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The Creation of International Norms — Treaties, Customary Law, International Organizations, and Private Norm-Creation

In this chapter, we first take up two traditional components, or "sources," of public international law, treaties and customary international law, as well as the phenomenon of "soft law." We then examine the increasingly important law-generating work of international organizations and transnational networks of government regulators, as well as the activities of "nongovernmental organizations" (NGOs) and multinational (or "transnational") corporations,* which are growing more influential in international law-making processes. Finally, we address the third traditional component of public international law, the general principles of law common to the major legal systems of the world.

A. TREATIES

Treaties have become the most important source of international law and are the means by which international organizations are created. The database of treaties registered or filed and recorded with the United Nations since 1946 contains over 158,000 treaties and related subsequent actions. The United States is a party to literally thousands of international agreements that are categorized as "treaties" under international law. These agreements can be bilateral (i.e., between two countries) or multilateral. They can be labeled in a variety of ways, such as treaty, convention (often used for multilateral agreements), agreement, covenant, charter, statute, and protocol. These agreements cover a broad range of subjects, reflecting the growing complexity of international life. Bilateral agreements might deal with extradition, visas, aircraft landing rights, taxation, and investment. Multilateral agreements range from the United Nations Charter, the Agreement Establishing

*The terms "multinational corporation" and "transnational corporation" are essentially interchangeable.

the World Trade Organization, the International Covenant on Civil and Political Rights, and the Law of the Sea Convention.

Whether an instrument is a treaty or not carries a number of significant legal consequences. Under international law a treaty creates international legal obligations, with corresponding duties of compliance and entitlement to remedies, including rights of retaliation, in the event of a breach. A treaty may also create domestic legal obligations.

The U.S. domestic law relating to treaties is rather complicated and will be more fully explored in the next chapter. For present purposes it is important to recognize the differences in terminology used in international law and U.S. domestic law. In international parlance all written international agreements are referred to as "treaties." In U.S. law only some international agreements are called "treaties," *viz.*, those agreements concluded by the President with the advice and consent, or approval, of two-thirds of the Senate. The President may also conclude other international agreements on the basis of an authorization by the Congress as a whole or on the basis of his independent constitutional authority (such as his commander-in-chief power). Those other international agreements concluded by the President are sometimes called "executive agreements," even though they are still called "treaties" for purposes of international law.

Domestically, treaties approved by two-thirds of the Senate are the "law of the land" under the Constitution and may be directly enforceable in the courts. Executive agreements may also have legal status in the United States. This domestic incorporation of treaties into U.S. law is explored in Chapter 3. Sometimes domestic law will also simply refer to "international law" or will use a concept of international law for domestic purposes. For example, the Alien Tort Statute (or Alien Tort Claims Act) confers federal court jurisdiction over certain cases involving violations of "the law of nations or a treaty of the United States." (See Chapter 3.) The federal criminal code punishes "piracy as defined by the law of nations."

1. *The Formation of Treaties*

a. What Is a "Treaty"?

The Vienna Convention on the Law of Treaties sets forth a comprehensive set of rules governing the formation, interpretation, and termination of treaties concluded after the Vienna Convention's entry into force in 1980. As noted by a British legal expert:

> The UN General Assembly established the International Law Commission in 1947 with the object of promoting the progressive development of international law and its codification. The law of treaties was one of the topics selected by the Commission at its first session in 1949 as being suitable for codification. A series of eminent British international legal scholars (James Brierly, Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock) were appointed as Special Rapporteurs. Their task was to draw up a coherent account of the already well-developed customary international law on treaties. The Commission adopted a final set of draft articles in 1966. They were considered by the United Nations Conference on the Law of Treaties in Vienna in 1968 and 1969. The Convention was adopted on 22 May 1969 and entered into force on 27 January 1980. [Anthony Aust, Modern Treaty Law and Practice 6 (2d ed. 2007).]

As of February 2011, 111 states were parties to the Convention. (The Convention is in the Documentary Supplement.) The United States, however, has signed but not ratified the Convention, so the United States is not a party to the Convention and not formally covered by it. Nevertheless, U.S. officials have consistently stated that at least most of the Convention's provisions represent customary international law, and U.S. courts have frequently relied on its terms. In his 1971 letter transmitting the Vienna Convention to the President, Secretary of State William P. Rogers called it "a generally agreed body of rules to govern all aspects of treaty making and treaty observance." See also Restatement (Third) of Foreign Relations Law pt. III, introductory note (1987) (documenting U.S. acceptance of the terms of the Convention).

Consequently, the rules set forth in the Vienna Convention are relevant to the work of private lawyers, as well as government officials, who must consider the impact of a treaty on a proposed course of conduct. The following provisions of the Convention define what treaties are and how they are made.

Vienna Convention on the Law of Treaties

Article 2. Use of Terms

For the purposes of the present Convention . . . "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . . [and a "party" to a treaty] means a State which has consented to be bound by the treaty. . . .

Article 11. Means of Expressing Consent to Be Bound by a Treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 2 of the Convention does not tell us much about the characteristics required of these instruments because it leaves unanswered the question of the definition of "international agreement." It does, however, limit the field to some extent in that *states* must be parties, the agreement must be governed by *international law*, and it must be in *writing*. The Restatement offers some additional detail about the nature of international agreements:

Restatement Section 301

Comment

. . . The terminology used for international agreements is varied. Among the terms used are: treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, *concordat*, exchange of notes, agreed minute, memorandum of agreement, memorandum of understanding, and *modus vivendi*. Whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise. . . .

. . . Since an international agreement does not require consideration . . . its obligations may be wholly unilateral, flowing from one party only, as in a peace treaty following unconditional surrender. . . .

. . . An international agreement, as defined, does not include a contract by a state, even with another state, that is essentially commercial in character and is intended to be governed by some national or other body of contract law. Examples include a loan agreement, a lease of a building, or a sale of goods.

[A] n international agreement is one intended to be legally binding and to have legal consequences. . . .

Notes and Questions

1. Recall that, according to the Restatement, "an international agreement is one intended to be legally binding" and the Vienna Convention refers to "consent." If the principal test is whether the parties intended to be bound, how do you know? Besides the text, what other places could you look to discern the intent of a party to an agreement?

2. Suppose the United States and India made an agreement for the sale of aircraft and provided that it would be governed by the law of New York. Would that agreement be a "treaty"? Would it be legally binding and enforceable in accordance with its terms?

3. The definition of a "treaty" in Article 2 of the Vienna Convention is limited to agreements "in written form." That does not mean, however, that states may not conclude valid and legally binding oral agreements. The Convention specifically notes that the fact that it does not apply to "international agreements not in written form" does not affect "the legal force of such agreements." The Comment to section 301 of the Restatement notes:

> . . . While most international agreements are in writing, written form is not essential to their binding character. The Vienna Convention specifies (Article 2(1)(a)) that it applies only to written agreements, but under customary international law oral agreements are no less binding although their terms may not be readily susceptible of proof.

In the *Legal Status of Eastern Greenland* case (Denmark v. Norway), the Permanent Court of International Justice had to determine the legal character of an oral statement by the Norwegian foreign minister to his Danish counterpart in the context of discussions about Danish claims to sovereignty over Greenland. These talks also concerned Norway's claims to sovereignty over the island of Spitzbergen. During the discussions (which the Norwegian Foreign Minister recorded in writing), the Danish minister outlined Denmark's efforts to secure international recognition of its territorial claims over Greenland and stated that Denmark was confident that Norway "will not make any difficulties in the settlement of this question." The Norwegian minister, in a subsequent meeting, replied that "the Norwegian Government would not make any difficulties in the settlement of this question." The Court concluded that the Norwegian Minister's oral declaration was binding.

> The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to the request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs. [1933 P.C.I.J. (ser. A/B), No. 53, at 53 (Apr. 5).]

4. The Vienna Convention defines a treaty as an agreement concluded "between States." But a state can, in some circumstances, also assume binding legal obligations through unilateral acts or statements. Such unilateral acts or statements do not amount to a treaty, but can be another manner in which a state assumes obligations under international law. As the Restatement notes:

> A unilateral statement is not an agreement, but may have legal consequences and may become a source of rights and obligations on principles analogous to estoppel. It may also contribute to customary law. [Restatement Section 301 comment.]

In the *Nuclear Tests* cases (Australia v. France; New Zealand v. France), Australia and New Zealand initiated litigation in the ICJ challenging the legality of atmospheric nuclear weapons tests conducted by France in the Pacific Ocean. After the cases were filed, French officials, including the French President, announced that France had completed the course of its atmospheric nuclear tests. In deciding whether to address the merits of the case, the Court considered the legal effect of these statements. The Court concluded that a unilateral declaration, "given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." The Court noted that although "not all unilateral acts imply obligation," the French President had made a public statement addressed "to the international community as a whole"; the Court concluded that this statement constituted "an undertaking possessing legal effect." Nuclear Tests (Australia v. France), 1974 I.C.J. 253, 267, 269.

In 2006, the International Law Commission (ILC) adopted a set of principles entitled "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations" and accompanying commentaries. Report of the International Law Commission to the General Assembly, U.N. GAOR Supp. 10, U.N. Doc. A/61/10, at 362 (2006). The principles, which stipulate that they apply "only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law," affirm that "[d]eclarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations." Id. at 368. According to these principles, "[a] unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily." Id. at 369. One commentator, who was member of the ILC at the time, has emphasized the limited scope of these principles, noting that they "do not apply to policy statements or even formal declarations that were not specifically intended to create legal results, even if other states might have relied upon them or asserted that they were legally binding." Michael J. Matheson, The Fifty-Eighth Session of the International Law Commission, 101 Am. J. Int'l L. 407, 421-422 (2007).

5. Although the 1969 Vienna Convention on the Law of Treaties defines a treaty as an agreement concluded "between States," states can also conclude "treaties"

with international organizations, and international organizations can conclude "treaties" with other international organizations. The United States and the United Nations, for instance, are parties to the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, more commonly known as the U.N. Headquarters Agreement. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, which contains provisions similar to the 1969 Vienna Convention on the Law of Treaties, applies to treaties entered into by international organizations. It was concluded in 1986 but has yet to enter into force.

b. Distinguishing Treaties from Political Commitments

Not every document that states negotiate and conclude in the course of their international relations constitutes a treaty or is meant to be binding under international law. As the Reporters' Notes to Section 301 of the Restatement observe:

> . . . An example of a nonbinding agreement is the Final Act of the Conference on Security and Cooperation in Europe signed at Helsinki on August 1, 1975, which avoids words of legal undertaking, is designated as "not eligible for registration under Article 102 of the [U.N.] Charter," and was clearly intended not to be legally binding. Other examples include the various codes of conduct for multinational enterprises, which are characterized as voluntary and not legally binding, with respect to both the enterprises and to the states involved.
>
> Parties sometimes prefer a non-binding agreement in order to avoid legal remedies. Nevertheless, the political inducements to comply with such agreements may be strong and the consequences of noncompliance may sometimes be serious. . . . A nonbinding agreement is sometimes used in order to avoid processes required by a national constitutional system for making legally-binding agreements. . . .

Even if a commitment is not legally binding, it may still carry force as a "political commitment." Governments may develop expectations of compliance with political commitments, invoke them in public debate to marshal support, and even impose sanctions for their violation. Given the absence of a general dispute settlement and enforcement mechanism for violations of legally binding commitments, the practical significance of the distinction between legal and political commitments may be blurred in particular cases.

As Professor Oscar Schachter observed, such political commitments

> take many forms and are designated by various names. Many are informal: communiqués, statements by high officials, correspondence, unwritten understandings as to future conduct. Others are more formal: proclamations by Heads of State, "final acts" of conferences, written agreements signed by the highest officials. . . . [N]either the form nor name of a document is decisive of its legal or non-legal character. . . . [Oscar Schachter, International Law in Theory and Practice 95 (1991).]

Against this background we now consider three instruments concluded by states addressing important international issues. Are they "treaties" within the meaning of the Vienna Convention?

(1) United States-Japan FCN Treaty

Since the eighteenth century a significant component of U.S. foreign economic policy has been the conclusion of treaties of Friendship, Commerce, and Navigation (FCN Treaties). Those treaties established favorable terms for mutual travel, trade shipping, and investment with other countries. Article VII of the 1953 United States-Japan FCN Treaty is a typical provision:

> ***Article VII***
>
> 1. Nationals and companies of either Party shall be . . . permitted . . . : (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired.

(2) Brazil-Turkey-Iran Joint Declaration

In May 2010, officials from Brazil and Turkey traveled to Tehran to meet with Iranian officials in an attempt to find a solution to the crisis related to Iran's efforts to develop a nuclear energy program, which the United States and many other countries believe is aimed at developing nuclear weapons. This diplomatic initiative was meant to be an alternative to the ultimately unsuccessful negotiations in which Iran had participated in 2009 with the "Vienna group"—officials from Russia, France, the United States, and the International Atomic Energy Agency. At the conclusion of the May 2010 meeting, the foreign ministers of Brazil, Turkey, and Iran produced and signed a document called a "Joint Declaration" memorializing the results of the negotiations. Here is key language from the Joint Declaration:

> Having met in Tehran, . . . the undersigned have agreed on the following Declaration:
>
> 5. . . . [I]n order to facilitate . . . nuclear co-operation . . . , the Islamic Republic of Iran agrees to deposit 1,200 kg (2,600 lb) LEU [low-enriched uranium] in Turkey. While in Turkey, this LEU will continue to be the property of Iran. Iran and the IAEA [International Atomic Energy Agency] may station observers to monitor the safekeeping of the LEU in Turkey. . . .
> 6. Iran will notify the IAEA in writing through official channels of its agreement with the above within seven days following the date of this declaration. Upon the positive response of the Vienna Group (US, Russia, France and the IAEA), further details of the exchange will be elaborated through a written agreement and proper arrangement between Iran and the Vienna Group that specifically committed themselves to deliver 120 kg of fuel needed for the Tehran Research Reactor (TRR).
> 7. When the Vienna Group declares its commitment to this provision, then both parties would commit themselves to the implementation of the agreement mentioned in item 6.
>
> Islamic Republic of Iran expressed its readiness to deposit its LEU (1,200 kg) within one month. On the basis of the same agreement, the Vienna Group should deliver 120 kg fuel required for TRR in no later than one year.

8. In case the provisions of this declaration are not respected, Turkey, upon the request of Iran, will return swiftly and unconditionally Iran's LEU to Iran.*

(3) 2010 G-8 Declaration

The Group of Eight is composed of certain major countries that share common interests and sometimes take coordinated actions. The Heads of State meet for a private session on an annual basis, and ministers might meet on other occasions. (The present membership is the United States, Canada, England, France, Germany, Italy, Japan, and Russia. See discussion in Chapter 5.)

At the 2010 G-8 summit in Muskoka, Canada, the heads of government issued a lengthy Declaration entitled "Recovery and New Beginnings." The subsection on environmental issues included the following language regarding efforts to reduce greenhouse gas emissions:

Environmental Sustainability and Green Recovery

21. Among environmental issues, climate change remains top of mind. . . . [W]e recognize the scientific view that the increase in global temperature should not exceed 2 degrees Celsius compared to pre-industrial levels. Achieving this goal requires deep cuts in global emissions. Because this global challenge can only be met by a global response, we reiterate our willingness to share with all countries the goal of achieving at least a 50% reduction of global emissions by 2050, recognizing that this implies that global emissions need to peak as soon as possible and decline thereafter. We will cooperate to that end. As part of this effort, we also support a goal of developed countries reducing emissions of greenhouse gases in aggregate by 80% or more by 2050, compared to 1990 or more recent years. Consistent with this ambitious long-term objective, we will undertake robust aggregate and individual mid-term reductions, taking into account that baselines may vary and that efforts need to be comparable. Similarly, major emerging economies need to undertake quantifiable actions to reduce emissions significantly below business-as-usual by a specified year.

Notes and Questions

1. Are all the commitments quoted in subsections (1), (2), and (3) above legally binding agreements? In addition to analysis of the text, what else would you like to know in answering this question?

2. Is it possible for some portions of an instrument to be legally binding and others not? If so, how do you distinguish the binding from the nonbinding provisions? Would a document of this type be a treaty?

3. Why would a state (or a negotiator) want to make an instrument sound binding but not actually be binding?

*[The Vienna Group did not agree to the arrangement proposed in the document, and Iran did not deposit 1,200 kg of LEU in Turkey. — Eds.]

4. What force do political commitments have? If an instrument is not legally binding, will states have any reason to fulfill the commitments in it? Consider Professor Schachter's analysis of the force of political commitments:

> . . . States entering into a non-legal commitment generally view it as a political (or moral) obligation and intend to carry it out in good faith. Other parties and other States concerned have reason to expect such compliance and to rely on it. What we must deduce from this, I submit, is that the political texts which express commitments and positions of one kind or another are governed by the general principle of good faith. . . .
>
> It is also worth noting that the violation of a political [commitment] justifies the victim of that violation in using all the means permissible under international law to bring about a cessation of that violation and to obtain reparation. . . .
>
> These juridical effects of a political engagement are limited. They do not extend so far as to impose on the States concerned a legal responsibility to provide reparation for a breach nor do they furnish ground for judicial action on the basis of international law. Moreover they do not limit the right of the parties to terminate the non-legal undertaking when political circumstances are deemed by that State to warrant termination.
>
> The fact that non-binding [commitments] may be terminated easily does not mean that they are illusory. . . . As long as they do last, even non-binding agreements can be authoritative and controlling for the parties. It would seem sensible to recognize that non-binding agreements may be attainable when binding treaties are not and to seek to reinforce their moral and political commitments when they serve ends we value. [Oscar Schachter, International Law in Theory and Practice 100-101 (1991).]

5. How could states have "reason to expect," in Professor Schachter's words, another state to comply with a commitment that intentionally was made nonbinding? And what is the significance, in terms of compliance, that political commitments may not be subjected to the same domestic political process in their formation? An Executive Branch official may make what other states consider to be a political commitment. But under the U.S. Constitution, at least some forms of legally binding international agreements require the participation of the Congress or the Senate. See Chapter 3. The making of a political commitment has not been subjected to the same process of publicity, consensus building, and support normally accompanying congressional approval of such agreements. In light of this, shouldn't a state rely on a political commitment at its peril?

6. Although political commitments may not be legally binding, they can contribute to the formulation of what is referred to as "soft law," which is discussed below in Section B.

c. Obligation Not to Defeat the Object and Purpose

When states do decide to enter into a legally binding treaty, it is not uncommon at the successful conclusion of the negotiation process for executive branch negotiators to sign the treaty, subject to the understanding that it must be approved by each state's legislature before it has the force of law. Article 18 of the Vienna Convention imposes limited obligations on a state that has signed a treaty, but has not yet brought it into force.

Article 18. Obligation Not to Defeat the Object and Purpose of a Treaty Prior to Its Entry into Force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

On December 31, 2000, shortly before President Bill Clinton left office, the United States signed the Rome Statute of the International Criminal Court. (See Chapter 12.) At the time, President Clinton noted "our concerns about the significant flaws in the treaty," but hoped that the U.S. signature might provide influence to obtain some changes in the ICC. The Clinton Administration never transmitted the Rome Statute to the U.S. Senate for its advice and consent, which is required before the United States can ratify a treaty. When the Bush Administration took office on January 20, 2001, it expressed more fundamental objections to the Rome Statute and concluded that the ICC's flaws could not be addressed.

In light of this determination that the Rome Statute could not be fixed, the United States sent a brief letter to the Secretary-General of the United Nations, stating that "the United States does not intend to become a party to the treaty. . . . Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000." Some newspapers headlined that the United States had "unsigned" the treaty, but this was not technically accurate. The United States did not physically remove its original signature, but rather signified that since it no longer intended to become a party to the treaty, it was not obliged under Article 18 of the Vienna Convention "to refrain from acts which would defeat the object and purpose" of the Rome Statute.

How necessary was this step? What is the "object and purpose" of the Rome Statute that created and regulated a new international entity? Did President Clinton's announced concerns at the signing provide a basis for saying the United States, even at the moment of signature, did not intend to become bound by the Rome Statute? Or, how long does this obligation last after a state has signed the treaty? Could a long delay in ratifying the treaty be interpreted as signaling a clear intent not to become a party to the treaty?

Similar questions might arise with other treaties that the United States has signed, but not ratified. For example, in July 1994, the United States signed the 1982 Convention on the Law of the Sea. President Clinton transmitted the multilateral Convention and a companion 1994 agreement to the U.S. Senate for its advice and consent in October 1994. The Convention actually came into force a month later and the agreement two years later. Although the Senate Foreign Relations Committee has voted to approve ratification of the Convention, the full Senate has not, as of February 2011, voted to give its advice and consent. Is the United States still obliged to refrain from acts that would defeat the object and purpose of that

Convention and the companion agreement? (See Chapter 9 for a discussion of the Law of the Sea Convention, especially Section I.)

Notes and Questions

1. The obligation not to defeat the object and purpose of a treaty does not mean that a state must comply with all provisions of the treaty. If it did, there would be no difference between merely signing a treaty and becoming a party to it. What standard should we use to assess whether an act would defeat the object and purpose of a treaty? If a state signed but had not yet ratified a treaty prohibiting the death penalty, would the execution of a convicted criminal defeat the object and purpose? The United States has signed, but not ratified, the Comprehensive Nuclear Test Ban Treaty, which prohibits all nuclear testing. Would the United States violate its obligation not to defeat the object and purpose of the treaty by carrying out an underground test of a new nuclear warhead? One commentator, basing his argument in part on the drafting history of Article 18, suggests that the obligation not to defeat the object and purpose of a treaty "is best construed as precluding only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification." Curtis Bradley, Unratified Treaties, Domestic Politics, and the U.S. Constitution, 48 Harv. Int'l L.J. 307, 308 (2007).

2. Is the United States under an obligation not to defeat the object and purpose of the Vienna Convention on the Law of Treaties itself, which came into force in 1980? The United States signed the Convention in 1970 and President Nixon transmitted it to the U.S. Senate in 1971, but the Senate has yet to give its advice and consent.

3. Does the Bush administration's letter regarding the Rome Statute provide evidence that the United States accepts the rule in Article 18 of the Vienna Convention as constituting customary international law? Senior U.S. officials have previously characterized the obligation not to defeat the object and purpose of a treaty as "widely recognized in customary international law." Robert E. Dalton, The Vienna Convention on the Law of Treaties: Consequences for the United States, 78 Am. Soc'y Int'l L. Proc. 276, 278 (1984) (quoting Secretary of State William P. Rogers).

2. *Observance and Interpretation of Treaties*

Article 26 of the Vienna Convention expresses the fundamental and widely accepted rule of *pacta sunt servanda:* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." As a Comment to the Restatement notes, this rule "lies at the core of the law of international agreements and is perhaps the most important principle of international law." A corollary of the rule, reflected in Article 27 of the Vienna Convention, is that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This reflects a broader international rule that a state "cannot use [its] internal law as a means of escaping international responsibility." Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. Doc. A/56/10, at 38 (2001). The *pacta*

sunt servanda rule is subject, however, to the rules concerning the validity and termination of treaties discussed below.

Other frequently cited provisions of the Vienna Convention are those dealing with treaty interpretation (Articles 31 and 32). They provide:

Article 31. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

The rules of interpretation contained in the Vienna Convention are somewhat different from the rules that a U.S. court would apply to interpret a contract or a statute. The Restatement contrasts the approach likely to be taken by U.S. courts (and presumably by other U.S. authorities, such as the Departments of State, Defense, Treasury, or Commerce, or by the Congress).

Restatement Section 325

Comment

. . . The Vienna Convention, in Article 32, requires the interpreting body to conclude that the "ordinary meaning" of the text is either obscure or unreasonable before it can look to "supplementary means." . . . Article 32 of the Vienna Convention reflects reluctance to permit the use of materials constituting the development and negotiation of an agreement (*travaux preparatoires*) as a guide to the interpretation of an agreement. The Convention's inhospitality to *travaux* is not wholly consistent with the attitude of the International Court of Justice and not at all with that of United States courts. . . .

. . . Courts in the United States are generally more willing than those of other states to look outside the instrument to determine its meaning. In most cases, the United States approach would lead to the same result, but an international tribunal using the approach called for by this section might find the United States interpretation erroneous and United States action pursuant to that interpretation a violation of the agreement.

Reporters' Notes

1. . . . Some states at the Vienna Conference objected to resort to *travaux* as contrary to their traditions, in which resort to legislative history to interpret domestic statutory questions is impermissible, or at least uncommon. Some were concerned that if resort to *travaux* were accepted, a state might be deterred from acceding to a multilateral convention negotiated at a conference that it had not attended. Others feared that resort to *travaux* would favor nations with long-maintained and well-indexed archives. . . .

Notes and Questions

1. The Convention's rules regarding interpretation have been widely applied, or at least cited, by U.S. domestic courts (including the Supreme Court), congressional committees, bilateral trade dispute-settlement panels, the WTO Appellate Body, arbitral bodies, and the International Court of Justice.

2. What is the purpose of treaty interpretation — to ascertain the meaning of the text or the intent of the parties? Or is it to determine how to apply treaty language to situations that may not have been contemplated when the treaty was concluded? Are these different? What practical difference would it make? If the objective is to ascertain the meaning of the text (as opposed to the intent of the parties), would the negotiation history *(travaux)* be relevant? How does the Vienna Convention resolve this issue? In any given dispute, is it likely that the meaning of the text will prove to be unambiguous? If not, is the *travaux* likely to be any less ambiguous? Will interpreting a treaty "in light of its object and purpose" assist in determining how to apply the treaty to unforeseen circumstances?

3. Do "supplementary" means of interpretation used in Article 32 mean "subordinate"? Is there any case where the use of *travaux*, or negotiating history, would be excluded? Professor Frankowska writes:

> Obviously, article 32 is depicted inaccurately [in the Restatement comment quoted above]. No mention is made of the fact that article 32 permits recourse to the *travaux*

to confirm the meaning of the terms of the treaty, a clause which changes the whole tenor of the article. In spite of what the Restatement suggests, it is possible for the courts to look to the authority of the Vienna Convention while using the *travaux* in accordance with the American judicial tradition. [Maria Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 Va. J. Int'l L. 281, 335 (1988).]

Do you agree?

4. The "ordinary meaning" of a word in English can be different from its "ordinary meaning" in German or another language. If the texts of the treaties in those languages are equally authentic, as is the common practice, the interpreter must resort to context and external sources to determine *the*—or *a*—proper interpretation. Do you think that there is always a single correct interpretation? Consider how the Vienna Convention addresses situations in which different languages used in a treaty produce different meanings in Article 33.

5. Why is the definition of "context" in Article 31 of the Convention so narrow? Should declarations and resolutions adopted at a diplomatic conference recommending a treaty, or authoritative explanations or reports prepared by drafters, be regarded as part of the "context"?

6. Why should the *travaux* not be accorded equal weight with the text and subsequent practice of the parties? What about domestic legislative history, such as the report of the delegation, a letter of transmittal of the treaty by the President, Senate or Congressional hearings and committee reports, or statements by delegates? For example, if one party believes that a specific treaty provision prohibits a particular practice, but the other party believes that the practice is not prohibited, should the dispute be resolved with reference to unilateral statements made by one party to its legislature? In another situation, would the unilateral behavior or practice of a party to a treaty, which was known to and acquiesced in by the other party, amount to an "agreement" of the parties that would appropriately be treated as part of the treaty's context under the Vienna Convention?

3. *Invalidity of Treaties*

Articles 46-52 of the Convention are provisions dealing with the possible invalidity of a treaty. They cover a state or its representative's competence to conclude a treaty, error, fraud, corruption, and duress. (See the Documentary Supplement for their texts.) In many ways, these provisions are analogous to the contract rules found in many nations. However, Article 52 on "Coercion of a State by the Threat or Use of Force" evoked considerable debate during the drafting process. Professor Sinclair describes the background:

> Article 52 of the Convention deals with coercion of the State itself and again lays down a rule of absolute nullity. The Commission, after reviewing the history of the matter and taking into account the clear-cut prohibition of the threat or use of force in Article 2(4) of the United Nations Charter, considered that these developments "justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a

> principle which is *lex lata* in the international law of today." Discussion at the Conference on this article tended to concentrate on two issues:
>
> (a) Whether the expression "threat or use of force" could, or should, be interpreted as covering economic and political pressure.
> (b) The temporal application of the rule—that is to say, the date from which the rule invalidating a treaty procured by the threat or use of force in violation of the principles of international law embodied in the Charter may be said to operate.
>
> The records of the Conference reveal strongly conflicting views on both these points. That the rule now embodied in Article 52 of the Convention represents the modern law on this topic is beyond serious dispute; but there are clearly uncertainties about the scope of the rule and its temporal application. . . . From this, it may be concluded that Article 52 may savour more of codification than of progressive development, at least insofar as the expression "threat or use of force" is confined to physical or armed force and no question arises as to the temporal application of the rule. . . . [Ian Sinclair, The Vienna Convention on the Law of Treaties 16-17 (2d ed. 1984).]

As Professor Sinclair notes, there could be uncertainties about Article 52's scope. For example, in early 2010 fears about Greece's indebtedness created a financial crisis that brought the Greek economy to the verge of collapse. The International Monetary Fund offered a critical loan of nearly $40 billion loan to Greece, but imposed strict conditions on Greek economic policies, including a combination of spending cuts and revenue increases. Could Greece validly argue later that the IMF-Greek agreement was void?

What about the agreements that come in the midst of a crisis, or even after hostilities end, where one or more countries might have gained the upper hand over another country? For example, in early 1999, key international states known as the Contact Group (the United States, Britain, France, Italy, Germany, and Russia) sought to broker a peaceful resolution to the Kosovo crisis (discussed in Chapter 11), and organized peace talks at Rambouillet, France. Leaders of NATO states threatened to use force against the Federal Republic of Yugoslavia if it did not agree to the terms that had been proposed by the Contact Group at the Rambouillet conference. Had Yugoslavia accepted those terms, would the agreement have been valid? What about the agreement Yugoslavia did sign in June 1999, after the NATO bombing campaign against it, accepting the withdrawal of its forces from Kosovo? Or what about the Algiers Accords, the agreement that ended the 1979-1981 Iranian hostage crisis by, among other things, bringing about the release of U.S. embassy personnel who had been held as hostages by Iran for over one year? The agreement required the United States, in exchange, to return to Iran certain funds and properties that had been blocked by the U.S. government in response to the hostage-taking. Could the United States later claim that the agreement was invalid? (See discussion of Dames & Moore in Chapter 3.)

4. *Reservations*

Sometimes a party to a treaty may wish to accept most of its obligations, but not all of them. There are many possible reasons for this. Sometimes the country might not

agree with a particular provision, or it might not wish to accept a dispute settlement provision (such as reference of disputes to the ICJ), or it might not have the constitutional power to accept a particular provision (e.g., a federal state may not be able to bind its constituent states or provinces).

In such a case the party may seek to enter a "reservation" to the treaty. The Vienna Convention defines a "reservation" in Article 2(1)(d) as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State."

Professor Edwards provides more background about the possible reasons for reservations.

Richard W. Edwards, Jr., Reservations to Treaties

10 Mich. J. Int'l L. 362, 362-364 (1989)

The subject matter of multilateral treaties has an immensely wide range, including, inter alia, rights respecting international waterways, trade and finance, alliances and military affairs, settlement of disputes, and creation of both general and highly specialized international and regional organizations. Multilateral treaties have also led to the creation and codification of legal regimes applicable to such diverse concerns as arms control, the conduct of military hostilities, educational and cultural exchanges, diplomatic and consular relations, international trade, intellectual property, the law of the sea, the use of the radio spectrum, and the protection of human rights. The number of nation States participating in treaties has greatly expanded in the period since World War II. . . .

The difficulty of fashioning agreed rules applicable to all parties to an international agreement has inspired the use of reservations. . . . [A] reservation can be roughly defined as a unilateral statement made by a State or international organization, when signing, ratifying, acceding, or otherwise expressing its consent to be bound by an international agreement, whereby it purports to exclude or to modify the legal effect of certain provisions of the international agreement in their application to that State or organization. Reasons for reservations include:

1. A State or international organization may wish to be a party to an international agreement while at the same time not yielding on certain substantive points believed to be against its interests.
2. A State or international organization may wish to be a party to an international agreement while at the same time not binding itself to certain procedural obligations, such as compulsory settlement of disputes in the form specified in a compromissory clause.
3. A State may wish to assure that its treaty obligations are compatible with peculiarities of its local law.
4. A State may want to preclude a treaty's application to subordinate political entities in a federal system or to foreign territories for which the State would otherwise have international responsibility.

These reasons could motivate any State, regardless of its form of government, to interpose a reservation when it expresses its consent to be bound by a treaty.

Let's now consider the process for making reservations, and their implications, as provided for in Articles 19-23 on the Vienna Convention on the Law of Treaties. These Articles are excerpted below.

Vienna Convention

Article 19. Formulation of Reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20. Acceptance of and Objection to Reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21. Legal Effects of Reservations and of Objections to Reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se.*

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. . . .

Article 23. Procedure Regarding Reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty. . . .

When the United States became a party to the multilateral Convention on the Prevention and Punishment of the Crime of Genocide in 1988, one of the reservations it formulated concerned Article IX, which vested the International Court of Justice with jurisdiction over any dispute concerning the interpretation or application of the treaty. The United States reservation provided that "before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice . . . , the specific consent of the United States is required in each case."

Consider the responses by the Netherlands and the United Kingdom to the United States reservation:

Declaration of the Netherlands

27 December 1989

. . . [T]he Government of the Kingdom of the Netherlands recalls its declaration, made on 20 June 1966 on the occasion of the accession of the Kingdom of the Netherlands to the Convention . . . stating that in its opinion the reservations in respect of article IX of the Convention, . . . were incompatible with the object and purpose of the Convention, and that the Government of the Kingdom of the Netherlands did not consider states making such reservations parties to the Convention. Accordingly, the Government of the Kingdom of the Netherlands does not consider the United States of America a party to the Convention. . . .

Declaration of the United Kingdom of Great Britain and Northern Ireland

22 December 1989

The Government of the United Kingdom have consistently stated that they are unable to accept reservations to article IX. Accordingly, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom do not accept the first reservation entered by the United States of America.

Notes and Questions

1. If a state formulates a reservation that is expressly prohibited by a treaty or is incompatible with its object and purpose, what is the effect of the reservation? Should we treat the state as a party to the treaty and give no legal effect to, or "sever," the impermissible reservation? Or does such a reservation mean that the state has not in fact consented to be bound by, and consequently is not a party to, the treaty?

2. What is the effect of the U.S. reservation to Article IX of the Genocide Convention on the legal obligations between the United States and other parties to the treaty that raised no objection to the reservation? What is the effect on the legal obligations between the United States and the Netherlands? Between the United States and the United Kingdom? What if a state objects to a reservation but does not state its reasons or express a position on whether the reservation precludes entry into force of the whole treaty between the two countries?

3. Are Articles 19 through 23 essentially applicable only to multilateral treaties and not bilateral ones? If the treaty is a bilateral treaty, can one of the two state parties make a reservation (as defined in Article 2(1)(d) of the Vienna Convention)? The Restatement suggests that "if a reservation is attached at ratification, it constitutes in effect a rejection of the original tentative agreement and a counter-offer of a new agreement." Restatement, §313 comment f. What might be the alternative to seeking to make a reservation for a state that, after initially negotiating and signing the bilateral treaty, discovers a problem with a substantive provision of the treaty or decides that a provision is ambiguous? Can this be a request for a modification in the treaty? This situation might arise during the domestic process of obtaining the advice and consent of a legislative body.

4. Should a unilateral interpretation, also sometimes referred to as an interpretative declaration, of an ambiguous provision of a treaty be treated as a reservation? In principle, is there anything wrong with treating it as a reservation? If the unilateral interpretation is made during the negotiating process on the treaty, might it also become an element in the interpretation of the treaty under Articles 31 and 32?

5. The flexible approach for reservations to multilateral conventions embodied in the Vienna Convention, especially Article 20(4), reflects the view adopted in the

International Court of Justice's Advisory Opinion on Reservations to the Genocide Convention, 1951 I.C.J. 15 (May 28). As the Court observed:

> [On one hand,] [i]t is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'etre of* the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.
>
> This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations — all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions. . . .
>
> It has [on the other hand] . . . been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty would lead to a complete disregard of the object and purpose of the Convention.

6. Some multilateral treaties prohibit reservations. What are the reasons why a treaty, say, establishing a new institution or a new regime of laws should prohibit reservations? For example, the Rome Statute of the International Criminal Court, which came into force in 2002, prohibits reservations (Article 120).

7. The 1982 Law of the Sea Convention also prohibited reservations (Article 309). However, the problems that the United States and several other countries had with the deep seabed mining provisions of the 1982 Convention led to the imaginative solution where a later companion agreement was negotiated in 1994 that has the effect of amending the objectionable provisions in the 1982 Convention. (See Chapter 9.)

8. It appears that most multilateral conventions do not have reservations, whether because they are prohibited or because countries choose not to make reservations. Reservations are particularly rare when the conventions are limited to a few states. For example, see John King Gamble, Reservations to Multilateral Treaties: A Macroscopic View of State Practice, 74 Am. J. Int'l L. 372 (1980). For some accounts of why reservations are relatively rare, see Vincy Fon & Francesco Parisi, The Economics of Treaty Ratification, 5 J. L. Econ. & Pol'y 209 (2009); and Francesco Parisi & Catherine Sevcenko, Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention, 21 Berkeley J. Int'l L. 1 (2003).

9. Reservations are nevertheless often made by the United States and other countries in conventions on human rights. Indeed, the frequency of these reservations led the U.N. Human Rights Committee and the International Law Commission to study these reservations. In its General Comment No. 24, the U.N. Human Rights Committee took the position in 1994 that it had the authority "to determine whether a specific reservation is compatible with the object and purpose" of the International Covenant on Civil and Political Rights. It also took the view that a reservation incompatible with the object and purpose of a treaty "will generally be severable, in the sense that the [treaty] will be operative for the reserving party without the benefit of the reservation." The United States and the United Kingdom objected to the Committee's claim of authority. (See Chapter 3 for a discussion of U.S. practice and the possible reasons for the U.S. use of reservations. See also Chapter 8.)

10. Do you think a reservation that, say, rejects a prohibition on capital punishment in a human rights treaty should be regarded as incompatible with the object and purpose of the agreement for purposes of Article 19 of the Vienna Convention? Who is entitled to make that judgment?

5. *Termination and the Suspension of the Operation of Treaties*

In the event of a material breach of a treaty, it has long been recognized and generally accepted that the affected party may unilaterally terminate the treaty or suspend the performance of its own obligations. The Vienna Convention provides:

Vienna Convention

Article 60. Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:
(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Notes and Questions

1. Summarize in a sentence or two the standard that must be met under Article 60 for a state to be justified in not performing a treaty obligation.

2. What can a state do in the event of a "material breach"? For example, if Chile violated a bilateral trade agreement with the United States providing for free trade in all products by restricting trade in American exports of designer blouses (but not computers, aircraft, and grain), what remedy would be available to the United States? Could the United States terminate the entire agreement? Would your answer change if the volume of trade in designer blouses amounted to less than $5 million out of a total of $5 billion in annual trade?

3. How do the remedies under the Vienna Convention differ from those available for breach of contract under the domestic law? What are the purposes and advantages or disadvantages of the different remedies that may be available?

4. Does Article 60 provide rules on when a state may, in response to a material breach, suspend operation of a treaty only in part, rather than in whole? Is there a requirement that the response to a material breach of a treaty be proportionate? During negotiations on the Vienna Convention, the U.S. negotiators sought to introduce "an element of proportionality" into Article 60. They proposed adding, at the end of paragraph 1 of Article 60, the following language: "as may be appropriate considering the nature and extent of the breach and the extent to which the treaty obligations have been performed." The amendment did not enjoy support, and the U.S. delegation withdrew it. See Richard D. Kearney & Robert E. Dalton, The Treaty on Treaties, 64 Am. J. Int'l L. 495, 540 (1970).

5. Who determines whether there has been a material breach? Whether the remedy should be suspension of part of or all of the treaty? Or some other remedy?

6. Articles 65 and 66 of the Vienna Convention provide for compulsory but nonbinding conciliation of disputes over the validity or interpretation of a treaty. There is a strong case that these provisions do not amount to customary international law, especially the specific provisions of the Annex regarding the establishment of a Conciliation Commission. If a state declared a material breach of a treaty (in effect relying on the terms of Article 60), do you think that it would be obligated to give formal notice and make some attempt with the offending treaty partner to settle the dispute? Or must it use some form of third-party dispute settlement? Should states like the United States that are not parties to the Vienna

Convention respect all, or some, of the dispute settlement provisions of Articles 65 and 66? Why or why not?

Besides Article 60 on material breach, the Vienna Convention contains other provisions allowing for termination or suspension of the operation of a treaty.

Article 61 deals with impossibility of performance as a basis for terminating or withdrawing from a treaty. Article 62 deals with the permissibility of terminating a treaty because of a "fundamental change in circumstances" (the doctrine of *rebus sic stantibus*). (Both articles are in the Documentary Supplement.) Sinclair traces the formulation of Article 62:

> . . . The concept that . . . a treaty may become inapplicable by reason of a fundamental change in circumstances obviously presents serious dangers to the security of treaties. Nevertheless, the doctrine that a fundamental change of circumstances may operate to bring about the termination of a treaty is of ancient origin. . . .
>
> . . . [D]iplomatic practice in the nineteenth century—and, particularly, the invocation by Russia of the *rebus* doctrine to justify her assertion in 1870 that the provisions of the 1856 Treaty regarding the neutralization of the Black Sea were no longer binding upon her . . . began to demonstrate some of the dangers inherent in the notion of the clause; and indeed the *rebus* doctrine fell into serious disrepute during the inter-war period, largely as a result of its indiscriminate invocation by States in the period immediately preceding 1914 to escape from inconvenient treaty obligations. . . .
>
> Against this background, the Commission approached the formulation of a text on *rebus sic stantibus* with considerable caution. After extensive debate, they decided to formulate it in negative terms, declaring that a fundamental change of circumstances which had occurred with regard to those existing at the time of the conclusion of a treaty might not be invoked as a ground for terminating or withdrawing from the treaty unless two conditions were met:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; *and*
> (b) the effect of the change was radically to transform the scope of obligations still to be performed under the treaty.
>
> To this the Commission proposed two exceptions:
>
> (a) a fundamental change of circumstances could not be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary;
> (b) a fundamental change of circumstances could not be invoked if it was the result of a breach by the invoking party either of the treaty or of a different international obligation owed to the other parties to the treaty. . . .
>
> Some interesting points were made in the course of the debate. In the first place, it was suggested, and not denied, that a State would not be entitled to invoke its own acts or omissions as amounting to a fundamental change of circumstances giving rise to the operation of Article 62. Attention was also directed to the view expressed by some members of the Commission, and recorded in the commentary to the Commission's proposal, that "a subjective change in the attitude or policy of a Government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty." . . . [Ian Sinclair, The Vienna Convention on the Law of Treaties 192-195 (2d ed. 1984).]

Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)

Int'l Court of Justice
1997 I.C.J. 7 (Sept. 25)

[In this case, Slovakia asked the International Court of Justice (ICJ) to rule on, among other issues, the validity of Hungary's termination of a 1977 Treaty with Slovakia's predecessor state (Czechoslovakia). The 1977 Treaty concerned the construction and operation of an elaborate system of locks on the Danube River, which formed part of the border between the two countries. The joint project, devised when Hungary and Czechoslovakia were communist command economies, was aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube, and the protection of the areas along the banks against flooding. After the fall of communist regimes in both countries, questions arose on both sides of the Danube, but especially in Hungary, about the economic viability of the Gabcikovo-Nagymaros project and its potentially harmful environmental impact. In 1989, Hungary suspended and later abandoned its participation in the project. In 1992, it purported to terminate the 1977 Treaty.

In arriving at its decision, the ICJ relied heavily on the 1969 Vienna Convention on the Law of Treaties. Even though the countries had not ratified the Vienna Convention at the time of their 1977 Treaty, the ICJ concluded that Articles 60 to 62 of the Vienna Convention were "declaratory of customary law." The ICJ then applied these articles to Hungary's arguments that it should be allowed to terminate the 1977 Treaty.]

94. Hungary's [impossibility of performance] argument . . . [was predicated on its view] that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". [Hungary] concluded that

> "By May 1992 the essential object of the Treaty—an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly—had permanently disappeared, and the Treaty had thus become impossible to perform." . . .

102. Hungary . . . relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article. . . .

103. Hungary contended that the essential object of the Treaty—an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly—had permanently disappeared and that the Treaty has thus become impossible to perform. . . . [I]f the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from the treaty.

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law. . . .

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. . . .

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention . . . is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

Questions

1. In the *Gabcikovo* decision excerpted above, is the Court correct that "the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases"?

2. Why did the drafters of the Vienna Convention decide on narrow exceptions, such as Articles 61 and 62? What is the value of, and whose interests are most protected by, the approach adopted by the Convention in this respect?

3. Does the Vienna Convention seem to protect continuation of agreements and therefore the status quo? If so, does that mean that treaty regimes are inherently conservative and difficult to change?

6. *Withdrawal from or Denunciation of a Treaty*

Most recent treaties contain clauses providing the bases for withdrawal from, or denunciation of, the treaty. The treaties usually specify the duration or date of termination of the treaty, and/or the conditions or events that allow for termination

or the right to withdraw or denounce the treaty. For example, the 1994 Agreement Establishing the World Trade Organization provides in Article XV that "Any Member may withdraw from this Agreement. Such withdrawal . . . shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-general of the WTO."

The Vienna Convention recognizes the right, and the now common practice, of states to include withdrawal clauses in treaties. Article 54 provides that the termination of a treaty or a party's withdrawal may take place "in conformity with the provisions of the treaty" or "at any time by consent of all the parties. . . ."

If, however, the treaty contains no such provisions regarding termination, withdrawal, or denunciation, then Article 56 of the Vienna Convention provides that the treaty "is not subject to denunciation or withdrawal" unless:

> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> (b) a right to denunciation or withdrawal may be implied by the nature of the treaty.

The International Court of Justice addressed this situation, where a treaty failed to include provisions for termination, denunciation, or withdrawal, in the Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7 (Sept. 25). In that case, which is also discussed in section 5 above, Hungary attempted to terminate a 1977 bilateral treaty without the other party's consent. After several years of difficult negotiations between Hungary and Czechoslovakia (the predecessor of Slovakia), the Hungarian Government notified Czechoslovakia that it was considering the treaty terminated, effective six days later. The ICJ held that Hungary could not terminate the treaty in this manner. In its judgment, the ICJ said:

> 100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable regime of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention. . . .
>
> 109. . . . [I]t should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both parties agree that Articles 65 to 67 of the Vienna Convention . . . , if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. . . .
>
> The termination of the Treaty by Hungary was to take effect six days after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

Notes and Questions

1. Should it be difficult to withdraw from treaties? If it is difficult, what effect, if any, will this have on the ratification of treaties? Is it better to have a regime under which a country that is unhappy with a treaty can withdraw from it, rather than a regime under which the country feels compelled to breach that treaty?

2. In January 2003, as tensions between the North Korea and the United States and other states over North Korea's suspected nuclear weapons program grew, North Korea announced that it was withdrawing from the Nuclear Nonproliferation Treaty (NPT). Article X(1) is the NPT's withdrawal clause; it provides:

> Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

In announcing its withdrawal from the NPT, North Korea declared that "[a] dangerous situation where our nation's sovereignty and our state's security are being seriously violated is prevailing on the Korean peninsula due to the US vicious hostile policy towards [North Korea]." North Korea's statement included President Bush's characterization of North Korea as a member of states comprising an "axis of evil" and U.S. efforts to pursue resolutions condemning North Korea's noncompliance with the NPT as a basis for its "self-defensive" withdrawal from the treaty.

Is it for North Korea, or for other states, to decide whether North Korea's stated reasons for withdrawing from the NPT satisfy Article X(1) of the treaty? Or should an international organization decide? Did North Korea's withdrawal from the NPT violate the treaty? Was it consistent with the Vienna Convention on the Law of Treaties?

3. Reflecting the development of new defensive missile technologies and the emergence of new threats from rogue states, the administration of President George W. Bush decided that it was in the U.S. interest to build a limited missile defense system. The United States accordingly gave formal notice to Russia in December 2001 that it would withdraw from the nearly 30-year old Treaty on the Limitation of Anti-Ballistic Missile Systems (the ABM Treaty), effective June 2002. Article XV(2) of the treaty provides that: "Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision prior to the withdrawal from the Treaty. . . ."

Is it for the United States, or for other states, to decide whether the emergence of new threats to the United States and the development of new technologies constituted "extraordinary events" that "jeopardized [U.S.] supreme interests"? Was the U.S. withdrawal a breach of the ABM Treaty? Was it consistent with the Vienna Convention on the Law of Treaties?

4. The International Covenant on Civil and Political Rights (ICCPR), an important human rights treaty that has been ratified by over 165 states, does not contain a withdrawal clause. In 1998, the Human Rights Committee established by the ICCPR concluded that countries are not allowed to withdraw from this treaty. The Committee reasoned that the rights under the ICCPR "belong to the people living in the territory of the State party" and that "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in Government of the State party,

including . . . any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant." Are you persuaded? (See discussion of the ICCPR in Chapter 8.)

5. In 1997, North Korea, formally known as the Democratic People's Republic of Korea (DPRK), notified the U.N. Secretary General of its withdrawal from the ICCPR. In response, the Secretariat noted that the Covenant does not contain a withdrawal provision and expressed the view that the DPRK's withdrawal from the Covenant "would appear impossible without the consent of all State parties" to the Covenant. See U.N. Secretary-General, Depository Notification of the Democratic Republic of North Korea, U.N. Doc. C.N.467.1997-TREATIES-10 (Nov. 12, 1997). Are you persuaded? How does the Secretary-General's analysis differ from that of the Human Rights Committee described in the preceding note?

7. *Jus Cogens*

Growing attention has been paid in recent years to the concept of "peremptory," or *jus cogens*, norms. Peremptory norms are not an independent "source" of international law. Rather, they are rules — whatever their source — that possess a different normative character from "ordinary" international law rules. *Jus cogens* norms are said to be so fundamental that they bind all states, and no nation may derogate from or agree to contravene them. Although the notion had previously received attention from academic commentators, it was initially recognized by states in Articles 53 and 64 of the Vienna Convention on the Law of Treaties. Professor Aust explains the background:

Anthony Aust, Modern Treaty Law and Practice

319-320 (2d ed. 2007)

The concept of *jus cogens* (peremptory norm of general international law) was controversial at the time of the Vienna Conference. Now it is more the scope and applicability of the concept which is debated. *Jus cogens* is defined in Article 53 for the purposes of the Convention as:

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

There is no agreement on the criteria for identifying which norms of general international law have a peremptory character. Whether a norm of general international law has it depends on the particular nature of the subject matter. Perhaps the only generally accepted example is the prohibition on the use of force as laid down in the UN Charter. The prohibitions on genocide, slavery and torture may also be said to be *jus cogens*. This is so even where such acts are prohibited by treaties which parties to them can denounce. But it would be rash to assume that all prohibitions contained in human rights treaties are *jus cogens*, or even part of customary international law. Some rights, such as the freedom of association, are

far from being generally accepted as customary law; and a state can usually derogate from others (e.g., due process) in time of public emergency. Article 53 does not therefore attempt to list examples of *jus cogens*, leaving that to be worked out by state practice and in the jurisprudence of international tribunals. . . .

The vast majority of rules do not of course have the character of *jus cogens*, and states are therefore free to contract out of them; and a treaty which conflicts with general international law is not necessarily void. Similarly, if a treaty provides that no derogation from it is permitted, but later a party concludes a treaty which conflicts with it, the latter treaty is not void although the party may be liable for breach of the earlier treaty.

The consequences of the invalidity of a treaty that conflicts with *jus cogens* under Article 53 or Article 64 are dealt with in Article 71. Unfortunately, there are no reported instances of Articles 53 or 64, as such, being invoked.

Professor Shelton addresses the source and content of *jus cogens* and considers the practical impact of identifying such a category of rules:

Dinah Shelton, Normative Hierarchy in International Law

100 Am. J. Int'l L. 291, 297, 299-300, 302-304 (2006)

In Theory

The theory of *jus cogens* or peremptory norms posits the existence of rules of international law that admit of no derogation and that can be amended only by a new general norm of international law of the same value. It is a concept that lacks both an agreed content and consensus in state practice. . . .

Sources of peremptory norms. . . . A strictly voluntarist view of international law rejects the notion that a state may be bound by an international legal rule without its consent and thus does not recognize a collective interest that is capable of overriding the will of an individual member of the society. . . .

The provisions . . . adopted [in the Vienna Convention on the Law of Treaties] limited the ability of states to escape fundamental norms, but they also established state consent as the foundation for such rules. . . . Article 53 demands that there first be established a norm of general international law and, second, that the *international community of states as a whole* agree that it is a norm from which no derogation is possible. While this definition precludes an individual state from vetoing the emergence of a peremptory norm, it sets a high threshold for identifying such a norm and bases the identification squarely in state consent. . . .

Many scholars have long objected that the source of international obligation cannot lie in consent, but must be based on a prior, fundamental norm that imposes a duty to comply with obligations freely accepted. . . . Some scholars object that positivism does not adequately describe the reality of the current international order. . . . The [international] community consists of states that live within a legal framework of a few basic rules that nonetheless allow them considerable freedom of action. Out of the community come common values and fundamental principles that bind the entire society.

It is certainly rational to accept that such a framework has become necessary in the light of global problems threatening human survival in an unprecedented fashion. The emergence of global resource crises, such as the widespread depletion of commercial fish stocks, the destruction of the stratospheric ozone layer, and anthropogenic climate change, has produced growing concern about the "free rider," the holdout state that benefits from legal regulation accepted by others while enhancing its own profits through continued utilization of the resource or ongoing production and sale of banned substances. Recalcitrant states not only profit by rejecting regulatory regimes adopted by the overwhelming majority of states, they threaten the effectiveness of such regimes and pose risks to all humanity. The traditional consent-based international legal regime lacks a legislature to override the will of dissenting states, but efforts to affect their behavior are being made [in part] through the doctrine of peremptory norms or universal law applicable to all states, ...

In sum, the source of peremptory norms has been variously attributed to state consent, natural law, necessity, international public order, and the development of constitutional principles. The different theories lead to considerably different content for *jus cogens* norms and consequences for their breach. . . .

The content of jus cogens. Neither the International Law Commission nor the Vienna Convention on the Law of Treaties developed an accepted list of peremptory norms, although both made reference in commentaries and discussion to the norms against genocide, slave trading, and the use of force other than in self-defense. . . .

Since the adoption of the Vienna Convention, the literature has abounded in claims that additional international norms constitute *jus cogens*. Proponents have argued for the inclusion of all human rights, all humanitarian norms (human rights and the laws of war), or singly, the duty not to cause transboundary environmental harm, freedom from torture, the duty to assassinate dictators, the right to life of animals, self-determination, the right to development, free trade, and territorial sovereignty (despite legions of treaties transferring territory from one state to another). During the Cold War, Soviet writers asserted the invalidity of treaties that conflicted with the "basic principles and concepts" of international law, defined to include universal peace and security of nations; respect for sovereignty and territorial integrity; noninterference in internal affairs; equality and mutual benefit between nations; and *pacta sunt servanda*. Examples of invalid agreements included the NATO pact, the peace treaty between the United States and Japan, the SEATO agreement, and the U.S.-UK agreement on establishing air bases. In most instances, little evidence has been presented to demonstrate how and why the preferred norm has become *jus cogens*. Wladyslaw Czaplinksi correctly comments that "the trend to abuse the notion of *jus cogens* is always present among international lawyers." . . .

Notes and Questions

1. The definition of *jus cogens* in the Vienna Convention on the Law of Treaties as a norm "accepted and recognized by the international community of States as a whole" suggests that norms acquire a peremptory character through a process similar to the way state practice attains customary international law status. In determining whether a norm is peremptory, what qualifies as "the international community of States as a whole"? Does that mean all states? If unanimity is not required, how many "dissenters" can there be before a norm is no longer accepted by the international community as a whole? One? Two? Five? Do the views of all states count equally in making this determination?

2. The characterization of a legal norm as peremptory seems to require not only a universal, or nearly universal, belief by states that the norm is binding, but also a belief that the norm is so fundamental that other states may not derogate from it. How do we ascertain whether states believe not only that they are legally bound by a rule, but additionally that the rule is so fundamental that all states are bound by it?

3. Does the doctrine of *jus cogens* merely enable diplomats, judges, and lawyers to justify preferred policy results? If you think that judges (or scholars) do not make decisions that way, how do you think they would go about a disinterested search for the norms of *jus cogens?*

4. A report produced by a Study Group of the International Law Commission commented that "[t]he problem of how to identify *jus cogens* is not easy to resolve *in abstracto*," but nevertheless suggested that "the most frequently cited candidates for the status of *jus cogens* include: (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at civilian population ('basic rules of international humanitarian law')." Report of the Study Group of International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682, at 189 (2006).

5. Can you think of examples of agreements between states that would violate a *jus cogens* norm, and that would accordingly be void under Article 53 of the Vienna Convention on the Law of Treaties? Are states likely to enter into agreements to enslave the population of another country? To deny the right of self-determination, to violate the law of peaceful co-existence, to commit the international crime of apartheid, or to engage in torture, state terrorism, or the capital punishment of juveniles?

6. The practical impact of *jus cogens* has been limited. It has not, for instance, been invoked to void a treaty. The concept has, however, appeared in discussions of what constitutes customary international law and whether certain norms have greater weight. We turn to customary international law in Section B.

7. For additional perspectives on *jus cogens* norms, see Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of *Jus Cogens*, 34 Yale J. Int'l L. 331 (2009); and Alexadner Orakhelashvili, Peremptory Norms in International Law (2006).

B. CUSTOMARY INTERNATIONAL LAW

1. Formation of Customary International Law

Until recently, international law for the most part consisted of customary law. In the last decades, treaties have increasingly become the means by which law is made in the international system. Yet many important legal rules continue to arise