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Full Professor Milenko Kreća, LL.D

Faculty of Law, University of Belgrade

A FEW REFLECTIONS ABOUT PRACTICE OF STATES REGARDING SUCCESSION TO MULTILATERAL TREATIES

The author discusses the practice of successor States in respect of multilateral treaties in the frame of dichotomy ipso iure /consented succession. He comes to the conclusion that the practice favours consented succession to multilateral treaties. Such practice seems reasonable for a number of reasons. First of all, if we stick to the difference between the predecessor State and the successor State in terms of legal personality, it is unclear how the successor State, a new State, may be considered bound by the will of the predecessor State, being another State in legal terms. Such an understanding obliterates the difference between the predecessor State and the successor State as distinct legal personalities and relies on the fiction that, in respect of treaties, their wills consur. Further, a rule on automatic succession runs counter to the fundamental principle of equality of States to the detriment of successor States. Successor States, by applying this rule, would be deprived of the rights which, otherwise, States have when expressing consent to be bound, such as, for example, making a reservation in respect of part of a treaty or accepting to be bound by a treaty under certain conditions. Finally, automatic successin rests on, or is substantially close to, the idea of universal succession in civil law which is incompatible with an essentially consensual order, in which the main legal persons are States as equal and sovereign political entities. Substantive provisions of general international treaties adopted in the interests of the international community as a whole being part of corpus iurus cogentis, have a special position. These provisions are ab initio et suo vigore binding on any successor State regardless of the law of succession in respect of treaties.

Key words: Multilateral treaties; Succession; State practice; Jus cogens; Vienna Convention on Succession of States in respect to treaties.

Milenko Kreća, *mkreca@ius.bg.ac.rs.*

1. GENERAL CONSIDERATIONS

The emergence of a number of new States in Central and Eastern Europe has actualized, *inter alia*, the issue of legal nature of succession to multilateral treaties.

Two opposing views have been articulated in that regard – one pleading automatic, *ipso iure* succession of multilateral treaties concluded by the predecessor State and other that sees the agreement between the successor State and third States as the basis of succession.

The latter is usually termed as „clean slate" rule, being as such rather metaphorical than the term coached in legal fashion. It suggests that a new State represent a sort of statal newborn without any treaty rights and obligations. Such consideration seems to be in conflict with legal reality. For, the substantive provisions of general international treaties adopted in the interests of the international community as a whole, being part of the *corpus juris cogentis,* bind any successor State, regardless whether it is, or is not, a Contracting Party to the treaty. The rules of *jus cogens* as peremptory, absolutely binding rules, bind *a priori* every State, be it a successor or predecessor State „even without any conventional obligation.[1] Therefore, the term „consented succession" seems more suitable, meaning that successor State becomes binding by multilateral treaties concluded by the predecessor State on its own right in agreement pattern.

Main argument of the supporters of automatic, *ipso iure* succession appears to be aligned with Article 34 of the Vienna Convention on Succession of States in respect to treaties 1978.

Is this argument well founded from the standpoint of legal considerations and practise of States?

Effects and legal nature of Article 34 of VCSST

Article 34 (*Succession of States in cases of separation of parts of a State*) of the Convention on Succession of States in Respect of Treaties (VCSST) is clearly designed in terms of automatic succession of international treaties concluded by predecessor State.

It reads:

"1. When a parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

1. any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

[1] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, 23.

2. any treaty in force at the date of the succession of State in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone".

Theoretically, Article 34 corresponds to the concept of succession based on a strict analogy with the notion of inheritance in civil law and/or the concept on legal succession (substitution + continuation) according to which „the successor State under international law succeeds to its predecessor's rights and obligations, which become its own". ("Der Nachfolger des Völkerrechts aber trill in Rechte und Pflichten seines Vorgängers so ein, als wären es seine eigenen").[2]

The comprehensive assessment of the legal nature and effects of Article 34 of the Convention implies answers to three relevant issues:

(a) A qualification of the solution established by Article 34 (1) of the Convention from the standpoint of treaty law;

(b) A qualification of that solution from the standpoint of the practice of States prior to the adoption of the Convention on Succession in respect of Treaties;

(c) A qualification of the practice of States before and after entry into force of the Convention.

Article 34 as a treaty rule

Article 34 (Succession of States in Cases of Separation of Parts of a State) is an integral part of the Convention on Succession in respect of Treaties and as such it shares the fate of the Convention itself.

The Convention was adopted on 22 August 1978 and entered into force on 6 November 1996 in accordance with its article 49(1) which stipulates that:

"1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession".

On 28 April 2017 twenty-two States has expressed their consent to be bound by the Convention. It should be noted that none of the western countries among them.[3]

Due to relatively small number of parties, it appears that the Convention created the particular treaty law, applicable *inter partes* from the date of its entry into force.

Is Article 34 the expression of customary law?

Characterization of Article 34 of the Convention as a particular treaty regime does not exclude *a priori* the relevance of the rule on *ipso iure* succession

[2] H. M. Huber, *Beiträge zu einer Lehre van der Staatensuccession*, Berlin 1897, 14.

[3] *https://treaties.un.org/pages/ViewDetalis.aspx?src-REATY&mtdsg_no=XXIII-2&chapt.*, 28.4.2017.

contained in that Article as an expression of existing customary law. In that regard Article 3(a) of the Convention provides that the Convention shall not affect the application „of any of the rules set forth in the present Convention to which they are subject under international law independently of the Convention".

Does this rule merit the qualification of customary law?

The generally held view of customary law, endorsed by International Court of Justice,[4] is that the creation of a rule of customary international law postulates: „two constitutive elements: (1) a general practice of States, and (2) the acceptance by States of the general practice as law".

An analysis of practice in cases of separation of parts of a State suggests two principal conclusions:

In quantitative terms it is difficult, if not impossible, to speak of a generalized practice in this respect. As the ILC loyally notes in its commentary on Article 34 (Succession of States in Cases of Separation of Parts of a State) and Article 35 (Position of a State Continues after Separation of Part of its Territory) of its Draft: „During the United Nations period cases of separation resulting in the creation on a newly independent State... have been comparatively few."[5] Previous practice does not substantively affect the argument because „(b)efore the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial power", hence, „some of the earlier precedents usually cited... in cases of secession concerned secession of colonies".[6] One could rather, and with greater justification, speak of a certain number of precedents.

These precedents in the qualitative sense have in common an identical position regarding treaties of the Predecessor State – new States were neither bound nor entitled *ipso jure* to the continuance of preindependence treaties. In relation to the period prior to the foundation of the United Nations.

„(t)he majority of writers take the view, supported by State practice, that a newly independent State begins its life with a clean slate, except in regard to 'local' or 'real' obligations.[7]

The practice in the United Nations era is presented in the commentary on Article 33 of the Draft (Article 34 of the Convention) with the cases of Pakistan and Singapore. The case of Pakistan is qualified as the appli-

[4] *Exemple causa*, North Sea Continental Shelf Cases, ICJ Reports 1969, p. 44 par. 77.

[5] Draft Article on Succession of States in respect of Treaties with commentaries adopted by the International Law Commission at its twenty-sixth session, United Nations Conference on Succession of States in respect of Treaties, 1977 session and resumed session 1978, *Official Records*, Vol. III, Documents of the Conference, p. 92 para. 17.

[6] *Ibid*, p. 91 para. 12.

[7] *Ibid*, p. 41 para 3.

cation of the principle than on separation such a State has a „clean slate" in the sense that it is not under any *obligation* to accept the continuance in force of its predecessor's treaties.[8] As far as Singapore is concerned in spite of the „devolution agreement" of 1965, it „adopted a posture similar to that of other newly independent States", that is, „(while ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent".[9]

The ILC viewed the case of Pakistan as a „special one"[10] probably because it prompted a legal opinion of the United Nations Secretariat. The relevant part of the opinion reads:

„1. From the viewpoint of international law, the situation is one in which part of an existing State breaks off and becomes a new State. On this analysis there is no change in the international status of India; it continues as a State with all treaty rights and obligations of membership in the United Nations. The territory which breaks off, Pakistan, will be a new State, it will not have the treaty rights and obligations of the old State...

In international law the situation is analogous to the separation of the Irish Free State from Britain and of Belgium from the Netherlands. In these cases the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before".[11]

This legal opinion was given in connection with the concrete issue concerning Pakistan's position in relation to the Charter of the United Nations, but its wording and argumentation clearly indicate that it was designed as an opinion of principle. In any event, there are clear indications that States interpreted it as a principled position of the United Nations with regard to the relationship of a part of a State territory which breaks off and becomes a new State to the treaty rights and obligations of the old State.

In the *note verbale* of its Permanent Mission to the United Nations received on 11 September 1963, the Government of Afghanistan bases its assertion that „Pakistan is not a successor to British treaty rights because Pakistan is a new State" precisely on the argument that the Secretary-General of the United Nations „denied the right of succession" to Pakistan.[12]

[8] *Ibid.*, p. 92 para. 17.

[9] *Ibid*, pp. 93–99 para. 18.

[10] United Nations Conference on Succession of States in respect of Treaties, 1977 session and resumed session 1978, *Official Records*, Vol. III, Documents of the Conference, p. 92 para. 17.

[11] Legal opinion of 8 August 1947 by the Assistant Secretary-General for Legal Affairs approved and made public by the Secretary-General in United Nations Press Release PM/473. 12 August 1947 (*Yearbook of the International Law Commission*, 1962, Vol. II, 101.

[12] United Nations, *Legislative Series*, Materials on Succession of States, 1967 (ST/LEG/SER.B/14), p. 2, para 3 (a) and footnote 1.

It appears that in the light of practice, the distinction between the consequences of succession in the case of creation of a newly independent State by secession from the metropolis (Article 15 of the Draft) and the creation of a State by the separation of parts of an existing State (Article 33 of the Draft) the ICL did not follow the established practice.

It is therefore not difficult to agree the Expert Consultant of the Confederence, Sir Francis Vallat, that

„(t)he rule (in Article 2 – Succession of States in Case of Separation of Parts of a State) was not based either on established practice or on precedent, it was a matter of the progressive development of international law rather than of codification".[13]

It was noted that in the case of Article 34 of the Convention

„the International Law Commission abandoned the 'clean slate' principle and introduced, on the contrary, a rule of continuity. It was clear that in doing so it had been aware of the fact that it was not simply reflecting the present state of the law, but was proposing progressive development. For 'clean slate' was part of general international law and would continue to be so, whatever solution was adopted in the Convention".[14]

Practise of successor States following adoption of the CSSRT

The CSSRT entered into force on 6 November 1996 when the wave of successions in Europe and Asia already occurred, forming a number of new states and one State territorially enlarged (unification of Germany).

The occurrence of those successions well before the entry into force of CSSRT does not eliminate completely the application of its Article 34. For, pursuant to Article 7, paras. 2 and 3, of the Convention a successor State may, "at the time of expressing its consent to be bound by the present Convention or at any time thereafter, make a declaration that it will apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other contracting State or State Party to the Convention which makes a declaration accepting the declaration, of the successor State".

Analogous provision of paragraph 3 of Article 7 provides provisional application of the provisions of the Convention before its entry into force.

However, practical effects of these provisions were limited, since only two signatories – Czechia and Slovakia – issued proper declarations.[15]

[13] *Summary Records*, Committee of the Whole, 48th Meeting, 8 August 1978, p. 105 para. 10.

[14] J. P. Ritter, *The UN Conference on Succession in Respect of Treaties*, Vienna 31 July–23 August 1978, 52–55.

[15] *https://treaties.un.org/pages/ViewDetails.aspx?sre=TREATY&mtdsg_no=XXIII-2&chapt.*, 28.4.2017.

The practice of successor States as well as third States as regards succession to multilateral treaties in case of secession/separation is not uniform.

So, the Minsk Accords of 8 December 1991, signed by Russia, Belarus and Ukraine, providing for the unconditional commitment to honor treaty obligations of the USSR, appeared to lay conventional foundations for universal succession of the treaties of the former USSR. However, the subsequent Alma-Ata Accords modified the commitment to fulfill treaty obligations of the former Soviet Union to the extent that such continuation was "in accordance with constitutional procedures" of the successor State.[16] Acting on that basis, the Baltic republic opted to accede to conventions of the USSR in their own right,[17] while Moldova, Uzbekistan and Turkmenistan explicitly adopted the clean State model.[18] Turkmenistan, Kazakhstan, Kyrgyzstan and Tajikistan issued notifications of succession in their own right, without any reference to reservations and declarations made by the Soviet Union as a predecessor State.[19] Consequently, the former Soviet republics widely practice accession as a means of binding themselves by multilateral treaties to which the USSR was a party.

The practice of the Czech and the Slovak Republics is also not free from inconsistency, although these two States notified the Secretary-General of the United Nations that they consider themselves bound by the multilateral treaties to which the former Czechoslovakia was a party. Inconsistency is reflected not only in the fact that they consider themselves bound as from different dates (the Czech Republic as from 1 January 1993 and Slovakia as from 31 December 1992), but also because, in spite of confirmatory notifications relating to the multilateral treaties to which Czechoslovakia was a party, they also issued notifications on succession in respect of particular treaties, while they acceded to some others. Thus the Czech Republic became a party to the 1985 International Convention against Apartheid in Sports by succession, whereas Slovakia did not. Also, whereas Slovakia succeeded to most treaties on the date of general notification, the Czech Republic, in a number of cases, succeeded on the basis of notification of success on which

[16] P. R. Williams, "The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?" *23 Denver Journal of International Law and Policy*, 1, 1994– 1995, 22–23; see also R. Mullerson, „The Continuity and Succession of States by Referenda the Former USSR and Yugoslavia", 42 *International and Comparative Law Quarterly*, 1993, 479.

[17] J. Klabbers, "State Succession and Reservations to Treaties in J. Klabbers and R. Lefeber, *Essays on the Law of Treaties*, 1998, 111.

[18] B. Stern, "Rapport prèliminaire sur la succession detals on matière de traits" (Report submitted to the International Law Associationss Committee on Aspects of the Law States Succession for the 1996 Helsinki Conference, 675.

[19] J. Klabbers, 113.

followed on a later date.[20] As regards some multilateral conventions, the Czech Republic bound itself in the from of accession, although in question were conventions to which the former Czechoslovakia was a party such as, for example, the Convention on International Civil Aviation.

The legal situation as regards the former Yugoslav republics is much more contradictory. At first, while the FRY stuck to the continuity claim until 2000, Slovenia, Croatia, Bosnia and Herzegovina and Macedonia *ab intitio* considered themselves as successor States and were recognized as such by the international community. Further, although declaratively favoring automatic succession in respect of multilateral treaties to which the SFRY was a party, in particular Bosnia and Herzegovina and Croatia in proceedings before the International Court of Justice regarding the Application of Genocide Convention did not apply the automatic succession pattern of treaty action in practice. Thus, for instance, Bosnia and Herzegovina designed its notification on succession to the Genocide Convention in terms of a "wish" to succeed to same, which fits in with the concept of succession in its own rights rather than automatic succession. Particularly illustrative is the case of the 1989 Convention on the Rights of the Child. Bosnia and Herzegovina is listed as having succeeded on 1 September 1993; Croatia succeeded on 12 October 1992; Slovenia succeeded on 6 Jul 1992 and Macedonia did so on 2 December 1993.[21] None of these dates corresponds to the dates upon which those republics succeeded the SFRY according to the generally accepted opinion of the Badinter Arbitration Commission.[22] The Commission established the following dates in that regard: 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia; 17 November 1991 in the case of the Former Yugoslav Republic of Macedonia; 6 March 1992 in the case of the Republic of Bosnia and Herzegovina. Finally, this contradictory practice seems to be nothing more than the expression of a confused and ambivalent attitude towards the automatic succession rule. For example, at a meeting of Legal Advisers on International Public Law convened by the Committee of Ministers for the Council of Europe on 14-15 September 1992, the representative of Croatia noted that Croatia would respect all the treaties of the SFRY unless they conflicted with the Croatian Constitution.[23] Slovenia, as stated by its representative "had been invited to accede to some conventions to which former Yugoslavia had been a party and would like to be invited to accede to other conventions which had been ratified by the former federation."[24]

[20] *Ibid*., 117–118.

[21] *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1993*, United Nations doc. ST/Leg/Ser.E/11–12, 193–194.

[22] *International Legal Materials*, Vol. 32, 1993, 1587–1589.

[23] Committee of Legal Advisers on International Public Law by the Council of Europe, 4 th meeting 14–15 September 1992, 3.

[24] *Ibid.*

Of relevance is also the fact that the practice of competent international organizations goes hand by hand with such actions of successor States.

In that regard a detailed and comprehensive analysis of the ILA Committee on Aspects of the law of State Succession resulted in the conclusion:

"The UN Secretary General has requested to every Successor State – no matter the type of State succession concerned – to produce specific declarations of succession to each multilateral treaty to which the UN is the depositary. This practice is also being followed by other depositaries, either States or International organizations. Remarkably, this practice corresponds to that set up by Article 22 to the 1978 Vienna Convention, only related to newly independent States. According to UN practice, the Successor State must satisfy the conditions provided for by the treaty for becoming party to it".

2. EVALUATION OF PRACTICE

It appears that the practice of Successor States favors consented succession to multilateral treaties on its own right, through notification or declaration on succession.

This fact *per se* supports the consented succession to treaties. For, the effects of automatic succession would consist of the automatic, *ipso iure* transfer of treaty rights and obligations from the Predecessor State to the Successor State. In that case, therefore, the succession does not occur as a result of the will of the successor but on the basis of the norm of international law which stipulates the transfer of treaty rights and obligations as a consequence of the replacement of one State by another in the responsibility for the international relations of territory. "Notification of succession" and "negotiations about the fate" of treaty relations have a rational and legal justification in cases in which the transfer of treaty rights and obligations or the modalities of that transfer depend on the will of the successor since, *ex definitione*, it represents "any notification, however phrased or named, made by a successor State *expressing its consent to be considered as bound by the treaty*.[25] In other words, it is applied in cases when the Successor State is not bound, by norms of objective international law, to continue to apply the treaties of its predecessor to its territory after the succession of States but is entitled to consider itself as a party to the treaties in its own name. In that regard the position of UN Secretary-General as depositary of multilateral treaties seems clear:

"The deposit of an instrument of succession results in having the succeeding State become *bound, in its own name, by the treaty to which the succession applies, with exactly the same rights and obligations as if that State had ratified or acceded to, or otherwise accepted, the treaty.* Con-

[25] Article 2, 1 (g) of the VCSST.

sequently, it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as party to a given treaty solely on the basis of a formal document similar to instruments of ratification, accession, etc., that is, a notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound".[26]

Such a solution seems reasonable.

First of all, if we stick to the difference between the predecessor State and the successor State, in terms of legal personality, it is unclear how the successor State, as a new State, may be considered bound by the will of the predecessor State, being another State in legal terms. Such an understanding obliterates the difference between the Predecessor State and the Successor State as distinct legal personalities and relies on the fiction that, in respect of treaties, their wills concur. Further, a rule on automatic succession runs counter to the fundamental principle of equality of States to the detriment of successor States. Successor States, by applying this rule, would be deprived of the rights which, otherwise, States have when expressing consent to be bound, such as, for example, making a reservation in respect of part of a treaty or accepting to be bound by a treaty under certain conditions. Finally, automatic succession rests on, or is substantially close to, the idea of universal succession in civil law which is incompatible with an essentially consensual order, in which the main legal persons are States as equal and sovereign political entities.

No need to say that the result of action of a successor State, followed by the consent of third State, may be the continuity of treaty rights and obligations but on the basis of agreement between successor States and third states not as *ipso iure* succession.

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