

Reading Guide for International Law Unit IV

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Unit IV covers perhaps the most conventionally recognized source of international law, and the discussion of treaty interpretation and validity constitutes a central part of the course. Get comfortable with the Vienna Convention on the Law of Treaties, and keep in mind that the ‘Vienna Convention’ in this unit is no longer the Vienna Convention on Consular Relations.

Overarching Themes

What actors in the international system have *juris generative* capacity? How can treaties help to solve governance type questions? Are treaties (and treaty negotiations) a convincing proxy for a legislature? Is it better to think of treaties as making up a ‘lattice’ of overlapping responsibilities? What kind of treaties (moral, economic, military) would best fit into a ‘lattice’ framework? Or are treaties really best understood as contracts? What kind of treaties would be easiest to fit into a contractual understanding? Who monitors compliance? What is the role of repeat players? What do international treaties actually do? What underlying normative principles can aid us?

Vienna Convention on the Law of Treaties

How does the VCLT reflect the Foreign Office model, and does that matter for interpreting newer treaties? Make sure that you know the functional aspects of the treaty: to what treaties does it apply? Is it retroactive? Is the US a party to the treaty? Can you have an oral treaty? How does a state make a treaty? What does ratification mean? What is the effect of signing a treaty when you haven’t yet ratified it? Knowing the answers to these types of questions will make it easier to evaluate the validity of other treaties and declarations.

Validity of Treaties and Declarations

What makes a treaty valid, and how would you argue for or against the validity of a treaty in an ambiguous situation? Look at Articles 45-53 (the ones that were assigned.) Which could apply to the Panama Canal Treaty problem? (Go through each claim.) Is there a priority on the stability of treaties? Should stability of treaties be a priority? Does it create ‘inertia’ in the system – how does this effect technological change? Do you think *rebus sic stantibus* (regarding the validity of a treaty in light of a fundamental change in circumstance) is implied in all treaties? Is it implied in all contracts? What policy goals (and types of states) is this doctrine support most likely to support, and what types of goals does it undermine? Politically, why is the United States suspicious of a vibrant doctrine of *rebus sic stantibus*?

Under what conditions does a unilateral declaration have binding effect? To what degree does this fit in with the general impetus behind treaty-making? Ask yourself how this meshes with the idea of reciprocity in international law and also with the traditional insistence on clear consent by states to legal obligations imposed upon them.

Interpretation of Treaties

Know VCLT articles 31-33. How do supplementary materials (such as the *travaux préparatoires*) help to interpret treaty provisions – and to what degree are they actually ‘supplementary’? How does the U.S. Supreme Court approach treaty interpretation in *Saks*, and in what ways is the use of the *travaux* similar and different to the ECtHR decision in *Golder* (and other international tribunal decisions)?

To what extent does a global law of interpretation influence national practices, and vice versa? Can parties ‘delegate’ the responsibility for fleshing out the treat to the courts? Is there a ‘deep’ international community of values, in which a treat interpretation could be embedded? Is Justice O’Connor’s overall approach consistent with the VCLT? (*Air France*) In the U.S., should the Court give ‘great weight’ (i.e. significantly greater weight than the VCLT provides) to how the Executive views the treaty?

Breach of Treaty and State Responsibility

Pay careful attention to the ILC Draft Articles on state responsibility – although they have not been adopted yet, they are important secondary rules about the consequences of breach. (How do the ILC Articles and the VCLT intersect?) Review Articles 35, 36, 49-53.

Consider how actions that constitute a breach of treaty can be attributed to a state (*Rainbow Warrior*). The *Gabcikovo-Nagymaros case (Hungary/Slovakia)* is an interesting case which should not be overlooked (it also raises the issue of *rebus sic stantibus*). Is the court’s decision here based on ‘law’ or on a commonsense idea geared to resolving a dispute? Is this a resolution that could be replicated in other situations, or is it specific to the facts of the case?

More generally, what countermeasures or reprisals are available to states that have been harmed by a treaty breach? What limits on substantive countermeasures are placed by the procedural status of a dispute (look at the *Air Services* arbitration)? The more that the law on countermeasures is permissive, the more it leaves scope for powerful states to act. How is this like the persistent objector problem in customary international law?

Treaties in United States Law

Does the US constitution police the application of international law to the United States? How does the Supreme Court? How are U.S. interests promoted or constrained and who is responsible? (Think here of the disaggregated state.)

What is the distinction between self-executing and non-self-executing treaties in U.S. law? Generally, look for an intention to establish direct, affirmative and judicially enforceable rights for a self-executing law (*Saipan*); many arguments will center around the presence or absence of such an intention. Note how a democratic concern for congressional intent may influence interpretation on this front (*Postal*). Think about other treaties we have studied: Is there an argument that the ICJ statute is self-executing (making decisions under the statute self-executing)? How does *Hamdan* fit into the pattern of Supreme Court precedent on international law issues?

How do states’ and individuals’ rights set limits on the federal treaty power? How does the federal government use international law to gain authority at the state’s expense in *Missouri v. Holland*? (Similarly at the individual’s expense in *Dames & Moore v. Regan*.) Do you think this approach is appropriate, and would there be alternative ways to solve the problem at issue? How does Justice Taney use international legal ideas in *Dred Scott* (and where does he derive these ideas from)? This series of cases offers still more insight into the issue of interaction

between international law and domestic law. (How does the discussion of federalism here fit into previous discussions of *Loewen* and *Breard*, among others?) As has been discussed in previous units, Professor Kingsbury sees this as part of a two-level game: an international game and a domestic game. When the President represents the nation in the international game, he may be trying to achieve a domestic outcome at the same time. How does the problem of the disaggregated state strengthen or weaken the explanatory value of the ‘two-level’ game?

Application: Human Rights Treaties

Throughout the section on human rights treaties, ask yourself whether treaties, given their state-state character, are really well suited to protecting human rights. (Can you think of preferable alternatives or modifications to the human rights treaty system? Might there be a multi-tiered approach encompassing different levels of rights?) What impetus might there be for sustaining the human rights treaty system in spite of this imperfection?

Consider the Human Rights Committee, which oversees the ICCPR. Would you prefer a committee with more teeth, or are there political reasons for the current approach? How do we reconcile competing norms? In *Lovelace*, what is more important, the rights of the tribe or the individual (and how does this fit in with more general concerns of sexual discrimination)? What is more progressive? (Also think about the contextual political choices made by the HRC, as demonstrated in the *Toonen* decision noted below.)

Reservations and derogations are some of the ways that states can limit the power of treaties. What are the limits on reservations to treaties (look at VCLT articles 19-23), and how do these limits differ in the bilateral and multilateral context? Note that the principle of reciprocity still applies when a state makes a reservation to a treaty. Derogations are even more limited in their allowance and application, and may be subject to judicial review (see *Brogan*).

In interpreting human rights instruments, what factors should be taken into consideration? What is going on with the HRC in *Toonen v. Australia*? Note how Australia ‘uses’ international law to make a domestic change it could not have made otherwise, and how this is a repeat concept (*Missouri v. Holland*). Again, is this appropriate? How does this case fit into the ‘two-level game’? How is human rights enforcement limited by traditional understandings of territoriality and *lex specialis* (discussed in the Nuclear Weapons Advisor Opinion)? Is this a step backward or should there be space for these concepts in the modern human rights regime? In *Refah Partisi v. Turkey*, do you think the ECtHR did justice to Article 11 of the European Convention on Human Rights in allowing the dissolution of the Welfare Party (Refah Partisi)? How did it fit in with and stretch the conventions of treaty interpretation, and what factors may have gone into the court’s decision?

Finally, we return to breach of treaty and state responsibility in the human rights context. Note how the territorial model of jurisdiction flows from the foreign office model. Does this limited view of jurisdiction, as applied in *Bankovic*, limit a state’s responsibility for human rights violations? Contrast this with the European Court’s attribution of responsibility to the United Nations in *Behrami*. The due diligence standard set forth by the Inter-American Court in *Velasquez-Rodriguez* has been adopted by other human rights bodies. How does it expand the scope of state responsibility from what we discussed earlier in this unit? Contrast this expansion of state responsibility—holding the state responsible for certain actions of other actors—with the way in which state responsibility can be limited through narrow conceptions of the state’s jurisdiction. We will return to jurisdiction in international law in Unit 5.