CHAPTER III

THE I.L.C. AND SUCCESSION OF STATES TO TREATIES

1. The Work of the I.L.C.

Resolution 1686 (XVL) of the General Assembly recommended the I.L.C. to include the topic of succession of States and Governments on its priority list. The General Assembly also recommended that the I.L.C. should proceed with its report on the succession of States with appropriate reference to the views of the States which have achieved independence since the Second World War. The independence of the former colonized nations and the succession of the newly independent States to their predecessor colonial masters was found to be the next common form of succession during the past twenty five years. As such the I.L.C. has expressed that the stress laid on the views of the newly independent States needs neither justification nor explanation at the present moment of history.[1]

The I.L.C. set up a Committee on the succession of States and Governments. The objective of this Committee was to survey and evaluate the present position of the law and practice on State succession and to prepare draft articles in the light of new developments in international law.[2] It was in 1967 that the I.L.C. decided to divide the topic of State succession under three headings, namely

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[1] 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. 5.

[2] United Nations Office of Public Information, The Work of the International Law Commission, Revised Edition, New York, U.N. Publications, p. 59.

succession in respect of treaties, succession in respect of matters other than treaties and succession in respect of membership to international organizations. It is with respect to the first that this paper is concerned with and therefore the work of the Committee on this aspect shall be discussed at length.

The Committee has found that this task of codifying the law relating to succession of States in respect of treaties, in the light of State practice is one of determining within the law of treaties, the impact of the occurrence of a "succession of States" rather than vice versa.[3] The Committee has found that the rules on the law of treaties and the effects of these rules has constantly to be borne in mind in approaching the subject of State succession to treaties. The Vienna Convention on the Law of Treaties, 1969 is the most authoritative statement of the general law of treaties and therefore the Committee felt that it is bound to use the provisions of this Convention as an essential framework of the law relating to the succession of States to treaties.

It is to be noted that the draft articles on State succession in respect of treaties have been prepared in such a form as to render them capable of serving as a basis for the conclusion of a Convention, should this be decided upon. The draft articles have been divided into six parts. They are:

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[3]International Law Commission, op. cit., N. 1, p. 6.

Part I : General Provisions.

Part II : Transfer of Territory.

Part III : Newly independent States.

Part IV : Uniting, dissolution and separation of States.

Part V : Boundary regimes and other territorial regimes established by treaty.

Part VI : Miscellaneous Provisions.

The draft articles relating to newly independent States shall be discussed in this Chapter. A look at these articles would show the position of the I.L.C., which would to a great extent reflect the position of the newly independent States themselves on the succession of States to treaties.

Article 15 of the draft articles provides that a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.[4] This article appears to be the key article reflecting the attitude of the I.L.C. on the succession of newly independent States to the treaties of their predecessor States.

In the view of the I.L.C., as is shown in the comments of the Committee on Article 15, succession to the treaties of the predecessor State has two aspects. These are: whether the new State is under

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[4] International Law Commission, Report on the Work of its Twenty-Sixth Session, G.A.O.R., 29th Session, Supplement 10, (A/9610/REV.1) p.51.

an obligation to apply the treaties of the predecessor State to its territory after a change of sovereignty over territory has taken place and whether a new State is entitled to consider itself a party to the treaties in its own name after the change of sovereignty. These two aspects of succession cannot be treated as if they are the same.

The I.L.C. goes on to point out that if a newly independent State is under a legal obligation to assume its predecessor's treaties, the question whether it has a right to claim the status of a party to them becomes irrelevant. This, it would appear, is because once a State is under an obligation to succeed to the treaties of the predecessor State there is no question of choice for the newly independent State. Therefore, it is essential to determine whether such a legal obligation exists in general international law and it is to this issue that the present article is directed. The answer of the I.L.C. obviously is that there exists no such legal obligation. In this respect, the I.L.C. endorses the clean slate doctrine. The I.L.C. had deduced a general rule from State practice that a newly independent State is not, ipso jure bound to inherit its predecessor's treaties, whatever may be the practical advantages of a continuity in treaty relations.

Article 16 provides that a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty, which at the date of succession was in force

in respect of the territory, unless it appears from the treaty or is otherwise established that the application of the treaty to the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.[5] A newly independent State may also not establish itself as a party to the treaty if, under the terms of the treaty or by reason of the limited number of negotiating States and the object and purpose of the treaty, the participation of any other States must be considered as requiring the consent of all the parties. It may establish its status as a party to the treaty with the consent of the other States.[6]

The I.L.C. observes that the practice of the Secretary-General of the U.N., acting in his capacity as depository for multilateral treaties, has been to write to newly independent States, inviting them to confirm whether they consider themselves bound by the treaties in question. The Secretary-General does not consult the other parties before he writes to the newly independent States, nor does he seek the views of the other parties or await their reaction when he notifies them of any affirmative replies from the newly independent States. He appears to act on the assumption that a newly independent State has a right, if it chooses, to notify the depository of its continued

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[5] Ibid., p. 55.

[6] Ibid.

participation in any such general multilateral treaty. The I.L.C. observes that so far as is known, no existing party to a treaty has ever questioned the correctness of the assumption and newly independent States have themselves proceeded on the basis that they do indeed possess such a right.

Article 17 provides that a newly independent State may by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States, the predecessor State was a contracting State in respect of the territory to which that succession of States relates, or which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State in respect of the territory in question.[7] However, this rule does not apply if it appears that the application of the treaty is incompatible with its object and purposes or would radically change the conditions for the operation of the treaty. The other exception is when the consent of the other contracting States is necessary before the newly independent State can establish its status as a party to the treaty.

As far as bilateral treaties are concerned, Article 23 provides that a bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates, is considered as being in force between a newly

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[7] Ibid., p. 58.

independent State and the other State party in conformity with the provisions of the treaty when they expressly agree or by reason of their conduct they are considered as having so agreed.[8]

The rule that a newly independent State is not ipso jure bound by its predecessor States' treaties as provided for in Article 15 applies both to multilateral and bilateral treaties. However, it still leaves open the question whether this means that the newly independent State has a "clean slate" as far as bilateral treaties are concerned.[9] The comment of the I.L.C. on succession to bilateral treaties indicates that bilateral treaties are treated differently from multilateral treaties. The I.L.C. observes that the clean slate metaphor expresses the basic principle that a newly independent State begins its life free from any general obligation to take over the treaties of its predecessor. However, a treaty in force in the territory at the date of succession is frequently applied afterwards between the newly independent States and the party or parties to the treaty. The I.L.C. observes that this indicates that the former legal nexus between the territory and the treaties of the predecessor has at any rate some legal implication for the subsequent relations between the newly independent State and the other parties to the treaties.[10]

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[8] Ibid., p. 76

[9] Ibid.

[10] Ibid., p. 77.

In the case of multilateral treaties, the legal nexus appears to generate an actual right for the newly independent State to establish itself as a party or a contracting State. However, this does not appear to be so in the case of bilateral treaties. The reason given for this is the "personal equation", the identity of the other contracting party plays a more dominant role in bilateral treaty relations. This is because the object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests.

As such the application of a treaty to the territory by a predecessor State does not automatically allow the inference that the treaty will continue to apply even after a wholly new sovereign has taken over the territory. Moreover, a bilateral treaty cannot be brought into force between the newly independent State and its predecessor as is possible in the case of multilateral treaties. It has to be a bilateral relation between the newly independent State and the other party.

The I.L.C. said that it was aware that State practice shows a tendency towards continuity in certain categories of treaties. It did not however believe that the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the State concerned.[11]

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[11] Ibid., p. 78.

The codification and progressive development of the Law of State succession in respect of treaties does not end with the formulation of the draft articles, some of which have been discussed above.

In Resolution 3315 (XXIX) of December 1974, the General Assembly invited member States to submit to the Secretary-General of the U.N. their written comments and observations on the draft articles contained in the report of the I.L.C. on the work of its twenty-sixth session.[12]

At the thirtieth Session, the Sixth Committee recommended to the General Assembly that it adopt a draft urging member States who had not yet submitted their written observations and comments to the Secretary-General, to do so as soon as possible. The Sixth Committee also recommended in the same draft that a conference of plenipotentiaries be convened in 1977 to consider the draft articles on succession of States in respect of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate.[13] This then is the current position on the work of the I.L.C. on the subject.

2. Reactions to the Work of the I.L.C.

It would be relevant at this stage to consider some of the responses evoked by the work of the I.L.C. on State succession to

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[12] U.N. General Assembly, Thirtieth Session, Recommendation of the Sixth Committee, Agenda Item 109, Succession of States in Respect of Treaties, 12 December 1975, (A/10462), p. 2.

[13] Ibid., p. 3.

treaties.

D.P. O'Connell, while writing on the present state of State succession, in honour of the Centenary Celebration of the I.L.A., has observed that the I.L.C. has reinstated "in the most absolute and inflexible manner" the dichotomy between personal and dispositive treaties.[14] The I.L.C. has been charged with supporting this dichotomy with "precedents which are selected apparently with a view to proving the point, and without the ordinary scholastic techniques of evaluation of the evidence or clear statement of contradictory positions".[15] Moreover in deriving at the present position, the I.L.C. is said to have cited the old precedents of the independence of the United States, Latin American States, Belgium, Greece and Panama "as if they were qualitatively valid as the cases of the past ten years".[16]

It has also been expressed that this restoration of the old personal dispositive dichotomy is based upon broad propositions which the I.L.A. committee's report tends to contradict. For instance, the I.L.C. is said to have claimed that the majority of writers take the view, supported by State practice, that a newly independent State begins life with a clean slate, except in regard of "local" or "real" obligations. However the committee of the I.L.A. has found that

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[14] Professor Dr. Mart[redacted]bs, The Present State of International Law and Other Essays, The Netherlands, Kluwer, (1973), p. 333.

[15] Ibid.

[16] Ibid.

modern legal opinion "did not support this view even if one counted heads without evaluation".[17] It appears therefore that the draft proposals of the I.L.C. have not been found to be without fault.

Among the States, the Austrian Government has expressed approval of the provisional draft articles adopted by the I.L.C. because they represent basically a system which has already been propounded by Austrian jurists.[18]

Czechoslovakia has stated that the draft of the articles "reflects in its subject the current international practice, proceeds from the requirements of newly established States and is in harmony with the fundamental principles of current international law, particularly the principles of sovereign equality of States and self-determination of nations".[19] As such, it regards the draft articles as a good foundation for a future codification of the questions involved. The "clean slate" principle is also approved.

Denmark has urged the adoption of a legally binding convention on State succession to treaties. A convention rather than a non-binding code may serve more adequately to determine what shall be considered generally accepted rules of international law regarding succession to treaties and consequently a guide to all States.[20]

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[17] Ibid., p. 334.

[18] U.N. General Assembly, Twenty-Ninth Session. Item 88 of the Provisional Agenda - Observations of Member States on the Draft Articles on Succession of States in Respect of Treaties Adopted by the Commission at its Twenty-Fourth Session (A/9610/ADD.1) p. 2.

[19] Ibid., p. 3.

[20] Ibid., p. 5.

The comments of the Netherlands are of significance, the Netherlands being a former colonial government. It has expressed approval for the approach of the I.L.C. in attempting "to strike a balance between the well-recognized principle of self-determination of peoples and the facts of the legal nexus between the treaty regime and the State prior to its independence.[21] The Netherlands stresses that the fact of the legal nexus points to the desirability of continuance of such treaties as treaty partners of its predecessor. It goes on to suggest that certain general multilateral conventions of a world-wide application which embody important international law principles should escape the application of the "clean slate" principle. The Netherlands also s ggests that there be a presumption of continuity in the case of such conventions. The decision as to which conventions should be subject to a presumption of continuity should be made by the General Assembly or by the diplomatic conference adopting the text of the Convention in question.

It is observed that almost all the States which have submitted their comments and observations have voiced their opinions on the adoption of the clean slate principle by the I.L.C. Poland is no exception. It has expressed that the Commission rightly applied the "clean slate" principle in the case of newly independent States, as is required by the principle of self-determination of nations and sovereignty of States.[22]

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[21] Ibid., p. 12.

[22] Ibid.

Sweden is one country which has spoken critically of the work of the I.L.C. It states that the draft articles on newly independent States hardly solve the problem as the extent to which the treaties concluded by the predecessor States are still valid for States which have achieved independence since the Second World War.[23] Instead, the articles are said to tend to confirm the prevailing uncertainty on the subject. It suggests that it would be better to seek a separate solution to problems of treaty succession which are connected with decolonization; that is, "by an ad hoc settlement of an ad hoc situation".[24]

It criticises the non-obligation to succeed to the predecessor State's treaties and the right at the same time to establish its status as a party as prolonging the uncertainty regarding the new State's treaty relations instead of offering workable solutions. On the "clean slate" principle it says that although the I.L.C. considers the doctrine consistent with State practice, yet the commentaries of the I.L.C. show conflicting views which reflect that such State practice is far from consistent.

Sweden proposes that since the "clean slate" principle creates and maintains confusion as to the continuity of treaties of the predecessor State, it would be better to work on the principle that a new State continues to be bound by the treaties concluded by the

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[23] Ibid., p. 25.

[24] Ibid.

predecessor State. The application of such a principle would maintain stability and clarity in treaty relations. It goes on to suggest that the desire of the newly independent States not to be bound by the treaties of its predecessor could be satisfied by granting to these States an extensive right to denounce undesirable treaties. Furthermore it could also be provided that certain categories of treaties such as treaties of alliance and military treaties would not be binding on the newly independent States.

The United Kingdom reacted to the proposals by expressing doubts as to whether the right of self-determination confirms the "clean slate" principle. This was because the U.K. felt that weight had not been given to the many instances in which without controversy, the States concerned have continued to apply treaties after a succession of States. The U.K. also expressed that while a succession of States marks a time of change, it is usually in the interests of all States concerned to maintain as much of the essential fabric of international society as is consistent with the change. The U.K. does not appear to be in favour of the clean slate principle.[25]

The United States has expressed approval of the draft articles. It feels that the difficulties inherent in preserving a proper balance between continuity in international relationships on the one hand, and the necessities of an emergent State, on the other hand, have, to a large extent, been met in the proposed articles.[26]

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[25] Ibid., p. 33.

[26] Ibid., p. 37.