© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

NYU International Law Course (Kingsbury)

Unit 4: Treaties in International Law (With Extended Treatment of Human Rights Treaties)

Users' Guide
Updated April 27, 2009

A. *Theoretical Framework*

Unit 4 studies treaties, a significant source of international law. There are two main themes in this unit. The first theme looks at treaties *ex ante*—how is a treaty regime established and what are its objectives? The second theme considers the treaty regime *ex post*—how does the treaty regime develop over time?

Much of this unit can be discussed through the lens of game theory. In a ***coordination game***, states may have trouble coming to the agreement in the first place, but both states are better off once they make the agreement. Once made, the agreement is self-enforcing; neither state has an incentive to defect because if they cheat, they will be worse off. A ***cooperation game*** is more complicated because each state is better off if they defect but the other state continues to cooperate.

Thus, for example, Canada and the U.S. might make an agreement concerning the dumping of waste into the oceans. Canada wants the U.S. to stop its vessels from doing so, so that the oceans become cleaner, but does not want to stop its own vessels. The oceans will be cleaner but Canada won't have to absorb the costs. The U.S. has similar goals. Both sides want to make the agreement and then cheat on it. However, when both sides cheat, everyone is worse off. International law can play much more challenging role here, by helping to make a clear agreement, providing a capacity for information and monitoring, and making it expensive enough to breach that it's not worth it to either state.

Treaties may set up sanctions regimes, making clear what the remedy for breach is and further serving to separate one international law regime from others (for example, separating a dispute over fisheries from counterterrorism and border control issues). Different logics may lend themselves to different governance structures designed to further cooperation. For example, it may be more difficult to achieve cooperation and coordination in the human rights context than

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

in the markets context. Compare, for example, the Human Rights Committee and ICCPR to the WTO. Note also the role domestic politics can play in encouraging or discouraging cooperation. Domestic politics and support for the environment in the waste-dumping case discussed above, for example, could keep Canada from retaliating in kind against US violations. This use or absence of counter-measures is discussed regarding *Oil Platforms*, *Air Services*, and *Corfu Channel*.

These "games" become all the more complicated when national politics get factored in. In reality, a ***two-level game*** is occurring.[1] The Canadian prime minister is negotiating with the U.S. President, and each leader is also a player in the domestic game, seeking to stay in power. Courts may consider how their decisions in the domestic game will affect the executive at the international level. A court might know that by making ICJ decisions self-enforcing in domestic court, for example, the state loses negotiation power with other states, which might otherwise have to make concessions to gain compliance.

A second important theme to consider is the role that international institutions play in interpreting and expanding the treaty regime. Under the traditional foreign office model, treaties are based on state consent, and state consent defines the limits of the legal obligation. Yet, the ICJ and other institutional bodies have sometimes expanded a treaty regime beyond what states may have thought they agreed to when ratifying the treaty. These institutional bodies may limit themselves as well, not wanting to lose constituents through politically unpopular decisions.

B. The Trajectory of the Unit

Unit IV begins by examining how treaties are made, with a focus on the Vienna Convention on the Law of Treaties (VCLT). It moves on to explore other important doctrinal points from the traditional law of treaties, such as how states can become bound to a treaty and the ways in which a state can end its treaty obligations. Following this, Unit 4 studies the interpretation of treaties, with examples from different courts. It then explores the doctrine of state responsibility in international law, with a particular focus on countermeasures. Next, a

[1] *See* Robert D. Putnam, *Diplomacy and Domestic Politics: the Logic of Two-Level Games*, 42 International Organization (1988).

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

study of treaties in U.S. law further illuminates the two-level game framework, as it provides an example of the interaction between the domestic and international planes.

Finally, Unit 4 returns to many issues studied previously (such as the interpretation of treaties and state responsibility), examining these issues in the context of human rights treaties. This international law course consistently explores the limits of the foreign office model in international law, and the ways in which the global governance model might be a better framework in some situations. The study of human rights treaties showcases the limitations of the foreign office model, since human rights are individual rights. Furthermore, in most human rights treaties, states undertake obligations towards their own citizens, rather than vis-à-vis another state. Thus, the general law of treaties expressed in the Vienna Convention may not map perfectly onto human rights law, and human rights law may also help change the general law of treaties, as in the case of reservations.

This section also discusses the law of state responsibility and attribution. Again, there is a need to look beyond the traditional foreign office model views of territorial jurisdiction to determine when a state can be held responsible for actions outside of its jurisdiction, and further, when a state can be held responsible for the actions of private actors.

C. A First Look at the International Law of Treaties

Any study of treaties must include a study of the Vienna Convention on the Law of Treaties. The VCLT only applies between states that are parties to the VCLT, although much of it is also customary international law. The VCLT embodies an important idea, that there is a unified law of treaties. In this unit, we question the idea whether there *should* be a unified law of treaties across various subjects. For example, in domestic law, the canons of interpretation will not necessarily be used to interpret wills, the Constitution, and civil rights statutes. In practice, it is not clear that the law is as unified as the VCLT implies.

It is possible and routine to contract out of most of the law of treaties. In making an agreement, states can specify how it is to be interpreted, and can exclude the general customary international law rule or the VCLT as a treaty. An example of this is the WTO's Anti-Dumping Agreement, which contains its own rule of interpretation. This can also be used to exemplify the concept of a ***self-contained regime***, although it is not completely self-contained.

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

This section examines how treaties are made and how states can become bound. It then looks at the validity of a treaty, using the Panama Canal treaty to explore various articles of the VCLT that render a treaty invalid, such as corruption of a representative, coercion, and fraud. Although the VCLT was not yet enacted at the time of the Panama Canal treaty, it serves a useful case study in applying the provisions of the Convention. Notably, VCLT Article 52 means military force; nothing in the VCLT invalidates a treaty procured by economic coercion.

The unit also explores withdrawal from a treaty and the doctrine of ***rebus sic stantibus***. There are two situations where a fundamental change of circumstances cannot be relied on to withdraw from a treaty—if the treaty establishes a boundary or if the fundamental change is the result of a breach by the party invoking it. Why is this so? What is special about boundaries?

Finally, we explore the legal effects of unilateral obligations. Some of the conditions under which a unilateral declaration by a state has legal effects might have parallels to law of treaties. For example, who can represent the state for international purposes? In the case on the ***Legal Status of Eastern Greenland (PCIJ, 1933)***, the ICJ held Norway's statement, made by the Foreign Minister, to be binding on it (although opposable only between Norway and Denmark, and not any third parties.) So too in the ***Nuclear Tests Cases (ICJ, 1974)***, where the ICJ gave France's statements legally binding effect. The ICJ may have had strong prudential reasons for holding this way, and finding that the ongoing case before the court was no longer a case after France's statements. Given that most states no longer conducted atmospheric tests and were shifting their practice to underground tests, it would have been retrogressive for the Court to find atmospheric testing lawful, but it also may have been too progressive to find it unlawful. The ICJ was able to avoid the question by dismissing the case before it after France's out-of-court statements that it would no longer conduct these tests. In the ***§ 301 Trade Panel case (European Community v. USA, 1999)***, the panel seemed to imply that the US (through USTR, its trade representative) had made a unilateral declaration in saying that it would not enforce a law that was potentially violative under the WTO regime. The ultimate outcome was that the panel would not evaluate the violation until they saw whether or not the US violated that declaration and actually enforced the law. Consider whether unilateral declaration actually encourages cooperation between countries or is used by international institutions to escape the burden of politically impracticable adjudication (or both).

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

D. Interpretation of Treaties

Who interprets treaties in international law? Often, interpretation is not judicial, but rather, is exercised by a state's legal advisers. Other times, an international organ—such as the Security Council—interprets a treaty. National courts must interpret treaties as well. Do these various institutions approach treaty interpretation in a different way? What happens when another body has interpreted a treaty—should that interpretation be taken into account? The following three cases consider treaty interpretation in three different institutional settings: the U.S. Supreme Court, the European Court of Human Rights, and the ICJ. How does the institutional setting influence the different approaches taken by each tribunal? Does the context in which the decision is given—markets, military, or morals—influence the interpretive approach? Although three cases are focused on here, treaty interpretation is an issue throughout this unit, and much of this course.

Note the different ways in which treaties can be interpreted: with reference to the *telos* (teleological interpretation, often found in the WTO); with reference to the object and purpose (a narrower concept than the *telos* which refers to the specific intent of the states parties regarding the facts of the case and in the preamble, rather than the overall scheme of the organization/treaty); or focusing most heavily on the ordinary meaning of the text (usually as found in its international context). Another useful term is *acquis*, which is a European term used to refer to the existing body of law and cultural context of the specific institution created by the treaty.

Air France v. Saks (U.S. Supreme Court, 1985) provides an example of the United States Supreme Court's method of interpretation as the court determines the proper meaning of the word "accident" in a particular article of the Warsaw Convention. The Supreme Court began by reviewing the language of the relevant article. Since the French text governed, the court looked at French cases, not to apply French law but to give the specific words of the treaty a meaning consistent with the shared expectations of the parties. The court also looked at the *travaux préparatoires*—the negotiating history of the Convention—to confirm its interpretation. Finally, the court looked at interpretation given to the term by other courts, which begs the question of how far a national court should find independently significant what other national

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

courts have done. A court might value uniformity and consistency, and so might want to bring its interpretation of a treaty in line with the interpretation of that clause around the world.

In deciding how much weight to give the interpretation of a treaty by other national courts, many questions arise. Should it matter if the foreign jurisprudence is the highest court of those countries or a lower court? Does the quality of the reasoning matter? Is the foreign court captured by industry? Furthermore, although not present in the *Air France* case, an international tribunal might exist. Should the national court follow the international tribunal's interpretation? Joseph Weiler has proposed the idea of ***exhaustion of international remedies*****,** whereby national courts should wait and first find out what the international court thinks on a given issue.

The European Court of Human Rights held in ***Golder (European Ct. Hum. Rts. 1975)*** that the right of access to courts constitutes an element inherent in the right stated by Article 6(1). The majority performs a textual analysis of the French and English texts, and uses the preamble of the European Convention on Human Rights to conclude that that "rule of law" was intended to inform the object or purpose of the overall convention even though the relevant provisions do not mention right of access to the courts. Per VCLT Article 31(3)(c), the court takes into account relevant rules of international law applicable in the relations between the parties; it finds that the principle whereby a civil claim must be capable of being submitted to a judge is one of the universally recognized fundamental principles of law, as is the principle of international law which forbids denial of justice. Both the majority and the dissent claimed to be giving effect to the parties' intentions, with the majority taking the approach of deepening the protection of the Convention over time.

In ***Bosnia v. Serbia (ICJ, 2007)***, the ICJ had to interpret the Genocide Convention in the context of state responsibility. The court determines that Bosnia's burden of proof to show specific intent to destroy a group as such is not the civil burden, but rather proof beyond a reasonable doubt. The ICJ shifts the criminal standard—used when the Genocide Convention is used to convict individuals in criminal courts—into the ordinary state responsibility context. Notably, this interpretive move is not grounded in the text, which says nothing about burden of proof. Ultimately, the ICJ does not find specific intent to commit genocide was proven as attributable to Serbia, but does find complicity.

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

E. Breach of Treaty and State Responsibility

This next section of Unit 4 begins by examining the relevant VCLT articles as well as sections of the ILC Draft Articles on State Responsibility. Both sets of rules apply in the case of a breached treaty obligation; the challenge is to figure out how the rules interact and work together. The rules on state responsibility are *secondary rules*, in contrast to the *primary rules* that consist of the rules of conduct. These secondary rules govern whether that conduct is attributable to the state. The ILC Draft Articles are not a treaty; the U.N. General Assembly has merely passed a resolution taking note of them. However, the articles are cited in many international law cases, especially in investor-state arbitration awards. They have become influential without going through any foreign office form. Historically, a basic tension existing in the law of state responsibility concerns whether a national treatment standard or an international minimum standard is appropriate.

The materials next consist of several cases. The ***Rainbow Warrior (France-New Zealand Arbitration Tribunal, 1990)*** and ***Gabcikovo-Nagymaros (Hungary v. Slovakia, ICJ 1997)*** cases are helpful for examining the various circumstances precluding wrongfulness contained in the ILC articles, including force majeure, necessity, and distress. In *Gabcikovo*, The ICJ held that Hungary's termination of the treaty was unlawful and that none of the circumstances precluding wrongfulness applied. However, the ICJ also found that Slovakia could not repudiate the treaty because it also acted unlawfully by trying to unilaterally divert the Danube, a boundary river in which Hungary had an interest. Thus, both states must treat the treaty as continuing, even though both had acted inconsistently with it. Hungary had argued a fundamental change of circumstances took place by the democratization of the two states, since the treaty was made during the communist era. The ICJ determined that this democratization was not a fundamental change of circumstance *in relation to this treaty* because it was not a political treaty and was not tied to communism.

This section next moves on to the study of ***countermeasures***: a measure taken by a state in response to a breach of international law by another state. Countermeasures include *retorsion*—measures a state could take which would not be illegal anyway, such as breaking off diplomatic relations—and *reprisals*—an action which would be unlawful except that it may be justified and made lawful by prior illegality of the other state. Reprisals may be forcible or non-

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

forcible; though the ILC has tried to move toward the point that forcible reprisals are no longer permitted in international law. The ***Air Services Arbitration Case (France v. United States, Arbitral Tribunal, 1978)*** establishes the modern law of countermeasures, accepting the idea that states can engage in countermeasures as long as they are proportionate and necessary. This self-help regime is unpopular with many developing countries, because it allows more powerful countries to have the upper hand, using countermeasures to force the result they seek. The law of countermeasures is also at work in the ***Oil Platforms (Iran v. United States, ICJ, 2003)*** case, where the U.S. bombed some Iranian Oil Platforms in the Gulf and argued its actions were a countermeasure. The court disagreed. In the classic international law case of ***Corfu Channel (United Kingdom v. Albania, ICJ 1949)***, Britain brought Albania to court after mines destroyed one of its ships. Albania claimed Britain was sailing its ships through the straight in a threatening way, but the court said that Britain didn't use force against Albania, so there was not enough of a threat to have a justifiable response involving force. The mines were not a proper response.

F. Treaties in U.S. Law

In the United States, treaty-making is a federal power. The President has the power to make treaties with the advice and consent of two-thirds of the Senate. The States are prohibited from making treaties but can make compacts with the advice and consent of Congress. The Senate cannot amend a treaty but can refuse consent unless the parties amend it. The House has a role in treaty process for some treaties (such as trade treaties.)

Initially, the U.S. needed the government to be able to sign peace treaties and conduct effective international relations with France, Britain, and other states. Now, the U.S. has the opposite problem: it is so powerful in international relations that it doesn't make sense for smaller states to make cooperation deals with the U.S. because they can't stop the U.S. from defecting. This problem returns us to the role treaties and international institutions can play in cooperation games: setting up sanctions, providing a monitoring capacity, etc. The two-level game is important to keep in mind when thinking about how national law and national courts augment or diminish the executive's power in the international game.

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

In ***Curtiss-Wright (U.S. Supreme Court, 1936)***, the Supreme Court establishes that the foreign affairs power is given over to the federal government. The idea of maximizing the U.S.'s ability to act vis-à-vis other states was reaffirmed in ***Crosby (U.S. Supreme Court, 2000)***, where a State law that regulated trading with Burma was found to be pre-empted by a similar federal law on the topic. In ***Dames & Moore (U.S. Supreme Court, 1981)***, the Supreme Court approved a presidential executive agreement that prevented Americans from attaching Iranian assets for judgments in US court and further suspended pending cases against Iran. The court found it significant that Congress had not said the president couldn't do this. In a classic foreign office model move, the court found that in order for the U.S. to make these commitments credibly in the international game, a key element of presidential power is to make these types of agreements that trade off private rights in favor of the international interest. Notably, the Supreme Court left open the question of whether the suspension of Dames & Moore's case in US court could be a fifth amendment taking.

Time and time again the Supreme Court has given a broad reading to the federal treaty power, with the common theme that the federal government needs to be able to deliver on its international agreements, and so needs the foreign affairs power. In ***Missouri v. Holland (U.S. Supreme Court, 1920)*** the court found that the 10th Amendment did not limit this power. In ***Garamendi (U.S. Supreme Court, 2003)***, the court held that a state statute concerning insurance companies and Holocaust survivors interfered with the national government's conduct of foreign relations and thus was pre-empted. Yet there are some limitations on this broad power. In ***Reid v. Covert (U.S. Supreme Court, 1957)***, the Supreme Court held that treaties cannot displace constitutional rights. Thus, despite a treaty between the U.S. and Japan providing for trial by court martial for anyone on U.S. bases in Japan, two civilian women accused of committing a crime could not be denied their constitutional right to a trial by jury. Furthermore, federalism concerns may finally have reached foreign affairs with ***Medellin v. Texas (U.S. Supreme Court, 2008)***. The state's rights in that case were upheld even in the face of a strong foreign affairs interest.

Treaties are the supreme law of the land, per the Constitution, and are thus seemingly part of U.S. law. However, U.S. courts have evolved a doctrine that says the only treaties that will be enforced as part of judicial decisions are treaties that are ***self-executing***. In ***Asakura (U.S.***

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

Supreme Court, 1924), the court finds the treaty to be self-executing. The treaty is framed in terms of individual rights and is capable of implementation by a court. The judicial remedy is an effective remedy: striking down the ordinance. The court does not need to appropriate money. In ***People of Saipan (9th Cir., 1974)***, the court similarly finds the treaty to be self-executing, listing several factors to be looked at: the purposes of the treaty and objectives of creators; the existence of domestic procedures and institutions appropriate for direct implementation; the availability and feasibility of alternative enforcement methods; and the immediate and long-range social consequences of self- or non-self-execution. By contrast, in ***Postal (5th Circuit, 1979)***, the circuit court finds the treaty at issue is not self-executing. Although the treaty seems like it might meet the self-executing criteria, the court instead focuses on Congress' intent, finding that the Senate did not have the impression that it was radically limiting US maritime jurisdiction in adopting this treaty. In ***Hamdan (U.S. Supreme Court, 2006)***, the court avoids answering the question of whether the Geneva Conventions are self-executing, instead finding the Conventions are part of the law of war and that Common Article III applies to the conflict with Al Quaeda.

In addition to the role treaties play in domestic law, another key issue concerns the role that the decisions of other courts should play in national jurisprudence. In ***Sanchez-Llamas (U.S. Supreme Court, 2006)***, the Supreme Court finds the ICJ's decision is not decisive after the ICJ held that the United States' breach of the Vienna Convention required the remedy of reconsideration of the cases at issue. On a narrow view of this case, the Vienna Convention does not provide for a remedy, which the ICJ concocted, moving far away from what was explicitly agreed to by the states. Furthermore, they are dealing with a treaty that comes into the structure of national criminal law and national remedies. Perhaps in other scenarios, the Supreme Court would give an ICJ decision more weight. Note that this was a morals case. In a markets case, a national court might help capture gains from cooperation by giving effect to an international decision. The EU system exemplifies this, where national courts intensify the effect of international decisions. However, the Supreme Court again did not go down this route in ***Medellin***, where it determined that the U.N. Charter, ICJ Statute, and Vienna Convention Optional Protocol were not self-executing in a way that would make the ICJ's decision self-executing.

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

G. Applying the Law of Treaties: Human Rights Treaties

The U.N. Charter, the Universal Declaration on Human Rights, and the ICCPR and ICESCR form the basic international human rights instruments, although there are several other core human rights treaties. The U.S. and some other countries, though accepting of the civil and political rights contained in the ICCPR, continue to maintain a view that economic and social rights (contained in the ICESCR) are not really human rights.

The ICCPR and the Human Rights Committee (HRC) exemplify the treaty body process for many human rights treaties. The HRC receives state reports (and alternative reports prepared by NGOs), can issue general comments, and can hear state-versus-state complaints for states that have made a particular declaration subjecting themselves to this power. Although a reasonable number of states have made this declaration, there has never been a state-to-state complaint. Additionally, if a state had ratified the First Optional Protocol of the ICCPR, individuals are permitted to bring a complaint against that state, although the HRC's decisions are not legally binding. ***Lovelace (Human Rts. Comm., 1981)*** exemplifies this type of complaint; effectively, Lovelace wanted to challenge her tribe's own membership rule, but she formally had to bring her complaint against Canada. The HRC found that her right to access her native culture and language in community with the other members had been interfered with in violation of Article 27. The court did not decide the case as a discrimination case (although women had to leave the reservation once they married outside the tribe, but men did not), nor did it address the question of self-determination under Article 1.

The materials next turn to ***reservations***. Under the classic foreign office model idea, if the treaty itself did not say anything about reservations, then a state was not allowed to make reservations to a treaty unless all the other states consented. In the ***Case on Reservations to the Genocide Convention (ICJ, 1951)***, the ICJ determined that this foreign office/contractual model of reservations is a widespread practice but not customary international law. The court developed a new test: where a treaty does not make a provision about it, reservations are allowed but cannot undermine the object and purpose of treaty. The prohibition on genocide, like many human rights treaty provisions, is not based on reciprocity. The point is to vindicate a global, cosmopolitan norm rather than a quid pro quo between states. As a result, the court took this

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

case out of the markets and security models to evaluate reservations in this context. To maintain the integrity of global policy against genocide, the reservations that are allowed must not undermine object and purpose of treaty. Though this standard might only apply to "morals" treaties, the VCLT takes this standard and applies it to all treaties. In ***DRC v. Rwanda (ICJ, 2006)***, the court found that a statement by the new Rwandan government that it would not continue to have reservations to the genocide convention did not withdraw the reservation to Article IX. Reservations to that article are permissible because it is a choice about institutional supervision of the treaty, rather than about genocide itself, and does not undermine the object and purpose of the treaty.

Notice that the VCLT does not envision a role for any central institution making decisions about validity of reservations. In its General Comment on Reservations, the HRC seeks to displace the traditional law of reservations by stating that it falls within the HRC's competence to define the legal obligations of each state because most states never get around to objecting to reservations. The HRC also says that if a state makes an impermissible reservation, the reservation can be severed and the state's ratification of the treaty will be treated as if the state ratified the treaty and did not make that reservation. A European Court of Human Rights case, *Belilos*, may have served as precedent for this view, but the treaty under consideration gave a much clearer basis for the court to act and for severability as a consequence of an invalid reservation (see Article 64 of the European Convention on Human Rights). The U.S. and U.K. comments defend the foreign office model, claiming that there is no legal basis for binding states to an entire treaty as if they hadn't made a reservation, and doubting that the HRC has the power to determine the validity of reservations. The ILC is trying to draft a set of detailed Articles about the law of reservations to treaties.

Human rights advocates frequently argue in favor of defining and enforcing human rights law at the international level. However, this presumption is not self-evidence. In some cases, national and local law may be preferable. Does a turn to international law always mean "progress"? What are the arguments in favor of a more dialogical approach to Human Rights? Should human rights treaties allow more than one approach or understanding of rights issues? These are some of the issues that inform the law of reservations.

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

Derogations are another common feature of human rights law. Most treaties have derogation clauses that say that if State is facing a public emergency, state may make a derogation from one or more rights in the treaty. The state must file notice with a supervising body. Instead of having a lawless area outside treaty system, the aim is to legally regulate these problems. The ***margin of appreciation*** is the idea that courts are not close to the situation, so if a State files a notice of derogation from a clause, the government has wide margin of appreciation to decide which rights they need to depart from and how far. In ***Brogan v. United Kingdom (European Ct. of Hum. Rts., 1988)***, the court found a violation of Article 5-3 of the European Convention because Britain had not derogated from the treaty, the detention was for an unreasonable period, and the detained were not "promptly" brought before a court. After the case, the UK gave notice that it would be derogating from the ECHR Article 5. Other types of treaties have different derogation models. For example, most trade treaties allow breaches of basic rules of international trade to protect certain things, such as public health, and also typically have a clause for national security exceptions.

We return to the interpretation of treaties, now in the human rights context, in *Toonen* and *Refah Partisi*. In ***Toonen v. Australia (Hum. Rts. Comm., 1994)***, note that Australia supported the individual complaining (even though the individual had to file a complaint against Australia, rather than the Tasmanian state.) Australia used international law to change a state provision that commonwealth law would not otherwise allow it to address. The HRC is careful to frame its decision that Article 17 was violated based on the domestic consensus within Australia, and does not imply that it is illegal for all parties everywhere to criminalize gay sexual conduct. In ***Refah Partisi v. Turkey (Eur. Ct. Hum. Rts., 2003)***, the European Court upheld Turkey's dissolution of the party and suspension of political rights. The Court found that dissolution amounted to an interference with the rights prescribed in Article 11(1), but that the penalty imposed on the applicants may reasonably be considered to have met a "pressing social need" as defined in 11(2). Although this decision might seem alarming to Americans, lots of countries have rules restricting political parties in order to preserve the system of democracy. Furthermore, the practical result of this decision was not to stifle a strong democratic force—the party reformed into a slightly more secular party and is now in power. However, the

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

constitutional court in 2008 against considered measures against this party for non-secular policies.

Finally, we return to the subject of state responsibility, discussed previously. The cases concern the issue of when a state party to a human rights treaty can be held responsible for actions to persons outside of the state's territory. In ***Bankovic v. Belgium (Eur. Ct. Hum. Rts., 2001)***, although the European Court had previously held that a state's effective control of a territory outside of its state territory can trigger human rights obligations (*see Loizidou*), that rationale was not extended to this situation, where NATO had no forces on the ground in Serbia. This decision might be seen as in tension with the basic idea of human rights: if Britain can't bomb persons in Britain, for example, why should it be able to bomb them in Serbia? Note that the Court did not consider whether bombing the Serbian TV station was or was not lawful under human rights law or the laws of war (*jus in bello*), and it did not consider whether NATO was acting lawfully in bombing Serbia in relation to Kosovo under the *jus ad bellum*.

In ***Behrami v. France (Eur. Ct. Hum. Rts., 2007)***, the court explores whether the sending states of peacekeeping troop contingents on a UN force in Kosovo can be held responsible, rather than the UN itself. The Court finds it has no jurisdiction *ratione personae* over France. Whatever conduct is attributable to the French soldiers is attributed to the UN, not France. Strikingly, the UN was not a party to the case, and made only limited submissions. Though dealing with a multinational force in Iraq, rather than Kosovo, ***Al-Jedda (House of Lords, 2007)*** seems to disagree with the Behrami rationale, though it distinguishes the Iraq force as much less of a U.N. enterprise than the multinational force in Kosovo. The case also poses interesting questions concerning the interaction of the U.N. Charter and the European Convention. If there is a presumption that treaties later in time must conform to the spirit of the U.N. Charter, does this mean the Charter can effectively displace human rights treaties? Finally, ***Velásquez-Rodríguez (Inter-Amer. Ct. of Hum. Rts., 1988)*** demonstrates the concept of due diligence, later adopted by many other human rights bodies to set forth when a state should be held accountable for human rights violations committed by private actors. A state can be held responsible for the lack of due diligence to prevent the human rights violation or to respond to it; thus, the state has a legal duty to "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

its jurisdiction." The state also must identify those responsible, impose punishment, and ensure compensation to the victim. Furthermore, the duty to prevent violations of human rights requires the State to use all means of a legal, political, administrative, and cultural nature that promote the protection of human rights and to ensure that violations are treated as illegal acts.

H. Questions to Consider

- A First Look at the International Law of Treaties
    - What actors in the international system have *juris generative* capacity?
    - How can treaties help to solve governance type questions?
    - Are treaties (and treaty negotiations) a convincing proxy for a legislature?
    - Is it better to think of treaties as making up a 'lattice' of overlapping responsibilities? What kind of treaties (moral, economic, military) would best fit into a 'lattice' framework? Or are treaties really best understood as contracts? What kind of treaties would be easiest to fit into a contractual understanding?
    - Who monitors compliance?
    - What is the role of repeat players? What do international treaties actually do?
    - How does the VCLT reflect the Foreign Office model, and does that matter for interpreting newer treaties?
    - What treaties does the VCLT apply to? Is it retroactive? Is the US a party to the treaty?
    - How does a state make a treaty? What does ratification mean?
    - Can you have an oral treaty?
    - What is the effect of signing a treaty when you haven't yet ratified it?
    - What makes a treaty valid, and how would you argue for or against the validity of a treaty in an ambiguous situation?
    - Is there a priority on the stability of treaties? Should stability of treaties be a priority?
    - Do you think *rebus sic stantibus* (regarding the validity of a treaty in light of a fundamental change in circumstance) is implied in all treaties? Is it implied in all contracts? What policy goals (and types of states) is this doctrine support most likely to support, and what types of goals does it undermine? Politically, why is the United States suspicious of a vibrant doctrine of *rebus sic stantibus*?
    - Under what conditions does a unilateral declaration have binding effect? To what degree does this fit in with the general impetus behind treaty-making?
- Interpretation of Treaties
    - To what extent does a global law of interpretation influence national practices, and vice versa?
    - Can parties 'delegate' the responsibility for fleshing out the treaty to the courts?
    - Is there a 'deep' international community of values, in which a treaty interpretation could be embedded?
    - Is Justice O'Connor's overall approach in *Air France* consistent with the VCLT?

© Professor Benedict Kingsbury, Institute for International Law and Justice, New York University School of Law, Creative Commons license for use is granted as detailed on the course website, www.iilj.org

- In the U.S., should the courts give 'great weight' (i.e. significantly greater weight than the VCLT provides) to how the Executive views the treaty?
- Should treaties be interpreted the same way regardless of subject matter?

- Breach of Treaty and State Responsibility
  - How do the ILC Articles and the VCLT intersect?
  - What countermeasures or reprisals are available to states that have been harmed by a treaty breach? What limits on substantive countermeasures are placed by the procedural status of a dispute?
  - The more that the law on countermeasures is permissive, the more it leaves scope for powerful states to act. How is this like the persistent objector problem in customary international law?
- Treaties in US Law
  - Does the US constitution police the application of international law to the United States? How does the Supreme Court? How are U.S. interests promoted or constrained and who is responsible?
  - What is the distinction between self-executing and non-self-executing treaties in U.S. law?
  - How do states' and individuals' rights set limits on the U.S. federal treaty power?
  - How does the federal government use international law to gain authority at the state's expense?
  - When the President represents the nation in the international game, he may be trying to achieve a domestic outcome at the same time. How does the problem of the disaggregated state strengthen or weaken the explanatory value of the 'two-level' game?
- Human Rights Treaties
  - Are treaties, given their state-state character, are really well suited to protecting human rights?
  - What impetus might there be for sustaining the human rights treaty system in spite of this imperfection?
  - Consider the Human Rights Committee, which oversees the ICCPR. Would you prefer a committee with more teeth, or are there political reasons for the current approach? How do we reconcile competing norms?
  - What are the limits on reservations to treaties (look at VCLT articles 19-23), and how do these limits differ in the bilateral and multilateral context?
  - In interpreting human rights instruments, what factors should be taken into consideration?
  - How is human rights enforcement limited by traditional understandings of territoriality and *lex specialis* (discussed in the Nuclear Weapons Advisory Opinion)? Is this a step backward or should there be space for these concepts in the modern human rights regime?
  - Note how the territorial model of jurisdiction flows from the foreign office model. Does this limited view of jurisdiction, as applied in *Bankovic*, limit a state's responsibility for human rights violations? Contrast this with the European Court's attribution of responsibility to the United Nations in *Behrami*.