

# International Agreements

## TYPES OF AGREEMENTS

Treaties and other forms of international agreements have been in evidence throughout recorded history. We noted earlier an agreement between Umma and Lagash, defining the boundary between them, at the very dawn of recorded history. On display in Ankara, one of the most noted treaties involves a negotiated peace between Egypt and the Hittite Empire (modern Turkey) after the Battle of Kadesh (c. 1294 B.C.).<sup>1</sup> In modern times, beginning with the writings of Grotius, writers and diplomats have depended mostly on rules of law governing contractual relations between private individuals in developing the principles regulating contractual arrangements between states. Only in the past few decades have states made serious attempts to develop systematic international rules governing treaties and other interstate agreements. Even so, the general principles applied by states in actual practice have achieved a high degree of uniformity.

International agreements underpin much of the everyday business of international politics. No other mechanism really exists that reflects the explicit agreed preferences of states.<sup>2</sup> The United States has over 10,000 treaties in force.<sup>3</sup> All writers, from Hugo Grotius onward, have pointed out that the *names* or *titles* of international agreements included under the general term *treaty* have little or no legal significance in and of themselves. Simply put, what those drafting the instrument choose to call it—whether a treaty, convention, or protocol—has no intrinsic legal meaning. Indeed, the variety of names given over the years to various international agreements is astounding. Besides the common varieties, such as *convention*, *agreement*, *protocol*, *treaty*, and *covenant*, and the less common *final act*, *general*

<sup>1</sup>Dates for this battle vary. Indeed, one edition, the *Encyclopedia Britannica*, in three different articles mentioning the battle, gives three different dates.

<sup>2</sup>On the general subject of treaties, consult Hackworth, IV, 1; Moore, V, 155; and McNair, *The Law of Treaties* (reiss. 1986).

<sup>3</sup>U.S. Department of State, “Treaty Affairs,” [www.state.gov/s/l/treaty/index.htm](http://www.state.gov/s/l/treaty/index.htm). The State Department also publishes *Treaties in Force* (TIF) each January, as well as the *Treaties and Other International Agreements* (TIAS) series.

*act*, and *declaration*, a bewildering array of relatively rare terms confronts the student. Among them, to list but a few, are *arrangement*, *accord*, *code*, *compact*, *contract*, *regulation*, *concordat*, and *statute*.<sup>4</sup> Certain terms are more common, but they furnish little more than general designations of category.

A treaty in the accepted sense of the term may be characterized in the words of Sir Gerald G. Fitzmaurice:<sup>5</sup>

A *treaty* is an international agreement embodied in a single formal instrument (whatever its name, title or designation) made between entities both or all of which are subjects of international law possessed of an international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law.

The *Restatement of [American] Foreign Relations Law* notes that a “treaty is one of many terms used to describe an international agreement.” An *international agreement* has been defined as “an agreement among two or more states or international organizations that is intended to be legally binding and is governed by international law.”<sup>6</sup> In fact, both of these definitions emphasize the legal rather than the practical aspect. In practical form, a treaty represents a set of *mutually conditional promises* that both states consider legal obligations. Translated into personal terms, this means that I promise in good faith to keep my promises if you keep your promises, and you promise in good faith to keep your promises if I keep my promises. Simply keep in mind that *intent* constitutes the most important element here. The parties must *intend* to create a binding set of mutual legal obligation by their actions. Not all international instruments create binding legal obligations. Some may merely state commonly held political beliefs or principles (see the discussion of “soft law” in Chapter 3).

## Bilateral Treaties

Bilateral agreements are between only two states or parties and are closely related, at least by analogy, to contracts between individuals. A bilateral treaty is concluded between two states desiring to promote or regulate interests or matters of particular interest to them alone. Hence, bilateral treaties create limited obligations. For example, extradition treaties are normally bilateral instruments.

## Multilateral Treaties

States also conclude multilateral (multiparty) treaties—agreements negotiated by and involving more than two parties. Some of these agreements do not create new principles or rules of international law but merely serve as expanded versions of bilateral treaties. Multiparty alliances such as the North Atlantic Treaty Organization

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<sup>4</sup>D. P. Myers, “The Names and Scope of Treaties,” 51 *American Journal of International Law* 574 (1957), 575.

<sup>5</sup>Later a judge on the International Court of Justice. G. G. Fitzmaurice, *Third Report on the Law of Treaties: Yearbook of the International Law Commission* (1958), II, 24.

<sup>6</sup>*Restatement (Third) of Foreign Relations Law*, § 301 (1987).

(NATO) or its Eastern Bloc adversary, the Warsaw Pact, form two good examples. Multilateral treaties created the United Nations, the Organization of American States (OAS), and other international agencies such as the World Health Organization and the World Trade Organization (WTO). Multilateral treaties that have as their principal purpose the codification of existing law or the elaboration of new principles of law governing a particular issue area are often characterized as *lawmaking treaties*. The International Covenant on Civil and Political Rights and other human rights instruments provide good illustrations of lawmaking treaties.

**A Note on Lawmaking Treaties** Many multilateral treaties do have as their principal purpose the codification of existing customary law (Chapter 3) or the establishment of a new international governmental organization (IGO). The Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on the Law of Treaties (1969) exemplify efforts to establish uniform rules based upon long-standing (but somewhat inconsistent) customary practice. The International Criminal Court (ICC), as the most recent high-profile addition to the IGO ranks, exemplifies the constitutive function.

Others intend to put in place new general principles of law governing a particular issue area. These are often characterized as lawmaking treaties. The International Covenant on Civil and Political Rights (ICCPR; 1966), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), and the Convention on the Elimination of All Forms of Discrimination Against Women (1979) represent initiatives to establish new general rules of international law.

To understand the limits of lawmaking treaties, note first that the provisions will apply only to those states that have **signed and ratified, or deposited an instrument of accession with the United Nations** for, a particular convention. We have emphasized the element of consent throughout this introduction. Signature and ratification or accession indicate a state's consent, with ratification or accession forming the most important element because it certifies final acceptance. *Accession* to a treaty has exactly the same effect as signature and ratification. Often treaties will specify a time frame in which the treaty will be open for signature. While states may sign a treaty during this time, the act of signing does not mean that they have any time frame in which to ratify it. If a state does not sign the treaty during the time frame when it is open for signature (perhaps the state did not exist when the treaty was first open for signature, for example), it bypasses the signature phase by simply depositing an instrument of accession with the secretary-general of the United Nations. This action formally signals state consent, just as an instrument of ratification would.

Thus, the impact of the treaty in the sense of establishing a general rule *still depends upon which states and how many*. If the initial number of ratifying states is small, the treaty does not create a new rule of general international law but only a rule of particular or regional application among the consenting states. The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries opened for signature in 1989. It needed only 22 ratifications to enter into force, but did not receive those until December 2001. Currently, it has only 32 states parties. No major state has ratified the treaty or submitted an instrument of accession. As a result, the impact of the treaty in terms of establishing the prohibitions in the treaty as general rules of international law remains marginal.

Obviously, rules may become more general as acquiescence in practice that supports the new rule by nonparty states (review the discussion on custom, Chapter 3), formal ratification or accession to the instrument embodying the new rule, or adherence to it by additional states increases. On the other hand, as we shall discuss later in text, states that specifically refuse to acquiesce in the new rule by refusing to ratify the treaty or to otherwise acknowledge its provisions are, of course, not *normally* bound by the rule, principle, or interpretation in question. The active opposition of the United States to the Rome Statute creating the ICC serves as a paradigm case.

Even though a lawmaking treaty may not achieve close to universal acceptance in terms of signature and ratification, it may nevertheless represent a source of international law for the broader community. The provisions, if adopted by a majority of states that have a very vital interest in the subject area, or who represent the major powers in a geographic area, may still have some influence on the resolution of issues between states that have not formally accepted the treaty. The convention may serve as a source that applies to particular issues or to the geographic region. To give one example, the consent or dissent of landlocked states on most issues related to the law of the sea (e.g., Bolivia, Uganda, Nepal, and Afghanistan) will have far less impact than that of those states that have extensive coastlines, large navies, or sizeable merchant marines. The Declaration of Paris of 1856 abolished privateering and redefined the rights of neutrals in naval warfare. The treaty technically bound only those states that signed the final Act,<sup>7</sup> but in fact, many other states accepted the rules as part of an evolving customary law (Chapter 3).

## Declarations

Declarations are a peculiar type of agreement resulting from inter-American conferences and meetings of foreign ministers. They produce statements of legal principles applying, on a regional basis, in the Western Hemisphere. Thus, the Preamble of the Act of Chapultepec (Conference on Problems of War and Peace, Mexico City, 1945) states, “the American States have been incorporating in their international law, since 1890, by means of conventions, resolutions and *declarations*, the following principles.” The governments of states in Latin America do not differentiate, in regard to legal status or binding force, between rules laid down in formal treaties and those found in resolutions or declarations; they regard all such rules as having equal standing.

## Executive Agreements

*Executive agreements* represent a unique American practice in conducting relations with other states. Unlike a treaty concluded by the president (or his agents, such as the secretary of state), which requires submission to the U.S. Senate for its “advice and consent” before ratification, an executive agreement does not require

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<sup>7</sup>Austria, France, Prussia, Russia, Sardinia, Turkey, and Great Britain.

the Senate's final approval. It is a binding international obligation made *solely* by the executive branch. At times the authority may come from prior congressional authorization (presidential grants of most favored nation status), a prior treaty (individual agreements with NATO partners), or without prior authority from the powers generally recognized as vested by the Constitution solely in the presidential office (e.g., power granted as commander in chief and chief executive). Recent examples include a new United States–Brazilian Defense Cooperation Agreement (April 2010)<sup>8</sup> and U.S. accession to the ASEAN Treaty of Amity and Cooperation (July 2009).<sup>9</sup>

### DAMES & MOORE V. REAGAN

## United States Supreme Court, 1981 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed. 2d 918

### Facts

On November 4, 1979, a group of Iranian militants seized the U.S. embassy in Teheran and detained the diplomatic personnel as hostages. In response, President Carter issued an executive order to block the Iranian government from the use of any of its assets (money, property, etc.) subject to the jurisdiction of the United States. In response, the Treasury Department issued a regulation providing that unless "licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment or other judicial process is null and void with respect to any property in which on or since November 14, 1979 there existed an interest of Iran."

Dames & Moore filed suit in the U.S. District Court for Central California against the Atomic Energy Organization of Iran and a number of Iranian banks, claiming that the Atomic Energy Organization of Iran owed the company more than \$3.4 million for

performance of services under a contract. In January 1981, through the mediation efforts of Algeria, the United States and Iran reached an agreement on terms for the release of the hostages. The agreement stipulated that all litigation between "the Government of each party and the nationals of the other" would immediately terminate. Instead, claims for damages would be submitted to binding arbitration. On that same day, President Carter issued a series of executive orders implementing the terms of the agreement. On February 24, 1981, President Reagan issued an executive order "ratifying" the earlier action of President Carter. He also "suspended" all claims in any U.S. court that might be presented to the arbitration tribunal.

Dames & Moore received a summary judgment against the government of Iran. They attempted to execute the judgment by obtaining writs of garnishment and execution in state courts in Washington

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<sup>8</sup>U.S. Department of State, [www.state.gov/r/pa/prs/ps/2010/04/140059.htm](http://www.state.gov/r/pa/prs/ps/2010/04/140059.htm).

<sup>9</sup>U.S. Department of State, "United States Accedes to the Treaty of Amity and Cooperation in South-east Asia," Press Release, July 22, 2009, [www.state.gov/r/pa/prs/ps/2009/july/126294.htm](http://www.state.gov/r/pa/prs/ps/2009/july/126294.htm).

state. The district court stayed these attempts, and in light of the executive orders, vacated all attachments and prohibited further action against the defendants. Dames & Moore then filed for declaratory and injunctive relief against the United States and the secretary of the Treasury, seeking to prevent enforcement of the executive orders and Treasury Department regulations on the grounds they exceeded the statutory and constitutional powers of any agency.

### Issues

1. Can the president of the United States unilaterally override the interests of

private citizens in obtaining redress through the courts by invoking broader concerns of national interest?

2. Can he do so through executive agreement?

### Decision

The executive orders and Treasury regulations fall within the powers and authority granted by the Constitution.

### Reasoning

“When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress.”

Much of the controversy surrounding executive agreements has concerned questions relating to unilateral presidential commitments that seem to compel congressional approval because of funding or other need for legislation to implement the commitment successfully (i.e., separation of powers issues).<sup>10</sup> In August 1972, President Richard Nixon signed the Case Act (Pub. L. 92–404), which requires that international agreements, other than treaties, thereafter entered into by the United States should be transmitted to Congress within 60 days after the agreements have been executed (i.e., concluded).<sup>11</sup> The Act came in response to congressional irritation over secret agreements that generated commitments that might potentially require action by the legislature. The law did not question the right of the president to make executive agreements. It sought to restore a proper balance between the branches.

<sup>10</sup>See, for example, *Dames & Moore v. Reagan*, 453 U.S. 654, 101 S.Ct. 2972 (1981); *United States v. Guy W. Capps, Inc.*, U.S. Court of Appeals, 4th Cir., 1953, 204 F.2d 655, digested in 48 *AJIL* 153 (1954); for the problem of a conflict between an executive agreement and a state law, see *United States v. Pink*, U.S. Supreme Court, 1942, 315 U.S. 203.

<sup>11</sup>Text of the law in 11 *International Legal Materials* 1117 (1972); see also the statement by the legal adviser, Department of State (May 18, 1972), excerpted in 66 *AJIL* 845 (1972), and letters from the acting secretary of state (January 26, 1973), 67 *AJIL* 544 (1973); and (September 6, 1973), 68 *AJIL* 117 (1974). The Act was amended by Pub. L. 95–426 (Foreign Relations Authorization Act, Fiscal Year 1979, of October 7, 1978) to include all agencies. The law states that the secretary of state shall transmit to the Congress the text of any international agreement, other than a treaty to which the United States is a party, as soon as practicable after such agreement has entered into force regarding the United States but in no event later than 60 days thereafter. However, any such agreement the immediate disclosure of which would, in the president’s opinion, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the president. This ensures that Congress is aware of commitments made by the executive branch on behalf of the U.S. government. See further L. Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (1990), 58.

Perhaps the Far Eastern Agreement (signed at Yalta on February 11, 1945) stands as the most famous and controversial modern executive agreement post World War II. President Roosevelt clearly regarded the document as an executive agreement, yet did not admit this in his actual verbal report to Congress on March 1, 1945.<sup>12</sup> The circumstances surrounding the Yalta Agreement illustrate the circumstances the Case Act sought to correct. President Roosevelt requested Congress to “concur in the general conclusions” reached at Yalta, yet Congress could take no such action because the text of the agreement was not released by the Department of State until February 1946. In the meantime, however, the U.S. government, through the executive branch, undertook to carry out the measures called for in the agreement.

## WHAT MAKES A TREATY VALID?

First, the validity of treaties rests upon a principle of customary law, *pacta sunt servanda*, or *treaties must be observed*.<sup>13</sup> We should add here the corollary that states must act in *good faith* in performing treaty obligations. Without this principle, we cannot speak of international agreements as instruments that create binding legal obligations. Skeptics may question this precept. We ask the reader to review the material in Chapter 1 on “why do states obey international law” as an answer to the skepticism. Keep in mind that states make agreements because the agreements reflect mutual interests.<sup>14</sup> All states have a vital interest in protecting the general principle of *pacta sunt servanda*.

Second, to reiterate a fundamental principle, whether bilateral or multilateral, as evidence of state consent, international agreements are *normally* binding *only* upon those states that have signed *and* ratified them or otherwise indicated consent through accession. As with every general rule, some exceptions exist. We will discuss the exceptions at the appropriate places in this chapter. Some treaties, the Charter of the United Nations for one, do contain rules of *jus cogens* (peremptory norms) considered binding on all regardless of formal consent.

Third, treaties are made between or among *states* (or, in certain cases, between or among international organizations and states), not governments. A change in government, even a radical change in the form of government, does not release the

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<sup>12</sup>See C. Y. Pan, “Legal Aspects of the Yalta Agreement,” 46 *AJIL* 40 (1952); the essentially opposing views of H. W. Briggs, “The Leaders’ Agreement of Yalta,” 40 *AJIL* 376 (1946) (text of the agreement is reprinted in full in both sources); and O. Schachter, “The Twilight Existence of Nonbinding International Agreements,” 71 *AJIL* 296 (1977).

<sup>13</sup>See Vienna Convention on the Law of Treaties of May 23, 1969. Text and elaborate commentary in 61 *AJIL* 263 (1967 Supp.); text of convention and related documents in 63 *AJIL* 875 (1969), and in 8 *ILM* 679 (1969); text also at [www.untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://www.untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf); entered into force January 27, 1980. The United States has not ratified the convention.

<sup>14</sup>One of the crazier comments voiced during the Cold War was “We should not approve this agreement because it is in the interest of the Soviet Union.” Well, why would the Soviet Union sign *any* agreement that was *not* in its interest? Why would the United States sign any agreement that was not in its interest?

*state* from the treaty obligation. A quick review of the relevant cases on recognition in Chapter 7 will illustrate this principle.

Fourth, to be valid, a treaty must be *registered* with the United Nations. This has become a principle since World War I, when the League of Nations pioneered the idea. Many attributed the events leading to World War I to treaties negotiated in secret (and kept secret) that states felt bound to honor. Registration became the practical means to ensure President Woodrow Wilson's insistence that all treaties should be "open covenants, openly arrived at."

## FORMATION OF TREATIES

Because constitutions differ, nothing useful can be said in general about *who* may have the authority within a particular state to engage in treaty making. International law leaves the question of internal arrangements strictly to the state.<sup>15</sup> On the other hand, the process at the international level generally has four identifiable stages, several of which may occur concurrently:

1. Negotiation (including the drawing up and authentication of the text)
2. Provisional acceptance of the text, normally through the affixing of the signatures of the negotiators
3. Final acceptance of the treaty by states, normally through ratification
4. The treaty's official entry into force of the treaty (and registration with the United Nations)

### Negotiation

No prescribed format exists regarding the generation and acceptance of the text of a treaty. Negotiations may occur in many different settings. The crucial consideration for the negotiation stage is that individuals engaged in the process must have the official authority to do so. Representatives negotiating a treaty must be duly authorized to carry out their tasks and normally are required to have credentials to that effect. Complex and controversial multilateral treaties such as that establishing the ICC may go through many different stages of development during which delegates and others debate and amend the text. Organizations such as the International Law Commission (ILC) or the International Maritime Organization (IMO) may work to produce a draft text that will be considered by delegates to a subsequent conference convened specifically to produce a final document. In some instances, the UN General Assembly has served as the principal forum for debate and approval (e.g., the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries).<sup>16</sup>

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<sup>15</sup>See the *Memorandum* (October 15, 1973) of the acting legal adviser, U.S. Department of State, on the functions of the secretary of state regarding treaties, excerpted in 68 *AJIL* 322 (1974).

<sup>16</sup>G.A. Res. 44/34, U.N. GAOR, 6th Comm., 44th Sess., Supp. No. 49, at 306, U.N. Doc. A/44/766 (1989).

The United Nations sponsored the developmental stages of the Rome Statute of the ICC, but approval of the final text involved a separate conference where states and others had an opportunity to suggest additions, amendments, or alternative wording.<sup>17</sup>

**A Note on NGOs and Conference Diplomacy** We should note that the Rome conference marks one of the first where NGOs played an important role.<sup>18</sup> In fact, by their activities, they had an important role in the dynamic development of the text. To understand their role, one needs to understand how international conferences work. As with legislatures, the important work happens in committees. Large states can afford to have enough people in their delegation to have someone attend all sessions of committees. This gives larger delegations an edge in terms of information and input. At the Rome conference, representatives from various NGOs attended committee sessions with laptop computers. They took notes on the committee proceedings and then distributed the information to interested delegations, thus leveling the playing field in terms of access to information. This permitted smaller states to play a much greater part in constructing the language of the final text that emerged from the deliberations. We can note this as one of the unanticipated consequences of the revolution in communications that underlies many of the changes we attribute to globalization (Chapter 2).

### Adoption/Authentication/Consent

Once the text of a treaty has been drafted in formal form by negotiation, the parties must indicate their consent. For bilateral agreements, this is by mutual consent of the two parties. For treaties negotiated between a limited number of states, this is usually by unanimous consent. For multilateral instruments negotiated by an international conference, this is by the voting rules adopted by that conference. For treaties drawn up in an international organization or at a conference convened by such an organization, this is according to the voting rules provided either by the constitution of the organization or by the decision of an organ or agency competent to issue such rules. *Treaties will also normally include a stipulation about what official/authentic versions of the text will be accepted in terms of language.* Because translation is not an exact art, this is an important condition.<sup>19</sup>

Adoption of a final text by the negotiators is followed by authentication. This step may take place in a number of ways: The negotiators may simply initial the text on behalf of their states; the text may be incorporated in the final act of the conference at which it was drawn up; the text may be incorporated in a resolution

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<sup>17</sup>See W. A. Schabas, *An Introduction to the International Criminal Court* (2011); B. N. Schiff, *Building the International Criminal Court* (2011).

<sup>18</sup>See M. J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Constituency and Agency* (2008).

<sup>19</sup>See R. Cohen, *Negotiating Across Cultures: Communication Obstacles in International Diplomacy* (rev. ed. 1997).

adopted by an organ of an international organization; or, most commonly, the negotiators may append their signatures to the text of the agreement. Any of these procedures confirm that the text of the treaty is in its final form (Vienna Convention, Article 10).

## Signature

Who may sign a treaty? Obviously, only persons with the capacity (authority) to do so—those with the *plenipotentiary power* (the authority to bind their state). Heads of states or governments and ministers of foreign affairs usually have the authority to sign. In other cases, representatives of states to whom full (plenary) powers to negotiate and sign have been issued may sign. Article 18 of the Vienna Convention contains the logical assertion that once a state has signed a treaty, it is obliged to refrain from all acts that would defeat the treaty's object and purpose, at least until that state has ratified the agreement or has indicated it does not intend to become a party to the agreement.

## Ratification

Most modern international treaties become effective only upon ratification. International law does not specify how a state carries out the ratification process. Virtually every state has developed detailed domestic regulations spelling out the process of treaty ratification. Constitutional provisions vary greatly from country to country. Until such acceptance is forthcoming, a treaty does not create binding obligations for the state in question except in the extremely rare instance of an agreement that becomes effective and binding on signature alone.<sup>20</sup>

In the United States, the president transmits the authenticated and signed text of a treaty to the Senate. To accept a treaty, the Senate must approve it by a two-thirds majority. Upon Senate approval, the final step requires that the president *proclaim* the treaty by issuing a formal statement indicating the United States now considers the treaty in effect. Many descriptions of the U.S. treaty-making process leave out the last, but vital, step of *proclamation*.<sup>21</sup>

## Understandings

An *understanding* is an attempt by a state to specify in advance its own interpretation of certain parts of an agreement. These statements will accompany the notification of ratification or accession when it is transmitted to the secretary-general. These statements have no binding force. Understandings simply reflect the views of one state. However, in a dispute, they may prove useful as a quick way to determine the views of other states regarding the meaning of certain provisions.

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<sup>20</sup>For an interesting discussion concerning ratification, see R. D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two Level Games," 42 *International Organization* 427 (1988).

<sup>21</sup>See M. J. Glennon, "The Senate Role in Treaty Ratification," 77 *AJIL* 257 (1983).

## Reservations

Obviously during the negotiation phase, states will try to shape an agreement in a manner that best reflects their own interests.<sup>22</sup> Sometimes these efforts will not produce an acceptable outcome. In other cases, states may have chosen not to participate in the original negotiations, or, in the case of new states, they may not have been eligible to participate. In other cases, state organs involved in the process of ratification may not find certain provisions acceptable. In these cases, a state may wish to become a party to a treaty because of the overall benefits, but it may have objections to certain requirements as stated.

A *reservation* is a statement by which a state indicates its nonacceptance or interpretation of an article in a multilateral treaty. Unlike an understanding, a *reservation* is a statement of *amendment* inserted into a treaty by one party as a specified condition of ratification (Vienna Convention, Articles 19–23). It is an attempt either to opt out (exempt itself) or to modify certain “unacceptable” conditions. Like an understanding, a reservation constitutes a *unilateral* statement of position. Other states may or may not accept such reservations.

If the treaty is a *bilateral agreement*, few problems arise over a reservation. The other party either ratifies the original agreement as altered by the reservation or refuses to ratify it and thus kills the agreement. Reservations to multilateral treaties obviously pose a different problem. Before World War II, two approaches existed. The secretary-general of the League of Nations adopted the position that a state proposing a reservation to a multilateral treaty could not become a party unless *all* other states parties accepted the reservation. In sum, without unanimous consent to the proposed alteration by those states that had accepted the provisions “as is,” the party seeking to join the regime on its own terms would be precluded from doing so. On the other hand, the Governing Board of the Pan-American Union (the precursor to the Organization of American States) expressed a much more flexible view:<sup>23</sup>

1. The treaty shall be in force, in the form in which it was signed, as between more countries that ratify it without reservations, in the terms in which it was originally drafted and signed.
2. It shall be in force as between the governments that ratify it with reservations and the signatory states that accept the reservations in the form in which the treaty may be modified by said reservations.
3. It shall not be in force between a government that may have ratified with reservations and another that may have already ratified, and which does not accept such reservations.

With the proliferation of multilateral treaties post World War II—many of which addressed controversial subjects like human rights—the question of reservations

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<sup>22</sup>See G. G. Fitzmaurice, “Reservations to Multilateral Conventions,” 2 *Int’l. and Comp. L. Q.* (1953); and Hackworth, V, 130 (one of the clearest statements on this point). See also the unusual approach adopted in J. K. Gamble, “Reservations to Multilateral Treaties: A Macroscopic View of State Practice,” 74 *AJIL* 372 (1980). The new standard work on the subject is F. Horn, *Reservations and Interpretive Declarations to Multilateral Treaties* (1988).

<sup>23</sup>See 45 *AJIL* 3 (1951 Supp.); refer also to C. G. Fenwick, “Reservations to Multilateral Treaties,” 45 *AJIL* 145 (1951).

became an ongoing subject of debate. At base, the question involves the tension between the desire for certain treaty regimes to be as inclusive (as broadly accepted) as possible and the hard question of how accepting states that pose reservations may affect the integrity and effectiveness of the established regime. Post World War II, the debate over reservations focused upon the Genocide Convention (1948), the first of the major human rights treaties. In an advisory opinion, the International Court of Justice (ICJ) expressed the opinion that a state that had proposed a reservation that raised objections from one or more parties to the convention, but not by others, could still be accepted as a party *if* the reservation “is compatible with the object and purpose of the Convention.”<sup>24</sup> After much further debate, the ILC adopted the ICJ position in constructing its draft of the Vienna Convention on the Law of Treaties. In addition, the ILC promoted the idea that each future multilateral treaty should contain specific stipulations concerning how reservations should be treated.

Articles 20 and 21 of the Vienna Convention give the best evidence of current law. To summarize the important points:

1. A reservation expressly authorized by a treaty does not require subsequent acceptance by the other contracting states unless the treaty so provides.
2. When 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 constitutive instrument of an international organization (i.e., its constitution) and unless otherwise specified, a reservation requires the acceptance of the competent organ of that organization.
4. 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.
5. 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.
6. A reservation established with regard to another party in accordance with Articles 20 and 23 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 modifies those provisions to the same extent for that other party in its relations with the reserving state (Article 21). The reservation does *not* modify the provisions of the treaty for the other parties to the treaty *inter se*.

As the Vienna Convention illustrates, the post–World War II environment promoted a more flexible stance with respect to reservations in an attempt to build the broadest base for many emerging regimes. On the other hand, recent practice has again tended toward more restrictive views, especially for complicated, comprehensive treaties involving multi-subject issue areas—such as the United

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<sup>24</sup>*Reservations to the Genocide Treaty, ICJ Reports* (1951), 24; *ICJ Reports, 1951* (Pleadings, Oral Arguments), May 28, 1951, in 45 *AJIL* 579 (1951); see also Y.-L. Liang, “The Third Session of the International Law Commission: Review of Its Work by the General Assembly—I,” 46 *AJIL* 483 (1952), for a detailed analysis of the opinion.

Nations Convention on the Law of the Sea (UNCLOS III—see Chapter 12) and the Rome Statute establishing the ICC. We discuss the role of reservations in dispute resolution later, when the questions have relevance in resolving a dispute.

### Accession

Related to both signature and ratification is the subject of accession—the formal act of acceptance by a state that had not originally signed or ratified a treaty. In some circumstances, the permission of the original parties to the treaty may be required before non-signatories may join in the agreement (e.g., admission to an alliance group or organization set up by treaty). Accession commonly applies only to general multilateral agreements such as the Law of the Sea Treaty, the Vienna Convention on Treaties, or the Genocide Convention. We should note that, *if permitted*, states may make reservations upon accession.

### Succession

On occasion, a newly independent state, formerly part of another entity (such as a former British colony), joins a multipartite agreement to which its former governing authority (i.e., the United Kingdom) had been a party. For example, on April 2, 1982, Kiribati deposited with the UN Secretariat its *notification of succession* to the Vienna Convention on Diplomatic Relations (see Chapter 7 on state succession).

### The Vienna Convention on the Law of Treaties

To illustrate one possible sequence of how treaties evolve, we shall briefly examine the genesis of the Vienna Convention on the Law of Treaties (May 23, 1969). The ILC developed draft articles on the Law of Treaties in several of its sessions, culminating in January 1966 in a draft convention, complete with an elaborate commentary. That draft was discussed at the first session of the United Nations Diplomatic Conference on the Law of Treaties, held in Vienna from March 26 to May 24, 1968. Delegates adopted 65 of the original 75 articles in question (many with relatively minor changes) by the Committee of the Whole, deferred action on 9 articles, added 4 new ones, and totally deleted 1.

At the second sessions of the conference (April 9 to May 22, 1969, in Vienna), delegates again discussed the revised draft in its entirety and then voted on the text, article by article. This resulting text was then produced for submission to governments for a final vote on the whole. States adopted the text of the Vienna Convention on the Law of Treaties (hereafter referred to as the Vienna Convention) on May 22, 1969, by a vote of 79 in favor and 1 against (France), with 19 abstentions (including all members of the Soviet Bloc). Article 85 stated, “Chinese, English, French, Russian and Spanish texts are equally authentic.” Adoption or approval of the text then meant the treaty was open for formal signature.

Article 81 declared the convention open for signature until April 30, 1970. After that date, states could become a party by *accession*, a formal notice of acceptance deposited with the secretary-general of the United Nations. Article 84 provided that *the treaty would enter into force* on the 30th day after the 35th deposit of a notice of ratification or accession with the secretary-general. The convention entered into force on January 27, 1980. The United States has signed the

original, but has not, as of this writing, ratified the convention. Most provisions of the Vienna Convention, including Articles 31 and 32 on matters of treaty interpretation, are considered declaratory of customary international law.<sup>25</sup> On the other hand, the Preamble states, “rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.”

### Self-Executing and Non-Self-Executing Treaties

In the United States, treaties may be either *self-executing* or *non-self-executing* in nature.<sup>26</sup> A self-executing treaty becomes domestic law as soon as the Senate acts and the president signs and proclaims it (instrument enters into force internationally). Judges will then deal with the treaty as if the provisions had been enacted by the Congress and signed by the president into statutory law. Non-self-executing agreements require *implementing legislation* before they come into effect domestically. In the United Kingdom (and most other states), this distinction does not have the importance it does for U.S. courts, because treaties cannot become the “law of the land” until the Parliament acts formally to so incorporate them. In the United Kingdom, for example, the Parliament has no formal role in treaty making including ratification. That prerogative lies solely with the Crown/executive. Yet the treaty cannot go into force in the United Kingdom in the sense of having domestic courts apply provisions unless the Parliament takes formal action to adopt the treaty as domestic law. So, even though Parliament has no formal role, the need for its ultimate consent gives the legislature some informal power. Presumably because the prime minister also heads a parliamentary majority (or coalition majority), problems seldom occur.

In the United States, the decision about the category into which a given treaty falls has usually been made by the judicial branch, based on the intentions of the parties as shown in the wording of the treaty or other evidence such as statements by the chief executive or legislative body. In *Asakura v. City of Seattle* (Chapter 6), after a very long examination of the issue, the court regarded the relevant treaty as self-executing. Note that the United States has regarded *all human rights treaties as non-self-executing* (see Chapter 15). For example, even though the United States signed the Genocide Treaty in 1948, ratification took place in 1988 only after the Congress wrote very detailed implementing legislation. In the United States and elsewhere, the courts look at such implementing legislation in arriving at a decision in relevant cases. Legal scholars are virtually unanimous in believing that whether a treaty falls into one or the other of the two categories is immaterial as far as the legal obligations of a party to that treaty are concerned. Naturally, if a country fails to adopt implementing legislation in the case of a non-self-executing treaty, it cannot carry out its obligations under that agreement, but from the standpoint of international law, it will still be obligated by that instrument (see Chapter 6).

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<sup>25</sup>At this writing (August 2011), the convention had received 45 signatures and had 111 states parties. The International Law Commission also promoted the development of the Convention on Treaties Concluded Between States and International Organizations or Between International Organizations done at Vienna on March 21, 1986. This convention has not yet entered into force. See [www.state.gov/s/l/treaty/faqs/70139.htm](http://www.state.gov/s/l/treaty/faqs/70139.htm) for the U.S. position.

<sup>26</sup>See S. I. Vladeck, “Non-self-executing Treaties and the Suspension Clause After *St. Cyr*,” 113 *Yale L.J.* 2007 (2004).

## RAFFINGTON V. CANGEMI

## U.S. Court of Appeals for the Eighth Circuit (2004) 399 F.3d 900; 2005 U.S. App. LEXIS 1809

### Facts

Sherneth Raffington,<sup>27</sup> an alien in custody awaiting removal to Jamaica, appealed the district court's denial of her petition for a writ of habeas corpus. Raffington argued that the government cannot remove her because of its frivolous appeal of the immigration judge's (IJ) grant of suspension of deportation and, further, that the district court erred in failing to consider the merits of her belated claim for relief under the Convention Against Torture (CAT).

Raffington had reentered the United States illegally in April 1988. The Immigration and Naturalization Service (INS) initiated deportation proceedings (now called removal proceedings) in October 1994. The IJ granted suspension of deportation in December 1996, and the INS appealed. In September 2001, the Board of Immigration Appeals sustained the appeal and denied Raffington's application for suspension of deportation.

After Raffington was taken into custody pursuant to a warrant of removal, she petitioned for habeas corpus relief. The district court denied relief, concluding that the INS had a good faith basis to appeal the IJ's grant of suspension of deportation. The IJ noted that Raffington's attempt to assert a claim under the CAT in her reply brief was untimely. Raffington moved to reopen the case to present her CAT claim. The district court denied leave to file a motion for reconsideration because they found "no evidence to suggest that Raffington could

obtain relief under the Convention." She appealed both orders. The district court granted a stay pending appeal because removal may cause irreparable injury and Raffington "raises a substantial question as to whether her Convention Against Torture claim has been adequately adjudicated."

### Issue

Does Raffington have grounds to stay the deportation order under the Convention Against Torture?

### Decision

No. She may have requested a stay, but the law does not require she receive one.

### Reasoning

Raffington argued that the district court erred in refusing to consider her request for relief under the CAT because that claim has never been adjudicated on the merits. The court stated, "At the outset, we seriously doubt whether this claim is even cognizable in habeas. As ratified by the United States, the CAT is a *non-self-executing treaty*, which means *there is no direct right of action for violation of the treaty*, only for violation of any domestic law implementing the treaty. The relevant statute provides that implementation of CAT shall be in accordance with nonreviewable agency regulations, and that judicial review of the denial of CAT relief must be 'as part of the review of a final order of removal.'" (Emphasis added)

<sup>27</sup>See also *Wang v. Ashcroft*, U.S. Court of Appeals Second Circuit (2003), 320 F.3d 130; 2003 U.S. App. LEXIS 2086.

## Rejection of Treaties

Technically, even though its representatives have signed a treaty, a state is not bound by the treaty's obligations until ratification has taken place. Instances abound where states have signed but not ratified a treaty. In the United States, the Senate is free to deny its consent to a treaty negotiated by the executive branch even though the action might generate ill-feeling among the other parties to the agreement. Under such circumstances, the president has no independent authority to proclaim the treaty as the "law of the land." Among the more noted instances of Senate refusal stand the Treaty of Versailles (ending World War I), which included the Covenant of the League of Nations. More to the point, a state may not ratify an agreement because politics within the state may make acceptance difficult or impossible. Negotiation of terms acceptable at the international level may not be so at the domestic level.<sup>28</sup> It took the United States 40 years to ratify the Genocide Convention. In many instances, the president has not submitted a treaty to the Senate for ratification or has withdrawn it before a vote because of a calculation that the Senate would reject it. President Carter submitted the Strategic Arms Limitation Treaty II (SALT II) with the Soviet Union to the Senate, but chose to withdraw it before a formal vote because he knew it had no chance of ratification. He then, in a statement designed to reassure the Soviet Union, emphasized that the United States would adhere to the provisions of the treaty as official "policy" even though the Senate had not ratified the treaty. The United States signed the Rome Statute creating the ICC, but neither President Clinton nor President Bush has submitted the treaty to the Senate because of perceived opposition.

The United States did not originally sign the Rome Statute that established the ICC. It had opposed many features of the Rome Statute before and during the conference (1997) that produced the final text (see Chapters 15 and 22).<sup>29</sup> When finally signing the treaty in December 2000, President Clinton reiterated American objections and said he would not submit the treaty to the Senate for ratification unless other states would consent to revise the treaty to take into account American objections.<sup>30</sup> In May 2002, President George W. Bush "unsigned" the ICC treaty. The decision to "unsigned" was unprecedented and raised many questions about the legal significance of the withdrawal as well as the importance of the precedent.<sup>31</sup>

Simply stated, the U.S. action raised the question of the legal significance of signature alone. As noted earlier, Article 18 of the Vienna Convention arguably

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<sup>28</sup>See Putnam, note 20.

<sup>29</sup>Letter from John R. Bolton, undersecretary of state for arms control and international security, to UN Secretary-General Kofi Annan (May 6, 2002), [www.state.gov/r/pa/prs/2002/9968.htm](http://www.state.gov/r/pa/prs/2002/9968.htm), in keeping with the role of the United Nation as treaty depository.

<sup>30</sup>W. J. Clinton, president of the United States, "Statement on Signature of the International Criminal Court Treaty, Washington, DC," at 1 (December 31, 2000), 37 *Weekly Comp. Press Doc.* 4 (January 8, 2001). Note that President Clinton's signature occurred in the very last days of his administration and on the last possible day for a "signature without ratification," as specified in the Statute.

<sup>31</sup>D. C. Scott, "Presidential Power to 'Unsign' Treaties," 69 *U. Chi. L. Rev.* 1447 (2002), discusses the circumstances surrounding the possibility that the United States might also unsign the Comprehensive Test Ban Treaty. See also E. T. Swaine, "Unsigning," 55 *Stan. L. Rev.* 2061 (2003), for a concise discussion of issues and positions.

obligates states that have signed a particular instrument to refrain from any acts that might hinder or disrupt the operation of the treaty regime.<sup>32</sup> This presumably obligates states not to act in bad faith or in a way that might affect the legitimate expectations of benefits other states hoped to achieve in agreeing to the treaty. The first unanswered question then becomes the permissibility of unsigning. The second then depends upon the answer to the first: If permissible, does unsigning release the United States from the obligation not to disrupt the purpose and operations of the treaty?

## Registration of Treaties

The registration of international treaties<sup>33</sup> is not a new idea. Before World War I, the practice of states was governed largely by secret diplomacy. The search for the causes of World War I led to strong criticism of secret diplomacy. President Woodrow Wilson emerged as the leader of a segment of international public opinion favoring not only open diplomacy but also the registration of treaties as a means of ensuring publicity for their contents. Although the expectation that open diplomacy and full public knowledge concerning the making and contents of all kinds of agreements among nations would eliminate a major cause of war has proven illusory, the idea of registering treaties has survived largely as the result of Wilson's crusade. Article 18 of the League Covenant provided that "every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered."

The Charter of the United Nations in Article 102 requires the compulsory registration of international treaties and agreements:

1. Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement that has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

The significant change in the Charter from the provisions of Article 18 of the Covenant is the avoidance of the principle that unregistered treaties would lack binding force for the parties in question. The Charter simply says that presumed obligations under unregistered treaties may not be used in any dispute taken up by any organ of the United Nations. Post World War II, we have no cases where states have attempted to invoke an unregistered instrument in this way.

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<sup>32</sup>As noted earlier, many states—including the United States—have not ratified the Vienna Convention but have nonetheless accepted it as declaratory of customary law.

<sup>33</sup>The interested reader will find suggestive materials in P. C. Jessup, "Modernization of the Law of International Contractual Agreements," 41 *AJIL* 378, 381 (1947); see also Vienna Convention, Articles 76–80.

## Interpretation of Treaties

Once an international agreement comes into force, the interpretation<sup>34</sup> of its meaning and purposes will often continue to be a problem. Negotiators are not psychics, and new problems not part of the negotiations will emerge. Disarmament and arms control agreements are particularly fragile because technologies change, and competitive states will seek loopholes. Consider in this respect the attempt of President Reagan's administration to "reinterpret" the antiballistic missile ban (ABM) Treaty that formed an integral part of the first Strategic Arms Limitation Treaty talks and agreement (SALT I) to permit continued research, testing, and development of the technologies associated with the Strategic Defense Initiative (colloquially known as "Star Wars"). While some "schools" of thought have proposed *canons*<sup>35</sup> for interpretation, a thorough discussion of these lies far beyond the tasks of an introductory text. An examination of these is not necessary to grasp the fundamental principles. Most modern writers agree that three basic principles govern the interpretation of treaties: (1) ordinary meaning in context, that is, determination of the real meaning of the parties' accepting the instrument; (2) good faith; and (3) intent and purpose. Unless there is substantial evidence to the contrary, interpretations must assume that the parties intended a treaty to have effect and must not produce an absurd result (see Vienna Convention, Articles 31–33).

**Wording** A fundamental objective of interpretation is, therefore, to discover just what the parties to a treaty understood the agreement to mean when they entered into it. The process parallels that of a lawyer in seeking to give effect to contracts, wills, trusts, and other arrangement within the domestic context. If the instrument's terms are clear and specific, no contrary intent can be asserted by either party to the agreement. A commonly cited example illustrates this principle. Article III, Section 1, of the Hay–Pauncefote Treaty of 1901 provided that the Panama Canal should be "free and open to the vessels of commerce and war of all nations observing these Rules, on terms of entire equality." The United States asserted, however, that the term *all nations* did not include the United States—because the United States had built the canal, continued as its owner, and thus had the right to grant preferential treatment to its own ships, namely, exemption from payment of tolls under the Panama Tolls Act. Elihu Root, one of the most prominent international lawyers in the United States, sided with the British government in its protest that the clear terms and intentions of the treaty had been violated by the exemptions in question. After much discussion in Congress, the exemptions were eventually repealed in 1914.

The words used in the agreement are to be interpreted in their usual, ordinary meaning unless, by some chance, such an interpretation would produce absurd, contradictory, or impossible consequences. Because a treaty is expected to reflect the intentions of the parties involved, it may be necessary in interpretation to depart

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<sup>34</sup>The literature on the subject is extensive and diversified in its approach. Consult, *inter alia*, Lauterpacht, *Oppenheim*, I: 950 (which, incidentally, lists an unusually large total of 16 rules to be applied to the interpretation of treaties), and the illuminating opinions of the legal adviser of the Department of State concerning the 1963 Nuclear Test Ban Treaty, reprinted in 58 *AJIL* 175 (1964).

<sup>35</sup>A *canon* is a rule or, more particularly, a body of rules established as fundamental and valid for a particular area of study.

from the literal meaning of certain words in order to avoid conclusions quite obviously contrary to the treaty's intent. Moreover, difficulties in translation may produce anomalies because many words and terms do not translate literally from one language to another. Treaties can also be interpreted, on occasion, in the light of other conventions covering the same subject matter. This was done, for example, by the Permanent Court of International Justice in the *River Oder Commission* case.<sup>36</sup>

**Rules for Interpreting Multilingual Treaties** When a treaty is concluded in two or more languages, all texts being authentic, there may be considerable difficulties in interpretation. For instance, a given term may have a broad, liberal meaning in one of the languages, and its equivalent in another language may have a restrictive, narrow meaning. Under such conditions, the tendency has been to use the **narrower meaning** in interpreting the treaty. As in the case of virtually all other rules applicable to the subject, limitations exist, the most commonly cited being the decision of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case. A question about the narrower meaning of *contrôle public* and the more extensive meaning of *public control* was decided in favor of the meaning of the English term.<sup>37</sup>

On occasion, a term in a treaty may have a different meaning in the countries that are parties to the agreement. In this case, one commonly employed solution is to apply the meaning prevalent in the country where the action contemplated by the treaty is to take place. If, of course, such action is scheduled for, say, both parties to such agreement, then the application of this rule might result in the rather odd—and perhaps unacceptable—spectacle of different procedures or actions being taken in two countries under the terms of the same instrument.

The following two examples may serve to illustrate the linguistic problems encountered on occasion in the interpretation of treaties. Article 5(3) of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) provides that spies and saboteurs, “in case of a trial, shall not be deprived of the rights of fair and regular trial.” The governing French text reads, “in case of pursuit” rather than the English “in case of trial.” Second, in the Hague regulations of 1907, now regarded not only as treaty law but also as customary international law, Article 43 refers, in the French version, to *l'ordre et la vie publics* (public order and safety of occupying forces, or public life, or social functions of everyday life), whereas the common English translation refers to “public order and safety.”

**Logical Interpretation** If grammatical analysis should prove insufficient to interpret a treaty, logical interpretation may be called into play. In other words, a given term or provision in an international instrument may be given a meaning that is logical and in harmony with the other parts of the agreement.<sup>38</sup> Such an interpretation

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<sup>36</sup>*River Oder Commission* case (*Six Gov'ts v. Poland*), PCIJ, Ser. A, No. 23 (1929), at 26 of the *Judgment* of September 10, 1929.

<sup>37</sup>PCIJ, Ser. A, No. 2 (1924).

<sup>38</sup>See such pertinent opinions of the Permanent Court of International Justice as the one on the *Interpretation of the Statute of Memel*, PCIJ, Ser. A/B, No. 49 (1932), on the *Minority Schools in Upper Silesia*, Ser. A., No. 15 (1928); the *Mosul* case, Ser. B, No. 12 (1925); and the opinion on the *Postal Service in Danzig*, Ser. B, No. 11 (1925).

seeks to construe dubious passages or terms in their context—a principle one can find little to quarrel with.

**Historical Interpretation** Courts have occasionally applied a historical interpretation to certain treaties, although this method requires considerable caution in its application. As long as a court restricts itself in this sphere to an examination of records concerned with negotiation of the agreement and related documents (*travaux préparatoires*, or preparatory work and discussions), the historical approach to interpretation appears quite reasonable. But once a court accepts previous history (historical relations among the parties, for example), it begins to tread on highly questionable ground. In this same vein, a court may examine *common practice* regarding the treaty that might establish a common understanding of the meaning of the terms.<sup>39</sup>

**Purpose and Function** Still another approach to treaty interpretation—also others having failed—is to relate one’s inquiry to the function intended to be served by the treaty.<sup>40</sup> A court may attempt to interpret the instrument based on its purposes.

## SPECIAL PROBLEMS

### Effects on Third Parties

At this point, we need to address certain special problems with the interpretation of international agreements. One of these is the effect of such instruments on third parties. Many agreements, by their positive terminology, have been clearly intended to benefit third parties. This is particularly true when a treaty contains an accession or accession clause, enabling third states to become parties to the instrument and to acquire by such a step a variety of legal privileges that otherwise might—or might not—have been conceded to them. On the other hand, *no treaty can create legally binding obligations or rights for a third party without the latter’s consent*. If that consent is stated expressly, then the third party accepts the obligation established intentionally by the treaty. A legal right is created if the parties to the treaty intend to grant that right to a third party, to a group of states that party belongs to, or to all states, but in every instance, the third party must assent to the right. That assent, however, need not be expressed specifically (as in the case of a

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<sup>39</sup>See E. Lauterpacht, “Some Observations on the Preparatory Work in the Interpretation of Treaties,” 48 *Harvard L. J.* 549 (1935); also the Advisory Opinion of the Permanent Court of International Justice in *Jurisdiction of the European Advisory Commission of the Danube Between Galatz and Braila*, PCIJ, Ser. B, No. 14 (1927), 18.

<sup>40</sup>See Permanent Court of International Justice advisory opinions on the *Acquisition of Polish Nationality*, Ser. B, No. 7 (1923); on the *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of Employers*, Ser. B, No. 13 (1923); on *Interpretation of the 1919 Convention Concerning Employment of Women During the Night*, Ser. A/B, No. 50 (1932); in the judgment on *Certain German Interests in Polish Upper Silesia*, Ser. A, No. 7 (1926); and in the *Chorzów Factory* case, Ser. A, No. 17 (1928).

treaty-created obligation); as long as the third party does not voice an objection to the right granted, assent is assumed by the parties to the treaty.<sup>41</sup>

## Charters and Constitutions of International Organizations

Special problems of interpretation may arise in connection with the charters or constitutions of international organizations. A majority of such instruments, certainly in the case of most contemporary specialized agencies of the United Nations, contain provisions specifying how any disputes concerning interpretation are to be settled. But the Charter of the United Nations lacks such a precise formulation, even though it does contain a number of hints about possible methods of interpretation. The absence of specific provisions might indicate that unilateral interpretation is permissible, but designation in Article 92 of the ICJ as “the principal judicial organ of the United Nations” could lead to the logical conclusion that the court should serve as the agency of interpretation. Finally, the provision of Article 10, which grants competence to the General Assembly to “discuss any questions or any matters relating to the powers and function of any organs provided for in the present Charter,” could be viewed as authority for the General Assembly to interpret at least certain aspects of the Charter. The factual development of Charter interpretation in the United Nations appears to have emphasized interpretation by the political organs of the United Nations, but on occasion not only the ICJ but also the secretary-general has handed down rulings as to the applicable meaning of Charter provisions.

## VALIDITY OF TREATIES

One of the oldest principles in international law is usually rendered as *pacta sunt servanda*: “treaties must be observed.”<sup>42</sup> However, as in the case of domestic contracts as well as domestic legislation, circumstances or conditions may occur that will invalidate either. Hence, we must examine not only the validity of the principle itself but also the conditions under which treaties will be considered valid or invalid. A state may not render an agreement invalid by just verbally condemning it, as Pope Innocent X did in the instance of the Treaty of Westphalia, calling it “null, void, invalid, iniquitous, unjust, damnable, reprobate, inane, empty of meaning and effect for all times.” Rather, specific conditions or situations affect the validity of an agreement; that is, validity is determined by the existence, or lack thereof, of binding force on the parties involved. Many considerations play a part in this matter, any or many of which may nullify an international agreement.<sup>43</sup>

<sup>41</sup>Based on Vienna Convention, Articles 34–38, on the effect of treaties on third parties. See also Permanent Court of International Justice, *Free Zones of Upper Savoy and Gex*, PCIJ, Ser. A/B, No. 46 (1932), in W. Friedman, 367.

<sup>42</sup>See the historical analysis of the maxim in H. Wehberg, “Pacta Sunt Servanda,” 53 *AJIL* 775 (1959), as well as the heavily documented study of J. L. Kunz, “The Meaning and the Range of the Norm *Pacta Sunt Servanda*,” 39 *AJIL* 180 (1945); and Vienna Convention, Article 26.

<sup>43</sup>Validity, invalidity, and termination of treaties are dealt with in the Vienna Convention, Articles 26–75.

1. **Capacity to contract.** A treaty is invalid if one of the parties to a bilateral agreement lacks the capacity to contract (i.e., international personality; see Chapter 7).

Certain international organizations have the right to conclude valid international agreements with states and/or among themselves. This ability adds a new aspect to the problems of capacity to contract: In the case of such organizations, the governing statutes, charters, or constitutions may have to be checked carefully to determine whether a given organization has the capacity to conclude a certain agreement or commit itself to specific obligations.

2. **Authority granted to agents.** The validity of an international agreement depends on the authority granted by the respective government to the agents entrusted with its negotiation. If an agent exceeds the powers conferred on him/her, the resulting agreement will lack validity if the other parties have been notified beforehand of the restrictions on his/her authority to conclude an agreement.
3. **Personal duress or intimidation.** A treaty is invalid when personal duress has been brought to bear against the negotiators of one party (Vienna Convention, Article 51).

Note one exception to this general rule. Every peace treaty imposed at the end of a war by the victors on the vanquished lacks the element of voluntary consent. However, the same writers who stress the need of free assent also maintain that the particular duress involved in a peace treaty does not negate its validity, and thus they place peace treaties in an essentially separate category. The traditional view—that the consent of the defeated state is required to make a peace treaty legally valid—has been replaced in some modern instances by a new attitude. The consent of Italy was not required for giving effect to the peace treaty after World War II. Although Italy, Bulgaria, and Finland did sign their respective peace treaties, Hungary and Romania did not. No one has claimed that the latter peace treaties lacked validity.

4. **Use of fraud in negotiation.** A treaty whose negotiation involved fraud would be considered invalid. Modern history can show very few instances in which outright fraud formed a part of treaty negotiation, but this does not preclude the possibility of such instances occurring in the future. However, mere failure to disclose some facts during negotiation when such disclosure would weaken the case or argument of one of the negotiating parties should not be taken as a case of fraud. Only **deliberate** fraudulent misrepresentation during the course of negotiation, such as the use of falsified maps or documents or false statements as to facts, would have the effect of invalidating the resulting agreement (Vienna Convention, Article 49).
5. **Corruption of a state agent.** At the insistence of several Third World delegations at the 1969 Vienna Conference, Article 50 was added to the Vienna Convention. It provides that if the expression of a state's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating state, the first state may invoke this corruption as invalidating its consent to be bound by the treaty (Vienna Convention, Article 50).
6. **Substantial error.** A treaty is void *ab initio* (from the beginning) if it can be shown that the agreement was based upon a substantial error concerning the

facts. In other words, if in the course of negotiation and ratification, an incorrect assumption is made by one or both of the parties, then the treaty may lack validity, or the party in question may consider it “voidable” and refuse to be bound by the agreement. An illustrative instance might be the use of an incorrect map. Note that in this case (to distinguish this point from the one in item 3), this would be an *erroneous* map, not one deliberately falsified to defraud the other party (see Vienna Convention, Article 48).

7. **Conformity to other agreements.** A treaty is not necessarily invalid if its provisions do not conform to earlier agreements concluded among the same parties. In the event of inconsistency between a new treaty and earlier agreements between the same parties, the latest agreement prevails (as the latest evidence of intent and purpose).
8. **Inconsistency with provisions of UN Charter.** A treaty inconsistent with the provisions of the Charter of the United Nations has to yield to the Charter, provided that all parties to the agreement are members of the United Nations.
9. **Conflict with international law.** Is a treaty invalid if its provisions contradict principles of general customary or conventional international law? Most writers believe this is the case. Their attitude reflects a conviction that a combination of the rules of customary law and the rules laid down in lawmaking treaties constitutes a body of principles to which treaties between states must conform, even if one of the parties to the agreement has not ratified or acceded to a specific lawmaking treaty touching on the subject matter of the agreement in question.
10. **Immoral object.** Is a treaty void or voidable because it has an immoral object as its substance? Lauterpacht has given a most persuasive affirmative answer. But dissent must be registered, because the position taken by Lauterpacht implies both that whatever is immoral is ipso facto illegal and that states may generally agree on actions considered immoral. Certainly there are grave doubts about both assumptions. As yet, morality and legality have not been united in marriage. Moreover, definitions of immorality may—and indeed do—differ greatly, not only among different civilizations in the world but also among the member states of the “Western” group.
11. **Oral agreement.** An agreement is not invalid simply because it is an oral agreement rather than a written instrument. An agreement reached verbally between agents of states who are capable of binding their respective governments is quite sufficient, provided the evidence confirms that the individuals in question intend at the time to conclude a binding agreement. Nevertheless, a written instrument is preferable to a verbal agreement, if only to prevent subsequent disputes about the nature of the understanding that has been reached.

In conclusion, we must call attention to Article 42(1) of the Vienna Convention: “the validity of a treaty or of the consent of a state to be bound by a treaty may be questioned only through application of the relevant procedures contained in the provisions of the Convention.” In other words, no state bound by the convention may make allegations about the invalidity of a given agreement without reference to the provisions of the Convention.

## Textual Elements

While most treaties follow an established pattern in regard to their format, no general rules specify a particular formula. Many agreements have a preamble stating the reasons for the agreement and the results expected to arise from it. Others incorporate such a statement of purpose in the opening paragraphs of the actual text of the agreement. Following the statement of purpose, however made, will come the substantive part of the agreement, containing the detailed provisions of the treaty—the mutual obligations to which each state has consented. The following sections will then deal normally with the issues of implementation, such as the details of the ratification process, the effective date of the treaty, the duration of the treaty, the time the instrument will remain open for signature, dispute resolution procedures, registration, method(s) of termination (if applicable), and other details the negotiators feel are important. In some cases, implementation issues will be included in an ancillary protocol rather than in the primary document.

Treaties vary regarding the detail the parties feel necessary to include. For example, as noted earlier, the SALT I Interim Agreement and the ABM Treaty were very concise (remarkably so). On the other hand, the agreement between President Reagan and General Secretary Mikhail Gorbachev of the Soviet Union that dealt with the removal of intermediate-range ballistic missiles (INF Treaty) ran to 166 pages. The ABM Treaty (May 26, 1972)<sup>44</sup> consisted of two parts. Part I contained the preamble and text. Part II consisted of agreed statements, common understandings, and unilateral statements regarding the treaty. As discussed earlier, Part II involves the efforts of the parties to specify more precisely their views of certain provisions of the agreement. In this case, questions always arose concerning the *legal* standing of Part II because President Nixon and General Secretary Leonid Brezhnev technically signed only Part I. To handle disputes concerning implementation and compliance, Article XIII set up a Standing Consultative Committee (SCC). Article XIV authorized the SCC to undertake a review of the treaty every five years with an eye toward amendment or modernization as technologies and political circumstances change.

## Termination of Treaties

States may terminate treaties in six basic ways: (1) according to the terms of the treaty itself; (2) by explicit or tacit agreement of the parties concerned; (3) through violation of the provisions of the agreement by one party, the second party then asserting, if it so desires, that it considers violation as terminating the treaty; (4) by one party on the grounds that fundamental conditions on which the treaty rests have changed; (5) through the emergence of a new peremptory norm of general international law conflicting with the treaty; and (6) through the outbreak of hostilities between parties to the agreement (Vienna Convention, Articles 54–64). A seventh, and obvious, cause of termination—particularly true in the case of bilateral agreements—is the disappearance (extinction) of one of the parties. Unless specified in the text, theoretically treaties are in effect forever. The fact that we have listed so many

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<sup>44</sup>Text at [www.fas.org/nuke/control/abmt/](http://www.fas.org/nuke/control/abmt/) (accessed August 1, 2005).

ways of termination indicates that few treaties will last forever, but we should note that this observation applies more to bilateral treaties than multilateral treaties.

Many treaties contain specific provisions about termination. In general, such provisions envisage three basic causes for the end of the agreement: lack of performance, arrival of a fixed termination date, and denunciation of the agreement as outlined therein. Some treaties end when the acts called for by the agreement have been performed by the parties involved. An example would be the voluntary cession of territory by sale. When the purchasing state has transmitted the appropriate sums to the selling state, the title to the affected area is transferred and the treaty is terminated. The actual documents remain, of course, as evidences of the transaction and may help settle any disputes about the performance of the acts involved.

Many treaties contain a specific expiration date. On that date, the treaty becomes null and void unless the parties have made appropriate arrangements for extending the life of the agreements, and the parties concerned have acted in accordance with that provision to extend their agreement's duration. Many treaties contain provisions permitting denunciation (sometimes termed *renunciation*) of the agreement. Usually such provisions set a minimum duration of the agreement. After the date on which this minimum life comes to an end, the treaty continues in force but may terminate when renounced by either party. Commonly termination, in regard to the renouncing party, does not occur immediately but after a time interval (six months or a year is a period frequently utilized) between the time the notice of denunciation was filed and the effective termination of the agreement for the denouncing party. For example, the ABM Treaty states that it shall be of "unlimited duration" but contains the following stipulation in Article XIV.2:

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 to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

Obviously, any agreement between states may end by **mutual consent** of the parties to the instrument. Such agreement would normally take the form of a written declaration by which the parties state their intention to terminate. Similarly, states may terminate a treaty by implication—that is, through the conclusion of another treaty that obviously supersedes prior agreements among the same parties without mentioning such agreements in the text of the new instrument. And, on occasion, it appears that a treaty has been terminated by a tacit agreement among the parties involved to let the treaty lapse through nonobservance. In other words, each in turn fails to comply with the terms of the treaty, and no one protests such nonobservance, because all are in tacit agreement that they no longer wish to be bound by the provisions of the instrument.

**Violations as a Cause for Termination** For obvious reasons, the questions here relate mainly to bilateral treaties. In the event that one of the states involved in a treaty violates any of its provisions, the treaty does not by that fact automatically become invalid or void. States may *not* unilaterally cancel a *mutual* obligation.

Many treaties, such as the ABM Treaty discussed earlier, contain provisions dealing with alleged violations (i.e., the SCC). Where treaties do not specify rules for resolving conflicts, this question has no good answer in the abstract because the answer or outcome really depends upon the nature and intent of the violation. Moreover, while in some ways the principles that apply to contracts in municipal law yield a parallel, those at the international level seem more imprecise and less evident in terms of consistent practice. At the very least, the other part may suspend its performance. *If* the violation is of such a nature that it has eliminated the basis for the agreement, and the state committing the violation has deliberately undertaken the action, clearly the requirement of good faith no longer applies. Under these circumstances, abrogation would seem permissible (see Article 60 of the Vienna Treaty concerning “material breach”).<sup>45</sup> In some circumstances, a state may undertake an act of *retorsion* or *reprisal* as a measure of punishment in an effort to have the violator redress the grievance. We find few instances of punishment (see Chapter 1) because enforcement or “teaching a lesson” may affect other relationships and values (in particular, relationships and values involving third states).

Many multilateral treaties such as those setting up the WTO and the UNCLOS III contain explicit and compulsory dispute resolution mechanisms. The Charter of the United Nations contains a harsh-sounding approach to the question of unilateral violation. Article 6 states:

a Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization of the General Assembly upon the recommendation of the Security Council.

This has never occurred.

**Changed Circumstances** Is a treaty void or voidable because circumstances have altered in fundamental ways since the agreement’s inception? This question represents one of the most irritating problems in the realm of international agreements. Unilateral denunciation of a treaty on the grounds of changed circumstances has been accepted as a doctrine, though often regretfully, by almost all modern writers on international law. Since Vattel’s time, the correctness of the concept of *rebus sic stantibus* has been recognized not only by writers but also by the secretary-general of the United Nations, in commenting on the termination of European treaties protecting minorities (between 1939 and 1947) through basic changes in conditions. Numerous modern court decisions have also referred to the doctrine, so that it may now be invoked by states. The ICJ itself affirmed the doctrine of *rebus sic stantibus* in the *Fisheries Jurisdiction* case<sup>46</sup> when it held that

this principle and the conditions and exceptions to which it is subjected, have been embodied in Art. 62 of the Vienna Convention which may in many respects be considered as a codification of existing customary international law.

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<sup>45</sup>Article 60(3) of the Vienna Convention says, “A material breach of a treaty, for the purpose 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.”

<sup>46</sup>*United Kingdom v. Iceland, Jurisdiction, ICJ Reports* (1973), 18.

Article 62 of the Vienna Convention contains two conditions for the application of the doctrine: (1) the existence of the circumstances subsequently changed “must have constituted an essential basis of the consent of the parties to be bound by the treaty” (i.e., a fundamental change) and (2) the effect of the changes must have been such as “radically to transform the extent of obligations still to be performed under the treaty.”

The real problem in the doctrine of *rebus sic stantibus* arises when one looks for its invocation in actual practice. Few writers and fewer diplomats appear to be able to agree on the circumstances under which the doctrine could be justifiably invoked. The most recent use of the doctrine involved the enormous Gabčíkovo–Nagymaros Project on the Danube River, originally based on a Hungarian–Czechoslovak treaty of 1977 (see Chapter 18). Hungary unilaterally terminated the treaty in 1992. A Special Agreement of July 2, 1993, between Hungary and the Slovak Republic submitted existing differences to the ICJ. In examining the circumstances in light of Article 62, the ICJ concluded:<sup>47</sup>

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 obligation still to be performed in order to accomplish the Project. A fundamental change of circumstance 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 . . . [T]he stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

**An Interesting Question: Termination in the United States** President Jimmy Carter chose to terminate the Mutual Defense Treaty with the Republic of China in accordance with the terms of the instrument. He invoked Article X of the 1954 treaty, which stated that termination would occur after one year’s notice by either party. This was fully in accord with Article 67(2) of the Vienna Convention:

Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of Article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representatives of the state communicating it may be called upon to produce full powers.

The arguments concerning the legal aspects of President Carter’s termination of the Mutual Defense Treaty with the Republic of China did not address the *international law* aspects of the matter. Rather, they related to internal questions of constitutional authority (separation of powers). The U.S. Constitution gives the president the power to make treaties with the advice and consent of the Senate. The Constitution is silent concerning who may “unmake” (i.e., terminate) a treaty. President Carter’s critics argued that logic dictated that, if the president

<sup>47</sup>*Case Concerning the Gabčíkovo–Nagymaros Project (Hungary v. Slovakia)*, International Court of Justice, Judgment of September 25, 1997, General List No. 92, [www.icj-cij.org/docket/files/92/7375.pdf](http://www.icj-cij.org/docket/files/92/7375.pdf).

could make a treaty only with the advice and consent of the Senate, then the president also needed the advice and consent of the Senate to “unmake” (terminate) a treaty.<sup>48</sup> He had no authority to do it unilaterally. The Supreme Court determined this to be a nonjusticiable “political question”—something that had to be decided between the executive and the Congress. By leaving controversy moot, the Court in essence approved the president’s action.

One further note here: No rule of international law requires that all treaties with a “derecognized” government terminate automatically with the end of recognition, provided the agreements in question relate to the area (territory) actually under the control of the derecognized government. Hence the U.S. government announced, some time after the denunciation of the Mutual Defense Treaty, that the slightly fewer than 60 other agreements concluded earlier with the Republic of China (Taiwan) would be regarded as continuing in force.<sup>49</sup>

## SUGGESTED READINGS

### EXECUTIVE AGREEMENTS

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 Reisenfeld, “The Doctrine of Self-Executing Treaties and *U.S. v. Postal*: Win at Any Price?” 74 AJIL 892 (1980).

<sup>48</sup>*Goldwater et al. v. Carter et al.*, U.S. Court of Appeals, DC, November 30, 1979, 617 F.2d 697, in 18 ILM 1488 (1979). See especially 1501–1502 on the presidential power to recognize governments and to void a treaty without congressional action. On appeal, the Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court with directions to dismiss the complaint: U.S. Supreme Court, No. 79–856, December 13, 1979, in 19 ILM 239 (1980), and in 74 AJIL 441 (1980). On the other hand, see the *Memorandum, Termination of Treaties: International Rules and Internal United States Procedure*, by the deputy assistant legal adviser for Foreign Affairs, Department of State, in Whiteman, XIV, 461, in which the author asserted that “matters of policy or special circumstances may make it appear to be advisable or necessary to obtain the concurrence or support of Congress or the Senate.”

<sup>49</sup>*New York Times* (December 18, 1978), A1, A10; see also U.S. Pub. L. 96–8, the “Taiwan Relations Act” of April 10, 1979, in 18 ILM 873 (1979). See also United States Senate Foreign Relations Committee, *Termination of Treaties: The Constitutional Allocation of Power* (2005).

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