CHAPTER 5: International Law of Treaties

As explained already, treaty law is one of the main sources of international law. Treaties are more specific statements of international obligation than customs, and the consent of the parties to the treaty is clearly expressed. In modern times the number of treaties in force has increased dramatically such that treaties often cover all the major issues that come up in a particular international dispute.

What is a treaty? A treaty is an agreement governed by international law. This definition is meant to distinguish between treaties on the one hand and contracts entered into by States on the other. States may enter into contracts, commercial or otherwise, that are governed by the national laws of one of the States involved. Thus an agreement between the U.S. and Ethiopia to purchase land for the Ethiopian Embassy in Washington D.C. is a contract governed by local U.S. property law, not international law.

Generally, treaties are entered into by States, but international organizations have the capacity to enter into treaties as well. Treaties may be bilateral or multilateral. Bilateral treaties are treaties between two parties. Multilateral treaties are treaties among three or more parties. Usually the same legal rules apply to the different types of treaties.

In international relations, treaties tend to serve one of two functions. Some treaties are like international "legislation" – they are open for all States to join and are intended to be universal and binding on all. Such treaties are "law-making." Their purpose is to establish a set of universal rules to govern State conduct. Other treaties are more like "contracts." These treaties are the means by which two or more States transact business. For example, U.S. and Russia entered a treaty in 1867 by which the U.S. acquired Alaska for a certain amount of money. In such cases, international treaty law may seem in a way similar to domestic contract law. When we try to understand how States enter into such treaties, how such treaties should be interpreted, and how such treaties may be terminated, we may think of contract law analogies.
To be more specific, here are some examples of what treaties can do: serve as constitutions for international organizations (e.g. the UN Charter), transfer territory, regulate commercial relations, guarantee investments, settle disputes, establish jurisdiction for an international court like the ICJ, and protect human rights.

The international laws that govern treaties will be reviewed in specific subsections below. Here it is enough to introduce the main bodies of relevant law. First, the student should remember the customary law "*pacta sunt servanda*" meaning that treaty promises must be kept. This is a foundational law for all treaties. It has been restated in the following way: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." (See VCLT Article 26, The ICJ has said that "good faith" means that the purpose of the treaty and the

intentions of the parties in concluding it should prevail over its literal application.) Second, there is a "treaty on treaties" or in other words a treaty that many States have joined that provides rules for the interpretation and application of treaties. This is the 1969 Vienna Convention on the Law of Treaties (VCLT). Although not all States in the world have joined this treaty, it has become customary law and thus is binding even on non-signatories.

The VCLT applies to written treaties entered into between States. Treaties not in writing and treaties between States and international organizations are still binding in international law. It is just that the rules governing such treaties may be different from the rules in the VCLT. For instance, there is a separate set of rules in the 1986 Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations that governs treaties to which an international organization is a party. Of course, the rules in the 1986 Vienna Convention are very similar to the rules in the VCLT.

Finally, it is often the case that a State's domestic laws will be important in understanding treaty obligations. Domestic laws are important in domestic courts, not in international courts. A State cannot use domestic law as a justification for failing to perform international treaty obligations. (VCLT Art 27.) The student must remember, however, that treaties are binding as law at two levels, the domestic level as well as the international level. In domestic courts, domestic laws will color the interpretation and application of treaties. For example, in the U.S. (and probably in Ethiopia), a later-enacted domestic law that contradicts a treaty provision will prevail over the treaty provision. Just as a U.S. or Ethiopian court will apply the later-enacted domestic law, international courts will ignore the domestic law and apply the treaty provision. This apparent duality sometimes leads to awkward results. In fact, the FDRE Constitution provides that Ethiopian government organs (presumably including domestic courts) will "observe international agreements which ensure respect to Ethiopia's sovereignty and are not contrary to the interests of its peoples." Seemingly, if an Ethiopian court determined that an otherwise valid treaty was "contrary to the interests of its peoples," the court possibly could disregard the treaty altogether. Of course, this would be a violation of international law, but such a violation would not affect the decision of the Ethiopian court as applied in the territory of Ethiopia.

5.1 Treaty Formation

The basic process for entering into a treaty often is laid out in a particular State's Constitution. In Ethiopia treaties are negotiated by the Executive and then ratified by the House of Peoples' Representatives. (See Article 55(12) of the FDRE Constitution.) For a point of contrast, in the U.S. the President negotiates the treaty and then must get the advice and consent of two-thirds of the senate to ratify the treaty. Once Ethiopia ratifies a treaty (and the treaty enters into force), Ethiopia is bound by that treaty.

The details of treaty formation are somewhat more complex. Typically, negotiations over a potential treaty begin when representatives from the State parties meet. These representatives must be authorized to speak on behalf of the State or organization, or in other words they must have "full powers." (Really this is a question of agency law. The "principal" is the State and the "agent" is the representative. The agent will have express and implied powers to negotiate on behalf of his or her principal, the State; for the most part, the principal has the responsibility of controlling its agent.) Heads of State, heads of government, and Foreign Ministers are assumed to have authority to speak on behalf of the State and will not be required to show full powers.

Negotiations will proceed over the language in the treaty text. Some of the exchanges in these negotiations are recorded in a separate document known as the drafting history (also called "preparatory materials" or "*travaux preperatoires*"). The drafting history may be relevant later on if a dispute arises as to the interpretation of a particular provision. At the end of negotiations, the parties will be asked to adopt the full text of the treaty and authenticate it, possibly by signature. At this point the text of the treaty has reached its final form.

Now the State parties must express their consent to be bound by the treaty. This is a separate step from adopting and authenticating the text of the treaty. Presumably a State representative may negotiate the details of the text and adopt and authenticate the text only to have the treaty rejected by the State government. Most States have internal processes for the approval of treaties, and representatives to the treaty negotiations must return home to get this approval before consent can be expressed to be bound by the treaty. As explained already, the FDRE Constitution requires approval of all treaties by the House of Peoples' Representatives.

Consent to be bound by a treaty may be expressed in many different ways. "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." (VCLT Art. 11) The most common method for expression of consent is ratification. A ratification is a declaration by some authorized official of the State that the State considers itself bound by the treaty. This declaration is usually contained in an "instrument of ratification" (in other words, a writing) that is exchanged by the parties (in the case of bilateral treaties) or deposited somewhere for safe-keeping (usually at the UN for multilateral treaties). For most treaties, this is the end of the treaty formation process and the beginning of the State's international obligations under the treaty. The treaty has "entered into force."

There is a last step for large multilateral treaties. For multilateral treaties, it would be impractical to require all negotiating parties to consent before the treaty entered into force. Therefore, multilateral treaties usually provide that the treaty will enter into force upon the consent of a certain number of the parties. Let us say that 20 States negotiate a treaty and 10 States must ratify for the treaty to enter into force. The first State may ratify the treaty but not actually be bound by the treaty until 10 States total ratify the treaty and the treaty enters into force.

A party not present at the original negotiation may be allowed to join the treaty at a later time if the treaty so provides. This is called "accession." The rules of accession typically will be laid out in the treaty itself.

Having described the normal process of treaty formation in detail, it must now be conceded that treaty-like obligations sometimes arise through entirely different processes. Some unilateral statements by certain State officials have been taken as binding on that State in the same way that treaty obligations are binding. For example, the Norwegian Minister of Foreign Affairs, speaking on behalf of his government, made the statement that Norway would not interfere with Danish plans concerning Greenland. The Permanent Court of International Justice concluded that

> a reply of this nature given by the Minister of Foreign Affairs on behalf of his government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

The ICJ faced a similar issue in the *Nuclear Tests case*. The student should try to ascertain from this case what the criteria are for determining whether a unilateral statement will be binding on a State as a matter of international law.

***Nuclear Tests Case* (Australia and New Zealand v. France), ICJ, 1974.**

[France carried out nuclear tests over the Pacific Ocean near Australia and New Zealand. Fearing pollution, Australia and New Zealand brought a case before the ICJ to demand that France stop its nuclear tests. While the case was pending, France announced that it had completed its tests and did not plan any more tests. The Court considered whether France's announcement was binding and thus whether the announcement resolved the dispute.]

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound -- the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form…

46. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

47. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government…

49. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

50. The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes,* even though the first of them was communicated to the Government of Australia. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications…

Questions:

1. The Court lists three criteria for determining whether a State is bound by its unilateral statement: the statement must be public, it must be made by someone with authority to represent the State on such a matter, and it must express the State's intent to be bound. Note that it is not necessary for the statement to be addressed particularly to the parties affected.
2. What does it mean for a State to have "an intent to be bound"? If a State truly intended to be bound, why wouldn't the State go through the normal treaty formation procedure and enter into a treaty? In any case, this intent can be inferred from the seriousness of the statement itself and the context in which the statement was made.

5.2 Interpretation of Treaty Terms

As is the case with the language in domestic contracts, treaty language is not always perfectly clear. It is difficult for the parties to the treaty to anticipate every problem that might arise between them and spell out every solution in the treaty text. In fact, many of the ambiguities in the treaty text may be purposeful, because a clearer provision would have broken the deal and prevented the parties from reaching agreement. In other words, the parties may leave a controversial provision vague and put off arguing over it until after the treaty has come into force and an actual problem arises in regard to this provision.

The ultimate goal of a court in interpreting treaty terms is to fulfill the intentions of the parties to the treaty. The parties are free actors and may enter into agreements that are substantively unfair to them. A court is not there to make the deal fair. Rather, the court is there to guarantee to each party its reasonable expectations under the agreement. Goals and concerns kept private by one party do not lead to reasonable expectations from that party. Thus, the intentions of the parties matter, but only those intentions that were expressed and made clear to the other parties to the treaty. For example, imagine that Ethiopia enters into a treaty with Sudan to cooperate in setting up stations along their shared border. One of Ethiopia's intentions may be to prevent certain Sudanese citizens from obtaining entry into Ethiopia. Sudan however may be more concerned about marking the geographic limits of its territory. If Sudan simply allows all Sudanese citizens to cross into Ethiopia, this will defeat Ethiopia's expectations. Nonetheless, a court would not interpret the treaty to fulfill such of Ethiopia's expectations unless Ethiopia had communicated its intentions to Sudan clearly at the time of treaty formation. Treaty interpretation, then, must focus on what the parties to the treaty communicated to one another at the time of treaty formation.

There are two basic theories for understanding communications among parties to a treaty (or contract for that matter). The first, the objective approach, requires that we take the parties at their word and interpret treaty terms according to their ordinary meaning and as an ordinary person would understand them. Thus, if there is a question as to the meaning of a word in a treaty, the court should look up the word in the dictionary. According to the objective approach,

it is not important what was in the minds of the drafters of the treaty. After all, other members of the treaty cannot see into the minds of the drafters. What is important is how the drafters manifested their thoughts in the words of the treaty. The second theory, the subjective approach, acknowledges that words only have such meaning as the parties gave them. It is possible that the parties to the treaty had some special understanding as to the meaning of terms that is not found in a dictionary. Thus, a court should look at anything that might indicate what the parties were thinking – their behavior, letters, and the drafting history of the treaty.

The approach of the VCLT – and the approach that matters for us when we do treaty interpretation – is a combination of the objective and subjective approaches. The VCLT attempts to combine the best parts of each approach into one coherent whole.

Vienna Convention on the Law of Treaties, 1969.

Article 31. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
    (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
    (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
    (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
    (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
    (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
    (a) leaves the meaning ambiguous or obscure; or
    (b) leads to a result which is manifestly absurd or unreasonable.

The basic provision relating to interpretation is found in Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This is not a step by step analysis. Rather, when interpreting a treaty, the student should apply all these elements, at the same time.

To start, the treaty must be interpreted in good faith. In other words, a party should not attempt to twist the language of the treaty in order to secure some selfish benefit for it that was not contemplated by the other parties. Good faith requires neutrality. "The purpose of the Treaty, and the intentions of the parties in concluding it,… should prevail over its literal application… The principle of good faith obliges the Parties to apply [the treaty] in a reasonable way…" (*Case Concerning the Gabcikovo-Nagymaros Project* (Hungry v. Slovakia), ICJ, 1997.)

As for the treaty terms, they must be given their "ordinary meaning." The ordinary meaning is typically the one found in the dictionary. However, ""[a] special meaning shall be given to a term if it is established that the parties so intended." (VCLT Article 31(4).) This leaves room for the parties to introduce other evidence that would modify or change the dictionary definition of a term.

The terms must be interpreted "in their context." In other words, the treaty must be interpreted as a whole document, not in bits and pieces. The court should not look at specific terms in isolation from the rest of the treaty. Relevant context includes (1) other terms in the same provision, (2) other provisions in the treaty, (3) the preamble of the treaty, and (4) annexes to the treaty.

As a final check on the appropriateness of interpretation, the VCLT reminds us that interpretation should proceed in light of the treaty's object and purpose. If a literal understanding of some provision conflicts with the underlying purpose of the treaty, then the underlying purpose must prevail. In practice the object and purpose of the treaty may not be particularly helpful, as the object and purpose itself is explained by the words in the treaty and may be subject to different interpretations. A good place to look for the object and purpose is in the preamble of the treaty. In the end, resort to the object and purpose is more to confirm an interpretation based on text and context.

The VCLT has rather specific rules in regard to the use of drafting history in treaty interpretation. Drafting history is the body of writings produced by the drafters of the treaty during the drafting process. It may include, for example, discussions amongst parties to the treaty about how the treaty should be written, or an alternative proposal by one of the parties that was rejected and the reasons for rejection. Although the subjective approach always would allow drafting history to be considered when interpreting treaty terms, the VCLT disfavors the drafting history and only allows it in certain circumstances.

There are some good reasons for being cautious when using drafting history. It is tempting to use the drafting history because it often contains a detailed description of how the terms of the treaty were negotiated. Many would take this record of negotiations as the best reflection of the parties' intent and best explanation for the parties' choice of language. In fact, though, State representatives say many things that they do not mean in the course of negotiations in order to secure a better bargaining position. Thus, the language of bargaining may not reflect the parties' true intentions. Moreover, not all parties to the treaty may be present at the negotiations. This is especially true for States who accede to a treaty later on and take the terms of the treaty at their face value. How can we hold such States to an interpretation of treaty terms derived from the record of negotiations in which they did not participate?

Unlike the pure objective approach, the VCLT does not forbid the use of drafting history altogether. Clearly, though, drafting history is given a secondary role in treaty interpretation. First, it may be used to *confirm* the meaning of a word that has already been established by resort to text and context. (VCLT Article 32.) But what if the drafting history somehow changes or contradicts the meaning of a provision established by text and context? This is not allowed. There are cases, however, when the meaning of a provision simply cannot be determined by text and context. In such cases the drafting history may be used as an independent source of meaning. As the VCLT explains, drafting history may be used on its own to determine the meaning of words when either (1) regular interpretation according to text and context "leaves the meaning ambiguous or obscure" or (2) regular interpretation "leads to a result which is manifestly absurd or unreasonable." (See VCLT Article 32.)

The method of treaty interpretation under the VCLT is known as "progressive encirclement." There are not steps to be applied linearly but rather layers of meaning to be uncovered by circling deeper and deeper. An example of treaty interpretation under the VCLT may help explain. Austria entered into a treaty after World War II that prohibited Austrians from buying "airplanes" from Germany or Japan. Later, an Austrian flying club wanted to purchase a glider (a non-motorized aircraft) from Germany. The simple question is, are "gliders" included in the meaning of the word "airplane" such that the Austrians are not allowed to purchase gliders from Germany? The plain meaning of the text indicates that "airplane" means only motorized aircraft. A glider is not motorized and therefore it is not an airplane. The context, however, gives us some more clues. Other provisions in the treaty referred to "aircraft" which is a broader category including both motorized and non-motorized flying vehicles. It appeared that the drafters of the treaty used the word "airplane" in this particular provision as a synonym for "aircraft." Thus, it can be inferred that the treaty meant to ban the purchase of all aircraft from Germany, including gliders. (The object and purpose of the treaty would also be relevant to interpretation although not mentioned here.)

The student should note that, under VCLT Article 31(3), the subsequent activities of the parties affect the interpretation of treaty terms. Subsequent activities include subsequent *agreements* between the parties (later treaties, etc.), subsequent *practices* by the parties (how the parties

apply the treaty), and rules of international law that develop subsequently. To give an example, the UN Charter says that the Security Council cannot pass a resolution without the concurring votes of the five permanent members. In other words, five permanent members must vote in favor of the resolution in order for it to pass. After the Charter was adopted, however, the Security Council started a different practice. The members of the Security Council allowed resolutions to pass when a permanent member decided to abstain from voting or did not vote because its representative did not attend the meeting. Thus, the subsequent practice of Member States modified the meaning of the treaty terms as determined by text and context.

A further question may arise as to who has authority to interpret treaty terms. Although it is clearly advantageous to have a neutral third party like the ICJ determine rights and duties under a treaty, inevitably the State parties to the treaty will engage in some interpretation on their own in the domestic application of the treaty. The State legislature often will draft implementing legislation; domestic courts often will apply treaty terms to domestic disputes before them. Domestic application of treaty terms will not become an international issue until one of the State parties has a problem with the way in which another State party is applying treaty terms domestically and sues that State before an international tribunal for violation of the treaty.

Unfortunately, international tribunals like the ICJ cannot interpret a treaty provision unless they have jurisdiction to do so. As will be discussed later, one of the most common ways that international tribunals establish their jurisdiction is through a jurisdictional clause contained in the treaty itself. The clause typically grants exclusive authority to a particular international body to interpret the treaty in case of a dispute. Jurisdictional clauses are of particularly great importance, then, in determining who will have the authority to interpret a treaty. Many treaties, in addition to their substantive terms, include jurisdictional clauses, like the one in the Charter of the International Civil Aviation Organization:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council [of the International Civil Aviation Organization].

Once jurisdiction is established, an international tribunal will interpret treaty terms in accordance with the VCLT. The Tribunal's interpretation will prevail over any interpretation of the treaty by domestic courts or other domestic government body. This principle was discussed in the following arbitration between the U.S. and Great Britain. The major issue for the tribunal was whether the tribunal had authority to reinterpret a treaty provision that had already been interpreted and applied by Canadian (at that time, British) domestic courts.

***Jesse Lewis Claim* (U.S. v. Great Britain), Claims Arbitration under Special Agreement, 1921.**

Great Britain and Canada, acting in the full exercise of their sovereignty and by such proper legislative authority as was established by their municipal public law, had enacted and were entitled to enact such legislative provisions as they considered necessary or expedient to secure observance of the said Treaty; and, so far as they are not inconsistent with the said Treaty, those provisions are binding as municipal public law of the country on any person within the limits of British jurisdiction…

Great Britain and Canada, acting by such proper judicial authority as was established by their municipal law, were fully entitled to interpret and apply such legislation and to pronounce and impose such penalty as was provided by the same, but such judicial action had the same limits as the aforesaid legislative action, that is to say so far as it was not inconsistent with the said Treaty.

In this case the question is not and cannot be to ascertain whether or not British law has been justly applied by said judicial authorities, nor to consider, revise, reverse, or affirm a decision given in that respect by British Courts. On the contrary, any such decision must be taken as the authorized expression of the position assumed by Great Britain in the subject matter, and, so far as such decision implies an interpretation of said treaty, it must be taken as the authorized expression of the British interpretation.

The fundamental principle of the juridicial equality of States is opposed to placing one State under the jurisdiction of another State. It is opposed to the subjection of one State to an interpretation of a Treaty asserted by another State. There is no reason why one more than the other should impose such an unilateral interpretation of a contract which is essentially bilateral. The fact that this interpretation is given by the legislative or judicial or any other authority of one of the Parties does not make that interpretation binding upon the other Party. Far from contesting that principle, the British Government did not fail to recognize it…
For that reason the mere fact that a British Court, whatever be the respect and high authority it carries, interpreted the treaty in such a way… cannot be accepted by this Tribunal as a conclusive interpretation binding upon the United States Government. Such a decision is conclusive from the national British point of view; it is not from the national United States point of view… [T]he duty of this international Tribunal is to determine, from the international point of view, how the provisions of the treaty are to be interpreted and applied to the facts…

5.3 Invalidity of Treaties and Treaty Termination

International law does not allow treaties to end easily. There is a general policy of the international community in favor of stable interstate relations. The policy also favors stable treaty relations and continuation of treaty obligations. One might compare, for example, the termination of contracts under domestic law with the termination of treaties under international law. A party to a contract may unilaterally terminate the contract and pay damages to the other party for the unlawful breach. In a sense, the breaching party is paying to be free from the

contract. In international law, a State cannot unilaterally terminate a treaty and simply pay damages for the unlawful breach. The treaty will continue in force even after payment of damages by the breaching party, unless of course the non-breaching party opts to terminate the treaty (i.e. unless the non-breaching party agrees with the breaching party to terminate).

Even when termination is permissible, as for example by the language of the treaty itself or because of material breach by the other party, there are certain procedures that a State must follow before terminating. (See VCLT Article 65.) First, the State that wants to terminate must notify the other parties to the treaty and give its reasons for termination. Then, if the other parties object, the State must attempt to resolve the disagreement through international dispute mechanisms like negotiation or arbitration or adjudication before an international court. Basically, unless the other parties consent, termination will require the intervention of an impartial third party like the ICJ to determine the validity of the terminating party's claims and to determine whether termination is permissible.

In rare cases a seemingly binding treaty is discovered to be invalid from the beginning. This is not a case of treaty termination per se but still may require that the State follow the procedures above for treaty termination – the State probably will have to resort to an impartial international body before effectively declaring the treaty invalid. In any case, invalidity of a treaty is difficult to prove and rarely argued. The various grounds for invalidity are not particularly important but are listed here to give the student the complete picture. (1) A treaty may be invalid because it is "ultra vires" or in other words because the representative acted beyond his authority and agreed to a treaty or a term in a treaty that was against the State's domestic law. The violation of domestic law must be "manifest" (i.e. obvious), and the domestic law that is violated must be one of "fundamental importance." (See VCLT Article 46.) (2) A treaty may be invalid because of error, i.e. the treaty is based on some incorrect understanding of facts. For example, a treaty establishing a border may be invalid because it is based on an incorrect map. (3) A treaty may be invalid because of fraud. This happens when a State is induced to conclude a treaty based on misrepresentation by other parties. (4) A treaty may be invalid because of corruption, for example when a State's representative is bribed. (5) A treaty may be invalid because of coercion, for example when a State is threatened into signing a treaty. (6) Finally, a treaty may be invalid because it violates a peremptory norm (*jus cogens*). This was discussed earlier in the text.

Now we come to the more important question, when can a State terminate a treaty? First, it is always possible to terminate the treaty if all the parties to the treaty agree to do so. Second, there may be provisions in the treaty itself that allow termination in certain situations. For example, the treaty may last for 20 years and then automatically terminate. Or, the treaty may allow termination on application by one of the parties to some international body.

In the absence of agreement among the parties as to termination, the default rule is that termination is possible only in four situations. (See VCLT Articles 60-62.) These situations are

(1) material breach by the other party, (2) impossibility of performance, (3) fundamental change of circumstances such that it no longer makes sense to continue with the treaty, and (4) a new rule of *jus cogens* that emerges some time after the treaty is already in force and that conflicts with the treaty.

The student should remember that, whatever the grounds for termination, the terminating State will have to go through the procedures listed above and argue its grounds for termination before some neutral body. This issue came up in the following case, *Appeal Relating to the Jurisdiction of the ICAO Council*. India did not want the ICAO – a neutral international body – to consider whether India had properly suspended a treaty that guaranteed certain rights to Pakistan. India argued that, because India had suspended the treaty already, the provision in the treaty establishing the jurisdiction of the ICAO was no longer operative.

***Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), ICJ, 1972.**

[India suspected that Pakistan was involved in the hijacking of an Indian airplane and, in response, India suspended flights of Pakistani aircraft over Indian territory. Pakistan objected that this was a violation of certain international aviation treaties and brought a case before the Council of the International Civil Aviation Organization (ICAO). The ICAO assumed jurisdiction based on jurisdictional clauses in the aviation treaties. India appealed to the ICJ to prevent the ICAO from taking up jurisdiction. India argued that it had suspended the treaties in question because of a breach by Pakistan based on Pakistan's involvement in the hijacking and that therefore its actions subsequent to the suspension of the treaty would not properly fall under the jurisdiction of the ICAO. The question for the court was whether India could terminate or suspend treaty obligations unilaterally – thus also negating the jurisdictional provisions in the treaty – based on Pakistan's alleged material breach of the treaty.]

31. …[India's] contention is to the effect that since India, in suspending overflights in February 1971, was not invoking any right that might be afforded by the Treaties, but was acting outside them on the basis of a general principle of international law, "therefore" the [ICAO], whose jurisdiction was derived from the Treaties, and which was entitled to deal only with matters arising under them, must be incompetent… The Court considers however, that… a mere unilateral affirmation of these contentions -- contested by the other party -- cannot be utilized so as to negative the [ICAO's] jurisdiction. The point is not that these contentions are necessarily wrong but that their validity has not yet been determined. Since therefore the Parties are in disagreement as to whether the Treaties ever were (validly) suspended or replaced by something else; as to whether they are in force between the Parties or not; and as to whether India's action in relation to Pakistan overflights was such as not to involve the Treaties… -- these very questions are in issue before the Council, and no conclusions as to jurisdiction can be drawn from them, at least at this stage, so as to exclude *ipso facto* and *a priori* the competence of the Council.

32. To put the matter in another way, these contentions are essentially in the nature of replies to the charge that India is in breach of the Treaties: the Treaties were at the material times suspended or not operative, or replaced, -- hence they cannot have been infringed. India has not of course claimed that, in consequence, such a matter can never be tested by any form of judicial recourse. This contention, if it were put forward, would be equivalent to saying that questions that prima facie may involve a given treaty, and if so would be within the scope of its jurisdictional clause, could be removed therefrom at a stroke by a unilateral declaration that the treaty was no longer operative. The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension, -- whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable.

Questions:

1. The concepts in the case are somewhat complex, but the conclusion at least is straight-forward. A State cannot allege that a treaty has been terminated and then use termination of the treaty as a reason for denying jurisdiction to some neutral international body to resolve the dispute. Could the Court really have reached any other conclusion? If it had, all jurisdictional clauses in all treaties would be pointless because one party could allege termination and unilaterally refuse jurisdiction.
2. Note that it is a separate issue whether Pakistan actually committed material breach through its involvement in the hijacking and justified India's suspension of the treaty. This is the issue that the ICAO must rule on.

A party to a treaty commits a material breach when (1) the party unlawfully repudiates the treaty (the party says that it will no longer observe the treaty), or (2) the party violates "a provision essential to the accomplishment of the object or purpose of the treaty." (See VCLT Article 60(3).) The most litigated issue is whether a small breach is "material" or not. How do we know whether the breached provision is essential to the accomplishment of the purpose of the treaty? This may be something of a judgment call.

***Advisory Opinion on Namibia*, ICJ, 1971.**

[South Africa had a mandate from the League of Nations to administer the territory that became known as Namibia. The UN was the successor organization to the League, and the UN General Assembly decided to terminate the mandate because South Africa was introducing apartheid to Namibia. The UN SC passed a resolution stating that "the continued presence of the South

African authorities in Namibia is illegal…" Did South Africa's action constitute "material breach" of the mandate? The ICJ ruled on this issue in this advisory opinion.]

93. In paragraph 3 of the operative part of [General Assembly resolution 2145] "*Declares* that South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate". In paragraph 4 the decision is reached, as a consequence of the previous declaration "that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is *therefore* terminated…" (Emphasis added.) It is this part of the resolution which is relevant in the present proceedings.

94. In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach… As the Court indicated in 1962 "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and instituting a novel international regime. It incorporates a definite agreement…" (ICJ Reports 1962, p. 331). The Court state conclusively in that Judgment that the Mandate "…in fact and in law, is an international agreement having the character of a treaty or convention" (ICJ Reports 1962, p. 330). The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

> (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 (Art. 60, para. 3).

95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa "has, in fact, disavowed the Mandate", the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship…

…101. It has been suggested that, even if the Council of the League had possessed the power of revocation of the Mandate in an extreme case, it could not have been exercised unilaterally but only in cooperation with the Mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the

Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.

Questions:

1. Was there a material breach by South Africa? The specific provisions of the Mandate that South Africa allegedly breached are not reproduced above. In the Mandate, South Africa had an obligation to supervise Namibian territory for the benefit of its people. Seemingly, this provision was essential to the accomplishment of the purpose of the Mandate. Is it possible to argue the opposite, that this provision is not important and that the overall purpose of the Mandate was to see to the smooth administration of the former colonies of the losing powers in World War I? In other words, the focus of the Mandate was on European relations and not on the well-being of colonized peoples?
2. Racial discrimination is probably a violation of *jus cogens*. Does a breach become material simply because it also involves a violation of a peremptory norm?

Vienna Convention on the Law of Treaties, 1969.

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach.

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
    (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
        (i) in the relations between themselves and the defaulting State, or
        (ii) as between all the parties;
    (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

…

3. A material breach of a treaty, for the purposes of this article, consists in:
    (a) a repudiation of the treaty not sanction by the present Convention; or
    (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

Impossibility of performance and fundamental change in circumstances are two grounds for termination that are often raised in conjunction with the same set of facts. Impossibility of

performance results from “permanent disappearance or destruction of an object indispensable for the execution of the treaty.” (See VCLT Article 61.) An example often given is if the treaty pertains to a river and that river later dries up. A fundamental change in circumstances does not make it impossible to perform on the treaty but rather makes it senseless to perform. Three requirements must be met in order to terminate based on fundamental change: (1) the change must not be foreseeable by the parties at the time of treaty formation, (2) the existence of the circumstances (that now have changed) must be an essential basis of the agreement, and (3) the change itself must be something so dramatic that it transforms treaty obligations. Consider the analysis of these two grounds for breach in the following case.

***Case Concerning the Gabcikovo-Nagymaros Project* (Hungry/Slovakia), ICJ, 1997.**

[At a time when both countries were under Communist rule, Hungary and Czechoslovakia entered into a treaty to make improvements on the Danube River including a dam, a reservoir, a canal, hydroelectric power plants, etc. (The Danube flows partly along the border of the two countries.) Construction began in 1978 but was not completed. Later, after political and economic changes associated with the fall of Soviet communism, Hungry stopped work on the project and tried to terminate the treaty. Soon thereafter, Czechoslovakia split into two States, the Czech Republic and Slovakia. Slovakia did not want to terminate and treaty, and Hungry and Slovakia went to the ICJ for a resolution of their dispute. Hungry argued *inter alia* that the treaty was terminated due to impossibility or due to changed circumstances.]

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties… Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty -- an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly -- had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal regime as in any event, even if that were the case, it would have to conclude that in this instance that regime had not definitively ceased to exist. The 1977 Treaty -- and in particular its Articles 15, 19 and 20 -- actually made available to

the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the Fisheries Jurisdiction case (I.C.J. Reports 1973, p. 63, para. 36), it stated that,

> Article 62 of the Vienna Convention on the Law of Treaties,… may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.

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

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the

Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

Questions:

1. Do you think it is wise to incorporate a great deal of flexibility into treaty terms such that the treaty can be adjusted to fit the twists and turns of time? By the court's reasoning, a State that enters into an extremely flexible treaty like the treaty in this case seemingly will have few excuses to get out of its treaty obligations. What if the other party to the treaty, in accordance with provisions in the treaty allowing for flexibility, agrees to adjust treaty obligations but refuses to adjust obligations in a way that is acceptable to both parties?
2. How were changes in the state of environmental law foreseeable to Hungry at the time of treaty formation? The Court does not explain its reasoning here. Even if the science was known previously, is it not possible that the weight of expert scientific opinion could have shifted from support of dams to criticism of dams?

Section 5.4 Treaty Reservations

A treaty reservation is a unilateral statement whereby a nation tries to exclude or modify the legal effect of a provision of a treaty while still joining the treaty. A State may want to ratify a treaty, but the State disagrees with one provision in the treaty. The State will make a reservation to that provision, so that the treaty is binding on the state, except for the one provision. To give an example, the U.S. made the following reservations to the 1948 Genocide Convention:

> That with reference to article IX of the Convention, before any dispute to which the U.S. is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the U.S. is required in each case.

That nothing in the Convention requires or authorizes legislation or other action by the U.S. prohibited by the Constitution of the U.S. as interpreted by the U.S.

Reservations usually are made to multilateral treaties, especially human rights treaties. The U.S. is notorious for making such reservations. The student should note that there can be no reservations to bilateral treaties. An attempted "reservation" would be rather an invitation to the other side to renegotiate this part of the treaty.

Reservations must be distinguished from "understandings" and "declarations." Unlike reservations, understandings and declarations are interpretive statements that are not meant to

change the treaty terms but rather clarify what that party understands the treaty to mean. Such statements are less controversial and have no effect on a particular party's obligations under the treaty. The student must be careful, because a State may make a reservation but call that reservation an "understanding." It is of no concern to us what a State calls its reservations. What matters is whether the State has tried to change the legal effect of a particular treaty provision, in which case it has made a reservation.

Historically, States did not make reservations to treaties. The old rule in international law was that all parties had to agree to all terms of the treaty. One party could have proposed an amendment to the treaty after the negotiations were concluded, but the other parties would have had to accept this amendment in order for it to have legal effect. Reservations truly became a practice in international law in modern times with the proliferation of Human Rights treaties. This is not to say that reservations can only be made to Human Rights treaties. Rather, it is to show the historical development of reservations practice. One of the seminal cases in this regard was *Reservations to the Convention on Genocide*.

***Reservations to the Convention on Genocide*, ICJ, 1951.**

[Traditionally, all parties had to agree to all terms of a treaty and reservations could not be made. After the promulgation of the Genocide Convention in 1948, several States expressed their desire to ratify the Convention but with reservations concerning various articles, especially Article 9 which provided for reference of disputes to the ICJ. In the following advisory opinion, the ICJ gives reasons for moving away from the traditional rule and allowing reservations at least with regard to human rights treaties.]

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'etre of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide

Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations-all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions...

...

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

...As has been pointed out above, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State; on the other hand, as will be pointed out later, such a decision might aim at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

The disadvantages which result from this possible divergence of views-which an article concerning the making of reservations could have obviated-are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the

reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application...

For these reasons,
THE COURT IS OF OPINION...
by seven votes to five,
(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo

...[W]e have difficulty in seeing how the new rule can work.

(i) It hinges on the expression 'if the reservation is compatible with the object and purpose of the Convention'. What is the 'object and purpose' of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter. One has only to look at them to realize the importance of this question. As we showed at the beginning of our Opinion, these are the articles which are causing trouble.

(ii)

(ii) It is said that on the basis of the criterion of compatibility each party should make its own individual appraisal of a reservation and reach its own conclusion. Thus, a reserving State may or may not be a party to the Convention according to the different view-points of States which have already become parties. Under such a system, it is obvious that there will be no finality or certainty as to the status of the reserving State as a party as long as the admissibility of any reservation that has been objected to is left to subjective determination by individual States. It will only be objectively determined when the question of the compatibility of the reservation is

referred to judicial decision; but this procedure, for various reasons, may never be resorted to by the parties…

…It is therefore not universality at any price that forms the first consideration. It is rather the acceptance of common obligations-keeping step with like-minded States-in order to attain a high objective for all humanity, that is of paramount importance. Such being the case, the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude than ever the existing rule which requires the consent of all parties to any reservation to a multilateral convention…

Questions:

1. The Court identifies two important purposes behind the treaty and then attempts to take a middle path to reconcile the two purposes. On the one hand, this is a treaty of "universal character" that was intended to secure a "wide degree of participation." For this reason, inclusivity is very important – one of the purposes of the treaty is to get as many States as possible to join in order to make the treaty universally applicable law. A State that makes a minor reservation still should be allowed to join the treaty. On the other hand, the purpose of the treaty is also to prevent genocide. It would be bad to sacrifice this purpose in the effort to be inclusive. Thus, the court devises a new rule that a reservation is okay (inclusivity) so long as the reservation does not defeat the object and purpose of the treaty (guarantee that substantive provisions of the treaty will not be affected). Do you agree with the dissent that it is difficult to determine which provisions of the treaty are essential to its purpose? Are provisions designed to guarantee enforcement of the treaty less important than substantive provisions that lay out rights and obligations?
2. Even though some reservations are permissible, a party's consent still is required in order for a reservation to have effect. A party may refuse to accept a reservation even if that reservation is minor and does not defeat the object and purpose of the treaty. Each party to the treaty must individually determine first whether it will accept the reservation and second, if no, whether it will nonetheless have treaty relations with the reserving party. Although the reserving State ostensibly has entered into the treaty, its relations with treaty members will vary according to the individual members' reactions to the reservation. Does this make treaty relations among members of the treaty hopelessly confusing as the dissent asserts?
3. It must be remembered that, once the negotiations on the treaty text have been concluded, there is no central body left to evaluate modifications to the treaty like reservations. Presumably, the question of whether a reservation violates the object and purpose of the treaty is an objective question that should not be determined by each treaty party separately. Yet there is no one else to make this determination unless a dispute arises and the issue is brought before the ICJ.

The VCLT adopted the approach taken by the court in *Reservations to the Convention on Genocide*. Under the VCLT, States are free to make reservations to treaties. As in the *Genocide* case, this freedom is subject to certain limitations. (1) A State may not make reservations to a treaty if the treaty expressly prohibits reservations. (For example, the United Nations Convention on the Law of the Sea expressly prohibits reservations.) And (2) A State may not make a reservation to a treaty if the reservation is incompatible with the object and purpose of the treaty.

The VCLT has not resolved the problem of who will decide whether a reservation is valid under international law or not. State parties to the treaty make this determination individually. Of course, if the treaty comes up for dispute before some international body like the ICJ, then this body will determine whether the reservation is valid. Interestingly, some Human Rights bodies (i.e. Human Rights courts and committees) have held that a reserving State has made an invalid reservation, against the purpose of the treaty, and, as a consequence, is a full member of the treaty without benefit of its reservation. This is controversial because it is not clear that a reservation should be "severable" from a State's expression of consent to a treaty such that the reservation can be erased and the party held to all obligations in the treaty. On the other hand, it is an equally ridiculous result to conclude that a reservation is invalid and allow the reserving State the benefit of appearing to have joined the treaty when in fact the reserving State is not a member of the treaty and is not liable for any breach of treaty terms.

In some cases, the treaty itself will lay out detailed rules in regard to reservations. A reservation expressly authorized by a treaty does not require acceptance by other parties. The reservation will have automatic effect. Other treaties require that all parties accept a reservation for the reservation to be valid. The reservation will not have effect unless everyone accepts the reservation. If everyone does not accept, the reserving party will be part of the original treaty and the reservation will be ignored. A treaty that is the constitution for an international organization may require that all reservations have to be accepted by the organization itself.

An example will help illustrate how treaty reservations affect the obligations of State parties to a treaty. Imagine that Ethiopia, Eritrea, Sudan, Egypt, Somalia, and Kenya enter into a multilateral treaty to protect and preserve wildlife in their respective territories. The treaty requires that State parties implement certain protections for wildlife and explains under Article X that hunting licenses will be issued by a Committee formed under the Treaty. The Committee has jurisdiction to hear cases involving violations of the regulations regarding hunting.

Ethiopia decides to "clarify" Article X of the treaty, including in its ratification of the treaty the following statement: "Ethiopia maintains that, in order for Ethiopian citizens to be brought under the jurisdiction of the Committee, the Ethiopian Courts must first pass on the matter and then specifically authorize the transfer of the case to the Committee."

The other parties to the treaty react differently to Ethiopia's "clarification." Eritrea expressly accepts it as a reservation to the treaty. Sudan says nothing in response. Egypt objects to Ethiopia's "clarification" but gives no reason as to its objection. Somalia objects to Ethiopia's clarification "because it is against the object and purpose of the entire treaty." Kenya objects to Ethiopia's clarification and says that "therefore Kenya refuses to enter into treaty relations with Ethiopia."

First, is Ethiopia's statement a reservation? Just because Ethiopia calls this a "clarification" does not mean that it is not a reservation. We ask, does it modify Ethiopia's legal obligations under the treaty? The answer is, yes. So it is a reservation.

What types of treaty relations have been created? (1) Eritrea has accepted the reservation, so Eritrea and Ethiopia will have treaty relations, and the reservation will apply as between them. (2) Sudan has said nothing, which amounts to tacit acceptance of Ethiopia's reservation. Therefore, Sudan and Ethiopia will have treaty relations, and the reservation will apply as between them. (3) Egypt objected to the reservation, so the reservation cannot apply between Egypt and Ethiopia. Egypt has said nothing about whether Ethiopia and Egypt will have treaty relations, and the default rule is that, in the absence of a refusal to have treaty relations, the parties will have treaty relations. The result is that Ethiopia and Egypt have treaty relations, but Article X will not apply as between them (because of Egypt's objection). (4) Somalia also objected to the reservation, but for a specific reason. Somalia says that the reservation is against the object and purpose of the treaty. The result here is surprising: again, because Somalia did not specifically object to having treaty relations with Ethiopia, the two parties will have treaty relations. Article X will not apply as between them. (In some cases, this will mean that the reserving party will get the benefit of the reservation despite the fact that the other party has objected to it.) (5) Finally, Kenya will not have treaty relations at all with Ethiopia.

Problem 5: Treaty Reservations.

Five states enter into a treaty to prevent torture. State V ratifies the treaty but includes a statement of "understanding": "We understand that, under Article 5 of the treaty, we will make a good faith effort to stop torture, using only such means as we deem necessary." Article 5 of the treaty specifies that "each state must enact domestic legislation forbidding torture." States W and X say nothing about State V's "understanding." State Y says that State V's understanding goes against the object and purpose of the treaty. State Z objects to State V's understanding but gives no reason for its objection. States Y and Z make no further statements against State V.

Ten years later, State V still has not enacted domestic legislation forbidding torture. A group of citizens from States W, X, Y, and Z travel to State V for vacation. The police in State V arrest the group on charges of terrorism and the citizens are tortured in an effort to get information

about a terrorist attack. States W, X, Y, and Z bring actions in the ICJ against State V for violation of the treaty to prevent torture. Will any of these States succeed in holding State V to its treaty obligations to prevent torture?