CHAPTER I

WHAT IS STATE SUCCESSION

1. The Concept of State Succession

Much has been written on the subject of State succession, yet the subject is clouded by much confusion and uncertainty. This state of affairs has been caused largely by "a failure to define terms with adequate precision"[1]. Hence it is essential that the concept of State succession be clearly defined in order to facilitate an understanding of the subject.

State succession has been defined as "the factual situation which arises when one State is substituted for another in sovereignty over a given territory"[2]. Thus where one State replaces another as the sovereign in that territory, State succession is said to have taken place. The replacement of one State by another may take place in more than one way. It may be by cession, annexation, fusion with another State, separation or secession, by entry into a federal union or by dismemberment or partition[3]. In the process of substitution of one State by another, there inevitably arises a vacuum and a disruption of legal continuity. The law or doctrine of State succession has evolved to cover such situations so as to minimise any gap between the two stages and to ensure that some form of order and continuity is maintained whenever State succession occurs.

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[1] Mervyn Jones, "State Succession in the Matter of Treaties", in B.Y.I.L., Vol. 24, (1947), p. 360.

[2] Ukon Udokang, Succession of New States to International Treaties, New York, Oceana Publications, (1972), p. 106.

[3] Jones, op. cit., N. 1, p. 361.

From the above, it may be seen that the term "State succession" can be used in two ways. On the one hand, it can be used to denote "succession in fact". "Succession in fact" denotes the factual situation, that is, when one State in fact substitutes another in the possession of territory by one of the means mentioned above. The other way in which the term can be used is to denote "succession in law". "Succession in law" is the legal or juridical substitution of one State for another. The factual transfer of sovereignty from one State to another gives rise to legal consequences. "Succession in law" therefore concerns the legal aspects of succession. The issue of State succession revolves around whether a State's rights and obligations remain unaffected or are succeeded to, as a matter of law, by the new or successor State.

The International Law Commission (I.L.C.), in making a study on State succession has also approached the subject by distinguishing succession in fact from succession in law. It has done this by drawing a distinction between the factual substitution of one State by another and the transmission of treaty rights and obligations from the predecessor to the successor State. In its proposals on State succession, the I.L.C. has chosen to define "succession of States" in Article 2 as "the replacement of one State by another in responsibility for the international relations of the territory".[4] The I.L.C. has thus chosen to use the term "State succession" to denote "succession in fact".

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[4] International Law Commission, Report on the Work of its Twenty-Fourth Session, G.A.O.R., 27th Session, Supplement 10 (A/8710/REV.1) p. 10.

The concept of State succession must be clearly distinguished from governmental succession. The latter embraces the replacement or succession of one government by another. International law is concerned with State succession and not governmental succession, which is of greater significance in municipal law. A change in the government or the constitutional structure of a State does not affect the rights and obligations of that State under international law. The question of rights and obligations arising from treaties occurs only in the case of State succession. However, one instance where governmental succession was raised to contend that the State was not bound by the obligations of its predecessor government must be pointed out. The new Soviet Government refused to consider itself bound by the obligations of the Bolshevik Government because a fundamental change in the political system had taken place.

Apart from this, it is well established that governmental succession does not affect the rights and obligations of a State. This principle has been embodied in the 1957 draft code on the Law of treaties prepared by the I.L.C. Article 6(2) of Chapter II of the draft code provides:

> "In consequence, the treaty obligation, once assumed by or on behalf of the State, is not affected, in respect of its international validity or operative force, by any of the following circumstances:
> (a) That there has been a change of government or regime in any State party to the treaty."[5]

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[5] I.L.C. Yearbook, Vol. 2, (1959) p. 43.

When one State is substituted for another, succession may be universal or partial. The succession of a State is said to be universal when the predecessor State has been totally absorbed or extinguished. Here the legal personality of the predecessor State disappears. Universal succession may take place by voluntary agreement or it may be by annexation or by the division of a State into several international persons or by the fusion of several States into one State. The issue here is: which rights and obligations pass to the successor State and which lapse for want of a legal personality in which they can be invested?

In the case of partial succession the personality of the State is not wholly extinguished or the territory of the State is not wholly absorbed. Partial succession takes place when, for instance, a State acquires a portion of another State through cession or conquest. Here the State which has lost part of its territory still continues to exist and to bear its rights and obligations. The issue which arises here in terms of State succession is: which rights and obligations are transmitted to the successor State and which remain with the predecessor State?

2. Theories of State Succession

(i) Universal Succession

Proponents of the theory of universal succession advocated that all rights and obligations of the predecessor State devolve upon the upon the successor State. This theory was popularly propounded in the nineteenth century. It is based on the Roman conception of succession

upon death. The substitution of one State for another was likened to the transfer of property of a deceased's estate, in which case, rights and duties followed such transfer. An important factor which influenced the evolution of this theory was the belief that the legal personality of the State never ceased to exist. Therefore all rights and obligations of the State also continued to exist and thus passed to the successor State. These rights and obligations passed ipso jure. The "unextinguishable" legal personality of the State had far-reaching effects in that even if one State was substituted for another through revolution, the rights and obligations of the predecessor State still devolved upon the successor State. In this respect, the universality of succession was very lucid. However a line was drawn in respect of the acts of a ruler in his personal or private capacity. Obligations or rights arising in such a manner did not devolve because they were supposed to lapse upon the death or expulsion of the ruler. Hence in general the theory of universal succession advocated that rights and obligations of the predecessor State arising from treaties passed on or devolved upon the successor State.

The greatest of the proponents of the theory of universal succession was Max Huber whose work "Die Staaten - Succession" was published in 1898. Huber's approach to universal succession was influenced by State-practice of his time and it took on a sociological outlook. Huber was of the belief that a new State which entered a legal community was by that fact bound by the rights and obligations of the community. This was regarded as a fact which must exist irrespective of the wishes of the new State. Huber's reasoning ran

contrary to the belief that when a new State is created by secession, it should be freed from its treaty obligations because the act of secession in itself indicates that it no longer wishes to be so bound.[5] Thus Huber was of the view that all treaties devolved upon the successor State which was formed by separation from an old State, even if it was by means of conquest.[6] However, he was willing to make exceptions for treaties of alliance and guarantees. Huber's theory is of high repute till this day. It has caused one writer to comment:

> "... so conspicuous a dissent from the general current of opinion by so outstanding an authority, based as it is on a special study of State succession in general which has still not been superceded, cannot be lightly disregarded".[7]

Although in theory Huber appeared to be a strict adherent of the doctrine of universal succession, yet in practice Huber was willing to make exceptions to the universality of succession. He was willing to concede to a generally-agreed principle that a State whose safety and security was threatened could amongst other means, employ the extraordinary measure of violation of treaty provisions to avert such danger. Huber displayed this flexibility in the WIMBLEDON CASE[8] where in a

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[5] C.W. Jenks, "State Succession in Respect of Law-Making Treaties", in B.Y.I.L., Vol. 29, (1952) p. 113.

[6] M. Huber, Die Staaten-Succession, Leipzig, (1898) pp. 136-154; cited in Udokang, op. cit., N. 2, p. 124.

[7] Jenks, op. cit., N. 5, p. 113.

[8] P.C.I.J., [1923] Ser. A, No. 1, p. 37.

joint dissenting opinion with Judge Anzilotti he stated:

> "The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an intepretation."

At the same time there were other writers who did not adhere strictly to the theory of universal succession. Klatibian in 1892 considered that in terms of succession only treaties relating to local obligations and debts devolved. However the same writer admitted doubts as to whether some other treaties and conventions proclaiming principles of law and humanity and other administrative treaties should not pass on to the successor State. However, these doubts were overcome on the grounds that the continuance of these treaties might limit sovereignty.

Lariviere, also writing in 1892, warned against generalisations on succession. He regarded it necessary to consider the objects of a treaty and suggested that if these objects could no longer be met such treaty ought to be terminated.[9] Thus Lariviere did not favour universal succession. Thus although Huber and Lariviere both wrote within the same period of time, they held different views on succession.

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[9] Jenks, op. cit., N. 5, p. 111.

It is to be noted that the theory of universal succession did not come about in a vacuum. The theory was largely motivated by the constant change of boundaries as a result of wars, such as the Napoleonic Wars and by independence movements, such as the independence of Greece. Universal succession to rights and obligations, especially those arising from treaties would promote some form of stability and continuity in the face of changing circumstances.

At the same time too, a distinction was made between 'real' and 'personal' treaties. 'Real' treaties are entered into with relation to the nation itself. These treaties continue in force when a ruler dies, and they devolve upon the new State. 'Personal' treaties are entered into by a ruler on his own behalf. These die with the ruler and do not devolve upon a new State.

The concept of 'dispositive' treaties ran on similar lines with 'real' treaties. The distinct feature of 'dispositive' treaties is that they run with the land. These treaties have been likened to the creation of servitudes, which is a concept of municipal law. Treaties regarding boundaries and rivers are classic examples of such treaties. Because these treaties are said to run with the land and are said to constitute a permanent feature, they are therefore said to devolve automatically upon the successor State. In contrast 'personal' treaties, such as treaties of alliance, do not possess qualities of permanence and objectivity. As such, they are not regarded as automatically devolving upon the successor State.

(ii) The Clean Slate Doctrine

The clean slate principle grew in the early part of the twentieth century. It was a reaction against the theory of universal succession. Under the clean slate principle a newly independent State was held to begin its international life free from any obligations or rights of the predecessor State. Hence this doctrine freed the new State from the treaty rights and obligations of the predecessor State. In this way the autonomy of the new State was said to be preserved and it could enter into international relationships free from any encumberances arising out of the past.

The main proponent of this doctrine was Arthur B. Keith. His work "The Theory of State succession with Special Reference to English and Colonial Law" was published in 1907 and he was of the view that "no treaties are inherited by a conqueror or cessionary State, but that the latter's treaties are extended over the conquered or ceded territory".[10] Keith was of the opinion that a new State has the choice of either following the same method of action in relation to a third State as its predecessor or to choose a different course of action. If it chooses the former, then the implication is that a new treaty is entered into between the new State and the third State. The former treaty between the predecessor State and the third State was regarded by Keith as a res inter alios acta. As far as Keith was concerned, the new State could not "step into treaties of its mother country or the conqueror into the treaties of its conquest."[11]

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[10] Udokang, op. cit. N. 2, p. 126.

[11] Ibid., p. 127.

Keith's views have been described as "largely influenced by the official views of the British Government".[12] This is true because when Finland obtained independence the United Kingdom, touching on Russian treaties which had been applicable to pre-independent Finland, adopted the view that when a new State was formed from an old State, there was no succession by the new State to the treaties of the old State. Only obligations of the old State in relation to matters such as the navigation of rivers which were servitudes passed on to the new State. As such the United Kingdom expressed that there were no treaties in existence between her and Finland. This is a clear manifestation of the clean slate principle.

Lord McNair too has stated:

> "... newly independent States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations ...."[13]

Thus when the Union of Colombia was dissolved to form new Granada, Venezuela and Ecuador, these States were regarded as starting international life with a clean slate. In line with this, the Prime Minister of the Irish Free State, when his State separated from Great

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[12] Jenks, op. cit., N. 5, p. 115.

[13] McNair, The Law of Treaties, Oxford, (1938), p. 601, cited in Udokang, op. cit., N. 2, p. 128.

Britain, expressed that acceptance or otherwise of treaty-relationships of the old State by the new State was to be determined by express declaration or by conduct, as it was considerations of policy which would dictate how the State is to act upon the matter. Here too the Prime Minister's statement was based on the clean slate doctrine.

The United Nations, in 1947, also seemed to have emulated the clean slate principle. When Pakistan separated from India, the United Nations Secretariat expressed the view that Pakistan was a new State and thus would not succeed to the treaty rights and obligations of the old State, India.

Generally, other English writers such as Brierly, Oppenheim, Hall and Holland have shown favour for the clean slate doctrine.[14] Among the American writers, Taylor, Wheaton, Hershey and Fenwick fall into this category. Most of the Latin American writers[15] also appear to be in favour of this doctrine, among them being Ursua, Costa, Sierra and Accioly.[16]

Hence the clean slate doctrine appears to have made a great impact on the law of succession during the first-half of the twentieth century.

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[14] Jenks, op. cit., N. 5, p. 117.

[15] Ibid, p. 118.

[16] Ibid.

(iii) Contemporary Trends on the Theory of State Succession

Neither of the two theories discussed above can be said to be representative of contemporary thinking on State succession. This is because contemporary writers are all too aware of the advantages and setbacks implicit in both theories. In order to appreciate fully the contemporary trend on the theory of State succession, it would be useful to consider these two theories a little further.

The theory of universal succession is aimed chiefly at ensuring legal continuity when State succession takes place. But this theory also bears with it a problem, in that there may be some treaties of the predecessor State which are "manifestly inconsistent with the political status of the new State."[17]

Some proponents of this theory suggest that a new State succeeds automatically to all the treaties of its predecessor but afterwards, it may denounce those which are incompatible with its status as a sovereign State.[18] This does not in reality amount to a solution but would rather go against the rationale of securing continuity and stability because there would be much uncertainty and confusion over the status of the treaties which are denounced.

Further, if new States succeed to the treaty rights and obligations of their predecessors ipso jure, it would appear that the new States

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[17] Udokang, op. cit., N. 2, p. 490.

[18] Ibid.

have "completely mortgaged their contractual capacity which is the essence of an independent State".[19] The international life of the new State would be heavily burdened by the hand of its past. Thus the theory of universal succession is by no means the perfect answer to the problems of State succession.

Similarly, although the clean slate principle is impregnated with the noble ideal of giving a new State a clean break and a fresh start in the international community, it also bears the negative consequence of a legal vacuum if this principle is put into practice. Whereas the doctrine of State succession should be geared at minimising a breach of legal continuity, the clean slate doctrine seems to secure that which directly contradicts the rationale of State succession. It is no wonder that O'Connell was led to write:

> "This negative theory ... has little to commend it. It aggravates rather than mitigates the legal crisis occasioned by change and is inherently anarchic."[20]

However, both the theory of universal succession and the clean slate doctrine play a significant role today in that the contemporary trend in the theory of State succession revolves around the two theories. The contemporary trend appears to be an attempt to mitigate the harshness of the two theories and to reconcile them in such a way as to

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[19] Ibid.

[20] D.P.O Connell, International Law for Students, London, Steven and Sons, (1971) p. 157.

reach a balanced and reasonable doctrine governing State succession.

Whether such an attempt has been successful or not, the writers of the present time appear to have taken upon themselves the task of commenting on the two theories. Jenks, for example, writing in 1952 has this to say.

> "Despite the impressive weight of opinion, it is not unreasonable to argue that the acknowledged doctrine of the text books is not good law."[21]

Jenks also accuses the writers of "uncritical repetition" and describes their work as "juristically faulty and historically inaccurate."[22]

The chief reason for the unsatisfactory nature of the earlier works in relation to contemporary times is that the views of the earlier writers were based mainly on bilateral treaties. The law on State succession to treaties related to succession to bilateral treaties. In modern times, it is the multipartite treaty which has gained significance in international law. Hence State succession to treaties revolves around the succession of States to multilateral treaties. Because of the change which has occurred, the earlier works would well appear to be out of perspective in modern times.

Jenks regards the multipartite treaties as a vehicle for the rapid and progressive development of international law in order to

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[21] Jenks, op. cit., N. 8, p. 99.

[22] Ibid., p. 119.

meet the changing needs of our time. These treaties are regarded as a legislative process in international law. The clean slate principle however developed before multipartite treaties took their promising place in international law. As such, the rationale of the clean slate doctrine appears to have little or no relevance to such instruments. It may be concluded from this that Jenks is of the view that the clean slate doctrine does not meet the needs of the times. According to his argument, since multipartite treaties are instruments for the legislation of international law, it would mean that a new State would ipso jure succeed to the rights and obligations arising under these treaties.

It is apparent that Jenks advocates a more positive theory of succession than the clean slate doctrine. In urging the necessity for succession to treaties of the predecessor State, especially in the case of newly independent States, Jenks writes:

> "The obligations of multipartite legislative instruments are not, however, badges of continuing servitude, they are a necessary part of full cooperation in the international community and participation in them must therefore be regarded as one of the hallmarks of emancipation."[23]

Thus while theorising on State succession, Jenks shows acute awareness of the need to take into consideration the position of the newly

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[23] Ibid., p. 108.

independent States and he tries to reconcile such States to the acceptance of the treaties of their predecessors by suggesting that such acceptance is "one of the hallmarks of emancipation". How newly independent States react to such a suggestion is left to be seen in a subsequent chapter.

One other argument used by Jenks in support of his theory of succession (whose effects resemble those of the theory of universal succession) is that it has now been generally admitted that war does not have the same effect on multilateral 'legislative' treaties as it has upon bilateral 'contractual' treaties. From this, Jenks argues:

> "... it is surely not fanciful to suggest that such treaties survive changes of sovereignty just as they survive the outbreak of war."[24]

Drawing a clear distinction between bilateral and multilateral treaties, Jenks advocates universal succession in the case of the latter. The ultimate result appears to be that Jenks propounds a theory of neo-universal succession to treaties for modern times.

Another writer, Mervyn Jones, has adopted a different approach. Jones is of the view that it is better to avoid general theories on State succession. This view has emerged because it has been found that adherence to general theories produces inadequate results. Also Jones shares McNair's view that the subject is best treated under the

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[24] Ibid., p. 120.

Law of Treaties. He says:

> "Complicated though the problem may be, an examination of practice shows that the difficulties are greater if there is a too rigid adherence to the doctrine of State succession and too little application to the question of treaty law - that is, the results of the survival or otherwise of the original contracting party."[25]

Jones' view seems clearly to be a new and "break-away" approach from the traditional approach to the theory of State succession.

Jones expresses that in practice "a 'treaty vacuum' rarely arises".[26] By this he means that it is very rarely that no treaty system is applicable when a succession of States takes place. He makes a study of State practice and from this arrives at the conclusion that when a territory is annexed, the treaties of the annexed State either falls to the ground with its extinction or cease to be applicable to the annexed territory. The annexing State is not bound by those treaties, although the treaties of the annexing State will apply to the annexed territory. It may be gathered from this that Jones would be more or less in favour of the clean slate doctrine in the case of succession by annexation.

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[25] Jones, op. cit., N. 1, p. 373.

[26] Ibid.

Similarly when succession results from a violent secession, he is of the view that a new State is born and that therefore the new State starts with a clean slate.

Jones distinguishes succession by cession of territory from the earlier two forms of succession. Cession of territory takes place by agreement. Jones submits therefore that the rights of third States should not be abrogated by a unilateral act. The ceding State is therefore urged to bear a legal duty of ensuring that the rights of third States are respected as far as possible. Hence the clean slate principle might not apply here in its purest form.

Similarly in the case of dismemberment, Jones is of the view that the identity of the dismembered State is not totally extinguished and therefore treaty rights and obligations of the original State should be continued.

As to the fusion of two or more States, Jones expresses that a fusion which creates an entirely new State is so rare that he doubts whether it ever really occurs. Generally, one of the merging States survives in the enlarged State and therefore it retains its own treaty obligations.

The above approach to State succession is not without appeal. There is an evident flexibility in the approach. Each form or mode of succession is given unique and individual treatment and consideration. This seems to be only right since the modes of succession differ in nature. This approach to State succession is not dogmatic

and is more preferable to an approach where the various forms of State succession are squeezed into the mould of one particular theory.

Another contemporary writer, O'Connell, is of the view that the law relating to State succession has never really been settled. He regards the law which evolved in the nineteenth century as "excessively influenced by theoretical considerations which proceeded in part from the philosophies then current, and in part from political and policy attitudes which tended to be inconsistent".[27] O'Connell regards such writings as irrelevant in the twentieth century.

Among the reasons given is the fact that these writings were based on practice which was haphazard and which had not been studied extensively. Another reason given and which appears to fall in line with Jenks view is the nature of the treaties existing at the time. The categories of treaties were restricted. O'Connell also gives consideration to the fact that presently, the law of State succession revolves largely around the newly independent States. During the nineteenth century this important ingredient was not present in influencing and shaping the law of State succession. Hence the writings of the nineteenth century would appear to be irrelevant in the light of the events of the twentieth century. It is also the writer's view that the very need to make a study of State succession is caused largely by the emergence of these States and hence the theory and law of State succession which materialised in the nineteenth century may be inadequate and outdated in this second-half of the twentieth century.

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[27] O'Connell, "Independence and Succession to Treaties", in B.Y.I.L., Vol. 28, (1962) p. 84.

The pattern and considerations of State succession during the nineteenth and early twentieth centuries were largely influenced by the concepts of 'personal' and 'dispositive' treaties. O'Connell describes the distinction between these two categories as "excessively antithetical and insufficiently comprehensive".[28] Furthermore, O'Connell is of the view that the category of heritable treaties today extends far beyond the category of 'dispositive' treaties. This is an observation based on State practice.

Another writer, A. P. Lester, writing in 1963, in making a study of succession to bilateral treaties in the Commonwealth, arrives at the conclusion that treaties do not automatically devolve upon a new State and goes on to say:

> "... this conclusion accords with theory and state practice in general International Law".[29]

Lester is of the view that a new State starts life with a clean slate, this view being based on British practice.

Lester's views may not coincide with the views of other contemporary writers but what stands out clearly is the fact that his views are not purely hypotheses but are based on State practice. Credit ought to be given for this in that any contemporary trend on the subject must be based on contemporary patterns and situations and not on the writings of past centuries.

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[28] Ibid., p. 85.

[29] A.P. Lester "State Succession to Treaties in the Commonwealth", in I.C.L.Q., Vol. 22, (1963) p. 476.

In reflecting on the contemporary trends in the theories of State succession, it is only fair that the views of as many contemporary writers as possible be considered in order to discover a pattern for our times. Keith writes:

> "Until recently the view that most States start life unencumbered by the treaties which applied to their territories before independence has been almost universally and too often, one might add, uncritically accepted."[30]

As a result of the study of State practice, Keith concludes that new States often succeed to treaties. Keith is in fact of the view that such succession is in many instances required by customary law.

It becomes apparent from the above consideration of the views of contemporary writers that the theories evolved in the nineteenth century and in the first-half of this century are not wholly relevant today. However, contemporary writers have much to gain from studying these theories especially when they are in the position to survey them objectively with the wisdom of hindsight.

The International Law Commission which gives the fullest regard to the principle of self-determination, a principle embodied in Resolution 1515(XV) by the United Nations and which will be discussed

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[30] Keith, "Succession to Bilateral Treaties by Succeeding States", in A.J.I.L., Vol. 61, (1967) p. 521.

in Chapter II, is of the view that the clean slate principle is consistent with the principle of self-determination.[31] The I.L.C. has expressed that the "clean slate" metaphor is merely a convenient and succinct way of referring to the newly independent State's general freedom from obligation in respect of its predecessor's treaties.[32]

However, the I.L.C. also expressed that the clean slate principle must also be considered in the light of other principleswhich affect the newly independent State in relation to the treaties of its predecessor. For example, the I.L.C. points out that modern treaty practice recognizes the right of a newly independent State to become a party to any multilateral treaty (except those which are of a restricted character) to which the predecessor State was a party at the time of independence.[33] The I.L.C. is of the view that a legal nexus is created between the territory and a treaty to which the predecessor State was a party by virtue of the consent of the predecessor State to be bound by the treaty. If the multilateral treaty is of a restricted character or in the case of a bilateral treaty, a legal nexus may be created between the successor State and the treaty by obtaining the consent of the other State(s) concerned for the continuance in force of such a treaty.[34]

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[31] International Law Commission, op. cit., N. 4, p. 6.

[32] Ibid., p. 7.

[33] Ibid.

[34] Ibid.

As such, the I.L.C. is of the view that the clean slate principle in the modern law of State succession does not cause a rupture in the treaty relations of a newly independent State. The clean slate principle thus gives scope for the new State to determine its own treaty relations and at the same time, facilitates the continuance of such treaties of the predecessor State as are in the interests of the new State.[35] The I.L.C. thus appears to have found a "happy" solution and reconciled the clean slate doctrine to the modern law of State succession.

While such is the view of the I.L.C., no one particular theory has been recognized as the theory predominating the law of succession at this time. Writers generally base their views largely on State practice. While this is commendable, there is no consistency in State practice. This is because of conflicting needs and interests and the new situations which have arisen in the international community during the last half century, especially in the post-World War II period. Such conflicts and unique interests and situations will become clearer in the following chapters. While such conflicts and needs are being resolved it remains true that theories on State succession are still in the process of being shaped and formulated.

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[35] Ibid.