its succession to the human rights treaties of the former Yugoslavia.[142] In the formal Comments of the Human Rights Committee upon the initial short reports submitted by the three states,[143] the Committee emphasised clearly and unambiguously that 'all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant'.[144] In its General Comment No. 26 of October 1997, the Committee took the view that 'once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government . . . or State succession'.[145]

The Commission on Human Rights adopted resolution 1994/16 on 25 February 1994 in which it 'reiterates its call to successor states which have not yet done so to confirm to appropriate depositories that they continue to be bound by obligations under international human rights treaties' and 'emphasises the special nature of the human rights treaties aimed at the protection of human rights and fundamental freedoms'. In addition, the Commission requested the human rights treaty bodies to continue further the 'continuing applicability of the respective international human rights treaties to successor states' and the Secretary-General 'to encourage successor states to confirm their obligations under the international human

[142] See Müllerson, *International Law*, p. 157. In the ensuing discussion in the Committee, Müllerson (at the time a member) noted that human rights treaties besides being interstate instruments also conferred rights upon individuals 'who could not be deprived of those rights in the event of state succession', while Serrano Caldera emphasised that 'state succession should be viewed as a matter of the acquired rights of the population of the state that had ratified the Covenant, which were not diluted when a state was divided'. CCPR/C/SR.1178/Add.1, pp. 2, 4 and 9.

[143] These reports were supplemented by Special Reports from each of the three states in April 1993: see that of Croatia, CCPR/C/87; that of the Federal Republic of Yugoslavia (Serbia and Montenegro), CCPR/C/88, and that of Bosnia and Herzegovina, CCPR/C/89.

[144] See CCPR/C/79/Add. 14–16, 28 December 1992. Note that at its 49th session, the UN Commission on Human Rights adopted resolution 1993/23 of 5 March 1993 in which it encouraged successor states to confirm to appropriate depositaries that they continued to be bound by obligations under relevant international human rights treaties. See also the Report of the UN Secretary-General, E/CN.4/1994/68. On 25 May 1994, the Committee on the Elimination of Racial Discrimination sent a communication to those successor states of the USSR that had not yet declared their adherence or succession to the Convention, inviting them to confirm the applicability of compliance with the Convention's provisions: see E/CN.4/1995/80, p. 3.

[145] A/53/40, annex VII. Cf. Aust, *Modern Treaty Law*, pp. 371–2. See also M. Kamminga, 'State Succession in respect of Human Rights Treaties', 6 EJIL, 1995, p. 469, and A. Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?', 14 EJIL, 2003, p. 141.

rights treaties to which their predecessors were a party as from the date of their independence'.[146] In addition, the fifth meeting of persons chairing the human rights treaty bodies in September 1994 took the view that successor states were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the government of the successor state.[147]

The issue of succession to the Genocide Convention in the Yugoslav situation was raised before the International Court specifically in the Preliminary Objections phase of the *Application of the Genocide Convention (Bosnia-Herzegovina* v. *Yugoslavia)* case. The Court held that it was unnecessary to determine this question in the circumstances since both Bosnia and Yugoslavia were clearly parties to the Convention by one means or another by the date of the filing of the Application.[148] The issue was, however, addressed particularly in two Separate Opinions. Judge Shahabuddeen declared that 'to effectuate its object and purpose, the [Genocide] Convention would fall to be construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor states as continuing as from independence any status which the predecessor state had as a party to the Convention'. It was suggested that it might be possible to extend this object and purpose argument to human rights treaties generally.[149] Judge Weeramantry in his Separate Opinion undertook a close analysis of the underlying principles and concluded by pointing to 'a principle of contemporary international law that there is automatic state succession to so vital a human rights convention as the Genocide Convention'.[150] One of the main reasons for this was the danger of gaps appearing in the system of human rights protection as between the dissolution of the predecessor state and the acceptance of human rights treaty obligations by the successor state or states.

Accordingly, the question of continued application of human rights treaties within the territory of a predecessor state irrespective of a succession is clearly under consideration. Whether such a principle has been clearly established is at the present moment unclear. However, with regard to those human rights which are established as a matter of customary international law, the new state will be bound by these as such.

[146] See also Commission on Human Rights Resolution 1995/18 adopted on 24 February 1995.
[147] E/CN.4/1995/80, pp. 3–4. [148] ICJ Reports, 1996, pp. 595, 612.
[149] *Ibid.*, p. 636. [150] *Ibid.*, pp. 645 ff.

## Succession with respect to matters other than treaties

### *Membership of international organisations*[151]

Succession to membership of international organisations will proceed (depending upon the terms of the organisation's constitution) according to whether a new state is formed or an old state continues in a slightly different form. In the case of the partition of British India in 1947, India was considered by the UN General Assembly as a continuation of the previous entity, while Pakistan was regarded as a new state, which had then to apply for admission to the organisation.[152] Upon the merger of Egypt and Syria in 1958 to form the United Arab Republic, the latter was treated as a single member of the United Nations, while upon the dissolution of the merger in 1961, Syria simply resumed its separate membership of the organisation.[153] In the case of the merger of North and South Yemen in 1990, the new state simply replaced the predecessor states as a member of the relevant international organisations. Where the predecessor state is dissolved and new states are created, such states will have to apply anew for membership to international organisations. For example, the new states of the Czech Republic and Slovakia were admitted as new members of the UN on 19 January 1993.[154]

The Sixth (Legal) Committee of the General Assembly considered the situation of new states being formed through division of a member state and the membership problem and produced the following principles:[155]

> 1. That, as a general rule, it is in conformity with legal principles to presume that a state which is a member of the Organization of the United Nations does not cease to be a member simply because its Constitution or frontier

[151] See O'Connell, *State Succession*, vol. II, pp. 183 ff., and H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd edn, The Hague, 1995, pp. 73 ff.

[152] This issue, of a separation of part of an existing state to form a new state, was considered by the UN to be on a par with the separation from the UK of the Irish Free State and from the Netherlands of Belgium, where the remaining portions continued as existing states: see O'Connell, *State Succession*, vol. I, pp. 184–7.

[153] *Ibid.*, pp. 197–8. This situation, which differed from the India–Pakistan precedent of 1947, has been criticised: see e.g. C. Rousseau, 'Sécession de la Syrie et de la RUA', 66 RGDIP, 1962, p. 413. See also E. Cotran, 'Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States', 8 ICLQ, 1959, p. 346.

[154] See Schermers and Blokker, *International Institutional Law*, pp. 73 and 77. See above, p. 960, with regard to the position of the Russian Federation and the Federal Republic of Yugoslavia and membership of the UN.

[155] A/CN.4/149, p. 8, quoted in O'Connell, *State Succession*, vol. I, p. 187.

has been subjected to changes, and that the extinction of the state as a legal personality recognised in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

2. That when a new state is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a state member of the United Nations, it cannot under the system of the Charter claim the status of a member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

3. Beyond that, each case must be judged according to its merits.

### *Succession to assets and debts*[156]

The relevant international law in this area is based upon customary law. The Vienna Convention on Succession to State Property, Archives and Debts, 1983 is not currently in force, although most of its provisions (apart from those concerning 'newly independent states') are reflective of custom. The primary rule with regard to the allocation of assets (including archives) and debts in succession situations is that the relevant parties should settle such issues by agreement. Virtually all of the rules that are formulated, for example in the Vienna Convention, 1983, are deemed to operate only where such agreement has not taken place.[157] In addition, the Arbitration Commission on Yugoslavia declared in Opinion No. 9 that 'the successor states to the SFRY must together settle all aspects of the succession by agreement'[158] and reinforced this approach in Opinion No. 14, declaring that 'the first principle applicable to state succession is that

[156] See generally, O'Connell, *State Succession*, vol. I, pp. 199 ff.; E. H. Feilchenfeld, *Public Debts and State Succession*, New York, 1931; UN, *Materials on Succession of States in Matters Other than Treaties*, New York, 1978; International Law Association Reports on Aspects of the Law of State Succession 2004 (preliminary) and 2006 (final); A. Stanič, 'Financial Aspects of State Succession: The Case of Yugoslavia', 12 EJIL, 2001, p. 751; C. Rousseau, *Droit International Public*, Paris, 1977, vol. III, p. 374; M. Streinz, 'Succession of States in Assets and Liabilities – A New Regime?', 26 German YIL, 1983, p. 198; P. Monnier, 'La Convention de Vienne sur la Succession d'États en Matière de Biens, Archives et Dettes d'État', AFDI, 1984, p. 221; V. D. Degan, 'State Succession Especially in Respect of State Property and Debts', 4 Finnish YIL, 1993, p. 130; Mrak, *Succession of States*, and E. Nathan, 'The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts' in *International Law at a Time of Perplexity* (ed. Y. Dinstein), Dordrecht, 1989, p. 489. See also *Yearbook of the ILC*, 1981, vol. II, part 2.

[157] See, for example, articles 14, 17, 18, 22, 23, 27, 28, 30, 31, 37, 38, 40 and 41.

[158] 92 ILR, p. 205.

the successor states should consult with each other and agree a settlement of all questions relating to the succession'.[159]

## State property[160]

The classic rule postulates that only the public property of the predecessor state passes automatically to the successor state,[161] but this, of course, raises the question of the definition of public property. The distinction between public and private property is to some extent based upon the conceptual differences between public and private law, a distinction unknown to common law countries. Although in many cases there will be a relevant agreement to define what is meant by public property in this context,[162] this does not always occur and recourse to municipal law is often required. This indeed may be necessitated to a large extent also because international law itself simply does not provide many of the required definitions with regard to, for example, public companies or public utility undertakings.[163]

The relevant municipal law for such purposes is that of the predecessor state. It is that law which will define the nature of the property in question and thus in essence decide its destination in the event of a succession.[164] Article 8 of the Vienna Convention, 1983 provides that state property for the purposes of the Convention means 'property, rights and interests which, at the date of the succession of states, were, according to the internal law of the predecessor state owned by that state'[165] and this can be taken as reflective of customary law. The Arbitration Commission on Yugoslavia reiterated this position by declaring that 'to determine whether the property, debts and archives belonged to the SFRY, reference should

[159] 96 ILR, p. 731.

[160] Note that private rights are unaffected as such by a succession: see, for example, *Oppenheim's International Law*, p. 216, and below, p. 1001.

[161] See, for example, the United Nations Tribunal for Libya, 22 ILR, p. 103. See also International Law Association, *Final Report*, p. 1.

[162] See, for example, the treaties concerned with the establishment of Cyprus in 1960, 382 UNTS, pp. 3 ff., and the Treaty of Peace with Italy, 1947, 49 UNTS, annex XIV, p. 225.

[163] For an example, see the dispute concerning property belonging to the Order of St Mauritz and St Lazarus, AFDI, 1965, p. 323. See also Stern, 'Succession', p. 329.

[164] See the *Chorzów Factory* case, PCIJ, Series A, No. 7, p. 30 and the *German Settlers in Upper Silesia* case, PCIJ, Series B, No. 6, p. 6, but cf. the *Peter Pazmany University* case, PCIJ, Series A/B, No. 61, p. 236.

[165] See also *Yearbook of the ILC*, 1970, vol. II, pp. 136–43 and *ibid.*, 1981, vol. II, p. 23; cf. O'Connell, *State Succession*, vol. I, pp. 202–3.

be had to the domestic law of the SFRY in operation at the date of succession'.[166] The relevant date for the passing of the property is the date of succession[167] and this is the date of independence, although difficulties may arise in the context of the allocation of assets and debts where different dates of succession occur for different successor states.[168] Such problems would need to be resolved on the basis of agreement between the relevant parties.[169]

The Arbitration Commission was faced with two particular problems. First, the 1974 SFRY Constitution had transferred to the constituent republics ownership of many items of property. This, held the Commission, led to the conclusion that such property could not be held to have belonged to the SFRY whatever their origin or initial financing.[170] Secondly, the Commission was faced with the concept of 'social ownership', a concept regarded as particularly highly developed in the SFRY. In the event, the Commission resolved the dilemma by adopting a mixture of the territorial principle and a functional approach. It was noted that 'social ownership' was 'held for the most part by "associated labour organisations" – bodies with their own legal personality, operating in a single republic and coming within its exclusive jurisdiction. Their property, debts and archives are not to be divided for purposes of state succession: each successor state exercises its sovereign powers in respect of them.'[171] However, where other organisations operated 'social ownership' either at the federal level or in two or more republics, 'their property, debts and archives should be divided between the successor states in question if they exercised public prerogatives on behalf of the SFRY of individual republics'. Where such public prerogatives were not being exercised, the organisations should be

[166] Opinion No. 14, 96 ILR, p. 732.

[167] Note that article 10 of the Vienna Convention, 1983 provides that the date of the passing of state property of the predecessor state is that of the date of succession of states 'unless otherwise agreed by the states concerned or decided by an appropriate international body'. Article 21 repeats this principle in the context of state archives and article 35 with regard to state debts.

[168] See e.g. Arbitration Commission Opinion No. 11, 96 ILR, p. 719. Cf. the Yugoslav Agreement on Succession Issues of June 2001, 41 ILM, 2002, p. 3. See also *AY Bank Ltd* v. *Bosnia and Herzegovina and Others* [2006] EWHC 830 (Ch) and C. Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia', 96 AJIL, 2002, p. 379.

[169] See the Yugoslav Agreement on Succession Issues, 2001, articles 3 and 7 of Annex A and article 4(3) of Annex B.

[170] Opinion No. 14, 96 ILR, p. 732.

[171] *Ibid.*

regarded as private-sector enterprises to which state succession does not apply.[172]

The Yugoslav Agreement on Succession Issues, 2001, however, provides that, 'It shall be for the successor state on whose territory immovable and tangible movable property is situated to determine, for the purposes of this Annex, whether that property was state property of the SFRY in accordance with international law.'[173]

It is a recognised principle of customary international law that the public property of a predecessor state with respect to the territory in question passes to the successor state.[174] Thus, as a general rule, the test of succession of public, or state, property as so characterised under the laws of the predecessor state is a territorial one.

However, one needs to distinguish here between immovable and movable property. State immovable property situated in the territory to which the succession relates passes to the successor state.[175] This is provided for in the Vienna Convention, 1983.[176] It is also evident in state practice,[177] most recently being reaffirmed by the Arbitration Commission on Yugoslavia[178] and in the Yugoslav Agreement on Succession Issues, 2001.[179]

In the case of immovable property situated outside the successor state or states, traditional state practice posits that where the predecessor state continues in existence this property should remain with the predecessor state (subject to agreement to the contrary by the states concerned, of

[172] *Ibid.*

[173] Article 6 of Annex A. This is to be contrasted with the more usual reference to domestic law at the relevant time.

[174] See, for example, the *Third US Restatement of Foreign Relations Law*, pp. 102 ff.; Brownlie, *Principles*, pp. 624–5, and O'Connell, *State Succession*, vol. I, pp. 199–200. See also the *Peter Pazmany University* case, PCIJ, Series A/B, No. 61, 1933, p. 237 and *Haile Selassie* v. *Cable and Wireless Ltd (No. 2)* [1939] Ch. 182; 9 AD, p. 94. See also *Kunstsammlungen zu Weimar* v. *Elicofon* 536 F.Supp. 829, 855 (1981); 94 ILR, pp. 133, 180. Note that under article 11, which basically reflects practice, no compensation is payable for the passing of state property unless otherwise agreed, and article 12 provides that third states' property in the territory of the predecessor state remains unaffected by the succession.

[175] E.g. fixed military installations, prisons, airports, government offices, state hospitals and universities: see *Yearbook of the ILC*, 1981, vol. II, part 2, p. 33.

[176] In article 14 (with regard to the transfer of part of a state to another state); article 15(i)a (with regard to 'newly independent states'); article 16 (upon a uniting of states to form one successor state); article 17 (with regard to separation of part of a state to form a new state) and article 18 (with regard to the dissolution of a state).

[177] See, for example, O'Connell, *State Succession*, vol. I, pp. 220–1. See also *Yearbook of the ILC*, 1981, vol. II, part 2, p. 29.

[178] Opinion No. 14, 96 ILR, p. 731.

[179] Article 2(1) of Annex A.

course). Only special circumstances might modify this principle.[180] Where the predecessor state ceases to exist, it would appear that its property abroad should be divided proportionately between the successor states.[181]

Article 15(1)b of the Convention makes out a special, and highly controversial, case for 'newly independent states'. This provides that 'immovable property, having belonged to the territory to which the succession of states relates, situated outside it and having become state property of the predecessor state during the period of dependence, shall pass to the successor state', while other immovable state property situated outside the territory 'shall pass to the successor state in proportion to the contribution of the dependent territory'. Neither of these propositions can be regarded as part of customary international law and their force would thus be dependent upon the coming into effect of the Convention, should this happen.[182]

As far as movable property connected with the territory in question is concerned,[183] the territorial principle continues to predominate. O'Connell notes that 'such property as is destined specifically for local use is acquired by the successor state',[184] while the formulation in the Vienna Convention, 1983 is more flexible. This provides that 'movable state property of the predecessor state connected with the activity of the

[180] See, for example, *Oppenheim's International Law*, p. 223, note 6.

[181] *Ibid.*, at p. 221. Article 18(1)b of the Vienna Convention, 1983 provides that 'immovable state property of the predecessor state situated outside its territory shall pass to the successor states in equitable proportions'. Note that the Yugoslav Agreement on Succession Issues, 2001 deals specifically with the allocation of diplomatic and consular premises: see Annex B.

[182] It is to be noted that article 15 does not, unlike other succession situations, refer to agreements between the predecessor and successor states. This was deliberate as the International Law Commission, which drafted the articles upon which the Convention is based, felt that this was required as a recognition of the special circumstances of decolonisation and the fact that many such agreements are unfavourable to the newly independent state: see *Yearbook of the ILC*, 1981, vol. II, part 2, p. 38. The article is also unusual in that it provides that immovable state property situated outside the territory and movable state property other than that already covered in the article 'to the creation of which the dependent territory has contributed' shall pass to the successor state in proportion to the contribution of the dependent territory. This was intended to introduce the application of equity to the situation and was designed to preserve *inter alia*, 'the patrimony and the historical and cultural heritage of the people inhabiting the dependent territory concerned', *ibid.* It is unclear how far this extends. It may cover contributions to international institutions made where the territory is a dependent territory, but beyond this one can only speculate.

[183] E.g. currency and state public funds, *Yearbook of the ILC*, 1981, vol. II, part 2, pp. 35–6.

[184] O'Connell, *State Succession*, vol. I, p. 204.

predecessor state in respect of the territory to which the succession of states applies shall pass to the successor state'.[185] There are, however, likely to be difficulties of precision in specific cases with regard to borderline instances of what may be accepted as either property 'destined specifically for local use' or property 'connected with the activity of the predecessor State in . . . the territory'. The view taken by the Arbitration Commission in Opinion No. 14 appears to be even more flexible for it simply notes that 'public property passes to the successor state on whose territory it is situated'.[186] However, particular kinds of property may be dealt with differently. For example, the Yugoslav Agreement on Succession Issues provides that the rule is not to apply to tangible state property of great importance to the cultural heritage of one of the successor states and which originated there, even though situated elsewhere at the date of independence. Such property is to go to the state whose cultural heritage it is.[187] Secondly, military property is to be made the subject of special arrangements.[188]

The situation with regard to movable property outside of the territory in question is more complicated. Article 17(1)c of the Vienna Convention, 1983 provides that such property (in the case of separation of part of a state) 'shall pass to the successor state in an equitable proportion'. This must be regarded as a controversial proposition since it appears to modify the dominant territorial approach to the succession of state property.[189] However, in the case of the dissolution of the predecessor state, the argument in favour of an equitable division of movable property not linked to the territory in respect of which the succession occurs is much stronger.[190] The Arbitration Commission on Yugoslavia limited itself to noting the general principle that state property, debts and archives of the SFRY (other than immovable property within each of the successor states) should be divided between the successor states[191] and that while each category of

[185] Article 17. See also articles 14(2)b, 15(1)d and 18(1)c.

[186] 96 ILR, p. 731. See also article 3(1) of Annex A of the Yugoslav Agreement on Succession Issues, 2001.

[187] Article 3(2) of Annex A. [188] Article 4(1).

[189] See O'Connell, *State Succession*, vol. I, p. 204. Cf. *Yearbook of the ILC*, 1981, vol. II, part 1, pp. 46–7.

[190] See article 18(1)d of the Vienna Convention, 1983. See also the decision of the Austrian Supreme Court in *Republic of Croatia et al.* v. *Girocredit Bank AG der Sparkassen* 36 ILM, 1997, p. 1520.

[191] Opinion No. 14, 96 ILR, pp. 731–2. See now the Yugoslav Agreement on Succession Issues, 2001 as discussed.

assets and liabilities need not be divided equitably, the overall outcome had to be an equitable division.[192]

The state succession situation which in general poses the least problem is that of absorption or merger, since the absorbing or newly created state respectively will simply take over the assets and debts of the extinguished state. The issues were, however, discussed in detail in the context of German unification. Article 21 of the Unification Treaty provides that the assets of the German Democratic Republic which served directly specified administrative tasks were to become Federal assets[193] and were to be used to discharge public tasks in the territory of the former GDR. Article 22 dealt with public assets of legal entities in that territory, including the land and assets in the agricultural sectors which did not serve directly specified administrative tasks.[194] Such financial assets were to be administered in trust by the Federal Government and be appointed by federal law equally between the Federal Government on the one hand and the *Länder* of the former GDR on the other, with the local authorities receiving an appropriate share of the *Länder* allocation. The Federal Government was to use its share to discharge public tasks in the territory of the former GDR, while the distribution of the *Länder* share to the individual *Länder* was to take place upon the basis of population ratio. Publicly owned assets used for the housing supply became the property of the local authorities together with the assumption by the latter of a proportionate share of the debts, with the ultimate aim of privatisation.

In fact, state practice demonstrates that with the exception of some clear and basic rules, all will depend upon the particular agreement reached in the particular circumstances. In the case of the former Czech and Slovak Federal Republic, the two successor states agreed to divide the assets

[192] Opinion No. 13, *ibid.*, p. 728. The Yugoslav Agreement on Succession Issues, 2001 provides that where the allocation of property results in a 'significantly unequal distribution' of SFRY state property, then the matter may be raised with the Joint Committee established under article 5 of the Annex.

[193] Unless they were earmarked on 1 October 1989 predominantly for administrative tasks which under the Basic Law of the FRG are to be discharged by the *Länder*, local authorities or other public administrative bodies, in which case they will accrue to the appropriate institution of public administration. Administrative assets used predominantly for tasks of the former Ministry of State Security/Office for National Security are to accrue to the Trust Agency established under the Law on the Privatisation and Reorganisation of Publicly Owned Assets (Trust Law) of 17 June 1990 for the purpose of privatising former publicly owned companies.

[194] These were termed 'financial assets' and deliberately exclude social insurance assets.

and liabilities of the predecessor state[195] in the ratio of two to one (the approximate population ratio of the two new states).[196] In the case of the former Soviet Union, Russia and the successor states signed agreements in 1991 and 1992 apportioning assets and liabilities of the predecessor state with the share of Russia being 61.34 per cent and the Ukraine being 16.37 per cent.[197] In the case of the former Yugoslavia, the Agreement on Succession Issues of 2001, in addition to the provisions referred to above,[198] provided for the distribution of assets on the basis of agreed proportions.[199] Financial assets in the International Monetary Fund (IMF) and World Bank were distributed on a slightly different proportional basis (that became known as the IMF key).[200] The IMF key was also used with regard to the distribution of assets in the Bank of International Settlements in an arrangement dated 10 April 2001.[201]

## State archives

Archives are state property with special characteristics. Many are difficult by their nature to divide up, but they may be relatively easily reproduced

[195] Apart from immovable property located within each republic which went to the republic concerned in accordance with the territorial principle.

[196] See, for example, Degan, 'State Succession', p. 144.

[197] See Müllerson, *International Law*, p. 144, and Stern, 'Succession', pp. 379 ff. The proportions were reached using four criteria: the participation of the republics concerned in the imports and exports respectively of the former USSR, the proportion of GNP, and the proportion of populations: see W. Czaplinski, 'Equity and Equitable Principles in the Law of State Succession' in Mark, *Succession of States*, pp. 61, 71. However, several successor states refused to accept this and the arrangement never came into being, and in 1993 Russia claimed all of the assets and liabilities of the former USSR, see Stern, 'Succession', p. 405, and a number of bilateral agreements were signed to reflect this, see International Law Association, *Final Report*, pp. 7 ff. A special agreement was reached in 1997 with regard to the division of the Black Sea fleet based in the Crimea in Ukraine, following a number of unsuccessful efforts: Stern 'Succession', p. 386.

[198] See above, pp. 989–91.

[199] These were Bosnia and Herzegovina 15.5 per cent; Croatia 23 per cent; Macedonia 7.5 per cent: Slovenia 16 per cent and Yugoslavia 38 per cent: see article 4 of Annex C. This proportion was also used for all other rights and interests of the SFRY not otherwise covered in the Agreements (such as patents, trade marks, copyrights and royalties), Annex F.

[200] This was as follows: Bosnia and Herzegovina 13.20 per cent; Croatia 28.49 per cent; Macedonia 5.40 per cent; Slovenia 16.39 per cent and FRY 36.52 per cent: see IMF Press Release No. 92/92, 15 December 1992. See also P. Williams, 'State Succession and the International Financial Institutions', 43 ICLQ, 1994, pp. 776, 802, n. 168, and I. Shihata, 'Matters of State Succession in the World Bank's Practice' in Mark, *Succession of States*, pp. 75, 87.

[201] See Appendix to the Yugoslav Agreement on Succession Issues, 2001.

and duplicated. Archives are a crucial part of the heritage of a community and may consist of documents, numismatic collections, iconographic documents, photographs and films. The issue has been of great concern to UNESCO, which has called for the restitution of archives as part of the reconstitution and protection of the national cultural heritage and has appealed for the return of an irreplaceable cultural heritage to those that created it.[202] In this general context, one should also note articles 149 and 303 of the 1982 Convention on the Law of the Sea. The former provides that all objects of an archaeological and historical nature found in the International Seabed Area are to be preserved or disposed of for the benefit of mankind as a whole, 'particular regard being paid to the preferential rights of the state or country of origin, or the state of historical and archaeological origin', while the latter stipulates that states have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.

In general, treaties between European states dealing with cessions of territory included archival clauses providing for the treatment of archives, while such clauses are very rare in cases of decolonisation.[203]

Article 20 of the 1983 Vienna Convention provides that state archives in the present context means:

> all documents of whatever date and kind, produced or received by the predecessor state in the exercise of its functions which, at the date of the succession of states, belonged to the predecessor state according to its internal law and were preserved by it directly or under its control as archives for whatever purpose.

Generally, such archives will pass as at the date of succession and without compensation, without as such affecting archives in the territory owned by a third state.[204]

Where part of the territory of a state is transferred by that state to another state, in the absence of agreement, the part of the state archives of the predecessor state which, for normal administration of the territory

[202] UNESCO, Records of the General Conference, 18th Session, Resolutions, 1974, pp. 68 ff., 20 C/102, 1978, paras. 18–19; and UNESCO Records of the General Conference, 20th Session, Resolutions, 1978, pp. 92–3. See also *Yearbook of the ILC*, 1979, vol. II, part 1, pp. 78–80. Note in addition the call for a New International Cultural Order: see e.g. M. Bedjaoui, *Towards a New International Economic Order*, Paris, 1979, pp. 75 ff. and 245 ff., and General Assembly Resolutions 3026A (XXVII); 3148 (XXVIII); 3187 (XXVIII); 3391 (XXX) and 31/40.

[203] *Yearbook of the ILC*, 1979, vol. II, part 1, p. 93.

[204] Articles 21–4.

concerned, should be at the disposal of the state to which the territory is transferred, shall pass to the successor state, as shall any part of the state archives that relates exclusively or principally to the territory.[205] In the case of 'newly independent states', the same general provisions apply,[206] but with some alterations. Archives having belonged to the territory in question and having become state archives of the predecessor state during the period of dependence are to pass to the successor state. The reference here to archives that became state archives is to pre-colonial material, whether kept by central government, local governments or tribes, religious ministers, private enterprises or individuals.[207] One may mention here the Treaty of Peace with Italy of 1947, which provided that Italy was to restore all archives and objects of historical value belonging to Ethiopia or its natives and removed from Ethiopia to Italy since October 1935.[208] In the case of Vietnam, the 1950 Franco-Vietnamese agreement provided for the return as of right of all historical archives,[209] while a dispute between France and Algeria has been in existence since the latter's independence over pre-colonial material removed to France.[210]

Article 28(2) provides that the passing or the appropriate reproduction of parts of the state archives of the predecessor state (other than those already discussed above) of interest to the territory concerned is to be determined by agreement, 'in such a manner that each of these states [i.e. predecessor and successor] can benefit as widely and equitably as possible from those parts of the state archives of the predecessor state'. The reference here is primarily to material relating to colonisation and the colonial period, and in an arrangement of 1975, the French specifically noted the practice of microfilming in the context of France's acquisition of Algeria.[211] Article 28(3) emphasises that the predecessor state is to provide the newly independent state with the best available evidence from its state archives relating to territorial title and boundary issues. This is important as many post-colonial territorial disputes will invariably revolve around the interpretation of colonial treaties delimiting frontiers and colonial administrative practice concerning the area in contention.[212]

[205] Article 27. [206] Article 28(1)b and c.
[207] *Yearbook of the ILC*, 1981, vol. II, part 2, p. 62. [208] 49 UNTS, p. 142.
[209] See *Yearbook of the ILC*, 1979, vol. II, part 1, p. 113. [210] *Ibid.*, pp. 113–14.
[211] *Yearbook of the ILC*, 1981, vol. II, part 2, p. 64.
[212] See, for example, the Mali–Upper Volta (Burkina Faso) border dispute, Shaw, *Title to Territory*, pp. 257–8, and the *Burkina Faso/Mali* case, ICJ Reports, 1986, p. 554; 80 ILR, p. 459.

Where two or more states unite to form one successor state, the state archives of the former will pass to the latter.[213] Where part of a state secedes to form another state, unless the states otherwise agree the part of the state archives of the predecessor state, which for normal administration of the territory concerned should be in that territory, will pass, as will those parts of the state archives that relate directly to the territory that is the subject of the succession.[214]

The same provisions apply in the case of a dissolution of a state, which is replaced by two or more successor states, in the absence of agreement, with the addition that other state archives are to pass to the successor states in an equitable manner, taking into account all relevant circumstances.[215] These principles were confirmed in the Yugoslav Agreement on Succession Issues, 2001,[216] while it was additionally provided that archives other than those falling within these categories are to be the subject of an agreement between the successor states as to their equitable distribution.[217]

Articles 28, 30 and 31 also contain a paragraph explaining that the relevant agreements over state archives 'shall not infringe the right of the peoples of those states to development, to information about their history and to their cultural heritage'. Despite the controversy over whether such a right does indeed exist in law as a right and precisely how such a provision might be interpreted in practice in concrete situations, the general concept of encouraging awareness and knowledge of a people's heritage is to be supported.[218]

### Public debt[219]

This is an area of particular uncertainty and doubt has been expressed as to whether there is a rule of succession in such circumstances.[220] As in other parts of state succession, political and economic imperatives play

[213] Article 29. [214] Article 30.

[215] Article 31. Note in particular the dispute between Denmark and Iceland, after the dissolution of their Union, over valuable parchments: see Verzijl, *International Law*, vol. VII, 1974, p. 153, and *Yearbook of the ILC*, 1981, vol. II, part 1, pp. 68–9, and the Treaty of St Germain of 1919 with Austria which contained provisions relating to the succession to archives of various new or reconstituted states.

[216] See Annex D. [217] *Ibid.*, article 6.

[218] See further, with regard to article 3(2) of Annex A of the Yugoslav Agreement on Succession Issues, 2001, above, p. 991.

[219] See generally, O'Connell, *State Succession*, vol. I, chapters 15–17; *Yearbook of the ILC*, 1977, vol. II, part 1, pp. 49 ff., and Zemanek, 'State Succession'.

[220] See e.g. Brownlie, *Principles*, pp. 625–6.

a large role and much practice centres upon agreements made between relevant parties.

The public debt (or national debt) is that debt assumed by the central government in the interests of the state as a whole. It constitutes a particularly sensitive issue since third parties are involved who are often reluctant to accept a change in the identity of the debtor. This encourages an approach based on the continuing liability for the debt in question and in situations where a division of debt has taken place for that situation to continue with the successor state being responsible to the predecessor state (where this continues, of course) for its share rather than to the creditor directly. And as article 36 of the Vienna Convention, 1983 notes, a succession of states does not as such affect the rights and obligations of creditors.[221]

Public debts[222] may be divided into national debts, being debts owned by the state as a whole; local debts, being debts contracted by a subgovernmental territorial unit or other form of local authority, and localised debts, being debts incurred by the central government for the purpose of local projects or areas.[223]

Local debts clearly pass under customary international law to the successor state, since they constitute arrangements entered into by subgovernmental territorial authorities now transferred to the jurisdiction of the successor state and a succession does not directly affect them. In effect, they continue to constitute debts borne by the specific territory in question.[224] Similarly, localised debts, being closely attached to the territory to which the succession relates, also pass to the successor state in conformity with the same territorial principle.[225]

There appears to be no definitive answer to the question as to the allocation of the national debt as such. In the case of absorption or merger, the expanding or newly created state respectively will simply take over

[221] Note that the Convention does not deal with private creditors, a point which is criticised in the *Third US Restatement on Foreign Relations Law*, p. 106, but article 6 of the Convention constitutes in effect a savings clause here.

[222] Note that the Convention is concerned with state debts which are defined in article 33 as 'any financial obligation of a predecessor state arising in conformity with international law with another state, an international organisation or any other subject of international law'.

[223] See O'Connell, *State Succession*, vol. I, chapters 15–17, and *Yearbook of the ILC*, 1981, vol. II, part 1, p. 76. A variety of other distinctions have also been drawn, *ibid.*

[224] See, for example, O'Connell, *State Succession*, vol. I, pp. 416 ff.

[225] *Ibid.* See also *Yearbook of the ILC*, 1981, vol. II, part 1, p. 90, and the *Ottoman Public Debt* case, 1 RIAA, p. 529 (1925).

the national debt of the extinguished state.[226] The German unification example is instructive. Article 23 of the Unification Treaty provided that the total national budget debt of the German Democratic Republic was to be assumed by a special Federal fund administered by the Federal Minister of Finance. The Federal Government was to be liable for the obligations of the special fund which was to service the debt and might raise loans *inter alia* to redeem debts and to cover interest and borrowing costs. Until 31 December 1993, the Federal Government and the Trust Agency were each to reimburse one half of the interest payments made by the special fund. As from 1 January 1994, the Federal Government, the Trust Agency and the *Länder* of the former GDR assumed the total debt accrued at that date by the special fund, which was dissolved. The sureties, warranties and guarantees assumed by the GDR were taken over by the Federal Republic, while the interests of the GDR in the Berlin State Bank were transferred to the *Länder* of the former GDR. The liabilities arising from the GDR's responsibility for the Berlin State Bank were assumed by the Federal Government.

In the case of secession or separation where the predecessor state continues to exist, it would appear that the presumption is that the responsibility for the general public debt of the predecessor state remains with the predecessor state after the succession.[227] This would certainly appear to be the case where part of a state is transferred to another state.[228] Generally the paucity of practice leads one to be reluctant to claim that a new rule of international law has been established with regard to such situations, so that the general principle of non-division of the public debt is not displaced. However, successor states may be keen to establish their international creditworthiness by becoming involved in a debt allocation arrangement in circumstances where in strict international law this may not be necessary.[229] Further, the increasing pertinence of the notion of equitable distribution might have an impact upon this question.

A brief review of some practice may serve to illustrate the complexity of the area. When Texas seceded from Mexico in 1840, for example, it denied any liability for the latter's debts, although an *ex gratia* payment was in the circumstances made. However, no part of Colombia's debt was assumed

[226] Article 39 of the Convention provides that where two or more states unite to form a successor state, the state debts of the former states will pass to the successor state.
[227] See the *Ottoman Public Debt* case, 1 RIAA, p. 529.
[228] See *Yearbook of the ILC*, 1977, vol. II, part 1, p. 81.
[229] See Williams, 'State Succession', pp. 786 and 802–3.

by Panama upon its independence in 1903. The arrangements made in the peace treaties of 1919 and 1923 were complex, but it can be noted that while no division of the public debt occurred with regard to some territories emerging from the collapsed empires, in most cases there was a negotiated and invariably complicated settlement. The successor states of the Austro-Hungarian Empire, for example, assumed responsibility for such portions of the pre-war bonded debt as were determined by the Reparations Committee, while Turkey took over a share of the Ottoman public debt on a revenue proportionality basis.[230] When in 1921, the Irish Free State separated from the United Kingdom, it was provided that the public debt of the UK would be apportioned 'as may be fair and equitable', having regard to any claims by way of set-off or counter-claim.

The agreement between India (the continuation of British India) and Pakistan (the new state) provided for the responsibility of the former with regard to all the financial obligations, including loans and guarantees, of British India. India thus remained as the sole debtor of the national debt, while Pakistan's share of this, as established upon the basis of proportionality relating to its share of the assets of British India that it received, became a debt to India.[231]

With regard to secured debts, the general view appears to be that debts secured by mortgage of assets located in the territory in question survive the transfer of that territory. The Treaties of St Germain and Trianon in 1919, for example (articles 203 and 186 respectively), provided that assets thus pledged would remain so pledged with regard to that part of the national debt that it had been agreed would pass to the particular successor state. Such debts had to be specifically secured and the securities had to be 'railways, salt mines or other property'.[232] However, where debts have been charged to local revenue, the presumption lies the other way.

Much will depend upon the circumstances and it may well be that where the seceding territory constituted a substantial or meaningful part of the predecessor state, considerations of equity would suggest some form of apportionment of the national debt. It was with this in mind, together with the example of the UK–Irish Free State Treaty of 1921, that led the International Law Commission to propose the draft that led to article 40 of the Vienna Convention, 1983.

[230] See, for example, O'Connell, *State Succession*, vol. I, pp. 397–401, and Feilchenfeld, *Public Debts*, pp. 431 ff.

[231] O'Connell, *State Succession*, vol. I, pp. 404–6.

[232] *Ibid.*, p. 411.

Article 40 provides that where part of a state separates to form another state, unless otherwise agreed, the state debt of the predecessor state passes to the successor state 'in an equitable proportion' taking into account in particular the property, rights and interests which pass to the successor state in relation to that debt.[233] It is doubtful that this proposition constitutes a codification of customary law as such in view of the confused and disparate practice of states to date, but it does reflect a viable approach.

However, in the case of separation where the predecessor state ceases to exist, some form of apportionment of the public debt is required and the provision in article 41 for an equitable division taking into account in particular the property, rights and interests which pass to the successor states in relation to that debt, is reasonable and can be taken to reflect international practice.[234] The basis for any equitable apportionment of debts would clearly depend upon the parties concerned and would have to be regulated by agreement. A variety of possibilities exists, including taxation ratio, extent of territory, population, nationality of creditors, taxable value as distinct from actual revenue contributions, value of assets and contributions of the territory in question to the central administration.[235] The Yugoslav Agreement on Succession Issues, 2001 provides that 'allocated debts', that is external debts where the final beneficiary of the debt is located on the territory of a specific successor state or group of successor states, are to be accepted by the successor state on the territory of which the final beneficiary is located.[236]

In common with the other parts of the 1983 Convention, a specific article is devoted to the situation of the 'newly independent state'. Article 38 provides that 'no state debt of the predecessor state shall pass to the newly independent state' in the absence of an agreement between the

[233] The same rule applies in the case of the transfer of part of a state to another state: see article 37.

[234] See, for example, *Oppenheim's International Law*, p. 221.

[235] In the 1919 peace treaties, the principle of distribution proportional to the future paying capacity of the ceded territories was utilised, measured by reference to revenues contributed in the pre-war years, while in the Treaty of Lausanne, 1923, concerning the consequences of the demise of the Ottoman Empire, the principle considered was that of proportional distribution based solely upon actual past contributions to the amortisation of debts: see O'Connell, *State Succession*, vol. I, pp. 454–6. Cf. *Yearbook of the ILC*, 1981, vol. II, part 2, p. 113. The phrase ultimately adopted in the Vienna Convention was: 'taking into account, in particular, the property, rights and interests which pass to the successor state in relation to that state debt'. In other words, stress was laid upon the factor of proportionality of assets to debts.

[236] Article 2(1)b of Annex C.

parties providing otherwise, 'in view of the link between the state debt of the predecessor state connected with its activity in the territory to which the succession of states relates and the property, rights and interests which pass to the newly independent state'. State practice generally in the decolonisation process dating back to the independence of the United States appears to show that there would be no succession to part of the general state debt of the predecessor state, but that this would differ where the debt related specifically to the territory in question.[237] It is unlikely that this provision reflects customary law.

### Private rights

The question also arises as to how far a succession of states will affect, if at all, private rights. Principles of state sovereignty and respect for acquired or subsisting rights are relevant here and often questions of expropriation provide the context. As far as those inhabitants who become nationals of the successor state are concerned, they are fully subject to its laws and regulations, and apart from the application of international human rights rules, they have little direct recourse to international law in these circumstances. Accordingly what does become open to discussion is the protection afforded to aliens by international provisions relating to the succession of rights and duties upon a change of sovereignty.

It is within this context that the doctrine of acquired rights[238] has been formulated. This relates to rights obtained by foreign nationals and has been held by some to include virtually all types of legal interests. Its import is that such rights continue after the succession and can be enforced against the new sovereign. Some writers declare this proposition to be a fundamental principle of international law,[239] while others describe it merely as a source of confusion.[240] There is a certain amount of disagreement as to its extent. On the one hand, it has been held to mean that the passing of sovereignty has no effect upon such rights, and on the other that

[237] See *Yearbook of the ILC*, 1981, vol. II, part 1, pp. 91–105 and *ibid.*, 1977, vol. II, part 1, pp. 86–107. Note the varied practice of succession to public debts in the colonisation process, *ibid.*, pp. 87–8, and with regard to annexations, *ibid.*, pp. 93–4. See also *West Rand Gold Mining Co.* v. *R* [1905] 2 KB 391, and O'Connell, *State Succession*, vol. I, pp. 373–83.

[238] See, in particular, O'Connell, *State Succession*, chapter 10; *Oppenheim's International Law*, pp. 215 ff., and Brownlie, *Principles*, pp. 626 ff. See also T. H. Cheng, *State Succession and Commercial Obligations*, New York, 2006.

[239] See e.g. O'Connell, *State Succession*, vol. I, pp. 239–40.

[240] See e.g. Brownlie, *Principles*, p. 627.

it implies no more than that aliens should be, as far as possible, insulated from the changes consequent upon succession.

The principle of acquired rights was discussed in a number of cases that came before the Permanent Court of International Justice between the two world wars, dealing with the creation of an independent Poland out of the former German, Russian and Austrian Empires. Problems arose specifically with regard to rights obtained under German rule, which were challenged by the new Polish authorities. In the *German Settlers*' case,[241] Poland had attempted to evict German settlers from its lands, arguing that since many of them had not taken transfer of title before the Armistice they could be legitimately ejected. According to the German system, such settlers could acquire title either by means of leases, or by means of an arrangement whereby they paid parts of the purchase price at regular intervals and upon payment of the final instalment the land would become theirs. The Court held that German law would apply in the circumstances until the final transfer of the territory and that the titles to land acquired in this fashion would be protected under the terms of the 1919 Minorities Treaty. More importantly, the Court declared that even in the absence of such a treaty:

> private rights acquired under existing law do not cease on a change of sovereignty . . . even those who contest the existence in international law of a general principle of state succession do not go so far as to maintain that private rights, including those acquired from the state as the owner of the property, are invalid as against a successor in sovereignty.[242]

The fact that there was a political purpose behind the colonisation scheme would not affect the private rights thus secured, which could be enforced against the new sovereign. It is very doubtful that this would be accepted today. The principles emerging from such inter-war cases affirming the continuation of acquired rights have modified the views expressed in the *West Rand Central Gold Mining Company* case[243] to the

[241] PCIJ, Series B, No. 6, 1923; 2 AD, p. 71. The proposition was reaffirmed in the *Certain German Interests in Polish Upper Silesia* case, PCIJ, Series A, No. 7, 1926; 3 AD, p. 429 and the *Chorzów Factory* case, PCIJ, Series A, No. 17, 1928; 4 AD, p. 268. See also the *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 5, 1924 and *US* v. *Percheman* 7 Pet. 51 (1830).

[242] See also *El Salvador/Honduras*, ICJ Reports, 1992, pp. 351, 400, referring to 'full respect for acquired rights', the *German–Poland Border Treaty Constitutionality* case, 108 ILR, p. 656, and cf. *Gosalia* v. *Agarwal* 118 ILR, p. 429.

[243] [1905] 2 KB 391.

effect that, upon annexation, the new sovereign may choose which of the contractual rights and duties adopted by the previous sovereign it wishes to respect.

The inter-war cases mark the high-water mark of the concept of the continuation of private rights upon succession, but they should not be interpreted to mean that the new sovereign cannot alter such rights. The expropriation of alien property is possible under international law subject to certain conditions.[244] What the doctrine does indicate is that there is a presumption of the continuation of foreign acquired rights, though the matter is best regulated by treaty. Only private rights that have become vested or acquired would be covered by the doctrine. Thus, where rights are to come into operation in the future, they will not be binding upon the new sovereign. Similarly, claims to unliquidated damages will not continue beyond the succession. Claims to unliquidated damages occur where the matter in dispute has not come before the judicial authorities and the issue of compensation has yet to be determined by a competent court or tribunal. In the *Robert E. Brown* claim,[245] an American citizen's prospecting licence had been unjustifiably cancelled by the Boer republic of South Africa in the 1890s and Brown's claim had been dismissed in the Boer courts. In 1900 the United Kingdom annexed the republic and Brown sought (through the US government) to hold it responsible. This contention was rejected by the arbitration tribunal, which said that Brown's claim did not represent an acquired right since the denial of justice that had taken place by the Boer court's wrongful rejection of his case had prevented the claim from becoming liquidated. The tribunal also noted that liability for a wrongful act committed by a state did not pass to the new sovereign after succession.

The fact that the disappearance of the former sovereign automatically ends liability for any wrong it may have committed is recognised as a rule of international law, although where the new state adopts the illegal actions of the predecessor, it may inherit liability since it itself is in effect committing a wrong. This was brought out in the *Lighthouses* arbitration[246] in 1956 between France and Greece, which concerned the latter's liability to respect concessions granted by Turkey to a French company

[244] See above, chapter 14, p. 827.

[245] 6 RIAA, p. 120 (1923); 2 AD, p. 66. See also the *Hawaiian Claims* case, 6 RIAA, p. 157 (1925); 3 AD, p. 80.

[246] 12 RIAA, p. 155 (1956); 23 ILR, p. 659. Cf. the decision of the Namibian Supreme Court in *Minister of Defence, Namibia* v. *Mwandinghi* 91 ILR, p. 341, taking into account the provisions of the Namibian Constitution.

regarding territory subsequently acquired by Greece. The problem of the survival of foreign nationals' rights upon succession is inevitably closely bound up with ideological differences and economic pressures.[247]

## State succession and nationality[248]

The issue of state succession and nationality links together not only those two distinct areas, but also the question of human rights. The terms under which a state may award nationality are solely within its control[249] but problems may arise in the context of a succession. In principle, the issue of nationality will depend upon the municipal regulations of the predecessor and successor states. The laws of the former will determine the extent to which the inhabitants of an area to be ceded to another authority will retain their nationality after the change in sovereignty, while the laws of the successor state will prescribe the conditions under which the new nationality will be granted. The general rule would appear to be that nationality will change with sovereignty, although it will be incumbent upon the new sovereign to declare the pertinent rules with regard to people born in the territory or resident there, or born abroad of parents who are nationals of the former regime. Similarly, the ceding state may well provide for its former citizens in the territory in question to retain

[247] As to state succession to wrongful acts, see e.g. P. Dumberry, *State Succession to International Responsibility*, The Hague, 2007; W. Czaplinski, 'State Succession and State Responsibility', 28 Canadian YIL, 1990, p. 339 and M. J. Volkovitsch, 'Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts', 92 *Columbia Law Review*, 1992, p. 2162. See also *Minister of Defence* v. *Mwandinghi* (SA 5/91) [1991] NASC 5; 1992 (2) SA 355 (NmS) (25 October 1991).

[248] See O'Connell, *State Succession*, vol. I, chapters 20 and 21; P. Weis, *Nationality and Statelessness in International Law*, 2nd edn, Alphen aan den Rijn, 1979; I. Ziemele, *State Continuity and Nationality: Past, Present and Future as Defined by International Law*, The Hague, 2005; P. Dumberry, 'Obsolete and Unjust: The Rule of Continuous Nationality in the Context of State Succession', 76 *Nordic Journal of International Law*, 2007, p. 153; C. Economidès, 'Les Effets de la Succession d'États sur la Nationalité', 103 RGDIP, 1999, p. 577; *Nationalité, Minorités et Succession d'États en Europe de l'Est* (eds. E. Decaux and A. Pellet), Paris, 1996; European Commission for Democracy Through Law, *Citizenship and State Succession*, Strasbourg, 1997; *Oppenheim's International Law*, p. 218, and Reports of the International Law Commission, A/50/10, 1995, p. 68; A/51/10, 1996, p. 171; A/52/10, 1997, p. 11; A/53/10, 1998, p. 189 and A/54/10, 1999, p. 12. See also above, chapters 12, p. 659, and 14, p. 808.

[249] See e.g. article 1 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 1930, the *Nationality Decrees in Tunis and Morocco* case, PCIJ, Series B, No. 4, p. 24 (1923); 2 AD, p. 349, the *Acquisition of Polish Nationality* case, PCIJ, Series B, No. 7, p. 16; 2 AD, p. 292, and the *Nottebohm* case, ICJ Reports, 1955, p. 23; 22 ILR, p. 349.

their nationality, thus creating a situation of dual nationality. This would not arise, of course, where the former state completely disappears.

Some states acquiring territory may provide for the inhabitants to obtain the new nationality automatically while others may give the inhabitants an option to depart and retain their original nationality. Actual practice is varied and much depends on the circumstances, but it should be noted that the 1961 Convention on the Reduction of Statelessness provides that states involved in the cession of territory should ensure that no person becomes stateless as a result of the particular change in sovereignty. There may indeed be a principle in international law to the effect that the successor state should provide for the possibility of nationals of the predecessor state living in or having a substantial connection with the territory taken over by the successor state.[250] It may indeed be, on the other hand, that such nationals have the right to choose their nationality in such situations, although this is unclear. The Arbitration Commission on Yugoslavia referred in this context to the principle of self-determination as proclaimed in article 1 of the two International Covenants on Human Rights, 1966. The Commission stated that, 'by virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he wishes'. Further, it was noted that:

> In the Commission's view one possible consequence of this principle might be for the members of the Serbian population in Bosnia and Herzegovina and Croatia to be recognised under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the states concerned.[251]

In 1997 the European Convention on Nationality was adopted.[252] Article 19 provides that states parties should seek to resolve issues

[250] See *Oppenheim's International Law*, p. 219.

[251] Opinion No. 2, 92 ILR, pp. 167, 168–9. The Commission concluded by stating that the Republics 'must afford the members of those minorities and ethnic groups [i.e. the Serbian population in Bosnia-Herzegovina and Croatia] all the human rights and fundamental freedoms recognised in international law, including, where appropriate, the right to choose their nationality', *ibid.*, p. 169.

[252] See also the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, European Commission for Democracy Through Law, 1996, CDL-NAT (1996)007e-rev-restr. and the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, 2006, which provides that any person with the nationality of the predecessor state who has or would become stateless as a result of state succession has the right to nationality of a state concerned in accordance with the Convention.

concerning nationality and state succession by agreement between themselves. Article 18 stipulates that in deciding on the granting or the retention of nationality in cases of state succession, each state party concerned shall take account, in particular, of the genuine and effective link of the person concerned with the state; the habitual residence of the person concerned at the time of state succession; the will of the person concerned and the territorial origin of the person concerned. In the case of non-nationals, article 20 provides for respect for the principle that nationals of a predecessor state habitually resident in the territory over which sovereignty is transferred to a successor state and who have not acquired its nationality shall have the right to remain in that state.

In 1999, the International Law Commission adopted Draft Articles on Nationality of Natural Persons in Relation to a Succession of States.[253] Article 1 (defined as the 'very foundation' of the draft articles[254]), reaffirming the right to a nationality, provides that individuals who on the date of succession had the nationality of the predecessor state, irrespective of the mode of acquisition of that nationality, have the right to the nationality of at least one of the states concerned. States are to take all appropriate measures to prevent persons who had the nationality of the predecessor state on the date of succession from becoming stateless as a result of the succession,[255] while persons having their habitual residence in the territory concerned are presumed to acquire the nationality of the successor state.[256] The intention of the latter provision is to avoid a gap arising between the date of succession and the date of any agreement or legislation granting nationality.[257] Article 11 stipulates that each state concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that state if those persons would otherwise become stateless as a result of the succession of states, and that when this right has been exercised, the state whose nationality they have opted for shall attribute its nationality to such persons. Conversely, the state whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

[253] See Report of the International Law Commission on its 51st Session, A/54/10, 1999, p. 12.

[254] *Ibid.*, p. 29.

[255] Article 4. Article 16 provides that persons concerned shall not be arbitrarily deprived of the nationality of the predecessor state nor arbitrarily denied the right to acquire the nationality of the successor state.

[256] Article 5. Article 12 states that the status of persons concerned as habitual residents shall not be affected by the succession of states.

[257] Report of the International Law Commission on its 51st Session, p. 40.

Article 12 provides that where the acquisition or loss of nationality in relation to the succession of states would impair the unity of a family, the states concerned shall take all appropriate measures to allow that family to remain together or to be reunited.[258]

The second part of the set of draft articles concerns specific succession situations and their implications for nationality. Article 20 concerns the situation where one state transfers part of its territory to another state. Here the successor state shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor state shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. The predecessor state shall not, however, withdraw its nationality before such persons acquire the nationality of the successor state. Where two or more states unite to form one successor state, the successor state shall attribute its nationality to all persons who on the date of succession held the nationality of the predecessor state.[259]

In the case both of the dissolution of the predecessor state to form two or more successor states and the separation of parts of a territory to form one or more successor states while the predecessor state continues to exist, the same fundamental rules apply. Articles 22 and 24 respectively provide that each successor state shall, unless otherwise indicated by the exercise of a right of option,[260] attribute its nationality to (a) persons concerned having their habitual residence in its territory; and (b) other persons concerned having an appropriate legal connection with a constituent unit of the predecessor state that has become part of that successor state; and to (c) persons not otherwise entitled to a nationality of any state concerned having their habitual residence in a third state, who were born in or, before leaving the predecessor state, had their last habitual residence in what has become the territory of that successor state or having any other

[258] A child born after the date of succession who has not acquired any nationality has the right to the nationality of the state concerned on whose territory he/she was born, article 13.

[259] Article 21. This the Commission concluded was a rule of customary law: see Report of the International Law Commission on its 51st Session, p. 80.

[260] Article 23 provides that successor states shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor states, while each successor state shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22. Where the predecessor state continues, article 26 provides that both the predecessor and successor states shall grant a right of option to all persons concerned who are qualified to have the nationality of both the predecessor and successor states or of two or more successor states.

appropriate connection with that successor state.[261] These provisions are meant to prevent a situation, such as occurred with regard to some successor states of the former Yugoslavia and Czechoslovakia, where the test of nationality of the successor state centred upon the possession of the citizenship of the former constituent republics rather than upon habitual residence, thus having the effect of depriving certain persons of the nationality of the successor state.[262]

## Hong Kong[263]

Of particular interest in the context of state succession and the decolonisation process has been the situation with regard to Hong Kong. While Hong Kong island and the southern tip of the Kowloon peninsula (with Stonecutters island) were ceded to Britain in perpetuity,[264] the New Territories (comprising some 92 per cent of the total land area of the territory) were leased to Britain for ninety-nine years commencing 1 July 1898.[265] Accordingly, the British and Chinese governments opened negotiations and in 1984 reached an agreement. This Agreement took the form of a Joint Declaration and Three Annexes[266] and lays down the system under which Hong Kong has been governed as from 1 July 1997. A Hong Kong

[261] In the case of categories (b) and (c), the provision does not apply to persons who have their habitual residence in a third state and also have the nationality of that other or any other state: see article 8.

[262] See Report of the International Law Commission on its 51st Session, pp. 83–5, and J. F. Rezek, 'Le Droit International de la Nationalité', 198 HR, 1986, pp. 342–3. Article 25 provides that in the case where the predecessor state continues, then it shall withdraw its nationality from persons concerned who are qualified to acquire the nationality of the successor state in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor state. Unless otherwise indicated by the exercise of a right of option, the predecessor state shall not, however, withdraw its nationality from such persons who: (a) have their habitual residence in its territory; (b) are not covered by subparagraph (a) and have an appropriate legal connection with a constituent unit of the predecessor state that has remained part of the predecessor state; (c) have their habitual residence in a third state, and were born in or, before leaving the predecessor state, had their last habitual residence in what has remained part of the territory of the predecessor state or have any other appropriate connection with that state.

[263] See e.g. R. Mushkat, *One Country, Two International Legal Personalities*, Hong Kong, 1997, and Mushkat, 'Hong Kong and Succession of Treaties', 46 ICLQ, 1997, p. 181.

[264] See the Treaty of Nanking, 1842, 30 BFSP, p. 389 and the Convention of Peking, 1860, 50 BFSP, p. 10.

[265] 90 BFSP, p. 17. All three treaties were denounced by China as 'unequal treaties'.

[266] See 23 ILM, 1984, p. 1366.

Special Administrative Region (SAR) was established, which enjoys a high degree of autonomy, except in foreign and defence affairs. It is vested with executive, legislative and independent judicial power, including that of final adjudication. The laws of Hong Kong remain basically unaffected. The government of the SAR is composed of local inhabitants and the current social and economic systems continue unchanged. The SAR retains the status of a free port and a separate customs territory and remains an international financial centre with a freely convertible currency. Using the name of 'Hong Kong, China', the SAR may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations. Existing systems of shipping management continue and shipping certificates relating to the shipping register are issued under the name of 'Hong Kong, China'.

These policies are enshrined in a Basic Law of the SAR to remain unchanged for fifty years. Annex I of the Agreement also provides that public servants in Hong Kong, including members of the police and judiciary, will remain in employment and upon retirement will receive their pension and other benefits due to them on terms no less favourable than before and irrespective of their nationality or place of residence. Airlines incorporated and having their principal place of business in Hong Kong continue to operate and the system of civil aviation management continues. The SAR has extensive authority to conclude agreements in this field. Rights and freedoms in Hong Kong are maintained, including freedoms of the person, of speech, of the press, of assembly, of belief, of movement, to strike and to form and join trade unions. In an important provision, article XIII of Annex I stipulates that the provisions of the International Covenants on Human Rights, 1966 are to continue in force. Accordingly, a high level of succession is provided for, but it is as well to recognise that the Hong Kong situation is unusual.

### Suggestions for further reading

M. Craven, 'The Problem of State Succession and the Identity of States under International Law', 9 EJIL, 1998, p. 142

D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge, 2 vols., 1967

M. N. Shaw, 'State Succession Revisited', 5 Finnish YIL, 1994, p. 34

*Succession of States* (ed. M. Mrak), The Hague, 1999

# 18

# The settlement of disputes by peaceful means

It is fair to say that international law has always considered its fundamental purpose to be the maintenance of peace.[1] Although ethical preoccupations stimulated its development and inform its growth, international law has historically been regarded by the international community primarily as a means to ensure the establishment and preservation of world peace and security. This chapter is concerned with the procedures available within the international order for the peaceful resolution of disputes and conflicts, except for judicial procedures covered elsewhere.[2]

[1] See generally J. G. Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2005, and Merrills, 'The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?', 54 NILR, 2007, p. 361; F. Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization*, Cambridge, 2004; J. Collier and V. Lowe, *The Settlement of Disputes in International Law*, Cambridge, 1999; United Nations, *Handbook on the Peaceful Settlement of Disputes Between States*, New York, 1992; L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, chapter 10; David Davies Memorial Institute, *International Disputes: The Legal Aspects*, London, 1972; K. V. Raman, *Dispute Settlement Through the UN*, Dobbs Ferry, 1977; O. R. Young, *The Intermediaries*, Princeton, 1967; D. W. Bowett, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes', 180 HR, 1983, p. 171, and B. S. Murty, 'Settlement of Disputes' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, p. 673. See also Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 821; K. Oellers-Frahm and A. Zimmermann, *Dispute Settlement in Public International Law*, Berlin, 2001; C. P. Economides, 'L'Obligation de Règlement Pacifique des Différends Internationaux' in *Mélanges Boutros-Ghali*, Brussels, 1999, p. 405; A. Peters, 'International Dispute Settlement: A Network of Cooperational Duties', 14 EJIL, 2003, p. 1; P. Pazartzis, *Les Engagements Internationaux en Matière de Règlement Pacifique des Différends entre États*, Paris, 1992, and *The UN Decade of International Law: Reflections on International Dispute Settlement* (eds. M. Brus, S. Muller and S. Wiemers), Dordrecht, 1991.

[2] See above, chapter 6 with regard to regional human rights courts; chapter 8 with regard to international criminal courts and tribunals; chapter 11 with regard to dispute settlement under the Convention on the Law of the Sea and chapter 19 with regard to the International Court of Justice.

Basically the techniques of conflict management fall into two categories: diplomatic procedures and adjudication. The former involves an attempt to resolve differences either by the contending parties themselves or with the aid of other entities by the use of the discussion and fact-finding methods. Adjudication procedures involve the determination by a disinterested third party of the legal and factual issues involved, either by arbitration or by the decision of judicial organs.

The political approach to conflict settlement is divided into two sections, with the measures applicable by the United Nations being separately examined (in chapter 22) as they possess a distinctive character. Although for the sake of convenience each method of dispute settlement is separately examined, it should be noted that in any given situation a range of mechanisms may well be utilised. A good example of this is afforded by the successful settlement of the Chad–Libya boundary dispute. Following a long period of conflict and armed hostilities since the dispute erupted in 1973, the two states signed a Framework Agreement on the Peaceful Settlement of the Territorial Dispute on 31 August 1989 in which they undertook to seek a peaceful solution within one year. In the absence of a political settlement, the parties undertook to take the matter to the International Court.[3] After inconclusive negotiations, the dispute was submitted to the International Court by notification of the Framework Agreement by the two parties.[4] The decision of the Court was delivered on 3 February 1994. The Court accepted the argument of Chad that the boundary between the two states was defined by the Franco-Libyan Treaty of 10 August 1955.[5] Following this decision, the two states concluded an agreement providing for Libyan withdrawal from the Aouzou Strip by 30 May 1994. The agreement provided for monitoring of this withdrawal by United Nations observers.[6] The two parties also agreed to establish a joint team of experts to undertake the delimitation of the common frontier in accordance with the decision of the International Court.[7] On 4 May 1994, the Security Council adopted resolution 915 (1994) establishing

[3] See Report of the UN Secretary-General, S/1994/512, 27 April 1994, 33 ILM, 1994, p. 786, and generally M. M. Ricciardi, 'Title to the Aouzou Strip: A Legal and Historical Analysis', 17 *Yale Journal of International Law*, 1992, p. 301.

[4] Libya on 31 August 1990 and Chad on 3 September 1990: see the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 14; 100 ILR, pp. 1, 13.

[5] ICJ Reports, 1994, p. 40; 100 ILR, p. 39.

[6] 100 ILR, p. 102, article 1. See also 33 ILM, 1994, p. 619.

[7] 100 ILR, p. 103, article 6. See also the letter of the UN Secretary-General to the Security Council, S/1994/432, 13 April 1994, *ibid.*, pp. 103–4.

the UN Aouzou Strip Observer Group (UNASOG) and authorising the deployment of observers and support staff for a period up to forty days.[8] On 30 May, Libya and Chad signed a Joint Declaration stating that the withdrawal of the Libyan administration and forces had been effected as of that date to the satisfaction of both parties as monitored by UNASOG.[9] The Security Council terminated the mandate of UNASOG upon the successful conclusion of the mission by resolution 926 (1994) on 13 June that year.[10]

However, states are not obliged to resolve their differences at all, and this applies in the case of serious legal conflicts as well as peripheral political disagreements. All the methods available to settle disputes are operative only upon the consent of the particular states.[11] This, of course, can be contrasted with the situation within municipal systems. It is reflected in the different functions performed by the courts in the international and domestic legal orders respectively, and it is one aspect of the absence of a stable, central focus within the world community.

The mechanisms dealing with the peaceful settlement of disputes require in the first instance the existence of a dispute. The definition of a dispute has been the subject of some consideration by the International Court,[12] but the reference by the Permanent Court in the *Mavrommatis Palestine Concessions (Jurisdiction)* case[13] to 'a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons' constitutes an authoritative indication. A distinction is sometimes made between legal and political disputes, or justiciable and non-justiciable disputes.[14] Although maintained in some international treaties, it is to some extent unsound, in view of the fact that any dispute will involve some political considerations and many overtly political disagreements may be resolved by judicial means. Whether any dispute is to be termed legal or political may well hinge upon the particular circumstances of

[8] Note that on 14 April, the Security Council adopted resolution 910 (1994) by which the initial UN reconnaissance team was exempted from sanctions operating against Libya by virtue of resolution 748 (1992). The observer group received a similar exemption by virtue of resolution 915 B.

[9] See Report of the UN Secretary-General, S/1994/672, 6 June 1994, 100 ILR, pp. 111 ff. The Joint Declaration was countersigned by the Chief Military Observer of UNASOG as a witness.

[10] *Ibid.*, p. 114.

[11] With the exception of binding Security Council resolutions: see further below, chapter 22, p. 1241.

[12] See further below, chapter 19, p. 1067.

[13] PCIJ, Series A, No. 2, 1924, p. 11.

[14] See H. Lauterpacht, *The Function of Law in the International Community*, London, 1933, especially pp. 19–20.

the case, the views adopted by the relevant parties and the way in which they choose to characterise their differences. It is in reality extremely difficult to point to objective general criteria clearly differentiating the two.[15] This does not, however, imply that there are not significant differences between the legal and political procedures available for resolving problems. For one thing, the strictly legal approach is dependent upon the provisions of the law as they stand at that point, irrespective of any reforming tendencies the particular court may have, while the political techniques of settlement are not so restricted. It is also not unusual for political and legal organs to deal with aspects of the same basic situation.[16]

The role of political influences and considerations in inter-state disputes is obviously a vital one, and many settlements can only be properly understood within the wider international political context. In addition, how a state proceeds in a dispute will be conditioned by political factors. If the dispute is perceived to be one affecting vital interests, for example, the state would be less willing to submit the matter to binding third party settlement than if it were a more technical issue, while the existence of regional mechanisms will often be of political significance.

Article 2(3) of the United Nations Charter provides that:

> [a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States[17] develops this principle and notes that:

> states shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

The same methods of dispute settlement are stipulated in article 33(1) of the UN Charter, although in the context of disputes the continuance of

[15] See further below, p. 1067.

[16] See the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 22–3; 61 ILR, pp. 530, 548–9 and the *Nicaragua* case, ICJ Reports, 1984, pp. 392, 435–6; 76 ILR, pp. 104, 146–7.

[17] General Assembly resolution 2625 (XXV). See also the Manila Declaration on the Peaceful Settlement of International Disputes, General Assembly resolution 37/590; resolutions 2627 (XXV); 2734 (XXV); 40/9; the Declaration on the Prevention and Removal of Disputes and Situations which may Threaten International Peace and Security, resolution 43/51 and the Declaration on Fact-finding, resolution 46/59.

which are likely to endanger international peace and security. The 1970 Declaration, which is not so limited, asserts that in seeking an early and just settlement, the parties are to agree upon such peaceful means as they see appropriate to the circumstances and nature of the dispute.

There would appear, therefore, to be no inherent hierarchy with respect to the methods specified and no specific method required in any given situation. States have a free choice as to the mechanisms adopted for settling their disputes.[18] This approach is also taken in a number of regional instruments, including the American Treaty on Pacific Settlement (the Pact of Bogotá), 1948 of the Organisation of American States, the European Convention for the Peaceful Settlement of Disputes, 1957 and the Helsinki Final Act of the Conference on Security and Co-operation in Europe, 1975. In addition, it is to be noted that the parties to a dispute have the duty to continue to seek a settlement by other peaceful means agreed by them, in the event of the failure of one particular method. Should the means elaborated fail to resolve a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, the parties under article 37(1) of the Charter, '*shall* refer it to the Security Council'.[19]

## Diplomatic methods of dispute settlement

### *Negotiation*[20]

Of all the procedures used to resolve differences, the simplest and most utilised form is understandably negotiation. It consists basically of discussions between the interested parties with a view to reconciling divergent

[18] See article 33(1) of the UN Charter and section I(3) and (10) of the Manila Declaration.

[19] Emphasis added.

[20] See UN Handbook, chapter II; Collier and Lowe, *Settlement*, chapter 2; Merrills, *International Dispute Settlement*, chapter 1, and Merrills, 'Mosaic'; and H. Lachs, 'The Law and Settlement of International Disputes' in Brus *et al.*, *Dispute Settlement*, pp. 287–9. See also Murty, 'Settlement', pp. 678–9; A. Watson, *Diplomacy*, London, 1982; F. Kirgis, *Prior Consultation in International Law*, Charlottesville, 1983; P. J. De Waart, *The Element of Negotiation in the Pacific Settlement of Disputes between States*, The Hague, 1973; A. Lall, *Modern International Negotiation*, New York, 1966; G. Geamanu, 'Théorie et Pratique des Négociations en Droit International', 166 HR, 1980 I, p. 365; B. Y. Diallo, *Introduction à l'Étude et à la Pratique de la Négociation*, Paris, 1998; N. E. Ghozali, 'La Négociation Diplomatique dans la Jurisprudence Internationale', *Revue Belge de Droit International*, 1992, p. 323, and D. Anderson, 'Negotiations and Dispute Settlement' in *Remedies in International Law* (ed. M. Evans), Oxford, 1998, p. 111. Note also that operative paragraph 10 of the Manila Declaration emphasises that direct negotiations are a 'flexible and effective means of peaceful settlement'.

opinions, or at least understanding the different positions maintained. It does not involve any third party, at least at that stage, and so differs from the other forms of dispute management. In addition to being an extremely active method of settlement itself, negotiation is normally the precursor to other settlement procedures as the parties decide amongst themselves how best to resolve their differences.[21] It is eminently suited to the clarification, if not always resolution, of complicated disagreements. It is by mutual discussions that the essence of the differences will be revealed and the opposing contentions elucidated. Negotiations are the most satisfactory means to resolve disputes since the parties are so directly engaged. Negotiations, of course, do not always succeed, since they do depend on a certain degree of mutual goodwill, flexibility and sensitivity. Hostile public opinion in one state may prevent the concession of certain points and mutual distrust may fatally complicate the process, while opposing political attitudes may be such as to preclude any acceptable negotiated agreement.[22]

In certain circumstances there may exist a duty to enter into negotiations arising out of particular bilateral or multilateral agreements.[23] Article 283(1) of the Convention on the Law of the Sea, 1982 provides, for example, that when a dispute arises between states parties concerning the interpretation or application of the Convention, 'the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means'.[24] Other treaties may

[21] See Judge Nervo, *Fisheries Jurisdiction* case, ICJ Reports, 1973, pp. 3, 45; 55 ILR, pp. 183, 225. See also the *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, 1924, p. 15, noting that 'Before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by diplomatic negotiations', and the *Right of Passage* (*Preliminary Objections*) case, ICJ Reports, 1957, pp. 105, 148; 24 ILR, pp. 840, 848–9. The Court noted in the *Free Zones of Upper Savoy and the District of Gex* case, PCIJ, Series A, No. 22, p. 13; 5 AD, pp. 461, 463, that the judicial settlement of disputes was 'simply an alternative to the direct and friendly settlement of such disputes between the parties'.

[22] Note that certain treaties provide for consultations in certain circumstances: see article 84 of the Vienna Convention on the Representation of States in their Relations with International Organisations, 1975; article 41 of the Convention on Succession of States in Respect of Treaties, 1978 and article 42 of the Convention on Succession of States in Respect of Property, Archives and Debts, 1983.

[23] See the *Fisheries Jurisdiction* case, ICJ Reports, 1974, p. 3; 55 ILR, p. 238. See also article 8(2) of the Antarctic Treaty, 1959; article 15 of the Moon Treaty, 1979; article 41 of the Vienna Convention on Succession of States in Respect of Treaties, 1978; article 84 of the Vienna Convention on the Representation of States in their Relations with International Organisations, 1975 and article 283 of the Convention on the Law of the Sea, 1982.

[24] This provision has been discussed by the International Tribunal for the Law of the Sea. See e.g. the *Southern Bluefin Tuna* cases, 28 ILM, 1999, p. 1624 and the *Mox* case, 41 ILM, 2002,

predicate resort to third-party mechanisms upon the failure of negotiations.[25] In addition, although it has been emphasised that: 'Neither in the Charter or otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court',[26] it is possible that tribunals may direct the parties to engage in negotiations in good faith and may indicate the factors to be taken into account in the course of negotiations between the parties.[27] Where there is an obligation to negotiate, this would imply also an obligation to pursue such negotiations as far as possible with a view to concluding agreements.[28] The Court held in the *North Sea Continental Shelf* cases that:

> the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition . . . they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[29]

p. 405. In the *Land Reclamation* case, 126 ILR, p. 487, it was held that there was no need to continue the exchange of views where it was clear that the exchange could yield no positive result, *ibid.*, para. 48. In *Barbados* v. *Trinidad and Tobago*, arbitral award of 11 April 2006, paras. 201–3, it was held that article 283(1) could not reasonably be interpreted to require that, when several years of negotiations had already failed to resolve the dispute, further and separate exchanges of views would be required. It was noted that the requirement of article 283(1) for settlement by negotiation is in relation to the obligation to agree upon a delimitation under articles 74 and 83, subsumed within the negotiations which those articles require already to have taken place.

[25] See e.g. the Revised General Act for the Settlement of Disputes 1949; the International Maritime Organisation Treaty, 1948 and the Convention on the Law of the Sea, 1982.

[26] *Cameroon* v. *Nigeria* (*Preliminary Objections*), ICJ Reports, 1998, pp. 275, 303.

[27] See the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 53–4; 41 ILR, pp. 29, 83. See also the *Fisheries Jurisdiction* case, ICJ Reports, 1974, pp. 3, 32; 55 ILR, pp. 238, 267.

[28] See the *Railway Traffic between Lithuania and Poland* case, PCIJ, Series A/B, No. 42, p. 116; 6 AD, pp. 403, 405. Section I, paragraph 10 of the Manila Declaration declares that when states resort to negotiations, they should 'negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties'. Article 4(e) of the International Law Association's draft International Instrument on the Protection of the Environment from Damage Caused by Space Debris provides that 'to negotiate in good faith . . . means *inter alia* not only to hold consultations or talks but also to pursue them with a view of reaching a solution': see Report of the Sixty-sixth Conference, Buenos Aires, 1994, p. 319.

[29] ICJ Reports, 1969, pp. 3, 47; 41 ILR, pp. 29, 76. The Court has noted that, 'like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith', *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 423. Questions as to the meaning

The Court in the *German External Debts* case emphasised that although an agreement to negotiate did not necessarily imply an obligation to reach an agreement, 'it does imply that serious efforts towards that end will be made'.[30] In the *Lac Lanoux* arbitration, it was stated that 'consultations and negotiations between the two states must be genuine, must comply with the rules of good faith and must not be mere formalities'.[31] Examples of infringement of the rules of good faith were held to include the unjustified breaking off of conversations, unusual delays and systematic refusal to give consideration to proposals or adverse interests.[32]

The point was also emphasised by the International Court in the *Legality of the Threat or Use of Nuclear Weapons*, where it noted the reference in article VI of the Treaty on the Non-Proliferation of Nuclear Weapons to 'pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control'. The Court then declared that:

> The legal import of that obligation goes beyond that of a mere obligation of conduct: the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all it aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.[33]

Where disputes are by their continuance likely to endanger the maintenance of international peace and security, article 33 of the UN Charter provides that the parties to such disputes shall first of all seek a solution by negotiation, inquiry or mediation, and then resort, if the efforts have not borne fruit, to more complex forms of resolution.[34]

of 'negotiations' arose in both *Nicaragua* v. *Honduras*, ICJ Reports, 1988, pp. 69, 99 and *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports, 2006, pp. 6, 46 ff.

[30] 47 ILR, pp. 418, 454. [31] 24 ILR, pp. 101, 119.

[32] *Ibid.*, p. 128. See also the *Tacna–Arica Arbitration*, 2 RIAA, pp. 921 ff.

[33] ICJ Reports, 1996, pp. 226, 263–4; 110 ILR, pp. 163, 213–14. The Court usually urges the parties to negotiate when making an order granting (or indeed declining) provisional measures: see e.g. the *Great Belt* case, ICJ Reports, 1991, p. 12 and the *Pulp Mills on the River Uruguay* orders of 13 July 2006 and 23 January 2007. See further as to provisional measures, below, chapter 19, p. 1093.

[34] See the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 47; 41 ILR, pp. 29, 77 and the *Fisheries Jurisdiction* cases, ICJ Reports, 1974, pp. 3, 32; 55 ILR, p. 267.

### *Good offices and mediation*[35]

The employment of the procedures of good offices and mediation involves the use of a third party, whether an individual or individuals, a state or group of states or an international organisation, to encourage the contending parties to come to a settlement. Unlike the techniques of arbitration and adjudication, the process aims at persuading the parties to a dispute to reach satisfactory terms for its termination by themselves. Provisions for settling the dispute are not prescribed.

Technically, good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediation implies the active participation in the negotiating process of the third party itself. In fact, the dividing line between the two approaches is often difficult to maintain as they tend to merge into one another, depending upon the circumstances. One example of the good offices method is the role played by the US President in 1906 in concluding the Russian–Japanese War,[36] or the function performed by the USSR in assisting in the peaceful settlement of the India–Pakistan dispute in 1965.[37] Another might be the part played by France in encouraging US–North Vietnamese negotiations to begin in Paris in the early 1970s.[38] A mediator, such as the US Secretary of State in the Middle East in 1973–4,[39] has an active and vital function to perform in seeking to cajole the disputing parties into accepting what are often his own proposals. It is his responsibility to reconcile the different claims and improve the atmosphere pervading the discussions. The UN Secretary-General can sometimes play an important role

[35] See UN Handbook, p. 33; Collier and Lowe, *Settlement*, p. 27; Merrills, *International Dispute Settlement*, chapter 2; R. R. Probst, *'Good Offices' In the Light of Swiss International Practice and Experience*, Dordrecht, 1989; *New Approaches to International Mediation* (eds. C. R. Mitchell and K. Webb), New York, 1988; J. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, pp. 373–6, and Murty, 'Settlement', pp. 680–1. See also *International Mediation in Theory and Practice* (eds. S. Touval and I. W. Zartman), Boulder, 1985, and *Mediation in International Relations* (eds. J. Bercovitch and J. Z. Rubin), London, 1992.

[36] Murty, 'Settlement', p. 681. Note also the exercise of US good offices in relation to a territorial dispute between France in regard to its protectorate of Cambodia and Thailand, SCOR, First Year, 81st meeting, pp. 505–7.

[37] See GAOR, 21st session, supp. no. 2, part I, chapter III.

[38] See AFDI, 1972, pp. 995–6. Note also the role played by Cardinal Samoré, a Papal mediator in the Beagle Channel dispute between Argentina and Chile, between 1978 and 1985: see Merrills, *International Dispute Settlement*, p. 30, and 24 ILM, 1985, pp. 1 ff. See also below, p. 1054.

[39] See DUSPIL, 1974, pp. 656–8 and *ibid.*, pp. 759–62.

by the exercise of his good offices.[40] An example of this was provided in the situation relating to Afghanistan in 1988. The Geneva Agreements of that year specifically noted that a representative of the Secretary-General would lend his good offices to the parties.[41] Good offices may also be undertaken by the Secretary-General jointly with office-holders of regional organisations.[42]

The Hague Conventions of 1899 and 1907 laid down many of the rules governing these two processes. It was stipulated that the signatories to the treaties had a right to offer good offices or mediation, even during hostilities, and that the exercise of the right was never to be regarded by either of the contending sides as an unfriendly act.[43] It was also explained that such procedures were not binding. The Conventions laid a duty upon the parties to a serious dispute or conflict to resort to good offices or mediation as far as circumstances allow, before having recourse to arms.[44] This, of course, has to be seen in the light of the relevant Charter provisions regarding the use of force, but it does point to the part that should be played by these diplomatic procedures.

### *Inquiry*[45]

Where differences of opinion on factual matters underlie a dispute between parties, the logical solution is often to institute a commission of

[40] See Security Council resolution 367 (1975) requesting the UN Secretary-General to undertake a good offices mission to Cyprus. See the statement by the Secretary-General of the functions of good offices cited in UN Handbook, pp. 35–6. See also B. G. Ramcharan, 'The Good Offices of the United Nations Secretary-General in the Field of Human Rights', 76 AJIL, 1982, p. 130. Note also paragraph 12 of the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security, 1988, General Assembly resolution 43/51. See also below, chapter 22, p. 1222.

[41] S/19835, annex. See also Security Council resolution 622 (1988).

[42] For example with the Chairman of the Organisation of African Unity with regard to the Western Sahara and Mayotte situations, UN Handbook, p. 39, and with the Secretary-General of the Organisation of American States with regard to Central America, *ibid.*

[43] Article 3 of Hague Convention No. I, 1899 and Convention No. I, 1907.

[44] *Ibid.*, article 2.

[45] See Collier and Lowe, *Settlement*, p. 24; Merrills, *International Dispute Settlement*, chapter 3, and N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry*, London, 1974. See also UN Handbook, pp. 24 ff.; T. Bensalah, *L'Enquête Internationale dans le Règlement des Conflits*, Paris, 1976; P. Ruegger, 'Quelques Réflexions sur le Rôle Actuel et Futur des Commissions Internationales d'Enquête' in *Mélanges Bindschedler*, Paris, 1980, p. 427, and Ruegger, 'Nouvelles Réflexions sur le Rôle des Procédures Internationales d'Enquête dans la Solution des Conflits Internationaux' in *Études en l'Honneur de Robert Ago*, Milan, 1987, p. 327.

inquiry to be conducted by reputable observers to ascertain precisely the facts in contention.[46] Provisions for such inquiries were first elaborated in the 1899 Hague Conference as a possible alternative to the use of arbitration.[47] However, the technique is limited in that it can only have relevance in the case of international disputes, involving neither the honour nor the vital interests of the parties, where the conflict centres around a genuine disagreement as to particular facts which can be resolved by recourse to an impartial and conscientious investigation.[48]

Inquiry was most successfully used in the Dogger Bank incident of 1904 where Russian naval ships fired on British fishing boats in the belief that they were hostile Japanese torpedo craft.[49] The Hague provisions were put into effect[50] and the report of the international inquiry commission contributed to a peaceful settlement of the issue.[51] This encouraged an elaboration of the technique by the 1907 Hague Conference,[52] and a wave of support for the procedure.[53] The United States, for instance, concluded forty-eight bilateral treaties between 1913 and 1940 with provisions in each one of them for the creation of a permanent inquiry commission. These agreements were known as the 'Bryan treaties'.[54]

[46] Inquiry as a specific procedure under consideration here is to be distinguished from the general process of inquiry or fact-finding as part of other mechanisms for dispute settlement, such as through the UN or other institutions. See *Fact-Finding Before International Tribunals* (ed. R. B. Lillich), Charlottesville, 1992.

[47] See Bar-Yaacov, *International Disputes*, chapter 2. The incident of the destruction of the US battleship *Maine* in 1898, which precipitated the American–Spanish War, was particularly noted as an impetus to the evolution of inquiry as an important 'safety valve' mechanism, *ibid.*, pp. 33–4. This was particularly in the light of the rival national inquiries that came to opposing conclusions in that episode: see the inquiry commission in that case, *Annual Register*, 1898, p. 362.

[48] Article 9, 1899 Hague Convention for the Pacific Settlement of International Disputes.

[49] Bar-Yaacov, *International Disputes*, chapter 3. See also Merrills, *International Dispute Settlement*, pp. 47 ff., and J. B. Scott, *The Hague Court Reports*, New York, 1916, p. 403.

[50] The Commission of Inquiry consisted of four naval officers of the UK, Russian, French and American fleets, plus a fifth member chosen by the other four (in the event an Austro-Hungarian). It was required to examine all the circumstances, particularly with regard to responsibility and blame.

[51] It was found that there was no justification for the Russian attack. In the event, both sides accepted the report and the sum of £65,000 was paid by Russia to the UK, Bar-Yaacov, *International Disputes*, p. 70.

[52] *Ibid.*, chapter 4. Note also the *Tavignano* inquiry, Scott, *Hague Court Reports*, New York, 1916, p. 413; the *Tiger* inquiry, Bar-Yaacov, *International Disputes*, p. 156, and the *Tubantia* inquiry, Scott, *Hague Court Reports*, New York, 1932, p. 135. See also Merrills, *International Dispute Settlement*, pp. 49 ff., and Bar-Yaacov, *International Disputes*, pp. 141–79.

[53] Bar-Yaacov, *International Disputes*, chapter 5.

[54] These were prefigured by the Taft or Knox Treaties of 1911 (which did not come into operation), *ibid.*, pp. 113–17. The USSR also signed a number of treaties which provide for joint inquiries with regard to frontier incidents, *ibid.*, pp. 117–19.

However, the use of commissions of inquiry in accordance with the Hague Convention of 1907 proved in practice to be extremely rare. The *Red Crusader* inquiry of 1962[55] followed an interval of some forty years since the previous inquiry. This concerned an incident between a British trawler and a Danish fisheries protection vessel, which subsequently involved a British frigate. Although instituted as a fact-finding exercise, it did incorporate judicial aspects. A majority of the Commission were lawyers and the procedures followed a judicial pattern. In addition, aspects of the report reflected legal findings, such as the declaration that the firing on the trawler by the Danish vessel in an attempt to stop it escaping arrest for alleged illegal fishing, 'exceeded legitimate use of armed force'.[56] In the *Letelier and Moffitt* case, the only decision to date under one of the Bryan treaties, a US–Chile Commission was established in order to determine the amount of compensation that would be paid by Chile to the US in respect of an assassination alleged to have been carried out by it in Washington DC.[57] As in the *Red Crusader* inquiry, the Commission in its decision in January 1992 made a number of judicial determinations and the proceedings were conducted less as a fact-finding inquiry and more as an arbitration.[58]

The value of inquiry within specified institutional frameworks, nevertheless, has been evident. Its use has increased within the United Nations generally[59] and in the specialised agencies.[60] Inquiry is also part of other

[55] *Ibid.*, pp. 179–95, and Merrills, *International Dispute Settlement*, pp. 53 ff. See also 35 ILR, p. 485; Cmnd 776, and E. Lauterpacht, *The Contemporary Practice of the UK in the Field of International Law*, London, 1962, vol. I, pp. 50–3.

[56] Lauterpacht, *Contemporary Practice*, p. 53; Merrills, *International Dispute Settlement*, p. 55, and Bar-Yaacov, *International Disputes*, p. 192.

[57] Chile denied liability but agreed to make an *ex gratia* payment equal to the amount of compensation that would be payable upon a finding of liability, such amount to be determined by the Commission.

[58] 88 ILR, p. 727, and see Merrills, *International Dispute Settlement*, pp. 56 ff.

[59] See the announcement by the UN Secretary-General of a mission in 1988 to Iran and Iraq to investigate the situation of prisoners of war at the request of those states, S/20147. See also Security Council resolution 384 (1975) concerning East Timor. The General Assembly adopted a Declaration on Fact-Finding in resolution 46/59 (1991). See also the operation of the UN Compensation Commission established to resolve claims against Iraq resulting from its invasion of Kuwait in 1990 and described by the UN Secretary-General as performing an 'essentially fact-finding function', S/2259, 1991, para. 20: see Collier and Lowe, *Settlement*, p. 42, and Merrills, *International Dispute Settlement*, p. 61, and the work of the World Bank Inspection Panel. See further below, pp. 1040 and 1042.

[60] See article 26 of the Constitution of the International Labour Organisation. See also the inquiry by the International Civil Aviation Organisation in 1983 into the shooting down of a Korean airliner, Collier and Lowe, *Settlement*, p. 26.

processes of dispute settlement in the context of general fact-finding.[61] But inquiry as a separate mechanism in accordance with the Hague Convention of 1907 has fallen out of favour.[62] In many disputes, of course, the determination of the relevant circumstances would simply not aid a settlement, whilst its nature as a third-party involvement in a situation would discourage some states.

### *Conciliation*[63]

The process of conciliation involves a third-party investigation of the basis of the dispute and the submission of a report embodying suggestions for a settlement. As such it involves elements of both inquiry and mediation, and in fact the process of conciliation emerged from treaties providing for permanent inquiry commissions.[64] Conciliation reports are only proposals and as such do not constitute binding decisions.[65] They are thus different from arbitration awards. The period between the world wars was the heyday for conciliation commissions and many treaties made provision for them as a method for resolving disputes. But the process

[61] Note, for example, article 90 of Protocol I to the Geneva Red Cross Conventions, 1949 providing for the establishment of an International Fact-Finding Commission, and Security Council resolution 780 (1992) establishing a Commission of Experts to investigate violations of international humanitarian law in the Former Yugoslavia: see M. C. Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', 88 AJIL, 1994, p. 784.

[62] Note, however, the Permanent Court of Arbitration's Optional Rules for Fact-Finding Commissions of Inquiry, effective December 1997: see http://pca-cpa.org/ENGLISH/BD/inquiryenglish.htm.

[63] See UN Handbook, pp. 45 ff.; Lauterpacht, *Function of Law*, pp. 260–9; Merrills, *International Dispute Settlement*, chapter 4; Collier and Lowe, *Settlement*, p. 29; Murty, 'Settlement', pp. 682–3; H. Fox, 'Conciliation' in David Davies Memorial Institute, *International Disputes*, p. 93; J. P. Cot, *La Conciliation Internationale*, Paris, 1968; Bowett, 'Contemporary Developments', chapter 2; V. Degan, 'International Conciliation: Its Past and Future', *Völkerrecht und Rechtsphilosophie*, 1980, p. 261; and R. Donner, 'The Procedure of International Conciliation: Some Historical Aspects', 1 *Journal of the History of International Law*, 1999, p. 103.

[64] See Murty, 'Settlement'. Merrills notes that by 1940, nearly 200 conciliation treaties had been concluded, *International Dispute Settlement*, p. 66.

[65] See paragraph 6 of the annex to the Vienna Convention on the Law of Treaties, 1969. The Vienna Convention for the Protection of the Ozone Layer, 1985 provides that conciliation awards should be considered in good faith, while article 85(7) of the Vienna Convention on the Representation of States in their Relations with International Organisations provides that any party to the dispute may declare unilaterally that it will abide by the recommendations in the report as far as it is concerned. Note that article 14(3) of the Treaty Establishing the Organisation of Eastern Caribbean States, 1981 stipulates that member states undertake to accept the conciliation procedure as compulsory.

has not been widely employed and certainly has not justified the faith evinced in it by states between 1920 and 1938.[66]

Nevertheless, conciliation processes do have a role to play. They are extremely flexible and by clarifying the facts and discussing proposals may stimulate negotiations between the parties. The rules dealing with conciliation were elaborated in the 1928 General Act on the Pacific Settlement of International Disputes (revised in 1949). The function of the commissions was defined to include inquiries and mediation techniques. Such commissions were to be composed of five persons, one appointed by each opposing side and the other three to be appointed by agreement from amongst the citizens of third states. The proceedings were to be concluded within six months and were not to be held in public. The conciliation procedure was intended to deal with mixed legal–factual situations and to operate quickly and informally.[67]

There have of late been a number of proposals to reactivate the conciliation technique, but how far they will succeed in their aim remains to be seen.[68] A number of multilateral treaties do, however, provide for conciliation as a means of resolving disputes. The 1948 American Treaty of Pacific Settlement; 1957 European Convention for the Peaceful Settlement of Disputes; the 1964 Protocol on the Commission of Mediation, Conciliation and Arbitration to the Charter of the Organisation of African Unity (now the African Union); the 1969 Vienna Convention on the Law of Treaties; the 1981 Treaty Establishing the Organisation of Eastern Caribbean States; the 1975 Convention on the Representation of States in their Relations with International Organisations; the 1978 Vienna

[66] But note the Chaco Commission, 1929, the Franco-Siamese Conciliation Commission, 1947 and the Franco-Swiss Commission, 1955: see Merrills, *International Dispute Settlement*, pp. 67 ff. See also Bar-Yaacov, *International Disputes*, chapter 7.

[67] Article 15(1) of the Geneva General Act as amended provides that 'The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.'

[68] See the Regulations on the Procedure of Conciliation adopted by the Institut de Droit International, *Annuaire de l'Institut de Droit International*, 1961, pp. 374 ff. See also the UN Model Rules for the Conciliation of Disputes Between States, 1995, General Assembly resolution 50/50, and the Optional Conciliation Rules adopted by the Permanent Court of Arbitration in 1996: see *Basic Documents: Conventions, Rules, Model Clauses and Guidelines*, The Hague, 1998. Note also the Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment adopted by the Permanent Court of Arbitration in April 2002.

Convention on Succession of States in respect of Treaties; the 1982 Convention on the Law of the Sea and the 1985 Vienna Convention on the Protection of the Ozone Layer, for example, all contain provisions concerning conciliation.

The conciliation procedure was used in the Iceland–Norway dispute over the continental shelf delimitation between Iceland and Jan Mayen island.[69] The agreement establishing the Conciliation Commission stressed that the question was the subject of continuing negotiations and that the Commission report would not be binding, both elements characteristic of the conciliation method. The Commission had also to take into account Iceland's strong economic interests in the area as well as other factors. The role of the concept of natural prolongation within continental shelf delimitation was examined as well as the legal status of islands and relevant state practice and court decisions. The solution proposed by the Commission was for a joint development zone, an idea that would have been unlikely to come from a judicial body reaching a decision solely on the basis of the legal rights of the parties. In other words, the flexibility of the conciliation process seen in the context of continued negotiations between the parties was demonstrated.[70]

Such commissions have also been established outside the framework of specific treaties, for example by the United Nations. Instances would include the Conciliation Commission for Palestine under General Assembly resolution 194 (III), 1948, and the Conciliation Commission for the Congo under resolution 1474 (ES-IV) of 1960.

## International institutions and dispute settlement[71]

### *Regional organisations*[72]

Article 52(1) of Chapter VIII of the UN Charter provides that nothing in the Charter precludes the existence of regional arrangements or agencies

[69] 20 ILM, 1981, p. 797; 62 ILR, p. 108. The Commission Report was accepted by the parties, 21 ILM, 1982, p. 1222.

[70] See also the 1929 Chaco Conciliation Commission; the 1947 Franco-Siamese Commission; the 1952 Belgian–Danish Commission; the 1954–5 Franco-Swiss Commission and the 1958 Franco-Mexican Commission. See UN Handbook, p. 48 and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 838.

[71] See below, chapter 22 for peaceful settlement of disputes through the United Nations and chapter 23 generally with regard to international institutions.

[72] See *Bowett's Law of International Institutions* (eds. P. Sands and P. Klein), 5th edn, London, 2001; Merrills, *International Dispute Settlement*, chapter 11; Murty, 'Settlement', pp. 725–8; K. Oellers-Frahm and N. Wühler, *Dispute Settlement in Public International Law*, New York, 1984, pp. 92 ff., and Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 838 ff.

for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the UN.[73] Article 52(2) stipulates that members of the UN entering into such arrangements or agencies are to make every effort to settle local disputes peacefully through such regional arrangements or by such regional agencies before referring them to the Security Council, and that the Security Council encourages the development of the peaceful settlement of local disputes through such regional arrangements. That having been said, article 52(4) stresses that the application of articles 34 and 35 of the UN Charter relating to the roles of the Security Council and General Assembly remains unaffected.[74] The supremacy of the Security Council is reinforced by article 53(1) which provides that while the Council may, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority, 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council'. It should also be noted that by article 24 the Security Council possesses 'primary responsibility for the maintenance of international peace and security', while article 103 of the Charter emphasises that, in the event of a conflict between the obligations of a UN member under the Charter and obligations under any other international agreement, the former are to prevail.[75] In addition, under article 36, the Security Council may 'at any stage of a dispute . . . recommend appropriate procedures or methods of adjustment',[76] while article 37 provides that should the parties to a dispute fail to settle it, they 'shall refer it to the Security Council'. Furthermore, should the Council itself deem that the continuance of a dispute is likely to endanger the maintenance of international peace and security, 'it shall decide whether to take action under article 36 or to recommend such terms of settlement as it may consider appropriate'.[77] Thus, although reference where appropriate to regional organisations or arrangements should take place, this

[73] See *The Charter of the United Nations* (ed. B. Simma), 2nd edn, Oxford, 2002, pp. 807 ff. See also H. Saba, 'Les Accords Régionaux dans la Charte des Nations Unies', 80 HR, 1952 I, p. 635; D. E. Acevedo, 'Disputes under Consideration by the UN Security Council or Regional Bodies' in *The International Court of Justice at a Crossroads* (ed. L. F. Damrosch), Dobbs Ferry, 1987; B. Andemicael, *Regionalism and the United Nations*, Dobbs Ferry, 1979; J. M. Yepes, 'Les Accords Régionaux et le Droit International', 71 HR, 1947 II, p. 235.

[74] See further below, chapter 22, p. 1273.

[75] See the *Nicaragua* case, ICJ Reports, 1984, pp. 392, 440; 76 ILR, pp. 104, 151.

[76] This refers to disputes the continuance of which is likely to endanger the maintenance of international peace and security, article 33.

[77] Article 37(2).

does not affect the comprehensive role of the UN through the Security Council or General Assembly in dealing in various ways with disputes between states.[78] While provisions contained in regional instruments may prevent or restrict resort to mechanisms outside those instruments,[79] this does not constrain in any way the authority or competence of the UN.[80] In many cases, a matter may be simultaneously before both the UN and a regional organisation and such concurrent jurisdiction does not constitute a jurisdictional problem for the UN.[81] In practice and in relation to the adoption of active measures, the UN is likely to defer to appropriate regional mechanisms while realistic chances exist for a regional settlement.[82]

Various regional organisations have created machinery for the settlement of disputes.

### *The African Union (Organisation of African Unity)*[83]

The Organisation of African Unity was established in 1963. Article XIX of its Charter referred to the principle of 'the peaceful settlement of disputes

[78] Note that section I, paragraph 6 of the Manila Declaration on the Pacific Settlement of International Disputes adopted in General Assembly resolution 37/10, 1982, provides that states parties to relevant regional arrangements or agencies shall make every effort to settle disputes through such mechanisms, but that this 'does not preclude states from bringing any dispute to the attention of the Security Council or of the General Assembly in accordance with the Charter of the United Nations'.

[79] See below, p. 1273.

[80] See M. Bartos, 'L'ONU et la Co-opération Régionale', 27 RGDIP, 1956, p. 7.

[81] The International Court noted in the *Nicaragua* case, ICJ Reports, 1984, pp. 392, 440; 76 ILR, pp. 104, 151, in the context of contended regional discussions, that 'even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court'.

[82] In such cases, the Security Council is likely to inscribe the dispute on its agenda and, providing the dispute is not one actually endangering international peace and security, refer the matter to the appropriate regional agency under article 52(2) and (3), keeping it under review on the agenda: see UN Handbook, p. 96.

[83] See e.g. K. D. Magliveras and G. J. Naldi, *The African Union and the Predecessor Organisation of African Unity*, The Hague, 2004. The Organisation of African Unity was established in 1963 and replaced by the African Union with the coming into force of the Constitutive Act in May 2001. As to the OAU, see generally T. Maluwa, 'The Peaceful Settlement of Disputes among African States, 1963–1983: Some Conceptual Issues and Practical Trends', 38 ICLQ, 1989, p. 299; S. G. Amoo and I. W. Zartman, 'Mediation by Regional Organisations: The Organisation of African Unity (OAU) in Chad' in Bercovitch and Rubin, *Mediation in International Relations*, p. 131; B. Boutros Ghali, *L'Organisation de l'Unité Africaine*, Paris, 1968; M. Bedjaoui, 'Le Règlement Pacifique des Différends Africains', AFDI, 1972, p. 85; B. Andemicael, *Le Règlement Pacifique des Différends Survenant entre États Africains*, New York, 1973; E. Jouve, *L'Organisation de l'Unité Africaine*, Paris, 1984; T. O. Elias,

by negotiation, mediation, conciliation or arbitration' and to assist in achieving this a Commission of Mediation, Conciliation and Arbitration was established by the Protocol of 21 July 1964.[84] The jurisdiction of the Commission was not, however, compulsory and it was not utilised. African states were historically unwilling to resort to judicial or arbitral methods of dispute settlement and in general preferred informal third-party involvement through the medium of the OAU. In the Algeria–Morocco boundary dispute,[85] for example, the OAU established an ad hoc commission consisting of the representatives of seven African states to seek to achieve a settlement of issues arising out of the 1963 clashes.[86] Similarly in the Somali–Ethiopian conflict,[87] a commission was set up by the OAU in an attempt to mediate.[88] This commission failed to resolve the dispute, although it did reaffirm the principle of the inviolability of frontiers of member states as attained at the time of independence.[89] In a third case, the Western Sahara dispute,[90] an OAU committee was established in July 1978, which sought unsuccessfully to reach a settlement in the conflict,[91] while the OAU also established committees to try to mediate in the Chad civil war, again with little success.[92] Despite mixed success, it became fairly established practice that in a dispute involving African states, initial recourse will be made to OAU mechanisms, primarily ad hoc commissions or committees.

In an attempt to improve the mechanisms available, the OAU approved a Mechanism for Conflict Prevention, Management and Resolution in 1993 (termed the Cairo Declaration).[93] It was intended to anticipate and

*Africa and the Development of International Law*, Leiden, 1972; Z. Cervenka, *The Organisation of African Unity and its Charter*, London, 1968, and M. N. Shaw, 'Dispute Settlement in Africa', 37 YBWA, 1983, p. 149.

84 Elias, *Africa*, chapter 9.

85 See I. Brownlie, *African Boundaries*, London, 1979, p. 55, and M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 196–7.

86 See *Keesing's Contemporary Archives*, pp. 19939–40, and Shaw, 'Dispute Settlement', p. 153.

87 See Brownlie, *African Boundaries*, p. 826. See also Shaw, *Title to Territory*, pp. 197–201.

88 *Africa Research Bulletin*, May 1973, p. 2845 and *ibid.*, June 1973, pp. 2883–4 and 2850.

89 *Ibid.*, August 1980, pp. 5763–4. This is the principle of *uti possidetis*: see further above, chapter 10, p. 525.

90 See Shaw, *Title to Territory*, pp. 123 ff.

91 *Ibid.*, and Shaw, 'Dispute Settlement', pp. 160–2.

92 Shaw, 'Dispute Settlement', pp. 158–60.

93 AHG/Dec. 1 (XXVIII) and see the Report of the OAU Secretary-General, Doc. CM/1747 (LVIII) and AHG/Dec. 3 (XXIX), 1993. See also M. C. Djiena-Wembon, 'A Propos du Nouveau Mécanisme de l'OUA sur les Conflits', 98 RGDIP, 1994, p. 377, and R. Ranjeva, 'Reflections on the Proposals for the Establishment of a Pan-African Mechanism for the Prevention and Settlement of Conflicts' in *Towards More Effective Supervision by International Organisations* (eds. N. Blokker and S. Muller), Dordrecht, 1994, vol. I, p. 93.

prevent situations of potential conflict from developing further; however, it was not successful and in 2001 the OAU Assembly decided to incorporate the Central Organ of the Mechanism as one of the organs of the African Union (which had come into force in May that year).[94] The Protocol Relating to the Establishment of the Peace and Security Council of the African Union was adopted by the First Ordinary Session of the Assembly of the African Union on 9 July 2002.[95] This instrument creates the Peace and Security Council as a 'standing decision-making organ for the prevention, management and resolution of conflicts', to be supported by the Commission of the African Union,[96] a Panel of the Wise,[97] a Continental Early Warning System,[98] an African Standby Force[99] and a Special Fund.[100] A series of guiding principles are laid down, including early response to crises, respect for the rule of law and human rights, respect for the sovereignty and territorial integrity of member states and respect for borders inherited on the achievement of independence.[101] The Council is composed of fifteen members based on equitable regional representation and rotation[102] and its functions include the promotion of peace, security and stability in Africa; early warning and preventive diplomacy; peacemaking including the use of good offices, mediation, conciliation and inquiry; peace-support operations and intervention; peace-building; and humanitarian action.[103] Article 9 provides that the Council 'shall take initiatives and action it deems appropriate' with regard to situations of potential and full-blown conflicts and shall use its discretion to effect

[94] See e.g. C. A. A. Packer and D. Rukare, 'The New African Union and its Constitutive Act', 96 AJIL, 2002, p. 365.

[95] This is stated to replace the Cairo Declaration 1993 and to supersede the resolution and decisions of the OAU relating to the Mechanism for Conflict Prevention, Management and Resolution in Africa which are in conflict with the Protocol: see article 22(1) and (2).

[96] See further article 10.

[97] This is to be composed of five highly respected African personalities selected by the chairperson of the Commission after consultation with the member states concerned and shall undertake such action at the request of the Council or chairperson of the Commission or at its own initiative as deemed appropriate for the prevention of conflicts: see article 11.

[98] This is to include an observation and monitoring centre to be known as 'the situation room' located at the Conflict Management Directorate of the African Union, together with observation and monitoring units of the Regional Mechanisms: see article 12.

[99] This is to consist of standby multidisciplinary contingents and shall perform functions such as observation missions, peace support missions, interventions, preventive deployment, peace-building and humanitarian assistance: see articles 13–15.

[100] Article 2. [101] Article 4. [102] Article 5.

[103] Article 6. See also the list of powers in article 7.

entry, whether through the collective intervention of the Council itself or through its chairperson and/or the chairperson of the Commission, the Panel of the Wise, and/or in collaboration with the regional mechanisms.[104] The Protocol came into force on 26 December 2003.

There are in addition a number of subregional organisations in Africa which are playing an increasing role in conflict resolution. First and foremost is the Economic Community of West African States (ECOWAS) created in 1975. The constituent instrument was revised in 1993[105] and article 58 of the revised treaty refers to the responsibility of ECOWAS to prevent and settle regional conflicts, with the ECOWAS Cease-fire Monitoring Group (ECOMOG) as the adopted regional intervention force. The mission of ECOWAS is to promote economic integration and its institutions include the Authority of Heads of State and Government; the Council of Ministers; the Community Parliament; the Economic and Social Council; the Community Court of Justice; a secretariat and a co-operation fund. ECOWAS intervened in the Liberian civil war in 1990 via a Cease-Fire Monitoring Group (ECOMOG)[106] and has been concerned with the conflicts in Sierra Leone and Guinea-Bissau.[107] An ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peacekeeping and Security was established in 1999 and a Protocol on Democracy and Good Governance adopted in 2001.[108]

The Southern African Development Community (SADC) was established in 1992.[109] In 1996 it decided to establish an Organ on Politics, Defence and Security Co-operation and in 2001 it adopted a Protocol on Politics, Defence and Security Co-operation.[110] Under this Protocol,

[104] See further article 16.

[105] There was a further revision in the Protocol of 2001 adopted at Dakar.

[106] See e.g. *Regional Peace-Keeping and International Enforcement: The Liberian Crisis* (ed. M. Weller), Cambridge, 1994, and see further below, chapter 22, p. 1276.

[107] See e.g. Security Council resolutions 1132 (1997) and 1233 (1999).

[108] The Mechanism's highest decision-making body is the Authority, consisting of the heads of state, with powers to act on all matters concerning conflict prevention, management and resolution, peace-keeping, security, humanitarian support, peace-building, control of cross-border crime and proliferation of small arms, see article 6, while a nine-person Mediation and Security Council is mandated to take appropriate decisions under the Protocol on behalf of the Authority, see articles 7–10. See also Security Council resolution 1197 (1998).

[109] See e.g. B. Chigora, 'The SAD Community', 11 *African Journal of International and Comparative Law*, 2000, p. 522. It evolved out of the Southern African Development Co-ordination Conference established in 1979.

[110] See www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_politics_defence_and_security_co-operation.

the objective of the Organ is to promote peace and security in the region and in particular to 'consider enforcement action in accordance with international law and as a matter of last resort where peaceful means have failed'.[111] A number of structures of the Organ were set up,[112] including a chairperson,[113] the troika (the chairperson together with the incoming and outgoing chairpersons), a ministerial committee,[114] an Inter-State Politics and Diplomacy Committee[115] and an Inter-State Defence and Security Committee.[116] The Organ has jurisdiction to seek to resolve any 'significant inter-state conflict'[117] or any 'significant intra-state conflict'.[118] It may employ a variety of peaceful means, including diplomacy, negotiations, mediation, arbitration and adjudication by an international tribunal and shall establish an early warning system to prevent the outbreak or escalation of a conflict. Where peaceful means fail, the chairperson acting on the advice of the Ministerial Committee may recommend to the Summit of the Community that enforcement action be taken, but such action may only be taken as a matter of last resort and only with the authorisation of the UN Security Council.[119]

### *The Organisation of American States*[120]

Article 23 of the Charter of the OAS, signed at Bogotá in 1948 and as amended by the Protocol of Cartagena de Indias, 1985, provides that international disputes between member states must be submitted to the Organisation for peaceful settlement, although this is not to be interpreted as an impairment of the rights and obligations of member states under

[111] Article 2(f). [112] Article 3. [113] See further article 4. [114] See further article 5. [115] See further article 6. [116] See further article 7.

[117] I.e. one concerning territorial boundaries or natural resources or in which aggression or military force has occurred or where peace and security of the region or of another state party who is not a party to the conflict is threatened: see article 11(2)a.

[118] I.e. one involving large-scale violence, including genocide and gross violation of human rights or a military coup or a civil war or a conflict threatening the peace and security of the region or of another state party, article 11(2)b.

[119] Article 11(3).

[120] See Merrills, *International Dispute Settlement*, pp. 282 ff., and *Bowett's International Institutions*, pp. 205 ff. See also E. Jiménez de Aréchaga, 'La Co-ordination des Systèmes de l'ONU et de l'Organisation des États Américains pour le Règlement Pacifique des Différends et la Sécurité Collective', 111 HR, 1964 I, p. 423, and A. Cançado Trindade, 'Mécanismes de Règlement Pacifiques des Différends en Amérique Centrale: De Contadora à Esquipulas II', AFDI, 1987, p. 798.

articles 34 and 35 of the UN Charter.[121] The 1948 American Treaty of Pacific Settlement (the Pact of Bogotá, to be distinguished from the Charter) sets out the procedures in detail, ranging from good offices, mediation and conciliation to arbitration and judicial settlement by the International Court of Justice. This treaty, however, has not been successful[122] and in practice the OAS has utilised the Inter-American Peace Committee created in 1940 for peaceful resolution of disputes. This was replaced in 1970 by the Inter-American Committee on Peaceful Settlement, a subsidiary organ of the Council. Since the late 1950s the Permanent Council of the OAS, a plenary body at ambassadorial level, has played an increasingly important role.[123] One example concerned the frontier incidents that took place on the border between Costa Rica and Nicaragua in 1985. The Council set up a fact-finding committee and, after hearing its report, adopted a resolution calling for talks to take place within the Contadora negotiating process.[124] The Esquipulas II agreement of 14 November 1987 established an International Verification and Follow-up Commission to be composed of the Foreign Ministers of the Contadora and Support Group States together with the secretaries-general of the UN and OAS.[125]

### *The Arab League*[126]

The Arab League, established in 1945, aims at increasing co-operation between the Arab states. Its facilities for peaceful settlement of disputes amongst its members are not, however, very well developed, and in

[121] Note that as originally drafted in the 1948 Charter, article 20 (as it then was) provided that submission to the OAS procedures had to occur prior to referral to the Security Council of the UN.

[122] Although note the *Nicaragua* v. *Honduras* case, ICJ Reports, 1988, pp. 69, 88; 84 ILR, pp. 218, 243, where the Court held that it had jurisdiction by virtue of article XXXI of the Pact of Bogotá.

[123] See articles 82–90 of the OAS Charter.

[124] OAS Permanent Council resolutions CP/Res. 427 (618/85); CP/doc. 1592/85 and A/40/737-S/17549, annex IV.

[125] The countries involved in the Contadora negotiating process were Colombia, Mexico, Panama and Venezuela, while the Support Group consisted of Argentina, Brazil, Peru and Uruguay. See A/43/729-S/20234.

[126] See H. A. Hassouna, *The League of Arab States and Regional Disputes*, Leiden, 1975; Bowett, 'Contemporary Development', p. 229; M. Abdennabi, *La Ligue des États Arabes et les Conflits Inter-Arabes* (*1962–1980*), 1985; B. Boutros Ghali, 'The Arab League 1945–1970', 25 *Revue Égyptienne de Droit International*, 1969, p. 67; and S. Al-Kadhem, 'The Role of the League of Arab States in Settling Inter-Arab Disputes', 32 *Revue Égyptienne de Droit International*, 1976, p. 1. See also www.al-bab.com/arab/docs/league.htm.

practice consist primarily of informal conciliation attempts. One notable exception was the creation in 1961 of an Inter-Arab Force to keep the peace between Iraq and Kuwait.[127] An Arab Security Force was sent to Lebanon in 1976 to be succeeded by the Arab Deterrent Force between 1976 and 1983. The Arab League was not able to play a significant part in either the Kuwait crisis of 1990–1 or the Iraq crisis of 2002–3.

### *Europe*[128]

The European Convention for the Peaceful Settlement of Disputes adopted by the Council of Europe in 1957 provides that legal disputes (as defined in article 36(2) of the Statute of the International Court of Justice) are to be sent to the International Court, although conciliation may be tried before this step is taken.[129] Other disputes are to go to arbitration, unless the parties have agreed to accept conciliation.

Within the NATO alliance,[130] there exist good offices facilities, and inquiry, mediation, conciliation and arbitration procedures may be instituted. In fact, the Organisation proved of some use, for instance in the longstanding 'cod war' between Britain and Iceland, two NATO partners.[131] The Organisation on Security and Co-operation in Europe (OSCE) has gradually been establishing dispute resolution mechanisms.[132] Under the key documents of this organisation,[133] the participating states are to endeavour in good faith to reach a rapid and equitable solution of their disputes by using a variety of means. Under the Valletta Report 1991, as amended by the Stockholm Decision of 1992, any party to a dispute may request the establishment of a Dispute Settlement Mechanism, which

[127] Note also the pan-Arab 'peacekeeping force' in the Lebanon between 1976 and 1982: see *Keesing's Contemporary Archives*, pp. 28117 ff. See also I. Pogany, *The Arab League and Peacekeeping in Lebanon*, London, 1987. The Council also appointed committees to deal with the 1963 Algerian–Moroccan and Democratic People's Republic of Yemen–Yemen Arab Republic boundary disputes, H. A. Hassouna, 'The League of Arab States and the United Nations: Relations in the Peaceful Settlement of Disputes', New York, 1979, p. 312. See also Simma, *Charter of the United Nations*, p. 852.

[128] See L. Caflisch, 'Vers des Mécanismes Pan-Européennes de Règlement Pacifique des Différends', 97 *Revue Générale de Droit International Public*, 1993, p. 1.

[129] Note that some states have entered reservations to this provision.

[130] See *Bowett's International Institutions*, p. 191, and Merrills, *International Dispute Settlement*, p. 280. See also www.nato.int/.

[131] Merrills, *International Dispute Settlement*, p. 287. Such procedures were also proposed following the Suez crisis in 1956 and with regard to the Cyprus crisis in 1963: see Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 855–6.

[132] See generally above, chapter 7, p. 372, and below, chapter 23, p. 1289.

[133] See the Helsinki Final Act 1975; the Charter of Paris 1990 and the Valletta Report of the Meeting of Experts on Peaceful Settlement of Disputes 1991.