

## INTERNATIONAL LAW AND PRACTICE

# State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention

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### Abstract

This article examines the question of state succession to bilateral treaties. It analyses the work of the International Law Commission undertaken in the 1970s and criticizes the solutions it has adopted in the 1978 Vienna Convention on Succession of States in Respect of Treaties for different types of state succession. I will argue that it is incoherent for the ILC to apply, on the one hand, the solution of automatic continuity for bilateral treaties in the context of secession and dissolution of states, while adopting, on the other hand, the solution of *tabula rasa* for Newly Independent States. In any event, it is plainly unjustifiable to apply the principle of automatic continuity to bilateral treaties. Thus, while the *tabula rasa* principle was adopted by the ILC for multilateral treaties to protect Newly Independent States' right to self-determination, the same solution was chosen for bilateral treaties for different reasons. The rule of *tabula rasa* was adopted because of the particular nature of bilateral treaties and the basic requirement that the other party to an original treaty must consent to the continuation of that treaty with a Newly Independent State. There are simply no logical reasons as to why the *tabula rasa* principle adopted for Newly Independent States should not also find application for all new states. Bilateral treaties do not automatically continue to be in force as of the date of succession unless both states that are implicated explicitly (or tacitly) agree to such a continuation.

### Key words

bilateral treaties; Newly Independent States; secession; state succession; Vienna Convention on Succession of States in Respect of Treaties

## I. INTRODUCTION

The issue of state succession to treaties is undoubtedly one of the most controversial ones in international law. It has long been the battleground for opposing schools of thought. Essentially, supporters of the theory of *tabula rasa* (clean slate) argue

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that a new state (the ‘successor’ state) does not succeed to the treaties to which the predecessor state was a party.<sup>1</sup> On the contrary, advocates of the theory of continuity believe that there is a succession to such treaties. The controversial question of state succession to treaties has been the object of a codification effort by the International Law Commission (ILC) which yielded the adoption of the Vienna Convention on Succession of States in Respect of Treaties in 1978 (the ‘Convention’). The Convention has been widely criticized by many authors. One common ground of complaint is the Convention’s emphasis on developing rules applicable to the situation of ‘Newly Independent States’, which arose from decolonization. The adoption of these rules was not opportune from a temporal standpoint, as the phenomenon of decolonization was drawing to its end.<sup>2</sup>

More generally, the issue to be examined is that of whether or not any codification on the matter of state succession is, on the one hand, realistic and possible and, on the other hand, necessary and useful.<sup>3</sup> This is because the Convention stands as a supplementary mechanism, wherein it always allows states to conclude an agreement that derogates from its dispositions. The practical effect of any codification effort in the area of succession of states is also limited. Thus, the text of the Convention is only binding on the few states that have become party to the treaty. Its content is thus not binding on third-party states, unless, of course, it can be concluded that a given provision codifies customary law on the topic. The ensuing practical implications are that upon its independence, a new state is simply not bound by the Convention.<sup>4</sup> This is what Brigitte Stern has rightly called the ‘hidden defect’ inherent to any convention concerning matters of state succession.<sup>5</sup> The work of the ILC on state succession to treaties has acknowledged these shortcomings.<sup>6</sup> Moreover, while the Convention may be considered as a codification of international law in some areas, it is clearly a ‘progressive development’ of the law with respect to others.<sup>7</sup> Ultimately,

1 According to the 1978 Vienna Convention on Succession of States in Respect of Treaties 1946 UNTS 3 [hereinafter ‘Convention’], state succession is defined as ‘the replacement of one State by another in the responsibility for the international relations of territory’ (Art. 2(1)(b)).

2 P. Cahier, ‘Quelques aspects de la Convention de 1978 sur la succession d’États en matière de traités’, in B. Dutoit and E. Grisel (eds.), *Mélanges Georges Perrin* (1984), at 76; V. Degan, ‘La succession d’États en matière de traités et les États nouveaux (issus de l’ex-Yougoslavie)’, (1996) 42 *AFDI*, at 213; D. P. O’Connell, ‘Reflections on the State Succession Convention’, (1979) 39(4) *ZaöRV* 725, at 726; A. Gruber, *Le droit international de la succession d’États* (1986), 89; I. Sinclair, ‘Some Reflections on the Vienna Convention on Succession of States in Respect of Treaties’, in *Essays in Honour of Erik Castren* (1978), 181; P. Caggiano, ‘The ILC Draft on the Succession of States in Respect of Treaties: A Critical Appraisal’, (1975) 1 *Italian YIL* 75, at 82–3; M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007), 16. See also D. P. O’Connell, ‘Recent Problems of State Succession in Relation to New States’, (1970) 130 *RCADI*, at 102. For arguments defending the Convention, see R. Szafarz, ‘Succession of States in Respect of Treaties in Contemporary International Law’, (1983) 12 *Polish Y.B. Int’l L.* 119, at 131–9.

3 O’Connell, *supra* note 2, at 726 (‘State succession is a subject altogether unsuited to the processes of codification’).

4 R. Mullerson, ‘Law and Politics in Succession of States: International Law on Succession of States’, in G. Burdeau and B. Stern (eds.), *Dissolution, continuation et succession en Europe de l’Est* (1994), 16–17; Caggiano, *supra* note 2, 71–72.

5 B. Stern, ‘Rapport de synthèse’, in G. Burdeau and B. Stern (eds.), *supra* note 4, at 385.

6 Report of the International Law Commission on the Work of its Twenty-Sixth Session, 6 May to 26 July 1974, UN Doc. A/9610/Rev.1 (1974), 169–70 [Polish Y.B. Int’l L., hereinafter ‘ILC Report, Twenty-Sixth Session, 1974’].

7 R. Szafarz, ‘Vienna Convention on Succession of States in Respect of Treaties: a General Analysis’, (1979–1980) 10 *Polish Y.B. Int’l L.* 77, at 107–8.

the Convention should be considered merely as a useful guide to resolve issues of state succession to treaties.<sup>8</sup>

The present article examines one major defect of the Convention that has almost gone unnoticed: the proposed solution in respect of bilateral treaties (of a 'general' nature).<sup>9</sup> The author's intent is to investigate the question of whether or not a new state is bound by the bilateral treaties entered into by the predecessor state with other states (hereinafter referred to as the 'other state party').<sup>10</sup> This article will analyse the work of the ILC on state succession to treaties undertaken in the 1970s and criticize the solutions it has adopted for different types of state succession. I will argue that it is incoherent for the ILC to apply, on the one hand, the solution of automatic continuity for bilateral treaties in the context of secession and dissolution of states, while adopting, on the other hand, the solution of *tabula rasa* for Newly Independent States. I will further argue that, in any event, it is plainly unjustifiable to apply the principle of automatic continuity to bilateral treaties (in the context of secession and dissolution of states) given the particular nature of these instruments. In my view, bilateral treaties do not automatically continue to be in force as of the date of succession unless both states that are implicated explicitly (or tacitly) agree to such a continuation. This basic solution should apply to all new states rather than exclusively to those emerging from the process of decolonization. In fact, this is the solution that states have adopted to resolve issues of succession to bilateral treaties in the context of the break-up of several states after the end of the Cold War, which has been based on negotiation between the parties.<sup>11</sup>

To the best of the author's knowledge, no comprehensive study on the question of state succession to bilateral treaties has been conducted in recent years.<sup>12</sup> Also, no scholar has critically examined the work of the ILC on the specific issue of state succession to bilateral treaties.<sup>13</sup> No investigation into the work of the ILC on this point has been conducted in order to discover how its adoption of the principle

8 Ibid., 108; Caggiano, *supra* note 2, at 71.

9 It should be noted at the outset that the present article does not aim to examine a number of specific types of bilateral treaties (such as those establishing boundaries, creating territorial regimes, so-called 'political' or 'personal' treaties, etc.). Specific solutions prevail under the Convention for these treaties.

10 Under Art. 2 of the Convention the term 'other State party' 'means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates'.

11 International Law Association (ILA), Conclusions of the Committee on Aspects of the Law of State Succession, Resolution no. 3/2008 (2008), adopted at the 73<sup>rd</sup> Conference of the ILA, at point no. 6.

12 Recent articles include: P. Dumberry, 'An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?' (2015) *Journal of International Dispute Settlement* (forthcoming); A. Genest, 'Sudan Bilateral Investment Treaties and South Sudan: Musings on State Succession to Bilateral Treaties in the Wake of Yugoslavia's Breakup', (2014) *TDM* 3; Q. Qerimi and S. Krasniqi, 'Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo', (2013) 14 *German Law Journal* 1639. Much older studies on succession to bilateral treaties include, K. J. Keith, 'Succession to Bilateral Treaties by Seceding States', (1967) 61 *AJIL* 521; A. P. Lester, 'State Succession to Treaties in the Commonwealth', (1963) *ICLQ*, 475. It should be noted that a number of articles have examined the question of bilateral treaties between two specific states: M. Koskenniemi and M. Lehto, 'La succession d'États dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande', (1992) 38 *AFDI* 179; G. Hafner and E. Kornfeind, 'The Recent Austrian Practice of State Succession: Does the Clean Slate Still Exist?', (1996) *Austrian RIEL* 1.

13 For a recent study on the work of the ILC regarding state succession to multilateral treaties, see Craven, *supra* note 2.

of automatic continuity in the context of secession and dissolution of states came about. The present article aims to fill this gap in the literature.

The present article is divided into two parts. The first part (section 2) examines the different solutions which have been adopted under the Convention for three specific types of state succession: Newly Independent States, secession, and dissolution of states. The second part (section 3) will discuss why the application of the principle of continuity to instances of secession and dissolution of states is incoherent with the solution adopted by the ILC regarding Newly Independent States. I will also explain the reasons why the solution of *tabula rasa* should apply to all instances of state succession.

## 2. THE DIFFERENT SOLUTIONS ADOPTED UNDER THE CONVENTION FOR SPECIFIC TYPES OF STATE SUCCESSION

The history of the work of the ILC on state succession to treaties can be roughly summarized as follows:

1. The ILC Special Rapporteur, Sir Humphrey Waldock, submitted five reports: in 1968,<sup>14</sup> 1969,<sup>15</sup> 1970,<sup>16</sup> 1971,<sup>17</sup> and 1972.<sup>18</sup>
2. At its 24<sup>th</sup> session, in 1972, the ILC adopted on first reading a provisional draft,<sup>19</sup> along with commentaries for each provision.<sup>20</sup> The draft articles were transmitted to member states for their observations;
3. In 1973 the ILC appointed a new Special Rapporteur, Sir Francis Vallat, who submitted a first report in 1974, which summarized the comments received from states;<sup>21</sup>
4. At its 26<sup>th</sup> session, in 1974, the Commission adopted the final text of the draft articles on succession of states in respect of treaties, together with commentaries for each provision;<sup>22</sup> member states were invited to submit their written comments and observations on the draft articles;

<sup>14</sup> First Report on Succession of States and Governments in Respect of Treaties, prepared by the Special Rapporteur, Sir Humphrey Waldock, UN Doc. A/CN.4/202 (1968).

<sup>15</sup> Second Report on Succession in Respect of Treaties, prepared by the Special Rapporteur, Sir Humphrey Waldock, UN Doc. A/CN.4/214 and Adds.1 & 2 (1969).

<sup>16</sup> Third Report on Succession in Respect of Treaties, prepared by the Special Rapporteur, Sir Humphrey Waldock, UN Doc. A/CN.4/224 and Add.1 (1970).

<sup>17</sup> Fourth Report on Succession in Respect of Treaties, prepared by the Special Rapporteur, Sir Humphrey Waldock, UN Doc. A/CN.4/249 (1971).

<sup>18</sup> Fifth Report on Succession in Respect of Treaties, prepared by the Special Rapporteur, Sir Humphrey Waldock, UN Doc. A/CN.4/256 and Adds.1-4 (1972).

<sup>19</sup> Draft Articles on Succession in Respect of Treaties: General Article Submitted by the Special Rapporteur as a Possible Means of Covering the Question of Lawfulness, UN Doc. A/CN.4/L.184 (1972).

<sup>20</sup> Report of the International Law Commission on the Work of its Twenty-Fourth Session, 2 May to 7 July 1972, UN Doc. A/8710/Rev.1 (1972) [hereinafter 'ILC Report, Twenty-Fourth Session, 1972'].

<sup>21</sup> First Report on Succession of States in Respect of Treaties, Prepared by the Special Rapporteur, Sir Francis Vallat, UN Doc. A/CN.4/278 and Adds.1-6 (1974).

<sup>22</sup> ILC Report, Twenty-Sixth Session, 1974, *supra* note 6.

5. The United Nations Conference on Succession of States in Respect of Treaties, a conference of plenipotentiaries, was held in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978;
6. On 22 August 1978, the Conference adopted the Vienna Convention on Succession of States in Respect of Treaties and the Final Act of the Conference was signed the day after;
7. The Convention entered into force on 6 November 1996.

As of March 2014, only 22 states have ratified the Convention. Article 2 of the Convention defines the term ‘treaty’ as including both bilateral and multilateral treaties. The Convention gives effect to a fundamental distinction between ‘Newly Independent States’ emerging from decolonization (Articles 16 to 30 of the Convention, examined below at section 2.1.) and other new states not emerging from decolonization (Articles 31 et seq., examined below at section 2.2.).<sup>23</sup> This basic distinction was, however, not apparent in the first four reports filed by Special Rapporteur Waldock. It only transpired later in 1972 when the ILC adopted its first provisional draft.<sup>24</sup>

Before commencing this analysis, a few words should be said about what distinguishes these different types of state succession. First, there are situations where the predecessor state ceases to exist following an event affecting its territorial integrity which leads to the creation of many new states on its original territory. This scenario would constitute a ‘dissolution’ of a state.<sup>25</sup> Second, there are situations where the predecessor state continues to exist following an event affecting its territorial integrity. This is the case of secession, where a new state emerges from the break-up of an already existing state which nevertheless continues its existence after the loss of part of its territory.<sup>26</sup>

Cases of secession must be distinguished from Newly Independent States, for which the Vienna Conventions on matters of state succession have adopted different rules because of their unique historical and political characteristics in the context of decolonization.<sup>27</sup> It is generally admitted that the territory of a colony should not be considered as part of the territory of the colonial state administering it.<sup>28</sup> In that sense, a Newly Independent State is a new state which, however, cannot be said to have ‘seceded’ from the colonial power to the extent that its territory

<sup>23</sup> This article will not examine the regime under the Convention for ‘Unification of States’ (Arts. 31 to 33) and cession of territory (Art. 15).

<sup>24</sup> On the evolution of the work of the ILC, see Craven, *supra* note 2, at 131–2, 159–71.

<sup>25</sup> It should be added that there are two other different scenarios which may result from the extinction of the predecessor state: unification of states and incorporation (or ‘absorption’) of a state.

<sup>26</sup> In the case of the cession or transfer of territory the event affecting the territorial integrity of the predecessor state will result not in the creation of a new state but in the enlargement of the territory of an existing state.

<sup>27</sup> Convention, *supra* note 1; 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 22 ILM (1983), 306. It should be added that the Commentary to the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, adopted by the ILC on second reading in 1999, UN Doc. A/54/10 (1999), Ch. IV, paras. 44 and 45, in 1997 YILC, Vol. II, 13, at 41, paras. 1 and 3, while recognizing the theoretical distinction between Newly Independent States and ‘separation of part or parts of the territory’ (i.e. secession), does not include different provisions for the former.

<sup>28</sup> Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (1970).

was never formally part of it. There is some controversy in doctrine as to whether Newly Independent States should at all be viewed as a distinct type of succession of states.<sup>29</sup> Supporters of the distinction argue that different rules of state succession should apply to these states in order for them to freely exercise their right to self-determination and to break the vicious circle of economic domination (a point further discussed below).<sup>30</sup> The cases of Namibia (1990) and East Timor (2002) are undeniable recent cases of Newly Independent States which occurred after the signing of the 1978 Convention.

### 2.1. Newly Independent States: The principle of *tabula rasa*

Article 2 of the Convention defines a Newly Independent State as being ‘a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible’. Article 16 provides for the general rule applying to both bilateral and multilateral treaties.<sup>31</sup> Under this provision, the principle of *tabula rasa* applies to Newly Independent States which are therefore not automatically bound by the treaties entered into by the predecessor (colonial) state. The new state thus ‘begins its international life free of any general obligation to take over the treaties of its predecessor’.<sup>32</sup> According to the ILC, the general *tabula rasa* principle (applicable to both bilateral and multilateral treaties) was based on state practice.<sup>33</sup>

The Convention also provides different specific rules for Newly Independent States regarding multilateral treaties (Articles 17 to 23) and bilateral treaties (Articles 24 to 26).

The regime prevailing for multilateral treaties is clearly favourable to Newly Independent States.<sup>34</sup> Thus, on the one hand, a Newly Independent State has no obligation to succeed to the treaties of the predecessor state. Yet, on the other hand, it has a right to become party to any multilateral treaty entered into by the predecessor state should it want to.<sup>35</sup> Under the Convention, the other states party to the treaty can only reject such a claim to participation by the Newly Independent State when the ‘application of the treaty in respect of the newly independent state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation’.<sup>36</sup>

29 Some writers do not view Newly Independent States as a distinct category: V.-D. Degan, ‘Création et Disparition de l’État (à la Lumière du Démembrement de Trois Fédérations Multiethniques en Europe)’, (1999) 279 RCADI 195, at 298–9. See also *Restatement (Third), Foreign Relations Law of the United States* (1987), Vol. I, § 210, Reporters’ Notes No. 4, at 113.

30 Y. Makonnen, ‘State Succession in Africa: Selected Problems’, (1986/V) 200 RCADI 93, at 130–1; M. Bedjaoui, ‘Problèmes récents de succession d’Etats dans les Etats nouveaux’, (1970/II) 130 RCADI 455, at 468–9, 530. This point is discussed in: Z. Meriboute, *La codification de la succession d’Etats aux Traités: Décolonisation, Sécession, Unification* (1984), 29–30, 49, 56, 63.

31 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 236.

32 *Ibid.*

33 *Ibid.*, at 212. See also M. K. Yasseen, ‘La Convention de Vienne sur la Succession d’Etats en matière de Traités’, (1978) 24 AFDI 59, 105; Szafarz, *supra* note 7, at 88; P. K. Menon, ‘The Newly Independent States and Succession in Respect of Treaties’, (1990) 18 *Korean Journal of Comparative Law*, at 145.

34 Szafarz, *supra* note 7, at 88–9; Menon, *supra* note 33, at 145.

35 Art. 17, Convention, *supra* note 1. See also ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 236.

36 Art. 17(2), Convention, *supra* note 1. Para. 3 also provides an exception to this principle.

On the contrary, the Convention provides a much less favourable regime for Newly Independent States regarding bilateral treaties.<sup>37</sup> Under Article 24, Newly Independent States are not automatically bound by bilateral treaties that have been entered into by the predecessor state with the ‘other State party’.<sup>38</sup> They have no right to become party to such treaties per se. The provision further indicates that there are two circumstances under which the principle of continuity will apply: when both the Newly Independent State and the ‘other State party’ have expressly agreed that the ‘original treaty’ continues to be in force after the independence, or when both states ‘by reason of their conduct ... are to be considered’ as having agreed to such a continuation.<sup>39</sup> In other words, the Convention does not support the continuity of bilateral treaties simply based on the unilateral will of either the ‘other State party’ or the Newly Independent State.<sup>40</sup> This basic principle of non-automatic continuity is further illustrated by Article 8 (on ‘devolution agreements’) and Article 9 (on unilateral declarations) of the Convention.<sup>41</sup>

## 2.2. Secession and dissolution of states: The principle of continuity

As mentioned above, Articles 31 et seq. deal with cases of state succession not emerging from decolonization. Article 34 of the Convention outlines the regime applicable to cases of ‘separation’ of states. While this provision uses the term ‘separation’, it is important to note that it actually applies to two different cases of state succession: ‘secession’ and ‘dissolution’ of states. Another important point to mention is that this provision applies to both bilateral and multilateral treaties.

Article 34 provides for the application of the principle of automatic continuity whereby the successor state is *ipso facto* bound by the bilateral treaties entered into by the predecessor state. This rule of continuity bears two exceptions: when the implicated parties have specifically agreed to the application of the *tabula rasa* rule, and where the automatic application of the treaty to the successor state would be ‘incompatible with the object and purpose of the treaty or would radically change the conditions for its operation’ (this last exception will be further discussed below).<sup>42</sup>

It is striking to note that the solution adopted by the Convention with respect to cases of secession and dissolution regarding bilateral treaties is completely opposite to the one prevailing in the context of Newly Independent States. This section examines the circumstances surrounding the ILC’s espousal of such a controversial position.<sup>43</sup>

37 On this question, see the analysis of A. Di Stefano, ‘Article 24’, in G. Distephano and G. Gaggioli (eds.), *Commentaire à la Convention de Vienne sur la succession d’États en matière de traités* (2015 expected).

38 The full text of Art. 24(1) reads as follows: ‘A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent State and the other State party when:

(a) they expressly so agree; or

(b) by reason of their conduct they are to be considered as having so agreed.’

39 The scopes of the two exceptions are discussed in Di Stefano, *supra* note 37, para. 35 ff.

40 Meriboute, *supra* note 30, at 73–8; Di Stefano, *supra* note 37, para. 19

41 See, ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 187, 183, 188, 192–9, 240, 246.

42 Art. 34(2) Convention, *supra* note 1.

43 See the discussion in P. Dumberry and D. Turp, ‘State Succession With Respect to Multilateral Treaties in the Context of Secession: From the Principle of Tabula Rasa to the Emergence of a Presumption of Continuity

The ILC's first draft Articles of 1972 clearly contrasted cases of dissolution of states (Article 27, where the principle of continuity applied) with situation of 'separation of one part of a State'. In matters of secession, Article 28(2) provided that the new state 'is to be considered as being in the same position as a newly independent state in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty'. In other words, the rule of *tabula rasa* should apply not only to Newly Independent States, but to all situations of secession due to the climate of intense political tension and violence in which the detachment of a territory often occurs.<sup>44</sup> There was indeed a presumption that in both cases the new state had not participated in the elaboration of the treaties concluded by the predecessor state and that, consequently, it would be unfair for the new state to be bound by such treaties. Moreover, some ILC members relied on state practice as a means to justify the application of the rule of *tabula rasa* in situations of secession.<sup>45</sup>

At its twenty-sixth session in 1974, the ILC decided to re-examine the relevance of treating cases of dissolution of states and those of secession distinctly. It determined that examples of state dissolution had been exclusively examined from the perspective of 'union of States', where 'the component parts of the union retained a measure of individual identity during the existence of the union'.<sup>46</sup> The ILC admitted that 'from a purely theoretical point of view, there may be a distinction between dissolution and separation of part of a State'.<sup>47</sup> But it added that 'it does not necessarily follow that the effects of the succession of States in the two categories of cases must be different for the parts which become new States'.<sup>48</sup> The ILC therefore decided to analyse together cases of dissolution of states as well as those of secession.<sup>49</sup> As such, the Commission opined that both cases should be governed by a single provision (Article 33).

The first paragraph of this provision provides for the same regime of *ipso facto* continuity of treaties to apply in both cases of secession and dissolution. This solution was adopted based on an analysis of state practice in the specific context of dissolution.<sup>50</sup> The third paragraph of Article 33 provides for an exception to this rule of continuity in the context of secession. This third paragraph was added in light of the ILC's cognizance of the fact that

the available evidence of practice during the United Nations period appears to indicate that, at least in some circumstances, the separated territory which becomes a sovereign State may be regarded as a newly independent State to which in principle the rules of the present draft articles concerning newly independent States should apply.<sup>51</sup>

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of Treaties', (2013) 13 *Baltic Yearbook of International Law* 27; V. Mikulka, 'Article 34' in G. Distephano and G. Gaggioli, *supra* note 37, para. 8ff.

44 Meriboute, *supra* note 30, at 216–17.

45 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 263, 266. See also Meriboute, *supra* note 30, at 156–7.

46 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 265.

47 *Ibid.*

48 *Ibid.*

49 R. D. Kearney, 'The Twenty-Sixth Session of the International Law Commission', (1975) 69 *AJIL* 591, at 600.

50 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 265.

51 *Ibid.*, at 266.

The new paragraph therefore stipulated that the principle of *tabula rasa* would apply to those special cases of secession 'where the separation occurred in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State'.<sup>52</sup> The focal point of the analysis became whether or not a territorial entity had effectively participated in the elaboration of treaties concluded by the predecessor State.<sup>53</sup> The principle of continuity therefore applied only to those secessionist states which had 'consented' to those treaties through their effective participation in the process before their independence.

As a result of this analytical shift, the rule of *tabula rasa* would no longer apply to secessionist states as a consequence of the codification of past state practice, which, as the ILC expressly acknowledged, supported the rule of *tabula rasa*.<sup>54</sup> The rule of *tabula rasa* would rather find application only to secessions which could be assimilated to those of Newly Independent States. The content of this third paragraph was, however, openly criticized by representatives of developing states because it (apparently) favoured secessionist movements.<sup>55</sup> It is essentially for this reason that the third paragraph of Article 33 was ultimately removed from the final version of the text in 1978.<sup>56</sup> The removal of this third paragraph of Article 33 (which would later become Article 34 during the adoption of the Convention in 1978) resulted in the integral application of the principle of continuity of treaties to all cases of secession, even those instances of secession that could be assimilated to Newly Independent States.<sup>57</sup>

While authors do not condemn the application of the principle of continuity to multilateral treaties in the case of the dissolution of states insofar as it corresponds to state practice,<sup>58</sup> they are nonetheless very critical of the solution adopted regarding secession. For many, state practice supports the application of *tabula rasa* for multilateral treaties in the context of secession.<sup>59</sup> I share the point of view adopted by Judge Kreca in his dissenting opinion in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* according to

52 Ibid.

53 R. J. Zedalis, 'An Independent Quebec: State Succession to NAFTA', (1996) 2(4) *NAFTA: Law and Business Review of the Americas* 3, at 9; Cahier, *supra* note 2, at 75–76.

54 ILC Report, Twenty-Fourth Session, 1972, *supra* note 20, at 296–7; ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 265.

55 See United Nations Conference on Succession of States in Respect of Treaties, Vienna, 31 July–23 August 1978, Summary records of the plenary meetings and of the meetings of the Committee of the Whole Nations Unies, A/CONF.80/16/Add. 1 (1979), Vol. II, at 53–73, 107–14; Szafarz, *supra* note 7, at 103; Meriboute, *supra* note 30, at 159–61, 163; Cahier, *supra* note 2, at 76.

56 United Nations Conference on Succession of States in Respect of Treaties, *supra* note 55, at 114 (see also, at 53 et seq.). See also Zedalis, *supra* note 53, at 11–13; Mikulka, *supra* note 43, para. 40ff.

57 Yasseen, *supra* note 33, at 103.

58 Meriboute, *supra* note 30, at 216; O'Connell, *supra* note 2, at 164–78; Cahier, *supra* note 2, at 75; M. Maloney, 'State Succession in Respect of Treaties: The Vienna Convention of 1978', (1978–79) 19 *VaJIL* 913; J. Klabbers et al. (dirs.), *Pilot Project on Documentation concerning State Practice relating to State Succession and Recognition* (1999), 117; Szafarz, *supra* note 7, at 104; Caggiano, *supra* note 2, at 75.

59 Szafarz, *supra* note 7, at 104–5; Meriboute, *supra* note 30, at 162; Cahier, *supra* note 2, at 76; Mullerson, *supra* note 4, at 34; I. Brownlie, *Principles of Public International Law* (1998), 663–64; *Restatement (Third)*, *supra* note 29, §210, 'Reporters' Notes' no. 4, at 113; S. A. Williams, 'International Legal Effects of Secession by Quebec', (1992) *York University Centre for Public Law and Public Policy*, at 33; D. B. Majzub, 'Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec', (1998) 24 *Queen's Law Journal* 411, at 429.

which the rule stated in Article 34 can only be considered as a mere ‘progressive development of law’, and not as a codification of customary international law.<sup>60</sup>

Most importantly, for the purposes of this article, the removal of Article 33’s third paragraph meant that the principle of continuity would now apply to bilateral treaties. This is a very strange outcome given that the ILC specifically adopted the exact opposite solution of *tabula rasa* for Newly Independent States. Intriguingly enough, the ILC’s work on Article 34 barely mentions the specific situation of bilateral treaties. The reading of these reports clearly suggests that the ILC ultimately adopted this provision to apply only to multilateral treaties. In fact, it seems that the ILC was not conscious of the fact that the same regime of continuity would incidentally also apply to bilateral treaties. The next section of this article discusses why the solution adopted by the ILC for bilateral treaties in the event of secession and dissolution of states is both incoherent and unjustifiable.

### 3. THE APPLICATION OF THE PRINCIPLE OF CONTINUITY TO CASES OF SECESSION AND DISSOLUTION OF STATES IS INCOHERENT AND UNJUSTIFIABLE

Under Article 34 of the Convention, a new state is *ipso facto* bound by all bilateral treaties entered into by the predecessor state before its independence.<sup>61</sup> This solution of automatic continuity is simply incoherent with the ILC’s position of *tabula rasa* adopted for Newly Independent States. It is indeed unsustainable to apply one rule to one type of succession of states and another principle to other types. In any event, it is plainly unjustifiable to adopt the principle of automatic continuity to bilateral treaties given the very particular nature of these instruments. The present section explains why this is so using the three following steps:

1. First, I will examine the reasons why the principle of *tabula rasa* was adopted for Newly Independent States in the different context of multilateral treaties. This section will show that the ILC adopted specific rules of state succession for these states in order to protect their right to self-determination (section 3.1.);
2. Second, I will show that the ILC adopted the rule of *tabula rasa* in the context of bilateral treaties for reasons entirely extraneous to protecting Newly Independent States’ right to self-determination. The rule was adopted because of the particular nature of these treaties and the basic requirement that the other party to an original bilateral treaty must consent to the continuation of that treaty with a Newly Independent State (section 3.2.);
3. Third, I will demonstrate that there are no logical reasons as to why the *tabula rasa* principle adopted for Newly Independent States should not also find application for all new States (section 3.3.).

<sup>60</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, [1996] ICJ Rep. 595, at 779. See also Caggiano, *supra* note 2, at 76; Szafarz, *supra* note 7, at 104–5, 108.

<sup>61</sup> The application of the two exceptions set out at Art. 34(2) will be examined later.

Finally, I will examine to what extent one of the two exceptions mentioned at Article 34(2) can actually be used by a state to reject the continuous application of a bilateral treaty (section 3.4.).

### **3.1. The principle of *tabula rasa* was adopted in the case of multilateral treaties to protect Newly Independent States' right to self-determination**

It should be first recalled that under Article 16 of the Convention, the principle of *tabula rasa* applies to Newly Independent States which are therefore not automatically bound by treaties entered into by the predecessor (colonial) state and other states. It is true that the ILC did refer to some state practice in favour of the application of this principle.<sup>62</sup> Yet, this is clearly not the reason why it was ultimately decided to apply the rule of *tabula rasa* to Newly Independent States regarding multilateral treaties. This rule was chosen because of the specific characteristics of these new states. The 1960s and 1970s were fundamentally marked by the arrival of a growing number of new states in Asia and Africa that openly contested the legitimacy of the existing rules of international law. These states demanded a revision of these 'outdated' rules that did not respond to the pivotal changes that had prevailed in the international community since the end of the colonization period.<sup>63</sup> According to one prominent scholar, these states '[did] not easily forget that the same body of international law that they [were] now asked to abide by, sanctioned their previous subjugation and exploitation and stood as a bar to their emancipation'.<sup>64</sup>

The rule of *tabula rasa* was therefore adopted based on the simple notion that 'State succession in the event of decolonization [was] a new phenomenon which [was] different in many ways from the traditional theories and practices of State succession'.<sup>65</sup> As explained by Makonnen, the process of decolonization is an entirely different type of succession of states because it is not aimed 'merely at the change of sovereignty in a territory', but rather at the 'creation of new sovereignty over a territory by totally displacing the old sovereignty over that territory'.<sup>66</sup> The same explanation is given by Bedjaoui who contends that the aim of decolonization is to 'purger les rapports anciens de leur contenu inégalitaire'.<sup>67</sup> Accordingly, 'the rules governing the conduct of succession are to be derived from the purposes and goals of decolonization'<sup>68</sup> which is to 'undo what has been done through colonization'<sup>69</sup> and to protect new states' right to self-determination.<sup>70</sup>

As explained by one writer, while the principle of automatic continuity of multilateral treaties was adopted (in general) because the 'overriding factor must be that of the interests of third States which are entitled to stable treaties'<sup>71</sup> the situation is

62 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 211.

63 G. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', (1962) 8 *Howard L.J.* 95, at 118.

64 *Ibid.*, at 100.

65 Makonnen, *supra* note 30, at 129. See also Bedjaoui, *supra* note 30, at 490.

66 Makonnen, *supra* note 30, at 129.

67 Bedjaoui, *supra* note 30, at 469, 530.

68 Makonnen, *supra* note 30, at 129-30.

69 Makonnen, *supra* note 30, at 131.

70 Bedjaoui, *supra* note 30, at 493.

71 Szafarz, *supra* note 2, at 110.

entirely different for Newly Independent States where it is *their interests* which must be overriding.<sup>72</sup> A Newly Independent State is thus free to decide which treaties it wants to be bound by; it is also free to reject those that are inconsistent with its own interests.<sup>73</sup> As explained by Yasseen, '[l]e principe de l'autodétermination exige qu'un État nouvellement indépendant puisse exercer sa pleine souveraineté, et cela nécessite qu'il jouisse d'une liberté totale quant à ses relations conventionnelles avec les autres États'.<sup>74</sup>

In sum, the ILC adopted the rule of *tabula rasa* for *multilateral* treaties because it was more congruous with Newly Independent States' right to self-determination.<sup>75</sup>

The next section examines why the ILC adopted the rule of *tabula rasa* for *bilateral* treaties, but based on an entirely different set of reasons.

### 3.2. The principle of *tabula rasa* was adopted for bilateral treaties based on the requirement that both states must consent to the continuation of a treaty

According to the ILC, the rule of *tabula rasa* set out at Article 24 of the Convention for bilateral treaties reflected the practice of Newly Independent States.<sup>76</sup> This conclusion is supported by some writers<sup>77</sup> who have in fact highlighted the customary nature of this rule in the context of bilateral treaties.<sup>78</sup> At the opposite end of the spectrum of views on this matter, one author went so far as to argue that new states are in fact bound by certain categories of bilateral treaties under an international law obligation.<sup>79</sup> The ILA also adopted a presumption in favour of the continuity of treaties in 1965.<sup>80</sup> In any event, this debate surrounding the customary nature of Article 24 is of limited relevance. This is because the ILC's decision to ultimately adopt the rule of *tabula rasa* was not at all based on state practice. It was also unrelated to the protection of Newly Independent States' right to self-determination.

The ILC rightly explained that an important distinction must be made between bilateral and multilateral treaties regarding the question as to whether or not a Newly Independent State has the right to be party to the treaties concluded by the predecessor state.

Special Rapporteur Waldock explained that a Newly Independent State enjoys a right to become party to an existing *multilateral* treaty 'independently of the consent

<sup>72</sup> Ibid.

<sup>73</sup> Bedjaoui, *supra* note 30, at 526.

<sup>74</sup> Yasseen, *supra* note 33, at 105, see also at 106.

<sup>75</sup> ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 169; Menon, *supra* note 33, at 145, 172.

<sup>76</sup> ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 211. It also mentioned that in 'some categories of treaties, it is true, continuity in one form or another occurs with impressive regularity' (at 237). See Succession of States in Respect of Bilateral Treaties: Second and Third Studies Prepared by the Secretariat, UN Doc. A/CN.4/243 and Add.1 (1971), at 111 *iff*.

<sup>77</sup> Di Stefano, *supra* note 37, para. 14; Meriboute, *supra* note 30, at 78; Menon, *supra* note 33, at 145; Szafarz, *supra* note 7, at 97. For an earlier study supporting the principle of *tabula rasa*, see Lester, *supra* note 12, at 476–7, 506–7.

<sup>78</sup> Di Stefano, *supra* note 37, paras. 14, 56, 76; Szafarz, *supra* note 2, at 130.

<sup>79</sup> Keith, *supra* note 13, at 545.

<sup>80</sup> ILA, *Report of the 52<sup>nd</sup> Conference, Helsinki* (1966), 557–96; ILA, *Report of the 53<sup>rd</sup> Conference, Buenos Aires* (1969), 589–633.

of the other parties to the treaty'.<sup>81</sup> This right hinges upon the existence of a 'legal nexus of a certain degree between the treaty and the territory'.<sup>82</sup> The ILC further explained the nature of this 'legal nexus' as follows:

the fact that prior to independence, the predecessor State had established its consent to be bound by a multilateral treaty and its act of consent related to the territory now under the sovereignty of the newly independent State creates a legal nexus between that territory and the treaty in virtue of which the newly independent State has the right, if it wishes, to participate in the treaty on its own behalf as a separate party or contracting State.<sup>83</sup>

What about bilateral treaties? The ILC put forward that 'a difference does exist and should be made between bilateral treaties and certain multilateral treaties in regard to a newly independent state's *right* to be a party to a treaty concluded by its predecessor'.<sup>84</sup> A new state does not have the right to become party to a bilateral treaty without the consent of the other party to the treaty.<sup>85</sup> There exists no automatic continuity because 'succession in respect of bilateral treaties has an essentially *voluntary character*, that is, on the part not only of the newly independent State but also of the other interested State'.<sup>86</sup>

The ILC thus explained that the 'personal equation' (i.e. 'the identity of the other contracting party'), necessarily plays a more dominant role in bilateral treaty relations.<sup>87</sup> Thus, 'the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests'.<sup>88</sup> While multilateral treaties are entered into by states to safeguard the *general* interest of the international community (i.e. all states), the same cannot be said about bilateral treaties. These treaties are signed to preserve the *specific* interests of the two parties involved.<sup>89</sup> As a result of this 'personal equation' of the two parties involved in a bilateral relationship, 'it is not possible automatically to infer from a state's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory'.<sup>90</sup> In other words, from the mere fact that the 'other State party' (state A) has entered into a treaty (the original treaty) with the predecessor state (state B) at some point in time, it simply cannot be inferred in any way that state A would be willing to later sign and ratify the exact same treaty with another state (state C, the Newly Independent State). This is because treaty negotiation between

81 Third Report on Succession in Respect of Treaties, *supra* note 16, at 37. See also Craven, *supra* note 2, at 142ff.

82 Third Report on Succession in Respect of Treaties, *supra* note 16, at 39. See also ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 237.

83 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 237 (see also at 169). On this question, see Szafarz, *supra* note 2, at 119–20.

84 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 212 (emphasis in the original). See also at 237.

85 This principle is reflected at Art. 24 of the Convention stating that the principle of *tabula rasa* applies to bilateral treaties unless the other state party to the original treaty has expressly (or tacitly) agreed to the continuation of that treaty.

86 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 239 (emphasis added). See also Gruber, *supra* note 2, at 182.

87 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 237.

88 *Ibid.*

89 Meriboute, *supra* note 30, at 79.

90 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 237.

different entities necessarily leads to different outcomes. In the example just mentioned, one should assume that state A would want to negotiate a set of rights and obligations with the new state (state C) different from those entered into previously with the predecessor state (state B). This is simply because states B and C are not the same entity. They have not only different sizes and population, but also different political and economic powers; they also have different interests.

Thus, in the specific context of bilateral treaties, the 'legal nexus' between the territory of the Newly Independent State and the original treaty does not generate for that state any right to become party to that treaty.<sup>91</sup> What is missing is the agreement by state A that this specific treaty should now apply to this new and different treaty partner (state C).<sup>92</sup> In the opinion of the ILC,

practice does not seem to support the existence of a unilateral right in a newly independent State to consider a bilateral treaty as continuing in force with respect to its territory after independence *regardless of the wishes of the other party to the treaty*.<sup>93</sup>

Scholars generally support this position.<sup>94</sup>

The ILC further provides another reason for applying the non-continuity rule in the context of bilateral treaties.<sup>95</sup> In the event of the arrival of a new state on the international scene, the original treaty between the predecessor state (state B) and the 'other State party' (state A) will remain in force despite its reduced scope of geographical application (it will no longer apply to the territory of the Newly Independent State).<sup>96</sup> This principle is specifically set out at Article 35 of the Convention.<sup>97</sup> But if state A and state C (the Newly Independent State) agree to the continuity of the original treaty, this agreement must be considered as the basis of a *new* treaty. This treaty (between states A and C) is legally a *different* instrument from the original treaty (between states A and B), even when they have the exact same content.<sup>98</sup> Article 25 of the Convention further explains that the fact that states A and C have agreed to the continuity of the original treaty does not result in that treaty being 'considered as being in force also in the relations between the predecessor State and the newly independent State'.<sup>99</sup> In other words, it is entirely up to the predecessor state (state B) and the Newly Independent State (state C) to decide whether or not they want their relationship to continue to be governed by that original treaty. If they do, this instrument should be considered as an entirely *new* treaty that is distinct from the original treaty.<sup>100</sup>

91 Ibid.

92 Yasseen, *supra* note 33, at 108.

93 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 238 (emphasis in the original).

94 Cahier, *supra* note 2, at 72; Meriboute, *supra* note 30, at 74, 78; Yasseen, *supra* note 33, at 108; Menon, *supra* note 33, at 156; Szafarz, *supra* note 7, at 97.

95 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 237 (emphasis in the original).

96 Gruber, *supra* note 2, at 181.

97 It is surprising that the Convention's section dealing specifically with Newly Independent States (Arts. 24 to 26) does not contain a provision equivalent to Art. 35.

98 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 241; Gruber, *supra* note 2, at 181.

99 Art. 25, Convention, *supra* note 1.

100 ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 237. See also Menon, *supra* note 33, at 161; Gruber, *supra* note 2, at 181; Meriboute, *supra* note 30, at 74; G. Bartolini, 'Article 25', in Distephano and Gaggioli (eds.), *supra* note 37, para. 15.

### 3.3. The *tabula rasa* principle should apply to all new states

As just explained, the principle of *tabula rasa* was correctly adopted for bilateral treaties based on the requirement that both states concerned must consent for a treaty to continue to be in force after independence. There are simply no reasons why this sound solution should be reserved only for Newly Independent States; it should apply to all instances of state succession. The next paragraphs set out two additional reasons in support of this proposition.

The first reason stems from the history of the drafting of the Convention. In the earlier stage of the work of the ILC, the rule of *tabula rasa* was clearly meant to apply to all instances of state succession.<sup>101</sup> It is only when the first draft Articles were adopted by the ILC in 1972 that it was decided to create a distinction between Newly Independent States and other cases outside the context of decolonization.<sup>102</sup> It is only then that a whole series of provisions were introduced to deal specifically with Newly Independent States.<sup>103</sup> A rather curious thing then happened in regard of the ILC's reasoning as to why the question of consent of all states concerned was so crucial to the continuation of bilateral treaties. The above-mentioned two main reasons, which were featured in Waldock's Fourth Report under the general section 'New States',<sup>104</sup> were simply moved in the first provisional draft (of 1972) to the new section dealing exclusively with Newly Independent States.<sup>105</sup> Bizarrely, these comments were not reproduced in the other new section of the draft concerning secession and dissolution. In fact, the ILC barely mentioned bilateral treaties at all when discussing Article 34. It seems at this stage that the ILC decided that these basic reasons explaining the importance of consent were now only relevant in the context of Newly Independent States. This is a rather strange outcome considering the obvious fact that these comments were clearly meant to be applicable to *all* bilateral treaties involving *all instances* of state succession. The work of the ILC is completely silent on why the principle of automatic continuity should apply to bilateral treaties in cases of dissolution and secession. This omission is not only regrettable; it is unexplainable.

The second reason why the rule of *tabula rasa* should apply to secession and dissolution cases is a purely logical one. Why should state A (the 'other State party') be automatically bound by a bilateral treaty in some situations and not in others? If the ILC is right in specifying that 'succession in respect of bilateral treaties has an essentially voluntary character',<sup>106</sup> this basic proposition should presumably apply to all types of state succession, not only to Newly Independent States. It simply cannot be that state A's consent is essential when dealing with Newly Independent States and irrelevant outside the context of decolonization. To protect the interests

<sup>101</sup> Thus, in Waldock's Third and Fourth Reports of 1970 and 1971 the general expression 'new States' was used for all states. See, for instance, Art. 13 entitled 'The Position of new States in regard to Bilateral Treaties' in Fourth Report on Succession in Respect of Treaties, *supra* note 17, at 145; Third Report on Succession in Respect of Treaties, *supra* note 16. See the discussion in Craven, *supra* note 2, at 131–2.

<sup>102</sup> ILC Report, Twenty-Fourth Session, 1972, *supra* note 20, at 227.

<sup>103</sup> *Ibid.*, at 250.

<sup>104</sup> Fourth Report on Succession in Respect of Treaties, *supra* note 17, at 145–6.

<sup>105</sup> ILC Report, Twenty-Fourth Session, 1972, *supra* note 20, at 272–3.

<sup>106</sup> ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 239.

of the ‘other State party’ to the original treaty in the context of Newly Independent States and not in situations of secession and dissolution of states is unjustifiable. Simple common sense therefore dictates that the rule of *tabula rasa* applies to cases of secession and dissolution.

### 3.4. Can a state claim the benefit of the *rebus sic stantibus* exception mentioned at Article 34(2)(b) to prevent the continuous application of a treaty?

There is one possible explanation as to why the ILC may have decided to apply the rule of automatic continuity in the context of secession and dissolution despite the fact that this solution was contrary to its past statements with respect to the importance of consent in the specific context of bilateral treaties. It may be that the ILC came to the conclusion that, in any event, the solution of continuity could never be imposed on a reluctant state.

As mentioned above, the rule of continuity of treaties under Article 34 bears two exceptions. Under Article 34(2)(b), the *tabula rasa* rule should prevail when the automatic application of the treaty to the successor state would be ‘incompatible with the object and purpose of the treaty or would radically change the conditions for its operation’.<sup>107</sup> The question arises as to whether or not a state (either the ‘other State party’ or the new state) can argue that the replacement of one state (the predecessor state) by another one (the new state) as a party to the treaty ‘radically change[s] the conditions for its operation’. In other words, can a state claim the benefit of the *rebus sic stantibus* exception mentioned at Article 34(2)(b) to prevent the continuous application of a treaty? The work of the ILC shows that the wording of this provision was adopted based on Article 62 of the Vienna Convention on the Law of Treaties.<sup>108</sup>

In its work on state succession, the ILC did not specifically address the scope of the *rebus sic stantibus* exception in the context of bilateral treaties. This omission is unfortunate. In fact, the only reference the present author could find in the work of the ILC on this point is the following brief explanation: ‘in most, if not all, cases of succession of States the territorial changes might result in “incompatibility with the object and purpose of the treaty” or a “radical change in the conditions for the operation of the treaty”’.<sup>109</sup> This comment seems to suggest that the exception set out at Article 34(2)(b) could be used in some circumstances by a state in order to prevent the continuous application of a treaty. This is also the position of some writers.<sup>110</sup>

Yet, recent state practice shows that ‘other States parties’ have actually not used this argument upon their decision to undertake fresh negotiations with new

<sup>107</sup> Art. 34(2)(b), Convention, *supra* note 2.

<sup>108</sup> ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 210. See also Yasseen, *supra* note 33, at 82.

<sup>109</sup> ILC Report, Twenty-Sixth Session, 1974, *supra* note 6, at 210.

<sup>110</sup> P. M. Eisemann, ‘Rapport du Directeur de la section de langue française du Centre’, in P. M. Eisemann and M. Koskeniemi (eds.), *State Succession: Codification Tested Against the Facts* (2000), 51, 53; B. Stern, ‘La succession d’États’ (1996) 262 RCADI, at 314; Mikulka, *supra* note 43, para. 71.

states.<sup>111</sup> In the context of the dissolution of Czechoslovakia in 1993, both successor states (the Czech Republic and the Republic of Slovakia) adopted the principle of continuity to bilateral treaties.<sup>112</sup> The Czech Republic negotiated with all states concerning the fate of these bilateral treaties and almost all of them have remained in force.<sup>113</sup> Interestingly enough, the exception set out at Article 34(2)(b) was not invoked at all during these negotiations.<sup>114</sup> It should be added that while Austria's general position was in favour of the application of the *tabula rasa* rule, it also failed to invoke Article 34(2)(b).<sup>115</sup>

The question of the practical application of the exception set out at Article 34(2)(b) of the Convention remains unsettled. In my view, a state would probably have a limited chance of success in convincing a court that the continuous application of a treaty should be denied *merely* on the ground that state succession has occurred.<sup>116</sup> The same position was recently taken by an arbitral tribunal which had to examine whether the China-Laos Bilateral Investment Treaty extended to the territory of Macao over which China resumed sovereignty in 1999.<sup>117</sup> In order to successfully invoke the *rebus sic stantibus* exception mentioned at Article 34(2)(b), a state would be required to demonstrate that the replacement of one state (the predecessor state) by another one (the new state) as a party to the treaty is 'incompatible' with the object and purpose of the treaty. The occurrence of such a scenario will be rare in practice. Could it be argued, for instance, that the secession of a state which adopts a Communist ideology soon after its independence is 'incompatible' with the object and purpose of a free trade agreement?<sup>118</sup>

Similarly, it is hard to envisage cases where the replacement of one state by another would 'radically' change the conditions for the operation of a treaty.

111 Eisemann, *supra* note 110, at 53. *Contra*, ILA, *supra* note 11, no. 8 ('The *rebus sic stantibus* rule is sometimes invoked as a way to obtain the renegotiation of the treaty').

112 Stern, *supra* note 110, at 316.

113 ILA, *New Delhi Conference 2002 – Committee on Aspects of The Law of State Succession - Rapport Final sur la Succession en matière de traités* (2002), 11; Mikulka, *supra* note 43, para. 124.

114 Klabbers et al., *supra* note 58, Report by the Czech Republic, at 469, ad. no. 3; Mikulka, *supra* note 43, para. 71.

115 G. Hafner, 'Austria and Slovenia: Succession to Bilateral Treaties and the State Treaty of 1955', in M. Mrak (ed.), *State Succession* (1999), 136.

116 The author is very grateful to Prof. Caroline Fournet (Groningen University, The Netherlands) for her insightful comments and remarks on this question. See also M. N. Shaw and C. Fournet, 'Article 62 – Changement Fondamental de Circonstances', in O. Corten and P. Klein (eds.), *Les conventions de Vienne sur le droit des traités – Commentaire article par article* (2006), Vol. III, at 2256, arguing that a succession of states should not be considered as a 'fundamental change of circumstances' in the context of the application of Art. 62 of the Vienna Convention on the Law of Treaties.

117 *Sanum Investments Limited v. Government of the Lao People's Democratic Republic*, UNCITRAL Arbitration Rules, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, para. 246: ('the Tribunal considers that it would be excessive to say that all bilateral treaties are so personal, so related to *intuitu personae* questions that they cannot survive a State's succession. In other words, the Tribunal considers that it is necessary to consider the application of the general rule to bilateral treaties on a case-by-case basis.' (emphasis in the original)). On the question of State succession to bilateral investment treaties, see Dumberry, *supra* note 12.

118 The *Sanum* tribunal answered the question in the affirmative (in the context of cession of territory): 'It can indeed be the case that when a treaty is concluded between two States with planned economies, the extension of such treaty to a capitalist economy would fundamentally change the conditions for its application if the treaty was based on features specific to a planned economy and irreconcilable with the liberal principles of a capitalist economy.' (Ibid., paras. 247–8). Yet, the tribunal ultimately held that the extension of the China–Laos Bilateral Investment Treaty to Macao would not radically change the condition of operation of the treaty.

#### 4. CONCLUSION

The author's conclusion is that upon its independence, a new state is not automatically bound by the bilateral treaties which have been entered into by the predecessor state with other states. Continuation of treaties is ultimately the result of the express (or tacit) agreement of both states concerned. In my view, and contrary to the position adopted by the ILC in the 1978 Convention, this basic logical solution should apply to all new states. This is indeed the solution favoured by scholars.<sup>119</sup>

This is also the general position that has been adopted by states in recent years in the context of numerous examples of secessions and dissolution of states.<sup>120</sup> Post Cold-War recent practice has shown an interesting pattern. A number of successor states (for instance, in the context of the dissolutions of Czechoslovakia and Yugoslavia) seem to have adopted a general position in favour of continuity regarding bilateral treaties.<sup>121</sup> They have indeed expressed their will to continue to apply these treaties after the date of secession. It may be that their position was influenced by the existence of the continuity rule set out at Article 34 of the Convention. In fact, many of these new states had become party to the Convention after their independence. Yet, the response of the other states party to such claim of continuity has been anything but coherent. Ultimately, the fate of these treaties has generally been decided through negotiation.<sup>122</sup> Thus, 'other States parties' have generally not endorsed the principle of automatic continuity set out at Article 34. The continuation of a great number of bilateral treaties has ultimately been the result of an *agreement* between the states concerned.

Such state practice further demonstrates that the 1978 Convention experiment regarding the issue of state succession to bilateral treaties has been a failure.

On the one hand, while the solution of *tabula rasa* which the ILC adopted for Newly Independent States was both legally sound and logic, it remains that it has been of very limited practical use for states. This is because the phenomenon of decolonization was near its end when the Convention was adopted in 1978. On the other hand, the solution of automatic continuity which was adopted by the ILC for bilateral treaties in the context of secession and dissolution of states is not only incoherent with the solution of *tabula rasa* applicable to Newly Independent States, it is also plainly unjustifiable given the particular nature of these instruments. Not surprisingly, this solution of automatic succession has not been observed by states in their actual practice in the context of secession and dissolution of states in the last twenty-five years.

<sup>119</sup> See, for instance, M. Shaw, *International Law* (2008), 967; Craven, *supra* note 2, at 142; Menon, *supra* note 33, at 156ff; Stern, *supra* note 110, at 315; Di Stefano, *supra* note 37, para. 15; A. Goncalves Pereira, *La succession d'États en matière de traités* (1969), 149; O. Udokang, *Succession of the New States to International Treaties* (1972), 501; K. Zemanek, 'State Succession after Decolonization', (1965) 116 RCADI, at 238; Cahier, *supra* note 2, at 72; Meriboute, *supra* note 30, at 74; Yasseen, *supra* note 33, at 108.

<sup>120</sup> ILA, *supra* note 11.

<sup>121</sup> Mikulka, *supra* note 43, paras. 121, 124.

<sup>122</sup> ILA, *supra* note 11, at point no. 6; ILA, *supra* note 113.