ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

# ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

## Право договоров

Марсело Коэн

# COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

## Law of Treaties

Marcelo G. Kohen

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*Летняя Школа по международному публичному праву 2018 года*
*Summer School on Public International Law of 2018*

## Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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Первая Летняя Школа состоялась в 2018 году. Специальные курсы были посвящены источникам международного права. Их прочитали Сэр Майкл Вуд («Обычное международное право»), Туллио Тревес («Источники международного права в международных судах и трибуналах»), Марсело Коэн («Право договоров»), Бахтияр Тузмухамедов («Международное право в конституционной юрисдикции»), Фрэнк Лэтти («Общие принципы права»). Общий курс международного публичного права прочёл Рейн Мюллерсон.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного Совета Летней Школы – Р.А. Колодкину, Р.А. Мюллерсону, С.М. Пунжину, Л.А. Скотникову, Б.Р. Тузмухамедову – и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

## Dear friends,

International and Comparative Law Research Center continues to publish the lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning international law, working or aspiring to work in the area, with an opportunity to obtain advanced knowledge of the subject and encouraging participants engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of a general and special courses joined under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The first Summer School was held in 2018. The Special Courses were devoted to the topic "Sources of International Law". The courses were delivered by Sir Michael Wood ("Customary International Law"), Tullio Treves ("International Courts and Tribunals and the Sources of International Law"), Marcelo Kohen ("Law of Treaties"), Bakhtiyar Tuzmukhamedov ("Sources of International Law in Constitutional Jurisdiction"), and Franck Latty ("General Principles of Law"). The General Course on public international law was delivered by Rein Müllerson.

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## Марсело Коэн

Профессор Института международных отношений (Женева), Титулярный член и Генеральный секретарь Института международного права (*Institut de Droit International*). Юридический советник ряда государств в международных судах и трибуналах. Выступает в качестве арбитра в делах, рассматриваемых МЦУИС и по правилам ЮНСИТРАЛ. Автор многочисленных публикаций по международному праву, в том числе по праву договоров.

## Marcelo G. Kohen

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# LECTURE 1:

## Introduction; Consent and consensus; Reservations and interpretive declarations to treaties

Good afternoon, it's a great pleasure to be here. As you know, I am Professor Marcelo Kohen. I was told that I was introduced last Sunday, so you know everything about me. I think you know that I am Argentinian, that I am Professor of International Law at the Graduate Institute of International and Development Studies in Geneva. I am also a football fan, and I will not speak about the World Cup for obvious reasons. And well, it's my pleasure to be in Moscow. It's not my first time in this city. Unfortunately, my Russian is very fragmentary. I know how to say 'good morning', 'good evening', etc., but I am totally unable to lead a course in Russian, or even to have a discussion. That's a real pity, because when I introduce myself to students of international law, what I like to say is that if you are an internationalist, you have to master different languages. This is your case; all of you are able to follow me in English. I know that you know two languages at least. But I also insist that you have to know more languages, if you are an internationalist. I teach at the Graduate Institute, this is still a bilingual institution, so I teach and work both in English and French, and as you know English and French are the working languages of the International Court of Justice, of the International Tribunal for the Law of the Sea, and they are the two working languages of the UN Secretariat. Obviously, you know that there are other official languages of the United Nations, but the working languages of the Secretariat are English and French. So, I strongly encourage you to learn French. And Spanish. Because, well, it's needless to say, the more languages you are able, at least, to read, the more possibility you have to have access to different sources. If you are interested in the history of international law, you will see that many works in the 19th century, and also in the 20th century, were written in languages other than English, including treaties.

Because practice in the past was to write treaties and arbitral awards in French. So, I know that some of you speak French. And I am very happy. Maybe some of you also speak and read Spanish; in this case I will be even happier, not only because it is my mother tongue, but because there is also very interesting literature on international law in Spanish.

**Consent and consensus**

Let's start with the course program. So this course on the law of treaties is part of a number of courses you are following on the so-called sources of international law. You were discussing customary law, you will discuss general principles of law, and I will discuss with you the law of treaties. You have learned that in Article 38(1) of the Statute of the International Court of Justice you have the enumeration of the sources of international law, and this list starts with treaties and then custom, and then 'general principles of law recognized by civilized nations' in a terminology which is very old-fashioned. But it was the expression of the predominant views at the international level when this article was drafted. This list is given in such an order not by chance. So if the list starts with treaties, there must be a reason for that. And I will not do what all professors do; they start by saying 'my subject is the most important one'. But I will say it is Article 38(1) of the Statute of the ICJ, and it is drafted not with the purpose of teaching students of international law, but with the purpose to give a guidance to the judges of the ICJ; how they have to settle an international dispute, what the tools they have at their disposal. And naturally this list starts with treaties. Why? Because if you have a treaty which binds the parties to a particular dispute, you will address, you will go, you will interpret and you will apply to this treaty first. You will need not to refer to other kind of rules. You will start with treaties, because you know when you have different kind of rules that are applicable to any problem, dispute, case, situation, you will start with the most specific rule. If you find that very specific rule dealing with the very specific problem, you will start with that

rule. When we speak about treaties, we are speaking about the highest degree of consent. I will take the Vienna Convention on the Law of Treaties and I will read the definition of treaties you have and, maybe, know by heart. Because when we are talking about treaties we are talking about the coordination of the will of the parties. It's the expression of the will, and when the will of one state coincides with the will of another state or other states, they coordinate this will in a formal manner, and you have a treaty. I used the word 'consent'. And 'consent' is a very important word at the international level. For some, this is the key word in international law. But this is a matter of legal theory, and, I would say, the conception you have about international law. There are different approaches to international law. This is a question which is á la mode. I make a parenthesis to say something about this. A lot of young students like you prefer to address, when they have to prepare their master thesis or a PhD thesis, very theoretical or philosophical issues, and I don't have anything against it. But my advice is to start with the law as it is, then make the next steps. If you don't know the law as it is, that is to say, the rules, the institutions, the procedures, it's very difficult to make philosophical analysis. So, start from the beginning, I would say.

Let me come back to consent. This is a very important word in international law, because international law governs relations among states. And states are sovereign entities, and sovereignty means that there is no other authority above sovereign states. I didn't say that there is nothing above sovereign states, you realize, I said there is no other authority above sovereign states. Because there is something above states. We know it very well. What is it? I answer: international law. What is its role? It depends on the theoretical conception of international law you have. If you are a voluntarist, a positive voluntarist, and I am not saying you are, you will place consent at the very top of international law. That is to say, without a state's consent there is no international law that binds states. This is a respectable position. I don't agree with it. For positivist voluntarists consent can be rendered in an explicit manner, these are treaties, or in an implicit manner, and these are customary rules.

This is the conception in which consent is something absolutely indispensable. What I will say is that consent is very important for international relations. And without any doubt consent is one of the most important elements to the formation of international law. And by definition, as I said, treaties are the expression of the coordination of the will of states, that is to say, it is the situation in which consent by two or more states meet, and they produce conventional rules. In my view, however, consent is not the only manner in which international law is formed, or develops, or emerges. I will not explain it in detail, because there is another course focused on customary law. My point here is that I don't agree with the idea that customary law is the implicit form of coordination of the will of states. I come back to these three notions of Article 38(1): treaties, custom and general principles of law. I would rather say you have consent, you have consensus, and you have logic inferences from legal reasoning. These are two different words: consent and consensus. Consent, which you find above all treaties, as I said, is the expression of coordination of the will in an explicit manner, but you also have the possibility of the expression of coordination of this will in implicit manner. But this is not custom in my view, these are different kinds of agreements. I might be able to develop this idea later on. And for me, customary law is the expression of the social consensus. That is to say, when there is a need at international level, states, even if they are not entirely satisfied with some solution, are ready to accept, even though they are not very happy. This is the manner in which consensus is formed. Consent is something different, something stronger. Everybody here are all equal for the law, but we are different from each other. We have different perceptions, different conceptions of the world, but we may reach some kind of arrangement in order to address some specific questions, even though some of us could prefer something quite different. And this is consensus, even though we are not entirely happy with the whole solution. This is, in my view, the manner in which we can explain custom. I don't have time, and it's not my task here to develop this, but I can say, even though I'm sure the colleague who is giving the course on customary law disagrees with me, that I don't believe there are two elements, though it is

what you studied, obviously. You can't separate in a definite manner, practice and *opinio juris*, but this isn't my topic.

And then you have general principles of law. Maybe, you have learned that general principles of law are the principles we find in different legal systems. So this is a kind of invitation for you to do an impossible task. And I don't like to impose impossible tasks on my students. That is to say, to go and study all the legal systems of the world, that is impossible. Instead of trying to explain this in that manner, I prefer to say that in a legal system, any legal system (no matter which, it can be international law, or it can be just a statute of a football club, this is also a legal system, because if you are a member of the club you have to respect the statute, etc., etc.), there are necessary consequences of the fact that it is a legal system. And these are general principles. And then like in any legal system you have logical inferences emerging from the very simple existence of a legal system. A legal system implies a corpus of binding rules plus institutions, plus consequences for breaching the rules etc., etc. There are some inferences that everyone can apply. So this is my perception of the international law in general. So this is just to put treaties in the general context of international law.

So you have consensus, you have consent, you have inferences, and we speak about treaties. We are speaking about the highest expression of consent. Why have I said the highest? Because a treaty is something which requires some kind of formalism, and there is a reason for that. Because states or other subjects of international law (because as you know treaties can also be concluded by other subjects, I will say states just not to mention every subject of the international law, but when I say states you can imagine that I'm also speaking about other subjects, such as international organizations), if they have chosen to express their coordination of the will in a treaty, intend to give this coordination of the will a very specific object, some kind of high standard. That is to say, for them, if the given aspect of their relations deserves a treaty, it is because they consider that they need to have the rules very clearly specified in order to avoid further disputes. And this is a very important element one has to bear

in mind. When we discuss the role of subsequent practice we will see why I insist on considering this a very important element, as treaties are the highest degree of expressing consent.

Before discussing treaties in general, I would like to say just a few words about the work of the International Law Commission. Because you've read, you know, three Conventions relating to treaties or to the law of treaties. So you have the Vienna Convention of 1969, treaties among states; you have the Vienna Convention of 1978 which is related to succession of states in relation to treaties; and you have the 1986 Vienna Convention which relates to treaties between a state and an international organization or between international organizations. This has been, essentially, the work of the ILC. The ILC prepared draft articles. In the three cases I mentioned, three different conferences were convened. And it was the task of these three conferences to adopt the treaties you know and you have studied. That is to say, the work of the ILC was further analyzed by the states at the conference – again, this is also the highest degree for the adoption of a multilateral treaty: we convene a specific conference to adopt a specific treaty. But the ILC also continued to work with regard to treaties in different ways. And then today you have four texts that relate to the law of treaties adopted, or in the process of adoption by the ILC. You have two of them in the readings for this course, one concerning reservations to treaties, the other concerning subsequent practice and subsequent agreements. There was also a text adopted on the impact of armed conflict on treaties. And still pending there is a work of the ILC on the provisional application of treaties. So the interest of the ILC in the field of treaties is important. And I will say that it is probably in this field that the work of the ILC has proved most successful. But I will keep conclusions on the work of codification of the law of treaties for our very last session. And if you read in French, you can read an article I published in the Revue Générale de Droit International Public in 2000 which is an assessment of the codification in the field of the law of treaties. It was published in the Vol. 104 No. 3 of the year 2000.

Okay, so let's start with the definition of a treaty. You have

the text, I suppose, of the three Vienna Conventions. So you have the definition of treaties in Article 2(1)(a). I will not read the same provision of the 1986 Convention on international organizations. A treaty means an international agreement concluded between states in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever its particular designation. You know it; this is quite basic, no matter what the name is: treaty, covenant, convention, even charter – these are treaties. In the past, when you referred to treaties some people spoke about the possibility of having oral treaties, but for the Vienna Conventions 'treaties' are those adopted in a written form. I will not take too much time for this point, because no matter what you call it, there can be agreements adopted in oral form. And there were cases; even in the case law you can find some examples. For example, if you have read the decision of the Permanent Court of International Justice on the Legal Status of Eastern Greenland, it was a territorial sovereignty dispute between Norway and Denmark. There was the so-called 'Ihlen declaration', a declaration by the then foreign affairs minister of Norway before the ambassador of Denmark. For some experts this is a unilateral act, for others, including myself, it seems like some kind of acceptance, and it can be considered as a kind of agreement. The agreement was given in an oral form, even though you have the expression of this oral agreement in a written form in separate minutes, because when you have a meeting at the diplomatic level the notes are taken, and minutes are adopted. Sometimes these minutes are common, but sometimes not. They are just internal notes of the foreign affairs ministries. When we refer to treaties we are referring, in accordance with the Vienna Conventions, to the international agreements concluded by states or other subjects in a written form. There are yet other problems with other kinds of international agreements. Sometimes we have conferences in which a final act is adopted. But it doesn't take the form of a treaty. It's just a declaration or a final act of an international conference. In the last century, for instance, there was a very important act adopted at the time of the Cold War, the Helsinki Act at the Conference on Security and Cooperation in Europe in 1975. That wasn't a treaty,

but it was a final act of a conference, and the participants of the conference had the idea that what they expressed in this act was a common understanding of how they would have to manage their relations. So is it a treaty or is it another kind of agreement? Or it's nothing, so you have here what is called 'soft law'. I don't like this expression 'soft law', because for me law is either law or not. If it is not, it's neither 'soft' nor 'hard', and people sometimes confuse two notions which are important in the field of the law of treaties. You know the negotium and the instrumentum. And these two different notions are often neglected. Because when some people speak about soft law, indeed, what is 'soft'? It is the instrument. That is to say, a mere declaration or a resolution of an organ not having the capacity to adopt binding decisions, this is 'soft'. But what is 'hard'? It's the content. It is 'hard', because it is the expression of consensus, or you can say customary law, if you prefer. Because when you have a treaty – and this is very important – when you have a treaty, you have these two things: negotium and instrumentum, together. And they have to be distinguished. Because when you have a sheet of paper, you have the instrument. But that's not enough, it's not everything. Even more important is the content. So it is what the parties agreed upon in this instrument, because we are talking about the coordination of the will and the expression of the agreement. The text is the expression of the agreement. This is instrumentum, the treaty, but the treaty contains what the parties agreed upon. And this is negotium. And sometimes these two ideas are not distinguished. I will not explain to you the different forms treaties may adopt. As I said, what characterized a treaty is the formalism. Some kind of formalism is necessary for having a treaty. Sometimes you have a very high standard formalism, and sometimes you have a lower one, because you know that there are different kinds of treaties that can be adopted in different forms. In some cases just a signature is enough for having a treaty entering into force; sometimes a treaty is rendered in the form of just an exchange of notes, so when a state is sending a note to the other, inviting the other to accept it, and the other party accepts sending another note saying 'I accept it', this is a treaty, even though you don't have a single paper with two or

more signatures, this is also a treaty. But you also know that in some cases a treaty does not need only a signature, but also ratification, and in this case different procedures can and must be followed. Some of them are governed by domestic law. You have studied the requirements of your Constitution about the procedure of ratification. I don't have time to compare different constitutional systems and the role of the legislative body in the adoption of treaties, but in some cases you need parliamentary approval, and then you need the ratification itself, which is done by the executive organ through the exchange of instruments of ratification. You also know that the entry into force of a treaty sometimes depends on a number of conditions, sometimes it depends on the number of ratifications, etc., etc., etc. I will not touch these kinds of questions. I take for granted that you know them, particularly in your domestic legal system, at least, the procedure to be followed with regard to different kinds of treaties. You have the rules of the Vienna Conventions that are applicable to this, at the very beginning of the 1969 and the 1986 Conventions. I take for granted that you know these, this is not very complicated and not too controversial, although in some cases there can be some particular problems. You also know who has the capacity to conclude a treaty on behalf of a state, and I will not refer to this either.

**Reservations to treaties**

By the definition, when I say 'reservations to treaties', I am talking about multilateral treaties. Again, you have the definition of 'reservation' in Article 2(1)(d) of the Vienna Convention. 'Reservation' means a unilateral statement, however phrased and named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state. As I said, this applies to multilateral treaties, because you cannot envisage a bilateral treaty containing rules that are applicable only to one state and not to the other, because this would not be the coordination of the will of the two states parties. There can be some

related problems in bilateral treaties, but this is also related to the distinction to be made between reservations and interpretative declarations, because these are two different things. If you have a look at the practice of multilateral treaties, you will see that in some cases you have reservations and in other cases you have interpretative declarations. And in the text adopted by the ILC, the guide to practice on reservations, you have a definition of interpretative declarations. Their purpose is to specify or to clarify the meaning and the scope of a treaty and of certain of its provisions for the state making this interpretative declaration. What is the problem? The problem is that sometimes 'interpretative declarations' are not interpretative declarations, but reservations. Why? The problem arises, because in some cases you have multilateral treaties not allowing the parties to make reservations, and one of the problems is this kind of disguise of reservations under the name of 'interpretative declarations'. It is true that in some bilateral treaties you also have these interpretative declarations. I will just mention one interesting case from the times of the Cold War, the so-called Ostpolitik treaties concluded by the Federal Republic of Germany with the USSR and Poland concerning the Eastern boundary of Germany. Because the Oder-Neisse line that emerged after the Second World War was not considered by the Federal Republic of Germany as the definite boundary. According to the Federal Republic of Germany in order to have this line as the definite and final delimitation between Germany and Poland it would be necessary to have a treaty concluded by a unified Germany. At that time there were two German states, to make it short. There were treaties concluded by the Federal Republic of Germany with the USSR and with Poland recognizing the Oder-Neisse line, but then the Federal German Parliament, while ratifying them, made a declaration with a provision that this is without prejudice to the position of a unified Germany. But that was an interpretative declaration. As I said, in a bilateral treaty there could have been no reservation, otherwise it wouldn't have been a treaty.

Multilateral treaties pursue two apparently contradictory goals. When you have a multilateral treaty, one of the purposes of it could

be universality, that is to say, facilitating the possibility for the largest number of states to become party to the treaty. This is the idea of universality. If you follow this perspective, you have to accept the possibility for some states that are not entirely happy with the treaty to become party to this treaty nevertheless, by authorizing it to make a reservation to a particular provision this state doesn't like. But on the other hand you have another element which is very important: the notion of integrity of the treaty. A multilateral treaty requires negotiation, multilateral negotiation. Each state has sometimes to give up its position in order to find the coordination of the will. And then if you have the possibility to say: 'Okay, I accept and become party to the treaty, but I don't like Article 5, it doesn't apply to me', there is a problem, because then you divide a treaty, and you have a certain number of bilateral relations that are different with regard to the same multilateral treaty. For example, between A and B the treaty applies as a whole, between A and C it doesn't apply with regard to Article 5. So these are two apparently contradictory purposes. There used to be two different positions in the practice of states when multilateral treaties started to be developed in the 19th century. So there were two different conceptions about reservations. One was the European practice requiring unanimity of acceptance of reservations. You have a multilateral treaty, if there is one contracting party willing to make a reservation, in order to have this reservation applicable, you needed the consent of all the other parties to the treaty. That was the European practice. On the contrary, in Latin America we privileged the notion of universality. The question is which of the two values must prevail. In Latin American practice the interest was on universality so allowing a maximum number of parties to enter a multilateral treaty. Then in the Latin American practice it was not necessary to have unanimous acceptance of reservations. So, after having made the reservation, the state becomes a party to the treaty. Before the Vienna Convention of 1969 there was a very important advisory opinion of the ICJ on reservations to the Genocide Convention in 1951. The two different positions were present. And the ICJ privileged the Latin American conception. Probably, because of the extremely important nature of the Genocide Convention

which was at stake, the purpose was to facilitate broad acceptance of this very important convention. And what the Court decided in its advisory opinion is finally, more or less, what the Vienna Convention of 1969 contains. That is to say, there is a possibility for states to make reservations, and there is no need for unanimous acceptance of the parties for making a reservation, and then the state, having made a reservation, becomes a party. Here again there were two different conceptions. When is a reservation possible? In some cases, or I would say in many cases, it is not possible to make a reservation. If the treaty concerned prohibits reservations, obviously, there is no possibility for making a reservation. If the treaty does not say anything about reservations, then the questions remains open. And then you have to take into account the object and purpose of the treaty, because if you follow the object and purpose of the treaty, you may find that there is no possibility of making a reservation. This is a very important element, the object and purpose of treaties. We will discuss this later on, tomorrow, and the day after. So you have the possibility of making reservations, and sometimes you have a situation in which the reservations made do not comply with these conditions. That is to say, if a reservation is not permitted, because it is against the object and purpose of the treaty, then you have a problem of invalidity of the reservation. And there have been a lot of discussions about whether the notion of invalidity applies to it or not. The European Court of Human Rights discussed this question with regard to some reservations made by state parties to the European Convention of Human Rights. Today this conception of the validity (or invalidity) of reservations is accepted. And then, if the reservation is valid, it can be accepted or objected by the other parties. If the reservation is accepted, either explicitly or implicitly, the state becomes a party to the treaty, and the treaty applies in relation to this state taking the reservation into account. But if there is an objection, there can be two possibilities. The state that makes the objection is not willing to consider the state that makes the reservation as a party, or the state that makes the reservation becomes a party with regard to the objector state, but the provision for which the reservation is made doesn't apply in their ratification sheets.

To finish, I would say that the Guide of Practice on Reservations adopted by the ILC is very detailed, but, in my view, there is one important point in relation to the consequences of the objections to reservations or the acceptance of reservations which has not been addressed. And this is probably a very interesting point for someone looking for a subject for their thesis or their master's thesis, or even an article. What is the difference? For example, you have a state that makes a reservation to Article 5, and you have a state that accepts the reservation; and then you have another state that objects to the reservation, but does not object to the fact that the state making the reservation becomes a party to the treaty. What are the legal consequences of these two different situations? Are they finally the same or not? This is a topic that unfortunately has not been clarified in the ILC Guide of Practice on Reservations to Treaties of 2011, and, probably, there is room for further research.

# LECTURE 2:

## Interpretation of treaties, subsequent practice and subsequent agreement

So this afternoon we will examine two different, but related, topics: the interpretation of treaties, and the role of subsequent practice and subsequent agreement in respect to treaties. When we say interpretation of treaties or any other instrument, you think about the way of determining the meaning, and scope of a given text. So we will discuss the basic questions that are: what, when, by whom? Not 'why', because it is obvious 'why'. But we will also discuss 'how'? This is a very important question. We will discuss these four questions with regard to the interpretation of treaties. Maybe I can start with 'who' can interpret. Obviously, you can say parties to the treaty, that is, states or other subjects of international law, but I would also say judges, arbitrators, diplomats, you and me. Everybody can interpret. Since you study law, you interpret the law. Obviously, the interpretation we can do of a legal text may not have the same weight as the interpretation made by a state, by a judge, or by an arbitrator. But everybody interprets. It is important to take into account that one's interpretation remains one's interpretation. That is to say, I cannot impose my interpretation of the law on you, and you cannot impose your interpretation on me. The same applies with regard to states. We are dealing with sovereign states. And sovereign states interpret the rules they have to apply in a sovereign way. I don't have anything against that. That is quite obvious. But what I would like to add is – the interpretation made by a single state cannot be imposed on the others. That is to say, self-interpretation binds only the state or the international organization, or any other subject of international law having made this interpretation; nothing less and nothing more. Secondly, you have the possibility of what is called the 'authentic interpretation', when you have the interpretation made by all the contracting parties to a treaty. So if this is the case, obviously,

you are in the presence of an interpretation which binds all the parties to a treaty.

There have been different perceptions about interpretation of treaties. I will discuss now the question 'how'. How can we interpret a treaty? Before the Vienna Convention on the Law of Treaties there were basically four different perceptions, maybe five, but I will focus on four, essentially two rather opposed ones. One was the so-called subjective interpretation, and the other was the objective interpretation. The first one was the position privileging the intention, the so-called 'real intention' of the parties while concluding a treaty. And that was called 'subjective', because what was crucial for the interpreter was in the term of what was the real intention of the parties. This is the subjective element. And on the other hand, you have the opposite view which was the objective one. In order to determine the scope and meaning of what the parties have agreed on in the treaty, you have to take into account what the text provides. That is the objective theory of interpretation. One theory focuses on the text, and the other on the psychological or subjective element, or if you prefer, the 'real' intention. There were two other approaches. The teleological view, that is to say, when you have to interpret a treaty, you have to take into account the goal, the purpose of the parties when they agreed on that text. This is the notion I have already mentioned, the notion of 'the object and purpose of the treaty'. And the fourth was the functional perspective which is, when the treaty is concluded, it is done in a given context, and then you have to take into account this context in order to determine the scope and meaning of the treaty. So these theoretical discussions were overcome by the adoption of the Vienna Convention of 1969. Maybe some of you, when you read Article 31 and Article 32, were tempted to identify all of these theories. Because (you know I'm not a diplomat, but my friends who are diplomats are not happy when I say so) diplomats, when they have a problem and have to attain an outcome, they end up adopting a text which is not clear, and which allows for different interpretations, and this is what my diplomat friends call 'the constructive ambiguity'. And by doing this, the diplomats create

problems for other people in the future. Sometimes they do rather the opposite, but the point is that with 'constructive ambiguity' you have a text ready, and the problems are simply postponed for the future, for the application of the treaty. You have the four theories I mentioned at the beginning, you have all of them. You may consider that they can satisfy everybody. I don't think so. I have to say that at the Vienna Conference a well-known professor of international law from the USA, who was the American delegate to the conference, Myres McDougal, strongly supported the subjective theory, that is, to determine the so-called 'real intention' of the parties. Is it true that Articles 31 and 32 put all the four theories I mentioned on the same footing? My answer is 'no'. I believe that Article 31 of the Vienna Convention privileges the so-called objective theory – taking the text into account. Read Article 31, paragraph 1: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. And then, maybe, if you go to Article 32, you will find some elements of the subjective conception. Because you have references to the travaux préparatoires (I told you that French is also important for an international lawyer). So when you refer to travaux préparatoires you are trying to identify what was the real intention of the parties. I wouldn't like to oppose real intention and declared intention, because it is not a good approach to the problem of interpretation. One can assume that when the parties agree on a text, it is the intended text and the real intention of the parties. It is not that you neglect the intention when adopting the objective perspective of interpretation. You simply adopt the idea that the parties agreed on a text, and this is the expression of the common will of the parties.

But the Vienna Convention gives an order in which different steps of interpretation must be followed. You have the ordinary meaning first, the context second, and then the object and the purpose. And then, as I said, you have in Article 32 subsidiary means of interpretation, or supplementary means of interpretation, which include the subjective element. So this is the orderly manner in which

you interpret a given rule. And there are various problems when you follow these different steps, because it is easy to say 'the ordinary meaning', but what is the ordinary meaning of a given word? Do we just look it up in a dictionary to see what it means? The meaning of a given word in legal terms may be one thing, in terms of science it may be different, in terms of sociology it also differs, etc. Here we are dealing with legal interpretation. So ordinary meaning also includes the reference to or taking into account the legal aspect of the meaning of a given word. Because if I ask you, what a continental shelf is, I'm sure you will go to the United Nations Convention on the Law of the Sea and you will see different definitions, and you will tell me that 'A continental shelf is…', and you will provide me with the legal meaning of a continental shelf. But if I ask a geologist (assuming that the geologist doesn't know international law, because some of them know it very well), what a continental shelf is, he will provide me with a geological definition of a continental shelf. We can also say the same with regard to the term 'people'. What is a people? Someone would say it's a nation. If I ask a sociologist, maybe he or she will provide a definition from sociology, the same with an anthropologist. But we have to apply the international law. 'People' has specific meaning in international law. It is the same when you have a multilateral treaty or a bilateral treaty in different languages, you may have different notions or different terms which do not necessarily coincide in one language and the other. And you have a provision in the Vienna Convention. You can read Article 33 which provides for a solution.

But then you also have the question 'when?' I have just mentioned 'who' interprets and 'how' it is done. In order to interpret a text you have to put yourself in the time when it was adopted. Because you may have to interpret a text that was adopted in the beginning of the 20th century. We are at the beginning of the 21st century, and you have to apply it. Do you have to determine the meaning of the term in accordance with the conception of the beginning of the 20th century, and not the conception we have today? This is also a very important problem. This is not just a theoretical problem,

it's a concrete problem, and there is case law about this. I will just mention two different cases which are very interesting. One is the advisory opinion of the ICJ on Namibia, 1971. Compare it with the judgment of the same ICJ, although with a different composition, of 1966 in the South-West Africa cases. So the Court had to analyze the Mandate of the League of Nations; the Covenant was adopted at the beginning of the 20th century. It wasn't the same court in 1966 and in 1971. In 1966 the Court interpreted the Covenant in the light of the law existing in 1919. That is to say, in 1966 the ICJ interpreted a text putting itself in the moment in which this text was adopted. In 1971 the Court did exactly the opposite. That is to say, the court said: 'I have to apply the Covenant of the League of Nations, but since then international law has evolved a lot, and I have to interpret it taking into account the situation of today. I apply the Covenant adopted in 1919, but I have to apply and consequently interpret it in the light of 1971 situation'. Unfortunately, I don't have time to discuss this. I'll give you another example and then I will tell you my views on this, because this is also linked with the problem of the so-called 'evolutive' texts. This is the notion that was developed by the European Court for Human Rights, because the judges of the European Court believed that they were dealing with a very specific area of international law, which is more progressive than others; and they say human rights instruments are 'living' instruments, so you have to interpret them in an evolutive manner and not to stay just at the moment when the text was adopted. However, it does not refer exclusively to human rights treaties. Take, for example, the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua). It was a decision of 2008 of the ICJ. There was a bilateral treaty of 1858 concerning Costa Rican navigation rights on the San Juan River which is a boundary river, the waters of which are entirely Nicaraguan. But Costa Rica has, according to that treaty, a 'perpetual right of navigation with commercial purposes' ('derecho perpetuo de navegación con objetos de comercio'). And the question was (the treaty was in Spanish) what the meaning of 'comercio' was. Do you have to accept navigation with commercial purposes as 'commerce' was meant in 1858 or in 2008? The Court rendered its judgment. The Court considered that when

the parties conclude a treaty, particularly a boundary treaty, they have in mind a kind of permanence, that is to say, something that can last. A permanent treaty. And this supposes that the word 'commerce' must evolve. There was a discussion about tourism, and you cannot say, whether tourism was a commercial activity in 1858 or not. The Court considered that you have to interpret commerce in the context of the application of the treaty today. That is to say, if tomorrow you have a new commercial activity, then it is included in the notion of commerce of the treaty adopted in 1858.

# LECTURE 3:

## Invalidity and termination of treaties

This afternoon we will address some particular issues that at first sight may appear to pose some problems to the basic rule of the law of treaties. What is the basic rule of the law of treaties? Yes, *Pacta sunt servanda*. Because obviously when states conclude a treaty, they are supposed to apply it, they are supposed to respect it. And also, another interesting point: when a treaty is concluded, if it doesn't contain a clause concerning its duration, what the duration of this treaty is. The right answer is 'indefinite'. Because some people say 'forever', but what 'forever' means, we never know. The indefinite duration of a treaty means also the idea of permanence. So when you conclude a treaty and you don't have established a given duration, you have in mind that this treaty is concluded with the idea that it will last. You don't conclude a treaty just for a couple of days. So this is a very important element that must be taken into account. So, I said we will address some issues that apparently pose some problems to the idea of *pacta sunt servanda*, because we will analyze the problem of validity, or rather invalidity – the problem is the invalidity – of treaties, and also the possibility of termination of a treaty. Even though there is no clause containing or determining its duration, there is a possibility of suspension of the application of a treaty and also a possibility of denunciation or withdrawal from treaties. Just a terminological point from the outset: you have read the Vienna Convention and you have seen that sometimes it mentions suspension, termination, withdrawal or denunciation. The terminology I will use, and the one I suggest you should employ, is used when you refer to denunciation. Do not refer to denunciation as synonymous of withdrawal. Denunciation is used for situations in which you have one party to a bilateral treaty denunciating it. That is to say, unilaterally willing to put an end to a bilateral treaty. This is the denunciation. If you denounce a bilateral treaty, there cannot

be a treaty with one party. And this is the denunciation. If you are denouncing a treaty, this treaty is terminated (if all the conditions are met, of course). Withdrawal is used for multilateral treaties, because the withdrawal of one party to a multilateral treaty does not mean the termination of a multilateral treaty. So a multilateral treaty continues to be applied for all the other parties, with the exception of the party that has withdrawn. So this is a question of terminology.

So this afternoon, I would like to analyze the question of validity or invalidity of treaties first, and then the question of termination or suspension, and withdrawal from treaties. First of all, there is a distinction between invalidity and termination on the one hand, suspension and withdrawal on the other hand. And this is a very important distinction. This distinction is related to the content and to the effect of these different categories. The question of invalidity of treaties is quite familiar to you, because you have read about it and studied it in the Vienna Convention, and you know that there are different grounds for invalidity of treaties. This is normal for you, but it was not so normal before the adoption of the Vienna Convention. Some people contended that the question of validity or nullity was a matter alien to the international relations. The idea of validity or invalidity is applicable in domestic law, but not with regard to treaties. That was a perception. Furthermore, in European continental law tradition there is a clear distinction between validity and invalidity of legal acts, and for European continental lawyers it was easier to understand the importance of the possibility to declare a treaty null and void than, for instance, for lawyers coming from the common law.

What is invalidity and what is termination? And what is suspension? I would like to focus on the distinction between invalidity of treaties and termination of treaties first. What does invalidity mean? Why what is apparently a treaty is not a treaty? It is a situation when you have an instrument that has been conceived as a treaty, and that has not produced any effect for the reasons we are going to analyze in detail. Some people distinguish between invalidity

and inexistence, but I will not discuss this now. The consequences are the same, but, theoretically, you could make a distinction between invalidity and inexistence of a treaty. And indeed, there is some case law distinguishing these two categories, but for the purposes of our course I will keep with the idea of invalidity. A treaty which is not valid or, if you prefer, a treaty which in null and void, does not produce any effect. And this idea applies from the very beginning of the conclusion of this treaty. If you declare a treaty null and void or invalid, this declaration operates with a retroactive effect. That is to say, from the very beginning it means that this treaty has not existed. It has never produced any effect. That is the idea of invalidity. Whereas if you have a treaty that is terminated, the situation is quite different. The situation is that the treaty has produced its effects during a certain lapse of time, but at a given moment of time it ceases to produce any effect. And this is the idea of termination; a treaty is terminated and ceases to produce any effect. So these are two different ideas, hence the distinction between invalidity and termination is not just purely terminological. It has very important legal and practical consequences.

I said that invalidity and termination pose problems to the basic rule of the law of treaties, and for this reason you will find Article 42 in the Vienna Convention, which establishes that states (remember what I said about other subjects of international law) can only invoke those causes of nullity that are mentioned in the Vienna Convention. That is to say, if you follow Article 42 of the Vienna Convention, you cannot invoke any other grounds for invalidity of treaties. Only those explicitly mentioned and analyzed in the Vienna Convention can be invoked to declare a treaty null and void. Here again, in doctrine and even in state practice, you have some people contending that in customary law there are also other grounds for invalidity of treaties. And Article 42 makes a distinction between invalidity and termination, or suspension, or withdrawal. Because with regard to termination, suspension and withdrawal you can have the grounds mentioned in the Vienna Convention, but also other grounds established by the treaties themselves. For termination of treaties,

for suspension or withdrawal of treaties there can be other grounds than those mentioned in the Vienna Convention. And the reason for this distinction is very simple, and it is related to what we said at the beginning with regard to the distinction between invalidity and termination. Termination is a matter for the states to decide. If the states decide that there must be a condition for the applicability of the treaty and if this condition is met, the treaty is finished, why not? One of the other basic ideas I mentioned yesterday, is the idea of the autonomy of the will of states. If the states decide to put an end to a treaty on different grounds, it is possible. On the contrary, if the states decide to create grounds for invalidity, that is not possible according to the Vienna Convention. If you make a comparison with the domestic law systems, you may understand this. And – I will use a French word – the reasons are of *ordre public*. So the questions concerning validity or invalidity of treaties are of general concern. It is not just the parties to a treaty. All members of the international community have an interest in the respect for treaties. This is one of the reasons why only those grounds established in the Vienna Convention can be invoked. There have been states and authors invoking other grounds for invalidity of treaties. And before I address those real grounds, I will just briefly mention one ground that was invoked and is still invoked by some states: the notion of unequal treaties. Here again if you make a comparison with domestic law, you may find (I don't know your domestic legal system), but if you have a contract in which what one of the parties has to do is much heavier than what the other party has to do, that may be a reason to consider that the contract is null and void. This is the idea of unequal treaties. That is to say, in the position of some states, before and during the Vienna Conference on the Law of Treaties some states invoked that some of the treaties they have concluded in the 19th century or at the beginning of the 20th century were imposed, and that the proportionality of the obligations of the parties was not adequate, and for these reasons the treaties should be considered null and void. The Vienna Conference did not accept this idea. And unequal treaties are not a separate ground or a real ground for declaring a treaty null and void. Maybe you have different views, I accept, but if I were

to advise you, if you are willing to invoke invalidity of a so-called unequal treaty, my advice would be to try and find another ground in the Vienna Convention, because it is possible. So you can find other arguments, which are recognized by the Vienna Convention, without any need to raise this controversial notion of unequal treaties.

Another distinction to be made before examining different grounds, established in the Vienna Convention. If you look at the wording of different articles dealing with grounds for invalidity of treaties, I'm sure you will notice that there are some differences. And in some cases the relevant articles just mention 'the state may invoke' the nullity of a treaty. Whereas in other articles the wording employed is 'if the situation is this, then the treaty is null and void'. This is not just a question of grammar or a choice of words just by chance. It is a very important legal distinction. And, again, you know this distinction in domestic law, I'm sure. That is to say, you have some grounds for the invalidity of treaties that can be invoked by the state, but if the state doesn't invoke them, then the treaty is valid. Whereas there are other grounds for invalidity of treaties in which there is no such choice: if the situation is met, the treaty is null and void. And in this regard it is also important to mention Article 45 of the Vienna Convention. Because according to Article 45, even though the conditions for invalidity are met, if the state concerned has adopted a given conduct, it cannot invoke this ground for invalidity anymore. It's the idea of acquiescence. So this is also a controversial point. For instance, my country, Argentina, has made a reservation concerning Article 45, but the question is always the same: when you refer to acquiescence, the problem is to determine in the concrete circumstances whether we are in a situation of acquiescence or not. That is to say, in the case of a treaty, if there is a ground for invalidity that the state may invoke. And instead of having invoked this ground, the state applied the treaty, and 20 years later, after having applied the treaty for two decades the state said: 'Ah, I am sorry, but this treaty was concluded disregarding a constitutional provision for the ratification'. That would be problematic for the stability of international conventions and relations; I suppose you agree with

me. So I believe it is possible in some circumstances to affirm that the situation of acquiescence is met, but the problem is always the same. You have to prove the existence of acquiescence, and under some circumstances it is not easy.

Now we can analyze the different grounds for invalidity of treaties as they are mentioned in the Vienna Convention. The first one is the reference to the rule of domestic law. You have concluded a treaty in breach of some rule of domestic law. And here many problems arise. First, there is an article in the Vienna Convention, that a state cannot invoke its domestic law in order not to respect an international obligation. So, apparently, there could be a contradiction here. The wording of Article 46 shows, first of all, that this is a ground that a state may invoke. So there is no automatic nullity of a treaty just because there is a contradiction with a domestic provision of its constitution. But the text mentions that there must be a manifest violation of a rule of internal law of fundamental importance for the conclusion of treaties. For instance, if it is quite clear that the treaty, by its nature and its content, needs parliamentary approval, but it was not submitted to the parliament, and if you prove, that the other party or the other parties knew or should have known this situation, then you can invoke it. In principle, I would say when you have a constitutional provision, other states are supposed to know, what the constitution of the state provides for. That is, at least, one of the tasks of diplomatic envoys. So, if you have an embassy in a country and you conclude a treaty with this country, you cannot say that you ignore the fact that the constitution of that country requested parliamentary approval before ratification. Nevertheless, in case law you have an interesting analysis of this in the Cameroon v. Nigeria case. It was a territorial and maritime dispute between these two African states, and there was a delimitation agreement concluded by the heads of state without any ratification. And then Nigeria invoked that the head of state could not have concluded such a treaty, because of the need of parliamentary approval according to the Nigerian constitution. The court, nevertheless, didn't accept this position. It didn't disregard the idea that parliamentary approval is

an important provision, a provision of fundamental importance for conclusion of treaties. But the court said it was not evident that in these circumstances the presidents were unable to conclude such a treaty. That is to say, there are two conditions in Article 46, and the Court considered that it was not a manifest violation of a rule of internal law of fundamental importance for the conclusion of treaties. Another point is who can invoke Article 46. So you have a breach of a rule of fundamental importance for conclusion of treaties in a treaty concluded between A and B, and there is a provision in the constitution of A that was disregarded. Who can invoke: A or B? Can both states invoke the nullity of the treaty, because one of the parties did not follow the procedure for the conclusion of treaties according to its constitution? Only the state concerned by the breach can, because if you are the other party, you cannot – you accepted the treaty, you concluded the treaty and you cannot say later on: 'Ah, but the other state has not followed its domestic law'. I have to say that sometimes this situation happens. In Guinea-Bissau v. Senegal arbitration, for instance, but this is due to the fact that lawyers, you know that very well, better than me probably, have to find arguments and look at all possibilities, and counsel for Guinea-Bissau tried to invoke the invalidity of the treaty because of the breach of other provisions from the other state.

Article 48. Error. Again, this is a ground for invalidity of contracts in domestic law, in some domestic law systems. And here there are a number of conditions that must be met, you cannot just say: 'Ah, there is a mistake, I am sorry, but this treaty is null and void. We didn't know that there was a mistake.' So first of all there must be an error on a fact that constituted an essential basis of the consent of the state, so this is the first element. That was ignored at the time of the conclusion of the treaty, but a state cannot invoke this error, if it contributed to its existence or if it ignored it just by negligence. So if it is your fault for not having discovered the error at the time of the conclusion, you cannot come later and invoke it. There is an example which is mentioned in case law, the *Temple of Preah Vihear* case between Cambodia and Thailand; the 'map of Annex 1'. Personally,

I am not sure that this is a good example. It is not easy to find an example, and some authors mention the *Temple of Preah Vihear*. Indeed, the question was the delimitation of the boundary, the land boundary between Cambodia and Siam or Thailand, and the text of the treaty mentioned the watershed, (la ligne de partage des eaux, for those speaking French), and then France produced a map in which this watershed was disregarded. The question was that Thailand accepted the map, used the map and requested France to send more maps. And 40 years later they say: 'Ah, but there is a mistake. The map doesn't depict the boundary as the treaty establishes'. And the court didn't say that it was a mistake. But some authors of books, including those I suggested you should read, mention this as an example. The Court didn't say that it was a mistake, the Court didn't pronounce this. Indeed, there was a mistake, that's clear. But the Court didn't analyze this as it was; it just analyzed that for the fact of having accepted the map as the boundary, as the depiction of the boundary, that was enough. It is not a concrete example of the analysis of error as a ground for invalidity of treaties.

Article 49. Fraud. I will just mention it, I will not stop here. We will not analyze fraud in detail, as you can read the article.

Article 50. Corruption of a representative of a state. We can also get rid of this article quite quickly. You can imagine that, if there is corruption with regard to a representative of the state with which you are concluding a treaty, the other state can invoke corruption as a ground for invalidity.

Coercion of a representative of a state. Here there is a difference between Articles 51 and 52, which is very important. Article 51 is coercion with regard to a representative of a state, of the other state, whereas coercion of Article 52 is coercion with regard to the other state. So the difference is quite clear. The example mentioned with regard to coercion of a representative of a state is always the same: the President Hacha of Czechoslovakia when Nazi Germany imposed the Protectorate of Bohemia and Moravia. I wonder whether that was just coercion of a representative of a state or coercion with regard

to the entire state. Personally, I have some doubts whether this is an example for Article 51 or/and 52. Coercion of Article 52 is with regard to the state and you see that there is a specific reference: not any coercion, but just the use of force. And at the Vienna Conference there were two different positions, because the Third World countries were willing to include coercion, not only military coercion, but also political coercion or economic coercion, because as you can imagine these kinds of coercion also exist in international relations. But the position adopted by the conference was to limit Article 52 to the coercion implying the use of force, and adopting as a declaration of the Conference, at the end of the Conference, just a statement indicating that states should refrain from different forms of coercion, including economic and political coercion. But what is clear is that in order to invoke Article 52 there must be coercion in the sense of Article 2, paragraph 4 of the Charter of the United Nations. And this is also a typical example of the notion of the threat of the use of force of Article 2, paragraph 4, because what is prohibited by Article 2, paragraph 4 of the Charter is not just the use of force, but also the threat of the use of force. I know that this is not for my course, the law of treaties, but just one word about the notion of 'threat of the use of force', because it was analyzed in the advisory opinion of the ICJ of 1996 on the *Legality of the threat or use of nuclear weapons*. And the policy of some states which possess nuclear weapons was that, if the Court declared that the use of nuclear weapons would be illegal in all circumstances, this would mean that their policy of deterrence (dissuasion, in French), would be also illegal, because it could constitute a threat prohibited by Article 2, paragraph 4. I disagree with this view, because the threat which is prohibited by Article 2, paragraph 4 is the threat which includes the notion of coercion. If there is no coercion, there is no illegal threat of the use of force. If you put your army at your boundary, that's not enough to consider that this is a threat to the use of force prohibited, and that you have breached Article 2, paragraph 4 of the Charter. We can speak about coercion if you put your army at the border and then you request your neighbor to conclude a treaty, otherwise your army will cross the border. Then there is a threat of the use of force prohibited

by Article 2, paragraph 4, and if the treaty is concluded there will be a ground for invalidity. But this is a ground in which no acquiescence is possible, the treaty would be null and void. So it is not just the fact that the state may invoke, but it is a treaty that is null and void.

Article 53. You know it very well, because it contains the definition, the circular definition, of *jus cogens*. And you know that a treaty which is concluded in contradiction with a peremptory norm is null and void. And there is no question of acquiescence or the possibility to invoke a treaty concluded in breach of a peremptory norm, it's null and void, full stop. Today everybody accepts the idea of *jus cogens*, even France which voted against it at the two Vienna Conferences in 1969 and in 1986. There was just one vote against the adoption of the Vienna Conventions of 1969 and 1986, and that was the vote of France. Maybe, because of the insistence of some legal advisor at the Quai d'Orsay, the French Foreign Affairs Ministry, France hasn't accepted the idea of the possibility of having such a norm in international law. But today everybody accepts the idea that the norms, for which no derogation is possible, exist. I will make a comment on Article 53 when I will analyze Article 64, because Article 64 is also related to peremptory norms, but the two situations are different. This is the reason why there are two articles. But the wording of Article 64 is rather confusing.

I have mentioned that in some circumstances the state may invoke nullity. And in other circumstances this nullity is applied, and it is not just a matter of choice for a state to do it or not. But what happens if a state considers that a treaty is null and void? What is a real situation? What does the state have to do? So you are the legal advisor of the foreign affairs ministry, and you consider, that the treaty concluded last week is null and void. What are you to do? You tell the foreign minister there's a problem, okay, but what else? You have to notify the other party or the other parties that you consider this treaty null and void. And then? The answer is in Article 65, and in the following articles: there is a procedure, but I would like to insist that this is not an automatic or a unilateral

decision. If you consider that a treaty is null and void, you cannot just say: this treaty is null and void, and it is the end of story. There must be a procedure. If the other party accepts that the treaty is null and void, obviously there is no problem, but if not there is a dispute concerning the validity or the invalidity of the treaty. And you have to settle this dispute, because, as you know, there is an international obligation to settle disputes by peaceful means. Again, I repeat what I said yesterday: unilateralism is not possible. What I have already said about interpretation also applies to this situation. So, you can interpret the treaty as you wish, okay, but you cannot impose your interpretation on the others. This is the same. You can consider that the treaty is null and void, but you cannot impose your views on the validity of the treaty on the other party or the other parties. So, there can be a dispute concerning the validity or the invalidity, it is for the parties to settle this dispute. Obviously, the question was discussed at the Vienna Conference. And there is a difference of treatment; there is a particular privileged position for Article 53 and also Article 64, so that if the dispute concerns Article 53, the parties can refer the dispute to the International Court of Justice. The idea was to limit the scope of *jus cogens*, because many states were reluctant to include *jus cogens* as a ground for invalidity, as this could enlarge the possibilities of declaring treaties null and void, and that was a kind of guarantee. If you have a dispute concerning the validity of a treaty because of an alleged breach of a peremptory norm, go to the ICJ. If it is not the case, the Convention just provides for a very low procedure of conciliation which is not really used. But the crucial thing is that it is not a unilateral decision. Even in cases in which there is an absolute nullity, for instance, the coercion of a state or a peremptory norm. In these circumstances it is not just the decision of the state claiming that these grounds exist, but there should be a procedure that must be followed, and the states have to respect the peaceful settlement of international disputes through the different means that are available. So, I conclude this part with the same message that I made yesterday: there is no unilateralism in the law of treaties.

# LECTURE 4:

## Termination, suspension and withdrawal from treaties

If you are bound by the treaty, apparently everything is clear. Sometimes the same conventional obligation also exists in customary law. But everything is not identical. When you have a conventional rule, you have something else. You are obliged by customary law not to do something, and you are obliged by a conventional law not to do exactly the same. But in the conventional rule you will find – even though the means can be very poor in some circumstances – procedures, mechanisms and means for settlement of disputes. Sometimes you will have bodies in charge of monitoring the application of the treaty, and all of these things do not exist at the customary level. You don't have a customary human rights committee, for instance. You have the same obligations you may find in the Covenant on Civil and Political Rights, for instance. You have them at the customary level. But if you are a party to the Civil and Political Rights Covenant, there are procedures, there is a committee, you have to submit reports, etc., etc., etc. And this is the difference.

If I ask you: is it possible to make a reservation to a peremptory norm? Someone may answer 'no'. Why not? By doing so you are not breaching the peremptory norm. You are just excluding a given rule from your acceptance. In any case you will be bound by the same rule from the customary law perspective. Another thing is whether the peremptory norm forms the basis of the convention, and without this peremptory norm the convention doesn't make any sense. I will agree with it. Instead of making a reservation, don't become a party, and this would be easier, because states are not obliged to become parties to a treaty. You have to keep it in mind. So, if you are not obliged to become a party to a treaty containing a peremptory norm, why, as a matter of principle, would you have to say that any reservation to a peremptory norm would be prohibited? That's my answer.

Just a few words before we start the question of termination, suspension and withdrawal from treaties. Tomorrow we also have a seminar, and I expect that in this seminar you will speak more than me. Tomorrow at the seminar we will discuss the two statements made by the President of the United States of America, Mr. Donald Trump, with regard to the withdrawal of the United States of America, first, from the Paris Agreement on climate change and then with regard to the agreement concerning Iranian nuclear capabilities. So you have the references to the two statements and you also have the references to the relevant parts of the two instruments, so I'm not asking you to read the entire Paris Accord and all its annexes, but I expect you to discuss whether it is possible for the United States to withdraw from these two instruments or not. And if the answer is 'yes', I am not pre-judging it, I am not saying that the answer is 'yes', I'm saying if the answer is 'yes', what procedure should be followed in one case or in the other case.

Now, we start with the analysis of grounds for termination or suspension of treaties. Most of these grounds are equally applicable to both termination and suspension. So, we have already made the distinction between nullity and termination. We see that termination is when a treaty has produced some effect during a given lapse of time, and then ceases to produce any effect; it does not produce the effect anymore, so the treaty is terminated. But it used to produce effect, and these effects of course must be respected and taken into account. And that is the difference between termination and nullity. The idea of suspension is very clear: the treaty continues to be in force, but its provisions are not applied during a given lapse of time. That's the difference, but in general the grounds for termination are also grounds for suspension of treaties. And here you have different possibilities. You have to keep in mind two perspectives. One perspective is when the treaty itself contains provisions with regard to its termination or suspension. In this case you apply obviously the specific rules contained in the treaty and there's no problem. If the treaty does not contain rules concerning its termination, then you have to keep in mind the different grounds mentioned by the Vienna

Convention. And, obviously, the first possibility is the consent of all the parties to the treaty. I mentioned yesterday the autonomy of will of the parties: if the parties have concluded a treaty and all of them are willing to terminate the treaty, there is no problem, and this can be done in an explicit manner, which may require a further treaty. If it is a bilateral treaty, obviously, you need the agreement of both states; if it is a multilateral treaty in order to terminate the treaty you need the consent of all states. But the Vienna Convention also envisages the possibility of termination between certain parties and not all of them. This is possible with some conditions, because in some circumstances one of the parties is no longer a party to a given multilateral treaty, if it was a condition for the acceptance by the others. If this is not possible, or if one of the parties, or two parties rather decide not to continue to apply the treaty with effect to performance of the treaty, for the other parties this would not be possible either.

Now we come to the question of denunciation or withdrawal. I mentioned the distinction in terminology and I advised you to use denunciation for bilateral, and withdrawal for multilateral treaties. Again, if you have a look at the wording of the Vienna Convention, you will see a negative formulation. That is to say, most of these articles are drafted in a manner that is rather discouraging with regard to their use, or the possibility to invoke them with success. These situations are rather extraordinary. So, if the treaty provides for denunciation or withdrawal, no problem, you follow the provision of the treaty. But if the treaty does not contain any provision regarding the termination for one party by way of denunciation or by way of withdrawal, then there are a number of conditions in Article 56. And there is practice. So if the treaty does not provide for denunciation or withdrawal, it is possible to denounce or withdraw, if it is established that the parties intended to admit the possibility of denunciation or withdrawal, or the right of denunciation or withdrawal may be implied by the nature of the treaty. Well, the first possibility, you have to demonstrate that the intention of the parties was to admit denunciation or withdrawal. And the other depends on the nature of the treaty, because there

are some treaties that, by definition, a state cannot denounce, or from which it cannot withdraw. You cannot denounce a boundary delimitation treaty, because you cannot unilaterally modify a border. So by definition, a boundary delimitates two states, and then you cannot, by denouncing a boundary delimitation treaty, impose on the other side the negotiation of a new boundary, because if there is a boundary, you have to respect it. If you don't like it, you have to tell the other state that you have to negotiate, but you cannot denounce unilaterally. That's a good example. Another good example is a peace treaty. Because if you denounce a peace treaty, what does it mean? Neither denunciation nor withdrawal is possible. A peace treaty can be bilateral or multilateral. So there are different examples. A treaty concerning the non-use of force. Well, you have the Charter of the United Nations prohibiting the use of force. You can decide not to continue to be a member of the United Nations. Yes, but this is different. A treaty constituting an international organization is a treaty, and at the same time it has an institutional aspect. By becoming a party, you are not only a party, but you are a member of the organization, and nobody can impose on you the membership, if you are not willing to be a member of an international organization. So you can withdraw. It is possible. I invert the question now. A treaty of alliance, for instance, is a typical treaty that a party could either denounce or withdraw from, because you cannot impose on other states being your ally for all your life. So this a typical example of a treaty that allows denunciation or withdrawal, even though there is no provision in the treaty. There was a case some twenty years ago. You have North Korea deciding to withdraw from the Covenant on Civil and Political Rights. And there was a legal analysis made by the Legal Advisor of the United Nations. He considered that it was not possible to denounce the Covenant on Civil and Political Rights. So the UN as the depositary considered that North Korea continues to be a party to the Covenant. Your comments? Do you agree or disagree?

I think it should be possible to withdraw from it for the reasons we have just talked about. If a state withdraws from the treaty, it is still bound by all of the obligations existing in customary law.

In fact, the consequence of withdrawal is the non-application of the procedural rules.

However, there is an argument according to which it is not possible to withdraw from human right treaties because of their content. Do you agree? Well, you know my view. Irrespective of the fact that declaration of termination by North Korea was absurd – because it invoked 'self-defense' – anyway, irrespective of this, in general terms I don't believe that the fact that a treaty deals with human rights is enough reason to say that it does not allow withdrawal. And the Genocide Convention is a good example of a very important treaty dealing with human rights. So, I don't believe that this is a sufficient reason. Well, human right specialists believe that they are dealing with a very special area deserving a specific treaty. I don't believe you can make this kind of distinctions on the basis of the area of international law a treaty is dealing with. I agree that you have to keep in mind the object and purpose. This is very important. But you cannot extrapolate – I would say manipulate – just for the reason that the treaty regards human rights, and human rights are very important, and you need specific rules that are not applicable to other kinds of treaties. By the way, we will analyze one exception, to what I have just said, in Article 60. In the three Vienna Conventions of 1969, 1978 and 1983 you have very limited rules which refer to the specific content of treaties. You have specific references to a treaty which sets up an international organization. Because obviously such treaties are not only treaties, but also institutional instruments creating a new subject, and, as I said, you become not only a party, but you become also a member. You have some references to treaties establishing boundaries; we will mention Article 62 in a moment. And you have Article 60, the one concerning the termination or suspension of a treaty because of a material breach by one of the parties. You have a reference to treaties that have a humanitarian character. But besides these references you don't have specific rules; there is no law of treaties concerning human rights, and no law of treaties concerning investment, and no law of treaties concerning the law of the sea. You have the law of treaties in general, and the

circumstances, in which the content or the area plays a role, are very limited. This is without prejudice to the importance of the notion of object and purpose. Because if you look at the three conventions you will see that the object and purpose of the treaty are mentioned many times, probably, this wording is repeated most often in the three Vienna Conventions. And this is very important, because the object and purpose are useful in order to determine whether a treaty can be denounced or not, and so on and so forth.

Another possibility of termination or suspension of a treaty is if all the parties to a given treaty conclude a new treaty, and the application of the old one is incompatible. So, if this is the case, you know *lex posteriori derogat legi priori*, then you apply the new one. But, again, a warning: this is not done automatically. There can be situations in which two treaties are concluded between the same parties and deal with the same area, but this does not automatically lead to the termination of the prior treaty, because both in some circumstances can be applied at the same time.

Article 60 is a very important provision of the Vienna Convention on the Law of Treaties. This is a case of the termination or the suspension of the operation of a treaty as a consequence of a breach. So, you have one party to a treaty that breaches a provision of the treaty, and then you are not obliged to respect your obligations; this is the *inadimplenti non est adimplendum* rule. But again there are many strict conditions to be met in order to successfully invoke Article 60. First of all, not any breach amounts to the possibility to terminate the treaty. Otherwise, if there were a possibility to terminate a treaty any time there is a breach, there would be not many treaties in force. The article refers to a material breach. In French it's violation substantielle. It is not a single breach, it is not just a minor breach, there must be a material breach or violation substantielle, and you have a definition of what a material breach is in Article 60(2). When you invoke a material breach you have to include your case within one or the other of the hypothesis defined by the Vienna Convention. Then, obviously, there is some difference, if it is a bilateral treaty

or a multilateral treaty. I believe it is not necessary to repeat all circumstances that you have in Article 60, but just a reference to case law. This article has been analyzed by the ICJ in different cases. One I mentioned yesterday was the advisory opinion of 1971 on Namibia. Because you know that there was a mandate by which South Africa administered Namibia as a mandatory power. That was according to the Covenant of the League of Nations. After the disappearance of the League of Nations the tasks of supervision of the mandate were devolved to the United Nations, and the United Nations, because of the policies of South Africa, decided to terminate the mandate. And the mandate was an agreement, an agreement between the League of Nations and South Africa. And here the Court analyzed whether the UN could put an end to the mandate. I'll make this story short: the Court considered that there was a material breach. The South African policies constituted a material breach. And I think the situation was quite clear. Another case in which this article was mentioned was the *Gabčíkovo-Nagymaros* case – Slovakia v. Hungary. Hungary declared the treaty terminated and it invoked many grounds for termination, so if you have to read just one case, in which the problems of termination of treaties are evoked and analyzed, just read the *Gabčíkovo-Nagymaros*, because you will find plenty grounds, including one which is not a ground for termination of treaties. And that is interesting, because Hungary mentioned the state of necessity. And as you know, you don't find the state of necessity in the Vienna Convention. But where do you find it? In the ILC Articles on State Responsibility. And what is the state of necessity? A circumstance excluding wrongfulness. That's it. The Court disregarded this. If you follow the case law, you have to fulfil very strict, nearly impossible conditions, in order to invoke the state of necessity. But here we have a very interesting point which also implies Article 60, because Hungary is mentioning a circumstance precluding wrongfulness. That is to say, there is a treaty; Hungary breached the treaty, but there is a circumstance precluding wrongfulness. But, even though there is a breach, it is not an internationally wrongful act. It would be more or less the same, if you do not act in accordance with the treaty, but you say 'Well, the other party does not respect the treaty,

neither will I. But I have a ground which allows me to do so'. And this would be Article 60. So, if your contracting party has breached the treaty, you can say 'I will not fulfil my obligations either'. And you can invoke Article 60. And what else can you invoke? Counter-measures. So, if you are a lawyer in need of finding different grounds in order to justify your conduct, you would say 'Article 60' and 'counter-measures'. Then I could say: 'Wait a moment. Article 60 is not a kind of counter-measure. Article 60 is 'State A has breached its conventional obligations, and I am State B, the other party, consequently, I will not fulfil my obligations either'. In the *Gabčíkovo-Nagymaros* case the Court said these are two different systems: you have the law of responsibility, and you have the law of treaties. This looks a very formalistic approach. I don't like to encapsulate the law into different boxes. You have the same conduct. You say 'Ah, no, this is the law of treaties', and then you analyze the same conduct and say 'Ah, no, this is the law of responsibility'. The explanation for the accepting of this distinction is that 'one thing is suspending the treaty and another is justifying the breach of your obligation stemming from the treaty'. Come on, the consequence is the same, because you can say: 'Okay, the treaty continues to be applied, but I'm not obliged to apply it, because there is a circumstance precluding wrongfulness'. I don't believe this is a good way to make an analysis. Some people try to solve the problem saying 'Article 60 is a particular case of counter-measures'. It is the application of counter-measures in the field of the law of treaties. Other people made a different analysis and they say: 'Okay, so when you analyze an internationally wrongful act, you make three steps'. First, there is the problem of attribution here. There is no problem. Then you have the determination of the breach. That is, you have to analyze whether the conduct is or is not in accordance with what is prescribed by the rule. And you say you can use the text of Article 60 for this, and if the text of Article 60 fails, that is not the end of the story. Then you have the third step of international responsibility, which is the analysis of the existence of a circumstance precluding wrongfulness. And you say: 'Okay, I made a mistake, I invoked Article 60 in a wrong manner, but that was a counter-measure. Then there is a circumstance precluding

wrongfulness, and then the fact that I didn't apply the treaty is not an internationally wrongful act'. I depicted all the different views concerning this relationship between Article 60 and countermeasures. I mentioned *Gabčíkovo-Nagymaros*; Hungary terminated the treaty and it invoked state of necessity, it also invoked Article 60, and the Court made a very interesting analysis. Not only did it mention Article 60, it mentioned Article 61, and it mentioned Article 62. But what was the main problem for Hungary in the *Gabčíkovo-Nagymaros* case? I remind you that the Court in its judgment of 1997 found that both parties had breached the 1977 treaty. That's interesting, because you go to the Court and the Court finds that both parties to the case have breached the same treaty. So, what was the problem for Hungary in the invocation of all these different grounds for the termination of the treaty? What is the main problem that precludes a state to invoke different grounds? Not only one, but many different grounds? What was the main problem here? That Hungary by its own conduct had contributed to the situation, because it invoked Article 61, the impossibility of performance, and it invoked Article 60. But Hungary also breached, and as the Court said it was premature to say that Slovakia or Czechoslovakia had breached, it was premature to invoke the breach from the other side. And also with regard to fundamental changes of circumstances, you cannot invoke the fundamental change of circumstances as a ground for termination of the treaty, if you have contributed to the change. So you have all these problems in the *Gabčíkovo-Nagymaros* case.

**Impossibility of performance**

You have a treaty, and then it is impossible to comply. But here we are talking about material impossibility. The treaty concerns a given object, and then the object is destroyed, and you cannot apply the treaty. It is material impossibility. What about legal impossibility? You know that international law evolves. And what was permitted, maybe, four decades ago is no longer permitted. Can you invoke Article 61 to declare a treaty suspended or terminated

on legal grounds? The law has changed, and you cannot apply it. What do you think? Indeed, Hungary also advanced this argument. Hungary said: 'Well, the law on the environment of 1977 was one thing; and at the end of the 90s it's something completely different'. My answer is 'no', you cannot invoke Article 61 in this context. Here we are referring to material impossibility, not to a legal one. And what happens if there is legal impossibility? What I have in mind is the following: you adopted a treaty at the time when there was a general legal situation and then this general legal situation changes. It is no longer possible to apply this treaty because of the new legal situation. What happens? Obviously, if it is a new peremptory norm, Article 64 is applied. If a new peremptory norm emerges, the treaty is terminated. This is Article 64, and that is the difference with Article 53, because Article 53 is applied when you conclude a treaty, and it is in contradiction with an existing peremptory norm. But you have concluded a treaty, at that time it was legally perfect, no problem, no contradiction with any peremptory norm, but then a new peremptory norm emerges. And then this treaty is terminated, because of the emergence of a new peremptory norm. It is a ground for termination, not for invalidity. But if it is not a peremptory norm? You can use a tool of interpretation in order to read the treaty in a different manner. And if this is not possible? What about the idea of obsolescence? In the Charter of the United Nations you have some articles referring to the enemies of the Second World War: Articles 53, 106, 107. These are particular provisions. And you know that during the Cold War the Soviet Union considered that if Germany did not act in an appropriate manner, these articles of the Charter would allow the Soviet Union to use force. That was even an exception to the provision on the use of force that was adopted by the Allied Powers in San-Francisco. But what is the situation today? There are no longer enemies of the Second World War. It is true that Russia has not concluded a treaty with Japan yet. I don't have the intention to discuss this. But in any case, with Germany, the situation, one could say, finished with the adoption of the '2+4 Treaty' of 1990, just shortly before the unification of Germany. That was a treaty that put a 'final solution' to the situation of Germany, because there was no

peace treaty with Germany after the Second World War. But today all these articles of the Charter of the United Nations are not applicable, because they are no longer enemies. So maybe, if you want to accept a ground for termination of a provision of a treaty, not the whole treaty, but a provision of a treaty, because of legal impossibility of its application, you can use this example.

I have to finish, and I would like to finish with a brief reference to another ground for termination of treaties that is not mentioned in the Vienna Conventions, but is invoked by some scholars. It is the possibility of desuetude, desuetudo in Latin, which is something different from obsolescence. Obsolescence is what I have just mentioned, a legal impossibility. But desuetudo means that if a treaty that has not been applied for a long time, it is considered to be terminated. I don't have time to discuss this with you, but there are other conceptions about desuetude which could be, for instance, a tacit agreement for termination. In my view, this is not the notion of desuetudo. You studied with Sir Michael Wood consuetude; and desuetudo has, by definition, a reference to time. So, it would be the role of time. You haven't applied a treaty for a long time, then you could not invoke it anymore. I don't believe this is a real ground for termination of treaties. If you have a treaty that was not applied for decades or even a century, there can be many reasons explaining that. One could simply be that there was not a situation to apply it, as simple as that. And the other is if the parties decided not to apply it: there can be also many reasons for that. And this does not automatically mean that the parties were willing to terminate the treaty. So, the mere fact that the treaty has not been applied for a long time does not automatically mean that this treaty is terminated. That could rather be a situation akin to suspension, not to termination. If you look at some repertory at treaties in force, that some states publish, they mention sometimes treaties coming back to the 15th or the 16th century. And there is no reason why these treaties cannot be listed there. When you desperately need some argument, you may have a look and you can find a treaty of the 19th century that can be helpful. Indeed, I am not joking at all, because,

for instance, when Nicaragua went to the ICJ against the USA in 1984, Nicaragua invoked in its Application the declarations made both by the USA and Nicaragua accepting the jurisdiction of the Court as the basis for jurisdiction. But then they looked more carefully and found that there was a treaty of friendship, commerce and navigation, concluded in the 1950s with a compromissory clause. And this treaty had never been invoked earlier. This is an example, and what I said is also linked to what I said at the very beginning: you conclude a treaty with the idea of permanence or, if you prefer, for an indefinite period of time. That's it. So, this is also a part of the notion of the idea of stability of conventional relations.

# LECTURE 5:

## Succession of states with regard to treaties

This afternoon we will analyze one of the three Vienna Conventions relating to the law of treaties that, without any doubt, was the most criticized one of all the three. That is to say, the Vienna Convention of 1978 on succession of states with regard to treaties. We will analyze the problems and the solutions when a situation of state succession occurs. So what happens with existing treaties? That's the problématique. And as I said the Vienna Convention of 1978 was very much criticized, because it was considered that this convention didn't reflect the applicable law, the status of the law with regard to this field. I wouldn't be so critical, and we will try to come to a conclusion after having analyzed the different hypotheses, the solutions provided by the Vienna Convention of 1978. We will try to compare it with practice, but before analyzing it, I would say, keep in mind that the key element to determine whether the rule is good or not, is not practice; sometimes practice cannot follow the best solution. So, we will try to analyze, and we will come to a conclusion. We will try to analyze the Vienna Convention of 1978 and the practice that was followed, and particularly after 1990, because after 1990 there were many cases, as you know very well, of state succession.

First of all, we have to know what we are talking about: state succession, what does it mean? So we have the definition of state succession in different Vienna Conventions relating to state succession. The Convention of 1978 is the one that interests us, because this is the Vienna Convention on state succession with regard to treaties, but then there's another Vienna Convention of 1983 with regard to debts, goods and archives. So both Vienna Conventions concerning state succession were very much criticized, and I don't share this criticism, as I said. The ILC, by the way, also worked on questions of state succession related to nationality of persons, and adopted a text in this field. And currently the ILC is also

working on another field of state succession, which is state succession with regard to state responsibility. So what happens with regard to the consequences of an internationally wrongful act that was committed before the date of state succession, if the consequences of an internationally wrongful act continue after the situation of state succession? So this is a new topic for the ILC. I have to say, that I was rapporteur for the *Institut de Droit International* on this very topic, and we adopted a resolution in Tallinn in 2015, and the ILC, in my view, is following the same solutions we found at the Institute of International Law, and we are particularly happy with that. So anyway, what is state succession? You have, what I consider to be, a good definition in the Vienna Conventions themselves. So succession of states means 'the replacement of one state by another in the responsibility for the international relations of territory'. As you see, the Vienna Conventions did not use the word 'sovereignty'. It's not the replacement of one state by another in sovereignty over a given territory. The reason is that responsibility for the international relations of a given territory can exist in situations other than sovereignty, for instance, in the past there were protectorates, the states having the responsibility for the international relations of the protected states or territories. They didn't have sovereignty, but they were responsible for international relations. Today, for instance, we have non-self-governing territories (Chapter 11 of the Charter of the UN), so you have the administering powers of these non-self-governing territories, they have the responsibility for the international relations of these territories, but not sovereignty.

But when we speak of succession, we also have to speak about continuation, as you know, probably, better than me for obvious reasons. Because there are situations, not all of them, but there are situations of state succession in which the predecessor state continues to exist. You know, as I said, that in the case of the breakdown of the Soviet Union, the Russian Federation was considered to be the continuator of the legal personality of the USSR, consequently, all treaties concluded with the USSR are considered to be in force with regard to the Russian Federation. But the situation

was different, as you know also better than me, with regard to other components of the Soviet Union, which were considered to be successor states. I know there are some discussions about that, but I don't have time to refer to this. So keep in mind these two basic situations: continuation and succession. And we will try to analyze both of them.

But when we discuss succession of states in relation to treaties we have, again, an apparent problem because of the need to conciliate two apparent opposite interests. I mentioned from the very beginning that, when you speak about treaties, you also speak about instruments expressing the agreement that has the idea of permanent character. So, there is one interest which is the stability of conventional relations. There is a need for stability when you speak about conventional rules. But on the other hand, I also mentioned at the very beginning of this course a very basic proposition with regard to treaties, which was consent. And if you have a situation of state succession in which there are new states, you are imposing something on the successor states without taking into account their consent sometimes. So this is the reason why there is an apparent contradiction or, I would say, there is a need to conciliate these two different interests: stability of conventional relations, on one side, and the need for consent, on the other side. It is true that states sometimes attempt to give more weight to one or to the other of these interests. And, consequently, the solutions, when you analyze the different hypotheses of state succession, are different, because if you privilege the need of having stability with regard to treaties, you will favor automatic succession. If you put your weight, on the contrary, on the idea of consent, you will adopt the opposite solution, which is known in Latin as tabula rasa or the clean slate rule in English. That is to say, the successor state is free to decide, and if the successor state is willing to succeed, then it can do it. If not, there is no obligation to succeed. So you have these two apparently opposite interests, and you can find opposite or different solutions. The question is, in my view, that in some circumstances one of these two interests may be more substantial than in other circumstances.

You cannot have a general rule applicable to all situations of state succession. You have to analyze different cases, and you may find different solutions.

Before analyzing the different hypotheses of state succession, I would like to say a word concerning some specific treaties deserving specific treatment. You may find a general rule for one hypothesis of state succession, and you may find another rule for another hypothesis of state succession. There are some specific treaties, and because of their content they need specific solutions. For instance, as I mentioned also earlier in this course, treaties that create international organizations, as I said, are not only treaties, but they are also constitutive instruments of international organizations. That is to say, you are not only a party to a treaty, but you are also a member of an international organization. The general rule with regard to such treaties is that there is no succession, so if you are a successor state, you do not succeed as a member of an international organization, no matter which hypothesis of state succession you are dealing with. That's the general point. I don't have too much time, so I will not develop this. I will focus on other treaties. And then you have also a specific rule for boundary treaties or territorial regimes in Article 11 and Article 12 of the Vienna Convention of 1978. Again, this is also due to the fact of the importance of sovereignty in international relations and also the importance of stability of boundaries and the need not to touch them as far as possible.

So another general comment is that solutions provided by the Vienna Convention of 1978, even if you find solutions in customary law, are general solutions. They are applied, if the states concerned have not decided otherwise. That is to say, here the autonomy of the will of states is present, and if the states are willing to decide something different from the general rule, they can do it.

So what are the different hypotheses of state succession? I will start with the hypothesis of transfer of a part of a territory from one state to another state. Here we don't have a new state, we have a territory which belonged to some state, and then this territory

belongs to another state. So there is a situation of succession with regard to the territory concerned. That is to say, in this case the two states have existed before the situation of state succession; the predecessor state continues to exist with less territory and the successor state continues, obviously, to exist with more territory. So what is the solution adopted by the Vienna Convention of 1978 in Article 15? The solution is what can be called 'the moving boundary rule': the treaties that were in force for the predecessor state ceased to be applied, and the treaties that are in force for the successor state start to be applied with regard to the territory that was transferred. There is no problem, this is the solution of the Vienna Convention of 1978, and, I would say, there is nothing to criticize. This is just the application in the field of state succession of what the Vienna Convention of 1969 established in Article 29. Unless established otherwise, the treaty is applied over the entire territory of state parties. So if the territory of one state changes, then the territorial applicability of treaties also changes. There is nothing to criticize, and the practice, in my view, is also coherent with Article 15.

The Vienna Convention of 1978 introduced a new category of state succession. Traditionally, when the situations of state succession were analyzed, what was analyzed was the situation of secession, the situation of dissolution, the situation of unification of states. But the Vienna Convention of 1978 was adopted at the time when the process of decolonization had been advanced at the UN level, and many newly independent states came to existence, and these states were commonly called at that time the 'third world states'. So the third world countries encouraged the adoption of specific rules for this situation. And I think that was a right proposal, because these new states, when they emerged, were not in a situation of secession. What is secession? It is when some part of the territory of an existing state separates to create a new state. But if you read the Friendly Relations Declaration adopted by General Assembly Resolution 2625 (XXV), you will see that colonial territories were not considered to be under the sovereignty of the colonial powers. They have a separate and distinct status from the territory of the states administering them. That is

to say, there was an evolution in international law, particularly after the adoption of the Charter of the UN and the recognition of the right of peoples to self-determination as a legal right. It was thanks to the application of the right to self-determination that all these states, which were under colonial rule, became independent. Consequently, they looked at the ILC first and at the Vienna Conference later for the acceptance of a new category: the 'newly independent states'. Be careful: the wording can confuse you, 'newly independent states' are not new states. There is a definition of newly independent states in the Vienna Convention of 1978, you have it in Article 2(1)(f): 'a newly independent state means a successor state, the territory of which immediately before the date of the succession of states was a dependent territory for the international relations for which the predecessor state was responsible'. So this is the idea. A dependent territory can claim to be a newly independent state. For instance, if you have the case of Namibia, if you have the case of Timor Leste, they are newly independent states for which these particular rules apply. But if you have a situation of secession, that is different. If you ask me whether South Sudan is a newly independent state or not, my answer will be that it is not. It is not a matter of geography; it is not a matter of the continent: all African states are newly independent states and European states are not newly independent states. No, it is a matter of character. Was the territory of the successor state a dependent territory or not? If the answer is 'yes', it is a newly independent state. That is the reason why Namibia and Timor Leste can claim to be newly independent states. And South Sudan, in my view, cannot, because it was part of an independent state, Sudan, and then it became a separate and distinct state. So this category was also criticized. And I believe there is no reason for that because of the different nature of the territory. And there were specific solutions for newly independent states, and here in the equilibrium between the two interests, I mentioned at the very beginning, the weight was put essentially on the consent. So given the dependent character of the territory, it was considered that these states deserved different treatment and could decide whether they would be candidates for state succession with regard to treaties concluded by the predecessor

state or not. And that was the case, and for these newly independent states the tabula rasa or clean slate rule was adopted. It is for the newly independent states to decide, whether there will be succession or not with regard to treaties. In order to do so you have the applicable rules for newly independent states in Article 16 and the following articles. And in Article 22 you have the manner in which the newly independent states have to proceed. That is to say, through a notification of succession. So if they are willing to succeed to a multilateral treaty, they have to communicate to the Depositary that they have the intention to succeed to this particular treaty, and they will become parties to this treaty. This is Article 22. If you have a look at Article 23, the question is since when newly independent states are considered to be parties to the treaties. Because if you have a newly independent state, you have a date of independence, you have a date on which the state made this notification, and one can think about the date from which the state is considered to be a party. And, obviously, here you have two solutions. One is to consider it to be the date of the notification, and the other is to consider the date of the independence. Article 23 favors the latter. That is to say, these notifications have a retroactive effect. If state A became independent on the 1st of January 2018 and it made a declaration on 10 June 2018, the state is considered to be a party to the treaties since the 1st of January. My criticism to that: there is a period of uncertainty, because between January and June you don't know whether the state is a party to a treaty or not. If there is a problem in May, and you have to settle this problem, you don't know whether the newly independent state is a party or not. This is a problem for which there is no solution in the Vienna Convention. I can criticize the Vienna Convention for that. And I agree that there is a case for considering that a state is a party to a treaty since the date of the independence, because if there is succession there cannot be any cut, a temporary cut; if there is succession, it is from the very beginning of the existence of the state. I agree with that. But there must be something done in order to solve this problem of uncertainty. And the solution could have been to put a time limit for the newly independent state for the declaration, because, otherwise, it is up for the newly independent

state to do it at any moment. You can imagine a newly independent state that became independent, say, in 1980 and has never made any notification, and in 2018 it makes this notification, and then it is considered to be a party since 1980. So what happened during all this period: from 1980 till 2018? So there must be some time limit. There are no rules now, and this is a problem, I believe.

So we have analyzed the situation of transfer of a part of the territory from one state to another. We have analyzed the situation of newly independent states. We are going to analyze the situation of separation of states now. Here the Vienna Convention can be criticized, because no distinction has been made. The Convention treats the unification and the separation of states in the same manner, and there is no distinction in the case of separation, because separation can be done with the agreement of the predecessor state or without the agreement of the predecessor state. And there are different problems, because when there is an agreement, the general questions concerning succession are decided in the agreement. When there is no agreement, then the general rules apply. The Vienna Convention did not distinguish it, and the solution of the Vienna Convention in case of separation is in Article 34. It is that there is succession. I mean, speaking about the general rule, I don't have time to analyze all the exceptions, but I will speak about different solutions for each of the categories. In the case of separation Article 34 provides for automatic succession. That is, if nothing else is decided, there is succession. This is the rule of Article 34. The question was raised before the ICJ in different cases, in *Gabčíkovo–Nagymaros*, as I mentioned yesterday, in the *Genocide Convention* case, Bosnia-Herzegovina versus the then Federal Republic of Yugoslavia; and the Court avoided taking a stance on this. But if you look at the practice, what happened in cases of separation? One could consider that the situation of the Soviet Union was one of separation, because if you consider that the Russian Federation continues the legal personality of the USSR, and then the other states are the successors, this is akin to a situation of separation. And in the situation with the former Socialist Federal Republic of Yugoslavia, there was a legal discussion

whether there was dissolution, or whether there was secession, or many cases of secession. The position of the UN and the majority of the states was that there was a case of dissolution. I don't have time to discuss it, but personally I think that it was not, even if Serbia and Montenegro accepted in 2000 that it was a case of dissolution.

So the practice followed with regard to separation was that there must be a need for a notification. The successor states have the possibility to decide. That was exactly the same situation that the Vienna Convention envisaged for newly independent states. That is, successor states can make a notification of succession, and this is the way by which they become parties to a treaty. If there is automatic succession, one could consider that there is no need for such notification. If there is automatic succession, there is no choice. On the date of independence you become a party to the treaties. This is an unfortunate practice, I would say. It creates more instability and uncertainty. The fact that you become independent on some date, and you make a declaration, probably, many months or even years later, enlarges this uncertainty in cases of separation, because we don't know what the status of the treaty with regard to the new state is. In my view, the UN Secretariat is to blame for it, because when these situations arose in the 1990s and some states were willing to make a general declaration saying: 'well, we are new states; we succeed to all the treaties to which the predecessor state was a party', (that was the practice that the Czech Republic and Slovakia decided to follow) the Secretary General, as the depositary of many multilateral treaties, said 'no, you have to make a specific declaration for each treaty'. The Secretary General, as the depositary, applied the clean slate rule for all successor states. And in order to complicate things, some successor states do not even follow this practice of notification of succession. They consider themselves as having nothing to do with those treaties, and they just send instruments of accession to multilateral treaties. That was the case, for instance, of Armenia, Azerbaijan, Georgia and other states of the former USSR with regard to the Geneva Conventions of 1949. As you know, the Soviet Union was a party to the Geneva Conventions of 1949, so the

Russian Federation, obviously, continued this capacity as state party, but then the other states of the former USSR made the notification of succession, but these five states sent instruments of accession as though it was not a case for succession. That was a mistake, in my view, because they are successors, but well, that is part of the practice.

Article 31 of the Vienna Convention is devoted to the situation of uniting of states. And here also the solution adopted by the Vienna Convention, I have to say, is very strange. Well, first of all, there was no distinction made by the Vienna Convention. Because when you speak about unification you have two different hypotheses. One is when you have two predecessor states that unify and create a new entity, a new state. So the two predecessor states ceased to exist, and a new state starts its independent life. Then you have a different situation which is incorporation of one state into another, and the incorporating state continues to exist with the same legal personality, with its territory and its population having been enlarged. So you have one state, the predecessor state, that ceases to exist, but you have the successor state that existed before and continues to exist after the situation of succession. You have guessed that the situations are different. The case of the so-called unification of Germany was a case of incorporation, so the German Democratic Republic was incorporated into the Federal Republic of Germany. And then you have the other situation, in which the two predecessor states disappear and you have a new sovereign entity. That was the case, for instance, of Yemen, the two Yemen states ceased to exist, and a new state, the Republic of Yemen, appeared. These two different categories deserve different treatment, because, obviously, the situations are different. And the Vienna Convention didn't make any distinction; furthermore, the solution in the Vienna Convention in Article 31 is that treaties concluded by the predecessor states in the case of unification continue to apply with regard to the territory of the respective predecessor state. That is a very bad solution, because you have a single state, and some treaties become applicable to a part of the territory of this state, and other treaties are applicable to the other part of the territory. This is a very strange solution which is not

followed in practice. So if you have a case like that of Germany, and we apply Article 29 of the Vienna Convention of 1969, the treaties in force for the Federal Republic of Germany after the incorporation of the German Democratic Republic apply to the entire territory of the unified Germany, including the territory of the former GDR. And in the case of Yemen you have a situation of state succession; it is also Article 29 of the Vienna Convention of 1969. If you would like to be coherent with this rule, the solution would be that the treaties concluded by the predecessor states continue to apply over the entire territory of the new Republic of Yemen, for instance. Obviously, you have to make a distinction with the so-called 'localized' treaties. Because if you have a treaty which specifically applies to a given territory of a part of a state, obviously, you continue to apply it to this given part. So this is the situation with regard to separations and unifications.

So we have analyzed the situations of transfer of a part of a territory from one state to another, newly independent states, separation with agreement and without agreement, unification in the form of incorporation and unification in the form of merger. So these different hypotheses deserve different treatment, and the general solution of the Vienna Convention of 1978 was clean slate rule only for newly independent states, and for other cases the general rule with exceptions was automatic succession. I believe that was a wise solution even putting aside some specific criticism I addressed. I believe that the Vienna Convention of 1978, in spite of all criticism, generally adopted the best solutions.

But then you have to analyze the status of the Vienna Convention of 1978. Have a look at the status of ratification, accession and the declaration of succession. The Vienna Convention of 1978 entered into force only in 1996. And today there are only 22 states parties to the Vienna Convention of 1978. That is to say, not too many states have become parties to the Vienna Convention of 1978. And one can wonder why. Think about the possible application of the Vienna Convention of 1978, because this is a Convention dealing with state succession with regard to treaties. We saw that in most

cases of state succession there is a new state, and you know that when a state becomes a party to a treaty, the general rule is that there is no retroactivity. So if you become a party to a treaty today, the treaty applies to you since today, not before. It means that this convention, if you have a situation of state succession and you are a new state, is very difficult to apply to the situation of the new state. But this problem was envisaged in the 1978 Vienna Convention itself, and in Article 7 you have the possibility for the new states to make a declaration rendering the Vienna Convention of 1978 applicable to its own succession. This is one of the rather rare cases of retroactivity in international law. So here you have a possibility of a retroactive application of the Vienna Convention. If a successor state becomes a party to the Vienna Convention of 1978, and if it makes the declaration of Article 7 of the Vienna Convention, then the Vienna convention can be applicable to its own situation. When you have a look at the list of the states which have become parties to the Vienna convention of 1978, you can see that most of the successor states of the Socialist Federal Republic of Yugoslavia became parties to the Vienna Convention of 1978 and made this declaration of Article 7. So this is the situation of state succession with regard to treaties. I have to finish, but I will take some minutes of the seminar to make an overall assessment of the entire codification of the law of treaties. So if you allow me, I will do that.

# SEMINAR SESSION

So now we have nearly two hours, so we have to take advantage of this situation and we can organize ourselves in the following manner. We have to discuss the statements made by President Donald Trump of the United States of America with regard to the Paris Agreement and to the so-called Iranian Nuclear Deal. So we have to analyze them; this is the seminar. I also have to make some general conclusions. And I would also like you to raise questions that you consider to be of general interest, and you were unable to raise them because I spoke a lot and I didn't allow you to raise questions… So, these are the three things I would like to do with you in the time we still have. Maybe the manner in which we can proceed is the following: now we can have some short time for questions, then we will analyze the two statements by President Trump, and then at the very end I will just mention the general conclusions of this course and the seminar, if you agree with that. So are there any questions, comments or criticism? If you don't agree with something I said, I'd like to hear the opposite views and I will be very sad if I leave Moscow without having heard any criticism to what I said. But anyway, maybe it will be a reason to come back again.

*[Question: Unfortunately I'm not going to criticize you, but I have a rather theoretical and practical question, it concerns the identification of treaties. We were talking a lot about identification of customary rules, but just before the interpretation of a treaty the question whether this agreement is a treaty or not should be decided. The answer to this question is not always obvious, and at this point I want to refer to the constituent, constructive element of a treaty. What features make an agreement a treaty in accordance with the Vienna Convention, and I think the answer is also rather obvious: these are rights and duties regulated by the international law. And they are what makes a treaty a treaty. And it's easy to distinguish international agreements from treaties when state parties explicitly establish that this is a treaty or, for*

*example, this agreement is not a treaty, for example, as the Helsinki Act of 1975 when the parties established political obligations. But how this dispute should be solved when there is contention between the parties with regard to the nature of their duties?]*

Well, I have to confess that one of the questions I would like to raise when we will discuss the two American statements is whether the Iranian Deal is a treaty or not. So if I answer your question, I will answer the question I am willing to ask you! Well, I will try to answer it. Because your question is: what happens if one party considers that this is a treaty and the other considers that it is not a treaty? The crucial point is not the definition, but whether there is an obligation. That's the crucial point. You consider it to be a treaty, and consequently there is an obligation by definition. If it is not a treaty, it is just a declaration of will, and I'm not bound. It is just what some people call the 'soft law', so it's a mere statement of wish but nothing else. It's not the expression of my consent. The crucial point is whether we are in front of an international obligation or not. And in cases in which you don't have a treaty, and the instrument declares obligations prior to that instrument, if you have to invoke these obligations, irrespective of the fact if this is a treaty or not, these obligations do exist in international law, because either they are customary or, because there are other treaties providing for the same obligations. But again in the face of this dispute, if you have to decide whether an instrument is a treaty or not, you have to read the text and you have to interpret it. And you have to decide on the basis of the text. So you cannot have other solutions. And then you will tell me whether the Iranian Deal is a treaty or not, because you raised the question. I'm aware that I didn't provide the entire answer to your question.

*[Question: My question has to do with extraterritorial application of treaties. What is your opinion on that? Because an argument has been made recently that the national covenants applied extraterritorially despite the fact that they clearly say that states only have to ensure rights to individuals within their territory and subject to their jurisdiction. So what's your take on this?]*

Well it's a very general question and it also depends on the treaty concerned.

*[Let's say the covenants. The human rights treaties or just the covenants.]*

Your question is also concerned with one of the statements made by President Donald Trump, because, as you know, the USA decided to apply sanctions to companies even if they are not American, and even if they are not acting in a specific situation on the American territory. But the USA will apply or is applying sanctions, and this is also extraterritoriality. I am thinking about a kind of introduction to the answer. I am thinking about a good policy for treaty makers. So if you have to negotiate a treaty, you have to determine the territorial application of the treaty, in order to avoid problems in the future. Some conventions use a formula that 'this convention applies to the territory of which the state parties have sovereignty or jurisdiction (or control)'. So if you apply this formula, it's better just to say that this treaty applies to the territory of these state parties. Because sometimes there are problems concerning sovereignty, and sometimes you have sovereignty disputes, and sometimes you have two states claiming sovereignty over the same territory. Or sometimes you have states controlling the territory of other states. And there is also the situation of military occupation, and military occupation does not mean sovereignty. You control, but you don't have sovereignty. So, in my view, the covenant or the covenants, both, apply to the territory under the jurisdiction or control. For instance, you have the situation of the occupied Palestinian territories, so Israel controls them. Consequently, Israel is a party to the Civil and Political Rights Covenant. So the Covenant applies to the occupied Palestinian territory. I'm not saying anything new. This is even what the ICJ has said in the advisory opinion on the Construction of a wall. Am I answering your question or not? [Yes] Okay. Thanks. I'm relieved.

*[Question: I have a very concise question. Is the law of treaties applicable to international informal agreements also called international commitments? Thank you.]*

In my view, when you have an instrument, if you can identify an obligation that the state accepts in this instrument, no matter what you call it, you have an agreement and this is binding. You can call it a final act, you can call it a treaty or a convention, or what was the term you used? International commitments or political obligations. But what is a political commitment? You have legal obligations and you have situations in which you are free to act. In the area in which you have the entire freedom of action you decide whatever you want. If you engage to do something, this is more than political. I am aware that in some cases states are willing not to adopt binding instruments or to accept binding commitments, and they say explicitly that this is just a political statement. If it is such a case, and they are not binding, and if the states concerned do something different, there is nothing to complain about from the legal viewpoint. You would criticize them from the political viewpoint, because they said they would do something and they are not doing that. But from the legal perspective there is nothing to complain about. I insist that the crucial point is to identify whether there are legal obligations or not. Sometimes states may declare that this is a political statement, but they refer to legal obligations stemming from other instruments. And then even if in this particular instrument it is mentioned that this is a political commitment, there are obligations stemming from other instruments. So again, you have to look carefully at the instrument to make a decision. Other questions?

*[Question: I am interested in your position concerning general principles of law. You have mentioned in one of your lectures that it's not a good idea to do an impossible task and go to any domestic jurisdiction to identify the general principles. And therefore from the practical point of view what would be the approach to identify the general principles?]*

I have mentioned that these are logical inferences from the system. I have mentioned that the general principles of law are not those 'recognized by the civilized nations' as Article 38(1)(c) says, but they are logical inferences. You may say: 'Well, my logical inference is not necessarily yours'. Okay, maybe. But let me give you some examples. You may find general principles of law, for

instance, in the field of judicial activity. I will give you a concrete example. Intervention of third states before the International Court of Justice. You know that Article 62 of the Statute of the ICJ allows states to request to intervene, if a legal interest of these states is at stake. There was a dispute brought by two states before a Chamber of the International Court of Justice. You know that the Court can act in chambers, instead of having fifteen judges, they have five, for instance. So you have a situation in which you have a dispute between A and B, and this dispute was referred to a Chamber. And what is the situation in a chamber? In a chamber of five, for instance, you have three judges of the Court, and the state parties to the dispute don't have a judge of their nationality. They can appoint an ad hoc judge. Then you have three plus two. That's the composition in which the weight of the ad hoc judges is higher than in a composition of fifteen plus two. And then assume that the third state is willing to intervene in this dispute. My question is: who has to decide whether intervention is possible or not? The entire International Court of Justice, the fifteen judges, or the Chamber? If you look at the Statute, you don't have an answer. If you look at the Rules of the Court, you don't have an answer. For example, take a dispute between El Salvador and Honduras. It was submitted to a Chamber by both parties. The Chamber was composed of five judges. And then Nicaragua was willing to intervene, and the question arose, who has to decide: the Court in its full composition or the Chamber? You don't have the solution in the relevant instruments. You don't have any precedent. That was the first time that this problem arose before the ICJ. You cannot say: 'Well, okay, there is a customary rule'. No, there is no customary rule, there is no conventional rule, and the Rules of the Court do not say anything either. There is nothing. You have to apply general principles of law. And for me here there is a logical inference. If you have a Chamber that has to decide the merits, it is for this Chamber to decide also about an incident, because intervention is considered to be an incident in the procedure. Maybe you have this solution, I don't know. Because, in general, in the domestic judiciary you know who is the competent judge, who is the judge having jurisdiction. But you have a formula according to

which the judge who has to decide the merits has also jurisdiction on the incidental aspects of the dispute. In French: 'le juge du principal est juge de l'accessoire'. Accessorium sequitur principali. But this is a logical inference. The same judge that has to decide the merits has to decide the incidental issues. I don't know whether I convinced you or not, but this is my vision of the question of general principles. Other questions?

*[Question: I wonder, to what extent and how, what you told us during the first lecture, applies to the situation of Brexit to determine legal rights and obligations of the United Kingdom and the European Union, because they are both parties to a number of different international conventions and organizations. For instance, a big question is how it will be decided about their rights in the World Trade Organization. So the question is whether we can apply the general rules of state succession to the situation when a state would like to leave an organization.]*

But this is a question for Sir Michael Wood! I'm not European, I'm not British but, nevertheless, I will answer that question… (laugh). I don't believe the United Kingdom can claim state succession with regard to the European Union. This is a particular situation. The European Union is nothing less and nothing more than an international organization. When I said so some years ago, my colleagues, who specialized in the European Union law, were furious against me, because they contended that the European Union was something different; that it was more than an international organization. And they also said after the Maastricht treaty was concluded that in the Maastricht treaty or in the prior treaties, in the treaty of Rome, there was no provision concerning the possibility of withdrawal of one state of the European Community or the European Union. And I contended that, nevertheless, it was possible to withdraw. And again, my European Union Law colleagues were furious against me saying 'no, it's not possible'. And I said: 'Come on, if it's not possible, it means that states, members of the European Union have lost their sovereignty'. This is what I mentioned yesterday: if you are a member of the organization you are willing to leave, you can withdraw, even though the instrument doesn't provide

for exiting; you have the possibility to do it if you are a sovereign state. Otherwise, you are no longer a sovereign state, and I never considered the European Union to be some kind of a supranational state. It is not. But now after the Lisbon treaty it is clear that this possibility was envisaged. The European Union is an international organization, a very specific one. The European Union is probably the highest degree, the highest example of regional integration. I don't have any problem accepting that. If the European Union is a party to a given agreement, and one of the state members of the European Union withdraws, and is no longer a member of the European Union, the treaty continues to apply to the European Union. In the future it will be the European Union minus the United Kingdom, because it is no longer a member. That's my particular view, but you know that there are discussions about that. And there were other kinds of discussions when Scotland organized a referendum in order to become independent. There was also a question whether there would be automatic membership to the European Union or not, and the position of the European Union was 'not', because they don't want to encourage secession all over the territories of the European Union member states. But this is a normal situation; this is what we have just said with regard to state succession and treaties instituting international organizations. That's my answer, I hope I have answered.

*[Question: You have probably touched this matter, but I just have not heard it correctly, so I would like to draw your attention to the case of East Timor, which was considered by the ICJ. The problem was that Australia concluded a treaty with Indonesia, and this treaty said that Indonesia had sovereignty over East Timor. And there was a discussion. Some scholars believed that this treaty was null and void, because Indonesia had no right to act on behalf of East Timor, it should have been done by Portugal. But some other scholars, for example, Alison Pert, wrote that it was absolutely okay for Australia and Indonesia to conclude such a treaty. Even if we assume that Indonesia didn't have any sovereignty over East Timor due to use of force in 1975, I wonder whether this treaty is, and, in general, this kind of treaties are, null and void or perfectly okay?]*

Well, I'm a strong defender of the principle ex injuria jus non oritur, which means that you cannot create any right from what is illegal. My answer would be that Indonesia was occupying the non-self-governing territory of East Timor, which was recognized as such by the United Nations. The United Nations recognized that the East Timorese people have the right to self-determination. Indonesia prevented them from exercising their right to self-determination; consequently, the presence of Indonesia in East Timor was illegal. I'm telling you what I think. And, consequently, Indonesia didn't have any right to decide about the natural resources of the territory or to deal with maritime areas of the territory in any manner. Consequently, my answer is that these treaties concluded by Indonesia are null and void. The court in the East Timor case, Portugal v. Australia, decided that it couldn't exercise its jurisdiction. It didn't mean that what Australia did was right. The court simply said 'we cannot decide'. The Court came to the conclusion that it couldn't decide without the presence of Indonesia, because Indonesia was the principal and indispensable interested state in the dispute. The Court applied the Monetary gold principle, as you probably know. That's my answer. But that was not only the position of the authors you mentioned, that was the position of Australia; that was what Australia said before the Court. Because Australia said: 'Well, there is a factual situation, we have to take into account the factual situation, we recognize that the East Timorese people has the right to self-determination, but Indonesia is exercising the sovereignty over the territory, that is why we concluded a treaty with the state exercising sovereignty'. But I believe that if the state doesn't have the right to exercise sovereignty, it's simply illegal.

**Transcript of the seminar**

I proposed you to read the statements made by the President of the United States of America: the first one is of July last year with regard to the Paris Agreement adopted at the 21st Conference of the United Nations Framework Convention on Climate Change; and the other statement has been made this year, in May, concerning the

Joint Comprehensive Plan of Action and if you prefer to abbreviate, the so-called Iranian Deal. Just to put both statements in a context. The Paris Agreement was adopted by the Conference of the parties of the Climate Change Convention. The United States of America is a party to the Climate Change Convention and the United States of America is also a party to the Paris Agreement. And you know that, according to the American Constitution, in order to become a party to some treaty, the US needs (when ratification is needed) the approval of the Senate; and this must be done by a two thirds majority. So this is the domestic law provision concerning ratification of treaties by the USA. I will not explain the negotiation of the Paris Agreement, but you are probably aware of the difficulties. If there had been a need for ratification of the Paris Agreement by the USA following this procedure, the USA, probably, could have never become a party to the Paris Agreement. Article 20 of the Paris Agreement, if you have the text, provides for the manner in which it will enter into force and says that 'the Agreement shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations that are Parties to the Convention'. And then there is a possibility of accession. But you see three words here: ratification, acceptance and approval. Because the then American government at the time of President Obama was willing to become a party, the procedure decided by the American government was that of acceptance and not ratification. That is, the USA became a party to the Paris Agreement. The date was the 3rd of September 2016. There was a declaration of acceptance. The American President considered that it was not necessary to require the Senate's approval for ratification, since the Paris Agreement was a consequence of the UNFCCC. Consequently, it was just a kind of executive agreement, and the executive of the USA was able to accept. That was the situation. There was no doubt that the USA was a party to the Paris Agreement.

And then you have the statement by President Trump on the Paris Agreement. You've read it, I will put aside all considerations about the environment he made, and we will not discuss environmental law

here, we are here to discuss the law of treaties. He announced that the United States would withdraw from this agreement. So here is the situation, and now I would like to hear your views. I think it is quite clear that we are in the presence of a binding instrument. Do you agree? The question is: what is the scope of President Trump's announcement? Is this tantamount to withdrawal from the Paris Agreement or not?

*[…]*

There was an intention to withdraw from the Agreement as soon as possible…

*[…and only then there would be a necessity to make another one, another statement, perhaps, or another official withdrawal, or otherwise, I think it's more true that this is an actual withdrawal, but a delayed one, so it will enter into force approximately a year from now.]*

In general, when you read the press at that time, the idea that emerged from the press was that the United States withdrew from the Paris Agreement. But you say it's just an announcement of withdrawal. And you mentioned some period of time, etc., etc. But, you know, when we have to make a legal analysis, we have to refer specifically to the rule on which your analysis is grounded. And maybe this is what your colleague will do.

*[I didn't want to cite a rule, but I want to cite a paragraph in the withdrawal remarks by Trump which states that 'thus as of today the United States will cease all implementation of the non-binding accord and…' I think it is paragraph 8, if I am right. 'Thus, as of today, the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country.']*

The United States will cease all implementation of the non-binding Paris Accord. Comments?

*[Well, it's contradictory, normally you implement treaties, but not this non-binding something.]*

Is it contradictory? If you say the USA will cease all implementation of the non-binding Paris Accord, you can read this in two different ways. The first one: 'Well, he is saying the Paris Accord is not binding, and it is', unless you think otherwise. But I believe all of us agree that this is an agreement that was subject to ratification, or acceptance, or accession and it's quite clear that we are in front of a treaty, no doubt here. So if you read this statement as implying that the Paris Agreement is not a treaty and you have a state (because the head of state engages the state) saying that a treaty to which you are a party is not binding, you may wonder whether this is a material breach in the sense of Article 60 we mentioned yesterday. Because, if you read the Vienna Convention, the definition of material breach, there is rejection. Here we have the rejection of the binding character of the Paris Agreement. This is serious. But one can also read this in a different manner. If you want, you can say: 'Well, what he had in mind was the non-binding elements of the Paris Agreement'. You can think about that, but personally I have some difficulties. But you can interpret this in these two different ways.

This was what President Trump said. But do you know what the United States of America did afterwards? You mentioned something. You said: this is an announcement and there must be a further step. Yes, but why? I'm sure you based your reasoning on an article of the Paris Agreement. It is Article 28 of the Paris Agreement:

> 'At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement'.

It's because the Paris Agreement is a consequence of the Climate Change Convention. But the third paragraph does not concern the

purposes of our analysis. That is to say, the statement by President Trump doesn't put an end to the quality of party of the United States of America. But the USA gave a notification on the 4th of August of 2017 (and I didn't mention this to you, because otherwise the exercise would have been very simple). I see that some of you found it on the Internet. But one thing is a press conference or a statement, and another thing is when a formal notification required is done by the US. And there was a notification by the United States of the intention to exercise its right to withdraw from the Paris Agreement. And this notification explicitly mentioned: 'in accordance with Article 28, paragraph 1'; and the notification went on saying that 'a formal written notification would be submitted as soon as it was eligible to do so'. That is to say, three years after the entry into force of the Paris Agreement, and then there will be one more year for this statement of withdrawal to take effect. So just for information, the treaty entered into force on the 4th of November 2016. It means that in 2019 the USA will be able to notify its intention, and then one year later its notification of withdrawal will take effect. Okay, this is quite simple. Apparently it is.

Now we will have a look at the situation with regard to the Iranian Deal, or the Iranian Nuclear Deal, or the Joint Comprehensive Plan of Action. Be careful with the wording. Here we are talking about a plan of action. And this plan of action was adopted (I have to be also careful with the terminology) by China, France, Germany, the Russian Federation, the United Kingdom, the USA, the European Union and the Islamic Republic of Iran. It was adopted on the 14th of July 2015. And do you know the two basic or essential elements of this Plan of Action? What is the content of this plan of action basically, in one sentence?

*[If I have to put it in one sentence: it reflected the measures to make Iran temporarily stop enriching uranium at its facilities.]*

That's the content?

*[That's the purpose, in one sentence.]*

I've asked to say in one sentence what the content is. Just to help you, in my view, in your sentence you have to mention two elements, and I would be more precise with regard to the only element you mentioned. Please, what were the two elements of this Plan of Action?

*[Corresponding duty to its sanctions.]*

That's it. But sometimes when I tell the students to be concise they are too concise.

*[Sorry, but perhaps reciprocal commitments, in accordance with point (i), it was the content of this plan, not duties.]*

Here indeed you have Iran on one side, and the others, more or less, on the other side, one could say. You have the commitment by some states, and you have the Iranian commitment on the other side. Equilibrium or not, I don't know. But I insist with my question: what is the purpose of this Plan of Action? I mentioned that there are two elements, and, indeed, from my question and the answers of both of your colleagues, there are two elements here. You mentioned 'temporary'; you used the word which is a little bit worrisome. What was the exact wording you employed? 'Stop uranium enrichment', this is what you said. I would believe that there was something more than that, because the first element of the content of this Plan of Action was to prevent Iran from having access to nuclear weapons. That is one of the elements. It is, indeed, mentioned like this. There is reference to the commitment of Iran that it would never obtain, produce or possess nuclear weapons. That was one of the elements of the Plan of Action. And if you did accept that, it was because there was something on the other side. What was the second element of this Plan of Action? You mentioned the termination of the sanctions that were decided against Iran, sanctions aimed at preventing Iran from having the possibility to produce nuclear weapons. That was the deal. That is to say, on the one side to stop the sanctions, on the other side not to continue with the activities that would lead Iran to have the capacity to produce nuclear weapons. That is the content of the

Plan of Action in one sentence. You read the Plan of Action, some elements are very complicated, I confess. I didn't try to understand them; it would be an impossible task, that's not the task of a jurist. You've read the essential elements of this Joint Plan of Action, and my first question is: which kind of instrument are we talking about? Is it a treaty? Or is it…? What was the wording you employed some minutes ago? An international political commitment. Is this a treaty or not? If you read the text, you will see there is no reference to state parties. What is the word employed instead? Not in the reference to those having adopted this text by name, but when they refer to all of them together – the 'JCPOA participants'. That is the wording. That's interesting. It's not the JCPOA party. It's a participant. I repeat my question: is this a treaty or not? Is it an international agreement having binding force or not?

*[It's political commitment, because we identified such agreements based on specific terms, 'participants' instead of 'party' or 'shall' instead of 'should'.]*

That's your view. Are there any other views?

*[The question is whether it gives rise to obligations, and in paragraph 10 it is stated: 'and verify the voluntary nuclear-related measures', which means the rest are not voluntary, the rest are obligatory, but I may be wrong.]*

Never say so. That's another advice I always give to my students, never say: 'I may be wrong'. If you say something, you say something. And the others will decide if you are wrong or not. But don't tell the others you are wrong. So, apparently, we have two different views here. One is that it is a political commitment and the other that it is something more, because there are rights and obligations stemming from this text with regard to those participants. Other views?

*[I, too, support the position that it's not a treaty. It's obvious that the structure of the document is not sufficient per se to make a concrete conclusion about the nature of the document. But anyway, I think that the absence of articles, which is also conventional for international*

*treaties, is also significant. Here we have no articles, we have paragraphs. And I think that the term 'reciprocal commitments', which is used in the document, is also indicative here. So it's not a document about international obligations or even duties, but it's about reciprocal commitments which are predominantly of political nature.]*

Okay, until now it's two-to-one.

*[Two-to-two. Because I would say it's a treaty, because I think the Vienna Convention was drafted in the way that we can interpret treaties broader than just whether the parties are called 'the parties' and there are paragraphs or articles, or there are very specific clauses and provisions. I think the one thing that matters is that there are competent parties that are trying to concord their wills to a particular situation, so in my opinion, we can ignore the fact that the articles are called differently or there aren't enough provisions as long as we see what obligations parties undertake. And also I don't think it's necessary to call these obligations 'international duties', because when states make commitments under international law, they can call them 'commitments', but if they are under international law, they are still their obligations. That's my opinion.]*

Okay, we have different views.

*[I would also vote for the fact that this is a treaty. Firstly, I feel that there are obligations, but they are very specific in a way that even in a regular treaty we have obligations that exist from the moment it enters into force, and here it depends more on mutual execution of those commitments, and that we can see. There is an implementation plan, and there are steps listed. So if there is no first step, the next ones are also not in force. They are not obligatory, and there is a dispute resolution section which implies that there might be some disputes about the way the states should correspond and fulfill their obligations under this document. And finally, I think that what speaks most in favor of calling it a treaty is the fact that the United States decided to withdraw without being obliged to do so.]*

That was one of the questions I would like to raise. Other views?

So we are three-to-two up to now.

*[I will say that I would not qualify all the document as a treaty, but I would look whether this or that article raises specific obligations, because there are certain vague issues about confidence building measures that are quite weak to have the content of a specific obligation, and they are, normally, do not give rise to them.]*

Okay, so you say, maybe, some elements of this Joint Plan of Action are binding, since it is an agreement among different states or international organizations…

*[And they stem from other binding provisions.]*

So this is an instrument containing binding and non-binding provisions. But you may find treaties that also have this kind of provisions. Okay, other views? So we have to decide. Assuming there is a dispute, and you have to decide whether this is a binding instrument or not. This is important, because if it is not binding, and one state doesn't comply, then if it is not obliged, there is no internationally wrongful act, to use the wording of the state responsibility articles of the ILC. So it's important to discuss this. And it is also important in order to determine, legally speaking, not politically, but legally speaking, the attitude of the United States today. You say: 'Well, the USA just adopted a political commitment'. If it is a political commitment, then the USA can decide to do whatever it wishes, even though politically, but not legally, you can criticize, you cannot say that the USA is breaching an international obligation. So, what we are doing right now it's not a mere academic discussion, it's a concrete legal discussion. So I have to give my views, this is what you expect. My view is the following: it is obvious that the use of this wording shows ambiguity, a clear intention to leave the matter with some ambiguity. This ambiguity may be the result of different problems; these may be domestic problems for some of the participants.

We have to make a decision about the text we have. My view is: irrespective of this ambiguity in the use of terms, it clearly shows

that the parties are not willing to put it clearly that this is a treaty, as there are obligations for those who have adopted it. I consider it as a legal agreement; consequently, it is a treaty, no matter its name, because this is what we read at the very beginning of this course in the definition of a treaty by the Vienna Convention. So I believe that those who have adopted this text have taken binding obligations. It is not just a matter for Iran to decide what to do. So there is no freedom for Iran or the others to decide what conduct to follow after the adoption of this Joint Plan of Action. It is a Joint Comprehensive Plan of Action, so there are commitments which are accepted by Iran on the one side, and there are commitments concerning sanctions on the other side. For me these are binding obligations, and, consequently, this is an agreement. And you can consider it a treaty, and you have to analyze the provisions of it as though it were a treaty.

Now you have to analyze the statement by President Trump. President Trump, as you said, announced the withdrawal of the United States. Well, you could say that one can withdraw from a political statement; probably, this is what you would say. There is a political statement, and you can announce that you will no longer follow it. But my question is: is it possible to withdraw from the Joint Comprehensive Plan of Action? This Joint Comprehensive Plan of Action does not contain any clause concerning withdrawal. Consequently, if this is a treaty, you have to apply what the Vienna Convention provides in this kind of situation. Is it possible to withdraw from this Joint Comprehensive Plan of Action, though there is no clause providing for withdrawal? That's my question, and in order to answer my question you have to look at Article 56 of the Vienna Convention on the Law of Treaties which, as the Court mentioned, is also the expression of customary law. You can also discuss the delay; there is a one-year delay. The problem of withdrawal from a treaty that does not contain any provision concerning withdrawal is a matter of the Vienna Convention. So what do you think? Is it possible to withdraw or not? Because President Trump announced the withdrawal of the USA.

*[Because we have to assess whether the parties themselves decide if they can withdraw, or the nature of the document provides for withdrawal. I don't think the nature of it really provides for withdrawal. It's more likely that the parties would intend to be able to withdraw. Because what could happen is that in these negotiations Iran would only be willing to accept it, if all the states that signed this document refuse the sanctions or make specific steps. Only then Iran, you know, would stop enriching uranium or make counter steps. So, in this situation this agreement can be ineffective for the allies of the US, if the US withdraws. Therefore, maybe, it's not logical to think that they would intend that any party can withdraw at any time, because they understand, as a collective party, that their counterpart may not be interested in complying with this instrument anymore.]*

Okay, to sum up, I would say, if I interpret you correctly, you say, given the content of the Joint Comprehensive Plan of Action, it is not possible for the participants to withdraw, because withdrawal would deprive the treaty, or the agreement, or the Joint Plan of Action, whatever you want to call it, from its object and purpose. Well, if you are a judge and you have a problem, you have to decide. The exercise is that you have to decide. Well, you could say, if all the other participants agree, then there is no problem. But if they all agree, then it means that Iran has to continue with the policy depicted by the Joint Plan of Action. The other states have to terminate the sanctions, but the US can continue with the sanctions. The situation looks very strange, since they have a 'deal', that was the word employed by President Trump, because sanctions would be terminated, and Iran has to comply with this program. That's the deal. If you allow sanctions, then the equilibrium is completely lost.

So, if I have to answer my own question, I would say, having regard to what Article 56 of the Vienna Convention on the Law of Treaties provides for and taking into account that this article reflects the status of customary law in the field of withdrawal or denunciation of treaties, since it is not established that the parties intended to admit the possibility of withdrawal, it cannot be implied by the nature of the treaty that the withdrawal is possible. Rather

the opposite, it is not possible to withdraw, that's my answer to the question.

Well, if this is the answer, what is the consequence of President Trump's statement? And not only statement, but action. Because as you know, if you read the statement, he announced the withdrawal and at the same time said that the sanctions would be applied immediately. So if I ask you to analyze the USA's conduct in relation to the Joint Comprehensive Plan of Action, what would you say? It is a material breach, you may say. Other views? I consider that it is a breach to the Joint Comprehensive Plan of Action. As you know, this Comprehensive Plan of Action was also endorsed by Resolution 2231 of the Security Council. Some of the points of Resolution 2231 are covered under Article 41 of the Charter of the United Nations. This explicitly is a way to stress the binding character of the decisions taken by the Security Council in this regard. So my answer would be that what the USA have done and is doing is in breach of international obligations. It's not a withdrawal, it's a breach, and I consider that the Joint Comprehensive Plan of Action is still applicable, I would say, it is still in force because, I consider it a binding instrument, and there are binding obligations. Even if you don't agree that the Joint Comprehensive Plan of Action is a treaty, you have the Security Council Resolution and you have the provisions of the Security Council Resolution that are adopted under Article 41 of the Charter. Consequently, there are binding obligations, one way or other. By the way, if you look at the Joint Comprehensive Plan of Action itself or at the Security Council Resolution, you will see that there are means to settle disputes, if the dispute arises with regard to the implementation of the Joint Comprehensive Plan of Action. That is to say, if the American government considers that Iran is not complying with the Joint Comprehensive Plan of Action, there are means in both instruments that must be used. It is not a unilateral decision by one of the participants of the Joint Comprehensive Plan of Action, but it can be settled through the means provided for by both instruments. By the way, I would even say that Resolution 2231 contains a procedure which would be very easy for the US to follow,

and it could even achieve the same goal if it were willing to follow the procedure decided by the Security Council Resolution.

## Conclusion

Allow me to say not just one sentence, but, probably, two or three about the assessment one can make with regard to the process of codification of the law of treaties. I have to be very concise for time constraints; obviously, it's not all what I wanted to say. We discussed or, at least, we mentioned (because we didn't discuss the Vienna Convention of 1986), the three Vienna Conventions concerning the law of treaties. The assessment one can do with regard to these three Vienna Conventions is that the Vienna Convention of 1969, I think, is generally recognized as a success. It is largely followed by international courts and tribunals as the expression of general international law. It has been ratified (or states have acceded to it) by a considerable number of states. One can say that the 1978 convention was rather a failure, this is what some people contend. You heard my criticism, and I will not repeat what I have said just a moment ago with regard to this convention. It is true that it has not been largely ratified. And one could even say that the 1986 convention which has not yet entered into force was useless. But I wouldn't say so. I think, if you take the three conventions as a whole, it was rather a successful codification in this area together with the law of the sea, and the diplomatic and consular relations. These are areas in which codification was very successful, because now it is very easy for you, indeed, it's very easy for students, for practitioners, to deal with international law in the field of the law of treaties. Because we have all the elements, or nearly all the elements with some minor gaps, I also mentioned during my course, in written texts. The situation before 1969 was quite different. Everything was under discussion: whether the fundamental change of circumstances was or was not a ground for termination of treaties and so on, and so forth. So now, we have a corpus with rather clear-cut solutions, and, in my view, this is one of the successful examples of codification. And I have to finish and I thank you for your attention.

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