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FIFTH REPORT ON SUCCESSION IN RESPECT OF TREATIES

by

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Article 21

Other dismemberments of a State into two or more States

1. When part of a State, which is not a Union of States, becomes another State either by separating from it or as a result of the division of that State, the rules in paragraphs 2 and 3 govern the effects of that succession of States on treaties which at the date of the separation or division were in force in respect of that part.

2. The obligations and rights of the successor State and of other States parties under any such treaty shall be determined by application of the relevant provisions of articles 7 to 17 of the present articles.

3. In the case of a separation, any such treaty remains in force as between the predecessor State and other States parties in relation to the remaining territory of the predecessor State unless it appears from the provisions or from the object and purpose of the treaty that:

(a) it was intended to relate only to the part which has separated from the predecessor State;

(b) the effect of the separation is radically to transform the obligations and rights provided for in the treaty; or

(c) it is otherwise agreed.

Commentary

1. Article 2 covers the case of the separation from a State of an area of territory which joins with another State (the moving treaty-frontier principle), and article 20 deals with the dissolution of a union of States. The present article is concerned with other dismemberments of States resulting in two or more States.

2. The commonest case is where part of a State separates from it, becoming itself an independent State and leaving the State from which it has sprung to continue its existence unchanged and except for its diminished territory. In this type of case the effect of the dismemberment is the emergence of a "newly independent State" by secession, and the position of this newly independent State in regard to treaties previously applicable in respect of the seceded territory is governed by the articles contained in Part II 1/ of the present draft. The basic rule governing the case of a newly independent State is the so-called clean slate rule formulated in article 6. Although in recent years this rule has found its application mainly in regard to the emergence of dependent territories into independent States, it has its origin in practice relating to seceded States. Some references to the practice evidencing the application of this rule to seceding States will therefore be found in the Special Rapporteur's commentary to article 6.2/ But it is necessary to recall that practice here in order to place the problem of dismembered States in its true perspective.

3. Before the era of the United Nations colonies were considered as being in the fullest sense territories of the colonial power. Consequently some of the earlier precedents usually cited for the application of the "clean slate" rule in cases of secession concerned the secession of colonies; e.g. the secessions from Great Britain and Spain of their American colonies. In these cases the new States are commonly regarded as having started their existence freed from any obligation in respect of the treaties of their parent State.3/ Another early precedent is the secession of Belgium from the Netherlands in 1830 as to which one writer 4/ has said: "Little authority is available, but it is believed to be the accepted opinion that in the matter of treaties Belgium was regarded

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1/ To become Part III in the final text of the draft articles.

2/ Third report (A/CN.4/224) [Yearbook of the International Law Commission, 1970, vol. II, pp. 31-37].

3/ McNair, Law of Treaties (1961), pp. 601-603; D. P. O'Connell, State Succession in Municipal Law and International Law, vol. 2, pp. 90-95 who points out that the United States attitude with respect to the secession of the Spanish colonies was not consistently negative as to their succession to obligations under Spanish treaties.

4/ McNair, Op. cit., p.603.

as starting with a clean slate, except for treaties of a local or dispositive character." If a somewhat different line seems to have been adopted by the Belgian courts in some cases, another writer points out that, while the Netherlands pre-1830 treaties continued in force, it was Belgium who had to conclude new ones or formalize the continuance of the old ones with a number of States.5/

4. As to more modern precedents, when Cuba seceded from Spain in 1898, Spanish treaties were not considered as binding upon her after independence. Similarly, when Panama seceded from Colombia in 1903, both Great Britian and the United States regarded Panama as having a clean slate with respect to Colombia's treaties.6/ Panama herself took the same stand, though she was not apparently able to convince France that she was not bound by Franco-Colombian treaties. Colombia, for her part, continued her existence as a State after the separation of Panama, and that she remained bound by treaties concluded before the separation was never questioned. Again, when Finland seceded from Russia after the first world war, both Great Britain and the United States concluded that Russian treaties previously in force with respect to Finland would not be binding on the latter after independence.7/ In this connexion reference may be made to a statement by the United Kingdom cited in paragraph 3 of the commentary to article 6 where the position was firmly taken by that State that the clean slate principle applied to Finland except with respect to treaty obligations which were "in the nature of servitudes". The United Kingdom adopted the same position in regard to Esthonia, Latvia and Lithuania on their recognition after the first world war as independent States.8/

5. The termination of the Austro-Hungarian Empire has already been discussed in paragraphs 6-7 of the commentary to article 20 in the context of the dissolution of a union of States. The opinion was there expressed that it seemed to be a dissolution of a union in so far as it concerned the Dual Monarchy itself and a dismemberment in so far as it concerned other territories of the Empire. It was there noted that, even viewing the case as one of dissolution of a union, Austria had contested her obligation to assume the treaties of the Dual Monarchy, though Hungary had accepted that obligation. The other territories, which seem rather to fall into the category of dismemberment, were

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5/ De Muralt, The Problem of State Succession with regard to treaties (1954), p. 101.

6/ D. P. O'Connell, Op. cit., pp. 97-8; Hackworth, Digest of International Law, vol. V, pp. 362-3.

7/ D. P. O'Connell, Op. cit., pp. 99-100; McNair Law of Treaties (1961), p. 605.

8/ See also McNair, Op. cit., p. 605; D. P. O'Connell, Op. cit., vol. 2, pp. 99-100.

Czechoslovakia and Poland.9/ Both these States were required in the Peace Settlements to undertake to adhere to certain multilateral treaties as a condition of their recognition. But outside these special undertakings they were both considered as new States which started with a clean slate in respect of the treaties of the former Austro-Hungarian Empire.10/

6. Another precedent from the pre- United Nations era is the secession of the Irish Free State from the United Kingdom in 1922. Interpretation of the practice in this case is slightly obscured by the fact that for a period after her secession from the United Kingdom the Irish Free State remained within the British Commonwealth as a "Dominion". This being so, the United Kingdom Government took the position that the Irish Free State had not seceded and that, as in the case of Australia, New Zealand and Canada, British treaties previously applicable in respect of the Irish Free State remained binding upon the new Dominion. The Irish Free State, on the other hand, considered itself to have seceded from the United Kingdom and to be a new State for the purposes of succession in respect of treaties. In 1933 the Prime Minister (Mr. De Valera) made the following statement in the Irish Parliament:

> "The present position of the Irish Free State with regard to treaties and conventions concluded between the late United Kingdom and other countries is based upon the general international practice in the matter when a new State is established. When a new State comes into existence, which formerly formed part of an older State, its acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty) as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom until such time as the individual treaties or conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned."

9/ Poland was formed out of territories previously under the sovereignty of three different States - Austro-Hungarian Empire, Russia and Germany.

10/ McNair, op.cit. pp. 603-605; D.P. O'Connell, op.cit vol. 2, pp. 178-182.

The Irish Government, as its practice shows, did not claim that a new State had a right unilaterally to determine its acceptance or otherwise of its predecessor's treaties. This being so, the Irish Prime Minister in 1933 was attributing to a seceded State a position not very unlike that found in the practice of the post-war period concerning newly independent States.

7. Illustrations of the treaty practice in regard to the Irish Free State may be seen in the Secretariat studies of succession on States in respect of extradition treaties and trade agreements. The study of extradition treaties, inter alia, recalls 11/:

> "Forty-three extradition treaties applied to Ireland immediately before it became independent. One author in 1957-8 addressed inquiries to all forty-three States. Of the eleven States which expressed a view on the continued force of the treaties in relation to Ireland, three (Ecuador, Luxembourg and Hungary) seemed to consider that the treaties were in force, one (Sweden) had expressly denounced its treaty with regard to Ireland, two (Austria and Switzerland) seemed to be favourable to the treaties being in force but made this dependent on a declaration by Ireland that she is willing to consider herself bound by the treaties, and five States (Cuba, Denmark, Guatemala, Italy and the Netherlands) considered that Ireland was not bound by these treaties. Of these five, two (Italy and the Netherlands) seemed to take the view that, if Ireland wished, it could continue the treaties' operation by a declaration to that effect".

The study also mentions three instances in which the continuance in force of the treaty was evidenced by conduct, in that either Ireland or the other State party invoked the treaty without encountering the objection that it was not in force 12/. That the policy of the Irish Free State was to accept the position created by its predecessor's commercial and administrative treaties is equally shown in the study of trade agreements which sets out a number of instances of the termination or replacement of pre-independence treaties in respect of the Free State 13/.

8. As to multilateral treaties, the Irish Free State seems in general to have established itself as a party by means of accession, not succession. It is true that in the case of the 1906 Red Cross Convention the Irish Free State appears to have

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11/ Succession of States in respect of Bilateral Treaties (A/CN.4/229), para.17 [Yearbook of the International Law Commission, 1970, vol.II, p.108].

12/ Ibid., paras.19-21 [ibid.].

13/ Document A/CN.4/243/Add.1, paras.19-20.

acknowledged its status as a party on the basis of the United Kingdom's ratification of the Convention on 16 April 1907 14/. Although the Handbook of the International Red Cross lists the Irish Free State as a party to that Convention from 1926, without specifying the exact date or method of its participation, a communication from the International Committee to the British Consul-General in Geneva in 1956 explained the matter as follows:

> "... In the list of ratifications of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, it would be preferable for the date of ratification by the Commonwealth countries and the Irish Republic to be 16 April 1907, because not having repudiated them, the Commonwealth countries are bound by the international obligations deriving from the ratification of the Convention by the United Kingdom. ..."

To this the Secretariat study adds the comment that according to the above communication, "the United Kingdom considers that Australia, Canada. India, the Irish Republic and South Africa become parties to the 1906 Convention by Succession." As the Irish Free State had a radically different view of its own position from that of the United Kingdom, this is not really conclusive. But at least the Free State seems to have acquiesced in its being considered as party to this Convention on the basis of its predecessor's ratification. In the case of the Berne Union for the Protection of Literary and Artistic Works, however, it acceded to the Convention, although using the United Kingdom's diplomatic services to make the notification 15/. The Swiss Government as depositary, then informed the parties to the Union of this accession and, in doing so, added the observation that the Office considered the Irish Free State's accession to the Convention as "proof that, on becoming an independent territory, it had left the Union". In other words, the Office recognized that the Free State had acted on the basis of the "clean slate" principle and had not "succeeded" to the Berne Convention. Moreover, in "Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions" the Republic of Ireland is listed as a party to the two conventions ratified by Great Britain before the former's independence and in both these cases the Republic became a party by accession 16/.

14/ The Succession of States to Multilateral Treaties (A/CN.4/200), paras.154-158 [Yearbook of the International Law Commission, 1968, vol.II, pp.38-39].

15/ Ibid., para.25 [ibid., p.13].

16/ The International Convention of 1910 for the Suppression of the White Slave Traffic and the Agreement of 1910 for the Suppression of the Circulation of Obscene Publications [ST/LEG./SER.D/2, pp.150 and 163].

9. Thus the practice prior to the United Nations era, if there may be one or two inconsistencies, provides strong support for the "clean slate" rule in cases of "secession" in the form in which it is expressed in article 6 of the present draft: i.e. that a seceding State, as a newly independent State, is not bound to maintain in force, or to become a party to, its predecessor's treaties. Prior to the United Nations era depositary practice in regard to cases of succession of States was much less developed than it has become in the past twenty-five years owing to the very large number of cases of succession of States with which depositaries have been confronted. Consequently, it is not surprising that the earlier practice in regard to seceding States does not show any clear concept of notifying succession to multilateral treaties, such as is now familiar. With this exception, however, the position of a seceding State with respect to its predecessor's treaties seems in the League of Nations era to have been much the same as that in modern practice of a state which has emerged to independence from a previous colonial, trusteeship or protected status.

10. During the United Nations period cases of secession resulting in the creation of a new State, as distinct from a dependent territory emerging as a sovereign State, have been comparatively few. The first such case was the somewhat special one of Pakistan which, for purposes of membership of international organizations and participation in multilateral treaties, was in general treated as having seceded from India and, therefore, neither bound nor entitled ipso jure to the continuance of pre-independence treaties 17/. This is also to a large extent true in regard to bilateral treaties 18/, though in some instances it seems, on the basis of the devolution arrangements embodied in the Indian Independence (International Arrangements) Order 1947, to have been assumed that Pakistan was to be considered as a party to the treaty in question. Thus, the case of Pakistan has analogies with that of the Irish Free State and, as already indicated in the commentary to article 6, appears to be an application of the principle that a seceded State has a clean slate in the sense that it is not under any obligation to accept the continuance in force of its predecessor's treaties. However, it will be necessary to revert later in this commentary to a particular aspect of the Pakistan case, namely whether any special considerations apply to the splitting of a State into two more or less comparable States (paragraph 14 below). But, first, two further cases of secession must be mentioned.

11. The first is the dismemberment of the Federation of Rhodesia and Nyasaland in 1963. Reference has been made to the formation of this Federation in 1953 in paragraph 6 of the commentary to the article contained in Excursus A 19/; and it was there pointed out that, owing to the vestigial powers retained by the British Crown,

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17/ See paragraphs 3-5 of the Commentary to Article 6. See also Secretariat studies of Succession of States to Multilateral Treaties (A/CN.4/200 and Add.1 and 2), paras.38, 115-117, 166-167, (A/CN.4/210), para.49, and (A/CN.4/225), paras.24-33 [Yearbook of the International Law Commission, 1968, vol.II, pp.16, 29, 40, 1969, vol.II, pp.37-38, 1970, vol.II, p.71].

18/ See Secretariat Studies of Succession of States to Bilateral Treaties (A/CN.4/229), paras.28-34 [Yearbook of the International Law Commission, 1970, vol.II, pp.109-110], (A/CN.4/243), paras.11-19, and (A/CN.4/243/Add.1), paras.30-36; and Materials on Succession of States (ST.LEG/SER.B/14) pp.1-8, 137-138, 190-191, 223.

19/ A/CN.4/256/Add.1.

the case was too special to be a useful basis from which to draw general conclusions. This is in large measure true also of the Federation in the context of the present article. After the dismemberment of the Federation in 1963, the United Kingdom retained these powers in respect of Southern Rhodesia and responsibility for the external relations of Nyasaland and Northern Rhodesia until these two territories became independent as Malawi and Zambia. Despite this complication, however, the case was dealt with somewhat on the lines of the dismemberment of a federal State. A detailed account of the practice followed in regard to the continuity of the treaties of the Federation is given in a modern text book 20/. This indicates some uncertainty owing to doubts as to the implications of the United Kingdom's powers and the status in international law of the Federation itself. Although in many instances treaties were continued in force, the basis upon which this occurred is not clear and frequently recourse was had to exchanges of notes to confirm their maintenance in force. The Secretariat Studies of Succession of States in respect of Bilateral Treaties 21/ present much the same general picture of practice and the same unclearness as to its precise basis. As to multilateral treaties, the practice hardly seems reconcilable with ipso jure continuity. The United Kingdom, it is true, notified the Secretary-General that the treaties would continue in force with respect to the three territories; but this merely evidences the United Kingdom's continuing responsibility for the international relations of the territories at that date. More significant is the fact that, when they became independent, neither Malawi nor Zambia considered themselves as continuing ipso jure to be bound by multilateral treaties. Thus, in "Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions" 22/ Malawi, when shown as a party, is listed as having become one by accession, while Zambia in the majority of cases is not shown as a party to the treaty at all. In the case of the Geneva Red Cross Conventions Zambia became a party but in the Secretariat Studies of Succession of States to Multilateral Treaties 23/ is included amongst the newly independent States which acceded to those Conventions; and Malawi is not shown as having become a party at all. Again, while both Malawi and Zambia are recorded in those studies as having become parties to the Paris Union for the Protection of Industrial Property, 24/, the former did so by transmitting a declaration of continuity and the latter by acceding. Both States

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20/ D.P. O'Connell, State Succession in Municipal Law and International Law (1967), vol.II, pp.172-178.

21/ A/CN.4/229, paras.132-133 [Yearbook of the International Law Commission, 1970, vol.II, p.127] and A/CN.4/243/Add.1, paras.144-148.

22/ ST/LEG/SER.D/2.

23/ A/CN.4/200, para.182 [Yearbook of the International Law Commission, 1968, vol.II, p.44].

24/ Yearbook of the International Law Commission, 1968, vol.II, pp.70-71.

acceded to the International Telecommunication Union 25/. Accordingly, whether or not the dismemberment of the Federation of Rhodesia and Nyasaland be regarded as a case of the dismemberment of a State, it seems impossible to find in it any support for a rule of ipso jure continuity.

12. The adherence of Singapore to the Federation of Malaysia in 1963 has been referred to in paragraphs 4 and 5 of the commentary to the article contained in Excursus A. In 1965, by agreement, Singapore separated from Malaysia, becoming an independent State. The Agreement between Malaysia and Singapore, in effect, provided that any treaties in force between Malaysia and other States at the date of Singapore's independence should, in so far as they had application to Singapore be deemed to be a treaty between the latter and the other State or States concerned 26/. Despite this "devolution agreement" Singapore subsequently adopted a posture similar to that of other newly independent States. While ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent. Even if in one or two instances other States contended that she was under an obligation to accept the continuance of a treaty, this contention was rejected by Singapore 27/. Similarly, as the entries in Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions 28/ show, she has notified or not notified her succession to multilateral treaties, as she has thought fit, in the same way as other newly independent States.

13. The available evidence of practice does not therefore support the thesis that in the case of a dismemberment of a State, as distinct from the dissolution of a union of States, treaties continue in force ipso jure in respect of the separated territory. On the contrary, the evidence strongly indicates that any such territory which becomes a sovereign State is to be regarded as a newly independent State to which in principle the rules set out in articles 7 to 17 of the present draft should apply. That this is the practice in the case of an ordinary secession of part of a State, leaving that State to continue its international existence with truncated territory hardly seems open to question. There remains, however, the point whether the position is different when there is such a radical dismembermebt that it may be agreed that the original State has really disappeared and been replaced by two or more new States.

14. Such a total disappearance of the original State is clearly a theoretical possibility. But practice does not warrant the proposition that the mere magnitude of a dismemberment will suffice to prevent the case from being considered as one of secession. Thus, the separation of East and West Pakistan from India was regarded as analogous to a secession resulting in the emergence of the newly independent State of Pakistan. Similarly, if the recent decision of the World Health Organization to admit

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25/ A/CN.4/225, para.125 [Yearbook of the International Law Commission, 1970, p.93].

26/ See S. Tabaka, Japanese Annual of International Law (1968), No.12, pp.36-44.

27/ See paragraphs 11 and 12 of the commentary to article 13. And see Succession of States in respect of Bilateral Treaties (A/CN.4/229), para.89 [Yearbook of the International Law Commission, 1970, vol.II, p.118].

28/ ST/LEG/SER.D/2.

Bangla Desh as a new member together with its acceptance of West Pakistan as continuing the personality and membership of Pakistan are any guide, the virtual splitting of a State in two does not suffice to constitute the disappearance of the original State. Treaty practice in regard to Bangla Desh is not yet available to the Special Rapporteur. But it would seem a little anomalous if a dismembered part of a State were to be refused recognition of its share of the personality and membership of international organizations but required to accept, ipso jure, the treaty obligations of the dismembered State. At any rate, the Special Rapporteur knows of no practice which would justify the view that a territory, considered as having seceded from an existing State, should be treated otherwise than as a newly independent State.

15. In practice, in most cases of dismemberment one or other part is recognized as, or claims to be, the continuation of the State which has suffered the dismemberment; and if any part is treaty as still representing the former State, the other part or parts are correspondingly treated as having become independent States by secession. In such cases, therefore, what has been said in the preceding paragraphs applies. Ought, however, the draft articles to envisage the case of the total disappearance of the previous State and its replacement by two or more States? In other words, do the categories of succession include, as a special case, the mere division of a State into two or more States? And in that event is the international personality of the former State to be considered as extinguished and the State replaced by two or more new States, or as continuing in a divided form in the international personalities of the States resulting from the division?

16. Practice does not throw much useful light on this question, despite the fact that among the major political problems of the post-war world have been what are sometimes called the two Germanies, the two Koreas and the two Vietnams. The circumstances of each of these so-called divided States are, however, altogether too special for them to provide guidance in regard to questions of succession. In all three cases the problem of succession is complicated by the fact that one of the two governments is not recognized by a large number of States, and in all three cases one or both of the two governments claims to represent the whole State. Further complications are the effect of the Second World War on the treaties previously affecting the territories in question, and in the cases of Korea and Vietnam their very recent emergence to independence when the division of their territories occurred. These various complications are, no doubt, responsible for the extreme paucity of information regarding succession by one part of these States to the treaties of the previously undivided State or territory. The "German Democratic Republic", it appears, maintains the theory that it is entitled to "reactivate" treaties formerly concluded by the German Reich; but its attempts to put this theory into operation have had very limited effects owing to the non-recognition policies applied by a large number of States. In any event, the claim to "reactivation", as described in a recent book, 29/ seems not to be based on any principle of ipso jure continuity but on a right of "option" analogous to that of newly independent States.

17. If the question is viewed simply from the standpoint of principle, there does not seem to be any sufficient reason to differentiate between a part of a State which becomes an independent State by secession and one which does so by division. Indeed, a

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29/ B.R. Bot, Non-recognition and Treaty Relations (1968), pp. 198-208.

division of a State extinguishing altogether the predecessor State is an even more radical transformation of the situation than a secession, so that it seems to follow a fortiori that the parts resulting from the division, assuming their recognition as States, should be considered as in the same position as a seceded State for the purposes of the law of succession of States.

18. The present article has therefore been drafted on the basis that no distinction should be made between cases of "separation" and "division"; and that in both cases the rules contained in articles 7 to 17 of the draft should govern the position of the new States resulting from the separation or division and of the other States parties to the treaties concerned. In the case of a separation, when the predecessor State continues in existence, the treaties previously in force in respect of its territory in principle remain in force in respect of its remaining territory. But it seems necessary to provide some safeguards because of the possible effects on the treaties of the dismemberment; and these safeguards are formulated in paragraph 3 of the article.