### 2.3.3 *Bridging the Gap?*

Modern international law, with its "top–down" imagery, seeks a more pervasive and more commanding voice. To achieve that goal, it would not only address its institutional and instrumental frailties as systemic issues, but also co-opt the authority and legitimacy national legal orders. The separation of powers doctrine would resist any automatic recognition and enforcement of international law as law for the purposes of a domestic legal system. Some further justification is required, and commentators and scholars have obliged with ingenuity and quality. I suggest distinguishing the various strategies for justifying international law's binding force with a domestic system under three broadly defined categories. These are (1) the institutional, (2) the presumptive and (3) the reflective.

#### 2.3.3.1 Institutional Strategy

The most straightforward route is an appeal to institutional authority. This first strategy simply invokes the authority of an institution within the domestic legal system to declare international law to be valid law, or more generally, to have normative force. It relies on the ostensible position and function of the particular institution in the constitutional order. And what degree of normativity is attributed will depend upon the position of that institution in the legal hierarchy. This, in turn, emphasises that validity criteria are primarily relevant. As an appeal to authority, the institutional strategy principally engages the criteria of valid law-making, of passing the norms of international law through the appropriate channels. So validity criteria are applicable in the ordinary course: the right body, exercising the right powers, within the right limits. The "institutions" in question are, as might be expected, the courts, the legislature and the executive. The reference point is the constitution. Indeed the constitution itself, along with "the rule of law" and other fundamental constitutional doctrines—the separation of powers included—are also reasonably understood as "institutions" here.[232]

In pragmatic law terms, all this is naturally little more than highlighting constitutional power to recognise and apply international law. As such, there can be no question of going behind the decision that authority. The declaration should be accepted at face value in virtue of the authority the institution represents within the domestic legal order. Any application of the legitimacy criteria, the "secondary rules" in Hart's terms, raises a different issue at this level. Here legitimacy criteria are directed at the power and function of the body itself, not at the substance of the decision as with primary rules in the ordinary course. Because the appeal to authority focuses upon the powers and position of constitutional organs, or constitutional doctrines, questioning the legitimacy of a decision to incorporate

[232] On "institutions" as bodies and concepts, see, e.g., Zijderveld 2000 p. 37ff (distinguishing between institutions (conceptual) and institutes (organisational)) and MacCormick 2007, p. 11ff.

international law into the municipal system in fact questions the powers of that body. More precisely, it addresses place and function of that body in the larger structure of the state, which are fundamentally constitutional and separation of powers issues.

Institutional authority can be explicit or implicit. The first, explicit authority, originates in an express clause in a statute or in the constitution itself, at the apex of the legal hierarchy. For instance, the constitutions of France, the Netherlands, and the US all confer status of binding law upon the terms of treaties.[233] Of course the attribution of legal status only obtains providing certain formalities have been met, invariably including some form of legislative assent. A statute, too, may incorporate certain rules of international law for application within that legislative framework.[234] This obviously presumes also that the legislative body is acting within the limits of its constitutional jurisdiction. The legal effect of the rules depends upon the nature of their reference in the statute itself, which in turn relies on the operative doctrine of statutory interpretation. It should not escape notice, however, that apart from the requirement of legislative assent, all this applies only to treaties, or more generally, written instruments in international law. Customary international law is not included. Instead implicit authorisation conventionally serves as its widest portal into the national system.

#### 2.3.3.2 Presumptive Strategy

The second form of authorisation, the implicit, originates by way of implication from powers ordinarily conferred under the constitution. Those powers must, of course, specifically and necessarily include jurisdiction to make or declare law. This poses less of a (constitutional) problem under the doctrine of the separation of powers for the judicial branch than for the executive branch. As the institutions conventionally charged with declaring and interpreting the law, the courts exercise considerable responsibility in deciding what constitute the rules of recognition. By relying upon such (judicially developed) doctrines as direct effect/self-executing treaties, legitimate expectation, reciprocity and comity, and statutory interpretation, the courts can introduce both written and conventional rules of international law as domestic law. And coupled with the doctrines of *stare decisis* and

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[233] France: Article 55 ("*Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.*"); the Netherlands: Article 93 ("*Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, die naar haar inhoud een ieder kunnen verbinden, hebben verbindende kracht nadat zij zijn bekendgemaakt.*"), and the US, Article VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

[234] E.g., the Refugee and Asylum Convention Rules incorporated into the UK *Refugee and Asylum Act*, or the Warsaw Conventions, in the UK *Carriage by Air Acts*.

precedent, the courts can exercise a significant institutional authority. The government's powers, on the other hand, abut against the doctrine of the separation of powers. Accordingly, the executive branch must extract its constitutional authority by (necessary) implication either from express/implied grants of jurisdiction or from (historically held) prerogative powers.

As a strategy to justify the application of international law within the domestic legal system, the appeal to authority offers little more than a superficial solution. If an exercise of jurisdiction is to represent something more than arbitrary power, it should be supported by reasons explaining why and how it is being used. Yet beyond referring to the constitution, and any clause for transforming treaty provisions into national law in particular, an appeal to authority cannot itself offer any substantive grounds for transforming international law as a whole into national law. For example, the UK courts often refer to customary international law as being part of their legal order, and will cite a line of cases for that proposition deriving from *Triquet v Bath* at the source.[235] There exists a rather peculiar irony here, without considering the sketchy reasoning to the case. The issue in the case concerned diplomatic immunity. It applied by consequence the 1713 Statute of Anne dealing with diplomatic immunity. Moreover, the Act only came into existence as a result of foreign pressure threats—Prussian in particular—upon the English government to ensure protection of diplomatic immunity in the face of the rule's hitherto indifferent and inconsistent recognition before English courts.[236] Likewise, from the perspective of US law, *The Paquette Habana*[237] represents the US source authority for the seamless integration of (customary) international law into US law. Putting to one side any nuances possibly arising from prize jurisdiction, the case primarily discussed whether a rule of international law existed that exempted coastal fishing vessels from wartime capture. The majority simply declared, without more, that international law was part of US law. The three dissenting judges took issue not only with the establishing of the rule, but also its application within the US constitutional order without due constitutional authorisation. In particular, they cited *Brown v US* in which the majority held that

> [t]his argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign, and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

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[235] See, e.g., *R v Jones (Margaret)* [2007] 1 AC 136. The Scottish Court of Sessions in *Lord Advocate's Reference No. 2* (nuclear weaponry in Scotland not contrary to international law as applied in Scotland) did not even cite authority.

[236] Adair 1963, p. 290.

[237] *The Paquette Habana* 175 US 677, 700 ("international law is part of our law"). See also *Murray v Schooner Charming Betsy* 6 US 64 (1804) 118 (construing US statutes so as not to be inconsistent with or violate the law of nations).

> The rule is in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary….
>
> …Like all other questions of policy, it is proper for the consideration of a department which can modify it at will, not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.[238]

Trading upon the legitimacy and validity of the local constitutional system, we have not moved much past the need for a constitutional explanation, one in conformity with the current separation of powers. Indeed, if anything, the appeal to authority shows that international law may not claim normative authority in a municipal legal order except by its voluntary constitutional transformation into national law. Without that process, it remains simply rules applicable externally between states and other bodies having standing in international law, but without relevance or effect internally. So in effect we need to delve deeper than mere validity, into questions of legitimacy.

The second strategy presumes crossover validity because both sets of law derive from the same source: the general principles of (natural) law, of right, wrong and the good. National law and international law share a common substrate of fundamental principles, the larger rubric or collection of "general principles of law".[239] Indeed, this is prominently reflected in the Statute of the ICJ, at Article 38(1)(c) requiring the Court to apply the "general principles of law recognized by civilized nations".[240] Certainly this facilitates the borrowing of principles found in municipal legal systems, where the institutional and instrumental frailties of international law otherwise risk leaving a legal vacuum, the problem of "*non liquet*".[241] But nothing requires or mandates borrowing in the other direction, where municipal systems do not suffer like frailties. The basis lies deeper in the conceptual foundations of the law. In a reprise of the natural law underpinnings to the former "law of nations", the modern conception sees international law as the second branch, a fraternal twin, of municipal law. But it is no simple restatement of the natural position. Instead it presents a rather more sophisticated argument based on the functional uniformity of law. The reliance on a postulated single source of authority for the good, the right, has moved offstage. In its place in the limelight comes the conception of law as means of resolving conflicts among people based on a sense of cohesive and common obligation.[242] The rules of the various legal orders may reflect their different formal sources, but they all aim, in

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238 12 US 110 (1814) 128–129.

239 O'Connell 1970, vol. I, pp. 9–13 (and p. 11, citing Judge Tanaka's dissenting opinion in *International Status of South West Africa* (Adv. Op.) ICJ Reps 1950 128 regarding "general" to mean "common to all branches of law"); Shaw 2008, p. 98ff.

240 And repeating the same text found in the 1920 constituting statute of its predecessor, the PCIJ, at Article 38.

241 Shaw 2008, p. 98.

242 Relying here on O'Connell's outline of argument: O'Connell 1970, vol. I, p. 43ff.

their totality, at the orderly and beneficial conduct of human affairs. For law, in its totality and divested of any particular formalities, is just that: a means of resolving disputes based on rules of behaviour. Human nature and interaction remains basically the same over time and place. Likewise, the same sorts of conflicts recur at different times and in different places. No individual lives exclusively in on single legal order, national or international. There is inevitably and naturally an overlap. So it would be expected that law would seek and demonstrate an internal consistency in resolving disputes across formal boundaries and a harmony among the diverse statements of rules for behaviour. If it cannot avoid inconsistent particular rules testing its fundamental unity, law may nevertheless insist that no one or other rule be treated as necessarily void. Nor is it sufficient merely to avoid the problem by declaring the two legal orders—national and international, more often than not—as mutually exclusive and wholly separate. Hence an international or domestic court of law may not simply assume the rules of one system as paramount or voidable, but must seek to do justice by ensuring a harmony among those collections of rules. "It is one of the principal functions of juristic reasoning to eliminate contradiction by harmonising points of collision, not by pretending that they do not exist, nor by crushing the one with the other."[243]

This perceived conjunction of the two systems might therefore seem to permit an easier and greater interlacing and integration of the two, modulated of course by the rule of law mindset. On a practical level, then, the rules of international law are generally available to a judge. Of course, a judge is bound by jurisdictional rules, such that if they so dictate, the judge must comply with the latter. But it is important to note the nuance following upon the conjunction: a judge may resort to international law *except where the constitution prohibits*, and not *only where the constitution permits* (expressly or by necessary implication). When the two legal orders meet, in the words of Niboyet, "[T]hey are not like a gear [*scil*. on two separate drive shafts], but like two wheels revolving upon the same axis."[244]

But any such amalgamation of international law with national law over-simplifies the nature of the conjunction. The conjunction obtains only because the "general principles of law" are drawn at an impracticable, high level of abstraction and generality. That law is pitched at this level arguably justifies conjoining social laws, moral laws and religious laws as well, as well as all other rules regulating conduct in a society and derived from human thought. There is no reason to restrict "law" here to a forensic sense, a result which hardly advances progress towards a definitive, workable solution.[245] It would lead to the peculiar, awkward, and likely objectionable result of requiring courts *ex mero motu* to harmonise domestic laws

[243] O'Connell 1970, vol. I, p. 44.

[244] Quoted in Preuss 1950, pp. 413–415 (from J.P Niboyet, in *Melanges R. Carré de Malberg* (Receuil Sirrey, 1933), discussing the interaction of French law and treaty provisions).

[245] Of course, there are those who obviously would find no issue or fault in that proposition. The interpenetration of all those normative systems is a feature of natural law and of systems invoking a Kant-inspired categorical imperative as revealed through human conduct. But there are equally those who are not so persuaded, and thus controversy persists.

with not only international law, but also the laws of other legal systems, and other value systems more widely. And this apart from abstract principles rendering no assistance or facility in solving basic legal issues in practice, where details and nuances are determinative, even allowing for the possibility of interpenetration in theory. Moreover, that abstraction seems to discount in a perfunctory way the significance of differences, contradictions and inconsistencies, and fails to account for why they do exist. The functional assumption only suppresses the controversial basis to natural law, a single, unified conception of "right", "good" and "true", but does not discard it at all. The variations among laws and legal systems hardly appear cosmetic or accidental. They reflect serious differences in the substance of the law and in the process of law-making, in the same way that they also point to differing social conceptions of what is good, and right.

In reality, each system under the supposed conjunction has its own criteria for validity and legitimacy of laws, international law no less than national laws. And the one set cannot be presumed to apply with equal force and effect in any other normative systems but its own. The conditions for normative validity and legitimacy are neither presumptively nor inherently transferrable. The heterogeneity of national laws and legal systems is produced by, and is a reflection of, the relevant, specific constitutional settlement in operation at the time. We come full circle back to the demands imposed by the separation of powers doctrine.

#### 2.3.3.3 Reflexive Strategy

Rather than treating the normativity of international law primarily or entirely in terms of binding law, the last strategy considers international law as principles which should resound perceptibly in the understanding and application of domestic law. Rather than treating international law as binding law equivalent in some way to domestic legal rules, a "morality of duty" in Fuller's wording, it provides instead an interpretative framework, a "morality of aspiration". In other words, international law is a persuasive authority, rather than a mandatory authority for the domestic legal system, whatever its own status may be in the international legal system. Its application a rule of interpretation, rather than as a rule of decision, acts as a means of tuning national law to the harmonies evidenced from coordinated legal systems. This can occur in two ways. The first sees international law reflecting the underlying goods and values of established national law, so that resort to international norms ensures that national legal rules remain properly calibrated in terms of those goods and values. Citing international law serves to reiterate and reinforce those innate values. The second route views international law as reflecting the common goals and values of other legal and social systems (the "general legal principles" of Article 38 ICJ Statute), so that resorting to international norms would seek to orient and calibrate national rules in line with international standards. For example, then, argument before the US Supreme Court in support of overturning Texas criminal convictions for homosexual conduct, and for overturning death penalty convictions made extensive reference to

international and foreign legal materials.[246] In both aspects it is vital to recognise that the "international" character resounds in a comparative law sense of the collective wisdom or folly of other legal systems, and not as a unity or block of collected wisdom (so presumed) representing universal social value. The strength or weakness of that package will depend on the relative quality of the compared legal systems and their judicial decisions.

That reorientation obviously may only obtain within the limits of the domestic constitutional structure. Effecting a "paradigm shift" in the basic principles, rules and values of the domestic legal system is not the objective. The municipal legal and social systems will already be receptive to those ideals, containing some expression or kernel of them. Their articulation at the international level, the persuasive weight generated by their (ostensible) practice in manifold legal systems, would motivate local authorities to adjust or alter current practice by discovering or emphasising these ideals within their own system. The difference between the two branches to this strategy is really a matter of degrees.

The internalising of international law norms can occur through various channels. Interest and pressure groups, professional lobbyists and others will invoke the principles of international law to adopt and advance certain policy objectives in government and legislation. Government officials and advisors will refer to international law materials in developing legislation and policy. Lawyers and judges will draw upon foreign judgments and commentary (and perhaps also, albeit rarely or exceptionally, foreign legislation) in order to articulate how domestic legal rules ought to be understood and applied. Courts will use international law in cases to expand or narrow the scope and range of rules, limiting or broadening aspects of a rule's coverage and operation. I should hasten to emphasise that, at least in the common law world, the courts do not draw upon foreign and transnational materials *ex mero motu*. They are provided with those materials, usually and in the ordinary course, by counsel seeking to buttress and support the arguments in favour of their client's position. Strictly speaking, counsel are responsible (at least at the outset) for internalising international norms, and convincing the judiciary to make use of them. In civilian systems the responsibility tends to fall in general upon the judicial branch itself to resort to international law where relevant and necessary, even if counsel have not adverted to it.

The strategy relies on a process of "internalisation" of international law norms. There is no need to crystallise this into some formal institution of "transjudicial" or "transnational" legal networks. Formalisation and formalities suggest the need and presence of organisation, structure and rules, all at an international level. This simply posits a further level of international obligations and structures between national and international legal systems. The reflective strategy is better seen as an informal practice arising out of each individual legal system according to its own needs and procedures.

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246 *Lawrence v Texas* 539 US 558 (2003).

### *2.3.4 Where We Go from Here*

Now, by engaging domestic legal standards, mechanisms, institutions, and so on, international law thus invites a more searching evaluation of its validity and legitimacy criteria from the constitutional law perspective normally reserved for national laws. It would seem only reasonable and logical that, with the widened perspective of international law to include the internal, international law would have some practical and practicable idea of how law is made at a national level, how its own precepts might intersect with national law: in short, an understanding of how its own concept of law-making might be reconciled to that of national systems. To that end, I turn next to a consideration of treaties and thereafter, customary international law.

# Chapter 3
# Treaties and Law-Making Powers

## 3.1 A Compact Outline

### *3.1.1 Treaties and Other International Agreements*[1]

In the allocation of functions under the separation of powers, the conduct of foreign relations invariably falls into the hands of the executive branch. Less a matter of logic and principle, and more one of history and convention, international relations have been and continue to be transacted among heads of state and heads of government (or their authorised representatives) rather than among parliaments. Only in the latter decades of the twentieth century was the constituency of participants in the process of international law widened to include certain treaty-based organisations, recognised as having legal personality.[2] This is not to disregard nor discount the presence of an extensive and variegated class of international associations and non-governmental organisations advocating and lobbying for certain interests in international relations.[3] Their influence on state actors can be considerable. Their proposals for international standards are often adopted or ground international agreements. But it remains a fact of international law that it is states which by practice and agreement establish and recognise the rights and duties of public international law. And it is the governments of those states who direct and control the acts of officials, diplomats, armed forces and private parties on the international plane which constitute the ingredients of that practice and agreement. Diplomatic representation, military action, law enforcement, treaty- and agreement-making, in effect the entire

[1] This section draws heavily upon a leading statement of modern treaty practice under the Vienna Convention on the Law of Treaties (1969), being Aust 2007. For the state of international law prior thereto, see McNair 1961.

[2] See, e.g., Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) UN Doc. A/CONF.129/15 (not yet in force); Aust 2007, p. 399ff (providing the constituting treaty of the organisation allows for it).

[3] Boyle and Chinkin 2007, p. 46ff.

D. Haljan, *Separating Powers: International Law Before National Courts*,
DOI: 10.1007/978-90-6704-858-3_3, 

collection of public international relations, all arise from and are prosecuted by the executive branch.

Agreement and consensus lie at the foundation of foreign relations. Identifying and securing agreements among governments in their relations with one another has always been a concern of states, if not also at the core of public international law. Reducing mutual understanding and promises to writing always represented the best means of preserving and evidencing agreement, from the earliest of days. While international instruments bear any number of different titles, from treaty, convention, to protocol, covenant, memorandum, to concordat, declaration, joint statement and so on, in modern terms the treaty sits at the apex of agreements in international law.[4] This prominence derives in no small measure from efforts to codify uniform, basic, minimum level principles in the *Vienna Convention on the Law of Treaties* (VCLT).[5] Below treaties proper, extend any number of the formal and informal written agreements among international parties, public and private. Following Aust, we adopt his general term "memorandum of understanding" or "MOU" to refer to these non-treaty instruments.[6]

A treaty, defined in international law, is a contract in writing among two or more sovereign powers, by their designated representatives, and may be contained in a single instrument or in a number of written exchanges.[7] It is the substance of the agreement between the parties, and not the form or title, which determines whether an instrument is a treaty or not. A treaty is a formal agreement reflecting an intention to create mutual and reciprocal obligations binding in international law among the state parties. Article 102 of the UN Charter and Article 80 of the VCLT require treaties to be registered with the UN.[8] Lastly, VCLT has become the touchstone for the definition and legal assessment of treaties[9] whether by its own terms or as a statement of current customary international law.[10] Nevertheless there remains a considerable body of other international law, customary international law in particular, applicable to treaty relations and international agreements. The VCLT expressly acknowledges the continuing validity of that body of rules, where not otherwise covered by the VCLT and especially in the case of its newly-minted "peremptory norms of general international law".[11]

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[4] See generally, Aust 2007, esp. pp. 16–31; Shaw 2008, Chap. 16, p. 902ff; O'Connell 1971, vol. I, pp. 195–205.

[5] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (in force 1980).

[6] Aust 2007, pp. 25–26; 32ff.

[7] VCLT Articles 2, 4, 7; Fitzmaurice and Elias 2005, pp. 1–47; and generally Shaw 2008; Aust 2007, and Fitzmaurice 2002.

[8] Article 102 of the UN Charter also refers to "international agreements" on which see Aust 2007, p. 340.

[9] Note Article 69 "A treaty the invalidity of which is established under the present Convention is void."

[10] Aust 2007, pp. 12–13.

[11] Weil 1983. Arguing for a more long-standing provenance and existence: Byers 1997, pp. 213–214, and Paulus 2005, pp. 300–301 (and works cited there). See also Tams 2005, p. 99ff.

There are a number of elements at play in the definition. First, the international law framework recalls that the definition originates out of the international legal order, treaties being a central feature of that order. National legal systems may define a "treaty" differently—more widely or more narrowly—for their own purposes.[12] These definitions in and of themselves do not represent the position in and for international law. Of course, we should nevertheless expect the domestic concept of "treaty" to be reflected in a state's dealings on the international level. Internal considerations of a constitutional, legal, and political nature, will obviously constrain or restrain a state's conduct externally, and thus be projected onto the international plane.

Second, the parties must intend to create a legal obligation governed by international law. The circumstances of its negotiation and conclusion, and its terms, will determine whether an instrument demonstrates the necessary intention to create international obligations, and to be bound by them under international law. If the evidence is such to show no intention existed to create binding legal obligations, no treaty exists. The instrument may carry political, moral or other obligations, but are not otherwise legally binding (hence, *enforceable*) in international law. This means that intergovernmental agreements within a state are not treaties, not being international agreements. Nor do transnational agreements made subject to the national law of one of the states party to it, qualify as a treaty.[13]

Third, the parties to a treaty are states, signifying their consent by their respective heads of state, heads of government, or accredited representatives.[14] Transnational agreements between private parties, or between private and public parties, do not constitute treaties, at least for the purposes of the VCLT. Hence agreements granting concessions for oil exploration or mining ventures or other commercial investments entered into by states and corporations do not constitute treaties in this sense.[15] Nor are those agreements between governments and indigenous peoples treaties for the purposes of international law.[16] Nevertheless these types of compacts and agreements may be considered as treaties within and for the purposes of a particular national legal system.[17] By Article 3 VCLT, the exclusion of these types of agreement from coverage under the VCLT (and international law) does not affect their validity or legal force independent of the VCLT, whatever that may be. Moreover, despite the requirement for state parties, treaties can and do provide for

[12] As recognised in Article 2(2) VCLT. A good example of which is the US "executive agreement", to bypass the constitutional requirement of Senate approval for "treaties" (see further below). See generally, e.g., Krutz and Peake 2009.

[13] Such agreements may be made under cover of a prior, overarching treaty.

[14] See Article 7 (full powers to conclude treaties) and see also Article 4 VCLT and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) for considerations pertaining to non-governmental entities. Aust 2007, pp. 58ff (capacity to conclude treaties), 75ff (full powers).

[15] See, e.g., *Buttes Oil v Occidental Oil and Hammer* [1982] AC 888.

[16] Relying on Aust 2007, p. 18 and works cited there.

[17] As in the US: see e.g., *Choctaw Nation of Indians v US* 318 US 423 (1943).