CHAPTER II

THE NEWLY INDEPENDENT STATES

The post-World War II period was marked by the independence of several African and Asian nations. It is with these States that the law of State succession to treaties has been mainly concerned during this part of the present century. The background of these newly independent States is peculiar and this background has influenced the reaction of these States towards international law. This attitude towards international law has in turn, significantly characterised the reaction of the newly independent States towards the rules relating to the succession of States to treaties. It is this which prompts a consideration of the background of the newly independent States and their attitude towards international law.

1. Background of the Newly Independent States and Their Attitude Towards International Law

International law, prior to and at the time of the emergence of the newly independent States, had been largely influenced by the positivists. The positivists believed that international law came into existence only through tacit or express consent. But more significant is the fact that international law was regarded "as the law of the 'civilised Christian nations' of Western Europe, or of European origin. Thus international law seemed to be viewed almost exclusively as that body of rules regulating the conduct of 'civilised' States in their relations inter se".[1] Hence international law was

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not a system of law of universal application. It excluded by necessary implication, the uncivilised non-Christian nations.

This exclusion included the former African and Asian colonies which had newly gained their independence. As a result, the participation of these States in the formation of rules of international law has been minimal. As is pointed out:

> "It is only natural that the participation of the smaller and less developed States in international affairs should be less active than that of the great powers. Accordingly, their contribution to the formation of general practice and hence, of customary rules of law is considerably more limited."[2]

Although the minimal participation of these States has been described as 'natural', in reality, reactions towards such a development of international law have not always been so positive. For example, in the case of rules relating to responsibility of States, it has been said that "the rules now in force, moulded by a practice repeated a thousandfold throughout the last century and a half, were not only created independent of the interested smaller States, but even against their desires and interests".[3] These norms are regarded as reflecting the relations that were established

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[2] Jorge Castaneda, "The Underdeveloped Nations and the Development of International Law," in International Organization, Vol. 15, (1961) p. 38.

[3] Ibid., p. 39.

in the nineteenth and twentieth centuries between the militarily strong countries on the one hand and the underdeveloped and weaker countries which import capital on the other.

Not only have the newly independent States had little to do in the formation and development of international law but they also face economic, political and cultural backwardness. This has largely been regarded as resulting from the oppression and exploitation of their colonial masters. As such these States enter into the international arena on a very unequal and unsure footing. This has resulted in their attitude of suspicion towards some of the old rules of international law. They tend to see in some of the old rules a system of law which created and justified relations of inequality between themselves and the colonial powers of Europe. As such the newly independent States appear to be the greatest champions of freedom of action and for the protection of economic interests. It is in this respect that the background of these States and their attitude towards international law are highly relevant because they influence the practice of States in relation to succession to treaties.

Having regard to such an attitude, the question which arises is: how far are these States bound by the rules of international law in the making of which they did not participate and which in many instances run counter to their interests? Although the attitude of the new States towards international law has been described as ambivalent, it is outstanding that the new States "have often in practice, challenged the validity of certain of its rules, insisting that such rules must

be radically changed to reflect changes in the structure of contemporary international society".[4]

The argument advanced by the new States is that international law is consensual law and that the binding authority of international law depends upon the consent of States. The new States argue that they are not strictly bound by the traditional rules of international law because they have not consented to the rules forming the body of international law. However it must be pointed out that although some rules of international law have been challenged by the new States, they are only those which are not consistent with the new international order.[5]

The way in which the law can be changed to meet current international needs is by the participation of the new States in the progressive development of international law.

2. The Attitude of the Newly Independent States Towards State Succession

It may be seen from the attitude of the newly independent States towards traditional international law that these States would by no means consider themselves strictly bound by the laws relating to State succession which evolved at a time when they were still subject to their colonial masters. It is in this respect that it has been said:

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[4] Udokang, op. cit., N. 1, p. 10.

[5] R. P. Anand, "The Role of the New Asian-African Countries in the Present International Legal Order" in A.J.I.L., Vol. 56, (1962) p.387.

> "The psychology of newly won independence is a formidable reality, and juristic speculation on State succession which ignored it would be an altogether unprofitable exercise."[6]

This is especially so in the light of the growing popularity of the principle of self-determination among the newly independent States. This right has been enshrined in the Charter of the United Nations. Paragraph 2 of Article 1 of the Charter provides one of the aims of the U.N. as being:

> "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..."[7]

The newly independent States would naturally wish to be truly independent in every sense of the word. After years of subjection to their colonial masters, any traces and reminders of the past would not serve as a psychological boost to these nations. In this respect it would appear that State succession would appear to be a particularly sensitive topic in that the very core of the subject is the past i.e., it concerns succession to rights and obligations of the predecessor State. It signifies the bonds imposed upon them by their colonial masters. It is no wonder therefore that the clean slate principle is highly attractive to the newly independent States.

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[6] C.W. Jenks "State Succession in Respect of Law-Making Treaties", in B.Y.I.L., Vol. , (1952), p. 108.

[7] Shabtai Rosenne, The International Court of Justice, Leyden, (1957), p. 513.

The attractiveness of the clean slate principle is also manifested in the approach of the I.L.C. while working on the draft articles on the succession of States in respect to treaties. The I.L.C. pointed out that while working on the subject, it took account of the implications of the U.N. Charter, in particular, the principle of self-determination. It was for this reason that the I.L.C. found that it could not endorse the thesis put forward by some jurists that the modern law does, or ought to, make the presumption that a newly independent State consents to be bound by any treaties previously in force internationally with respect to its territory, unless it declares a contrary intention.[8] The I.L.C. was not willing to give the status of a legal presumption to such a suggestion although on the plane of policy it is generally desirable that there should be a certain continuity in treaty relations upon succession.

The I.L.C. expressed that it found the traditional clean slate principle more consistent with the principle of self-determination. It was also the opinion of the I.L.C. that the main implication of the principle of self-determination in the law concerning succession in respect of treaties was precisely to confirm as the underlying norm for cases of newly independent States, the traditional clean slate principle.

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[8] 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. 6.

While the clean slate principle has held great attraction for the newly independent States since it preserves their sovereignty, there are other factors which need also to be considered by the newly independent States. These tip the balance in favour of the continuity of treaty obligations. While the new States might protest against past economic exploitation at the hands of their colonial masters, these very States need continuing help in terms of aid, expertise, technology and capital investments in order to survive economically. The newly independent States are not economically viable and are very much in need of the aid which has been arranged for in the treaties of their predecessor States. Moreover, a continuity of the treaty relationships of the predecessor State would create a political atmosphere more conducive for obtaining aid from the predecessor State itself. It is this which prompts the International Law Association to say:

> "On the one hand, a relevant factor tending towards continuity rather than discontinuity of treaty relationships is the role which the modern treaty plays in stabilising the economic environment of new States..."[10]

Hence the attitude of the newly independent States towards the rules relating to succession to treaties ought to be a balance between the

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[10] International Law Association, The Effect of Independence on Treaties, London, Steven and Sons, (1965) p. 2.

need to continue the treaty obligations of the predecessor States and the desire to exert absolute sovereignty as new States.

Another writer discusses the desire for stability as a factor determining the attitude of new States towards continuity of treaty obligations. He writes:

> "... the human desire for stability which is indeed reflected in the rules of domestic legal systems relevant to the continuity of domestic law despite constitutional change, suggests that the relevant attitude will be to retain treaties in force".[11]

Thus while succession to treaties of predecessor States may appear to be a detraction from the sovereignty only newly independent States, yet these new States also face the great need to continue as parties to the treaties of their predecessor States.

The newly independent States have urged that the conflicts arising out of a clash between the past and the present, between the colonial States and the newly independent States can be resolved by changing certain rules of international law. As such, these new States have been very active in attempting to secure changes, especially in the areas where the rules of international law run against their interests.

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[11] Kenneth Keith, "Succession to Bilateral Treaties by Seceding States", in A.J.I.L., Vol. 61, (1967) p. 543.

However, these new States have neither the political, military nor the economic power to cause such changes. The only powerful weapon which they possess is their membership in the United Nations. They have resorted to their numerical strength in this international organization as a means of bringing about the necessary changes in international law.

This is done in particular, by means of Article 13 of the United Nations Charter which provides:

> "The General Assembly shall initiate studies and make recommendations for the purpose of:
> (a) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification...".[12]

Thus the newly independent States, through their membership in the United Nations are able to initiate studies particularly for the progressive development of international law.

It is by virtue of Article 13 of the U.N. Charter that the I.L.C. was set up, one of its objectives being the promotion of the progressive development of international law and its codification.[13]

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[12] Rosenne, op. cit., N. 7, p. 516.

[13] United Nations Office of Public Information, The Work of the International Law Commission, Revised Edition, New York, U.N. Publications, p. 14.

Progressive development of international law has been defined as the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law is not yet sufficiently developed in the practice of States.

The I.L.C. consists of twenty-five members, out of which not less than ten are from the new States. It is through membership and participation in this Commission that the newly independent States hope to assist in the development of international law and its adjustments to the requirements of a world-wide community.[14]

The I.L.C. is of great significance in the subject of State succession, especially with reference to treaties, because the topic of succession of States and Governments was among those selected for codification by the I.L.C. at its first session in 1949.[15] It is through the activities of the I.L.C. and the presentation of draft proposals to the General Assembly that the voice of the new States is heard. It is hoped that in this way the law relating to State succession will change and that there will evolve a system which will balance the interests of all parties concerned. Most of all it is hoped that the system agreed upon will be one which spells hope for the future of international law.

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[14] Udokang, op. cit., N. 1, p. 89.

[15] United Nations Office of Public Information, op. cit., N. 13, p. 5.

Conclusion

The newly independent States are no longer non-entities in current international law. Their history and background and their emergence as sovereign States has caused the reshaping of rules of international law. They have had a big hand in the drawing up of the present draft articles on State succession in respect of treaties, either directly or indirectly. Their role in shaping the law in this era will reach its peak and when the draft articles are adopted as a Convention among nations. Apart from this, the more active and direct role played by these States in this area of the law may be seen from a consideration of their practice in Chapter IV.