the meaning of any particular treaty provision should be measured.[141] This teleological school of thought has the effect of underlining the role of the judge or arbitrator, since he will be called upon to define the object and purpose of the treaty, and it has been criticised for encouraging judicial law-making. Nevertheless, any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any one of these components.

Articles 31 to 33 of the Vienna Convention comprise in some measure aspects of all three doctrines. Article 31 lays down the fundamental rules of interpretation and can be taken as reflecting customary international law.[142] Article 31(1) declares 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 and in the light of its object and purpose'.[143] The International Court noted in the *Competence of the General Assembly for the Admission of a State to the United Nations* case[144] that 'the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur'.[145] On the basis of this provision, for example, the European Court of Human Rights held in the *Lithgow* case[146] that the use of the phrase 'subject to the conditions provided for . . . by the general principles of international law' in article 1 of

[141] See e.g. Fitzmaurice, 'Reservations', pp. 7–8 and 13–14, and 'Law and Procedure', pp. 207–9.

[142] The International Court has on a number of occasions reaffirmed that articles 31 and 32 of the Vienna Convention reflect customary law: see e.g. the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, paras. 160 ff.; *Indonesia/Malaysia* case, ICJ Reports, 2002, pp. 625, 645–6; the *Botswana/Namibia* case, ICJ Reports, 1999, p. 1045; the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 21–2; 100 ILR, pp. 1, 20–1, and the *Qatar* v. *Bahrain* case, ICJ Reports, 1995, pp. 6, 18; 102 ILR, pp. 47, 59. Other courts and tribunals have done likewise: see e.g. the GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna in 1994, 33 ILM, 1994, pp. 839, 892; the case concerning the *Auditing of Accounts between the Netherlands and France*, arbitral award of 12 March 2004, para. 59 and the *Iron Rhine (Belgium/Netherlands)*, arbitral award of 24 May 2005, para. 45. See also *Oppenheim's International Law*, p. 1271.

[143] See e.g. the *German External Debts* arbitration, 19 ILM, 1980, pp. 1357, 1377. See also Judge Ajibola's Separate Opinion in the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 71; 100 ILR, pp. 1, 69. As to 'object and purpose', see e.g. the *LaGrand* case, ICJ Reports, 2001, para. 102; 134 ILR, p. 41.

[144] ICJ Reports, 1950, pp. 4, 8; 17 ILR, pp. 326, 328.

[145] See also the *La Bretagne* arbitration (*Canada* v. *France*), 82 ILR, pp. 590, 620.

[146] European Court of Human Rights, Series A, No. 102, para. 114; 75 ILR, pp. 438, 482.

Protocol I of the European Convention in the context of compensation for interference with property rights, could not be interpreted as extending the general principles of international law in this field to establish standards of compensation for the nationalisation of property of nationals (as distinct from aliens).[147] The word 'context' is held to include the preamble and annexes of the treaty as well as any agreement or instrument made by the parties in connection with the conclusion of the treaty.[148]

The Eritrea–Ethiopia Boundary Commission in its boundary delimitation decision emphasised that the elements contained in article 31(1) were guides to establishing what the parties actually intended or their 'common will'[149] and in this process the principle of 'contemporaneity' is relevant. This means that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded,[150] so that, for instance, expressions and geographical names used in the instrument should be given the meaning that they would have possessed at that time.[151] However, as the International Court has noted, this does not prevent it from taking into account in interpreting a treaty, 'the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the parties'.[152]

It has also been noted that the process of interpretation 'is a judicial function, whose purpose is to determine the precise meaning of a provision, but which cannot change it'.[153]

In addition, any subsequent agreement or practice relating to the treaty must be considered together with the context.[154] Subsequent practice may indeed have a dual role: it may act as an instrument of interpretation and

[147] See also the *James* case, European Court of Human Rights, Series A, No. 98, para. 61; 75 ILR, pp. 397, 423, and the Advisory Opinions of the Inter-American Court of Human Rights in the *Enforceability of the Right to Reply* case, 79 ILR, pp. 335, 343, and the *Meaning of the Word 'Laws'* case, 79 ILR, pp. 325, 329.

[148] Article 31(2). See also the *US Nationals in Morocco* case, ICJ Reports, 1952, pp. 176, 196; 19 ILR, pp. 255, 272; the *Beagle Channel* case, HMSO, 1977, p. 12; 52 ILR, p. 93, and the *Young Loan* arbitration, 59 ILR, pp. 495, 530.

[149] 130 ILR, pp. 1, 34. See also Lord McNair in the *Argentina/Chile Frontier* case, 38 ILR, pp. 10, 89.

[150] See *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 346. See also D. W. Greig, *Intertemporality and the Law of Treaties*, London, 2001, and, as to the doctrine of intertemporal law, above, chapter 10, p. 508.

[151] *Eritrea–Ethiopia*, 130 ILR, pp. 1, 34–5.

[152] *Botswana/Namibia*, ICJ Reports, 1999, pp. 1045, 1060.

[153] See e.g. the *Laguna del Desierto* case, 113 ILR, pp. 1, 44.

[154] Article 31(3)a and b.

it may also mark an alteration in the legal relations between the parties established by the treaty in question.[155]

The provision whereby any relevant rules of international law applicable in the relations between the parties shall be taken into account in interpreting a treaty[156] was used somewhat controversially in the *Oil Platforms (Iran* v. *USA)* case to justify recourse to the rules concerning the use of force in the context of the Treaty of Amity, Economic Relations and Consular Rights, 1955.[157]

Where the interpretation according to the provisions of article 31 needs confirmation, or determination since the meaning is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation under article 32. These means include the preparatory works (*travaux préparatoires*) of the treaty and the circumstances of its conclusion and may be employed in the above circumstances to aid the process of interpreting the treaty in question.[158] Nevertheless, the International Court has

[155] As to the latter, see e.g. the *Temple* case, ICJ Reports, 1962, p. 6; 33 ILR, p. 48, the *Namibia* case, ICJ Reports, 1971, pp. 16, 22; 49 ILR, p. 2, the *Taba* case, 80 ILR, p. 226 and *Eritrea–Ethiopia*, 130 ILR, pp. 1, 34 ff.

[156] Article 31(3)c.

[157] ICJ Reports, 2003, pp. 161, 182; 130 ILR, pp. 323, 341–2. Judge Higgins in her Separate Opinion noted that, 'The Court reads this provision as incorporating the totality of the substantive international law (which in paragraph 42 of the Judgment is defined as comprising Charter law) on the use of force. But this is to ignore that Article 31, paragraph 3, requires "the context" to be taken into account: and "the context" is clearly that of an economic and commercial treaty', *ibid.*, pp. 225, 237; 130 ILR, pp. 383, 395. See also *Iran* v. *USA*, Case No. A/18, 5 Iran–US CTR, p. 251; 75 ILR, pp. 175, 188, where the Full Tribunal held, citing article 31(3)c, that jurisdiction existed over claims against Iran by dual Iran–US nationals when the dominant and effective nationality of the claimant at the relevant period was that of the US, and *Loizidou* v. *Turkey (Preliminary Objections)*, European Court of Human Rights, Series A, No. 310, p. 25; 103 ILR, p. 621.

[158] See *Yearbook of the ILC*, 1966, vol. II, p. 223, doubting the rule in the *River Oder* case, PCIJ, Series A, No. 23, 1929; 5 AD, pp. 381, 383, that the *travaux préparatoires* of certain provisions of the Treaty of Versailles could not be taken into account since three of the states before the Court had not participated in the preparatory conference. See also the *Young Loan* case, 59 ILR, pp. 495, 544–5; Sinclair, *Vienna Convention*, pp. 141–7, and the *Lithgow* case, European Court of Human Rights, Series A, No. 102, para. 117; 75 ILR, pp. 438, 484. Note that in both the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 27; 100 ILR, pp. 1, 26, and *Qatar* v. *Bahrain* case, ICJ Reports, 1995, pp. 6, 21; 102 ILR, pp. 47, 62, the International Court held that while it was not necessary to have recourse to the *travaux préparatoires* to elucidate the content of the instruments in question, it could turn to them to confirm its reading of the text. See also the *Construction of a Wall* advisory opinion, ICJ Reports, 2004, pp. 136, 174 ff.; 129 ILR, pp. 37, 92 ff.

underlined that 'interpretation must be based above all upon the text of the treaty'.[159]

Case-law provides some interesting guidelines to the above-stated rules. In the *Interpretation of Peace Treaties* case,[160] the Court was asked whether the UN Secretary-General could appoint the third member of a Treaty Commission upon the request of one side to the dispute where the other side (Bulgaria, Hungary and Romania) refused to appoint its own representative. It was emphasised that the natural and ordinary meaning of the terms of the Peace Treaties with the three states concerned envisaged the appointment of the third member after the other two had been nominated. The breach of a treaty obligation could not be remedied by creating a Commission which was not the kind of Commission envisaged by the Treaties. The principle of effectiveness could not be used by the Court to attribute to the provisions for the settlement of disputes in the Peace Treaties a meaning which would be contrary to their letter and spirit. The Court also stressed the nature of the disputes clause as being one that had to be strictly construed. Thus, the character of the provisions to be interpreted is significant in the context of utilising the relevant rules of interpretation. The principle of effectiveness[161] will be used, however, in order to give effect to provisions in accordance with the intentions of the parties[162] and in accordance with the rules of international law.[163]

In two areas, it should be noted, the principle of effectiveness allied with the broader purposes approach has been used in an especially dynamic manner. In the case of treaties that also operate as the constitutional documents of an international organisation, a more flexible method of interpretation would seem to be justified, since one is dealing with an instrument that is being used in order to accomplish the stated aims

[159] The *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 22; 100 ILR, pp. 1, 21.

[160] ICJ Reports, 1950, pp. 221, 226–30; 17 ILR, pp. 318, 320–2. See also *Yearbook of the ILC*, 1966, vol. II, p. 220.

[161] The International Court in the *Fisheries Jurisdiction (Spain* v. *Canada)* case declared that the principle of effectiveness 'has an important role in the law of treaties', ICJ Reports, 1999, pp. 432, 455.

[162] See e.g. the *Ambatielos* case, ICJ Reports, 1952, p. 28; 19 ILR, p. 416. See also the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 24; 16 AD, pp. 155, 169 and *Yearbook of the ILC*, 1966, vol. II, p. 219.

[163] See e.g. the *Fisheries Jurisdiction (Spain* v. *Canada)* case, ICJ Reports, 1999, pp. 432, 455, the *Right of Passage (Preliminary Objections)* case, ICJ Reports, 1957, p. 142 and the *Laguna del Desierto* case, 113 ILR, pp. 1, 45.

of that organisation. In addition, of course, the concept and nature of subsequent practice possesses in such cases an added relevance.[164] This approach has been used as a way of inferring powers, not expressly provided for in the relevant instruments, which are deemed necessary in the context of the purposes of the organisation.[165] This programmatic interpretation doctrine in such cases is now well established and especially relevant to the United Nations, where over sixty years of practice related to the principles of the organisation by over 190 states is manifest.

The more dynamic approach to interpretation is also evident in the context of human rights treaties, such as the European Convention on Human Rights, which created a system of implementation.[166] It has been held that a particular legal order was thereby established involving objective obligations to protect human rights rather than subjective, reciprocal rights.[167] Accordingly, a more flexible and programmatic or

[164] Note that by article 5, the Vienna Convention is deemed to apply to any treaty which is the constituent instrument of an international organisation. See also C. F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, Cambridge, 1996, chapter 2, and Amerasinghe, 'Interpretation of Texts in Open International Organisations', 65 BYIL, 1994, p. 175; M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 64–73; S. Rosenne, 'Is the Constitution of an International Organisation an International Treaty?', 12 *Communicazioni e Studi*, 1966, p. 21, and G. Distefano, 'La Pratique Subséquente des Etats Parties à un Traité', AFDI, 1994, p. 41.

[165] See e.g. the *Reparations* case, ICJ Reports, 1949, p. 174; 16 AD, p. 318; the *Certain Expenses of the UN* case, ICJ Reports, 1962, p. 151; 34 ILR, p. 281; the *Competence of the General Assembly for the Admission of a State* case, ICJ Reports, 1950, p. 4; 17 ILR, p. 326, and the *Namibia* case, ICJ Reports, 1971, p. 16; 49 ILR, p. 2. See also Shaw, *Title to Territory*; R. Higgins, 'The Development of International Law by the Political Organs of the United Nations', PASIL, 1965, p. 119, and H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd edn, The Hague, 1995, chapter 9. See further below, chapter 23, pp. 1305 ff.

[166] See further above, chapter 7, p. 347. See also J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd edn, Manchester, 1993, chapter 4. Note that the European Court of Human Rights in *Loizidou* v. *Turkey (Preliminary Objections)*, Series A, No. 310, p. 26 (1995); 103 ILR, p. 621, emphasised the fundamental differences as between the role and purposes of the International Court of Justice and the European Court. See also the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, paras. 403 ff.

[167] See e.g. *Austria* v. *Italy*, 4 *European Yearbook of Human Rights*, 1960, pp. 116, 140 and *Ireland* v. *UK*, Series A, No. 25, p. 90 (1978). See also the Advisory Opinion of the Inter-American Court of Human Rights on the *Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, 22 ILM, 1983, pp. 37, 47; 67 ILR, pp. 559, 568, which adopted a similar approach.

purpose-oriented method of interpretation was adopted, emphasising that the Convention constituted a living instrument that had to be interpreted 'in the light of present-day conditions'.[168] In addition, the object and purpose of the Convention requires that its provisions be interpreted so as to make its safeguards practical and effective.[169]

Indeed, in this context, it was noted in the *Licensing of Journalists* case[170] that while it was useful to compare the Inter-American Convention on Human Rights with other relevant international instruments, this approach could not be utilised to read into the Convention restrictions existing in other treaties. In this situation, 'the rule most favourable to the individual must prevail'.

Article 31(4) provides that a special meaning shall be given to a term if it is established that the parties so intended. It would appear that the standard of proof is fairly high, since a derogation from the ordinary meaning of the term is involved. It is not enough that one party only uses the particular term in a particular way.[171]

Where a treaty is authenticated in more than one language, as often happens with multilateral agreements, article 33 provides that, in the absence of agreement, in the event of a difference of meaning that the normal processes of interpretation cannot resolve, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[172]

[168] See e.g. the *Tyrer* case, European Court of Human Rights, Series A, No. 26, at p. 15 (1978); 58 ILR, pp. 339, 553; the *Marckx* case, ECHR, Series A, No. 32, at p. 14 (1979); 58 ILR, pp. 561, 583; the *Wemhoff* case, ECHR, Series A, No. 7 (1968); 41 ILR, p. 281, and the *Loizidou* case, ECHR, Series A, No. 310, p. 23; 103 ILR, p. 621. See also H. Waldock, 'The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights' in *Mélanges Offerts à Paul Reuter*, Paris, 1981, p. 535. Note also the approach taken by the UN Human Rights Committee in its General Comment 24/52 of 2 November 1994 on Reservations: see 15 *Human Rights Law Journal*, 1994, p. 464, and above, p. 923.

[169] See e.g. *Soering* v. *UK*, European Court of Human Rights, Series A, No. 161, p. 34 (1989); 98 ILR, p. 270; *Artico* v. *Italy*, ECHR, Series A, No. 37 (1980) and *Loizidou* v. *Turkey*, ECHR, Series A, No. 310, p. 23 (1995); 103 ILR, p. 621.

[170] Advisory Opinion of the Inter-American Court of Human Rights, 1985, 75 ILR, pp. 30, 47–8.

[171] See the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933, p. 49; 6 AD, p. 95, and the *Anglo-French Continental Shelf* case, Cmnd 7438, p. 50; 54 ILR, p. 6.

[172] See the *LaGrand* case, ICJ Reports, 2001, para. 101; 134 ILR, pp. 1, 40–1, the *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, p. 19; 2 AD, p. 27, which called for the more restrictive interpretation in such cases, and the *Young Loan* case, 59 ILR, p. 495. See also Aust, *Modern Treaty Law*, pp. 250 ff.

Invalidity, termination and suspension of the operation of treaties[173]

General provisions

Article 42 states that the validity and continuance in force of a treaty may only be questioned on the basis of the provisions in the Vienna Convention. Article 44 provides that a state may only withdraw from or suspend the operation of a treaty in respect of the treaty as a whole and not particular parts of it, unless the treaty otherwise stipulates or the parties otherwise agree. If the appropriate ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty relates solely to particular clauses, it may only be invoked in relation to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;
(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of consent of the other party or parties to be bound by the treaty as a whole; and
(c) continued performance of the remainder of the treaty would not be unjust.

Thus the Convention adopts a cautious approach to the general issue of separability of treaty provisions in this context.[174]

Article 45 in essence provides that a ground for invalidity, termination, withdrawal or suspension may no longer be invoked by the state where, after becoming aware of the facts, it expressly agreed that the treaty is valid or remains in force or by reason of its conduct may be deemed to have acquiesced in the validity of the treaty or its continuance in force.[175]

[173] Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 302, and *Oppenheim's International Law*, p. 1284. See also N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, Oxford, 1995, and Aust, *Modern Treaty Law*, chapters 16 and 17.

[174] See Judge Lauterpacht, the *Norwegian Loans* case, ICJ Reports, 1957, pp. 9, 55–9; 24 ILR, pp. 782, 809, and Sinclair, *Vienna Convention*, pp. 165–7.

[175] See e.g. the *Arbitral Award by the King of Spain* case, ICJ Reports, 1960, pp. 192, 213–14; 30 ILR, pp. 457, 473, and the *Temple* case, ICJ Reports, 1962, pp. 6, 23–32; 33 ILR, pp. 48, 62. See also the *Argentina–Chile* case, 38 ILR, p. 10 and above, chapter 10.

Invalidity of treaties

Municipal law

A state cannot plead a breach of its constitutional provisions as to the making of treaties as a valid excuse for condemning an agreement. There has been for some years disagreement amongst international lawyers as to whether the failure to abide by a domestic legal limitation by, for example, a head of state in entering into a treaty, will result in rendering the agreement invalid or not.[176] The Convention took the view that in general it would not, but that it could in certain circumstances.

Article 46(1) provides that:

> state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

Violation will be regarded as manifest if it would be 'objectively evident' to any state conducting itself in the matter in accordance with normal practice, and in good faith.[177] For example, where the representative of the state has had his authority to consent on behalf of the state made subject to a specific restriction which is ignored, the state will still be bound by that consent save where the other negotiating states were aware of the restriction placed upon his authority to consent prior to the expression of that consent.[178] This particular provision applies as regards a person authorised to represent a state and such persons are defined in article 7 to include heads of state and government and foreign ministers in addition to persons possessing full powers.[179]

The International Court dealt with this question in *Cameroon* v. *Nigeria*, where it had been argued by Nigeria that the Maroua Declaration of 1975 between the two states was not valid as its constitutional rules had not been complied with. The Court noted that the Nigerian head of state had signed the Declaration and that a limitation of his

[176] See Sinclair, *Vienna Convention*, pp. 169–71, distinguishing between the constitutionalist and internationalist schools, and K. Holloway, *Modern Trends in Treaty Law*, London, 1967, pp. 123–33. See also *Yearbook of the ILC*, 1966, vol. II, pp. 240–1.

[177] Article 46(2).

[178] Article 47. See e.g. the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933; 6 AD, p. 95, and *Qatar* v. *Bahrain*, ICJ Reports, 1994, pp. 112, 121–2; 102 ILR, pp. 1, 18–19.

[179] See above, p. 908.

capacity would not be 'manifest' unless at least properly publicised. This was especially so since heads of state are deemed to represent their states for the purpose of performing acts relating to the conclusion of treaties.[180] The Court also noted that 'there is no general legal obligation for states to keep themselves informed of legislative and constitutional developments in other states which are or may become important for the international relations of these states'.[181]

It should, of course, also be noted that a state may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation. This is a general principle of international law[182] and finds its application in the law of treaties by virtue of article 27 of the 1969 Vienna Convention.

Error

Unlike the role of mistake in municipal laws of contract, the scope in international law of error as invalidating a state's consent is rather limited. In view of the character of states and the multiplicity of persons actually dealing with the negotiation and conclusion of treaties, errors are not very likely to happen, whether they be unilateral or mutual.

Article 48 declares that a state may only invoke an error in a treaty as invalidating its consent to be bound by the treaty, if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. But if the state knew or ought to have known of the error, or if it contributed to that error, then it cannot afterwards free itself from the obligation of observing the treaty by pointing to that error.

This restrictive approach is in harmony with the comments made in a number of cases, including the *Temple* case,[183] where the International Court of Justice rejected Thailand's argument that a particular map contained a basic error and therefore it was not bound to observe it, since 'the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on

[180] ICJ Reports, 2002, pp. 303, 430. [181] *Ibid*., pp. 430–1.

[182] See e.g. the *Alabama Claims* arbitration, J. B. Moore, *International Arbitrations*, New York, 1898, vol. I, p. 495, and the *Greco-Bulgarian Communities* case, PCIJ, Series B, No. 17, p. 32; 5 AD, p. 4. See also the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* case, ICJ Reports, 1988, pp. 12, 34–5; 82 ILR, pp. 225, 252.

[183] ICJ Reports, 1960, p. 6; 33 ILR, p. 48.

notice of a possible error'.[184] The Court felt that in view of the character and qualifications of the persons who were involved on the Thai side in examining the map, Thailand could not put forward a claim of error.

Fraud and corruption

Where a state consents to be bound by a treaty as a result of the fraudulent conduct of another negotiating state, that state may under article 49 invoke the fraud as invalidating its consent to be bound. Where a negotiating state directly or indirectly corrupts the representative of another state in order to obtain the consent of the latter to the treaty, that corruption may under article 50 be invoked as invalidating the consent to be bound.[185]

Coercion

Of more importance than error, fraud or corruption in the law of treaties is the issue of coercion as invalidating consent. Where consent has been obtained by coercing the representative of a state, whether by acts or threats directed against him, it shall, according to article 51 of the Convention, be without any legal effect.[186]

The problem of consent obtained by the application of coercion against the state itself is a slightly different one. Prior to the League of Nations, it was clear that international law did not provide for the invalidation of treaties on the grounds of the use or threat of force by one party against the other and this was a consequence of the lack of rules in customary law prohibiting recourse to war. With the signing of the Covenant of the League in 1919, and the Kellogg–Briand Pact in 1928 forbidding the resort to war to resolve international disputes, a new approach began to be taken with regard to the illegality of the use of force in international relations.

With the elucidation of the Nuremberg principles and the coming into effect of the Charter of the United Nations after the Second World War, it became clear that international law condemned coercive activities by states.

Article 2(4) of the United Nations Charter provides that:

> [a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other measure inconsistent with the purposes of the United Nations.

[184] ICJ Reports, 1960, p. 26; 33 ILR, p. 65.

[185] Such instances are very rare in practice: see *Yearbook of the ILC*, 1966, vol. II, pp. 244–5 and Sinclair, *Vienna Convention*, pp. 173–6.

[186] See e.g. *First Fidelity Bank NA* v. *Government of Antigua and Barbuda Permanent Mission* 877 F. 2d 189, 192 (1989); 99 ILR, pp. 126, 130.

It followed that treaties based on coercion of a state should be regarded as invalid.[187]

Accordingly, article 52 of the Convention provides that '[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'. This article was the subject of much debate in the Vienna Conference preceding the adoption of the Convention. Communist and certain Third World countries argued that coercion comprised not only the threat or use of force but also economic and political pressures.[188] The International Law Commission did not take a firm stand on the issue, but noted that the precise scope of the acts covered by the definition should be left to be determined in practice by interpretation of the relevant Charter provisions.[189]

The Vienna Conference, however, issued a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, which condemned the exercise of such coercion to procure the formation of a treaty. These points were not included in the Convention itself, which leaves one to conclude that the application of political or economic pressure to secure the consent of a state to a treaty may not be contrary to international law, but clearly a lot will depend upon the relevant circumstances.

In international relations, the variety of influences which may be brought to bear by a powerful state against a weaker one to induce it to adopt a particular line of policy is wide-ranging and may cover not only coercive threats but also subtle expressions of displeasure. The precise nuances of any particular situation will depend on a number of factors, and it will be misleading to suggest that all forms of pressure are as such violations of international law.

The problem was noted by Judge Padilla Nervo in the International Court in the *Fisheries Jurisdiction* case[190] when he stated that:

> there are moral and political pressures which cannot be proved by the so-called documentary evidence, but which are in fact indisputably real and which have, in history, given rise to treaties and conventions claimed to be freely concluded and subjected to the principle of *pacta sunt servanda*.[191]

[187] See *Yearbook of the ILC*, 1966, vol. II, pp. 246–7. See also the *Fisheries Jurisdiction* case, ICJ Reports, 1973, pp. 3, 14; 55 ILR, pp. 183, 194.
[188] See Sinclair, *Vienna Convention*, pp. 177–9.
[189] *Yearbook of the ILC*, 1966, vol. II, pp. 246–7.
[190] ICJ Reports, 1973, p. 3; 55 ILR, p. 183.
[191] ICJ Reports, 1973, p. 47; 55 ILR, p. 227.

It should also be noted that the phrase 'in violation of the principles of international law embodied in the Charter' was used so that article 52 should by no means be construed as applying solely to members of the United Nations but should be treated as a universal rule.

Jus cogens[192]

Article 53 of the Convention provides that:

> [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 recognised 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.

Article 64 declares that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.[193]

As noted in chapter 3,[194] the concept of *jus cogens*, of fundamental and entrenched rules of international law, is well established in doctrine now, but controversial as to content and method of creation. The insertion of articles dealing with *jus cogens* in the 1969 Convention underlines the basic principles with regard to treaties.

Consequences of invalidity

Article 69 provides that an invalid treaty is void and without legal force. If acts have nevertheless been performed in reliance on such a treaty, each party may require any other party to establish as far as possible in their

[192] See e.g. J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, New York, 1974; C. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, Leiden, 1976; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, Helsinki, 1988; E. Suy, 'Article 53' in Corten and Klein, *Conventions de Vienne*, p. 1905; A. Gomez Robledo, 'Le *Jus Cogens* International: Sa Genèse, Sa Nature, Ses Fonctions', 172 HR, 1981, p. 9; L. Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law', 172 HR, p. 219; G. Gaja, '*Jus Cogens* Beyond the Vienna Convention', 172 HR, 1981, p. 271; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 202, and *Oppenheim's International Law*, p. 1292. See also *Yearbook of the ILC*, 1966, vol. II, pp. 247–8, and Sinclair, *Vienna Convention*, chapter 7.

[193] See also article 71 and below, p. 945. See also A. Lagerwall, 'Article 64' in Corten and Klein, *Conventions de Vienne*, p. 2299.

[194] See above, p. 123.

mutual relations the position that would have existed if the acts had not been performed. Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

Where a treaty is void under article 53, article 71 provides that the parties are to eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with *jus cogens* and bring their mutual relations into conformity with the peremptory norm. Where a treaty terminates under article 64, the parties are released from any obligation further to perform the treaty, but this does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that the rights, obligations or situations may be maintained thereafter in conformity with the new peremptory norm.

The termination of treaties[195]

There are a number of methods available by which treaties may be terminated or suspended.

Termination by treaty provision or consent

A treaty may be terminated or suspended in accordance with a specific provision in that treaty, or otherwise at any time by consent of all the parties after consultation.[196] Where, however, a treaty contains no provision regarding termination and does not provide for denunciation or withdrawal specifically, a state may only denounce or withdraw from that treaty where the parties intended to admit such a possibility or where the right may be implied by the nature of the treaty.[197] In General Comment No. 26 of 1997, the UN Human Rights Committee, noting that the International Covenant on Civil and Political Rights had no provision for termination or denunciation, concluded on the basis of the Vienna Convention provisions, that the parties had not intended to admit of such

[195] See e.g. E. David, *The Strategy of Treaty Termination*, New Haven, 1975; A. Vamvoukis, *Termination of Treaties in International Law*, Oxford, 1985, and R. Plender, 'The Role of Consent in the Termination of Treaties', 57 BYIL, 1986, p. 133. See also Thirlway, 'Law and Procedure (Part Four)', pp. 63 ff., and Aust, *Modern Treaty Law*, chapter 16.

[196] Articles 54 and 57.

[197] Article 56. Examples given by J. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, p. 331, include treaties of alliance and commerce. See also *Nicaragua* v. *US*, ICJ Reports, 1984, pp. 392, 420; 76 ILR, pp. 1, 131.

a possibility. The Committee based itself on the fact that states parties were able to withdraw their acceptance of the right of inter-state complaint, while the First Optional Protocol, concerning the right of individual communication, provided in terms for denunciation. The Committee also emphasised that the Covenant, as an instrument codifying universal human rights, was not the type of treaty which, by its nature, implies a right of denunciation.[198]

A treaty may, of course, come to an end if its purposes and objects have been fulfilled or if it is clear from its provisions that it is limited in time and the requisite period has elapsed. The Tribunal in the *Rainbow Warrior* case[199] held that the breach of the New Zealand–France Agreement, 1986, concerning the two captured French agents that had sunk the vessel in question,[200] had commenced on 22 July 1986 and had run continuously for the three years' period of confinement of the agents stipulated in the agreement. Accordingly, the period concerned had expired on 22 July 1989, so that France could not be said to be in breach of its international obligations after that date. However, this did not exempt France from responsibility for its previous breaches of its obligations, committed while these obligations were in force. Claims arising out of a previous infringement of a treaty which has since expired acquire an existence independent of that treaty.[201] The termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.[202]

Just as two or more parties to a multilateral treaty may modify as between themselves particular provisions of the agreement,[203] so they may under article 58 agree to suspend the operation of treaty provisions

[198] A/53/40, annex VII. [199] 82 ILR, pp. 499, 567–8. [200] See above, p. 779.

[201] See the Dissenting Opinion of Judge McNair in the *Ambatielos* case, ICJ Reports, 1952, pp. 28, 63; 19 ILR, pp. 416, 433.

[202] Article 70(1)b of the 1969 Vienna Convention. See below, p. 952. Note that in draft article 3 of the ILC Draft Articles on the Effects of Armed Conflicts on Treaties, A/CN.4/178, 2007, p. 7, it is provided that the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as (a) between the parties to the armed conflict and (b) between one or more parties to the armed conflict and a third state. Draft article 10 provides that a state exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that state as an aggressor. This formulation is based upon article 7 of the resolution on the effects of armed conflicts on treaties adopted by the Institut de Droit International in 1985, *ibid.*, p. 18.

[203] Article 41 and above, p. 931.

temporarily and as between themselves alone if such a possibility is provided for by the treaty. Such suspension may also be possible under that article, where not prohibited by the treaty in question, provided it does not affect the rights or obligations of the other parties under the particular agreement and provided it is not incompatible with the object and purpose of the treaty.

Where all the parties to a treaty later conclude another agreement relating to the same subject matter, the earlier treaty will be regarded as terminated where it appears that the matter is to be governed by the later agreement or where the provisions of the later treaty are so incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.[204]

Material breach[205]

There are two approaches to be considered. First, if one state violates an important provision in an agreement, it is not unnatural for the other states concerned to regard that agreement as ended by it. It is in effect a reprisal or countermeasure,[206] a rather unsubtle but effective means of ensuring the enforcement of a treaty. The fact that an agreement may be terminated where it is breached by one party may act as a discouragement to any party that might contemplate a breach of one provision but would be unwilling to forgo the benefits prescribed in others. On the other hand, to render treaties revocable because one party has acted contrary to what might very well be only a minor provision in the agreement taken as a whole, would be to place the states participating in a treaty in rather a vulnerable position. There is a need for flexibility as well as certainty in such situations. Customary law supports the view that something more than a mere breach itself of a term in an agreement would be necessary to give the other party or parties the right to abrogate that agreement. In the *Tacna-Arica* arbitration,[207] between Chile and Peru, the arbitrator noted, in referring to an agreement about a plebiscite in former Peruvian territory occupied by Chile, that:

[204] Article 59.

[205] See e.g. S. Rosenne, *Breach of Treaty*, Cambridge, 1985. See also D. N. Hutchinson, 'Solidarity and Breaches of Multilateral Treaties', 59 BYIL, 1988, p. 151, and M. M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach*, The Hague, 1996.

[206] See above, chapter 14, p. 794.

[207] 2 RIAA, p. 921 (1925).

> [i]t is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement.[208]

The relevant provision of the Vienna Convention is contained in article 60, which codifies existing customary law.[209] Article 60(3) declares that a material breach of a treaty consists in either a repudiation of the treaty not permitted by the Vienna Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[210] The second part of article 60(3) was applied in the *Rainbow Warrior* case,[211] where the obligation to confine the two French agents in question on a Pacific Island for a minimum period of three years was held to have constituted the object or purpose of the New Zealand–France Agreement, 1986 so that France committed a material breach of this treaty by permitting the agents to leave the island before the expiry of the three-year period.

Where such a breach occurs in a bilateral treaty, then under article 60(1) the innocent party may invoke that breach as a ground for terminating the treaty or suspending its operation in whole or in part. The International Court has made clear that it is only a material breach of the treaty itself, by a state party to it, which entitles the other party to rely on it for grounds of termination.[212] Further, termination on the basis of a breach which has not yet occurred, such as Hungary's purported termination of a bilateral treaty on the basis of works done by Czechoslovakia which had not at the time resulted in a diversion of the Danube River, would be deemed premature and would not be lawful.[213]

There is a rather different situation in the case of a multilateral treaty since a number of innocent parties are involved that might not wish the treaty to be denounced by one of them because of a breach by another state. To cover such situations, article 60(2) prescribes that a material breach of a multilateral treaty by one of the parties entitles:

[208] *Ibid.*, pp. 943–4.
[209] See the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 38; 116 ILR, p. 1. See also B. Simma and C. J. Tams, 'Article 60' in Corten and Klein, *Conventions de Vienne*, p. 2131.
[210] See the *Namibia* case, ICJ Reports, 1971, pp. 16, 46–7; 49 ILR, pp. 2, 37.
[211] 82 ILR, pp. 499, 564–6.
[212] The *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 65; 116 ILR, p. 1.
[213] ICJ Reports, 1997, p. 66.

(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;
(c) any party other than the defaulting state to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.[214]

It is interesting to note that the provisions of article 60 regarding the definition and consequences of a material breach do not apply, by article 60(5), to provisions relating to the 'protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'. This is because objective and absolute principles are involved and not just reciprocal rights and duties.[215]

Supervening impossibility of performance[216]

Article 61 of the Convention[217] is intended to cover such situations as the submergence of an island, or the drying up of a river where the consequence of such events is to render the performance of the treaty impossible. Where the carrying out of the terms of the agreement becomes impossible because of the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty', a party may validly terminate or withdraw from it. However, where the impossibility is only temporary, it may be invoked solely to suspend the operation of the treaty. Impossibility cannot be used in this way where it arises from the breach

[214] See *Yearbook of the ILC*, 1966, vol. II, pp. 253–5. See also the *Namibia* case, ICJ Reports, 1971, pp. 16, 47; 49 ILR, p. 37, and the *US–France Air Services Agreement* case, 54 ILR, pp. 304, 331.

[215] See e.g. G. Fitzmaurice, 'General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 HR, 1957, pp. 1, 125–6, and above, chapter 7, p. 348.

[216] See e.g. McNair, *Law of Treaties*, pp. 685–8, and Sinclair, *Vienna Convention*, pp. 190–2.

[217] This is also a codification of customary law: see the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 38; 116 ILR, p. 1.

by the party attempting to terminate or suspend the agreement of a treaty or other international obligation owed to any other party to the treaty.[218]

Fundamental change of circumstances[219]

The doctrine of *rebus sic stantibus* is a principle in customary international law providing that where there has been a fundamental change of circumstances since an agreement was concluded, a party to that agreement may withdraw from or terminate it. It is justified by the fact that some treaties may remain in force for long periods of time, during which fundamental changes might have occurred. Such changes might encourage one of the parties to adopt drastic measures in the face of a general refusal to accept an alteration in the terms of the treaty. However, this doctrine has been criticised on the grounds that, having regard to the absence of any system for compulsory jurisdiction in the international order, it could operate as a disrupting influence upon the binding force of obligations undertaken by states. It might be used to justify withdrawal from treaties on rather tenuous grounds.[220]

The modern approach is to admit the existence of the doctrine, but severely restrict its scope.[221] The International Court in the *Fisheries Jurisdiction* case declared that:

> [i]nternational law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under

[218] See *Yearbook of the ILC*, 1966, vol. II, p. 256. See also the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 63–4; 116 ILR, p. 1.

[219] See e.g. M. N. Shaw and C. Fournet, 'Article 62' in Corten and Klein, *Conventions de Vienne*, p. 2229; D. F. Vagts, '*Rebus* Revisited: Changed Circumstances in Treaty Law', 43 *Columbia Journal of Transnational Law*, 2004–5, p. 459; M. Bennett and N. Roughan, '*Rebus Sic Stantibus* and the Treaty of Waitangi', 37 *Victoria University Wellington Law Review* 2006, 505; C. Hill, *The Doctrine of Rebus Sic Stantibus in International Law*, Leiden, 1934; O. Lissitzyn, 'Treaties and Changed Circumstances (*Rebus Sic Stantibus*)', 61 AJIL, 1967, p. 895; P. Cahier, 'Le Changement Fondamental de Circonstances et la Convention de Vienne de 1969 sur le Droit des Traités' in *Mélanges Ago*, Milan, 1987, vol. I, p. 163, and Vamvoukis, *Termination*, part 1. See also *Yearbook of the ILC*, 1966, vol. II, pp. 257 ff. Note the decision in *TWA Inc.* v. *Franklin Mint Corporation* 23 ILM, 1984, pp. 814, 820, that a private person could not plead the *rebus* rule.

[220] This was apparently occurring in the immediate pre-1914 period: see J. Garner, 'The Doctrine of *Rebus Sic Stantibus* and the Termination of Treaties', 21 AJIL, 1927, p. 409, and Sinclair, *Vienna Convention*, p. 193. See also G. Harastzi, 'Treaties and the Fundamental Change of Circumstances', 146 HR, 1975, p. 1.

[221] See e.g. the *Free Zones* case, PCIJ, Series A/B, No. 46, pp. 156–8; 6 AD, pp. 362, 365.

> certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.[222]

Before the doctrine may be applied, the Court continued, it is necessary that such changes 'must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken'.[223]

Article 62 of the Vienna Convention, which the International Court of Justice regarded in many respects as a codification of existing customary law,[224] declares that:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>   (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>   (a) if the treaty establishes a boundary; or
>   (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

The article also notes that instead of terminating or withdrawing from a treaty in the above circumstances, a party might suspend the operation of the treaty.

The doctrine was examined in the *Gabčíkovo–Nagymaros Project* case, where the International Court concluded that:

> 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

[222] ICJ Reports, 1973, pp. 3, 20–1; 55 ILR, p. 183. [223] *Ibid.*
[224] ICJ Reports, 1973, p. 18. See also the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 38; 116 ILR, p. 1.

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 should be applied only in exceptional cases.[225]

Consequences of the termination or suspension of a treaty

Article 70 provides that:

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
   (a) releases the parties from any obligation further to perform the treaty;
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 72 provides that:

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:
   (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;
   (b) does not otherwise affect the legal relations between the parties established by the treaty.
2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.[226]

Dispute settlement[227]

Article 66 provides that if a dispute has not been resolved within twelve months by the means specified in article 33 of the UN Charter then further

[225] ICJ Reports, 1997, p. 65. This was followed by the European Court of Justice in *Racke* v. *Hauptzollamt Mainz* [1998] ECR I-3655, 3705–7. Draft article 3 of the ILC Draft Articles on the Effects of Armed Conflicts on Treaties, A/CN.4/178, 2007, p. 7, provides that the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as (a) between the parties to the armed conflict and (b) between one or more parties to the armed conflict and a third state.

[226] See also article 65 with regard to the relevant procedures to be followed.

[227] See e.g. Aust, *Modern Treaty Law*, chapter 20; H. Ruiz Fabri, 'Article 66' in Corten and Klein, *Conventions de Vienne*, p. 2391, and J. G. Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2004. See also below, chapter 18.

procedures will be followed. If the dispute concerns article 53 or 64 (*jus cogens*), any one of the parties may by a written application submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration. If the dispute concerns other issues in the Convention, any one of the parties may by request to the UN Secretary-General set in motion the conciliation procedure laid down in the Annex to the Convention.

Treaties between states and international organisations[228]

The International Law Commission completed Draft Articles on the Law of Treaties between States and International Organisations or between International Organisations in 1982 and the Vienna Convention on the Law of Treaties between States and International Organisations was adopted in 1986.[229] Its provisions closely follow the provisions of the 1969 Vienna Convention *mutatis mutandis*. However, article 73 of the 1986 Convention notes that 'as between states parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those states under a treaty between two or more states and one or more international organisations shall be governed by that Convention'. Whether this provision affirming the superiority of the 1969 Convention for states will in practice prejudice the interests of international organisations is an open question. In any event, there is no doubt that the strong wish of the Conference adopting the 1986 Convention was for uniformity, despite arguments that the position of international organisations in certain areas of treaty law was difficult to assimilate to that of states.[230]

Special concern in the International Law Commission focused on the effects that a treaty concluded by an international organisation has upon the member states of the organisation. Article 36 *bis* of the ILC Draft[231] provided that:

> Obligations and rights arise for states members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of

[228] See e.g. G. Gaja, 'A "New" Vienna Convention on Treaties Between States and International Organisations or Between International Organisations: A Critical Commentary', 58 BYIL, 1987, p. 253, and F. Morgenstern, 'The Convention on the Law of Treaties Between States and International Organisations or Between International Organisations' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 435.

[229] See above, footnote 2.

[230] See Morgenstern, 'Convention', pp. 438–41.

[231] Described in the ILC Commentary as the article arousing the most controversy, *Yearbook of the ILC*, 1982, vol. II, part 2, p. 43.

> establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:
>
> (a) the states members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and
> (b) the assent of the states members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating states and negotiating organizations.

Such a situation would arise, for example, in the case of a customs union, which was an international organisation, normally concluding tariff agreements to which its members are not parties. Such agreements would be of little value if they were not to be immediately binding on member states.[232]

However, despite the fact that the European Community was particularly interested in the adoption of this draft article, it was rejected at the Conference.[233] It was replaced by article 74(3) of the Convention, which provides:

> The provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for states members of an international organisation under a treaty to which that organisation is a party.

Accordingly, the situation in question would fall to be resolved on the basis of the consent of the states concerned in the specific circumstances and on a case-by-case basis.

The other area of difference between the 1986 and 1969 Conventions concerns the provisions for dispute settlement. Since international organisations cannot be parties to contentious proceedings before the International Court, draft article 66 provided for the compulsory arbitration of disputes concerning issues relating to the principles of *jus cogens*, with the details of the proposed arbitral tribunal contained in the Annex. The provisions of the 1969 Convention relating to the compulsory conciliation of disputes concerning the other articles were incorporated in the draft with little change. The 1986 Convention itself, however, adopted a different approach. Under article 66(2), where an international organisation authorised under article 96 of the UN Charter to request advisory

[232] *Ibid.*, pp. 43–4. [233] See e.g. Gaja, '"New" Vienna Convention', p. 264.

opinions is a party to a dispute concerning *jus cogens*, it may apply for an advisory opinion to the International Court, which 'shall be accepted as decisive by all the parties to the dispute concerned'. If the organisation is not so authorised under article 96, it may follow the same procedure acting through a member state. If no advisory opinion is requested or the Court itself does not comply with the request, then compulsory arbitration is provided for.[234]

Suggestions for further reading

A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007

M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties*, Utrecht, 2005

I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester, 1984

[234] See also above, chapter 14, p. 778, regarding the relationship between treaties and state responsibility. The issue of state succession to treaties is covered in chapter 17, p. 966.

17

State succession

Political entities are not immutable. They are subject to change. New states appear and old states disappear.[1] Federations, mergers, dissolutions and secessions take place. International law has to incorporate such events into its general framework with the minimum of disruption and instability. Such changes have come to the fore since the end of the Second World War and the establishment of over 100 new, independent countries.

Difficulties may result from the change in the political sovereignty over a particular territorial entity for the purposes of international law and the world community. For instance, how far is a new state bound by

[1] See generally D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge, 2 vols., 1967; O'Connell, 'Recent Problems of State Succession in Relation to New States', 130 HR, 1970, p. 95; K. Zemanek, 'State Succession after Decolonisation', 116 HR, 1965, p. 180; O. Udokang, *Succession of New States to International Treaties*, New York, 1972; J. H. W. Verzijl, *International Law in Historical Perspective*, Leiden, 1974, vol. VII; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, chapter 29; UN, *Materials on Succession of States*, New York, 1967 and supplement A/CN.4/263, 1972, and UN, *Materials on Succession of States in Matters Other than Treaties*, New York, 1978; International Law Association, *The Effect of Independence on Treaties*, London, 1965; Z. Mériboute, *La Codification de la Succession d'États aux Traités*, Paris, 1984; S. Torres Bernardez, 'Succession of States' in *International Law: Achievements and Prospects* (ed. M. Bedjaoui), Paris, 1991, p. 381; D. Bardonnet, *La Succession d'États à Madagascar*, Paris, 1970; R. Müllerson, 'The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia', 42 ICLQ, 1993, p. 473; M. Koskenniemi and M. Lehto, 'La Succession d'États dans l'ex-URSS', AFDI, 1992, p. 179; M. Bedjaoui, 'Problèmes Récents de Succession d'États dans les États Nouveaux', 130 HR, 1970, p. 455; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 208; J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006; P. Radan, *The Break-up of Yugoslavia and International Law*, London, 2002; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 538; M. N. Shaw, 'State Succession Revisited', 5 Finnish YIL, 1994, p. 34; *Succession of States* (ed. M. Mrak), The Hague, 1999; B. Stern, 'La Succession d'États', 262 HR, 1996, p. 9; *State Succession: Codification Tested against Facts* (eds. P. M. Eisemann and M. Koskenniemi), Dordrecht, 2000, and *State Practice Regarding State Succession and Issues of Recognition* (eds. J. Klabbers *et al.*), The Hague, 1999.

the treaties and contracts entered into by the previous sovereign of the territory? Does nationality automatically devolve upon the inhabitants to replace that of the predecessor? What happens to the public property of the previous sovereign, and to what extent is the new authority liable for the debts of the old?

State succession in international law cannot be confused with succession in municipal law and the transmission of property and so forth to the relevant heir. Other interests and concerns are involved and the principles of state sovereignty, equality of states and non-interference prevent a universal succession principle similar to domestic law from being adopted. Despite attempts to assimilate Roman law views regarding the continuity of the legal personality in the estate which falls by inheritance,[2] this approach could not be sustained in the light of state interests and practice. The opposing doctrine, which basically denied any transmission of rights, obligations and property interests between the predecessor and successor sovereigns, arose in the heyday of positivism in the nineteenth century. It manifested itself again with the rise of the decolonisation process in the form of the 'clean slate' principle, under which new states acquired sovereignty free from encumbrances created by the predecessor sovereign.

The issue of state succession can arise in a number of defined circumstances, which mirror the ways in which political sovereignty may be acquired by, for example, decolonisation of all or part of an existing territorial unit, dismemberment of an existing state, secession, annexation and merger. In each of these cases a once-recognised entity disappears in whole or in part to be succeeded by some other authority, thus precipitating problems of transmission of rights and obligations. However, the question of state succession does not infringe upon the normal rights and duties of states under international law. These exist by virtue of the fundamental principles of international law and as a consequence of sovereignty and not as a result of transference from the previous sovereign. The issue of state succession should also be distinguished from questions of succession of governments, particularly revolutionary succession, and consequential patterns of recognition and responsibility.[3]

In many cases, such problems will be dealt with by treaties, whether multilateral treaties dealing with primarily territorial dispositions as, for example, the Treaty of St Germain, 1919, which resolved some succession questions relating to the dissolution of the Austro-Hungarian

[2] See O'Connell, *State Succession*, vol. I, pp. 9 ff. [3] See above, chapters 9 and 14.

Empire,[4] or bilateral agreements as between, for instance, colonial power and new state, which, however, would not bind third states. The system of devolution agreements signed by the colonial power with the successor, newly decolonised state, was used by, for example, the UK, France and the Netherlands. Such agreements provided in general that all the rights and benefits, obligations and responsibilities devolving upon the colonial power in respect of the territory in question arising from valid international instruments, would therefore devolve upon the new state.[5] This system, however, was not seen as satisfactory by many new states and several of them resorted to unilateral declarations, providing for a transitional period during which treaties entered into by the predecessor state would continue in force and be subject to review as to which should be accepted and which rejected.[6] In the case of bilateral treaties, those not surviving under customary law would be regarded as having terminated at the end of the period.

However, the issue of state succession in international law is particularly complex. Many of the rules have developed in specific response to particular political changes and such changes have not always been treated in a consistent manner by the international community.[7] The Arbitration Commission established by the Conference on Yugoslavia, for instance, emphasised that 'there are few well-established principles of international law that apply to state succession. Application of these principles is largely to be determined case by case, though the 1978 and 1983 Vienna Conventions do offer some guidance',[8] while the German Federal Supreme Court noted in the *Espionage Prosecution* case that 'the problem of state succession is one of the most disputed areas of

[4] See O'Connell, *State Succession*, vol. II, pp. 178–82. This treaty provided for the responsibility of the successor states of the Austro-Hungarian Empire for the latter's public debts. See also the Italian Peace Treaty, 1947.

[5] See e.g. the UK–Burma Agreement of 1947. See also N. Mugerwa, 'Subjects of International Law' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, pp. 247, 300–1, and *Yearbook of the ILC*, 1974, vol. II, p. 186. See also O'Connell, *State Succession*, vol. II, pp. 352–73, and Brownlie, *Principles*, p. 633.

[6] See e.g. the Tanganyika statement of December 1961, quoted in Mugerwa, 'Subjects', p. 302, subsequently followed by similar declarations by, for example, Uganda, Kenya and Burundi. See also *Yearbook of the ILC*, 1974, vol. II, p. 192. In Zambia's case, it was stated that the question would be governed by customary international law: see O'Connell, *State Succession*, vol. II, p. 115.

[7] See Shaw, 'State Succession Revisited'.

[8] Opinion No. 13, 96 ILR, pp. 726, 728. See also *Oppenheim's International Law*, p. 236, and *Third US Restatement of Foreign Relations Law*, Washington, 1987, p. 100.

international law'.[9] The international aspects of succession are governed through the rules of customary international law. There are two relevant Conventions, the Vienna Convention on Succession of States in Respect of Treaties, 1978, which entered into force in 1996, and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983, which is not yet in force. However, many of the provisions contained in these Conventions reflect existing international law.

State succession itself may be briefly defined as the replacement of one state by another in the responsibility for the international relations of territory.[10] However, this formulation conceals a host of problems since there is a complex range of situations that stretches from continuity of statehood through succession to non-succession. State succession is essentially an umbrella term for a phenomenon occurring upon a factual change in sovereign authority over a particular territory. In many circumstances it is unclear as to which rights and duties will flow from one authority to the other and upon which precise basis. Much will depend upon the circumstances of the particular case, for example whether what has occurred is a merger of two states to form a new state; the absorption of one state into another, continuing state; a cession of territory from one state to another; secession of part of a state to form a new state; the dissolution or dismemberment of a state to form two or more states, or the establishment of a new state as a result of decolonisation. The role of recognition and acquiescence in this process is especially important.

The relevant date of succession is the date at which the successor state replaces the predecessor state in the responsibility for the international relations of the territory to which the succession relates.[11] This is invariably the date of independence. However, problems may arise where successive dates of independence arise with regard to a state that is slowly disintegrating, such as Yugoslavia. The Yugoslav Arbitration Commission noted

[9] Case No. 2 BGz 38/91, 94 ILR, pp. 68, 77–8.

[10] See article 2 of the Vienna Conventions of both 1978 and 1983 and Opinion No. 1 of the Yugoslav Arbitration Commission, 92 ILR, pp. 162, 165. See also *Guinea-Bissau* v. *Senegal*, 83 ILR, pp. 1, 22 and the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 598; 97 ILR, pp. 266, 514.

[11] See article 2(1)e of the Vienna Convention on Succession of States to Treaties, 1978 and article 11 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983. See also Opinion No. 11 of the Yugoslav Arbitration Commission, 96 ILR, p. 719.

that the date of succession was a question of fact to be assessed in the light of all the relevant circumstances.[12]

Continuity and succession

Questions relating to continuity and succession may be particularly difficult.[13] Where a new entity emerges, one has to decide whether it is a totally separate creature from its predecessor, or whether it is a continuation of it in a slightly different form. For example, it seems to be accepted that India is the same legal entity as British India and Pakistan is a totally new state.[14] Yugoslavia was generally regarded as the successor state to Serbia,[15] and Israel as a completely different being from British mandated Palestine.[16] Cession or secession of territory from an existing state will not affect the continuity of the latter state, even though its territorial dimensions and population have been diminished. Pakistan after the independence of Bangladesh is a good example of this. In such a case, the existing state remains in being, complete with the rights and duties incumbent upon it, save for those specifically tied to the ceded or seceded territory. Where, however, a state is dismembered so that all of its territory falls within the territory of two or more states, these rights and duties will be allocated as between the successor states. In deciding whether continuity or succession has occurred with regard to one of the parties to the process, one has to consider the classical criteria of the creation of statehood,[17] together with assertions as to status made by the parties directly concerned and the attitudes adopted by third states and international organisations.

This issue has arisen recently with regard to events concerning the Soviet Union and Yugoslavia. In the former case, upon the demise of the USSR, the Russian Federation took the position that it was the continuation of that state.[18] This was asserted particularly with regard to membership of the UN.[19] Of great importance was the Decision of the Council of Heads of State of the Commonwealth of Independent States

[12] See Opinion No. 11, 96 ILR, p. 719. However, see also the Yugoslav Agreement on Succession Issues of June 2001, 41 ILM, 2002, p. 3. See further below, p. 989.

[13] See e.g. M. Craven, 'The Problem of State Succession and the Identity of States under International Law', 9 EJIL, 1998, p. 142.

[14] See e.g. *Yearbook of the ILC*, 1962, vol. II, pp. 101–3.

[15] See e.g. O'Connell, *State Succession*, vol. II, pp. 378–9. See also *Artukovic* v. *Rison* 784 F.2d 1354 (1986).

[16] O'Connell, *State Succession*, vol. II, pp. 155–7.

[17] See above, chapter 5, p. 197.

[18] See e.g. R. Müllerson, *International Law, Rights and Politics*, London, 1994, pp. 140–5, and Y. Blum, 'Russia Takes over the Soviet Union's Seat at the United Nations', 3 EJIL, 1992, p. 354.

[19] See 31 ILM, 1992, p. 138.

on 21 December 1991 supporting Russia's continuance of the membership of the USSR in the UN, including permanent membership of the Security Council, and other international organisations.[20] Although not all of the instruments produced by the Commonwealth of Independent States at the end of 1991 were strictly consistent with the continuity principle,[21] it is clear that Russia's claim to be the continuation of the USSR (albeit within different borders of course) was supported by the other former Republics and was accepted by international practice.[22] A rather special situation arose with respect to the Baltic states (Estonia, Latvia and Lithuania), which became independent after the First World War, but were annexed by the Soviet Union in 1940. This annexation had been refused recognition by some states[23] and accepted *de facto* but not *de jure* by some others.[24] The Baltic states declared their independence in August 1991.[25] The European Community adopted a Declaration on 27 August 1991 welcoming 'the restoration of the sovereignty and independence of the Baltic states which they lost in 1941'.[26] The United States recognised the restoration of the independence of the Baltic states on 4 September 1991.[27] The implication of this internationally accepted restoration of independence would appear to be that these states do not constitute successor states to the former USSR and would therefore be

[20] *Ibid.*, p. 151.

[21] For example, the Minsk Agreement signed by Russia, Belarus and Ukraine stated that the USSR 'as a subject of international law no longer existed', while the Alma Ata Declaration, signed by all of the former Soviet Republics except for Georgia (which acceded in 1993) and the Baltic states, stated that 'with the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist', *ibid.*, pp. 147–9.

[22] See e.g. the views expressed by the Secretary of State for Foreign and Commonwealth Affairs, UKMIL, 63 BYIL, 1992, pp. 639 and 652–5, and the comments by an official of the FCO submitted to the Outer House of the Court of Session in Scotland in *Coreck Maritime GmbH* v. *Sevrybokholodflot*, UKMIL, 64 BYIL, 1993, p. 636. As to French practice recognising Russia as the continuation of the USSR, see AFDI, 1993, p. 1038. See also L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, p. 539. Note that there is a distinction between the issue of continuity or succession to membership of international organisations and continuity or succession generally. However, the nature and importance of the UN is such that the question of membership of that organisation is strong evidence of continuity generally.

[23] For example the USA: see *Oppenheim's International Law*, p. 193. As to French practice, see AFDI, 1993, p. 1038 and *Gerbaud* v. *Meden* 18 ILR, p. 288.

[24] See, for example, the UK: see *A/S Tallinna Laevauhisus* v. *Tallinna Shipping Co. (The Vapper)* (1946) 79 LL. R 245 and the statement of the Secretary of State for the Foreign and Commonwealth Office on 16 January 1991, 183 HC Deb., col. 853.

[25] See Müllerson, *International Law*, pp. 119–20.

[26] See UKMIL, 62 BYIL, 1991, p. 558.

[27] See Müllerson, *International Law*, p. 121.

free of such rights and obligations as would be consequential upon such succession.[28]

In contrast to this situation, the issue of Yugoslavia has been more complicated and tragic. The collapse of the Socialist Federal Republic of Yugoslavia (the SFRY) took place over several months[29] as the various constituent republics proclaimed independence.[30] The process was regarded as having been completed in the view of the Arbitration Commission on Yugoslavia[31] by the time of its Opinion No. 8 issued on 4 July 1992.[32] The Commission noted that a referendum had been held in Bosnia and Herzegovina in February and March 1992 producing a majority in favour of independence, while Serbia and Montenegro had a established 'a new state, the "Federal Republic of Yugoslavia"' on 27 April 1992. The Commission noted that the common federal bodies of the SFRY had ceased to function, while Slovenia, Croatia and Bosnia had been recognised by the member states of the European Community and other states and had been admitted to membership of the UN.[33] The conclusion was that the former SFRY had ceased to exist.[34] This was particularly reaffirmed in Opinion No. 10.[35]

Nevertheless, the Federal Republic of Yugoslavia (Serbia and Montenegro) continued to maintain that it constituted not a new state, but the continuation of the former SFRY. This claim was opposed by the other former republics of the SFRY[36] and by the international community.[37]

[28] See Shaw, 'State Succession Revisited', pp. 56 ff.

[29] See generally M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86 AJIL, 1992, p. 569; Y. Blum, 'UN Membership of the "New" Yugoslavia: Continuity or Break ?', 86 AJIL, 1992, p. 830, and Müllerson, *International Law*, pp. 125 ff.

[30] Slovenia and Croatia on 25 June 1991 (postponed for three months) and Macedonia on 17 September 1991. Bosnia and Herzegovina adopted a resolution on sovereignty on 14 October 1991. The view taken at this point by Opinion No. 1 issued by the Arbitration Commission, established by the Conference on Yugoslavia convened by the European Community on 17 August 1991, was that 'the Socialist Federal Republic of Yugoslavia was in process of dissolution', 92 ILR, p. 166. See also M. Craven, 'The EC Arbitration Commission on Yugoslavia', 66 BYIL, 1995, p. 333.

[31] Which consisted of five of the Presidents of Constitutional Courts in EC countries, chaired by M. Badinter.

[32] 92 ILR, p. 199.

[33] On 22 May 1992: see General Assembly resolutions, 46/236; 46/237 and 46/238. Note that the 'Former Yugoslav Republic of Macedonia' was admitted to the UN on 8 April 1993: see Security Council resolution 817 (1993).

[34] 92 ILR, p. 202. See also Opinion No. 9, *ibid.*, p. 203.

[35] *Ibid.*, p. 206.

[36] See e.g. E/CN.4/1995/121 and E/CN.4/1995/122.

[37] Note, for example, that both the International Monetary Fund (on 15 December 1992) and the World Bank (on 25 February 1993) found that the former Yugoslavia had ceased

The Security Council, for example, in resolution 777 (1992) declared that 'the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist' and that 'the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations'.[38] However, the Yugoslav position changed in 2000 and it requested admission to the UN as a new member.[39] The question as to the legal status of Yugoslavia as between 1992 and 2000 remained a source of some controversy, since its admission to the UN in 2000 could not operate retroactively. The International Court in 2003 described this situation as *sui generis* and fraught with legal difficulties,[40] but in its judgment in the series of cases brought by Yugoslavia against NATO members following the Kosovo conflict in 1999, the Court concluded that Yugoslavia had been a a member of the UN (and thus a party to the Statute of the Court) from 1 November 2000 and that the *sui generis* status of that state could not have amounted to membership of the UN.[41] Accordingly, while in 1996 the Court decided that Yugoslavia could appear before it in the *Genocide Convention (Bosnia* v. *Serbia)* case, it held in 2003 that the situation as to Yugoslavia's status was *sui generis* and not without legal difficulty but finally decided in 2004 that Yugoslavia could not bring an action against NATO states as it had not been a member of the UN and thus a party to the Statute in 1999.[42] In its decision on the merits in the *Genocide Convention* case in 2007, the Court noted that its decision of 1996 constituted *res judicata* and could not be re-opened in the light of its subsequent rulings.[43]

State succession also covers the situation of unification. One method of unification is by the creation of a totally new state, such as the merger of the Yemen Arab Republic and the People's Democratic Republic of

to exist: see P. R. Williams, 'State Succession and the International Financial Institutions', 43 ICLQ, 1994, pp. 776, 802–3.

38 See also Security Council resolution 757 (1992) and General Assembly resolution 47/1. See also the letter dated 29 September 1992 from the UN Legal Counsel carefully analysing the legal situation in terms of representation, A/47/485, Annex and the *Genocide Convention* case, ICJ Reports, 1993, pp. 3, 13–14; 95 ILR, pp. 1, 28–9.

39 It was so admitted on 1 November 2000: see General Assembly resolution 55/12. On 4 February 2003, the name of the country was officially changed from the Federal Republic of Yugoslavia to Serbia and Montenegro and thence to Serbia upon the secession of Montenegro on 28 June 2006: see General Assembly resolution 60/264. See also Crawford, *Creation of States*, pp. 707 ff.

40 See *Application for Revision of the Judgment of 11 July 1996*, ICJ Reports, 2003, pp. 7, 31.

41 *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, pp. 1307, 1335 ff.

42 See the critical comments on this 'change of position' by the Court by seven judges in their joint declaration, *ibid*, pp. 1353, 1355–7.

43 ICJ Reports, 2007, paras. 105 ff.

Yemen. Under the agreement between the two states of 22 April 1990 the establishment of the Republic of Yemen was accomplished by way of a merger of the two existing states into a new entity with a new name.[44] Unification may also be achieved by the absorption of one state by another in circumstances where the former simply disappears and the latter continues, albeit with increased territory and population. Such was the case with Germany.

Following the conclusion of the Second World War, Germany was divided into the US, USSR, UK and French zones of occupation and a special Berlin area not forming part of any zone.[45] Supreme authority was exercised initially by the Commanders-in-Chief of the Armed Forces of the Four Allied Powers[46] and subsequently by the three Allied High Commissioners in Bonn, with parallel developments occurring in the Soviet zone. The Convention on Relations between the Three Powers and the Federal Republic of Germany (FRG), which came into force in 1955, terminated the occupation regime and abolished the Allied High Commission. The Three Allied Powers retained, however, their rights and obligations with regard to Berlin[47] and relating to 'Germany as a whole, including the reunification of Germany and a peace settlement'.[48] Recognition of the German Democratic Republic (GDR) was on the same basis, i.e. as a sovereign state having full authority over internal and external affairs subject to the rights and responsibilities of the Four Powers in respect of Berlin and Germany as a whole.[49] Accordingly, it was accepted that in some sense Germany as a whole continued to exist as a state in international law.[50] The question of the relationship of the two German states to each other and with respect to the pre-1945 German state has occasioned considerable interest

[44] Article 1 of the Agreement declared that 'there shall be established between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen . . . a full and complete union, based on a merger, in which the international personality of each of them shall be integrated in a single international person called "the Republic of Yemen"': see 30 ILM, 1991, p. 820.

[45] See e.g. the *Fourth Report of the Foreign Affairs Committee, Session 1989–90*, June 1990. Note that part of the Soviet zone was placed under Soviet administration (the city of Königsberg, now Kaliningrad and the surrounding area) and the territory of Germany east of the Oder–Neisse line was placed under Polish administration.

[46] Article 2 of the Agreement on Control Machinery in Germany of 14 November 1944, as amended by the Agreement of 1 May 1945.

[47] See, in particular, I. Hendry and M. Wood, *The Legal Status of Berlin*, Cambridge, 1987. See also Cmd 8571, 1952 and the Quadripartite Agreement on Berlin, Cmnd 5135, 1971.

[48] Article 2 of the Relations Convention. Parallel developments took place in the Soviet zone. Note the USSR–German Democratic Republic Treaty of 1955.

[49] See the Fourth Report, p. 2. [50] *Ibid.*, p. 3.

and generated no little complexity, not least because the Federal German Republic always claimed to be the successor of the pre-1945 Germany.[51]

On 18 May 1990 a treaty between the two German states was signed establishing a Monetary, Economic and Social Union. In essence this integrated the GDR into the FRG economic system, with the Deutsche Mark becoming legal tender in the GDR and with the Bundesbank becoming the central bank for the GDR as well as for the FRG.[52] On 31 August 1990, a second treaty was signed between the two German states which provided for unification on 3 October 1990 by the accession of the GDR under article 23 of the Basic Law of the Federal Republic. On 12 September 1990 the Treaty on the Final Settlement With Respect to Germany was signed by the two German states and the Four Allied Powers.[53] This latter agreement settled definitively matters arising out of the Second World War. It confirmed the borders of unified Germany as those of the FRG and the GDR (i.e. the post-war Oder–Neisse frontier with Poland), provided for a reduction in the armed forces of Germany and for the withdrawal of Soviet forces from the territory of the GDR. The Four Allied Powers terminated their rights and responsibilities regarding Berlin and Germany as a whole so that the united Germany has full sovereignty over its internal and external affairs.[54]

The Treaty between the Federal Republic of Germany and the German Democratic Republic of 31 August 1990 clearly provided that the latter was simply assimilated into the former. Article 1 of the Treaty stipulated that, 'upon the accession of the German Democratic Republic to the Federal Republic of Germany in accordance with article 23 of the Basic Law[55] taking effect on 3 October 1990, the Länder of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia[56] shall become Länder of the Federal Republic of Germany'. This approach, whereby

[51] See e.g. Brownlie, *Principles*, pp. 78–9; M. Whiteman, *Digest of International Law*, Washington, 1963, vol. I, pp. 332–8, and F. A. Mann, 'Germany's Present Legal Status Revisited', 16 ICLQ, 1967, p. 760. See also the decision of the Federal Constitutional Court of the Federal Republic of Germany in *Re Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic 1972*, 78 ILR, p. 149.

[52] See 29 ILM, 1990, p. 1108. [53] See 29 ILM, 1990, p. 1186.

[54] Note that by the Declaration of 1 October 1990, the Allied Powers suspended all rights and responsibilities relating to Berlin and to Germany as a whole upon the unification of Germany, pending the entry into force of the Treaty on the Final Settlement: see Annex 2 of the Observations by the Government to the Fourth Report, October 1990, Cm 1246.

[55] This provided that the Basic Law was to apply in Greater Berlin and specified *Länder* (forming the Federal Republic of Germany), while 'in other parts of Germany it shall be put into force on their accession'. This method had been used to achieve the accession of the Saarland in 1956.

[56] I.e. the constituent provinces of the German Democratic Republic.

unified Germany came about by a process of absorption of the constituent provinces of the former German Democratic Republic into the existing Federal Republic of Germany by way of the extension of the constitution of the latter, is reinforced by other provisions in the Unification Treaty. Article 7, for example, provided that the financial system of the FRG 'shall be extended to the territory specified in article 3' (i.e. the *Länder* of the former GDR), while article 8 declared that 'upon the accession taking effect, federal law shall enter into force in the territory specified in article 3'.[57] International practice also demonstrates acceptance of this approach.[58] No state objected to this characterisation of the process.[59] In other words, the view taken by the parties directly concerned and accepted by the international community demonstrates acceptance of the unification as one of the continuity of the Federal Republic of Germany and the disappearance or extinction of the German Democratic Republic.

Succession to treaties[60]

The importance of treaties within the international legal system requires no repetition.[61] They constitute the means by which a variety of legal obligations are imposed or rights conferred upon states in a wide range of matters from the significant to the mundane. Treaties are founded upon the pre-existing and indispensable norm of *pacta sunt servanda* or the

[57] Note also that under article 11, treaties entered into by the Federal Republic of Germany would continue and extend to the *Länder* of the former German Democratic Republic, while under article 12, the question of the continuation, amendment or expiry of treaties entered into by the former German Democratic Republic was to be discussed individually with contracting parties: see below, p. 971.

[58] Such as the European Community. See, for example, GATT document L/6759 of 31 October 1990 in which the Commission of the European Community stated that Germany had become united by way of the accession of the GDR to the FRG. See generally T. Oeter, 'German Unification and State Succession', 51 ZaöRV, 1991, p. 349; J. Frowein, 'Germany Reunited', *ibid.*, p. 333, and R. W. Piotrowicz and S. K. N. Blay, *The Unification of Germany in International and Domestic Law*, Amsterdam, 1997. See also UK Foreign Office affidavit, UKMIL, 68 BYIL, 1997, p. 520.

[59] See also *Oppenheim's International Law*, p. 210.

[60] Note particularly the work of the International Law Commission on this topic: see *Yearbook of the International Law Commission*, 1974, vol. II, part 1, pp. 157 ff., and the five Reports of Sir Humphrey Waldock (*ibid.*, 1968, vol. II, p. 88; 1969, vol. II, p. 45; 1970, vol. II, p. 25; 1971, vol. II, part 1, p. 143 and 1972, vol. II, p. 1) and the Report of Sir Francis Vallat (*ibid.*, 1974, vol. II, part 1, p. 1). See also the International Law Association, *The Effect of Independence on Treaties*, London, 1965; A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007, chapter 21, and M. Craven, *The Decolonisation of International Law: State Succession and the Law of Treaties*, Oxford, 2007.

[61] See above, chapter 16.

acceptance of treaty commitments as binding. Treaties may fall within the following categories: multilateral treaties, including the specific category of treaties concerning international human rights; treaties concerned with territorial definition and regimes; bilateral treaties; and treaties that are treated as 'political' in the circumstances.

The rules concerning succession to treaties are those of customary international law together with the Vienna Convention on Succession of States in Respect of Treaties, 1978, which came into force in 1996 and which applies with regard to a succession taking place after that date.[62]

As far as devolution agreements are concerned, article 8 of the Convention provides that such agreements of themselves cannot affect third states and this reaffirms an accepted principle, while article 9, dealing with unilateral declarations, emphasises that such a declaration by the successor state alone cannot of itself affect the rights and obligations of the state and third states. In other words, it would appear, the consent of the other parties to the treaties in question or an agreement with the predecessor state with regard to bilateral issues is required.

Categories of treaties: territorial, political and other treaties

Treaties may for succession purposes be generally divided into three categories. The first relates to territorially grounded treaties, under which rights or obligations are imposed directly upon identifiable territorial units. The prime example of these are agreements relating to territorial definition. Waldock, in his first Report on Succession of States and Governments in Respect of Treaties in 1968, declared that 'the weight both of opinion and practice seems clearly to be in favour of the view that boundaries established by treaties remain untouched by the mere fact of a succession. The opinion of jurists seems, indeed, to be unanimous on the point . . . [and] State practice in favour of the continuance in force of boundaries established by treaty appears to be such as to justify the conclusion that a general rule of international law exists to that effect',[63] while Bedjaoui has noted that 'in principle the territory devolves upon the successor State on the basis of the pre-existing boundaries'.[64]

For reasons relating to the maintenance of international stability, this approach has been clearly supported by state practice. The Latin American concept of *uti possidetis juris*, whereby the administrative divisions of the

[62] See article 7.
[63] *Yearbook of the International Law Commission*, 1968, vol. II, pp. 92–3.
[64] *Ibid.*, p. 112.

former Spanish empire were to constitute the boundaries of the newly independent states in South America in the first third of the nineteenth century was the first internationally accepted expression of this approach.[65] It was echoed in US practice[66] and explicitly laid down in resolution 16 of the meeting of Heads of State and Government of the Organisation of African Unity in 1964, by which all member states pledged themselves to respect colonial borders.[67] The principle of succession to colonial borders was underlined by the International Court in the *Burkina Faso/Mali* case.[68] The extension of the principle of *uti possidetis* from decolonisation to the creation of new states out of existing independent states is supported by international practice, taking effect as the transformation of administrative boundaries into international boundaries generally.[69] Of course, much will depend upon the particular situation, including the claims of the states concerned and the attitude adopted by third states and international organisations, particularly the United Nations. This principle regarding the continuity of borders in the absence of consent to the contrary is reinforced by other principles of international law, such as the provision enshrined in article 62(2) of the Vienna Convention on the Law

[65] See, for example, the *Colombia–Venezuela* arbitral award, 1 RIAA, pp. 223, 228 and the *Beagle Channel* award, 52 ILR, p. 93. See also A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law*, Manchester, 1967, p. 114; O'Connell, *State Succession*, vol. II, pp. 273 ff., and P. De La Pradelle, *La Frontière*, Paris, 1928, pp. 86–7.

[66] See the view of the US Secretary of State in 1856 that the US regarded it 'as an established principle of the public law and of international right that when a European colony in America becomes independent it succeeds to the territorial limits of the colony as it stood in the hands of the present country', Manning's *Diplomatic Correspondence*, vol. III (Great Britain), doc. 2767, cited in Cukwurah, *Settlement*, p. 106.

[67] See, for example, M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 185–7, and other works cited in chapter 10, p. 525.

[68] ICJ Reports, 1986, pp. 554, 565; 80 ILR, pp. 440, 469–70. See also the Arbitration Commission on Yugoslavia, which noted in Opinion No. 3 with respect to the status of the former internal boundaries between Serbia on the one hand and Croatia and Bosnia and Herzegovina on the other, that 'except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and in particular, from the principle of *uti possidetis*. *Uti possidetis* . . . is today recognised as a general principle', 92 ILR, pp. 170, 171.

[69] See also article 5 of the Minsk Agreement establishing the Commonwealth of Independent States of 8 December 1991 and the Alma Ata Declaration of 21 December 1991, which reaffirmed the territorial integrity of the former Republics of the USSR. Note also that under the Treaty on the General Delimitation of the Common State Frontiers of 29 October 1992, the boundary between the two new states of the Czech Republic and Slovakia, emerging out of Czechoslovakia on 1 January 1993, was to be that of the administrative border existing between the Czech and Slovak parts of the former state. See further above, chapter 10, p. 528.

of Treaties, which stipulates that a fundamental change in circumstances may not be invoked as a ground for terminating or withdrawing from a treaty that establishes a boundary.[70] In addition, article 11 of the Vienna Convention on Succession to Treaties, although in terminology which is cautious and negative, specifies that

> A succession of States does not as such affect:
>
> (a) a boundary established by treaty; or
> (b) obligations and rights established by a treaty and relating to the regime of a boundary.

The International Court dealt with succession to boundary treaties generally in the *Libya/Chad* case, where it was declared that 'once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasised by the Court'.[71] More particularly, the Court emphasised that 'a boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary . . . when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.'[72] It is particularly important to underline that the succession takes place, therefore, not as such to the boundary treaty but rather to the boundary as established by the treaty. The Tribunal in the *Eritrea/Yemen* case emphasised that boundary and territorial treaties made between two parties constituted a special category of treaties representing a 'legal reality which necessarily impinges upon third states, because they have effect *erga omnes*'.[73]

Territorially grounded treaties extend somewhat beyond the establishment of boundaries into the more controversial area of agreements creating other territorial regimes, such agreements being termed 'localised' or 'real' or 'dispositive'.[74] Examples of such arrangements might include demilitarised zones, rights of transit, port facilities and other servitudes generally.[75] Despite some reservations by members of the

[70] See above, chapter 16, p. 950. [71] ICJ Reports, 1994, pp. 6, 37; 100 ILR, pp. 1, 36.
[72] *Ibid.* [73] 114 ILR, pp. 1, 48.
[74] See O'Connell, *State Succession*, vol. II, pp. 231 ff. See also Udokang, *Succession*, pp. 327 ff.
[75] See Shaw, *Title to Territory*, pp. 244–8. See also the *Free Zones* case, PCIJ, Series A/B, No. 46, 1932, p. 145; 6 AD, pp. 362, 364 and the *Aaland Islands* case, LNOJ, Sp. Supp. No. 3, 1920, p. 18. See above, chapter 10, p. 538, and *Yearbook of the ILC*, 1974, vol. II, pp. 157 and 196 ff. Note that, by article 12(3), the provisions of article 12 do not apply to treaties

International Law Commission[76] and governments,[77] article 12 of the Vienna Convention provides that a succession of states does not as such affect obligations or rights relating to the use of any territory or to restrictions upon its use established by a treaty for the benefit of any foreign state, group of states or all states and considered as attaching to the territory in question. The International Court declared that article 12 reflected a rule of customary law in addressing the issue of territorial regimes in the *Gabčíkovo–Nagymaros Project* case and confirmed that treaties concerning water rights or navigation on rivers constituted territorial treaties.[78] It also noted that since the 1977 treaty in question in that case between Hungary and Czechoslovakia established *inter alia* the navigational regime for an important section of an international waterway, a territorial regime within the meaning of article 12 was created.[79]

Political or 'personal' treaties establish rights or obligations deemed to be particularly linked to the regime in power in the territory in question and to its political orientation. Examples of such treaties would include treaties of alliance or friendship or neutrality.[80] Such treaties do not bind successor states for they are seen as exceptionally closely tied to the nature of the state which has ceased to exist. However, it is not at all clear what the outer limits are to the concept of political treaties and difficulties over definitional problems do exist. Apart from the categories of territorial and political treaties, where succession rules in general are clear, other treaties cannot be so easily defined or categorised for succession purposes and must be analysed separately.

Succession to treaties generally

Practice seems to suggest 'a tendency'[81] or 'a general inclination'[82] to succession to 'some categories of multilateral treaties'[83] or to 'certain

providing for the establishment of foreign military bases on the territory concerned. See further Brownlie, *Principles*, pp. 633 ff., and O'Connell, *State Succession*, vol. II, pp. 12–23 and 231 ff.

[76] See, for example, *Yearbook of the ILC*, 1974, vol. I, pp. 206–7.

[77] See, for example, *UN Conference on Succession of States in Respect of Treaties*, 1977, Comments of Governments (A/Conf.80/5), pp. 145, 153, 161, 167, 170, 171 and 173.

[78] ICJ Reports, 1997, pp. 7, 72; 116 ILR, p. 1.

[79] *Ibid.*, pp. 71–2. See also J. Klabbers, 'Cat on a Hot Tin Roof: The World Court, State Succession and the *Gabčíkovo–Nagymaros* case', 11 *Leiden Journal of International Law*, 1998, p. 345.

[80] See, for example, O'Connell, *State Succession*, vol. II, pp. 2, 80 and 136, and *Oppenheim's International Law*, p. 211.

[81] O'Connell, *State Succession*, vol. II, p. 212.

[82] Udokang, *Succession*, p. 225.

[83] O'Connell, *State Succession*, vol. II, p. 213.

multilateral conventions'.[84] However, this 'modern-classical' approach is difficult to sustain as a general rule of comprehensive applicability.[85] One simply has to examine particular factual situations, take note of the claims made by the relevant states and mark the reactions of third states. In the case of bilateral treaties, the starting-point is from a rather different perspective. In such cases, the importance of the individual contractual party is more evident, since only two states are involved and the treaty is thus more clearly reciprocal in nature. Accordingly, the presumption is one of non-succession, depending upon all the particular circumstances of the case. Practice with regard to the US, Panama, Belgium and Finland supports the 'clean slate' approach.[86]

Absorption and merger

Where one state is absorbed by another and no new state is created (such as the 1990 accession to the Federal Republic of Germany of the *Länder* of the German Democratic Republic), the former becomes extinct whereas the latter simply continues albeit in an enlarged form. The basic situation is that the treaties of the former, certainly in so far as they may be deemed 'political',[87] die with the state concerned,[88] although territorial treaties defining the boundaries of the entity absorbed will continue to define such boundaries. Other treaties are also likely to be regarded as at an end.[89] However, treaties of the absorbing state continue and will extend to the territory of the extinguished state. These principles are, of course, subject to contrary intention expressed by the parties in question. For example, in the case of German unification, article 11 coupled with Annex I of the Unification Treaty, 1990 excluded from the extension of treaties of the Federal Republic of Germany to the territory of the former German Democratic Republic a series of treaties dealing primarily with NATO matters.

Article 31(1) of the Vienna Convention on Succession to Treaties provides that where two or more states unite and form one successor state, treaties continue in force unless the successor state and the other state party or states parties otherwise agree or it appears that this would be incompatible with the object and purpose of the treaty or would radically

[84] Udokang, *Succession*, p. 225.

[85] But see Jenks' view that multilateral law-making treaties devolve upon successor states, 'State Succession in Respect of Law-making Treaties', 29 BYIL, 1952, pp. 105, 108–10.

[86] See, for example, Udokang, *Succession*, pp. 412–15.

[87] See here, for example, *Oppenheim's International Law*, p. 211; Oeter, 'German Unification', p. 363, and Koskenniemi and Lehto, 'La Succession', p. 203.

[88] *Oppenheim's International Law*, p. 211.

[89] *Ibid.*, pp. 212–13.

change the conditions for its operation. Article 31(2) provides that such treaties would apply only in respect of the part of the territory of the successor state in respect of which the treaty was in force at the date of the succession of states. This is so unless the successor state makes a notification that the multilateral treaty in question shall apply in respect of its entire territory[90] or, if the multilateral treaty in question is one in which by virtue either of its terms or by reason of the limited number of participants and its object and purpose the participation of any other state must be considered as requiring the consent of all the parties,[91] the successor state and the other states parties otherwise agree. This general principle would apply also in the case of a bilateral treaty, unless the successor state and the other state party otherwise agree.[92]

While these provisions bear some logic with regard to the situation where two states unite to form a new third state,[93] they do not really take into account the special circumstances of unification where one state simply takes over another state in circumstances where the latter is extinguished. In these situations, the model provided by German unification appears to be fully consistent with international law and of value as a precedent. Article 11 of the Unification Treaty of 31 August 1990 provided that all international treaties and agreements to which the FRG was a contracting party were to retain their validity and that the rights and obligations arising therefrom would apply also to the territory of the GDR.[94] Article 12 provided that international treaties of the GDR were to be discussed with the parties concerned with a view to regulating or confirming their continued application, adjustment or expiry, taking into account protection of confidence, the interests of the state concerned, the

[90] Unless it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation (article 31(3)).

[91] Article 17(3).

[92] See the examples of the union of Egypt and Syria to form the United Arab Republic between 1958 and 1961 and the union of Tanganyika and Zanzibar in 1964, where the treaties of the component territories continued in force within those territorial limits: see O'Connell, *State Succession*, vol. II, pp. 71–8. The article 31 situation has to be distinguished from the situation involving a 'newly independent state', see article 29 and below, p. 977, and from the article 15 situation, where part of the territory of one state is transferred to another state, below, p. 973.

[93] But see above, pp. 967 ff., with regard to boundary treaties and below, p. 981, regarding human rights treaties.

[94] However, as noted, Annex I to the Treaty provided that certain listed treaties are not to apply to the territory of the former GDR. These treaties relate in essence to NATO activities.

treaty obligations of the FRG as well as the principles of a free, democratic order governed by the rule of law, and respecting the competence of the European Communities. The united Germany would then determine its position after such consultations. It was also stipulated that should the united Germany intend to accede to international organisations or other multilateral treaties of which the GDR, but not the FRG, was a member, agreement was to be reached with the respective contracting parties and the European Communities, where the competence of the latter was affected. The situation thus differs from the scenario envisaged in article 31 of the 1978 treaty.[95]

In the case of mergers to form a new third state, the formulation in article 31 is more relevant and acceptable. Practice appears to support that approach. For example, in the cases of both the Egypt–Syria merger to form the United Arab Republic in 1958[96] and the union of Tanganyika and Zanzibar to form Tanzania in 1964,[97] the continuation of treaties in the territories to which they had applied before the respective mergers was stipulated.[98]

Cession of territory from one state to another

When part of the territory of one state becomes part of the territory of another state, the general rule is that the treaties of the former cease to apply to the territory while the treaties of the latter extend to the territory. Article 15 of the Vienna Convention on Succession of States to Treaties, dealing with this 'moving-frontiers' rule,[99] provides for this, with the proviso that where it appears from the treaty concerned or is otherwise established that the application of the treaty to the territory would be incompatible with the object and purpose of the treaty or would radically change the condition for its operation, this extension should not happen. This is basically consistent with state practice. When, for example, the US annexed Hawaii in 1898, its treaties were extended to the islands and

[95] It should also be noted that the *Third US Restatement of Foreign Relations Law*, Washington, 1987, p. 108, provides that 'when a state is absorbed by another state, the international agreements of the absorbed state are terminated and the international agreements of the absorbing state become applicable to the territory of the absorbed state'.

[96] See O'Connell, *State Succession*, vol. II, pp. 71 ff., and D. Cottran, 'Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States', 8 ICLQ, 1959, p. 346.

[97] See O'Connell, *State Succession*, vol. II, pp. 77 ff.

[98] See also *Ltd Partnership Z* v. *High Court (Obergericht) of the Canton of Thurgau*, Federal Supreme Court, Insolvency Chamber, 15 June 2005, partly published as BGE 131 III 448.

[99] *Yearbook of the ILC*, 1974, vol. II, p. 208.

Belgium was informed that US–Belgium commercial agreements were thenceforth to be applied to Hawaii also.[100] Similarly it was held that after 1919, German treaties would not apply to Alsace-Lorraine, while French treaties would thereafter be extended to that territory.[101] Article 15 would therefore seem to reiterate existing custom,[102] although there have been indications to the contrary in the past.[103]

Secession from an existing state to form a new state or states

The factual situations out of which a separation or dismemberment takes place are many and varied. They range from a break-up of a previously created entity into its previous constituent elements, as in the 1961 dissolution of the United Arab Republic into the pre-1958 states of Egypt and Syria or the dissolution of the Federation of Mali, to the complete fragmenting of a state into a variety of successors not being co-terminous with previous territorial units, such as the demise of Austria-Hungary in 1919.[104] Where there is a separation or secession from an independent state which continues, in order to create a new state, the former continues as a state, albeit territorially reduced, with its international rights and obligations intact.[105] With regard to the seceding territory itself, the leading view appears to be that the newly created state will commence international life free from the treaty rights and obligations applicable to its former sovereign.[106] Reasons for this include the important point that it is difficult to maintain as a rule of general application that states that have not signed particular treaties are bound by them.

State practice has essentially reinforced the basic proposition. When Belgium seceded from the Netherlands in 1830, it was deemed to start

[100] See e.g. O'Connell, *State Succession*, vol. II, pp. 377–8.
[101] *Ibid.*, p. 379.
[102] The exception to the 'moving treaty-frontiers' rule reflects the concept that 'political treaties' would not pass, *ibid.*, p. 25. See further above, p. 964, with regard to the reunification of Germany in 1990. See also article IX of Annex 1 of the Anglo-Chinese Agreement, 1984 on Hong Kong, below, p. 1008.
[103] See, for example, O'Connell, *State Succession*, vol. II, pp. 374 ff.
[104] *Ibid.*, chapter 10.
[105] Save, of course, with regard to those that relate solely to the seceding territory.
[106] See O'Connell, *State Succession*, vol. II, pp. 88 ff., and *Oppenheim's International Law*, p. 222. See also the *Third US Restatement of Foreign Relations Law*, p. 108, which provides that 'When part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce.'

international life with 'a clean slate' and the same approach was adopted with regard to the secession of Cuba from Spain in 1898 and that of Panama from Colombia in 1903. Similarly, when Finland seceded from the Russian Empire after the First World War, the view taken by the UK and the US was that Finland was not bound by the existing Russian treaties dealing with the territory.[107]

While essentially this is the position taken by the Vienna Convention on Succession to Treaties with regard to decolonised territories (discussed in the following subsection), article 34 provides that 'any treaty in force at the date of the succession of states in respect of the entire territory of the predecessor state continues in force in respect of each successor state so formed'. Any treaty which applied only to part of the territory of the predecessor state which has become a successor state will continue in force in respect of the latter only. These provisions will not apply if the states concerned otherwise agree or if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.[108]

As far as the predecessor state is concerned in such a situation (assuming the predecessor state remains in existence), article 35 provides that existing treaties remain in force after the succession in respect of the remaining territory, unless the parties otherwise agree or it is established that the treaty related only to the territory which has separated from the predecessor state or it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

The approach in the Vienna Convention was adopted on the basis of the International Law Commission draft which had taken the position that 'in modern international law having regard to the need for the maintenance of the system of multilateral treaties and of the stability of treaty relationships, as a general rule the principle of *de jure* continuity should apply'.[109] This may have been an attempt to distinguish decolonised territories (termed 'newly independent states' in the Convention) from other

[107] *Yearbook of the International Law Commission*, 1974, vol. II, part 1, p. 263. See also O'Connell, *State Succession*, vol. II, pp. 96–100, and *Oppenheim's International Law*, p. 222. See also *Yearbook of the ILC*, 1974, vol. II, part 1, pp. 265–6.

[108] See *Yearbook of the ILC*, 1974, vol. II, pp. 260 ff.

[109] *Yearbook of the ILC*, 1974, vol. II, part 1, p. 169. See also UKMIL, 69 BYIL, 1998, p. 482.

examples of independence, but it constitutes a rather different approach from the traditional one and the formulation in article 34 cannot be taken as necessarily reflective of customary law. Much will depend upon the views of the states concerned.

What can be said is that the requirements of international stability in certain areas in particular will stimulate states generally to encourage an approach of succession to multilateral obligations by the newly independent secessionist states. The Guidelines on Recognition of New States in Eastern Europe and the Soviet Union adopted by the European Community on 16 December 1991 certainly noted that the common position of EC member states on recognition required *inter alia* 'acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability'.[110] But, of course, conditions attached to the essentially political process of recognition are not the same as accepting consequences arising out of succession itself. However, there were certainly indications that the United States was taking the position that Russia and the non-Baltic successor states to the USSR should be regarded as bound by some at least of the Soviet treaties.[111] This approach was clearly developed in view of the political need to ensure continuity with regard to arms control agreements and mechanisms.[112] Of course, the impact of Russia constituting the continuance of the Soviet Union is to maintain in force for the former the obligations of the latter, but there was concern about the control of the nuclear and other weapons subject to treaty regulation which were now situated in the successor states to the USSR. The signing of agreements with the major successor states appears to have mitigated the strength of this particular approach. Indeed, it should be noted that separate agreements with the nuclear successor states of Ukraine, Belarus and Kazakhstan were apparently required in order to ensure the compliance of those states with regard to the arms control treaties binding upon the Soviet Union,[113] although these states

[110] See 92 ILR, pp. 173–4.

[111] See Müllerson, 'Continuity'. See also T. Love, 'International Agreement Obligations after the Soviet Union's Break-up: Current United States Practice and its Consistency with International Law', 26 *Vanderbilt Journal of Transnational Law*, 1993, pp. 373, 396, who notes that the US practice of arguing that treaties are binding upon the republics (apart from the special case of Russia) is inconsistent with the views expressed in the US Restatement, *ibid.*, p. 410. The views of the US Restatement are referred to above, p. 974, note 106.

[112] Müllerson, 'Continuity', at pp. 398–401.

[113] See 'US–CIS Protocol to START Treaty', 86 AJIL, 1992, p. 799. See also the Agreement on Joint Measures with Respect to Nuclear Weapons, 31 ILM, 1992, p. 152, and Müllerson, *International Law*, pp. 150–2.

had agreed generally to be bound by international obligations deriving from treaties signed by the USSR.[114] The US and Ukraine agreed by an exchange of notes on 10 May 1995 that in so far as bilateral treaties between them were concerned, article 34 of the Convention would be taken as 'a point of departure'. A treaty-by-treaty review by the two states was conducted, as a result of which it was decided that some treaties had become obsolete, others would not be applied and others, specifically listed in the Annex to the note, were to be regarded as still in force.[115]

Whether in view of the greatly increased network of multilateral treaties and the vastly enhanced interdependence of states founded and manifested upon such agreement, it is possible to say that the international community is moving towards a position of a presumption of continuity, is in reality difficult to establish. Certainly the potentially disruptive effect of the creation of new states needs to be minimised, but it is far too early to be able to declare that continuity or a presumption of continuity is now the established norm.

'Newly independent states'

The post-Second World War period saw the dismantling of the overseas European empires. Based in international legal terms upon the principle of self-determination, which was founded upon a distinction between such territories and the metropolitan authority, decolonisation produced a number of changes in the international legal system.[116] The Vienna Convention on Succession to Treaties sought to establish a special category relating to decolonised territories. These were termed 'newly independent states' and defined in article 2(1)f as successor states 'the territory of which immediately before the date of the succession of states was a dependent territory for the international relations of which the predecessor state was responsible'.[117] Article 16 laid down the general rule that such states were not bound to maintain in force or to become a party to any treaty by reason only of the fact that the treaty had been in force regarding the territory in question at the date of succession. This approach was deemed to build upon the traditional 'clean slate' principle applying to new states

[114] Alma Ata Declaration, 21 December 1991, 21 ILM, 1992, pp. 148, 149.

[115] See 89 AJIL, 1995, p. 761. The note specifically excluded matters concerning succession to USA–USSR bilateral arms limitation and related agreements, with regard to which special mechanisms had been established.

[116] See above, chapter 5, p. 251.

[117] See also the Vienna Convention on Succession to State Property, Archives and Debt, 1983, article 2(1)e.

created out of existing states, such as the United States and the Spanish American Republics when they had obtained independence.[118] This was also consistent with the view taken by the UN Secretariat in 1947 when discussing Pakistan's position in relation to the organisation, where it was noted that 'the territory which breaks off, Pakistan, will be a new state; it will not have the treaty rights and obligations of the old state'.[119]

It should be noted that the provision dealing with bilateral treaties was more vigorously worded, no doubt because the personal and reciprocal nature of such treaties is that more obvious, or in the words of the International Law Commission 'dominant', and also because, unlike the case of multilateral treaties, there is no question of the treaty coming into force between the new state and the predecessor state.[120] While state practice demonstrates some continuity in areas such as air services agreements and trade agreements, the Commission felt that this did not reflect a customary rule, as distinct from the will of the states concerned, and that the fundamental rule with regard to bilateral treaties was that their continuance in force after independence was a matter for agreement, express or tacit, between the newly independent state and the other state party which had contracted with the predecessor state.[121] Article 24 notes that a bilateral treaty in force for the territory in question is considered to be in force for the newly independent state and the other state party where they expressly so agree or by reason of their conduct they are to be considered as having so agreed.[122]

There is, of course, a distinction between a new state being obliged to become a party to a treaty binding the predecessor state and having the facility or perhaps even the right to become a party to that treaty. Practice shows that new states may benefit from a 'fast track' method of participating in treaties. For example, new states are not required to adhere to the formal mechanism of accession as if they were existing

[118] See *Yearbook of the ILC*, 1974, vol. II, part 1, p. 211. See also, as to the theoretical basis of the 'clean slate' principle, the Separate Opinion of Judge Weeramantry, *Application of the Genocide Convention (Bosnia and Herzegovina* v. *Yugoslavia)*, ICJ Reports, 1996, pp. 595, 644; 115 ILR, p. 10.

[119] *Yearbook of the ILC*, 1974, vol. II, part 1, p. 211.

[120] *Ibid.*, p. 237. [121] *Ibid.*, pp. 237–9.

[122] The above rules also apply to newly independent states (as defined in the Convention) formed from two or more territories: see article 30 (referring to articles 16–29). Where a treaty affects one or more but not all of the territories in question, there is a presumption that on succession it will apply to the newly independent state, *ibid*. See also *Re Bottali* 78 ILR, p. 105 and *M* v. *Federal Department of Justice and Police* 75 ILR, p. 107.

non-party states[123] and article 17 of the Vienna Convention provides that a 'newly independent state' may by a notification of succession establish its status as a party to a multilateral treaty which at the date of succession was in force in respect of the territory to which the succession relates, unless it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent state would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation. In addition, where it appears from the nature of the treaty itself that the participation of any other state would require the consent of all the parties, such consent must be forthcoming for the new state to participate.[124]

The 'clean slate' principle has also in practice been mitigated by the terms of the process by which many colonies achieved independence. A number of colonial powers, particularly the United Kingdom, adopted the practice of concluding devolution agreements by which certain treaties signed on behalf of the territory becoming independent continued to apply to the newly independent state.[125] While such agreements would be considered *res inter alios* with regard to third states, they were of value in establishing the appropriate framework for relations between the former colonial power and the new state. Other newly independent states adopted the practice of making unilateral declarations by which they made known their views as to treaty succession. Such unilateral declarations often took the form of specifying that treaties would continue in force for an interim period during which time they would be reviewed,[126] but they could not in themselves, of course, alter treaty relationships with third states.[127] Devices such as devolution agreements and unilateral declarations were of value, however, in mitigating the effects that an absolute 'clean slate' approach might otherwise have had.

Dissolution of states

Where an existing state comes to an end as an international person and is replaced by two or more other states, it is accepted that political treaties will not continue but that territorially grounded treaties will continue to attach

[123] See *Oppenheim's International Law*, p. 229.
[124] Article 17(3). See also article 27(2).
[125] See, for example, O'Connell, *State Succession*, vol. II, pp. 352 ff., and *Yearbook of the ILC*, 1974, vol. II, part 1, pp. 182–7. See also article 8 of the Vienna Convention.
[126] See, for a survey of practice, *Yearbook of the ILC*, 1974, vol. II, part 1, pp. 187–93.
[127] See article 9 of the Vienna Convention.

to the territories in question now subject to new sovereign arrangements. The situation with regard to other treaties is more uncertain.[128]

State practice concerning dissolution has centred to all intents and purposes upon the dismemberment of 'unions of state', that is the ending of what had originally been a union of two international persons. Examples would include Colombia in 1829–31; Norway/Sweden in 1905; the United Arab Republic in 1960; the Mali Federation in 1960; the Federation of Rhodesia and Nyasaland in 1963[129] and the Czech and Slovak Federal Republic in 1992.[130] It is difficult to deduce clear rules of state succession from these episodes since much depended upon the expressed intentions of the states concerned. Perhaps a presumption in favour of continuity of treaties with regard to each component part may be suggested, but this is subject to expressed intention to the contrary.[131]

Article 34 of the Vienna Convention provides for treaties in force for all or part of the predecessor state to continue in force with regard to the specific territory unless the states concerned otherwise agree or it appears from the treaty or is otherwise established that the application of the treaty would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation. Whether this constitutes a rule of customary law also is unclear, but in the vast majority of situations the matter is likely to be regulated by specific agreements. Upon the dissolution of the Czech and Slovak Federal Republic, for example, on 1 January 1993, the UK took the position that, as appropriate, treaties and agreements in force to which the UK and that state were parties remained

[128] See, for example, O'Connell, *State Succession*, vol. II, pp. 219–20.

[129] See *Yearbook of the ILC*, 1974, vol. II, part 1, pp. 260–3, and O'Connell, *State Succession*, vol. II, pp. 164 ff.

[130] This state consisted of two distinct units, the Czech Republic and the Slovak Republic, each with their own parliament. The Constitutional Law on the Dissolution of the Czech and Slovak Republic of 25 November 1992 provided for the dissolution of that state and for the establishment of the successor states of the Czech Republic and Slovakia. At the same time, the two republics issued a joint declaration informing the international community that the two successor states would succeed to all international treaties to which the predecessor state had been a party and that where necessary negotiations would take place, particularly where the impact upon the two republics differed: see J. Malenovsky, 'Problèmes Juridiques Liées à la Partition de la Tchécoslovaquie, y compris Tracé de la Frontière', AFDI, 1993, p. 305.

[131] The case of the dissolution of the Austro-Hungarian Empire in 1918 was a special case, since it could be regarded as a dissolution of the union of Austria and Hungary (where the latter, unlike the former, asserted continuity) coupled with the secession of territories that either joined other states, such as Romania, or were merged into new states, such as Poland or Czechoslovakia.

in force as between the UK and the successor states.[132] The question of Yugoslavia was more complicated in that until 2000, the Federal Republic of Yugoslavia maintained that it was a continuation of the former Socialist Federal Republic of Yugoslavia, while the other former republics maintained that the former SFRY had come to an end to be replaced by a series of new states.

The issue of article 34 and automatic succession arose in the *Application of the Genocide Convention (Bosnia and Herzegovina* v. *Yugoslavia)* case, where Bosnia argued that the rule applied with regard to the Genocide Convention and Yugoslavia denied this. The Court, however, did not make a determination on this point.[133] The issue arose again in the *Gabčíkovo–Nagymaros Project* case, where the parties argued as to whether the rule of automatic succession applied or not. The Court similarly declined to make a determination and focused instead on the significance of article 12.[134]

International human rights treaties

A territorial treaty binds successor states by virtue of attaching to the territory itself and establishing a particular regime that transcends the treaty. Can it be maintained that international human rights treaties are analogous and thus 'attach' to the inhabitants concerned within the territory of the predecessor state and thus continue to bind successor states? There is no doubt that human rights treaties constitute a rather specific category of treaties. They establish that obligations are owed directly to individuals and often provide for direct access for individuals to international mechanisms.[135] The very nature of international human rights treaties varies somewhat from that of traditional international agreements. The International Court in the *Reservations to the Genocide Convention* case emphasised that '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

[132] See the letters sent by the UK Prime Minister to the Prime Ministers of the Czech Republic and Slovakia on 1 January 1993, UKMIL, 65 BYIL, 1994, pp. 586 ff.

[133] ICJ Reports, 1996, pp. 595, 611–12; 115 ILR, p. 1. See also M. Craven, 'The *Genocide* Case, the Law of Treaties and State Succession', 68 BYIL, 1997, p. 127.

[134] ICJ Reports, 1997, pp. 7, 71; 116 ILR, p. 1. As to article 12, see above, p. 970.

[135] See R. Higgins, *Problems and Process*, Oxford, 1994, p. 95.

the *raison d'être* of the Convention'.[136] In the *Barcelona Traction* case,[137] the Court differentiated between obligations of a state towards the international community as a whole and those arising vis-à-vis another state. The former are obligations that derive 'from the outlawing of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. In view of the importance of such rights, 'all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'. It is also the case that the process of interpretation of international human rights treaties is more dynamic than is the case with regard to other international agreements. Human rights treaties create not merely subjective, reciprocal rights but rather particular legal orders involving objective obligations to protect human rights.[138]

Where a state party to human rights treaties either disintegrates completely or from which another state or states are created, and the classical rules of succession were followed, there is a danger that this might result in a situation where people formerly protected by such treaties are deprived of such protection as a consequence or by-product of state succession.[139] The practice of the UN Human Rights Committee[140] with regard to the Yugoslav tragedy is particularly interesting here. After the conclusion of its 45th session, the UN Human Rights Committee requested special reports with regard to specific issues (for example, the policy of 'ethnic cleansing', arbitrary detention, torture and advocacy of hatred) from Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), noting 'that all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant'.[141] Representatives of all three states appeared before the Committee to discuss the relevant issues, no objection being made to the competence of the Committee, even though only Croatia had actually notified the Secretary-General of

[136] ICJ Reports, 1951, pp. 15, 23; 18 ILR, p. 364.

[137] ICJ Reports, 1970, pp. 4, 32; 46 ILR, pp. 178, 206.

[138] See, for example, *Austria* v. *Italy*, 4 European Yearbook of Human Rights, 1960, pp. 116, 140; *Ireland* v. *UK*, European Court of Human Rights, Series A, vol. 20, 1978, pp. 90–1, and *Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, 67 ILR, pp. 559, 568. See also above, chapter 16, p. 937.

[139] Note that the editors of *Oppenheim's International Law* take the view that in cases of the separation resulting in the creation of a new state, the latter 'is bound by – or at least entitled to accede to – general treaties of a "law-making" nature, especially those of a humanitarian character, previously binding on it as part of the state from which it has separated', p. 222.

[140] See above, chapter 6, p. 314.

[141] CCPR/C/SR.1178/Add.1, pp. 2–3.