of the Vienna Convention’s ambivalent attitude to time and history, it is not the only one.² A more fundamental battle took place when drafting the Convention on precisely this issue: what to do with the factor of time and, therewith, what to do with both yesterday and tomorrow? On the one hand, in Waldock’s 1964 report (and Waldock was the first of the special rapporteurs to address issues of interpretation) a proposal was included that the Vienna Convention comprise a rule on intertemporal law. Draft article 56 provided that a treaty be interpreted in light of the law in force at the time of its drafting, whereas its application be governed by the rules of international law in force when the treaty was to be applied.

---

* Professor of International Organizations Law, University of Helsinki and Director of the Academy of Finland Centre of Excellence on Global Governance Research.


Be that as it may, there is yet a different story to be told. Wallock’s draft article 56 eventually became article 31, paragraph 3(c) of the Vienna Convention, the single most relied on provision to quell anxieties about the fragmentation of international law. Curiously enough, and underlining the Convention’s ambivalence on externalities, the Convention contains another article, article 42, which had the potential to do much the same.

Article 42 aims, on its face at least, to place the Convention’s regime in a vacuum, isolating it from the influences of external and extraneous factors including the workings of time. Article 42 places the Vienna Convention as the sole possible source of arguments to contest the validity of a treaty and arguments to terminate a treaty or suspend its operation, and therewith aims to create a vacuum around the Vienna Convention or, in yet other (and sometimes over-used) words: it aims to create a self-contained regime. And since the law of treaties touches all of international law, this would amount to turning international law into a unified system, governed by the Vienna Convention. Article 42 reads:

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Partly, the idea is obvious and, really, not all that remarkable: it gives flesh to the notion that treaties can be invalidated, terminated, or suspended by the operation of law.3 What is remarkable, however, is the Convention’s attempt to carve the concept of ‘the operation of law’ in stone.

This paper then aims to contrast the stories of article 42 and draft article 56 with each other, in light of the ongoing discussion amongst international lawyers about the fragmentation of international law: one is an attempt to close off international law from anything (including the factor of time), whereas the other aimed to regulate how exactly the factor of time could be incorporated. Both, therewith, were potential basic norms (Grundnormen),4 keeping the international legal order together. The irony, or tragedy, is that neither story could be played out to the full. As a result, nothing is regulated or, if you will, everything is: article 31, paragraph 3(c) of the Vienna Convention admonishes interpreters to take into account any possible

---


4 The notion was famously developed by Hans Kelsen. See in particular his Introduction to the Problems of Legal Theory (1992), esp. 55–64. An excellent discussion of Kelsen’s work can be found in J. von Bernstorff, Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler (2001).