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The Human Rights Regime: Background and Birth

COMMENT ON INTERNATIONAL DIMENSION OF HUMAN RIGHTS REGIME

In its discussion of the legality of the death penalty and related issues, Chapter 1(B) concentrated on the law — often the constitutional law — of different states. The selected opinions of state courts devoted most of their analysis to their own and to foreign legal systems. International law figured through relevant treaty provisions, but in a subsidiary way. It was not at centre stage.

Chapters 2 to 4, on the other hand, concentrate on the international law aspects of the human rights regime. Why has this path been followed? After all, it is possible to study human rights issues not at the international level but in the detailed contexts of different states' histories, socio-economic and political structures, legal systems, religions, cultures and so on. With respect to its legal dimension, a human rights course that was so organized would stress the internal law of states as well as foreign and comparative law. It would engage in a contextual and comparative analysis of bodies of domestic law, perhaps devoting its full attention to states like China, Saudi Arabia, Italy, the United States or Guatemala. It could stress the recent trend in many states toward (at least as a formal matter) liberal constitutionalism. For such a study of human rights, international law could play a peripheral role, relevant only when it exerted some clear influence on the national scene or had a place in the basic logic of a judicial decision.

The attractiveness of such an approach becomes more apparent when one contrasts with international human rights many other international subjects where international law occupies, indeed *must* occupy, a central position. Imagine, for example, that this course book's interest was not human rights but the humanitarian law of war as applied to interstate conflicts, or the regulation of fisheries, or immunities of diplomats from arrest, or the regulation of trade barriers like tariffs. Each of those fields is inherently, intrinsically, *international* in character. Each involves relations *between* states or between citizens of one state and other states. We could not profitably examine any one of them without examining international custom and treaties, international institutions and processes.

Violations of human rights are different. Not only are they generally rooted within states rather than in interstate engagements, but they need not on their

surface involve any international consequences whatsoever. (Of course, systemic and severe human rights violations that appear to be 'internal' matters — for example, recurrent violence against an ethnic minority — could well have international consequences, perhaps by leading to refugee flows abroad or by angering other states whose populations are related by ethnicity to the oppressed minority.) In typical instances of violations, the police of state X torture defendants to extract confessions; the government of X shuts the opposition press as elections approach; prisoners are raped by their guards; courts decide cases according to executive command; women or a minority group are barred from education or certain work. Each of these events could profitably be studied entirely within a state's (or region's, culture's) internal framework, just as law students in many countries traditionally concentrate on the internal legal–political system, including that system's provision for civil liberties and human rights.

Nonetheless, since the Second World War it would be inadequate or even misleading to develop a framework for the study of human rights in many countries without including as a major ingredient the international legal and political aspects of the field: laws, processes and institutions. In today's world, human rights is characteristically imagined as a movement involving international law and institutions, as well as a movement involving the spread of liberal constitutions among states. Internal developments in many states have been much influenced by international law and institutions, as well as by pressures from other states trying to enforce international law.

Internal or comparative approaches to human rights law and the truly international aspects of human rights are now broadly recognized to be complexly intertwined and reciprocally influential with respect to the growth of human rights norms, the causes and effects of their violations, the reactions and sanctions of intergovernmental bodies or other states, the transformations of internal orders and so on.

From another perspective as well it would be impossible to grasp the character of the human rights regime without a basic knowledge about international law and its contributions to it. The regime's aspirations to universal validity are necessarily rooted in that body of law. Many of the distinctive organizations intended to help to realize those aspirations are creations of international law.

For such reasons, this course book frequently examines but does not concentrate on the internal law and politics of states. It relates throughout this 'horizontal' strand of the human rights movement, as constitutionalism spreads among states, to the 'vertical' strand of the new international law that is meant to bind states and that is implemented by the new international institutions. Both the horizontal and vertical dimensions are vital to an understanding of the human rights regime. But the truly novel developments of the last half-century have involved primarily this second dimension.

Chapter 2 has several functions. It sketches the doctrines and principles in an older international law that served as background to and precedents for the human rights regime that took root and developed immediately after the Second World War. It then examines the early instruments — particularly the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights — that

(together with the later-described International Covenant on Economic, Social and Cultural Rights) form the substantive core of the regime, an International Bill of Rights. The chapter uses national and international decisions of courts and other tribunals not only to present basic doctrines and principles, but also to convey an understanding of international law: its so-called 'sources', its processes of growth, particularly with respect to customary and treaty law. The two tasks are interrelated. By what means or methods have the international rules and standards of the human rights regime developed? By what processes are international legal rules made, elaborated, applied and changed?

Several of the opinions and scholarly writings in the chapter draw on Article 38 of the Statute of the International Court of Justice (ICJ), the judicial organ of the United Nations that was created by the UN Charter of 1945.[1] That article has long served as a traditional point of departure for examining questions about the 'sources' of international law. It repeats (largely in identical language) the similar provisions of the 1921 Statute of its predecessor court, the Permanent Court of International Justice that was linked to the League of Nations and effectively died during the Second World War. It reads:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59 [stating that decisions of the Court have no binding force except between the parties to the case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although Article 38 formally instructs this particular Court about the method of applying international law to resolve disputes, its influence has extended to other international tribunals, to national courts, and indeed generally to argument based on international law that is made in settings other than courts.

The Article takes a positivist perspective. It defines the task of the Court in terms of its *application* of an identifiable body of international law that in one or another sense, has been consented to ('expressly recognized', 'accepted as law', 'recognized') directly or indirectly by states. Its skeletal list expresses a formal conception of the judicial function that is radically different from that of, say, a legal realist. Consider the following comments on Article 38 by José Alvarez, *International Organizations as Law Makers*, at 46 (2005):

> Public international lawyers, through at least the greater part of the 20th century, have sought to define their field as relatively autonomous from either politics or

[1] The Court can only hear cases to which states are parties: Article 34 of the Statute. A state's consent is necessary for the Court to exercise jurisdiction over it. That consent generally refers to the Court's adjudicating all 'legal disputes' concerning the 'interpretation of a treaty', a 'question of international law', the existence of a fact which, if established 'would constitute a breach of an international obligation' and the reparation to be made for breach of an international obligation: Article 36. Statute of the International Court of Justice, T.S. No. 993 (at p. 25) (U.S.).

morality. Their endeavor turned many, particularly in Europe and North America, towards legal positivism....

...

Nothing embodies these central positivist tenets in international law as much as the doctrine of sources. For most international lawyers trained in the West, article 38 of the Statute of the International Court of Justice remains the "constitution" of the international community. Its enumerated sources of international law — treaties, custom, and general principles of law — remain, for most, the exclusive means for generating legal obligations on states. Through the doctrine of sources, international lawyers define (and defend) their field as characteristically legal. Thanks to sources doctrine, international lawyers argue that international law, like domestic law, also has a circumscribed set of sources and rules for interpreting them; thanks to article 38, international law is distinguished from morality or politics. Thanks to sources, international rules have a distinctive either/or quality, essential to distinguish mere wishful thinking (*lex ferenda*) from black letter obligation (*lex lata*): something either is or is not within one of the recognized sources of international law and someone with the requisite skill, like a judge, can do so....

... The doctrine of sources then, has a dual agenda: it tells the lawyer where to find the law in an objective fashion because it is ostensibly based in the concrete practice of states but it also seeks to provide a normatively constraining code for states....

NOTE

The chapter has the following organization: Section A examines customary law, and illustrates its theme through a national court decision in a field now known as 'the law of armed conflict'. Section B examines aspects of general principles of law and natural law, in the context of an arbitral decision on the law of state responsibility for injury to aliens. Section C examines treaty law by drawing on a decision of the Permanent Court of International Justice on the minorities regime in Europe between the two world wars. Section D looks at the judgment at Nuremberg after the Second World War, at the very threshold of the human rights movement. Section E carries the historical narrative into the formation of the movement, stressing the Universal Declaration of Human Rights.

A. THE LAW OF ARMED CONFLICT AND CUSTOMARY INTERNATIONAL LAW

NOTE

The following decision in *The Paquete Habana* deals with an earlier period in the development of the law of armed conflict (also called international humanitarian

the twentieth century, the world community creating international law was a small and relatively cohesive one; today's total of almost 200 states offers a striking contrast. Consider the multinational and multicultural character of an assembly of states today drafting a convention on the laws of war or a human rights convention, and imagine the range of states to which references might be made in a contemporary judicial opinion considering the customary law of international human rights.

COMMENT ON THE ROLE OF CUSTOM

The Supreme Court decision in *The Paquete Habana* raises basic questions about custom, which has been referred to as the oldest and original source of international law. Customary law remains indispensable to an adequate understanding of human rights law. It figures in many fora, from scholarship about the content of human rights law, to the broad debates about human rights within the United Nations, to the arguments of counsel before an international or national tribunal. As this chapter later indicates, the character of such argument today differs in significant respects from the character a century ago at the time of this decision.

Customary law refers to conduct, or the conscious abstention from certain conduct, of states that becomes in some measure a part of international legal order. By virtue of a developing custom, particular conduct may be considered to be permitted or obligatory in legal terms, or abstention from particular conduct may come to be considered a legal duty.

Consider the 1950 statement of a noted scholar describing the character of the state practice that can build a customary rule of international law: (1) 'concordant practice' by a number of states relating to a particular situation; (2) continuation of that practice 'over a considerable period of time'; (3) a conception that the practice is required by or consistent with international law; and (4) general acquiescence in that practice by other states.[2] Other scholars have contested some of these observations, and today many authorities contend that custom has long been a less rigid, more flexible and dynamic force in law-making.

Clause (b) of Article 38(1) of the Statute of the ICJ states that the Court shall apply 'international custom, as evidence of a general practice accepted as law'. The phrase is as confusing as it is terse. Contemporary formulations of custom have overcome some difficulties in understanding it, but three of the terms there used remain contested and vexing: 'general', 'practice' and 'accepted as law'.

Section 102 of the *Restatement (Third), Foreign Relations Law of the United States*, presents a clearer formulation of customary law that draws broadly on scholarly, judicial and diplomatic sources. Many authorities on international law, certainly in the developed world and to varying degrees in the developing states as well, could accept that formulation as an accurate description and guide. After including custom as one of the sources of international law, the *Restatement* provides in clause

[2] M. Hudson, Working Paper on Article 24 of the Statute of the International Law Commission, UN Doc. A/CN.4/16, 3 Mar. 1950, at 5.

(2): 'Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation'.

Each of these terms — 'general', 'consistent', 'practice', 'followed' and 'sense of legal obligation' — is defined in a particular way. For example, the *Restatement*'s comments on section 102 say:

> state practice includes diplomatic acts and instructions, public measures, and official statements, whether unilateral or in combination with other states in international organizations;
>
> inaction may constitute state practice as when a state acquiesces in another state's conduct that affects its legal rights;
>
> the state practice necessary may be of 'comparatively short duration';
>
> a practice can be general even if not universally followed;
>
> there is no 'precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity'.

The *Restatement* also addresses the question of the sense of legal obligation, or *opinio juris* in the conventional Latin phrase. For example, to form a customary rule, 'it must appear that the states follow the practice from a sense of legal obligation' (*opinio juris sive necessitatis*); hence a practice generally followed 'but which states feel legally free to disregard' cannot form such a rule; *opinio juris* need not be verbal or in some other way explicit, but may be inferred from acts or omissions. The comments also note that a state that is created after a practice has ripened into a rule of international law 'is bound by that rule'.

The *Restatement* (in the Reporter's Notes to Section 102) notes some of the perplexities in the concept of customary law:

> Each element in attempted definitions has raised difficulties. There have been philosophical debates about the very basis of the definition: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured? Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined.

Consider the need to evaluate state practice with respect to (1) *opinio juris* and (2) the reaction of other states to a given state's conduct. Suppose that what is at issue in a case is a state's 'abstention' — for example, state X neither arrests nor asserts judicial jurisdiction over a foreign ambassador, which is one aspect of the law of diplomatic immunities that developed as customary law long before it was subjected to treaty regulation. During the period when this customary law was being developed, it would have been relevant to inquire why states generally did not arrest or prosecute foreign ambassadors. For example, assume that X asserted that it was not legally barred from such conduct but merely exercised its discretion, as a matter of expediency or courtesy, not to arrest or prosecute. Abstention by X coupled with

such an explanation would not as readily have contributed to the formation of a customary legal rule. On the other hand, assume that a decision by the executive or courts of X not to arrest or assert judicial jurisdiction over the ambassador rested explicitly on the belief that international law required such abstention. Such practice of X would then constitute classic evidence of *opinio juris*.

Consider a polar illustration, where X acts in a way that immediately and adversely affects the interests of other states rather than abstains from conduct. Suppose that X imprisons without trial the ambassador from state Y, or imprisons many local residents who are citizens of Y. Surely it has not acted out of a sense of an international law *duty*. If it considered international law to be relevant at all, it may have concluded that its conduct was not prohibited by customary law, that customary law was here permissive. Or it may have decided that even if imprisonment was prohibited, it would nonetheless violate international law.

In this type of situation, the conception of *opinio juris* is less relevant, indeed irrelevant, to the state's conduct. The state did not act out of duty. What does appear central to a determination of the legality of X's conduct is the *reaction* of other states — in this instance, particularly Y. That reaction of Y might be one of tacit acquiescence, thus tending to support the legality of X's conduct, or, more likely on the facts here given, Y might make a diplomatic protest or criticize X's action in other ways as a violation of international law. Action and reaction, acts by a state perhaps accompanied by claims of the act's legality, followed by reaction-responses by other states adversely affected by those acts, here constitute the critical components of the growth of a customary rule.

These simplified illustrations suggest some of the typical dynamics of traditional customary international law. What is common to both illustrations — abstention from arrest, and arrest — is that the interests of at least two states were directly involved: at least the acting state X, and state Y. Of course states other than Y may well have taken an interest in X's action; after all, those states also have ambassadors and citizens in foreign countries. All of these possibilities are relevant to understanding *The Paquete Habana*.

Relationships between Treaties and Custom

Thus far we have considered custom independently of treaties (whose elements are described at p. 113, *infra*). But these two 'sources' or law-making processes of international law are complexly interrelated. For example, the question often arises of the extent to which a treaty should be read in the light of pre-existing custom. A treaty norm of great generality may naturally be interpreted against the background of relevant state practice or policies. In such contexts, the question whether the treaty is intended to be 'declaratory' of pre-existing customary law or to change that law may become relevant.

Moreover, treaties may give birth to rules of customary law. Assume a succession of bilateral treaties among many states, each containing a provision giving indigent aliens who are citizens of the other state party, the right to counsel at the government's expense in a criminal prosecution. The question may arise whether these bilateral treaties create a custom that would bind a state not party to any of

them. Polar arguments will likely be developed by parties to such a dispute, for example: (1) The nonparty state cannot be bound by those treaties since it has not consented. The series of bilateral treaties simply constitutes special exceptions to the traditional customary law that leaves the state's discretion unimpaired on this matter. Indeed, the necessity that many states saw for treaties underscores that no obligation existed under customary law. (2) A solution worked out among many states should be considered relevant or persuasive for the development of a customary law setting standards for all countries. Similarly, the network of treaties may have become dense enough, and state practice consistent with the treaty may have become general enough, to build a customary norm binding all states. Article 38 of the Vienna Convention on the Law of Treaties signals rather than resolves this issue by stating that nothing in its prior articles providing generally that a treaty does not create obligations for a third state precludes a rule set forth in a treaty from becoming binding on a third state 'as a customary rule of international law, recognized as such'.

In contemporary international law, broadly ratified multilateral treaties are more likely than a series of bilateral treaties to generate the argument that treaty rules have become customary law binding nonparties. Some of the principal human rights treaties, for example, have from around 150 to 190 states parties from all parts of the world. Of course, one must distinguish between substantive norms in multilateral treaties that are alleged to constitute customary law that binds nonparties, and institutional arrangements created by the treaties in which parties have agreed, for example, to submit reports or disputes to a treaty organ.

AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

Peter Malanczuk (7th edn. 1997), at 39

[The following excerpts develop some themes about custom in the preceding Comment.]

...

Where to Look for Evidence of Customary Law

The main evidence of customary law is to be found in the actual practice of states, and a rough idea of a state's practice can be gathered from published material — from newspaper reports of actions taken by states, and from statements made by government spokesmen to Parliament, to the press, at international conferences and at meetings of international organizations; and also from a state's laws and judicial decisions, because the legislature and the judiciary form part of a state just as much as the executive does. At times the Foreign Ministry of a state may publish extracts from its archives; for instance, when a state goes to war or becomes

involved in a particular bitter dispute, it may publish documents to justify itself in the eyes of the world. But the vast majority of the material which would tend to throw light on a state's practice concerning questions of international law — correspondence with other states, and the advice which each state receives from its own legal advisers — is normally not published; or, to be more precise, it is only recently that efforts have been made to publish digests of the practice followed by different states....

...

The Problem of Repetition

It has sometimes been suggested that a single precedent is not enough to establish a customary rule, and that there must be a degree of repetition over a period of time....

In the *Nicaragua* case [*Nicaragua v. US (Merits)*, ICJ Rep. 1986, para. 186] the ICJ held:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

In sum, *major* inconsistencies in the practice (that is, a large amount of practice which goes against the 'rule' in question) prevent the creation of a customary rule ...

There remains the question of what constitutes 'general' practice. This much depends on the circumstances of the case and on the rule at issue. 'General' practice is a relative concept and cannot be determined in the abstract. It should include the conduct of all states, which can participate in the formulation of the rule or the interests of which are specially affected. 'A practice can be general even if it is not universally accepted; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity'....

What is certain is that general practice does not require the unanimous practice of all states or other international subjects. This means that a state can be bound by the general practice of other states even against its wishes if it does not protest against the emergence of the rule and continues persistently to do so (persistent objector). Such instances are not frequent and the rule also requires that states are sufficiently aware of the emergence of the new practice and law....

...

The Psychological Element in the Formation of Customary Law (opinio iuris)

...

There is clearly something artificial about trying to analyse the psychology of collective entities such as states. Indeed, the modern tendency is not to look for direct evidence of a state's psychological convictions, but to infer *opinio iuris* indirectly from the actual behaviour of states. Thus, official statements are not required; *opinio iuris* may be gathered from acts or omissions....

...

Customary law has a built-in mechanism of change. If states are agreed that a rule should be changed, a new rule of customary international law based on the new practice of states can emerge very quickly; thus the law on outer space developed very quickly after the first artificial satellite was launched....

...

Universality and the Consensual Theory of International Law

... Can the opposition of a single state prevent the creation of a customary rule? If so, there would be very few rules, because state practice differs from state to state on many topics. On the other hand, to allow the majority to create a rule against the wishes of the minority would lead to insuperable difficulties. How large must the majority be? In counting the majority, must equal weight be given to the practice of Guatemala and that of the United States? If, on the other hand, some states are to be regarded as more important than others, on what criteria is importance to be based? Population? Area? Wealth? Military power? ...

...

... The International Court of Justice has emphasized that a claimant state which seeks to rely on a customary rule must prove that the rule has become binding on the defendant state. The obvious way of doing this is to show that the defendant state has recognized the rule in its own state practice (although recognition for this purpose may amount to no more than failure to protest when other states have applied the rule in cases affecting the defendant's interests). But it may not be possible to find any evidence of the defendant's attitude towards the rule, and so there is a second — and more frequently used — way of proving that the rule is binding on the defendant: by showing that the rule is accepted by other states. In these circumstances the rule in question is binding on the defendant state, unless the defendant state can show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence; dissent expressed after the rule has become well established is too late to prevent the rule binding the dissenting state....

The problem of the 'persistent objector', however, has recently attracted more attention in the literature. Can a disagreeing state ultimately and indefinitely remain outside of new law accepted by the large majority of states? Do emerging rules of *ius cogens* require criteria different to norms of lesser significance? Such questions are far from settled at this point in time....

...

Ius cogens [or Jus cogens]

Some of the early writers on international law said that a treaty would be void if it was contrary to morality or to certain (unspecified) basic principles of international law. The logical basis for this rule was that a treaty could not override natural law. With the decline of the theory of natural law, the rule was largely forgotten, although some writers continued to pay lip-service to it.

Recently there has been a tendency to revive the rule, although it is no longer based on natural law.... The technical name now given to the basic principles of international law, which states are not allowed to contract out of, is 'peremptory norms of general international law', otherwise known as *ius cogens*.

Article 53 of the Convention on the Law of Treaties provides as follows:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

What is said about treaties being void would also probably apply equally to local custom....

Although cautiously expressed to apply only 'for the purposes of the present Convention', the definition of a 'peremptory norm' is probably valid for all purposes. The definition is more skilful than appears at first sight. A rule cannot become a peremptory norm unless it is 'accepted and recognized [as such] by the international community of states *as a whole*'.... It must find acceptance and recognition by the international community at large and cannot be imposed upon a significant minority of states. Thus, an overwhelming majority of states is required, cutting across cultural and ideological differences.

At present very few rules pass this test. Many rules have been suggested as candidates. Some writers suggest that there is considerable agreement on the prohibition of the use of force, of genocide, slavery, of gross violations of the right of people to self-determination, and of racial discrimination. Others would include the prohibition on torture....

MARTTI KOSKENNIEMI, THE PULL OF THE MAINSTREAM

88 Mich. L. Rev. 1946 (1990)

... [I]nternational lawyers have had difficulty accounting for rules of international law that do not emanate from the consent of the states against which they are applied. In fact, most modern lawyers have assumed that international law is not really binding unless it can be traced to an agreement or some other meeting of wills between two or more sovereign states. Once the idea of a natural law is discarded, it seems difficult to justify an obligation that is not voluntarily assumed. ...

COMMENT ON TREATIES

Treaties have inevitably figured in this chapter's prior discussions — for example, the bilateral treaties whose relevance to custom was debated in *The Paquete Habana*, or the convention underlying the *Chattin* litigation. As noted above, the Albanian Declaration can be understood for present purposes as tantamount to a treaty, for the opinions do not distinguish between the two and refer to the Minorities Treaties to advance their interpretation of the Declaration. Hence this Comment, and particularly its sections on issues like interpretation, is relevant here.

In Article 38(1) of the Statute of the International Court of Justice, the Court is instructed in clause (a) to apply 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states'. Treaties thus head the list. They have become the primary expression of international law and, particularly when multilateral, the most effective if not the only path toward international regulation of many contemporary problems. Multilateral treaties have been the principal means for development of the human rights regime. One striking advantage of treaties over custom should be noted. Only treaties can create, and define the powers and jurisdiction of, international institutions in which state parties participate and to which they may owe duties.

The terminology for this voluminous and diverse body of international law varies. International agreements are referred to as pacts, protocols (generally supplemental to another agreement), covenants, conventions, charters, and exchanges of notes, as well as treaties — terms that are more or less interchangeable in legal significance. Within the internal law of some countries such as the United States, the term 'treaty' (as contrasted, say, with international executive agreement) has a particular constitutional significance.

Consider the different purposes that treaties serve. Some concerning vital national security interests have a basic political character: alliances, peace settlements, control of nuclear weapons. Others, outside the scope of national security, also involve relationships between governments and affect private parties only indirectly: agreements on foreign aid, cooperation in the provision of governmental services such as the mails. But treaties often have a direct and specific impact upon private parties. For many decades, tariff accords, income tax conventions, and treaties of friendship, commerce and navigation have determined the conditions under which the nationals or residents of one signatory can export to, or engage in business activities within, the other signatory's territory. Most significant for this book's purposes, human rights treaties have sought to extend protection to all persons against governmental abuse.

Domestic analogies to the treaty help to portray its distinctive character: contract and legislation. Some treaties settling particular disputes between states resemble an accord and satisfaction under contract law: an agreement over boundaries, an agreement to pay a stated sum as compensation for injury to the receiving nation or its nationals. Others are closer in character to private contracts of continuing significance or to domestic legislation because they regulate recurrent problems by defining rights and obligations of the parties and their nationals: agreements

over rules of navigation, income taxation or the enforcement of foreign judgments. The term 'international legislation' to describe treaties has accordingly gained some currency particularly with respect to multilateral treaties such as human rights agreements that impose rules on states intended to regulate their conduct. The Albanian Declaration and the many bilateral treaties that formed part of the minorities regime of the period come within this description.

Nonetheless, domestic legislation differs in several critical respects from the typical treaty. A statute is generally enacted by the majority of a legislature and binds all members of the relevant society. Even changes in a constitution, which usually require approval by the legislature and other institutions or groups, can be accomplished over substantial dissent. The ordinary treaty, on the other hand, is a consensual arrangement. With few exceptions, such as Article 2(6) of the UN Charter, it purports to bind or benefit only parties. Alteration of its terms by one state party generally requires the consent of all.

Consider the institution of contract. Like the treaty, a contract can be said to make or create law between the parties: within the facilitative framework of governing law and subject to that law's mandatory norms and constraints, courts recognize and enforce contract-created duties. The treaty shares a contract's consensual basis, but treaty law lacks the breadth and relative inclusiveness of a national body of contract law. It has preserved a certain Roman law flavour ('*pacta sunt servanda*', '*rebus sic stantibus*') acquired during the long period from the Renaissance to the nineteenth century, when continental European scholars dominated the field. But treaty law often reflects the diversity of approaches to domestic contract law that lawyers bring to the topic, a diversity that is particularly striking on issues of treaty interpretation.

Duties Imposed by Treaty Law

Whatever its purpose or character, an international agreement is generally recognized from the perspective of international law as an authoritative starting point for legal reasoning about any dispute to which it is relevant. The maxim '*pacta sunt servanda*' is at the core of treaty law. It embodies a widespread recognition that commitments publicly, formally and (more or less) voluntarily made by a nation should be honoured. As stated in Article 26 of the Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

Whatever the jurisprudential or philosophical basis for this norm, one can readily perceive the practical reasons for and the national interests served by adherence to the principle of *pacta sunt servanda*. The treaty represents one of the most effective means for bringing some order to relationships among states or their nationals, and for the systematic development of new principles responsive to the changing needs of the international community. It is the prime legal form through which that community can realize some degree of predictability and seek to institutionalize ideals like peaceful settlement of disputes and the protection of human rights. Often such goals can be achieved only through international organizations whose powers, structure, membership and purposes will be set forth in the treaties that

bring them into existence. Treaties then are the basic instruments underlying much contemporary international regulation.

Acceptance of the primary role of the treaty does not, however, mean that a problem between two countries is adequately solved from the perspective of legal ordering simply by execution of a treaty with satisfactory provisions. A body of law has necessarily developed to deal with questions analogous to those addressed by domestic contract law — for example, formation of a treaty, its interpretation and performance, remedies for breach, and amendment or termination. But that body of law is often fragmentary and vague, reflecting the scarcity of decisions of international tribunals and the political tensions which some aspects of treaty law reflect.

There have been recurrent efforts to remedy this situation through more or less creative codification of the law of treaties. The contemporary authoritative text grows out of a United Nations Conference on the Law of Treaties that adopted in 1969 the Convention on the Law of Treaties. That Convention became effective in 1980 and (as of May 2012) had been ratified by 111 states. Excerpts from it appear in the Documents Supplement. For reasons stemming largely from tensions between the Executive and the Congress over authority over different types of international agreements, the United States has not ratified the Vienna Convention. Nonetheless, in its provisions on international agreements, the *Restatement (Third), Foreign Relations Law of the United States* (1987) 'accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States ...'. All other major industrial countries have ratified the Convention. And the United States has signed it.

Treaty Formation

A treaty is formed by the express consent of its parties. Although there are no precise requirements for execution or form, certain procedures have become standard. By choice of the parties, or in order to comply with the internal rules of a signatory country that are considered in Chapter 12, it may be necessary to postpone the effectiveness of the agreement until a national legislative body has approved it and national executive authorities have ratified it. Instruments of ratification for bilateral agreements are then exchanged. In the case of multilateral treaties, such instruments are deposited with the national government or international organization that has been designated as the custodian of the authentic text and of all other instruments relating to the treaty, including subsequent adhesions by nations that were not among the original signatories. Thereafter a treaty will generally be proclaimed or promulgated by the executive in each country.

Consent

Given the established principle that treaties are consensual, what rules prevail as to the character of that consent? Do domestic law contract principles about the effect of duress carry over to the international field?

In a domestic legal system, a party cannot enforce a contract which was signed by a defendant at gunpoint. One could argue that victorious nations cannot assert rights under a peace treaty obtained by a whole army. It is not surprising that the large powers are reluctant to recognize that such forms of duress can invalidate a treaty. If duress were a defence, it would be critical to define its contours, for many treaties result from various forms of military, political or economic pressure. The paucity of and doubts about international institutions with authority to develop answers to such questions underscore the reluctance to open treaties to challenge on these grounds. Article 52 of the Vienna Convention states: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. Attempts at Vienna to broaden the scope of coercion to include economic duress failed, although they resulted in a declaration condemning the use of such practices.

Reservations

Problems of consent that have no precise parallel in national contract law arise in connection with reservations to treaties, i.e., unilateral statements made by a state accepting a treaty 'whereby it purports to exclude, or vary the legal effect of certain provisions of the treaty in their application to a state' (Art. 2(1)(d) of the Vienna Convention). With bilateral treaties, no conceptual difficulties arise: ratification with reservations amounts to a counteroffer; the other state may accept (or reject) explicitly or may be held to have tacitly accepted it by proceeding with its ratification process or with compliance with the treaty. With multilateral treaties the problems may be quite complex. The traditional rule held that acceptance by all parties was required. The expanding number of states has required more flexibility.

Given the increased number of reservations, some of great significance, that many states are attaching to their ratifications of basic human rights treaties, questions about those reservations' validity under general treaty law or under the terms of a specific treaty have become matters of high concern within the human rights regime. We discuss the issue of reservation at greater length in Chapter 12.

Violations of and Changes in Treaties

Violation of a treaty may lead to diplomatic protests and a claim before an international tribunal. But primarily because of the limited and qualified consent of states to the jurisdiction of international tribunals, the offended party will usually resort to other measures. In a national system of contract law, well-developed rules govern such measures. They may distinguish between a minor breach not authorizing the injured party to terminate its own performance, and a material breach providing justification for such a move. Article 60 of the Vienna Convention provides that a material breach (as defined) of a bilateral treaty entitles the other party to terminate the treaty or suspend its performance in whole or in part. These rules necessarily grow more complex for multilateral treaties, but they also entitle a party affected the material breach of another party to terminate or suspend its obligations under certain conditions. Article 60, however, explains that termination or

suspension 'do[es] not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character'. That said, it might very well apply to treaties that only indirectly affect human rights (e.g., an agreement on pharmaceutical patents; a multilateral peace agreement).

Amendments raise additional problems. The treaty's contractual aspect suggests that the consent of all parties is necessary. Parties may however agree in advance (see Art. 108 of the UN Charter) to be bound with respect to certain matters by the vote of a specified number. Such provisions in a multilateral treaty bring it closer in character to national legislation. They may be limited to changes which do not impose new obligations upon a dissenting party, although a state antagonistic to an amendment could generally withdraw. Absent such provisions, a treaty might aggravate rather than resolve a fundamental problem of international law: how to achieve in a peaceful manner changes in existing arrangements that are needed to adapt them to developing political, social or economic conditions.

One of the most contentious issues in treaty law is whether the emergence of conditions that were unforeseeable or unforeseen at the time of the treaty's conclusion terminates or modifies a party's obligation to perform. This problem borders the subject of treaty interpretation, considered *infra*, since it is often described as a question whether an implied condition or an escape clause should be read into a treaty. Mature municipal legal systems have developed rules for handling situations where the performance of one party is rendered impossible or useless by intervening conditions. 'Impossibility', 'frustration', 'force majeure' and 'implied conditions' are the concepts used in Anglo-American law.

At the international level, possibilities of changes in conditions that upset assumptions underlying an agreement are enhanced by the long duration of many treaties, the difficulty in amending them and the rapid political, economic and social vicissitudes in modern times. Thus nations have occasionally used *rebus sic stantibus* as the basis for declaring treaties no longer effective. Article 62 of the Vienna Convention states that a 'fundamental change of circumstances' which was not foreseen by the parties may not be invoked as a ground for terminating a treaty unless 'the existence of those circumstances constituted an essential basis of the consent of the parties to transform the extent of obligations still to be performed under the treaty'; and 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.'

Treaty Interpretation

There is no shortcut to a reliable sense of how a given treaty will be construed. Even immersion in a mass of diplomatic correspondence and cases would not develop such a skill. In view of the variety of treaties and of approaches to their interpretation, such learning would more likely shed light on the possibilities than provide a particular answer to any given question.

One obstacle to reliable generalization about treaty interpretation is the variety of purposes which treaties serve. Different approaches are advisable for treaties that lay down rules for a long or indefinite period, in contrast with those settling past or temporally limited disputes. The long-term treaty must rest upon a certain

flexibility and room for development if it is to survive changes in circumstances and relations between the parties. Changes in conditions like those that make *rebus sic stantibus* an attractive doctrine may lead a court or executive official to interpret a treaty flexibly so as to give it a sensible application to new circumstances. The type of problem that a treaty addresses will influence the approach of an official charged with interpreting it. Certain categories, such as income tax conventions, lend themselves to a detailed draftsmanship that will often be impractical and undesirable in a constitutional document such as the UN Charter. Conventions such as those relating to human rights will, for some matters, necessarily use broad terms and standards like fairness or *ordre public*. As a formal matter, a general rule of interpretation holds that a treaty should be interpreted in light of 'its object and purpose'.

Maxims similar to those found in domestic fields exist for treaties as well. The Vienna Convention contains several. Article 31 provides that 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'. Article 32 goes on to add that recourse may be had to supplementary means — including *travaux préparatoires* (literally, 'preparatory work', and analogous to legislative history) — if interpretation produces a meaning that is 'ambiguous or obscure' or an outcome 'manifestly absurd or unreasonable'. A standard form of interpretation also takes into account the subsequent practice of states in the application of the treaty.

One way to build a framework for construing treaties is to consider the continuum which lies between 'strict' interpretation according to the 'plain meaning' of the treaty, and interpretation according to the interpreter's view of the best means of implementing the purposes or realizing the principles expressed by the treaty. Of course, both extremes of the spectrum are untenanted. One cannot wholly ignore the treaty's words, nor can one always find an unambiguous and relevant text that resolves the immediate issue.

Part of the difficulty is that treaties may be drafted in several languages. If domestic courts deem it unwise to 'make a fortress out of the dictionary', it would seem particularly unwise when interpreters need to resort to dictionaries in several languages (and in different legal systems according different meanings to linguistically similar terms). Sometimes corresponding words in the different versions may shed more light on the intended meaning; at other times, they generate greater ambiguity.

Reliance upon literal construction or 'strict' interpretation may however be an attractive method or technique to an international tribunal that is sensitive to its weak political foundation. It may be tempted to take refuge in the position that its decision is the ineluctable outcome of the drafters' intention expressed in clear text, and not a choice arrived at on the basis of the tribunal's understanding of policy considerations or relevant principles that may resolve a dispute over interpretation. Reliance on *travaux préparatoires* can achieve the same result of placing responsibility on the drafters. The charge of 'judicial legislation' evokes strong reactions in some political and legal cultures; it inevitably influences judges of international tribunals and heightens the temptation to take refuge in the dictionary.

QUESTIONS

1. The types of protections or assurances given by treaty to a distinctive group within a larger polity can be categorized in various ways, including the following. The assurance can be *absolute* (fixed, unconditional) or *contingent* (dependent on some reference group). For example, treaties of commerce between two states may reciprocally grant to citizens of each state the right to reside (for business purposes) and do business (as aliens) in the other state. Some assurances in such treaties will be absolute — for example, citizens of each state are given the right to buy or lease real property for residential purposes in the other state. Other assurances will be contingent — for example, citizens of each state are given the right to organize a corporation and qualify to do business in the other state on the same terms as citizens of that other state (so called 'national treatment'). Within this framework, how would you characterize the rights given to members of a designated minority by the Albanian Declaration? Do the majority and dissenting opinions differ about how to characterize them?

2. If you were a member of the Greek-speaking Christian minority, would you have been content with a Declaration that contained no more than a general equal protection clause? If not, why not? How would you justify your argument for more protection?

3. Would Albania have been justified in imposing some control on the Greek schools, such as defining subjects to be taught and censoring teaching materials that, say, urged independence from Albania?

4. Why do the opinions refer to this minorities regime as 'extraordinary'? In what respects does it depart from classical conceptions of international law, or differ from the law of state responsibility?

5. Why do you suppose that Article 6(a) on crimes against peace (wars of aggression) has fallen into disuse with respect to individual criminal liability? What factors would make its return likely? The crime of aggression was omitted from the criminal provisions in the Statutes for the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Adopted in 1998, the Rome Treaty creating the International Criminal Court (ICC) states that the Court shall have jurisdiction over 'the crime of aggression once a provision is adopted [by the parties to the treaty] defining the crime'. No provision has been adopted. That said, in 2010 the ICC's Assembly of States Parties adopted a resolution that provides a definition and a set of extraordinary jurisdictional prerequisites for the Court to hear a case of aggression. The compromise document, however, essentially postpones the decision for several years. It requires the Assembly of States Parties to vote again to reaffirm the amendment after January 2017.

6. Consider how close to or distant from the minorities regime Article 27 of the International Covenant on Civil and Political Rights appears on its face to be. It provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

> Moreover, to ensure that these remedies are sufficient, we believe the U.S. government is obligated to grant Americans the right to invoke the protections of the treaty in U.S. courts, at least through specific legislation enabling them to do so, but preferably through a formal declaration that the treaty is self-executing, and thus invocable in U.S. courts without further legislation....

Do you agree with these observations about the need for a self-executing Covenant? What arguments would you make against this position?

2. Ratification by the United States of the ICCPR Optional Protocol does not seem to have been discussed. No such proposal was put to the Senate. (a) Why do you suppose this to have been the case? (b) As a member of the State Department, would you have argued for or against joining the Optional Protocol? (c) 'Ratification of the Optional Protocol would have been the correct solution, preferable to making the ICCPR self-executing.' Comment.

COMMENT ON EFFECTS OF RESERVATIONS WITH RESPECT TO OTHER STATES PARTIES

Upon the US ratification the ICCR, a number of states parties objected to one or more of the US reservations. Several states — including Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden — objected to the reservation regarding Article 6, paragraph 5, prohibiting the imposition of the death sentence for crimes committed by persons below 18 years of age, and found that reservation incompatible with the object and purpose of the Covenant. Most of these states also objected to other reservations (or to understandings), particularly the one relating to Article 7. The objections, however, stressed that (to take one illustration) the state's position on the relevant reservations 'does not constitute an obstacle to the entry into force of the Covenant between the Kingdom of Spain and the United States of America'. Compare in this respect Articles 20–21 of the Vienna Convention on the Law of Treaties.

In objecting to three reservations and three understandings, Sweden observed that under international treaty law, the name 'assigned to a statement' that excluded or modified the effect of certain treaty provisions:

> does not determine its status as a reservation to the treaty. Thus, the Government considers that some of the understandings made by the United States in substance constitute reservations to the Covenant.
>
> A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national

legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.

HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 24

CCPR/C/21/Rev. 1/Add. 6 (2 Nov. 1994)

[In 1994, the ICCPR Committee adopted General Comment No. 24 'on issues relating to reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.' This GC was adopted after the ratification of the ICCPR by the United States described above, and preceded the Committee's consideration of the first periodic report submitted by the United States in 1995. The GC refers to the provisions of the Vienna Convention on the Law of Treaties described at p. 1080, *supra*.

The GC notes that as of its date, 46 of the 127 states parties to the ICCPR had entered a total of 150 reservations, ranging from exclusion of the duty to provide particular rights, to insistence on the 'paramountcy of certain domestic legal provisions' and to limitations on the competence of the Committee. Those reservations 'tend to weaken respect' for obligations and 'may undermine the effective implementation of the Covenant'. The Committee felt compelled to act, partly under the necessity of clarifying for states parties just what obligations had been undertaken, a clarification that would require the Committee to determine 'the acceptability and effects' of reservations.

The GC observed that the ICCPR itself makes no reference to reservations (as is true also for the First Optional Protocol; the Second Optional Protocol limits reservations), and that the matter of reservations is governed by international law. It found in Article 19(3) of the Vienna Convention on the Law of Treaties 'relevant guidance'. Therefore, that article's 'object and purpose test... governs the matter of interpretation and acceptability of reservations'. The GC continues:]

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to

particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, . . . a State [may not] reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)).

10. . . . [I]t falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. . . . One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). . . . At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character [e.g., torture]. . . . While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. . . . The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. . . . Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

. . .

17. . . . [Human rights] treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. . . . Because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. . . .

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. . . . Because of the

special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific.... States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to the presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law.

...

INTERNATIONAL LAW COMMISSION'S GUIDE TO PRACTICE ON RESERVATIONS TO TREATIES: PERMISSIBILITY OF RESERVATIONS AND AUTHORITY TO DECIDE

[In 2011, the International Law Commission (ILC), see p. 402, *supra*, adopted the Guide to Practice on Reservations to Treaties. The Guide reflected the culmination of 17 years of work under the leadership of Special Rapporteur and Commission member Alain Pellet. As with other ILC documents of its kind, early drafts of the guidelines were scrutinized annually by the UN General Assembly's Sixth Committee, a body of governmental representatives, which gave states an opportunity to express their views on the general endeavour and specific details. Through this process of governmental review and continued refinement of the text, the Guide increased its legitimacy and support among states. Accompanying the publication of the Guide, the Commission also published a lengthy (nearly 600 pages) set of Commentaries. The following excerpts of the Guide and Commentaries include sections that are relevant to important areas of international human rights law and practice. You should notice, as you read, several points of agreement and disagreement between the ILC and the Human Rights Committee.]

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.