

## UNIT 4 READING GUIDE

(Based on work by Jennifer Hainsfurther, Doreen Lustig, Erin Delaney and Odette Lienau.)

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.

As you read these materials, make sure you are familiar with the basic provisions of the Vienna Convention on the Law of Treaties (not to be confused with the Vienna Convention on Consular Relations!), and bear in mind some of the overarching questions associated with treaties and their use. What actors in the international system have jurisgenerative 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?

### I. A First Look at the International 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 VCLT: to what treaties does it apply? Is it retroactive? Is the US a party to it? 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?

#### Validity of Treaties and Effect of Unilateral 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 Arts. 45-53. Which of these could apply to the Panama Canal Treaty problem?

Does the law of treaties give priority to the stability of treaties? Should stability of treaties be a priority? Does it create ‘inertia’ in the system? How does this affect the capacity of international legal arrangements to respond to 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 the rules on unilateral declarations (such as they are) mesh 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.

## II. Interpretation of Treaties

Be familiar with VCLT Arts. 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* in this case similar to, or different from, their use by the ECtHR in *Golder* and the ICJ in the *Application of the Genocide Convention Case*?

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

## III. Breach of Treaty and State Responsibility

Pay careful attention to the ILC Draft Articles on state responsibility. How do the ILC Articles and the VCLT intersect? Review in particular Arts. 35, 36, 49-53.

Consider what the cases assigned show about how breach of treaty and state responsibility intersect, and about how actions that constitute a breach of treaty can be attributed to a state. The *Gabcikovo-Nagymaros* case is an interesting case which should not be overlooked (it also raises the issue of *rebus sic stantibus* (see section I above)). 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 *Gabcikovo-Nagymaros* decision and 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?

## IV. Treaties in United States Law

How 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*) Do you think this approach is appropriate, and would there be alternative ways to solve the problem at issue? How does Justice Tawney 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, one way to view this is in terms of a two-level 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?

## V. Applying the Law of Treaties: Human Rights Treaties

Throughout the section on human rights treaties, ask yourself whether treaties, given their character as agreements between states, 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?

### The ICCPR and the Human Rights Committee

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

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 Arts. 19-23)? 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

Note the way in which courts struggle with the interpretation of rights in contexts of terrorism or other security threats (eg, the different views in the ECtHR on the application of Art. 5 ECHR in *Brogan*). Following that case, rather than amending the legislation impugned in *Brogan*, the UK derogated from Art. 5(3). This derogation was withdrawn in 2001, but the Government entered another derogation to Art. 5(1) (in the materials). Derogations are even more limited in their allowance and application, and may be subject to judicial review. On what grounds did the House of Lords quash the UK's 2001 attempted derogation in *A v Secretary of State for the Home Department*?

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*? Is this a step backward or should there be space for these concepts in the modern human rights regime?

#### Interpretation of Human Rights Treaties

In *Refah Partisi v. Turkey*, do you think the ECtHR did justice to Art. 11 of the ECHR in allowing the dissolution of the Welfare Party (Refah Partisi)? How did the decision fit in with or stretch the conventions of treaty interpretation, and what factors may have gone into the Court's decision?

#### Breach and State Responsibility

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 *Banković*, limit a state's responsibility for human rights violations? Contrast this with the ECtHR's attribution of responsibility to the United Nations in *Behrami*.

How do the more recent approaches in *Al-Skeini* and *Al-Jedda* sit with *Banković* and *Behrami*?

The due diligence standard set forth by the Inter-American Court in *Velásquez-Rodríguez* 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 behavior of other actors—with the way in which state responsibility can be limited through narrow conceptions of the state's jurisdiction.