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### TOWARDS A NEW PERCEPTION OF SUCCESSION OF STATES IN RESPECT OF MULTILATERAL TREATIES

*The author analyzes the very complex issue of succession of States in respect of human rights multilateral treaties by challenging the automatic succession rule. The analysis focuses on both theoretical perceptions of the automatic succession and its application in practice. In that regard, the article provides for a detailed analysis of not only the relevant jurisprudence of the International Court of Justice and its predecessor the Permanent Court of International Justice, but also the practice of States as regards the rule embodied in Article 34 of the Convention on Succession of States in Respect of Treaties. He devotes proper attention to events relating to the dissolution of the USSR, Czechoslovakia and the former Socialist Federal Republic of Yugoslavia. The article further examines the relationship between automatic succession and notification of succession since the two concepts seem to be mutually exclusive. However, it also questions the most important argument in favour of the automatic succession rule – the claim that its absence would undermine stability and certainty in the international community.*

Key words: *Succession of States in respect of multilateral treaties. Automatic succession. Successor State. International Court of Justice. Notification of succession.*

The paramount importance of multilateral treaties, especially human rights treaties within the international legal system, has generated extensive discussions on the impact of territorial changes on their validity *vis-à-vis* successor States.

The discussion was concentrated on *pro et contra* the automatic succession principle, as alleged by the only legal means of ensuring stability and certainty in treaty relations. It appears that such approach was

simplistic, based on the specific perception of the succession of multilateral treaties.

A different perception of the essence of succession offers scope for the construction which safeguards the application of substantive provisions of general multilateral treaties expressing interests of the international community as a whole, on the one hand, and protects the interests as well as practice of the successor States, on the other, outside the framework of automatic succession.

## 1. THEORETICAL VIEWS

The theory of automatic succession of treaties is not new. It is basically a *ratione materiae* narrowed projection of the oldest theories of succession of States, based on the strict analogy with the notion of inheritance in civil law and the concept of legal succession (substitution + continuation) according to which “(d)er Nachfolger des Volkerrechts aber tritt im Rechte und Pflichten seines Vorgängers so ein als wären es seine eigenen.”<sup>1</sup>

In a new, modified form it emerges in the pronouncements of various UN human rights bodies during the 1990ies of the last century. *Exempli causa*, the Human Rights Committee at its session in March/April 1993 declared that “all peoples within the territory of a former State party to the Covenant (International Covenant on Civil and Political Rights – M.K.) remained entitled to the guarantees of the Covenant and that, in particular, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan and Uzbekistan were bound by the obligations of the Covenant as from the dates of their independence”.<sup>2</sup> Similar terms were couched in a declaration with regard to Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia.<sup>3</sup> Kamminga, one of the protagonists of automatic succession of human rights treaties says, trying to explain the special position of human rights treaties, says: “From policy point of view, its importance lies in the fact that massive human rights violations often occur precisely during the period of political instability which tends to accompany State succession. In such circumstances there is an urgent need to know the precise extent of the international obligations which are incumbent on the successor State”.<sup>4</sup>

<sup>1</sup> H.M. Huber, *Beiträge zu einer Lehre von der Staatensuccession*, Berlin 1897, 14.

<sup>2</sup> UN Doc. A/49/40, para 39.

<sup>3</sup> *Ibid.*, para 48.

<sup>4</sup> M. Kamminga, “State Succession in Respect of Human Rights Treaties”, *European Journal of International Law (EJIL)* 7/1996, 470.

These and similar declarations and considerations are rather a statement of policy<sup>5</sup> or a plea for the establishment of automatic succession as regards human rights treaties, than a legal argument supporting its existence in terms of positive international law.

The argument that possesses some credibility in legal terms seems to be a doctrine of acquired rights, according to which “rights granted under human rights treaties are not affected by state succession...”<sup>6</sup> For “As a matter of fact private rights may consist not only of property rights...”<sup>7</sup>, and the doctrine of acquired rights “applies *a fortiori* with respect to human rights”.<sup>8</sup>

The only legal means by which the principle of acquired rights might be extended to human rights is an analogy, for, as Kamminga correctly states, private rights may consist not only of property rights “as a matter of fact”. Not as a matter of law as it stands.

Analogy *in concreto* involves reference to the opinion of the Permanent Court of International Justice in the case of German Settlers in Poland. In its advisory opinion the Court stated *inter alia*: “Private rights acquired under existing law do not cease on a change of sovereignty. No one denies the German civil law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that although the law survives, private rights acquired under it perished...”<sup>9</sup>

The extension of the opinion of the Court as regards acquired rights to human rights appears to be a complicated matter.

Apart from inherent controversies of the very notion of acquired rights<sup>10</sup> some intrinsic requirements needed to be met for the application

<sup>5</sup> In that regard it should be noted that after the presentation of her report the President of the Human Rights Committee, Professor Rosalyn Higgins, drew attention to the fact that the mere presence of the Bosnian delegation was a proof in itself, independently of any formal notification of succession, that Bosnia and Herzegovina was automatically bound by the Covenant from the date of its independence. CCPR/C/SR.1200, 9 November 1992, 5, s. 14). In fact, Bosnia and Herzegovina issued subsequently, on 1 September 1993, notification of succession as regards the Covenant on Civil and Political rights. Even more importantly, notifications of succession of Bosnia and Herzegovina were not couched in terms of automatic succession. In its notification of succession of 29 September 1992, Bosnia and Herzegovina stated: “The Government of the Republic of Bosnia and Herzegovina having considered the Convention on the Prevention and Punishment of the Crime of Genocide...wishes to succeed in the same and undertakes faithfully to perform and carry out all the stipulations contained therein with effect from 6 March 1992...” Memorial of Bosnia and Herzegovina, 3.52, 75 76.

<sup>6</sup> M. Kamminga, 472.

<sup>7</sup> *Ibid.*

<sup>8</sup> R. Mullerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS (The New International Relations)*, Routledge, 1994, 154 157.

<sup>9</sup> PCIJ, *German Settlers in Poland Case*, Series B, No 6, 36.

<sup>10</sup> See Second Report on Succession in respect of matters other than treaties by M. Bedjaoui, Special Rapporteur, Doc. A/CN.4/216/Rev. 1, YILC 1969, vol. II.

of analogy. Two of them are of special relevance in this particular matter. *Primo*, the facts surrounding the issue of acquired rights in German Settlers case must be identical or substantially similar to those relating to human rights.<sup>11</sup> Further, the issue was considered outside the context of succession of States.<sup>12</sup> Finally it appears that the real issue the Court dealt with was the principle of equality of nationals stipulated by the Minorities Treaty. For, as the Court stated: “By the Minorities Treaty Poland has agreed that all Polish nationals shall enjoy the same civil and political rights and the same treatment and security in law as well as in fact. The action taken by the Polish authorities under the Law of July 14<sup>th</sup>, 1920, and particularly under Article 5 is undoubtedly a virtual annulment of the rights which the settlers acquired under their contracts and therefore an infraction of the obligation concerning their civil rights. It is contrary to the principle of equality in that it subjects the Settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease are not subject.”<sup>13</sup>

*Secundo*, temporal element must be taken into account in the application of analogy. The purpose of using the analogy lies in filling *lacunae* in law in the judicial process or in the construction of *de lege ferenda* in theoretical considerations.

Hence, the importance of the state of affairs in the law of succession with respect to multilateral treaties, including human rights, in a given moment. Do *lacunae* exist in that regard?

If, as it seems from the consistent<sup>14</sup> practice of the successor States in the last decade of the 20th century, accepted by members of the international community, the customary rule is inconsistent with the doctrine of automatic succession emerged, then *lacunae* and the use of analogy in judicial process have no place. The analogy with acquired rights in this

<sup>11</sup> “It is not easy to equate acquired rights with human rights. The acquired rights, in contrast to human rights, derived from the contracts or national law. In its advisory opinion the Court dealt with acquired rights in a specific way dictated by the circumstances surrounding the issue.” For that reason the Court did not consider the question “whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power”. PCIJ, Series B, No 6, para 88.

<sup>12</sup> “The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty”. *Ibid.*, para 89.

<sup>13</sup> *Ibid.*, para 90.

<sup>14</sup> Discussing the formation of a new rule of customary international law, the Court stated: “...an indispensable requirement would be that within the period in question, short though it might be, State practice including that of States whose interests are specially affected, should have been both extensive and virtually uniform”, I.C.J. Reports 1969, *North Sea Continental Shelf*, 1969, 43.

case is possible on a theoretical level, as a basis for the construction of a new rule of succession in respect of human rights treaties in terms of automatic succession.

## 2. JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

The Jurisprudence of the International Court of Justice regarding automatic succession of multilateral treaties seems to be unclear and confusing, dictated by the specific circumstances of the cases the Court dealt with.

The issue of automatic succession of human rights treaties was raised in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Former Republic of Yugoslavia).

In its Memorial Bosnia and Herzegovina asserted, *inter alia*, that “automatic continuity clearly is, in any case, the prevailing rule of international law, applying to succession of multilateral conventions on human rights, like the Genocide Convention”.<sup>15</sup> In the view of Bosnia and Herzegovina, the rule of automatic succession is a part of customary law.<sup>16</sup>

The Third Preliminary Objection, raised by Yugoslavia, has been based on the view that the rule of automatic succession of multilateral treaties embodied in Article 34 of the Convention on Succession of States is not applicable as a rule of customary international law, for it has been in the Convention not as a result of codification but as a result of progressive development.<sup>17</sup>

In its Judgment on Preliminary Objections, the Court refrained from giving answer to the controversy. It found that: “Without prejudice as to whether or not the principle of “automatic succession” applies in the case of certain types of international treaties or conventions the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties. Whether Bosnia and Herzegovina automatically became party to the Genocide Convention on the date of its accession to independence on 6 March 1992, or whether it became a party as a result – retroactive or not of its Notice of Succession of 29 December 1992, at all events it was a party to

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<sup>15</sup> Memorial of the Government of the Republic of Bosnia and Herzegovina, 3.33, 65.

<sup>16</sup> *Ibid*, 3.34, 66.

<sup>17</sup> Preliminary Objections B. 1.4.1., 118.

it on the date of the filing of its Application on 20 March 1993. These matters might, at the most, possess a certain relevance with respect to the determination of the scope *ratione temporis* of the jurisdiction of the Court “<sup>18</sup>

But, the Court did not completely exclude the possibility to apply the principle of automatic succession of multilateral treaties of humanitarian nature. Moreover, the wording of successive decisions on the matter gives an impression that the Court, in a shy and indirect way, alluded to such a possibility. First, in its Order on provisional measures of April 1993<sup>19</sup> as well as in 1996 Judgment, the Court stated that the proceedings instituted before the Court “are between two States whose territories are located within the former SFR of Yugoslavia. That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950”.<sup>20</sup> The formulation “whose territories...”, being a factual not a legal one, is basically unnecessary, but can act in conjunction with virtually identical wording of para 1 of Article 34 of the Convention.

Further, the Court tacitly accepted the Bosnia-Herzegovina’s characterization of the Genocide Convention as a human rights or humanitarian treaty, although it is rather a convention of international criminal law.

Finally, the Court essentially declared retroactive effect as regards parties to the dispute of the Genocide Convention, finding that “the Genocide Convention – and in particular Article IX – does not contain any clause or object or effect of which is to limit... the scope of its jurisdiction *ratione temporis*...”<sup>21</sup>

However, the issue of automatic succession of human rights treaties, and especially of the Genocide Convention, was extensively discussed in the separate opinions of Judges Weeramantry, Shahabuddeen and Parra – Aranguren.

Judge Weeramantry strongly advocated the principle of automatic succession of the Genocide Convention as well as human rights treaties, considering that if the principle is not clearly recognized “the international legal system would be endorsing the curious result that people living under guarantees that genocide will not be committed against them, will suddenly be deprived of that guarantee, precisely at the time they need it most– when there is instability in their State. The anomaly of a

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<sup>18</sup> I.C.J. Reports, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, ICJ Reports 1996, para 23.

<sup>19</sup> I.C.J. Reports 1993, para 21.

<sup>20</sup> I.C.J. Reports 1996, para 17. Emphasis added.

<sup>21</sup> *Ibid.*, para 34.

grant followed by a withdrawal of the benefits, of such a Covenant as the International Covenant on Civil and Political Rights, becomes compounded in the case of the Genocide Convention, and the result is one which, in my view, international law does not recognize or endorse at the present stage of its development".<sup>22</sup>

In fact, Judge Weeramantry elaborated ten "Reasons favouring the view of automatic succession to the Genocide Convention".<sup>23</sup> But, paradoxically, the two reasons that from a legal point of view are the most promising – "The obligations imposed by the Convention exist independently of conventional obligations" and "It (Genocide Convention M.K.) embodies the rules of customary international law" – do not work in favour of automatic succession. For, if the obligations embodied in the Genocide Convention are customary by nature or exist independently of conventional obligations, then it is unclear why automatic succession to the Convention is vitally necessary?

Judge Shahabuddeen's opinion was that in order to "effectuate its object and purpose, the Convention would fall to be construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention. The necessary consensual bond is completed when the successor State decides to avail itself of the undertaking by regarding itself as a party to the treaty. It is not in dispute that, one way or another, Yugoslavia is a party to the Convention. Yugoslavia has therefore to be regarded as bound by a unilateral undertaking to treat Bosnia and Herzegovina (being a successor State) as having been a party to the Convention as from the date of its independence."<sup>24</sup>

It must be admitted that the interpretation of Judge Shahabuddeen is highly creative. As extensive, extratextual one, it exceeds the permissible interpretative framework, especially in relation to the provisions of the Convention as a whole. In addition, it places the successor States in an unequal position in relation to other Contracting Parties, depriving them of the right of choice stipulated by the Convention as regards some of its provisions (for instance, the right to make a reservation on Art. IX of the Convention).

True, Judge Shahabuddeen intended to make a construction that suffices "to answer the question in the case of the Genocide Convention in the light of specific features of this particular instrument".<sup>25</sup> But, based

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<sup>22</sup> I.C.J. Reports 1996, Separate Opinion of Judge Weeramantry, 650.

<sup>23</sup> *Ibid.*, 645 653.

<sup>24</sup> *Ibid.*, Separate Opinion of Judge Shahabuddeen, 636.

<sup>25</sup> *Ibid.*

on the judicial presumptions<sup>26</sup> it could not resist further developments in the Genocide case, as regards the status of the FR of Yugoslavia/Serbia in the United Nations and its status *vis-à-vis* the Genocide Convention.<sup>27</sup> Last but not least, the basic element of the construction implying “the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had ...” has virtually no support in state practice.<sup>28</sup> Moreover, the practice went in the opposite direction. That practice seems to be in accordance with Article XIII of the Convention, as well as the rule embodied in Article 24(3) of the Convention on the Law of Treaties.

In his separate opinion Judge Parra-Aranguren endorsed the importance of maintaining the application of conventions of a humanitarian character, including the Genocide Convention. To that effect he relied primarily on the Court’s position taken in the Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), according to which: “With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa, on behalf of, or concerning Namibia which involve active intergovernmental cooperation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions, such as those of a humanitarian character, the

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<sup>26</sup> On juridical presumption in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) and other cases in which Yugoslavia/Serbia was involved, see *Ibid.*, Separate Opinion of Judge *ad hoc* Kreća, 658 et seq.

<sup>27</sup> Following the admission of FR of Yugoslavia in the United Nations as a successor State, on 1 November 2000, the Legal Counsel of the United Nations sent, on 8 December 2000, a letter addressed to the Minister of Foreign Affairs of the FRY, expressing, *inter alia*, that “the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State”. On that basis the FRY sent a notification of accession to the Secretary General of the United Nations as its depositary on 6 March 2001, United Nations Doc. CN.945.2006.TREATIES 2 (Depositary Notification). In a Note dated 21 March 2001 the Secretary General took note of the instrument *Ibid.* The important element in the reasoning of Judge Shahabuddeen is the position of Yugoslavia taken in Preliminary Objections phase as regards its status to the Genocide Convention for, “If, as no one disputes, Yugoslavia is correct in regarding itself as having always been a party to the Convention, this by parity of reasoning applies equally to the case of Bosnia and Herzegovina” I.C.J. Reports 1996, Separate Opinion of Judge Shahabuddeen, 636. The statement resembles the justification of the failure of the Court to decide meritoriously upon two interdependent issues in the circumstances surrounding the case – the status of FR Yugoslavia in the United Nations in terms of state continuity and its status *vis à vis* Genocide Convention. What the party or parties consider as the basis of jurisdiction of the Court is one thing and the basis of jurisdiction of the Court is another.

<sup>28</sup> See, *supra* p. 10 et seq.

non-performance of which may adversely affect the people of Namibia”.<sup>29</sup>

The advice of the Court however, cannot be taken as relevant as regards the issue of automatic succession in respect of multilateral treaties, for it has nothing to do with. It only represents an advice regarding those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should have been considered as inconsistent with Resolution 276 (1970), because they might imply recognizing South Africa’s presence in Namibia as legal.<sup>30</sup>

In the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), the Court in its Judgment on Preliminary Objections put the Declaration of 27 April 1992 in a broader context of the succession in respect of treaties. Basically, the Court treated it as a notification of succession. The reasoning of the Court, as regards the succession in respect of multilateral treaties, is coloured by the logic of automatic succession.

The Court found that:” In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences following from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form.”<sup>31</sup>

And, further, that the idea is reflected in: “Article 2(g) of the 1978 Vienna Convention on Succession of States in Respect of Treaties...defining a ‘notification of succession’ as meaning ‘in relation to a multilateral treaty, *any notification, however framed or named*, made by a successor State expressing its consent to be considered as bound by the treaty”<sup>32</sup>

The Court interpreted “being...confirmatory”<sup>33</sup> in the context of “an already existing set of circumstances... (amounting) to a recognition by that State of certain legal consequences following from those circumstances”.<sup>34</sup> Further, that the 1992 Declaration referred “to a class of instruments which was perfectly ascertainable... the treaty ‘commitments’... the Genocide Convention was one of these ‘commitments’”<sup>35</sup>

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<sup>29</sup> I.C.J. Reports, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971, 55; I.C.J. Reports 1996, 657.

<sup>30</sup> I.C.J. Reports 1971, paras, 117 127, 133.

<sup>31</sup> I.C.J. Reports, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment Judgment, 2008, para 109. Emphasis added.

<sup>32</sup> *Ibid.* Emphasis added.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, para. 108.

It appears that the Court proceeded from the perception of notification of succession as confirmation that Serbia was bound by a “perfectly ascertainable”<sup>36</sup> class of instruments, which includes the Genocide Convention on the basis of law. Such an understanding might correspond to the grammatical meaning of Article 34 of the Convention on Succession of States in Respect of Treaties.<sup>37</sup>

### 3. LEGAL NATURE OF THE RULE EMBODIED IN ARTICLE 34 OF THE CONVENTION

The crucial question is: what is the legal nature of the rule embodied in Art. 34 of the Convention in terms of dichotomy *lex lata / lex ferenda*?

It seems indisputable that at the time of the adoption of the Convention on Succession of States in respect of treaties, the automatic succession rule was *lex ferenda*.

As an Expert Consultant of the Conference, Sir Francis Vallet, emphasized:

“The rule (in Article 2 – Succession of States in cases of separation of parts of a State – corresponding to Article 34) was not based either on established practice or on precedent, it was a matter of the progressive development of international law rather than of codification”.<sup>38</sup>

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<sup>36</sup> *Ibid.*

<sup>37</sup> Such understanding of the 1992 Declaration seems to be an attempt of the Court to reconcile its interpretation of the Declaration with the dictum in an Armed Activities case. In that case, the Court, dealing with Rwanda’s argument that the statement by its Minister of Justice could not have any implications for the Court’s jurisdiction since it did refer explicitly to the reservation made by Rwanda to Article IX of the Genocide Convention, took a precise and unequivocal position. The Court found that “the statement by the Rwandan Minister of Justice was not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations. Given the general nature of its wording, the statement cannot therefore be considered as confirmation by Rwanda of a previous decision to withdraw its reservation to Article IX of the Genocide Convention, or as any sort of unilateral commitment on its part having legal effects in regard to such withdrawal; at most, it can be interpreted as a declaration of intent, very general in scope”. I.C.J. Reports, *Armed Activities on the Territory of the Congo* (New Application: 2002), DR of the Congo v. Rwanda, Jurisdiction and Admissibility, Judgment 2006, para 52; Emphasis added. As a mode of reconciliation should serve, in the approach of the Court, the distinction between “the legal nature of ratification or accession to a treaty, on the one hand, and on the other, the process by which a State becomes bound by a treaty as a successor State...” ICJ Reports 2008, para 109. The difference makes sense in the case of the existence of specific rules of succession in respect of multilateral treaties, *in concreto* automatic succession rule. Otherwise, treaty succession rule as a matter of treaty law.

<sup>38</sup> Summary Records, Committee of the Whole, 48th meeting, 8 August 1978, Doc. A/CONF. 80/16/Add. 1, 105, para 10.

Whether the rule *tractu temporis* became part of general international law throughout customary law or is on the way to becoming?

The State practice following the adoption of the Convention gives a negative answer to this question.

The Minsk Accords of 8 December 1991, signed by Russia, Belarus and Ukraine, providing for the unconditional commitment to honour treaty obligations of the USSR, appeared to lay conventional foundations for universal succession of the treaties of the former USSR. However, the subsequent Alma-Ata Accords modified the commitment to fulfil the treaty obligations of the former Soviet Union to the extent that such continuation was “in accordance with constitutional procedures” of the successor State.<sup>39</sup> Acting on that basis, the Baltic republics opted to accede to the conventions of the USSR in their own right,<sup>40</sup> while Moldova, Uzbekistan and Turkmenistan explicitly adopted the clean State model.<sup>41</sup> Turkmenistan, Kazakhstan, Kyrgyzstan and Tajikistan issued notifications of succession in their own right, without any reference to reservations and declarations made by the Soviet Union as a predecessor State<sup>42</sup>. Consequently, the former Soviet republics widely practised accession, as a means of binding themselves by multilateral treaties to which the USSR was a party.

The practice of the Czech and the Slovak Republics is also not free from inconsistency, although these two States notified the Secretary-General of the United Nations that they consider themselves bound by the multilateral treaties, to which the former Czechoslovakia was a party. Inconsistency is reflected not only in the fact that they consider themselves bound as from different dates (the Czech Republic as from 1 January 1993 and Slovakia as from 31 December 1992), but also because, in spite of confirmatory notifications relating to the multilateral treaties to which Czechoslovakia was a party, they also issued notifications on succession in respect of particular treaties, while they acceded to some others. Thus the Czech Republic became a party to the 1985 International Convention against Apartheid in Sports by succession, whereas Slovakia did not. Also, whereas Slovakia succeeded to most treaties on the date of general

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<sup>39</sup> P.R. Williams, “The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?” *Denver Journal of International Law and Policy* 23(1)/1994 1995, 22–23; see also R. Mullerson, “The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia”, 42 *International and Comparative Law Quarterly* 42/1993, 479.

<sup>40</sup> J. Klabbers, “State Succession and Reservations to Treaties”, *Essays on the Law of Treaties*, (eds. J. Klabbers, R. Lefeber), Martinus Nijhoff Publishers 1998, 111.

<sup>41</sup> B. Stern “Rapport préliminaire sur la succession d’états en matière de traités”, Report submitted to the International Law Association’s Committee on Aspects of the Law of States Succession for the 1996 Helsinki Conference, 675.

<sup>42</sup> J. Klabbers, 113.

notification, the Czech Republic, in a number of cases, succeeded on the basis of notification of succession which followed on a later date.<sup>43</sup> As regards some multilateral conventions, the Czech Republic bound itself in the form of accession, although in question were conventions to which the former Czechoslovakia was a party such as, for example, the Convention on International Civil Aviation.<sup>44</sup>

The legal situation as regards the former Yugoslav republics is much more contradictory. At first, while the FRY stuck to the continuity claim until 2000, Slovenia, Croatia, Bosnia and Herzegovina and Macedonia *ab initio* considered themselves as successor States and were recognized as such by the international community. Further, although declaratively favouring automatic succession in respect of multilateral treaties to which the SFRY was a party, in particular, Bosnia and Herzegovina and Croatia in proceedings before the Court, they did not apply the automatic succession pattern of treaty action in practice. Thus, for instance, Bosnia and Herzegovina designed its notification on succession to the Genocide Convention in terms of a “wish” to succeed to same, which fits in with the concept of succession in its own right, rather than automatic succession. Particularly illustrative is the case of the 1989 Convention on the Rights of the Child. Bosnia and Herzegovina is listed as having succeeded on 1 September 1993, Croatia succeeded on 12 October 1992, Slovenia succeeded on 6 Jul 1992 and Macedonia did so on 2 December 1993.<sup>45</sup> None of these dates corresponds to the dates upon which those republics succeeded the SFRY according to the generally accepted opinion of the Badinter Arbitration Commission.<sup>46</sup> The Commission established the following dates in that regard: 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia; 17 November 1991 in the case of the former Yugoslav Republic of Macedonia; 6 March 1992 in the case of the Republic of Bosnia and Herzegovina. Finally, this contradictory practice seems to be nothing more than the expression of a confused and ambivalent attitude towards the automatic succession rule. For example, at a meeting of Legal Advisers on International Public Law convened by the Committee of Ministers of the Council of Europe on 14–15 September 1992, the representative of Croatia noted that Croatia would respect all the treaties of the SFRY unless they conflicted with the Croatian Constitution.<sup>47</sup> Slovenia, as stated by its representative “had been invited to

<sup>43</sup> *Ibid.*, 117–118.

<sup>44</sup> P.R. Williams, 41.

<sup>45</sup> *Multilateral Treaties Deposited with the Secretary General, Status as at 31 December 1993*, United Nations Doc. ST/Leg/Ser.E/11 12, 193–194.

<sup>46</sup> *International Legal Materials*, 32/1993, 1587–1589.

<sup>47</sup> Committee of Legal Advisers on International Public Law for the Council of Europe, 4th meeting 14–15 September 1992, 3.

accede to some conventions to which former Yugoslavia had been a party and would like to be invited to accede to other conventions which had been ratified by the former federation”.<sup>48</sup>

It comes out that the rule contained in Article 34 of the Convention on Succession of States in Respect of Treaties did not generate the rule of general international law on *ipso jure* transfer of the treaty rights and obligations from the predecessor State to the successor State.

Moreover, before the Convention entered into force in 1996, the automatic succession rule provided in Article 34 was modified by the practice of successor States, followed by acceptance of that practice by existing States. It is important to note that the Convention entered into force with a minimal number of fifteen expressions of consent to be bound almost eighteen years after its adoption, on one side and due to the consent of successor States FYR of Macedonia, Bosnia and Herzegovina, Croatia, Estonia, Slovakia, Slovenia, Ukraine which in their practice after gaining independence did not follow the spirit and the wording of Article 34 of the Convention, on the other.

None of the successor States applied the practice of confirmatory notification in a generalized form, which alone perfectly corresponds with the conception of the *ipso jure* transfer of the rights and obligations from the predecessor State to the successor State(s), but declared themselves bound by the treaties of their predecessor State in their own name, applying different modalities. Besides, universal succession implies not only *ipso jure* transfer of treaty rights and obligations, but transfer *uno actu* comprising *all* the treaty rights and obligations of the predecessor State, together with the reservations made, excluding boundary treaties or territorial settlement. The fact that the modalities applied have, or may have, the effect of a *continuum* of treaty rights and obligations does not mean automatic succession – although it is implied – because that *continuum* is created not by the operation of the rule of international law (*ipso jure*) but by the will of the successor State. It is difficult, *exempli causa*, to qualify the notification of succession of Bosnia and Herzegovina of 29 December 1992 in terms of automatic succession if it states that “*having considered the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 to which the former SFRY was a party, wishes to succeed to the same.*”<sup>49</sup> Successor States, most of them being at the same time Contracting Parties to the Convention on Succession of States in respect of Treaties, treated the continuity rule provided in its Article 34 “only as the main and general flexible rule covering everything that has

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<sup>48</sup> *Ibid.*

<sup>49</sup> Communication from the Secretary General of the United Nations dated 18 March 1993 (ref. C.N. 451 1992, Treaties 5 (Depositary Notification) entitled “Succession by Bosnia and Herzegovina”. Emphasis added.

emerged in the region involving State succession”.<sup>50</sup> The residual and *jus dispositivum* nature of the rules on succession on the one hand, and the general notion of succession of States given in Article 2, paragraph 1 (b), of the Convention, leaving aside any connotation of inheritance of rights and obligations on the occurrence of change of sovereignty, on the other, give supportive force to such practice of successor States.

#### 4. RELATIONSHIP BETWEEN NOTIFICATION OF SUCCESSION AND AUTOMATIC SUCCESSION

In the light of commonsense and legal consideration, it seems clear that “automatic succession” and “notification of succession” are mutually exclusive. The effect of automatic succession would consist of the automatic, *ipso iure* transfer of treaty rights and obligations from the predecessor State to the successor State. In that case, therefore, the succession does not occur as a result of the will of the successor but on the basis of the norm of international law which stipulates the transfer of treaty rights and obligations as a consequence of the replacement of one State by another, in the responsibility for the international relations of a territory. “Notification of succession” has a rational and legal justification only in cases in which the transfer of treaty rights and obligations or the modalities of that transfer, depend on the will of the successor since, *ex definitione*, it represents “any notification, however phrased or named, made by a successor State *expressing its consent to be considered as bound by the treaty*”. In other words, it is applied in cases when the successor State is not bound by the norms of objective international law, to continue to apply the treaties of its predecessor to its territory after the succession of States but is entitled to consider itself as a party to the treaties in its own name.

Misunderstanding stem from the broad use of the expression “notification of succession”.

In United Nations practice such notifications are called – “declarations”.<sup>51</sup> “Notification” of a function is a rather loose qualification of the practice of States, in the form of a “note” without the suffix of succession”<sup>52</sup> to declare themselves bound uninterruptedly by multilateral

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<sup>50</sup> H. Bokor Szego, “Questions of State Identity and State Succession in Eastern and Central Europe”, *Succession of States*, (ed.M. Mrak), Martinus Nijhoff Publishers, 1999, 104 105.

<sup>51</sup> Introduction to the Multilateral Treaties Deposited with the Secretary General, Status as at 31 December 1991 and cited by the International Court of Justice para 6 of the Order of 6 April 1993, note 4.

<sup>52</sup> See, UN Legislative Series, Materials on succession of States (ST/LEG/SER.B/14) 1967, 225 228.

treaties concluded on their behalf by the parent State before the new State emerged to full sovereignty or to deposit their own instruments of acceptance of such treaties, effective from the date of deposit of the new instrument. It would therefore be more opportune to speak of a “declaration of entry into the treaty”. Furthermore, the mentioned “notes”, as a rule, represented a form of realization of conventional obligations assumed by “devolution agreements”.

The true meaning of the expression might be established within the frame of the law of treaties. For, as the special reporter on the law on Succession of States in respect of treaties H. Waldock made it clear: “The Commission could not do otherwise than examine the topic of succession with respect to treaties within the general framework of the law of treaties... the principles and rules of the law of treaties seemed to provide a surer guide to the problems of succession with respect to treaties than any general theories of succession.”<sup>53</sup>

The Convention on the Law of Treaties (1969) stipulates in Article 11 (Means of expressing consent to be bound by a treaty): “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”.

The formulation of Article 11 of the Convention on the Law of Treaties does not exclude the *possibility* of notification of succession being understood as a means of expressing approval to be bound by a treaty. The operationalization of this possibility implies, however, the agreement of the parties for, in the light of treaty law as expressed in Article 11 of the Convention, “notification of succession” undoubtedly comes under “*any other means*” of expressing consent to be bound by a treaty but is conditioned by the phrase “if so agreed”. From this viewpoint, “*notification of succession as a unilateral act of the State, constitutes a basis for a collateral agreement in simplified form between the new State and the individual parties to its predecessor’s treaties*”. Thus “notification of succession” actually represents an abstract, generalized form of the new State’s consent to be bound by the treaties of the predecessor State – a form of consent which is, in each particular case, realized in conformity with the general rule of the law of treaties on expression of consent to be bound by a treaty contained in Article 11 if the Convention on the Law of Treaties and prescribed by provisions of the concrete Treaty.

The practice of the Secretary-General as a depositary of Multilateral Treaties confirms such consideration. “The deposit of an instrument

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<sup>53</sup> *Yearbook of the International Law Commission* 1968, II, 131, para 53. Also, O’Connell: “The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation. D.P.O’Connell, *The Law of State Succession*, Cambridge University Press 1956, 15.

of succession results in having the succeeding State become *bound, in its own name, by the treaty to which the succession applies, with exactly the same rights and obligations as if that State had ratified or acceded to, or otherwise accepted, the treaty*. Consequently, it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty solely on the basis of a formal document similar to instruments of ratification, accession, etc., that is, a notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound.<sup>54</sup>

## 5. DOES THE ABSENCE OF AUTOMATIC SUCCESSION RULE UNDERMINE STABILITY AND CERTAINTY?

The most important argument in favour of the automatic succession rule is that, in the absence of *ipso iure* transfer of rights and obligations, there appears a time gap or, even termination in the application of the general multilateral treaties expressing the interests of the international community as a whole.<sup>55</sup>

Judge Weeramantry expressed the thesis in following terms: “Without automatic succession to such a Convention (Genocide Convention – M.K.), we would have a situation where the worldwide system of human rights protection continually generates gaps in the most vital part of its framework, which open up and close, depending on the break up of the old political authorities and the emergence of the new”.<sup>56</sup>

Such understanding of the effects of automatic succession in respect of multilateral treaties and treaties in general, is a clear demonstration of a specific perception of succession which may prove to be misleading. In that regard the very expression “succession in respect of treaties” is in its brevity imprecise and abstract, and as such can create confusion.

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<sup>54</sup> Summary of Practice of the Secretary General as Depositary of Multilateral Treaties, Doc. ST/LEG/7/Rev. 1, paras 303–305 (footnote omitted, Emphasis added).

<sup>55</sup> Judge Weeramantry observes that “without automatic succession to such Convention (Genocide Convention – M.K.), we would have a situation where the worldwide system of human rights protection continually generates gaps in the most vital part of its framework...” ICJ Reports 1996, Separate Opinion of Judge Weeramantry, 654–655. In similar terms also, Kamminga, 470; I. Brownlie, *Principles of Public International Law*, 1990, 670; M. Bedjaoui, “Problèmes récents de succession d’Etats dans les Etats nouveaux”, *Recueil des cours* 1970 II 130, 526; Judge Shahabuddeen in his separate opinion in Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia), I.C.J. Reports 1996, 635.

<sup>56</sup> I.C.J. Reports 1996, Separate Opinion of Judge Weeramantry, 654–655.

*Sedes materiae* of the issue lies in the question – what is the object of the succession of States in respect of treaties? Whether it is treaty qua treaty or rights and obligations that it creates?

The answer seems clear. For, a treaty as a legal act is not law *per se*, but a source of law consisting of rights and obligations. The rights and obligations created by it are the very substance and *raison d'être* of a treaty as a legal act. Without the rights and obligations contained in it, the treaty is an empty form deprived of any legal significance.

This fact should be taken as a starting point in considering the true and genuine meaning of the expression “succession of treaties”. In this approach the focus shifts from the continuity of the treaty to the continuity of stipulated rights and obligations, opening up an entirely different perspective on the issues of succession in respect of multilateral treaties. Of particular importance is the fact that such perception of succession does not affect stability and certainty, but on the contrary, maintains in force the provisions of multilateral treaties expressing fundamental interests of the international community as a whole.

All the treaties, including general multilateral treaties, are composed of substantive provisions and procedural provisions.

In contrast to the procedural provisions, the substantive provisions of the general multilateral treaties adopted in the interests of the international community as a whole, being part of the *corpus juris cogentis*, bind any successor State, regardless of whether it is, or is not, a Contracting Party to the treaty. The rules of *jus cogens* as peremptory, absolutely binding rules, bind *a priori* every State, being a successor or predecessor State, “even without any conventional obligation”.<sup>57</sup>

In that regard, to speak about the automatic succession of substantive rules contained in universal treaties or general multilateral treaties adopted in the interests of the international community as a whole, is either superfluous or a wrong way of expressing, for those rules are *ab initio et suo vigore* binding on any successor State, regardless of the law on succession of States in respect of treaties.

The different position of the substantive and the procedural provisions of universal treaties or general multilateral treaties which express the interests of the international community as a whole is not contradicting the legal nature of succession in respect of treaties, either.

Substantive obligations in universal treaties being “the obligations of a State toward the international community as a whole”<sup>58</sup> are the obli-

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<sup>57</sup> I.C.J. Reports, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951, 23.

<sup>58</sup> I.C.J. Reports, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, 1970, 32, para 33.

gations of “a State”, regardless of its legal position in terms of whether it is a new State or the existing one. Opposite to them stand procedural provisions of such treaties, including provisions such as those of Article IX of the Genocide Convention, which are not “obligations toward the international community as a whole”, but obligations *intuitu personae* which are not binding upon the successor State without its consent.

Apart from these considerations, of the utmost importance is the fact that the practice of successor States acting in their own name, as regards succession in respect of multilateral treaties to which their predecessor States were parties, demonstrates that basically they did not jeopardized the stability of treaty relations. As a rule they decided to be bound, either in the form of notification of succession or in the form of accession, from the date of gaining independence or a slightly different later date. The choice of a later date of commitment, which in itself does not affect the validity of the obligations appertaining to *corpus iuris cogentis*, is primarily a demonstration of the sovereignty to which that successor State is especially sensitive of.