

State Succession in Respect of Human Rights Treaties

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I. Introduction

In the absence of consistent State practice, State succession in respect of treaties has long been a rather uncertain field of international law. For example, while the 1978 Vienna Convention on Succession of States in Respect of Treaties provided, in accordance with the advice given by the International Law Commission, that a new State is bound by the international agreements binding on the predecessor State,¹ the 1987 *Restatement (Third) of the Foreign Relations Law of the United States* took the opposite view.² Meanwhile, scholars involved in the drafting of these instruments readily acknowledged that these standards were very open to criticism.³ One of the foremost authorities on the subject even observed that 'State succession is a subject altogether unsuited to the process of codification.'⁴

As a result of the collapse of the Soviet Union, Yugoslavia and Czechoslovakia during the early 1990s, and the planned transfer of sovereignty over Hong Kong in 1997, the situation has now radically changed. State practice on succession to international treaties involving 23-odd successor States has suddenly become extremely vibrant. Fundamental questions that were until recently debated only among a limited circle of scholars have been brought into the political arena. Now that the dust has settled somewhat, the time seems ripe to try and draw some conclusions from this outburst of international activity. In particular, it now seems time to face the question of whether the standards included in instruments such as the Vienna

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1 Art. 34(1), Vienna Convention on Succession of States in Respect of Treaties, adopted 22 August 1978, not yet in force, reproduced in 17 ILM (1978) 1488.

2 Restatement (Third) of the Foreign Relations Law of the United States (1987), § 210(3), Reporters' Note 4.

3 See, e.g., I. Sinclair, 'Some Reflections on the Vienna Convention on Succession of States in Respect of Treaties', in *Essays in Honour of Erik Castrén* (1979) 149, 153; K. Zemanek, 'Die Wiener Konvention über die Staatennachfolge in Verträge', in H. Miesler et al. (eds), *Festschrift für Alfred Verdross* (1980) 719, 735; D. Vagts, 'State Succession: The Codifiers' View', 33 *Va.J.Int'l L.* (1993) 275, 294-295.

4 D.P. O'Connell, 'Reflections on the State Succession Convention', 39 *ZaöRV* (1979) 725, 726.

Convention and the Restatement (Third) accurately reflect customary international law.

Within the wider area of State succession, the subject of State succession in respect of human rights treaties is of particular interest. From a policy point of view, its importance lies in the fact that massive human rights violations often occur precisely during the periods of political instability which tend to accompany State succession. In such circumstances there is an urgent need to know the precise extent of the international obligations which are incumbent on the successor State. This applies not only to the primary obligations (the international human rights standards which are in force) but also to the secondary obligations (the reporting obligations, the complaints procedures and, more generally, the rules of accountability). From a scholarly point of view, the importance of the subject of State succession in respect of human rights treaties lies in the fact that there is an above average amount of State practice in this area. This is because of the interaction which can frequently be observed between States, political organs of international organizations, and the supervisory bodies established under the relevant human rights treaties. Conclusions about the law as it stands can therefore be drawn with more confidence than with respect to other categories of treaties.

The key question explored in this article is whether a successor State is bound by the obligations contained in international human rights instruments that were binding on the predecessor State or whether it is free to accept or not to accept those obligations. This question is considered both from the point of view of the international community and from the point of view of successor States themselves. After some introductory remarks about the system of the Vienna Convention and the special character of human rights treaties, the article first examines the attitude adopted by international organizations and treaty monitoring bodies. It then analyzes the attitude towards human rights treaties adopted by the successor States. While the emphasis is on human rights treaties *stricto sensu* reference will also be made to humanitarian treaties in a wider sense, i.e. treaties on international humanitarian law and international labour law.

II. The Vienna Convention Regime

The leading attempt to codify and progressively develop the international law concerning State succession in respect of treaties is the 1978 Vienna Convention on Succession of States in Respect of Treaties.⁵ Most of this Convention, however, is devoted to the position of the newly independent State. This concept is defined as 'a successor State the territory of which immediately before the succession of States was a dependent territory for the international relations of which the predecessor

5 *Supra* note 1.

was responsible.⁶ The Convention offers only little guidance to a successor State which is not newly independent. This is, of course, ironic because by the time the Convention was adopted there were hardly any dependent territories left that could be considered as potential candidates for the status of newly independent State.

The distinction made in the Convention between newly independent and other successor States is important because different consequences flow from it. While the 'clean slate' rule applies to newly independent States, the principle of continuity of treaty obligations applies to other successor States. This dramatic difference in legal effect makes the definition of a newly independent State critically important. It raises the question whether there should not be room for 'quasi-newly independent States' which would include States emerging outside a colonial context but in circumstances resembling the emergence of a newly independent State.

The International Law Commission in its proposals to the Vienna Conference, had proposed precisely such a category. It suggested that a territory which would become a State 'in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State' would also be treated as a newly independent State for the purposes of the Convention.⁷ What the ILC was thinking of here were cases such as the separation of East and West Pakistan from India.⁸ This proposal was rejected by the Conference at the initiative of France and Switzerland.⁹ What precisely these two States intended is obscure but the apparent reason why many delegations supported their amendment was that they did not wish to encourage secession.¹⁰ However, as Sinclair pointed out prophetically, the rejection of the ILC proposal by the Conference was unlikely to inhibit a quasi-newly independent State from insisting that it be given the benefit of the clean slate rule.¹¹

The Convention has so far failed to attract the 15 adherences it requires to enter into force. Significantly, no Western State has until now become a party. In 1990 the Dutch Government proposed to Parliament that the Netherlands should adhere, in order to contribute to the codification of the rules contained in the Convention.¹² However, this attempt was officially abandoned four years later when the Government suddenly announced that it had concluded that the Convention's rules were not an accurate reflection of customary international law.¹³ The Dutch view was that recent State practice showed a clean slate approach in respect of all new States, not merely in respect of newly independent ones.¹⁴ Austria, among others, has also

6 Article 2(1)(f).

7 Yearbook of the ILC (1974) II, Part One, 260.

8 Ibid., at 266.

9 A/CONF.80/16/Add. I, at 52-70.

10 Zemanek, *supra* note 3, at 734-736.

11 Sinclair, *supra* note 3, at 181.

12 TK 1989-1990, 21 495 (R 1385), nr. 1.

13 Ibid., nr. 9.

14 A. Bos, 'Statenopvolging in het bijzonder met betrekking tot verdragen', [State Succession: Particularly with Regard to Treaties], 111 *Mededelingen van de Nederlandse Vereniging voor Inter-*

taken this view.¹⁵ This attitude is intriguing because quite a few recent successor States have enthusiastically embraced the Convention. Bosnia-Herzegovina, Croatia, Estonia, Slovakia and Slovenia have all adhered to the Convention in recent years. The Convention has now been adhered to by 14 State parties and is therefore likely to soon enter into force.¹⁶ Apparently, state practice requires closer examination before accurate conclusions can be drawn from it.

III. The Special Character of Human Rights Treaties

More than 40 years ago, Wilfred Jenks made a powerful plea in favour of the argument that there can be no clean slate in respect of multilateral treaties of a legislative or universal character. In his view, this applied in particular to international instruments, such as the international labour conventions, which have the effect of vesting rights in individuals or organizations.¹⁷

It is indeed difficult to see on what legal basis beneficiaries of human rights granted to them under a treaty could be deprived of these rights simply because they have ended up under the jurisdiction of a successor state. One indication of the irreversible character of human rights obligations is that human rights treaties do not contain termination clauses. With very few exceptions (Greece's temporary withdrawal from the European Convention on Human Rights between 1969 and 1974), no state has ever terminated a human rights treaty, even after a radical change of government. When in 1979 the regime of Ayatollah Khomeini replaced that of the Shah of Iran the new Government did not terminate any of the human rights treaties to which Iran had been a party, including the International Covenant on Civil and Political Rights. Additional evidence of the special character of the rights granted under human rights treaties may be found in Article 60(5) of the Vienna Convention on the Law of Treaties, which provides that provisions relating to the protection of the human person contained in treaties of a humanitarian character may not be terminated or suspended in response to a breach by another party.

From the point of view of legal theory, the notion that rights granted under human rights treaties are not affected by state succession may be based on the doctrine of acquired rights, as applied by the Permanent Court of International Justice in the *German Settlers* case. In that case, the Court found that private rights, including

nationaal Recht (1995) 55. Bos is the Legal Adviser of the Netherlands' Ministry of Foreign Affairs.

15 H. Tichy, 'Two Recent Cases of State Succession – An Austrian Perspective', 4 *Austrian Journal of Public and International Law* (1992) 117, 123-124. Tichy is a staff member at the Office of the Legal Adviser of the Austrian Ministry of Foreign Affairs.

16 The other parties are the Dominican Republic, Egypt, Ethiopia, Iraq, Morocco, Seychelles, Tunisia, Ukraine and Yugoslavia.

17 W. Jenks, 'State Succession in Respect of Law-Making Treaties', 29 *BYIL* (1952) 105, 142. See also, slightly more cautiously, O. Schachter, 'State Succession: The Once and Future Law', 33 *Va.J.Int'l L.* (1993) 253, 259.

property rights, could be validly invoked against the successor state.¹⁸ As a matter of fact, private rights may consist not only of property rights but also of claims against other individuals and claims against the state. In this day and age, the most important category of rights that may be invoked against the state consists of basic human rights and fundamental freedoms deriving from both customary and treaty law (including, but certainly not limited to, the right to own property). The doctrine of acquired rights therefore applies *a fortiori* with respect to human rights.¹⁹

It is true that the view that obligations contained in human rights treaties, or more generally obligations contained in law-making treaties, continue to bind the successor state did not prevail in the Vienna Convention. The International Law Commission considered the idea but ultimately decided that the time was not yet ripe for it, and therefore did not include it in the draft it submitted to the Vienna Conference.²⁰ According to the Convention, the only category of treaties not affected by state succession are treaties establishing boundaries and other territorial regimes.²¹ However, as will be demonstrated below, state practice during the 1990s has vindicated Jenks and his school of thought.

IV. The Attitude of the International Community

The international community has an obvious interest in the continuity of obligations contained in human rights treaties. After all, non-respect for human rights in a successor state may result in tensions and refugee flows which may even endanger international peace and security. It is therefore not surprising that continuity of obligations under human rights treaties has been insisted upon by both political organs of international organizations and by treaty monitoring bodies.

The most successful operation to ensure continuity of treaty obligations concluded under its auspices has been conducted by the International Labour Organisation (ILO). Under the leadership of Jenks, it began to insist that, as a condition of membership of the organization, a new state had to declare itself bound by the ILO treaties to which its parent state had been a party. This strategy is reported to have achieved excellent results.²²

The International Committee of the Red Cross (ICRC) has also long taken the view that a successor state is automatically bound by the international humanitarian instruments that were binding on the predecessor state, unless the successor state has made a specific declaration to the contrary. In practice, however, the ICRC has en-

18 *German Settlers in Poland*, (Advisory Opinion) 10 September 1923, PCIJ Series B, No. 6, at 36.

19 See R. Müllerson, *International Law, Rights and Politics* (1994) 154-157.

20 See the report by Sir Francis Vallat, *Yearbook of the ILC* (1974) II, Part One, 43-45.

21 Articles 11 and 12.

22 See F. Wolf, 'Les conventions internationales du travail et la succession d'états', *AFDI* (1961) 742-751; O'Connell, *State Succession in Municipal and International Law* (1967) II, at 202-203.

couraged successor States to formally confirm their adherence to these instruments and, where successor States insisted upon acceding rather than succeeding to the Geneva Conventions and their Protocols, the ICRC has not objected.²³

Unlike the ILO, the United Nations has never insisted on a declaration of continuity of treaty obligations as a condition for membership of the organization. In recent years, however, its organs have started to become more active on the subject. The UN Commission on Human Rights has in successive resolutions emphasized the special nature of international human rights treaties and it has called on successor States to confirm to appropriate depositaries that they continue to be bound by obligations under international human rights treaties.²⁴ In these resolutions the Commission also requested human rights treaty bodies to consider further the continuing applicability of international human rights treaties to successor States. The first of these resolutions even considered that 'as successor States they *shall* succeed to international human rights treaties' [emphasis added]. The broad support for these resolutions appears from the fact that they were all adopted without a vote.

Not surprisingly in view of the role that has been assigned to them, UN treaty monitoring bodies have made more specific statements than this, although some have been more active on the issue of State succession than others. Most significantly, in September 1994, the 5th meeting of persons chairing UN human rights treaty bodies pointed out 'that successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.'²⁵

Of the various treaty monitoring bodies, the Human Rights Committee, set up under the International Covenant on Civil and Political Rights, has been the most outspoken on the issue of State succession. At its session in March/April 1993, it declared 'that all the peoples within the territory of a former State party to the Covenant remained entitled to the guarantees of the Covenant, and that, in particular, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan and Uzbekistan were bound by the obligations of the Covenant as from the dates of their independence.' The Committee pointed out that reports under Article 40 of the Covenant accordingly became due one year after these dates and it requested that such reports be submitted to it.²⁶ On 7 October 1992, the Committee had adopted a similar decision with regard to Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia.²⁷ The results of this policy were fairly positive. At the time of writing, all States succeeding to the for-

23 See H. Coursier, 'Accession des nouveaux états Africains aux Conventions de Genève', *AFDI* (1961) 760-761; editorial comment in 6 *Revue Internationale de la Croix - Rouge* (1966), No. 64, 386; O'Connell, *supra* note 22, at 220; B. Zimmermann, 'La succession d'Etats et les Conventions de Genève', in C. Swinarski (ed.), *Studies and Essays in Honour of Jean Pictet* (1984) 113-123.

24 Resolutions 1993/23, 1994/16 and 1995/18.

25 UN Doc. E/CN.4/1995/80, at 4.

26 UN Doc. A/49/40, para. 49.

27 *Ibid.*, para. 48.

mer Yugoslavia and the former Czechoslovakia had confirmed their continuing obligations under the Covenant. The successor States to the former USSR, on the other hand, had all acceded rather than succeeded, with the exception of Kazakhstan, Tajikistan and Turkmenistan which had not yet clarified their position one way or the other. The merits of these different attitudes will be discussed below.

V. The Attitude of Successor States

A. Czechoslovakia

As an example of State succession in respect of treaties, the dissolution of the Czech and Slovak Federal Republic (CSSR), on 1 January 1993, is comparatively unproblematic. Already on 16 February 1993, in a communication addressed to the UN Secretary-General, the Czech Republic declared itself bound by the multilateral treaties to which the CSSR had been a party on the dissolution date, including any reservations and declarations made by the CSSR.²⁸ A similar notification was made by the Slovak Republic on 19 May 1993.²⁹ Human rights treaties were among the first UN treaties to which the Czech Republic and Slovakia confirmed their continuing adherence by virtue of State succession.

The eagerness of the two successor States to ensure continuity of Czechoslovakia's obligations under the European Convention on Human Rights was also noteworthy. The CSSR had been a party to that Convention since 18 March 1992. According to Article 66 of the Convention, only members of the Council of Europe may become parties to it. Therefore, the Czech Republic and the Slovakia Republic could only succeed to the obligations of the predecessor State after they had first become members of the Council of Europe. This difficulty was solved pragmatically, however. On 30 June 1993 the Council of Europe's Committee of Ministers admitted the two States as members. At the same time the Committee decided that, in accordance with their expressed wishes, the two States were to be regarded as succeeding to the Convention retroactively, with effect from 1 January 1993.³⁰ Although the decision might have been worded more elegantly,³¹ the episode constitutes clear evidence of the strong desire on all sides to ensure seamless continuity of obligations in the field of human rights.

Since the CSSR had accepted the right of individual petition under Article 25 of the Convention, individual complaints against violations committed during the pe-

28 *Multilateral Treaties Deposited with the Secretary-General*, Status as at 31 December 1995, UN Doc. ST/LEG/SER.E/14, at 8.

29 *Ibid.*

30 Council of Europe Doc. H/INF(94)1, at 1.

31 See J.F. Flauss, 'Convention européenne des droits de l'homme et succession d'Etats aux traités: une curiosité, la décision du Comité des Ministres du Conseil de l'Europe en date du 30 juin 1993 concernant la République tchèque et la Slovaquie,' 6 *RUDH* (1994) 1-5.

riod when the CSSR was bound by this obligation should continue to be admissible. Such complaints may be addressed either against the Czech Republic or against the Slovak Republic, depending on the territory in which the violation was committed.³²

B. Yugoslavia

The consequences in respect of treaty succession of the gradual break-up of the Socialist Federal Republic of Yugoslavia (SFRY), during the course of 1991 and 1992, were, for the most part, similarly straightforward. Bosnia-Herzegovina (as of 6 March 1992), Croatia (as of 8 October 1991), Macedonia (as of 17 September 1991) and Slovenia (as of 25 June 1991) all informed the UN Secretary-General that they considered themselves bound, by virtue of State succession, to the treaties to which the SFRY had been a party. This was subsequently confirmed with respect to all relevant human rights treaties. The underlying assumption, as in the case of the CSSR, obviously was that these States had in the past, as former constituent parts of the Yugoslav Federation, given their consent to the ratification of these treaties.³³ Slovenia even specifically informed the Human Rights Committee that victims of human rights violations committed by the former regime remained entitled to remedy from the successor State.³⁴

However, no agreement could be reached between the former constituent parts of the Yugoslav Federation as to the status of the Federal Republic of Yugoslavia (FRY). The key difficulty here was whether the FRY should be regarded as a continuation of the SFRY or whether it should be regarded as a new State. While the FRY itself took the former view,³⁵ other States overwhelmingly adopted the latter approach. The Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission) issued the opinion that the FRY is a new State which cannot be considered as the sole successor to the SFRY.³⁶ This was also the line taken by the United States.³⁷ The Security Council similarly considered that the State formerly known as the Socialist Federal Republic of Yugoslavia had ceased to exist and that the new State could not automatically assume UN membership. According to the Council, the FRY should apply for membership in the United Nations and it

32 See, for example, App. No. 23131/93, *Brezny and Brezny v. Slovakia*, European Commission of Human Rights, Information Note No. 132, 11.

33 Article 271 of the Constitution of the SFRY provided that international treaties 'shall be concluded in agreement with the competent republican and/or provincial agencies.'

34 UN Doc. CCPR/C/79/Ad.40, para. 6.

35 The preamble of the 1992 Constitution of the FRY proclaims the 'unbroken continuity of Yugoslavia'.

36 Opinion No. 10, 4 July 1992, reproduced in 31 ILM (1992) 1488 at 1526.

37 E. Williamson and J. Osborn, 'A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia', 33 *Va.J.Int'l L.* (1993) 261-273.

could not participate in the work of the General Assembly.³⁸ This recommendation was endorsed by the General Assembly.³⁹

This line of action has been criticised as being inconsistent with the criteria for membership applied by the United Nations vis-a-vis India, Pakistan, Bangladesh and Russia.⁴⁰ Be that as it may, the attitude adopted by the international community has created considerable uncertainty with regard to the obligations of the FRY under the human rights treaties to which the SFRY had been a party. The UN Secretary-General continues to list 'Yugoslavia' as a party to the human rights treaties to which the SFRY was a party. The practice of human rights treaty monitoring bodies has been somewhat ambivalent. The Human Rights Committee, for example, in its reports lists 'Yugoslavia' as a party to the International Covenant on Civil and Political Rights and it indicates when 'Yugoslavia's' next report is due. However, when in 1993 the representatives of the FRY came to present their country's report to the Committee, they were listed as representing the Federal Republic of Yugoslavia (Serbia and Montenegro).⁴¹

Croatia, Bosnia-Herzegovina and Slovenia have argued that the FRY cannot be regarded as a party to treaties such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women. They base this conclusion on the argument that, on the one hand, the FRY cannot automatically continue the legal personality of the SFRY and, on the other hand, the FRY has refused to formally succeed to these treaties.⁴² Because this approach has prevailed at meetings of States parties of these treaties the FRY has been barred from attending them. This has occurred in spite of advice by the UN Legal Counsel that the General Assembly resolution had not deprived the FRY of its right to participate in the work of organs other than Assembly bodies.⁴³

The exclusion of the FRY from meetings of States parties to human rights conventions raises questions about its status with respect to these conventions. Western representatives have stressed that, in spite of its exclusion, the FRY continues to be bound by the obligations arising from these conventions on the grounds that it is one of the successor States to the SFRY.⁴⁴ The FRY has repeatedly declared itself ready to honour its obligations but it has warned that the result of the denial of its right of participation in meetings of States parties could be that it is no longer obliged to do so.⁴⁵ It subsequently began to carry out this threat when it informed the Human

38 SC Res. 777, 19 September 1992.

39 GA Res. 47/1, 22 September 1992.

40 Y. Blum, 'UN Membership of the "New" Yugoslavia: Continuity or Brake?', 8 *AJIL* (1992) 830-833.

41 UN Doc. A/48/40 (Part I), at 82.

42 See UN Docs. CCPR/SP/40 and CERD/SP/51 and 52.

43 Letter dated 29 September 1992, addressed to the permanent representatives to the United Nations of Bosnia-Herzegovina and Croatia, UN Doc. A/47/485.

44 UN Docs. CCPR/SP/SR.18 and 19.

45 UN Docs. CCPR/SP/40 and 44, CERD/SP/50 and 54.

Rights Committee that as long as it was denied its right to participate in the meetings of States parties to the Covenant, it would refuse to submit its fourth periodic report.⁴⁶ The Committee has expressed its regret at this decision and it has confirmed that it continues to regard the FRY as having succeeded to the obligations undertaken by the SFRY.⁴⁷

From the point of view of the international protection of human rights this quarrel is most unfortunate. All concerned agree that the FRY has succeeded or should have succeeded to the human rights treaty obligations undertaken by the SFRY. The difference of opinion is about the manner in which the succession should have occurred: as a result of dismemberment or as a result of secession. By requesting the FRY to submit its fourth rather than its initial periodic report (as it did in the case of Bosnia-Herzegovina, Croatia and Macedonia) the Human Rights Committee has accepted that we are dealing here with a case of secession in which the FRY is the continuation of the legal personality of the SFRY. The other States parties would have been wise to tacitly accept this ruling if only because it makes it absolutely clear that the FRY may be held accountable for any violations of the Covenant committed by the SFRY. By refusing to accept the attitude adopted by the Human Rights Committee, the other parties have provided the FRY with excellent grounds on which to dodge international scrutiny of its human rights record.

Paradoxically, in its application against the FRY which is currently pending before the International Court of Justice, Bosnia-Herzegovina argued that the jurisdiction of the Court could be based on Article IX of the Genocide Convention.⁴⁸ The Court apparently did not hesitate to rely on this provision for the indication of provisional measures. It simply noted that the SFRY had been a party to the Genocide Convention and that on 27 April 1992 the FRY had officially informed the UN Secretary-General that, as the continuation of the legal personality of the SFRY, it would honour the international treaties of the former Yugoslavia.⁴⁹ The Bosnian attitude smacks of bad faith or at least of serious inconsistency. It would appear that as a result of the attitude it adopted in this case, Bosnia-Herzegovina is now estopped from again putting forward the claim that the FRY cannot be regarded as a party to the Genocide Convention and to other human rights treaties adhered to by the SFRY.⁵⁰

46 Letter of 26 January 1995, UN Doc. A/50/40, para. 53.

47 Letter of 13 July 1995, *ibid.*, Annex VIII.

48 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 8 April 1993, ICJ Reports (1993) 3, para. 1.

49 *Ibid.*, para. 22.

50 In subsequent oral hearings in this case, Bosnia-Herzegovina relied on the general principle that the successor State succeeds automatically to human rights treaties to which the predecessor State had been a party, while the FRY took the opposite view. Observations by Professor Stern on behalf of Bosnia-Herzegovina, 1 May 1996, UN Doc. CR 96/9 and by Professor Suy on behalf of the FRY, 2 May 1996, UN Doc. CR 96/10. The Court, in its Judgment of 1 July 1996, did not take sides in this controversy. ICJ Reports 1996, para. 23. However, Judge Weeramantry, in his separate opinion, strongly argued in favour of automatic succession to the Genocide Convention.

C. USSR

The most complex case of all is that of the former Union of Soviet Socialist Republics. From the point of view of State succession, the USSR dissolved into four categories of States.⁵¹

The first category consists of the Russian Federation, a State which claims to be the continuation of the former USSR. Unlike the similar claim made by the Federal Republic of Yugoslavia, this claim has been widely accepted by other States. One important reason for this was that the former constituent parts of the USSR have all consented to this proposition, including Russia's continuation of the membership of the USSR in the United Nations and its permanent seat in the Security Council.⁵² Accordingly, the Russian Federation on 27 February 1992 informed the UN Secretary-General that it would honour the commitments deriving from treaties concluded by the USSR. This obviously includes human rights treaties.

The second category consists of the Ukraine and Belarus, two founding members of the United Nations which existed already as sovereign States at the time of the break-up of the USSR. They had already become parties to the principal UN human rights treaties, in accordance with their right, under Article 80 of the 1977 Constitution of the USSR, to conclude treaties with other States. The break-up obviously has not affected their obligations under these treaties.

The third category comprises Estonia, Latvia and Lithuania, three States which are claiming to have restored the independence they lost when they were occupied by the USSR in 1940.⁵³ They therefore do not regard themselves as new States but as States re-exercising the sovereignty of which they had been illegally deprived.⁵⁴ The question of State succession therefore does not arise. They have accordingly informed the UN Secretary-General that they do not regard themselves as a party by virtue of the doctrine of State succession to any treaty entered into by the USSR.⁵⁵ Pursuant to this philosophy, they have acceded rather than succeeded to a large number of multilateral treaties to which the USSR had been a party, including the principal UN human rights treaties.

The attitude adopted by the Baltic States has some merit when it argues that, as a matter of principle, treaties adhered to by the USSR are from their perspective *res inter alios acta*. However, the Baltic approach is ultimately unsatisfactory because it

- 51 See M. Bothe and C. Schmidt, 'Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie', 96 *RGDIP* (1992) 811-842.
- 52 Decision by the Council of Heads of State of the Commonwealth of Independent States, Alma Ata, 21 December 1991, reproduced in 31 *ILM* (1992) 151.
- 53 On the history of the occupation, see R. Yakemtchouk, 'Les républiques baltes en droit international. Echec d'une annexion opérée en violation du droit des gens', 37 *AFDI* (1991) 259-289.
- 54 On the legal position of the Baltic States, see, generally, R. Müllerson, 'New Developments in the Former USSR and Yugoslavia', 33 *Va.J.Int'l L.* (1993) 299, at 308-310. Müllerson was Deputy Foreign Minister of Estonia from 1991-1992.
- 55 Communications from Estonia, dated 8 October 1991, from Latvia, dated 26 February 1993, and from Lithuania, dated 22 June 1995 (!). *Multilateral Treaties Deposited with the Secretary-General*, Status as at 31 December 1995, 9.

fails to recognize that human rights treaties enjoy a special character which is different from other treaties. In particular, the assumption of the Baltic States that they are not bound by treaties in which rights had been granted to people within their territories seems questionable.⁵⁶ The Baltic attitude is also problematic because it causes uncertainties with respect to accountability for violations occurring before their accession to these treaties.

The fourth and largest category consists of Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. This group presents the least coherent picture with regard to treaty succession. No doubt actively encouraged by the ICRC, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan have succeeded to the Geneva Conventions and Protocols.⁵⁷ There has been a similar willingness on the part of these States to continue to be bound by the ILO conventions to which the USSR had been a party.⁵⁸ Again, this willingness is no doubt attributable to the active role played by the International Labour Office.

However, the performance of this group of States with regard to the principal human rights treaties is less encouraging. None of them has succeeded to a human rights treaty. Several have acceded to these treaties and some have simply failed to clarify their position at all. As in the case of the Baltic States, the apparent preference of these States for accession rather than succession to human rights treaties to which the USSR had been a party is disappointing. As the Human Rights Committee pointed out rather mildly when considering the first report by Azerbaijan after its accession to the Covenant: it would have been 'more correct' for Azerbaijan to have regarded itself as succeeding to the obligations of the Covenant.⁵⁹ More disturbing, however, is the absence of action by some of the States in this group. At the time of writing, more than four years after having gained their independence, Kazakhstan, Tajikistan and Turkmenistan had still not indicated their position with regard to the International Covenants on Human Rights. At the same time, none of these States had indicated that they did not regard themselves bound by these treaties. While this lack of clarity may be blamed on shortage of resources and lack of legal expertise rather than anything else, it is not indicative of high priority for international human rights commitments.

D. Hong Kong

An interesting experiment in State succession in respect of human rights treaties will commence on 1 July 1997 when the People's Republic of China will resume sover-

56 See M. Koskenniemi and M. Lehto, 'La succession d'états dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande', 38 *AFDI* (1992) 179, at 193.

57 *ICRC Annual Report 1994*, 266.

58 Compare, e.g., Tajikistan which, following its admission to the ILO, declared its willingness to continue to be bound by the obligations under the ILO Conventions which had previously been applicable to its territory. 76 *ILO Off. Bull.* (1993), Series A, at 168.

59 UN Doc. A/49/40, para. 294.

eignty over what is currently the British Crown Colony of Hong Kong. The terms of the transfer of sovereignty are set out in a Joint Declaration between the United Kingdom and China signed on 19 December 1984.⁶⁰ The Declaration stipulates *inter alia* that '(t)he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.'⁶¹ The Basic Law of the Hong Kong Special Administrative Region, adopted by China on 4 April 1990, contains a similar provision on the international labour conventions currently applied to Hong Kong.⁶² These are remarkable provisions because China is not currently a party to most of these treaties and in accordance with the principle of moving treaty-frontiers one would have assumed that these treaties would cease to be in force in respect of Hong Kong after the transfer of sovereignty.⁶³

The fact that the two States nevertheless specifically agreed to ensure continuity of the applicability of the two Covenants and the international labour conventions must be regarded as clear support for the proposition that entitlements in the field of human rights are inalienable and not affected by transfers of sovereignty. Under the doctrine of acquired rights, the population of Hong Kong could not be deprived of the protection of the human rights provisions it presently enjoys. However, from the perspective of the people of Hong Kong it is obviously preferable to have the continuity of obligations enshrined in a treaty between the predecessor and the successor State. China's acceptance of this principle appears all the more significant because it has not exactly established a reputation as a champion of the international protection of human rights.

The provision of the Joint Declaration has been brought to the attention of the Human Rights Committee by the United Kingdom⁶⁴ and the Committee has declared its readiness to give effect to its intentions.⁶⁵ The Committee took the opportunity to reiterate its view that '[o]nce the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another State or of more than one State.'⁶⁶

60 A Draft Agreement between the Government of the Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, 26 September 1984, reproduced in 32 ILM (1984) 1366.

61 Article 13 of Annex I to the Declaration, *ibid*.

62 Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 4 April, 1990, reproduced in 29 ILM (1990) 1511. See Shin-ichi Ago, 'Application of ILO Conventions to Hong Kong After 1997', 17 *Dalhousie L. J.* (1994) 612-623.

63 See Article 15 of the Vienna Convention on Succession of States in Respect of Treaties, *supra* note 1.

64 UN Doc. CCPR/C/58/Add.6, at 111-112 and Add.11, at 2.

65 Statement by the Chairperson on behalf of the Human Rights Committee, 20 October 1995, UN Doc. CCPR/C/79/Add.57, at 6.

66 *Ibid*.

However, it remains unclear precisely how the provision is going to be implemented. Under Article 40 of the International Covenant on Civil and Political Rights only States parties are required to report periodically to the Committee on the measures they have adopted to give effect to the rights contained in the Covenant. China is not expected to have become a party to the Covenant by 1 July 1997. It seems likely that as of that date the Committee will nevertheless regard China as a party to the Covenant with respect to Hong Kong, and that it will invite China to perform the reporting role with regard to Hong Kong previously carried out by the United Kingdom. It has been suggested that the result of the arrangements made between the United Kingdom and China is that the future Hong Kong Special Administrative Region will succeed to the Covenant and that it will therefore become accountable to the Human Rights Committee.⁶⁷ But it does not appear that such a radical result, by which a non-State entity would become a party to the Covenant, can be deduced from the Joint Declaration or the Basic Law. On the other hand, the Chinese Government could conceivably delegate the task of reporting to the Human Rights Committee to the authorities of Hong Kong. At the time of writing, this question was reported to be still under discussion between the United Kingdom and China.⁶⁸

Unfortunately, the international remedies available with respect to Hong Kong will remain limited to the reporting procedure under Article 40 of the Covenant. Since the United Kingdom has not accepted the right of individual petition under the Optional Protocol to the Covenant, the inhabitants of Hong Kong will continue to be deprived of this remedy.

VI. Conclusions

State practice during the 1990s strongly supports the view that obligations arising from a human rights treaty are not affected by a succession of States.⁶⁹ This applies to all obligations undertaken by the predecessor State, including any reservations, declarations and derogations made by it. The continuity of these obligations occurs *ipso jure*. The successor State is under no obligation to issue confirmations to anyone.⁷⁰ Consent from the other States parties is not required. Individuals residing within a given territory therefore remain entitled to the rights granted to them under

67 N. Jayawickrama, 'Human Rights in Hong Kong: The Continued Applicability of the International Covenants,' 25 *Hong Kong L. J.* (1995) 171, 178.

68 See the reply from Mr Steel (UK) in response to questions from members of the Human Rights Committee, 19 October 1995. UN Doc. CCPR/C/SR.1452 para. 43.

69 For a more cautious conclusion, see M.N. Shaw, 'State Succession Revisited', 5 *Finnish Yearbook of International Law* (1994) 34, 84 ('one is on the verge of widespread international acceptance of the principle that international human rights treaties continue to apply within the territory of a predecessor State irrespective of a succession'). Disagreeing, Bos, *supra* note 14, at 18.

70 As a matter of fact, while a notification of continuing adherence to a human rights treaty may not be strictly required, in practice such a step tends to be gratefully accepted by the depository and the other States parties because it resolves any ambiguities that may exist.

a human rights treaty. They cannot be deprived of the protection of these rights by virtue of the fact that another State has assumed responsibility for the territory in which they find themselves. It follows that human rights treaties have a similar 'localised' character as treaties establishing boundaries and other territorial regimes.

This principle of continuity applies also to the accountability provisions incorporated in human rights treaties. Successor States may therefore be held accountable for violations committed by the predecessor State, in accordance with any reporting and complaints procedures accepted by the predecessor State. In view of the fact that the key substantive obligations of human rights treaties are in any case part and parcel of customary international law,⁷¹ it is this continuity of treaty obligations governing accountability which is particularly important during the periods of upheaval which tend to accompany the succession of States. Whether a successor State may in addition be held responsible under *general* international law for any breaches committed by the predecessor State is controversial.⁷²

The idea that humanitarian treaties adhered to by the predecessor State are binding *ipso jure* on the successor State has for decades been successfully promoted by the ILO and the ICRC with regard to the conventions within their purview. During the 1990s, spurred by developments in Eastern Europe, the UN Commission on Human Rights and the monitoring bodies of the principal UN human rights treaties have also begun to follow this course of action. The Council of Europe has been equally firm with regard to the European Convention on Human Rights. This attitude by international institutions in support of the continuity of obligations under human rights treaties has not been objected to by the new States that gained their independence during the early 1990s. On the contrary, many of them have acknowledged the special character of these treaties by giving them priority treatment when submitting confirmations of succession to the depositories.

Three successor States, Kazakhstan, Tajikistan and Turkmenistan, have failed to clarify their position one way or the other with regard to the International Covenants on Human Rights. However, no major legal significance should be attributed to this attitude because this seems to have occurred primarily because they do not have the know-how and the administrative capacity to give the matter serious consideration. Successor States of the USSR have generally preferred to accede rather than succeed to the human rights treaties adhered to by the predecessor State. By doing so, a suc-

71 For an authoritative statement on the scope of customary international human rights law, see § 702 of the *Restatement (Third) of the Foreign Relations Law of the United States* (1987). See also, H. Hannum, 'Final Report of the Status of the Universal Declaration of Human Rights in National and International Law', *Report of the 66th Conference of the ILA* (1994) 525, 544-549 and the articles collected under the title 'Customary International Human Rights Law: Evolution, Status and Future', in 25 *Ga.J.Int'l & Comp.L.* (1995/96) Nos. 1 and 2.

72 See W. Czaplinski, 'State Succession and State Responsibility', 28 *Can. Y.B. Int'l L.* (1990) 339-359; M.J. Volkovitch, 'Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts', 92 *Colum. L. Rev.* (1992) 2162-2214. Generally on State responsibility for violations of human rights, see M.T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992) 127-190 and literature cited there.

cessor State is in fact claiming 'clean slate' status as a quasi-newly independent State under the terms of the Vienna Convention on Succession of States in Respect of Treaties. Strictly speaking, this is not satisfactory because it fails to recognize the special character of human rights treaties. It also creates an accountability gap, both in respect of the period between the moment of independence and the entry into force of the treaty for the successor State and in respect of any violations which occurred under the previous regime. However, monitoring bodies have generally decided not to challenge this type of behaviour. They have only made a point of insisting on continuity in accountability in instances of State succession in which the predecessor State continues to exist (in the case of the Russian Federation and the Federal Republic of Yugoslavia). From the point of view of the international protection of human rights it is unfortunate that the international community has undermined this approach by adopting the view that the break-up of Yugoslavia should be treated as a case of dismemberment rather than secession.

The wide support for the continuity of obligations under human rights treaties is not surprising in view of the interests which are at stake. Persons within the jurisdiction of the territory have an obvious interest in the continuation of the rights to which they were entitled under the predecessor State. Third States similarly have an obvious interest in the continuing applicability of human rights treaties. Apart from their immaterial interests in such treaties, they are keenly aware that discontinuity of human rights obligations may give rise to international tensions. Their interest in stability is comparable to the one which underlies the principle that treaties establishing territorial regimes are not affected by State succession. But even from the point of view of the successor State, discontinuity of obligations under human rights treaties may not appear particularly necessary or desirable. In view of the broad international consensus on which most of these treaties are based, it is unlikely that a new State will regard such treaties as 'political' instruments that are too closely linked to the predecessor State. The reporting obligations contained in human rights treaties may be perceived as the kind of administrative burden the new State would prefer to do without. However, international supervisory bodies have rightly been flexible on deadlines when States are demonstrably unable to meet this obligation.

As long as it is assumed that successor States in any case continue to be bound by the obligations of *all* treaties to which the predecessor State was a party, these findings may seem superfluous. However, in view of the doubts that have been expressed about the validity of the general principle of continuity of treaty obligations reflected in Article 34 of the Vienna Convention, it becomes necessary to highlight the special character of human rights treaties. If it were decided that the Vienna Convention needs to be revised because it does not adequately reflect customary international law, the research conducted in preparation for this article suggests that any new codification should contain a specific provision that a succession of States does not effect obligations arising from human rights treaties.