CHAPTER IV

PRACTICE OF THE NEWLY INDEPENDENT STATES UPON INDEPENDENCE

The treaties left behind by the colonial countries are very much a reality to the newly independent States. This chapter is devoted to a consideration of the practice of States regarding these treaties and to a consideration of the techniques employed to provide for the succession of the newly independent States to the treaties of their predecessor States. The two distinct techniques are the devolution agreement and the unilateral declaration of succession. The former is the more prevalent and will therefore be considered at greater length than the latter.

1. Devolution Agreements

(i) A General Survey

Devolution agreements have been defined as "those agreements between a new State and the State formerly responsible for its international affairs, whereby the former agrees to take the rights and obligations arising from treaties and other international agreements contracted for, or applied to, the territory of the new State by the latter".[1] Thus devolution agreements are those agreements entered into by the predecessor States, that is the colonial powers and the successor States, that is the newly independent States. They are agreements whereby the newly independent States agree to succeed to the rights and obligations arising under treaties

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[1] International Law Association, The Effect of Independence on Treaties, London, Steven and Sons, (1965) p. 191.

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arising under treaties entered into by the colonial power which has been ruling the State before independence. These agreements are entered into upon the granting of independence to the former colony or colonized State. The agreements have also been popularly termed 'inheritance agreements'.

As far as practice in the British Commonwealth is concerned, these agreements did not feature in the case of the older dominions such as Canada and Australia. The need for devolution agreements only grew with the granting of independence on a large scale to the former colonies. At this time it was realised that there was a need to consider the continued operation of international treaties entered into by the colonial power on behalf of its colonies.[2] This realization was precedented by Ireland's assertion of her own right to choose the treaties to which she intended to succeed. This was a deviation from the general practice of assuming obligations arising out of the treaties of the predecessor State. Such an attitude posed a potential threat to the constitutional integrity of the British Empire. Devolution agreements were therefore necessary to check the growth of such a threat.

French practice with regard to devolution agreements has been the reverse of the British pattern of practice. France employed

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[2] Okon Udokang, Succession of New States to International Treaties, New York, Oceana Publications, (1972), p. 187.

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these agreements to transfer her treaty rights and obligations to Morocco, Laos, Cambodia and Vietnam. However, in more recent times, this technique has not been used when independence was granted to her African colonies.

This technique of devolution of treaties has also been used by the Netherlands in granting independence to Indonesia. It has also been used by New Zealand in relation to Western Samoa and by Italy in relation to Somalia.

The earliest use of devolution agreements dates back to 1930. The first devolution agreement was entered into between the United Kingdom and Iraq. In 1946, a similar agreement was entered into between the United Kingdom and Jordan.

In 1947, devolution agreements were entered into between the U.K. and Ceylon and also between the U.K. and Burma. However, the texts of these agreements were different from those entered into by the U.K. with Iraq, and with Jordan. The devolution agreements between the U.K. and Iraq and between the U.K. and Jordan are straight-forward, unambiguious in terms and appear to be designed to achieve devolution without much quibble.[3] This may be explained by the fact that Iraq and Jordan were subjected to the League of Nations Mandated Regime. This status of theirs made it possible for a clear

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[3] O'Connell, "Independence and Succession to Treaties" in B.Y.I.L., Vol. 38, (1962) p. 119.

case of succession. Significance has also been credited to the abandonment of the formula "will take such steps as may be necessary to secure the transfer of these responsibilities".[4] These words appeared in the devolution agreements of Iraq and Jordan but were omitted in the devolution agreements of Ceylon and Burma.

Similar agreements with minor modifications have also been entered into by Malaya, Ghana, Cyprus, Nigeria, Sierra Leone, Jamaica and Trinidad. The devolution agreement entered into between Ghana and the U.K. in 1957 may be quoted here as a typical devolution agreement:

> "All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instruments shall henceforth, in so far as such instrument may be held to have application to Ghana, be assumed by the Government of Ghana.
> the rights and benefits enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to the Gold Coast [the former name of Ghana] shall henceforth be enjoyed by the Government of Ghana."[5]

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[4]Lauterpacht, "The Contemporary Practice of the United Kingdom in the field of International Law, in I.C.L.Q., Vol. 7, (1958) p. 525.

[5]Cmd. No. 345, U.N.T.S., Vol. 287, p. 238, Cited in Udokang, op.cit. N. 2, p. 189.

The terms of this agreement have been said to be the "evidence of the flexibility characterising the more recent agreements".[6] It has also been suggested that this agreement might have been drawn up with the deliberate object of giving the new State "sufficient leeway for freedom of action as to the type of treaties held, upon construction, to be binding upon the successor State".[7]

O'Connell, in analysing this agreement, questions whether the expression 'valid international instrument' means only such treaty as would bind the successor State under customary law.[8] If this were so then the devolution agreement achieves nothing. If it does not mean those treaties which would bind a successor State under customary international law, then it is doubtful what the expression could possibly mean.

Another question posed by O'Connell which the writer herself considers significant in the practical implementation of devolution agreements is: who is entitled to hold that such instrument 'has application to Ghana'? The wording of the agreement does not make it very clear that Ghana has the right to hold which instruments apply to Ghana.

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[6] Ibid., p. 188.

[7] Ibid., p. 189.

[8] O'Connell, op. cit., N. 3, p. 120.

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Other questions considered by O'Connell are: why are 'obligations and responsibilities' and 'rights and benefits' dealt with disjunctively? Why is the expression 'which arise from any valid international instrument' only used in clause (i)? Why is the expression 'in so far as such instrument may be held to have application to Ghana' confined to clause (i) and the expression 'in virtue of the application' used in clause (ii)? Why are instruments, so far as their obligations are concerned, held to have application to 'Ghana' while so far as rights are concerned, they arise from instruments having application to the Gold Coast?[9]

Having so analysed the agreement, O'Connell writes:

> "One might well conclude that the draftsman of these amazing documents was deliberately shelving the whole problem of succession and leaving the new States almost as much latitude for independent decision as customary law would have left them."[10]

In other words, the position would be no different if there had been no devolution agreement. It has also been found that it is this possibility of a wide interpretation of devolution agreements that has given rise to the contention that the new States gain rights and benefits by virtue of the devolution agreement, but at the same

[9] O'Connell, loc. cit.

[10] Ibid.

time, the new States have unlimited discretion to decide whether the obligations and responsibilities have application to them.

Such an interpretation may appear to put the new States in a comfortable position but O'Connell states that "from a jurispredential point of view, the interpretation is inherently anarchic".[11] The reason put forward is that similar rights in deciding whether a new State may become a party to treaties are not given to other parties contracting to the treaties concerned. This has the effect of undermining rather than sustaining the legal regimes. Such an interpretation also overlooks the fact that since so many of the African countries are ex-colonies, the problem of continuing treaty relations is more likely to arise between themselves than between them and the European countries. As such it is likely that a new State may find itself the claimant in one situation and the respondent in another, while recourse to treaty rights is being sought.

This has been counter-criticised as irrelevant in view of the fact that so far, no new State has in practice gone to the extent of invoking any provisions of the agreements as a legal justification for failure to fulfil a specific obligation incurred under a treaty acknowledged to have devolved upon it.[12] Moreover, the doctrine

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[11] Ibid.

[12] Udokang, op. cit., N. 2, p. 189.

that a State may not take the benefits of a treaty while denying the burdens prevents new States from playing fast and loose, as does the obligation to recognize executed treaty conveyances and international law created by 'law-making' treaties.[13]

However, even if one were to argue for a total devolution of treaty rights and obligations by virtue of the devolution agreements, it would be difficult to construct a treaty list which would be beyond controversy. Technical problems may arise in the application of treaties after independence. For example, in the case of the Warsaw Convention on Air Carriage the problem faced is whether it applies also to the new States which were not themselves signatories to the Convention or does it apply only to those States which had actually signed the Convention. It has been held in PHILIPPSON v. IMPERIAL AIRWAYS LTD.[14] that the expression 'High Contracting Parties' in the Convention means signatories. As far as the newly independent States are concerned, the question still remains unsettled. These then are general considerations concerning devolution agreements. It is necessary to consider further the legal effects of these agreements.

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[13] Lester, "State Succession to Treaties in the Commonwealth" in I.C.L.Q., Vol. 12, (1963) p. 503.

[14] [1939] A.C. 332.

(ii) The Legal Effects and Significance of Devolution Agreements

The predecessor State and the newly independent State agree, by means of the devolution agreement, that all treaty rights and obligations of the former devolve upon the latter. However, such an agreement has not always been accepted at face value. Popular as the technique of devolution agreement may be, it is necessary to consider the legal effects, significance and the validity of such agreements in order to place devolution agreements in the proper perspective in international law. It is also to be noted that the devolution agreements not only concern the predecessor States and successor States but also third States because these States have rights and obligations under the same treaties. Hence it is also necessary to consider the effects of these agreements in relation to third States.

The validity of such devolution agreements has been questioned by the newly independent States. The devolution agreements, they argue, are voidable. Professor Bartos is of the view that devolution agreements are voidable, the reason being that they were entered into under conditions of duress, or at least, undue influence.[15] Some States have looked upon these agreements as a form of coercion, especially as a form of political and economic coercion. The devolution agreements have been regarded as the price paid to the former

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[15] Keith, "Succession to Bilateral Treaties by Succeeding States", in A.J.I.L., Vol. 61, (1967) p. 541.

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sovereign for their independence.[16] As such it has been felt that the validity of such agreements cannot be sustained.

Another reason given for alleging the voidability of devolution agreements is that often the signatories to the agreement do not adequately represent the people. The newly independent countries also value very strongly the right of self-determination. In relation to this, it has been argued that if these devolution agreements continue to limit the sovereignty of the newly independent State in such a way that the relationship created does not differ from the former colonial relationship, then such agreements violate the rules of international law which"prohibits colonialism in all its forms and manifestations and is therefore void and voidable."[17] It has been suggested that by necessary implication the newly independent States have categorised devolution agreements as "unequal treaties" which they regard as void ab initio, on the ground that they are calculated to enshrine and protect the 'predatory interests' of the colonial powers.[18]

With regard to the argument that these agreements have been secured under coercion and duress, it would be useful to consider this matter in the context of treaty law. The Communist States

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[16] G.A.O.R., 23rd Session, Supplement No. 9 (A/7209/REV.1) p. 28, Cited in Udokang, op. cit., N. 2, p. 220.

[17] Ibid.

[18] Ibid.

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consider treaties not concluded on the basis of sovereign equality of the parties as invalid. Western jurists have opposed this doctrine on the ground that it is too vague. However, the newly independent States have considered this principle as entirely just.[19]

Specifically the question of coercion has been covered in Article 52 of the Vienna Convention on the Law of Treaties, 1969. Article 52 provides:

> "A treaty is void if its condition has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".[20]

The essence of treaties is their consensual quality. It is here that the question of duress is relevant. It has been noted that duress strikes at the crux of policy issues and this topic has been hotly debated at the Vienna Convention.[21] The wide considerations which arise can be further seen from the fact that the problem of treaties imposed by force is "... in its essence not a problem of treaty law, but a particular aspect of the much wider problem which pervades the whole system, that of subordinating the use of force to law".[22]

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[19] W.E. Holder and G.A. Brennan, The International Legal System, Sydney, Butterworths, (1972) p. 724.

[20] Ibid.

[21] Ibid., p. 725.

[22] Brierly, The Law of Nations, Waldock, (1963) p. 319.

It is to this end that Article 52 is directed. But Article 52 seems to be restricted only to the use of force or to a threat of force. Some newly independent States have expressed that "coercion other than armed force and in particular economic pressure should have been specifically included".[23] Hence they sought an amendment to this effect.

However, this was not a view shared by all the States. Objecting to the proposed amendment, Australia expressed that in seeking the amendment what was sought to be done was "what the [U.N.] Charter had not done, what the General Assembly could not do, and what the International Law Commission had not attempted to do".[24] Hence the new States were not successful in securing the amendment. As such, Article 52 cannot be relied upon to invalidate devolution agreements on the grounds of coercion. To date, no State is known to have become a party to a devolution agreement by threat or use of force so as to cause the agreement to fall within the scope of Article 52 of the Vienna Convention on the Law of Treaties, 1969.

Although the grounds of the invalidity of treaties have been limited only to an open and manifest threat or use of force, it is evident that some of the newly independent State would prefer it to

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[23]Holder and Brennan, loc. cit.

[24]G.A.O.R., 1st Session (1968) p. 282. Cited in Holder and Brennan, Ibid.

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be otherwise. These States have to be satisfied, for the time being, with a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties.

On the other hand, there are some other States which are of the view that some of the earlier devolution agreements might be regarded as part of the price of independence but later agreements seem to have been entered into for the purpose of avoiding the risk of a total gap in the treaty relations of a newly independent State, and at the same time for the purpose of recording the former sovereign's disclaimer of any future liability under its treaties in respect of the territory concerned.[25]

Although the existing rules of international law, especially on the law of treaties, may not outrightly invalidate devolution agreements, it does not necessarily follow that these agreements are legal and bind all parties. The agreements seem only to make provision for the predecessor and successor States: nothing appears to be mentioned in relation to third States who have been parties to the treaties of the predecessor State, for the devolution of which,provision is made in the devolution agreement.

Although a devolution agreement may purport to assign treaty rights and obligations of the predecessor State to the successor

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[25] 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. 20.

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State, it does not necessarily follow that third States are also bound by such an assignment. In international law the rule clearly seems to be that an agreement by a party to the treaty cannot bind any other party without the latter's consent.[26] The institution of assignment which is found in some municipal systems by which under certain conditions contractual rights can be transferred without the consent of the other party is not recognized in international law. Therefore the predecessor State purporting to transfer these treaty rights and obligations to the new State cannot by the same agreement seek to bind third States. It is no wonder that there are no provisions on the assignment of treaty rights and obligations in the Vienna Convention on the Law of Treaties, 1969. As such the devolution agreement is an instrument which, as a treaty, binds only the predecessor State and successor State and its direct legal effects are necessarily confined to them.[27]

Following this argument, it is clear that although the legal effects of the devolution agreements are that the predecessor State is relinquished of rights and obligations in respect of the territory forming the new State, the agreement does not in itself and of its own force bind the third States to maintain treaty relationships with successor States. Since third States are not automatically bound to maintain treaty relations with the successor

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[26] _Ibid._, p. 17.

[27] _Ibid._

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States by virtue only of the devolution agreements, it is questionable therefore how effectively these agreements provide for the succession of treaties by successor States. The I.L.C. is of the view that "... however wide may be the language of a devolution agreement and whatever may have been the intention of the predecessor and successor States, the devolution agreement cannot of its own force pass to the successor State any treaty rights of the predecessor State which would not in any event pass to it independent of that agreement".[28]

Accordingly, Lauterpacht proposes that the significance of devolution agreements in relation to third States is that a devolution agreement constitutes an offer by the new State to the third States, to remain bound, subject to certain conditions and limitations, by the commitments of its predecessor State.[29] If the third States accept such an offer, in effect, a new and unwritten treaty in terms similar to those concluded by the predecessor State is thereby entered into. However, it has been pointed out by another writer that a devolution agreement can only constitute an offer if it is "sufficiently definite to be capable of acceptance".[30] If lists of applicable treaties are annexed to the agreements, then the offer is definite and capable of acceptance. If however this

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[28] _Ibid._, p. 18.

[29] Lauterpacht, _op. cit._, N. 4, p. 529.

[30] Lester, _op. cit._, N. 13, p. 505.

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is not the case, the effect of the devolution agreement in relation to third States is questionable.

Lauterpacht is of the view that even if a devolution agreement were to be regarded as constituting an offer which a third State may accept, there are yet other problems. For example, Article 2(1)(a) of the Vienna Convention on the Law of Treaties defines a treaty as an international agreement concluded between States in written form. As such, he is of the view that current international law only recognizes written treaties. The status of an unwritten, oral treaty therefore would become questionable. Lauterpacht writes that "[in] those circumstances it might be difficult to regard the relationship between the third State and the new State as a treaty".[31]

However, Lauterpacht s deduction from Article 2(1)(a) of the Convention that current international law seems only to recognize written treaties is questionable. This is in view of the fact that Article 3 of the same Convention provides that the fact that the Convention does not apply among others, to international agreements not in written form shall not affect the legal force of such agreements. Hence it would appear that an unwritten treaty entered between a successor State and a third State, may for all intents and purposes, be legal and may be recognized under international law.

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[31]Lauterpacht, loc. cit.

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Another problem which has been foreseen to arise is in relation to Article 102 of the U.N. Charter which provides for the registration of agreements by the Secretary-General. It is pointed out that "the existence of a series of 'renovated' relationships based upon the tacit acceptances by third States of inheritance agreements would appear to defy registration."[32]

Another writer is of the view that "there is sufficient basis for the application of ordinary contract rules to yield the proposition that burdens, as distinct from benefits cannot be imposed upon third States in the absence of their consent".[33] On the other hand, the problem may be overcome by novation. Novation which may be express or tacit, can create a treaty nexus between the new State and third States. Thus if a successor State notifies a third party signatory that a treaty has devolved upon it and the third State acknowledges this affirmatively, a novation of the treaty has occured.[34] Novation may also be implied if a third State continues to exercise rights and discharge obligations under a treaty said to have devolved upon the new State.

However, one problem which might be encountered here is the case of third States which tend to do nothing. The problem is

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[32] Ibid.

[33] O'Connell, op. cit., N. 3, p. 124.

[34] Ibid.

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whether [illegible] affected with [illegible] constitute [illegible] consent.

On the other hand, [illegible] original [illegible] **Reservations to the Genocide Convention** case[36] [illegible] view. The Court [illegible] "incompatible reservation" [illegible] party to the treaty. [illegible] to an incompatible reservation [illegible] consent to such a reservation.

In this case, it would be possible to argue theoretically that a State which is affected with notice of a devolution agreement has brought about a novation by its failure to object within a reasonable time.[37] The [illegible] of this argument, however, [illegible]

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35 *Ibid.*

36 I.C.J. Reports [1951] p. 15.

37 O'Connell, *op. cit.*, [illegible] 3, p. 127.

whether "mere silence on the part of the third State affected with notice of the devolution agreement is sufficient to constitute novation".[35] Lauterpacht is of the view that it is difficult to construe mere silence on the part of third States as consent.

On the other hand, a presumption of novation could operate against a third State which refrains from taking a stand by virtue of the doctrine of tacit consent which appears now to be playing an increasingly important role in treaty-making. The RESERVATIONS TO THE GENOCIDE CONVENTION[36] CASE has been cited in support of this view. The Court in that case was willing to make great allowance for tacit consent to reservations by which the author of an "incompatible reservation" may be regarded by the signatories as a party to the treaty. Mere silence on the part of the signatories to an incompatible reservation was taken to amount to consent to such a reservation.

On this basis, it would be possible to argue theoretically that a State which is affected with notice of a devolution agreement has brought about a novation by its failure to object within a reasonable time.[37] The drawback of this argument, however, is the lack of

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[35] Ibid.

[36] I.C.J. Reports [1951] p. 15.

[37] O'Connell, op. cit., N. 3, p. 127.

machinery to communicate these agreements to third States. It is suggested that the successor States should therefore serve copies of the devolution agreements on third States. However, successor States may not be willing to do so because in so doing they would be estopped from denying succession to treaties. Consequently third States might well argue that since the successor State itself is unwilling to admit an assignment of or succession to specific treaties, "notice of a devolution agreement can hardly be regarded as achieving a novation".[38]

To every argument there appears to be a counter-argument. It does not appear as if there can be a single solution to the problem of the legal implications of devolution agreements on third States. However, it appears to be a consensus among writers that these agreements cannot be regarded as transmitting rights and obligations arising from the treaties of the predecessor State to the successor States in the absence of consent from third States. The significance of this consent may be seen from Lord McNair's reference to the devolution agreements of India and Pakistan in relation to which he said:

> "... it is not difficult to imagine circumstances in which a State might be quite willing to contract obligations of a certain character with the old India but not with the new India or Pakistan alone".[39]

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[38] Ibid.

[39] McNair, The Law of Treaties, (1961) p. 650, Cited in Udokang, op. cit., N. 2, p. 222.

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Van Panhuys has used the concept of recognition in international law in support of the presumption of novation of treaties in relation to third States. His view is that novation may be presumed when a new State is recognized by third States.[40] This seems logical but in view of the fact that recognition is really a political act, it may be difficult to assess its relevance in determining the legal significance of devolution agreements.

(iii) State Practice

It may be possible to draw up a whole system of rules concerning the legal effects of devolution agreements. But international law being a living subject and being a system of law which evolves through the consensus of States, it is necessary then to consider such rules together with State practice.

Among those States which have become parties to devolution agreements are Burma, Ceylon, Cyprus, Ghana, India, Indonesia, Iraq, Jamaica, Jordan, Laos, Federation of Malaya (now Malaysia), Morocco, Nigeria, Pakistan, Sierra Leone, Trinidad and Tobago, Vietnam and Western Samoa.

India, upon independence notified all the States with which British India had treaty relations that she would continue to honour those treaties. She still relies on some of the treaties which were negotiated before independence on her behalf by the U.K. In 1956,

[40] *Ibid.*, p. 221.

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forty-five extradition treaties which had been concluded before 1947 were still known to be in force.[41] India's controversy with China over Tibet and other border areas brought the question of India's succession to British India's treaties into the limelight. India has claimed succession to the boundary treaties concluded between the U.K. and China. In the course of the dispute with China, she clearly stated that she inherited all the treaties of British India.

Pakistan succeeded to the treaties of British India by virtue of the Indian Independence (International Agreements) Order, 1947. In practice, Pakistan has never challenged the validity of this Order.[42] However, the Supreme Court of Pakistan in YANGTZE (LONDON) LTD. v. BARLAS BROTHERS (KARACHI)[43] held that the Order was incapable of achieving devolution without the consent of the other parties. This decision has been criticised because not only has Pakistan claimed succession to treaties by virtue of this Order, but the Order is also binding on the Court because of its legislative form.

In practice, some States consider themselves parties to multilateral treaties by virtue of their devolution agreements. For example, Pakistan clearly referred to the Indian Independence

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[41] International Law Association, op. cit., N. 1, p. 93.

[42] Ibid., p. 193.

[43] Pakistan Legal Decisions [1961] p. 573.

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(International Agreements) Order, 1947 when accepting the terms of the Hague Convention on Conflict of Nationality Laws and on signing the protocol amending the 1923 Convention on the Suppression Obscene Publications. Yet on many occasions, States have given notice that they are bound by multilateral agreements concluded by the predecessor State, without mentioning their respective devolution agreements. For instance, Indonesia gave notice that she considered herself bound by the Berne Copyright Convention, by the convention on the Protection of Industrial Property and by the Load Mine Convention of 1936 but no reference was made to the inheritance agreement concluded between her and the Netherlands. This duality of practice makes it difficult to evaluate the significance of devolution agreements in the succession of States to treaties. It cannot generally be assumed that newly independent States succeed to the treaties of their predecessor States by virtue of their devolution agreements.

This problem is further complicated by the fact that States which have not entered into devolution agreements have regarded themselves bound by multilateral conventions concluded on their behalf by the predecessor State prior to independence. The Sudan, for example, gave notice to the Secretary-General of the U.N. in 1957 that she considered herself bound by the accession made on her behalf in 1926 to the Slavery Convention. This tends to throw doubt on any generalisation that the States parties to devolution agreements succeed to treaties by virtue of such agreements alone.

Newly independent States have also been found to react differently to one particular convention. Pakistan has declared herself a party to the Warsaw Convention while Cambodia, Laos and Vietnam "went through the process of adhesion as if they were entirely new contracting parties".[44] In 1957, Ghana claimed to have succeeded to ten I.L.O. Conventions, while Malaya succeeded to seven, Cyprus to ten and Nigeria to fifteen of them. It can be seen therefore, that although these countries are parties to devolution agreements, their practice is by no means uniform.

Moreover, the States which have entered into devolution agreements do not consider themselves bound by all the treaties and obligations of their respective predecessor States. For instance, the U.K. concluded seventy-eight multilateral and two-hundred and twenty-two bilateral treaties on behalf of Nigeria. In 1960, Nigeria entered into a devolution agreement with the U.K. But when in 1965, Nigeria published a list of treaties to which she claimed succession, it was found that only forty-eight treaties were listed, out of which seven were bilateral treaties. Thus the devolution agreement does not appear to have the effect of causing the successor State to succeed to all the treaties of its predecessor.

The practice and position of the U.K. with regard to devolution agreements does not seem very consistent. In 1961 the U.K. advised

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[44] Lauterpacht, op. cit., N. 4, p. 528.

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Nigeria that its devolution agreement would suffice to establish Nigeria as a separate party to the Warsaw Convention. Nigeria accepted this advice. However, Nigeria subsequently refused to regard her devolution agreement as committing her to all the obligations of the U.K. under certain extradition treaties. But of greater significance is the fact that the U.K. advised Burma differently in regard to the same Warsaw Convention.[45]

The legal significance of devolution agreements in relation to bilateral treaties is even more questionable if State practice is considered. States do not appear to recognize the continuance in force of each and every treaty. They reserve the right to make their intentions known with respect to each particular treaty.[46] The Government of Indonesia, in particular, has taken this stand and no objection has been made by the States directly affected, namely, the Federal Republic of Germany and the U.K.[47]

Ghana has expressed that her devolution agreement is evidence of her willingness to continue U.K.-U.S. treaties in force but in her correspondence with the U.S., Ghana has reserved a certain liberty to negotiate on the continuance of any particular clause or clauses of existing treaties.[48] Similarly Nigeria also has reserved for herself extensive powers to decide on the categories of treaties which should continue in force.

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[45] International Law Commission, _op. cit._, N. 25, p. 19.

[46] _Ibid._, p. 19.

[47] _Ibid._

[48] _Ibid._, p. 20.

While considering State practice in regard to devolution agreements, it would be useful to take into consideration the practice of third States in order to assess the actual significance of devolution agreements to the new States.

Thailand, which entered into treaties with the U.K. and France (which had signed those treaties on behalf of Burma, Malaya and Laos) is an important third State in this respect. Thailand is of the view that devolution agreements are ineffective in transferring rights and obligations under treaties to a successor State. Thailand has expressed that third States cannot be bound by these agreements as they are res inter alios acta.[49] As a result, Thailand does not consider as surviving, a 1911 Extradition Agreement between Burma (concluded on her behalf by the U.K.) and Thailand. This agreement has been renegotiated by the two parties.

The U.K., when in the position of a third State, has declined to attribute any automatic effect to devolution agreements. This can be seen from her reaction when informed by Laos that the latter considered the Anglo-French Civil Procedure Convention, 1922 as continuing to apply between Laos and the U.K., by virtue of the devolution agreement between Laos and France. The U.K. agreed that the two nations should be parties to the Convention but said that she wished it to be understood that the Convention continued to apply not by virtue of the Franco-Laotian Treaty of Friendship of

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[49] International Law Association, op. cit., N. 1, p. 192.

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1953 but because the U.K. and Laos had agreed that the Anglo-French Civil Procedure Convention should continue in force as between the U.K. and Laos.[50]

The practice of the United States as a third State in regard to devolution agreements is to enter all treaties of the predecessor State affecting the U.S. into the U.S. Treaties in Force Series if there is a devolution agreement entered into between the predecessor and successor States. The I.L.C. reports that the U.S. treats devolution agreements as acknowledgements in general terms of the continuance in force of agreements which justifies the making of appropriate entries in its Treaties in Force Series.

The practice of the U.S. has been interpreted as an indication of the presumption of continuity where a devolution agreement exists, irrespective of whether the U.S. receive a communication from the new States or not.[51] On the other hand, the I.L.C. says that "the U.S. does not seem to regard the devolution agreement as conclusive of the attitude of newly independent States with respect to individual treaties, nor its own entry of an individual treaty against the name of the new State in the Treaties in Force Series as doing more than recording a presumption or probability as to the

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[50] International Law Commission, op. cit., N. 15, p. 19.

[51] O'Connell, op. cit., N. 3, p. 125.

continuance in force of the treaty vis a vis that State".[52] The I.L.C. also observes that it is the practice of the U.S. to seek clarification of the newly independent State's intentions and to arrive at a common understanding with it in regard to the continuance in force of individual treaties.

It is submitted that even if the U.S. were to treat the presumption of continuance in force of treaties as irrebutable and as being of legal force, the law on this point remains unsettled and therefore is necessary to have regard to the attitudes of the newly independent States. In view of the fact that these new States have not adhered closely to the list of treaties covered by the devolution agreements when selecting those to which they wish to acknowledge succession, it is difficult to see how the proposition of a presumption of general succession based on the existence of devolution agreements can be successfully maintained.[53]

The practice of the Secretary-General of the U.N., as depository of multilateral conventions can also throw light on the significance and role of devolution agreements in State succession. The Secretary-General acts as a depository for international conventions which are concluded under the auspices of the U.N. The practice of the Secretary-General is to send every new State a list of multilateral treaties of which he is the depository and to which the predecessor

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[52] International Law Commission, loc. cit.

[53] Udokang, op. cit., N. 2, p. 222.

State was a party. The new State is asked to declare its attitude towards these treaties.[54] Initially the Secretary-General attributed largely automatic effects to devolution agreements. Today they are regarded by the Secretary-General more as a declaration of intention. Hence a new State is not treated as a party to a multilateral Convention unless it has confirmed that this is in accordance with its intention.[55]

When counting the number of States parties to a Convention in order to determine whether a Convention has been brought into force, the devolution agreement is not regarded as sufficient evidence to constitute a State as party to the Convention. This is because the Secretary-General of the U.N. does not receive the devolution agreements in his capacity as depository of multilateral treaties but as registrar and publisher of treaties under Article 102 of the U.N Charter. Hence there must be specific notification or manifestation of the will of the new State in order to establish that newly independent State as a party to the particular treaty. One writer points out that in determining whether a new State is a party to the treaty, the depository gives consideration to the nature of the treaty, if necessary from the travaux preparatoires and

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[54] International Law Commission, op. cit., N. 25, p. 18.

[55] Ibid.

from practice before reaching a conclusion.[56] In deciding whether a new State is entitled to be a party to an amending protocol, the Secretary-General, as depository, is guided "by the previous practice, the existence of a devolution agreement and the attitude of the new State itself towards the convention, the latter being decisive".[57]

Hence it can be seen that the devolution agreement is only one element in determining whether a new State is a party to a convention or treaty. It does not, by itself, bind a new State to a convention or treaty entered into on its behalf by its predecessor.

(iv) Conclusion

State practice with regard to devolution agreements is inconsistent. The existence of devolution agreements does not appear in any way to have brought about any uniformity or consistency of practice among the States which have entered into devolution agreements. Therefore, although the use of devolution agreements is widespread and extensive and these agreements have a role to play in the succession of States to treaties, it would be farcical to suggest that these agreements legally bind the new States to the treaties of their predecessor States. However, the role of these agreements in the growth and development of the newly independent States and in the maintaining of stability in international law should not be under-rated.

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[56] O'Connell, op. cit., N. 3, p. 128.

[57] Ibid., p. 129.

As far as the newly independent States are concerned, the devolution agreements form a bridge between the past and the present. The "bridge" is perhaps all the more acceptable to the newly independent States because they do not automatically and legally bind these new States. This gives the newly independent States more leeway and freedom of action. While one writer describes one of the legal effects of devolution agreements as "assisting the parent State to rid itself of any of its obligations in respect of its former dependent territories",[58] it may well be said that the newly independent States have used devolution agreements more as a convenience, crediting no legal effect to them and yet claiming rights and agreeing to undertake obligations arising from the treaties of their predecessor States when it is convenient.

More positively, the devolution agreements have the advantage of assisting the newly independent States "in focusing the attention of the new States upon the need to clarify the range and extent of their treaty commitments".[59] As such, the newly independent States can use their devolution agreements as a starting point from which to launch into the direction they choose. The newly independent States, newly entering the international arena and managing their domestic affairs, need the treaties of their predecessor States to guide them and also to act as a stabilising force. The validity

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[58] Keith, loc. cit.

[59] Lauterpacht, op. cit., N. 4, p. 530.

of this statement may be attested by the fact that the newly independent States do not usually renounce all the treaties of their predecessor States but succeed to at least some of the treaties. This arises from the need to maintain some form of continuity and to avoid a gap in the area of treaties because they are an important feature in the economic life of the newly independent nations.

Although devolution agreements have a significant role to play, State practice and other principles of international law do not permit the conclusion that these agreements create legal ties between the newly independent States and third States. This appears to be the present position of the law. It is with regard to all these factors that the I.L.C. in its draft articles has proposed in Article 7(1) of its provisions:

> "A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties in consequence only of the fact that the predecessor and successor States have concluded an agreement providing that obligations and rights shall devolve upon the successor State".[60]

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[60] International Law Commission, op. cit., N. 25, p. 16.

2. Unilateral Declarations of Succession

Among the States which have made unilateral declarations of succession are Tanganyika, Uganda, Kenya, Malawi, Bostwana, Lesotho and Nauru. These States, unlike the other newly independent States, have not entered into devolution agreements with their colonial masters. Instead, as far as succession is concerned, these States have made unilateral declarations that they would succeed to the treaties of their predecessor States.

Tanganyika is one of the States which has adopted this mode of succession. She had received advice that if she entered into a devolution agreement with the U.K., it would mean that third States would be able to call upon Tanganyika to perform treaty obligations from which it would otherwise have been released upon independence. Further, the devolution agreement would not by itself suffice to enable Tanganyika to call upon third States to perform their obligations arising under treaties concluded on her behalf by the U.K.[61]

On this basis, Tanganyika refused to enter into a devolution agreement with the U.K. Instead, she declared to the U.N. that as far as bilateral treaties were concerned, she would continue to apply these for two years. However, Tanganyika stipulated that such application should be on the basis of reciprocity. At the end of the two years, treaties which could not by application of the

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[61] *Ibid.*, p. 21.

customary rules of international law be considered as continuing would be considered terminated.[62] Tanganyika desired this moratorium to conduct negotiations with the States concerned to reach a satisfactory accord on the possibility of continuing the application of the treaties. Tanganyika, however, admitted that she could not do the same in the case of multilateral conventions. She would review them individually to determine her position in relation to the conventions. However, during this interim period any party to a multilateral convention could, on the basis of reciprocity, rely on the terms of the Convention as against Tanganyika.[63] Thus during this period, third States parties to a particular convention could treat Tanganyika as a party to the Convention.

This attitude of Tanganyika which was adopted upon independence in 1961 was followed by similar declarations by Bostwana in 1966 and Lesotho in 1967.[64]

Uganda's declaration in 1963 showed the application of a single procedure for the provisional application of both multilateral and bilateral treaties.[65] It did not distinguish between the two as had been done by Tanganyika. Uganda also adopted a two-year

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[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid., p. 22.

moratorium period.

Kenya also made a declaration similar to that made by Tanganyika, to the Secretary-General of the U.N. but its declaration provided that it would not prejudice either the existing territorial claims of Kenya against third parties or rights of a dispositive character vested under certain international treaties or administrative arrangements which constituted agreements.[66]

It is difficult to define the status of these declarations. This is because they are not sent to the Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the U.N. Charter. The nations sending them have not asked for their registration or filing and recording under the relevant General Assembly resolutions.[67] Neither are these declarations sent to the Secretary-General in his capacity as depository of multilateral treaties.

The I.L.C. has concluded that the unilateral declarations seem to be sent to the Secretary-General on the basis that the Secretary-General is an international organ entrusted with functions concerning the publication of acts relating to treaties or perhaps as a convenient diplomatic channel of notification of declarations to

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[66] Ibid.

[67] Ibid., p. 24.

all member States of the U.N.[68] In this respect the unilateral declarations differ from devolution agreements which are mostly registered by the Secretary-General of the U.N., under Article 102 of the U.N. Charter.

Another distinguishing feature is that the declarations are addressed directly to the third States. In contrast, devolution agreements are made between the predecessor and successor States but make no reference to third States.

However, despite the fact that the declarations are addressed directly to third States, these declarations are unilateral. Herein lies the snag: treaties cannot depend on the will of one State alone. The declarations can only have legal effect if there were a recognized rule of international law giving newly independent States a right of provisional application to the treaties of their predecessors.

As in the case of devolution agreements, the unilateral declarations also provide a starting point for the newly independent States in regard to treaties and relations with other States forming the international community. The I.L.C. suggests that the legal effect of these declarations is to "furnish bases for a collateral agreement in simplified form between the newly independent States and the individual parties to the predecessor's treaties for

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[68] Ibid.

for provisional application of treaties after independence".[69]

Devolution agreements tend to limit the freedom of choice and action in regard to treaties to which the new States wish to be parties. They curb the right which a sovereign State possesses in the assumption of contractual obligations.[70] At the same time if the use of these agreements were to be totally abandoned and no formal declaration made with regard to rights and obligations arising from treaties entered into on behalf of these States, this would create the danger of a gap in treaty relationships. Moreover, bearing in mind the position of the newly independent States, it might affect their economic and political stability. As such, unilateral declarations of succession appear to be a compromise between these two extreme positions.

However, these unilateral declarations have as their foundation the 'moratorium' or 'temporising' technique. This is not an absolutely foolproof technique. Generally, the period of time claimed by the newly independent States is two years. This length of time may not allow for a complete review of all the treaties.[71] As such the new States would be estopped from denying that their treaties have lapsed.

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[69] Ibid.

[70] Udokang, op. cit., p. 128.

[71] Ibid., p. 201.

This technique has also been criticised on the ground that it reserves to the successor State the right to pick and choose.[72] It appears as if the third States have no rights in this matter. Moreover, this technique does not in any way aid the development of a legal basis or criteria upon which heritable and non-heritable treaties may be determined.[73]

But the most harsh consequence of this technique is the uncertainty which characterises it. Any extension of the moratorium period would create much uncertainty and leave third States in a very difficult position. Ultimately the success of this technique depends on the attitude of third States. Opposition from third States would put this system in a very shaky position and this would in turn affect the future of the newly independent States.

Article 8(1) of the draft articles of the I.L.C. covers unilateral declarations of succession. It provides as follows:

> "A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of succession of States do not become the obligations or rights of the successor State or of the other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for continuance in force of treaties in respect of its territory."[74]

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[72] Ibid.

[73] Ibid.

[74] International Law Commission, op. cit., N. 25, p. 20.

Thus it would appear that while unilateral declarations of succession to treaties are an alternative to devolution agreements, their legal significance is just as limited as that of the devolution agreements, if not more so. However, their main value is that they bridge the chasm which might otherwise result between the past and the present of the newly independent States.