

Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries

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Olivier Corten and Pierre Klein (eds). **The Vienna Conventions on the Law of Treaties: A Commentary**. Oxford: Oxford University Press, 2011. Pp. 2176. £395. ISBN: 9780199546640.

Oliver Dörr and Kirsten Schmalenbach (eds). **The Vienna Convention on the Law of Treaties: A Commentary**. Berlin: Springer, 2012. Pp. 1423. €266.43. ISBN: 9783642192913.

Mark Villiger. **Commentary on the 1969 Vienna Convention on the Law of Treaties**. Leiden: Martinus Nijhoff, 2009. Pp. 1058. €233. ISBN: 9789004168046.

Abstract

Commentaries on international law abound and proliferate. To reflect upon this trend in international legal scholarship, three commentaries on the Vienna Convention on the Law of Treaties are reviewed. They are compared with regard to the ways in which they deal with three pertinent issues in the law of treaties: the ascertainment of jus cogens norms, the notion of object and purpose and grounds of invalidity, termination, and suspension. As a scholarly genre, commentaries form part of the legal culture of legal systems. So the review discusses their function in the past, in the present, and in their possible future. Their roots lie in the schools working on Roman law in the Middle Ages. They gained importance for international legal scholarship when international law entered the process of codification. Today, commentaries fulfil several functions in international legal discourse, the most important of which is that they structure this discourse. Digitization will seriously impact on all fields of scholarly publishing. The review concludes by discussing the possible changes in this scholarly genre. Those are accessibility, layout, referencing, inclusion of other media, and the possibility of enhanced discourse within the commentary.

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The number of commentaries in the field of international law has risen significantly.¹ Commentaries are books that discuss statutes in national law or treaties in international law article by article in a structured manner. Each chapter is normally dedicated to the discussion of one legal provision. Commentaries form one genre of international legal scholarship, with others being essays, book reviews, treatises, and monographs. The use of scholarly genres is a characteristic feature of the culture of the legal and scientific community. Each genre has specific features structuring and presenting the law. The scholarly form influences the way international legal scholarship looks at the law, the questions it asks, and the answers it gives. The genres of legal scholarship evolve over time abreast of technological developments.

Given the increase in the use of commentaries as well as their evolution in the age of digitization, the present review will reflect on these developments in international legal scholarship with a focus on three recent commentaries on the Vienna Convention on the Law of Treaties (VCLT). These commentaries add to an extensive literature generally on the law of treaties,² as well as on particular aspects of it.³

How do these commentaries deal with the law of treaties and how do commentaries more generally work in the realm of the law of nations? What is the significance of this genre of international law literature and how is it used by scholars? To answer these questions, the three commentaries under review will first be introduced, focussing on their structure, authors, and peculiarities. Secondly, the content of the commentaries will be compared with each other with regard to three aspects which have attracted attention in recent years: the status and content of *jus cogens* norms, the ascertainment of the object and purpose of treaties, and the grounds of invalidity, termination, and suspension. This comparison reveals the way in which commentaries as a genre present

¹ The Oxford Commentaries on International Law website alone lists 15 commentaries: available at: www.oup.com/us/catalog/general/series/OxfordcommentariesonInternationa (accessed 12 Dec. 2012); see also the seven vols of the Max Planck Commentaries on World Trade Law, available at: www.brill.com/publications/max-planck-commentaries-world-trade-law (accessed 20 Nov. 2013); J. Frowein and W. Peukert, *Europäische Menschenrechtskonvention* (3rd edn 2009); R. Grote, K. Meljnik, and R. Alledwedt (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2006); L.-E. Pettiti and E. Decaux (eds), *La convention européenne des droits de l'homme: Commentaire article par article* (1999); E. Decaux (ed.), *Le pacte international relatif aux droits civils et politiques: commentaire article par article* (2011); J.-P. Cot, A. Pellet, and M. Forteau (eds), *La Charte des Nations Unies: commentaire article par article* (3rd edn, 2005); F. Reuschle (ed.), *Montrealer Übereinkommen: Übereinkommen zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr: Kommentar* (2nd edn, 2011); N. Wagner, H. Raasch, and T. Pröbstl (eds), *Wiener Übereinkommen über diplomatische Beziehungen vom 18. April 1961: Kommentar für die Praxis* (2007); U. Karpenstein and F. Mayer (eds), *EMRK – Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (2012). The term 'Commentary' can of course also denote books which treat a certain subject in a systematic manner. Those were used in Anglo-American legal scholarship until the 19th century: see, e.g., R. Phillimore, *Commentaries Upon International Law* (1855) and W. Blackstone, *Commentaries on the Law of England* (1765–1769).

² See A. Aust, *Modern Treaty Law and Practice* (2007); E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011); D. B. Hollis (ed.), *The Oxford Guide to Treaties* (2012).

³ E.g., R. Gardiner, *Treaty Interpretation* (2010); C. R. Blaser, *Die clausula rebus sic stantibus im Völkerrecht* (2012); J. Klabbers, *The Concept of Treaty in International Law* (1996).

and deal with the law and contentious issues. The review essay will conclude with a reflection on the history, presence, and future of commentaries in international law.

1 Introducing the Three Commentaries

In 2006, Oliver Corten and Pierre Klein published the first scholarly commentary on the VCLT; the second edition was published in 2011 in English. With two volumes of over 2,000 pages written by over 80 authors, it is the longest of the three commentaries under review. It also includes an article by article commentary on the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.⁴ According to the editors, their work aims to display the law as it presently stands and applies the rules of treaty interpretation contained in the VCLT as a method and structure (at vii). While literal interpretation is part of each contribution to the commentary and the preparatory works are regularly mentioned, the authors try to carve out the object and purpose of each provision and to determine whether the respective norms constitute customary international law. As far as the general structure is concerned, the individual contributions first reproduce the English version of the treaty text, followed by a table of contents and a bibliography.

The second commentary under review was written by Eugen Villiger in 2007. The author, who has ploughed through the law of treaties in theory⁵ and practice,⁶ has produced a book of 1,058 pages. Drafting history, practice of international courts and tribunals, and state practice are the most important contextual features beyond textual analysis. The deliberations in the ILC as well as the negotiations at the Vienna Conference, being the preparatory works of the convention, are laid out and explained in great detail.⁷ This commentary, too, is structured along the individual provisions of the VCLT. It includes the authentic English and French versions of each provision, as well as the non-authentic German text. This is followed by the relevant part of the ILC Draft Convention of 1966 which laid the basis for the later treaty. The bibliography contains a section with references to the relevant parts of the deliberations within the ILC and the negotiations at the Vienna Conference. Each section's bibliography is organized in parallel to the structure of the relevant section. The sections usually begin with reference to the history and background of the respective provision of the VCLT. Then, the legal terms are interpreted, focussing on the text, but also taking into account scholarship and practice. If applicable, reservations by the states parties are mentioned. A section denoted 'context' treats the relationship between each provision and other provisions, matters not dealt with by the Convention, as well the customary

⁴ Vienna Convention on the Law of Treaties, Doc. A/CONE.129/15 concluded at Vienna, 21 Mar. 1986, not yet entered into force.

⁵ Villiger, 'The 1969 Vienna Convention on the Law of Treaties – 40 Years After', 344 *RdC* (2009) 9.

⁶ Being deputy registrar as well as judge at the ECtHR.

⁷ The VCLT was negotiated in the course of two diplomatic conferences in Vienna. The deliberations departed from the text the ILC had agreed on, while the delegations had the opportunity to propose amendments to the text.

status of the norm. At the end of the section, the author often gives his appreciation of the relevant article in general terms. Here he assesses the drafting of the provision (at 462), pronounces upon the general significance of the provision (at 253), or just summarizes content and history (at 689).

The commentary edited by Oliver Dörr and Kirsten Schmalenbach was published in 2012 and includes the contributions of 12 authors amounting to 1,423 pages. Preparatory works, international practice, and jurisprudence are referred to in each contribution. The structure of the commentaries shows that special importance is attributed to systematic considerations as each article is related to other provisions of the treaty. The vast majority of chapters address questions of the relationship between the individual treaty provisions. The structure of the contributions is as follows: first comes the English version of each treaty provision, followed by a table of contents, the commentary, and a bibliography. The commentaries always start with a section on ‘Purpose and Function’, which treats the significance of the provision in relation to the VCLT in particular and the law of treaties and international law in general. In this section, the provision is placed in the context of the other treaty provisions. It is followed by a section on the historical background and the negotiating history and an explanation of the elements of the provision.

Thus, all three commentaries are organized in a systematic way along a strict structure. Nevertheless, each commentary has specific strengths. The commentary by Corten and Klein contains the 1986 Convention; Villiger provides a very good and helpful overview of the drafting process and a well-structured bibliography and Dörr and Schmalenbach engage in system-building by placing the articles in their legal context of the law of treaties and international law and show how the law of treaties fits within the broader system of international law.

2 Comparing the Content of the Three Commentaries

For the following comparison three pertinent issues serve as focal points: the ascertainment of *jus cogens*, the object and purpose of the treaty, and the grounds of invalidity, termination, and suspension.

A The Ascertainment of Jus Cogens Norms

The insertion of Articles 53 and 64 into the VCLT has been considered one of the most important but also most controversial achievements of the law of treaties and international law more generally.⁸ The potential effects of peremptory norms are being disputed in academia and practice.⁹ Eric Suy (Corten and Klein) remarks that

⁸ Kearny and Dalton, ‘The Treaty on Treaties’, 64 *AJIL* (1970) 495, at 535; Zemanek, ‘Vienna Convention on the Law of Treaties’, available at: <http://untreaty.un.org/cod/avl/ha/vclt/vclt.html> (accessed 2 June 2011), at 2.

⁹ For informative summaries of the discourse about *jus cogens* exceptions and immunities see McGregor, ‘State Immunity Jus Cogens’, 55 *ICLQ* (2006) 437; T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012), at 369–406. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 Feb. 2012, at 1, 37 ff.

Article 53, which prescribes that treaties conflicting with *jus cogens* at the time of their conclusion are void, has no significant impact on international law since it is unlikely that treaties explicitly allow for the violation of prohibitions like those on slavery and torture that are currently acknowledged to constitute peremptory norms (at 1228). Thus, what the VCLT says about the ascertainment of *jus cogens* may be more important than the effects it ascribes to its violation. Each of the commentaries under review treats the significance of Articles 53 and 64 VCLT with respect to this issue. Anne Lagerwall (Corten and Klein) shows how the provisions evolved significantly in the course of the negotiations (at 1466–1467). The final draft of the ILC did not include rules on ascertainment and leaned towards a natural law conception of *jus cogens* (at 1466). At the Vienna Conference, the criterion ‘accepted and recognized by the international community of States as a whole’ was included in Article 53 to ground the status of *jus cogens* in the consent of states and make it positively ascertainable. Villiger rightly remarks that the determination of peremptory status according to the VCLT ought to proceed by formal rules, and that there is no material definition of *jus cogens* (at 669). Schmalenbach (Dörr and Schmalenbach) examines all sources as reflected in Article 38 of the ICJ Statute and beyond as to whether they constitute potential sources of ‘peremptory norms of general international law’. In the course of this systematic and extensive inquiry, which is typical for commentaries, she raises the question whether general principles as defined in Article 38 ICJ Statute may be a source of *jus cogens* character (at 914). While Schmalenbach argues that they may, Villiger (at 670) and Lagerwall (Corten and Klein) (at 1468) deny that possibility. The latter two point to the parallel use of the verbs ‘recognise’ and ‘accept’ in Article 53 VCLT and Article 38 ICJ Statute, and take it to indicate that only treaty as well as customary treaty norms can have peremptory status. This literal argument can be countered with a reference to Article 38(1) (c) ICJ Statute, which provides that general principles ought to be *recognized* by civilized nations. If one agrees that human rights can originate from general principles,¹⁰ it is hard to see why general principles cannot also be accepted and recognized as peremptory norms by the community of states as a whole.

This issue shows how commentaries can further the inquiry into the law of treaties. The systematic treatment of provisions can bring new problems to light. But the focus on individual provisions may also restrict the perspective and the focus of the contributions. It is another typical feature of this genre that commentaries usually focus on the *status quo* of legal scholarship and have, therefore, only limited potential for innovation.

B The Definition of the Object and Purpose of the Treaty

‘Object and purpose’ is one of the essential concepts in the VCLT. Although it is not defined in Article 2 VCLT, it is mentioned in several provisions.¹¹ Since this notion has

¹⁰ Simma and Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’, 12 *Australian Yrbk Int’lL* (1988–1989) 82, at 102–106.

¹¹ See Arts 18, 19, 20, 31, 33, 41, 58, 60 VCLT.

been famously called an ‘enigma’,¹² it is interesting to see how the different commentaries treat this phrase.

Villiger provides a general definition according to which the object and purpose encompasses a combined whole of the term, including its aim, nature, and end. He then uses this definition consistently throughout his commentary: He deals with the concept of ‘object and purpose’ in the context of Article 31 (at 427–428) and refers to that general account on several occasions (at 248, 272, 460, 535). The chapter on Article 19 VCLT contains a more detailed treatment in which he denotes the notion as being a ‘combined whole’, which means that it should not be divided into object on the one hand and purpose on the other (at 271). He also refers abundantly to the ILC’s work on reservations (at 272–273).

Dörr (Dörr and Schmalenbach) gives an extensive and informative account of the meaning of the notion of object and purpose, while other authors of Dörr and Schmalenbach use the concept as defined by Dörr. First, Dörr indicates how to arrive at the object and purpose, referring especially to treaty practice (at 232). This account rendered in more detail when he refers to the standards employed by the ILC in its project on reservations,¹³ which included a slightly modified version of the rules on interpretation as contained in Articles 31–32 VCLT (at 264–265). In the context of Article 31 VCLT, he remarks that a treaty may have more than one object and purpose and that ‘intuition and common sense’ may be good guides to arriving at the meaning of the object and purpose (at 546), thereby introducing a subjective element on the part of the interpreter.

In Corten and Klein, there are two accounts of the concept of object and purpose in the commentary. With respect to Article 18, Laurence Boisson de Chazournes, Anne-Marie La Rosa, and Makane Moïse Mbengue stress the necessary complementarity of the notion of object and purpose throughout the Convention (at 384). They favour an objective approach to the determination of object and purpose, relying less on the intention of the parties, although they acknowledge that practice is not clear in this regard (at 390). In contrast, in his contribution on Article 19 Alain Pellet emphasizes the subjective element in the inquiry (at 448). He provides a list of factors such as the *travaux préparatoires* which would help in the determination of the object and purpose (at 448) and arrives at several notions which reformulate object and purpose such as efficiency, *raison d’être*, or fundamental core (at 450–451). In their contribution on Article 33, Alain Papaux and Rémi Samson contend that the quest for the object and purpose is in itself a form of interpretation (at 881). Similarly, in their comment on Article 60, Bruno Simma and Christian Tams remark that the object and purpose ought to be determined in line with the rules of interpretation as contained in Article 31 VCLT. The determination would require ‘an analysis of the reasons which led to the conclusion of the treaty’ (at 1359).

¹² Buffard and Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’, 3 *Austrian Rev Int’l & European L* (1998) 311.

¹³ Guide to Practice on Reservations to Treaties 2011, adopted by the ILC at its 63rd session in 2011, and submitted to the GA as a part of the Commission’s report covering the work of that session (A/66/10, at para. 75). The report is in *Yrbk of the ILC*, 2011, II, Pt 2. Guideline 3.1.5.1.

Jean-Marc Sorel and Valérie Boré Eveno focus on the practical examples of using the object and purpose in their discussion of Article 31 VCLT (at 817–823). Marie-Pierre Lanfranchi interprets the use of the phrase in Articles 19 and 41 (agreements to modify multilateral treaties between certain of the parties only) as being more constrained than in Article 58 (suspension of the operation of a multilateral treaty agreement between certain of the parties). From these observations it emerges that the commentaries differ – sometimes quite substantially – in their treatment of key concepts of the law of treaties. It is a strength of Villiger and Dörr and Schmalenbach that they are consistent in their definition and use of terms throughout the commentary. By contrast, the commentary of Corten and Klein allows for diverging opinions between the contributions and achieves coherence by other means such as cross-referencing. On a more general level, commentaries can unify or multiply legal opinion, depending on the authors. In relation to specific issues, authors tend not to leave open legal questions, but to decide them in a determinative and authoritative manner.

C *Invalidity, Termination, and Suspension of Treaties*

Many of the provisions contained in the VCLT deal with invalidity, termination, and suspension of treaties. If one approaches international law in geological terms looking for its different layers,¹⁴ these provisions evidence layers from times in which international law was considered the law of contracts for states. Rules on error in Article 48 VCLT or fraud in Article 49 VCLT are typically known from the domestic law of contracts or civil codes. Domestic rules on the promulgation of acts of parliament differ substantially: acts of parliament have to be established in a specific procedure; furthermore, in some jurisdictions their conformity with a constitution is required. And usually they do not lose their force if circumstances change.

In the times when international law was seen as private law between princes or states, the major theoretical problem was the ontological question, i.e., how to explain why sovereign states could bind themselves through their sovereign will.¹⁵ The practical side of this problem was the degree to which states were bound by treaties and under what circumstances they could free themselves of obligations previously undertaken. Under the contractual model, civil law analogies provided for various grounds to terminate or avoid international treaties. If it is true that international law has been changing its structure in the course of time and has become more like public law,¹⁶ this would suggest that the contractual analogies ought to be rethought. What do the commentaries tell us about the grounds for invalidity and the direction in which the law of treaties has been heading?¹⁷

¹⁴ Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *ZaōrV/HJIL (Heidelberg J Int'lL)* (2004) 547.

¹⁵ See, e.g., H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927).

¹⁶ See the research outline by von Bogdandy, Dann, and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German LJ* (2008) 1375.

¹⁷ For a very interesting recent account on related questions, especially with regard to Arts 52 and 53 see Dajani, 'Contractualism in the Law of Treaties', 34 *Michigan J Int'lL* (2012)1.

The tension between the stability of treaty relations and the freedom of states to denunciate or withdraw from a treaty is evident when it comes to the question of implied rights of termination. As Villiger (at 706) puts it, Article 56 VCLT achieved ‘a sound balance between the general rule and the exceptions, between stability and orderly change’. Article 56 VCLT presumes that a treaty which provides neither for termination nor for denunciation or withdrawal is not subject to termination or withdrawal unless an implied right can be derived from the intention of the parties or the nature of the treaty. As Thomas Giegerich (Dörr and Schmalenbach) (at 980–985) and Theodore Christakis (Corten and Klein) (at 1253) show, there are still treaties which remain silent on the question of termination and withdrawal. Christakis (Corten and Klein) attacks the rule with the aim of achieving greater freedom for states to withdraw or denunciate from treaties. He argues for reframing the presumption in favour of an implied right of denunciation (at 1258–1261). On a normative level, this account is based on a voluntaristic view of international law (at 1259–1260). On a practical level, it sees advantages in attracting more parties to treaties without risking violations of the law, since the general right of denunciation allows the parties to escape from their obligations. In essence, Charistakis is reinforcing the old contractual and voluntaristic conception of international law. Another provision originating in the domestic law of contracts is Article 62 VCLT, which is the provision on *clausula rebus sic stantibus*. This ground for termination has been contested, but was nevertheless included in the Vienna Convention. All commentaries agree that the requirements for the application of Article 62 VCLT are very restrictive. Malcolm Shaw and Caroline Fournet (Corten and Klein) show that the customary status of the provision is unclear (at 1416–1418). The compromise achieved in Vienna was drafted in such a complex manner that Villiger developed a questionnaire with the aim of restructuring the different parts of the provision into logical order (at 779). This questionnaire provides the reader with a new structure that helps him to check whether Article 62 VCLT applies. This is a good example of how commentaries rearrange the law in a way to make it better comprehensible. Giegerich (Dörr and Schmalenbach) attributes only minor practical relevance to the provision, but mentions one important function of Article 62 VCLT that it shares with other rights to termination and withdrawal: it can be used as a threat to bring about a renegotiation of the treaty (at 1070). Thus, the mere possibility of exit may stabilize treaty relations. Yet, the high threshold established by Article 62 VCLT will render the possibility for exit very small. The fact that Article 62 VCLT has rarely been applied, may also be interpreted as a success of the VCLT. As the states ratified the VCLT, they accepted that treaty relations are to remain mostly stable. It remains to be seen whether a public law concept of international law will make grounds for termination superfluous and redundant. In order to examine whether the grounds for termination and withdrawal have become outdated, one would have to look at the bigger picture of which the grounds for termination and withdrawal are only one part. In terms of institutional economy, one can – following Albert Hirschman – conceptualize the continued attractiveness of participation in

institutions in the terms of exit and voice.¹⁸ Termination and withdrawal would then constitute exit options. And a restriction of these rights would make it necessary to increase participation rights. More abstract considerations are, however, rarely found in commentaries. Commentaries regularly produce what Harold Koh would consider to be ‘useful legal scholarship’: helping practitioners and policy makers to make decisions when faced with a legal problem.¹⁹

3 Commentaries as a Genre of International Legal Scholarship in the Past, Present, and Future

A *The History of Commentaries in International Law*

Looking into the history of commentaries is not only a matter of academic interest. In literary studies there has been a continuous reflection about the relationship between content and form.²⁰ The way in which knowledge is presented frames the discourse and the way in which the law is treated. Thus, genres of scholarship to a certain extent influence the content of the law. While the invention of genres often serves certain purposes, after some time these forms may be used for reasons of tradition while their roots are forgotten.

Searching for archetypes of today’s commentaries, one would certainly have to look at the medieval commentaries on the *Codex Iustitianus*. A school which was called the glossators,²¹ ranging from Irnerius to Accursius, annotated the *Codex* in a rather literal fashion: they explained the meaning of words, pointed to the use of the same words in other contexts, and tried to harmonize the meaning of words. This school was triggered by the appearance of Roman law scriptures in the 11th century. The short annotations to single words, which were placed directly around the text, were called ‘*glossae*’. Those were in effect word by word explanations. The scholars using this method were called glossators. As with the scholastic tradition in theology, the glossators shared the assumption that there is an inherent meaning in texts.²² Accursius managed to collect many *glossae* and to put them together as a rather systematic treatise which was called *glossa ordinaria* and which possessed the characteristics of a commentary.²³ Unlike the glossators, the commentators took more liberties in defining the meaning of the law.²⁴ In their commentaries, they actively engaged in the resolution of legal problems in

¹⁸ See A. Hirschmann, *Exit, Voice and Loyalty* (1970); for an application of the theory to the EU see Weiler, ‘The Transformation of Europe’, 100 *Yale LJ* (1991) 2403, at 2410 ff; for an application to transnational questions including the law of treaties in international law see Benvenisti, ‘Exit and Voice in the Age of Globalisation’, 98 *Michigan L Rev* (1999) 167.

¹⁹ See the video of one speech available at: www.asil.org (accessed 12 Mar. 2013), at 7 mins 22 secs.

²⁰ See, for instance, A. Pettersson, *Verbal Art*, (2000), at 251 ff.

²¹ On the glossators see the very brief introductions by W.A. Hunter, *A Systematic and Historical Exposition of Roman Law in the Order of a Code* (1930); S. Meder, *Rechtsgeschichte: Eine Einführung* (3rd edn, 2008), at 178 ff. See the detailed description in H. Lange, *Römisches Recht im Mittelalter: Band I: Die Glossatoren* (1997).

²² P. Koschaker, *Europa und das Römische Recht* (4th edn, 1966), at 68.

²³ *Ibid.*, at 86.

²⁴ A brief introduction to the ‘commentators’ can be found in W. Kunkel and M. Schermaier, *Römisches Rechtsgeschichte* (2008), at 232–233. For a detailed description see H. Lange and M. Kriechbaum, *Römisches Recht im Mittelalter: Band II: Die Kommentatoren* (2007).

practice. They accorded less importance to the text, their method allowed for much wider inferences. Adapting the *Codex* to present societal circumstances, they included broad and narrow interpretations as well as analogies in order to deal with problems occurring in practice. They aimed at developing the purpose of the respective provision instead of only focusing on its wording.²⁵ For the commentators the genre of the commentary was a form of academic self-empowerment.²⁶ One could say that they acted like emperors. The so-called standard commentaries of Bartolus de Sassoferrato and Baldus de Ubaldis remained authoritative and influential until the 17th century.

Those two ways of commenting, by the glossators and the commentators, could be taken as archetypes of commentaries on international law. Authors of commentaries can be seen to act like either glossators or commentators. The former engage in strict explanation, which looks upon every word and tries to relate it to the rest of the text. Seeming contradictions are detected and then ‘explained away’. Much reliance is placed on the text which is at the centre of the inquiry. The text is of central importance. By contrast, the latter develop and influence the law to a great extent and can be described as lawmakers.²⁷ Commentaries sway between those two types.

In the law of nations, there have been only a few commentaries on legal treatises, while in the age of codification, scholars as well as collective bodies provided for detailed explanations of real or proposed codes. As far as commentaries on legal treatises are concerned, annotations of important texts in the early days of the law of nations such as *‘De Jure Belli ac Pacis’* by Grotius came close to being commentaries. Barbeyrac translated Grotius into French and added his own comments to the text.²⁸ Those were sometimes explanatory, but they also criticized and developed Grotius’ work.

When the codification movement reached the law of nations, systematic commentaries were used in this field as well. Scholars like Field,²⁹ Fiore,³⁰ and Bluntschli³¹ developed draft codes and included commentaries to explain them. A late example of an attempt in that regard was Hersch Lauterpacht’s draft of a human rights treaty.³² But there were also scholarly commentaries on international treaties such as the famous commentary by Wehberg and Schücking on the Covenant of the League of Nations.³³ Furthermore, collective codification attempts have been accompanied by commentaries such as the

²⁵ On the method see Koschaker, *supra* note 22, at 90–91.

²⁶ *Ibid.*, at 88.

²⁷ *Ibid.*

²⁸ See H. Grotius and J. Barbeyrac, *Le droit de la guerre et de la Paix* (1724).

²⁹ D. D. Field, *Draft Outlines of an International Code* (1872).

³⁰ P. Fiore, *Le droit international codifié et sa sanction juridique* (1911).

³¹ J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten: als Rechtsbuch dargestellt* (1868).

³² H. Lauterpacht, *An International Bill of the Rights of Man* (1945).

³³ H. Wehberg and W. Schücking (eds), *Die Satzung des Völkerbundes* (1921). Interestingly, Schücking and Wehberg were assigned to editing the commentary by a commission on which one delegate from the Foreign Ministry and one from the Ministry of Justice sat: see Wehberg, ‘Erinnerungen an Walther Schücking’, 35 *Friedenswarte* (1935) 223, at 228. To draw a parallel, the initiative leading to Bruno Simma’s Charter commentary came from the German Ministry of Foreign Affairs: see introduction to B. Simma (ed.), *Die Charta der Vereinten Nationen* (1991), at ix.

Harvard Drafts.³⁴ The drafts and treaties produced at diplomatic conferences such as the Hague Peace Conferences of 1899 and 1907 were not accompanied by commentaries, neither were the attempts to codify international law within the framework of the League of Nations. This changed profoundly in the era of the United Nations.

B *The Present State and the Functions of Commentaries*

Looking at the current state of commentaries, one ought to look at their use as well as the function and role they play in international legal scholarship. Different types of commentaries have been established, especially in German domestic legal scholarship.³⁵ There are projects called 'great commentaries' ('*Großkommentare*') written mainly by judges and comprising several volumes as well as short commentaries, which contain only the most important information and many abbreviations but are very popular with practitioners. 'Alternative commentaries' seek to include contextual information that looks also to societal, cultural, and economic circumstances. There is also a commentary on the German civil code that takes a historical perspective.³⁶ In international law, commentaries are not as differentiated, yet, there are also some interesting approaches: Robert Kolb, for example, is editing a commentary on the Covenant of the League of Nations, thus introducing the genre to the study of the history of international law.³⁷ Commentaries can also engage in comparative law: one commentary, for example, provides a comparison between basic rights as contained in the ECHR and the German constitution.³⁸

The establishment of the ILC as a suborgan of the General Assembly has significantly increased the importance of commentaries in international law. Article 20 of the ILC Statute requires the Commission to accompany its drafts with commentaries. The Commission has consistently understood this as a mandate to provide article by article commentaries.³⁹ Those commentaries have been cited by the International Court of Justice⁴⁰ and are frequently quoted in international legal scholarship. The ILC is not the only public institution that produces commentaries. The European Court of Human Rights, too, has started to publish a succinct guide on case law which is essentially a commentary.⁴¹

³⁴ See the several codification projects conducted by Harvard Law School as reprinted in the special supplements to *AJIL*: 23 (1929); 26 (1932); 29 (1935). The subjects include the law of nationality, state responsibility, the law of territorial waters, diplomatic privileges and immunities, the legal position and function of consuls, competence of courts with regard to foreign states, extradition, jurisdiction, and, last but not least, the law of treaties.

³⁵ For an overview see Henne, 'Kommentar', in A. Cordes (ed.), *Handwörterbuch zur deutschen Rechtsgeschichte: HRG* (2nd edn, 2008), at 1972.

³⁶ M. Schmoekel, J. Rückert, and R. Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* (2003).

³⁷ See the commentary on the preamble by A. Tzanakopoulos, available at: <http://ssrn.com/abstract=2103652> (accessed 10 Dec. 2012).

³⁸ Grote, Meljnik, and Alledwedt (eds), *supra* note 1.

³⁹ Rosenne, 'Codification Revisited After Fifty Years', 2 *Max Planck Yrbk UN L* (1998) 1, at 13.

⁴⁰ See, e.g., the extensive treatment of the impact of the Draft Articles on State Responsibility: Olleson, 'The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, Preliminary Draft', (2007), available at: www.bicil.org/files/3107_impactofthearticlesonstate-responsibilitypreliminarydraftfinal.pdf (accessed 12 Dec. 2012); see also references in Rosenne, *supra* note 39, at 13–14.

⁴¹ See the Guide on Case Law, available at: www.echr.coe.int (accessed 10 Dec. 2012).

Commentaries on international law are sometimes written by scholars from countries where there is no tradition of publishing commentaries on domestic law. For example, even though French scholars are said not to use commentaries in domestic law,⁴² international law scholars from France have produced influential commentaries on international law.⁴³ There seems not yet to be a commentary on the Constitution of the United States, despite its immense importance for American legal scholarship and society,⁴⁴ but there are commentaries on the law of nations edited and written by American scholars.⁴⁵ The fact that not only German, but also American, English, and French authors have produced commentaries on international law may indicate that commentaries have come to form part of international legal culture.

It may then be fruitful to think about how this form of presenting the law impacts upon the content of international law. The present author submits that the use of the genre of commentaries can entail five functions, of greater or less importance depending on how the commentary is drafted. These functions can be called *textual*, *systematic*, *contextual*, *discursive* and *quasi-legislative*.

As previously mentioned, it is a defining characteristic of commentaries that they are organized round the *text* of the law,⁴⁶ in international law the text of treaties. As in the case of the glossators, a commentary will attribute primary importance to the text of the treaty. The text will be the focal point, to which all other sources are related. While this may seem natural to the continental lawyer, common law textbooks show that the actual practice of interpretation may also serve as a starting point for further inquiry. The authors of commentaries inquire into every part of the provision that is being commented upon, even if it is of minor importance or if it is seldom used in practice. An example is the provisions of error in Article 48 VCLT which are explained in detail in all the commentaries reviewed here even though Éric Wyler and Rémy Samson (Corten and Klein) admit that practice in the application of this Article is scarce (at 1119–1121). This comprehensive approach is also the reason why the commentary has a *system-building* function. It is often not the statute or treaty itself which is systematic but rather the belief by those interpreting it. A commentary has the tendency to display the individual provisions in a coherent manner and to make sense of what is in the treaty. We have seen that for example Villiger redrafted Article 62 VCLT in the form of a questionnaire to aid the understanding of its complex system of presumptions and exceptions (at 779).

Depending on how the commentary is structured, a narrower or wider notion of *context* is being resorted to in order to ascertain the meaning of the law. Commentaries first focus on the text, but they can also include broader layers of context, especially the use of the respective provision in practice.⁴⁷ As we have seen, the *travaux préparatoires* as well as the practice of states and pronouncements of international courts

⁴² U. Hübner and V. Constantinesco, *Einführung in das französische Recht* (2001), at 31 and 33.

⁴³ See *supra* note 2.

⁴⁴ For this observation I am indebted to Prof. Dr. Bardo Fassbender.

⁴⁵ See, e.g., L.M. Goodrich and E.I. Hambro (eds), *Charter of the United Nations: Commentary and Documents* (1949).

⁴⁶ See also Henne, *supra* note 35, at 4.

⁴⁷ A different account is given by *ibid.*, at 4–5. He thinks that the wording is always central to commentaries while contextual considerations and reflections are not considered.

and tribunals are taken into account in the commentaries under review. Yet, social, cultural, and economic factors can also be included as further layers.⁴⁸

A central feature of commentaries is that they *structure the discourse*.⁴⁹ Commentaries aspire to be complete collections of all interpretations by all relevant actors⁵⁰ of the legal provisions they comment upon. If they become a central point of reference as in the German legal system, they will have the power to give relative importance to some views but also not to consider and, therefore, to exclude other views. This can have a significant effect upon legal discourse. While it is sometimes suggested that a commentary must not be too innovative,⁵¹ the authors regularly take sides with respect to critical questions. This feature gives commentaries a special status in legal discourse; they decide disputes about questions of law in a way that courts would give advisory opinions. By supporting specific solutions to legal problems, commentaries establish discursive hierarchies.⁵² The authority of commentaries is strengthened by the fact that the authors are frequently established scholars, who have already published on related issues. This adds to the importance of commentaries in legal discourse.

As the commentaries of Bartolus and Baldus show, this importance attributed to commentaries in legal discourse can lead to their having a *quasi-legislative* function.⁵³ In some jurisdictions that used the *Codex Iustitianus* and canon law, writing commentaries was criminalized under certain circumstances.⁵⁴ This shows that writing commentaries was perceived to be a relevant activity that could seriously impair the intentions of the legislators. Even today writing commentaries is of political significance. It has been argued that interpretation is part of norm-creation.⁵⁵ If one accepts that scholars act as law-makers,⁵⁶ this specifically applies to authors writing commentaries. They seek to lay out the law as it stands and to decide between opposing views. They also seek to deal with every relevant legal question. In comparison to legislating, the process of commenting can be faster, more nuanced, but also more ambiguous. The more weight is given to commentaries, the more one will also have to think about their legitimacy, especially with regard to their quasi-legislative function.

Those are the five functions that can be ascribed to commentaries today. By contrast some other functions of legal scholarship are not performed by commentaries: this is not the genre in which original ideas are developed or reform proposals are put

⁴⁸ See Schmoeckel, Rückert, and Zimmermann (eds), *supra* note 36.

⁴⁹ Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations*, available at www.wissenschaftsrat.de/download/archiv/2558-12_engl.pdf, at 69 (last accessed 20 Nov. 2013).

⁵⁰ Which would include international as well as national courts and tribunals, legal scholarship, governments and parliaments, as well as organs of international organizations in international law.

⁵¹ Schulze-Fielitz, 'Qualität öffentlich-rechtlicher Forschung', 50 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2002) 1, at 19.

⁵² Henne, *supra* note 35.

⁵³ *Ibid.*

⁵⁴ On those see generally Becker, 'Kommentierverbot', in Cordes (ed.), *supra* note 35, at 1979.

⁵⁵ I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), at 29–37.

⁵⁶ For a recent account of the problem of scholars as law-makers see Kammerhofer, 'Law-Making by Scholars', in C. Brölmann and Y. Radi (eds), *Research Handbook on the Theory and Practice of Law-Making* (2013), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182547 (accessed 2 Jan. 2013).

forward. Rather, the commentary is a place to collect and evaluate thoughts developed elsewhere and to decide which approach should prevail.⁵⁷

The function of commentaries has changed significantly in the context of codification from a genre containing mainly literal information to a genre providing also contextual analysis. This reminds us that the form of commentaries may not remain stable in the future but is likely to change with the evolution of law, science, and technology.

C The Future of Commentaries in the Face of Digitization

Many times it has been asserted that digital technology will have a significant impact upon legal science, that it will change the law,⁵⁸ that it will change the way law is taught inside and outside law schools and universities,⁵⁹ and that it will affect the forms of publication.⁶⁰ A change can already be observed with respect to book reviews, which can take different forms from brief book announcements to elaborate review essays.⁶¹ In today's scholarship, book reviews mainly serve to inform the reader of the existence of a book and to give a short overview of the content. Only a minority of reviews have it as their main aim to engage critically with the book, to develop thoughts, or to show alternatives.⁶² Reviews merely summarizing content are valuable to keep the readership of journals abreast of developments in the literature. However, more and more readers will obtain information about the existence of books online where they also have the opportunity to look at the table of contents, and often the introduction and a short summary, and sometimes even sample chapters. The increasing use by scholars of online sources of information will reduce the need for reviews that simply summarize the content. So the function of reviews may shift from providing information to enhancing discourse and critique. Given the changes in the field of book reviews one may raise the question how digital technologies will impact upon commentaries. The answer will depend on technological possibilities on the one hand and demand on the other.

As already mentioned, commentaries can summarize and structure the legal discourse. In the face of an increasing number of legal acts and judicial pronouncements and the increasing speed with which they are delivered, there will be a greater need for coordination and organization of primary and secondary legal sources. Digital technology also facilitates the publication of books and articles, thereby increasing the amount of scholarly opinion. The amount of information that has to be organized will grow

⁵⁷ Schulze-Fielitz, *supra* note 51, at 19. This can of course lead to the problem that commentaries on the same issue tend to reproduce each other: see Derleder, 'Von Schreibern und Textorganisatoren', 60 *NJW* (2007) 1112, at 1113.

⁵⁸ For a general reflection on how technological revolutions change the law structured in relation to different legal acts see P. Tiersma, *Parchment, Paper, Pixels: Law and the Technologies of Communication* (2010).

⁵⁹ E. Rubin (ed.), *Legal Education in the Digital Age* (2012).

⁶⁰ C. Borgman, *Scholarship in the Digital Age: Information, Infrastructure and the Internet* (2010).

⁶¹ See Häberle, 'Einleitung: Rezensierte Verfassungsrechtswissenschaft', in P. Häberle (ed.), *Rezensierte Verfassungsrechtswissenschaft* (1982), at 34–35. He identifies three functions of book reviews: information, critique, and facilitating scientific discussion.

⁶² For a classical example of a deep analysis combined with a lucid critique see Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?', 65 *AJIL* (1971) 358; among some

significantly. Unlike earlier, when international treaties or diplomatic correspondence had to be collected in published volumes due to a lack of accessibility, access to public information no longer poses a problem. Yet, the need for reliable organization of the abundantly available information may increase. The function of scholarship to structure discourse will become more important. All of those developments will call for more commentaries, but also for more efficient commentaries. The present author suggests that commentaries will change in at least five respects: *accessibility*, *layout*, *referencing*, *inclusion of other media*, and the *possibility of enhanced discourse within the commentary*.

Like other media, commentaries have been made *accessible* digitally as ebooks or within content systems.⁶³ Villiger and Dörr and Schmalenbach are accessible in that way in parallel to the print edition. It remains to be seen whether 'digital-only' and open access commentaries will emerge.⁶⁴ Digital-only commentaries would of course have the advantage of being easily changeable and swiftly adaptable to new developments. However, this will trigger the problem of how to archive the respective versions of the commentary in a manageable and transparent way.⁶⁵ An analogy to loose-leaf services combined with separate track-change modes may be viable options. Makers of new commentaries will have to think about the *layout* of their commentaries. Digital publishing often only replicates and reproduces print products. It has been suggested that there will be a further transformation of digital publications.⁶⁶ A mere replication deprives online publications of their specific advantages, one of which is the ability to include cross-references via hyperlinks. Some online commentaries have already organized texts into tree structures with the ability to unfold further explanations if the reader wishes to see them.⁶⁷ There are many more possibilities that could provide for clarity and structure. The so-called social books allow for an open-ended number of annotations by internet users in all parts of the books. If social books were to be used in legal academia, they could become the modern form of *glossae*. This also applies to referencing. Whereas the fathers of international law made references by direct or indirect quotations in the text, our system of references goes back to a new scientific ethos in the age of enlightenment.⁶⁸ Digital technology provides for new alternatives in that regard. It is technically possible now to develop a completely new style of referencing, and point not only to the text or the page but to the sentence or

of the rather recent examples engaging substantially with the reviewed book see von Engelhardt, 'Die Völkerrechtswissenschaft und der Umgang mit Failed States zwischen Empirie, Dogmatik und postkolonialer Theorie', 45 *Verfassung und Recht in Übersee* (2012) 232.

⁶³ See, e.g., two of the commentaries under review at www.springer-link.de and other commentaries at www.beck-online.de (both accessed 8 Nov. 2012).

⁶⁴ For a successful initiative of a casebook see S. Cassese *et al.*, *Global Administrative Law: Cases, Materials, Issues* (2008), available at: www.iilj.org/GAL/GalCasebook.asp (accessed 12 Mar. 2013).

⁶⁵ This is necessary in particular if something changes. In the case of digital-only commentaries, there has to be a place for the old text so that references to the old text in other publications can still be verified.

⁶⁶ Brown, Griffiths, and Rascoff, 'University Publishing in a Digital Age', 10 *J Electronic Publishing* (2007) 1, at 7.

⁶⁷ See the online commentaries at www.beck-online.de (accessed 12 Nov. 2012).

⁶⁸ A very interesting essay on the development of footnotes in history is provided by A. Grafton, *The Footnote: A Curious History* (1999).

even the group of words the author wishes to refer to, if the work in question is available online. In comparison to the hyperlinks we know today, the link will not refer to a page or a document but to one or more sets of words. What is more, the author could attach words to the reference that explain how he/she understands the text referred to. This will improve the verifiability of references in footnotes and is much more convenient for the reader wishing to track sources. These new techniques will be of particular importance for commentaries since they aim to summarize the legal discourse concerning a specific provision. Moreover, digital commentaries will be able to integrate other *media* such as pictures and videos. This may be of advantage in certain areas of the law in which information provided in other than textual form increases the understanding of legal problems. A most important and interesting innovation could be to include means of discussion and *discourse* into commentaries. As in the ‘talk’ section of Wikipedia, there could be opportunities for readers to comment upon the commentaries. One could even go further and allow discussions and discourse on certain topics as in a forum in which every reader can comment or even edit. While this could be a way to allow for the inclusion of collective knowledge, these technical possibilities may as well pose a serious risk. The editors would need to organize the discussion in a way that provides for quality as well as lucidity.

In all of the areas just mentioned, digital commentaries could profoundly change the way legal scholarship analyses, views, and illustrates international law. The five areas of potential change are only illustrative of the many possibilities for legal scholarship if it actively chooses to engage in a debate about the future form of commentaries and other types of legal scholarly writing. The further development of the genres of legal scholarship in the future should be of great concern. It is an essential expression of international legal culture that influences how we see and treat the law, but to a certain extent also determines what the law is.