ABHANDLUNGEN

Reflections on the State Succession Convention

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There has recently been concluded in Vienna the United Nations Conference on State Succession to Treaties [1]). This has adopted as a Convention, with only minor drafting amendments, the draft Articles prepared by the International Law Commission. It has been commented that these draft articles have been treated by many delegations at the Conference as so sacred that they could not be challenged. In this respect the Conference is unique, and poses serious questions for the future methodology of international law.

A position paper written by the delegation of one major Western country on the Conference contains the following paragraph:

> "The conference confirmed the astuteness of the ILC in boldly adopting aspects of Third World practice in treaty succession as the basis of its draft articles, notwithstanding that at the time much of that practice was still un-developed and at variance with the preferred practice of older established states".

When this paper congratulates the International Law Commission (ILC) on its astuteness I make no observation, for that is a political comment and my concern is with the doctrine of international law and not with policies for reforming it. But when the paper assumes, as it does, two things, I take issue with it. The first thing it assumes it that there is a Third World practice standing in opposition to the practices of First and Second Worlds, and that it is radical and hence opposed to succession. That, I shall show from my own experience in advising ten newly

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[1]) For references and the text of the Convention on Succession of States in Respect of Treaties see the article by Treviranus, *supra* p. 259 *et seq.*

independent governments, some at least of which would classify themselves as Third World countries, is not true.

The second thing it assumes is that older, established States are conservative and hence in favour of succession. That, again, in my experience, is untrue. I could document more instances of Western European countries declining to be bound to successor States who sought continuing treaty links with them than I could instances of newly-independent countries declining when requested by older, established States, or other new States.

The paper, in short, expresses a new mythology about State succession, and when the doctrine of international law is built upon myth its ultimate content, as well as its stability, is questionable. State succession is a subject altogether unsuited to the processes of codification, let alone of progressive development, but this particular essay in refashioning the law was marred from its inception by a preoccupation with the special problem of decolonisation, around which myth and emotion have accumulated like mists in the marsh, so that the whole context became intellectually distorted; and, furthermore, it might be said that it has come too late to serve any practical purpose in that matter.

This is because its rules, which must surely be regarded as legislative rather than codificatory, are to apply only to cases of State succession occurring after they come into force, by which time decolonisation will be an historically remote episode and the serious questions to which it gave rise will long since have been dealt with, one way or another. The Convention does, it is true, provide for retroactive effect as between parties which may make retroactive declarations, but there are two things to be said about that: First, these declarations, if made, could destabilize situations which have been stable for a long time. And secondly, since they result in special bilateral links, they provide not for a general solution, but one as between specific countries.

When the Convention will come into force cannot be predicted. Among the diplomatic priorities of most governments State succession is of a very low order. That may mean either that the file on the Convention will sink ever deeper beneath more important papers on some civil servant's desk, or, because of sheer indifference, ratification will be hastened merely to get the file out of sight. When the Convention will come into force, and which countries will become parties to it, will thus be a lottery.

I say this not in mere cynicism, although it may sound like it. I have said that I have advised ten newly independent countries about succession

to treaties. I am not certain how many of them have attended the Conference, but I can name several who have not, and I am able to say that the richest one of them has not been present because it regards the Conference as altogether unimportant and not worth expenditure of public funds. One cannot resist the impression that many of the countries which are attending the Conference have no immediate concern with, or experience of, succession to treaties such as have my ten clients, and are meddling in an area of international law which they do not understand and about which preconceived opinions abound.

The draft which the ILC prepared for the Conference gives scant indication of any awareness of the fact that State succession to treaties is a matter of great intellectual, and hence of doctrinal subtlety; and it will not be surprising if the outcome of the Conference is, intellectually speaking, a further step in the debilitation of international jurisprudence. It is about the intellectual character of the subject that I wish to speak, for my audience is not political or diplomatic but intellectual, and hence scientific in its interest. I want to get to the heart of the science of the matter, for then only will we be critically armed to examine the Convention that has emerged from the Conference, or to know how to treat the subject in the scholarly literature.

Some years ago when I delivered lectures on State succession at the Hague Academy I concluded by quoting Savigny's remarks on codification. He said:

> "The call for codes arose from indolence and dereliction of duty on the part of the legal profession, which, instead of mastering the materials of the law, was overpowered and hurried headlong by their overwhelming mass".

I found that apt then for the purpose of criticising the proposal to codify the law of State succession instead of leaving it to evolve as common law, and I find it even more apt for the purpose of criticising the result of this effort at codification.

For what the draft of the ILC has done has been to force the topic within the constraints of inflexible dogmas that are at once over-simple and insufficiently comprehensive. Mutations in the international community and in the forms of political organisation are manifold, complex and *nuancées*. The text applies to them indiscriminately and hence capriciously, and so raises difficult dilemmas for governments.

One such dilemma I can indicate from my own experience. When Bangladesh separated from Pakistan I advised the new government of Bangladesh. If the separation of Bangladesh from Pakistan was to be characterised as secession one rule of the ILC's text would have applied

to it, namely the clean slate doctrine. But if it was to be characterized as dissolution of a federation, a quite different rule would have applied to it, namely universal succession.

So, Bangladesh would lie upon one or other of two opposite poles. Either position would have been politically difficult to sustain. For, if Bangladesh chose to argue its case on the basis of secession that would have compromised its claims to a share of Pakistan's assets, including gold in the World Bank, and would have affected court actions which were launched in various countries to recover private property which had been subjected to Pakistan decrees during the liberation war.

But if Bangladesh chose to argue its case on the basis of dissolution of the Federation of East and West Pakistan, it feared to be held liable to Pakistan's treaties. For, as a provincial government it had not even a list of these, let alone the texts, and, as I found, very few of the texts could be located in the libraries in Dacca. Until several hundred treaties were identified, collected and examined it was not even possible to ascertain what the issues were for a policy decision, and even though, with the help of the Commonwealth Secretariat, I was able to create a mechanism for examining these treaties it took three years to do so, by which time the whole matter had become past history.

In my view the true legal position was that the separation of Bangladesh involved the dissolution of a federation. For, shortly afterwards, the Supreme Court of Pakistan itself said that the military rule which preceded the separation was unconstitutional and that the federal Constitution subsisted. And that is certainly the sociological fact, for East Pakistan was a separately governed polity which retained throughout the change a large measure of separate identity in its public administration.

A generation or two ago a cataclysmic event such as the separation of Bangladesh would have led to a number of decisions and cases on State succession. The case of Bangladesh led to none, and that strikes me as remarkable considering the number of interests involved. What happened, then? The truth is that the issues were compromised, and that is increasingly the way with international organisations. What assisted in bringing about the compromise was the ambiguity concerning the way in which Bangladesh had gained independence. While the Government of Bangladesh oscillated between regarding itself as a seceding State and as a constituent part of a federation severing its connection with the other part, decisions were made for it from outside. How much Bangladesh gained or lost because of this ambiguity and hesitation no-one can tell.

But what one can say is that the case highlights the deficiency in the

State Succession Convention. For surely it is nonsense to say that a country like Bangladesh inherits either all or none of the treaties that previously applied to it. Common sense would suggest that the truth is somewhere between these poles, and cannot easily be found by rigid codes that cannot comprehend the evident range of questions and problems. That is a matter of juristic function, not of legislative intervention.

The fact of the matter is that the ILC's text was old-fashioned, if not downright reactionary. It might have been written by a theorist of the 1920's. The clean-slate doctrine which the ILC employed in the case of secession had to be used there because it had to be used in the case of decolonisation. And it had to be used in the case of decolonisation for motives of politics and rhetoric, and not for reasons of jurisprudence. Emotion thus crippled the exercise from the outset.

The spuriously scientific character of the ILC's text is indicated by the following statement in the commentary, which is a justification of the clean-slate position in the case of achievement of independence:

> "The majority of writers take the view, supported by State practice, that an independent State begins its life with a clean slate, except in regard to 'local' or 'real' obligations. The clean slate is generally recognized to be the traditional view on the matter. It has been applied to earlier cases of newly independent States emerging from former colonies (*i.e.* the United States; the Spanish American Republics) or from a process of secession or dismemberment (*i.e.* Belgium, Panama, Ireland, Poland, Czechoslovakia, Finland)".

That statement is breathtaking in its simplicity and want of discrimination, and it reveals the intellectual poverty, not only of the ILC's investigations, but also of what it calls the "traditional view". In the search for a truly scientific doctrine on State succession, this statement is a useful starting point for analysis.

The first thing to be noticed about it is the old-fashioned view it takes of the importance of the opinions of writers. It might be true to say that the "majority of writers" has traditionally supported the clean-slate doctrine, but it would only be true if one took into account the numbers of text-book writers who have copied from each other and have not had an independent view, for if one looks to the specialist works one finds that a much more variegated and controversial picture emerges. What the ILC has done is to rely upon enumeration of opinions, not upon when, or by whom, the opinions were expressed. It has subordinated quality to quantity, and in this age mere adding up of heads is no longer acceptable as a way of elucidating a rule of international law.

The next thing to be noticed about the ILC's statement is that it aggregates under the one rubric three categories of State succession, independence of colonies, secession and dismemberment, with no explanation for their supposed affinity. It puts to one side, for treatment under a different rubric, cases of union and dissolution of unions, yet these are sometimes only formally distinguishable from the other cases.

For example, the separation of Norway from Sweden or Iceland from Denmark, to which the clean-slate rule was not applied, are closer to the modern category of decolonisation than are any of the instances referred to by the Commission. That is because each colony was at least as autonomous a legal order and separate polity as Norway or Iceland, but even more because, except in a few cases such as the peace treaties or treaties like the Nuclear Test-Ban Treaty, treaties were only territorially applied to British territories after the territories themselves had gone through constitutional processes akin to decisions to ratify, and, in the case of the French territories, after local promulgation. The territorial governments participated before independence in the treaty-making process in a way that even Norway and Iceland did not.

The third point to be noticed is the violence done to history and jurisprudence by reliance, when speaking of independence, upon the instances of the United States and the Latin-American republics. These were, in any event, cases of violent disruption and not of orderly and protracted change such as decolonisation has been. But the main point is that the problem of succession to treaties could hardly have arisen then because of the restricted categories of treaties existing at the time. These were mostly treaties of political alliance. There were a few commercial treaties, like Cromwell's with Queen Christina of Sweden, and there were the peace treaties, like Utrecht.

So far as treaties of political alliance were concerned, they clearly would not survive the events, including war, which led to independence, and if that is so one begins to wonder if some rule other than of succession was at work in their cases.

So far as commercial treaties were concerned, the question did not arise for decision, and this could well have been because of treaty interpretation, these treaties referring, for example, to "subjects" of the contracting sovereign, when the colonists who declared independence clearly could not be so described. Again, one wonders if a different rule of law was at work in their case.

And, so far as the peace treaties are concerned, it is not true to say that there was no succession, for the boundary and fishing clauses in

them have been invoked in the cases of Latin-America. In fact, the situation there is complicated and obscure, for the one problem of succession to treaties that did cause diplomatic controversy, that concerning the dissolution of the union of Gran Colombia, led to the opposite of the clean-slate position. We know, of course, that that case has been put under a different heading from that of independence or secession, but the distinction is artificial, as the case of *The Mechanic* in 1862, which is the one case to arise out of the disruptions in Latin-America, testifies. In that case a Spanish commercial treaty of 1795 with the United States was applied by the arbitral tribunal set up between the United States and Ecuador. The double case of succession — Spain to Gran Colombia and Gran Colombia to Ecuador — were not clearly distinguished.

Indeed, to distinguish them strikes me as formalistic, just as it strikes me as formalistic to distinguish the independence of Panama from Colombia from the dissolution of Gran Colombia. In any event, that case of Panama is complicated by the fact that Colombia resolutely declined to recognize Panama during the League of Nations period.

The final point to be noticed about the Commission's statement is that it ignores the fundamental change that has occurred in international society since the cases of the precedents it cites. The world today is a complex structure of relationships sustained by about a thousand multilateral conventions, of which about 300 could be regarded as organically essential to the community's functioning. What was the situation in 1919? There were then in existence seventeen general multilateral conventions which provided for membership of international organisations and were not heritable for that reason.

There were fifteen conventions on the law of war which were binding on the new States, in a sense, because they became, as the Nuremberg Tribunal later held, customary law. And there were thirteen general administrative conventions, such as those relating to safety of life and collisions at sea.

The administrative task of reconstructing the links created by these few conventions was, in 1919, trivial compared with that of a country beginning its life today with a clean sheet. That was the point made by Dr. J e n k s in an impassioned plea for universal succession to what he called "law-making treaties". His point was that one could not regard with equanimity the prospect of half a century's effort in constructing over a hundred international labour conventions to collapse in case of two-thirds of the people previously governed by them. He was the architect

of the rule applied by the ILO that admission to membership would be conditional upon acknowledgement of succession to the ILO Conventions previously applying. He told me that, had he been more active in promoting the policy among other legal counsel of international organisations when decolonisation began, he believed that he would have made this a general rule for all the international organisations.

When, then, the ILC relies upon cases such as the independence of Belgium in 1839 as relevant precedents for modern times one is bound to question the validity of the methodology being employed, for there were no multilateral conventions at that time, and, in any real social sense, the cases of Belgium and Norway are indistinguishable. As for the other cases cited, that of Ireland takes no account of the fact that a celebrated dictum of Mr. de Valera, made for special political purposes, has not been implemented in practice; while the case of Finland is based upon a simplistic policy statement of the British government and overlooks the fact that the official Norwegian treaty list includes a number of Swedish-Russian treaties as applying to relations between Finland and Norway, affecting, for example, the grazing rights of the Lapps.

There is an additional criticism to be made of the Commission's statement: It cites the attitude of the United Nations towards Pakistan's claim to inherit India's membership of the Organization in support of its proposition about the clean slate, without regard to the fact that membership of an organisation is a question for the constitution of the organisation and not one for a general rule of international law, as the State Succession Convention makes clear.

Of course, the ILC, having re-affirmed the clean-slate doctrine as the traditional rule, then had to find ways of avoiding its implications, and these, again, raise questions about the current methodology of international law. The Commission had to take account of the fact that a large proportion, though, of course, not all, of the newly-independent States had devised mechanisms for keeping the treaty system going. These were either general in character, such as devolution or inheritance agreements, or general declarations of one sort or another; or they were specific, such as particular declarations of succession. The general instruments were a characteristic feature of Anglophone practice, and the particular declarations of Francophone practice.

Of course, the pattern is highly variegated, if not incoherent, but I would argue that the thrust of the practice was directed, if anywhere, away from the clean-slate principle. I would also argue that, because

of the administrative problems and want of resources that have made it impossible in the cases of all newly-independent countries except Fiji, Tonga, the Bahamas and Papua New Guinea to review all of the pre-independence treaties — amounting to around 500 — it has been to the advantage of these countries to keep the treaty system intact.

One fact overlooked by the Commission is that it is, in most cases, the newly-independent States which have invoked pre-independence treaties to their advantage, so that the political hypothesis upon which much of the Commission's work is based, and much of what has been said at the Conference on State Succession, is simply not sustainable. The only cases of State succession that have come before courts around the world in recent years have been extradition cases. There have been about a dozen of them. In most of these cases the pre-independence extradition treaty has been invoked by a newly-independent State, while in the remaining cases, when it is that State from which extradition has been sought, it has agreed that the treaty is in force.

The way in which the ILC seeks to accommodate this practice, which so evidently runs counter to the clean-slate doctrine, is to give newly-independent States the option to declare succession to multilateral conventions, and the option to agree expressly or tactitly with the other party to a bilateral treaty to keep it in force. So far as the case of multilateral conventions is concerned, this is undoubtedly a sensible rule which reflects actual practice, but doctrinally speaking it is very disturbing. For it undermines mutuality of consent by giving States a unilateral right to bind other States, and the eventual consequences of this contradiction of the basic rule of consent in treaty law are unforeseeable.

So far as the case of bilateral treaties is concerned, the rule as stated is redundant, for States can agree, even in the most informal fashion, to keep treaties in force. The problem is that until they agree no one will know what the situation is, and whether the agreement will have retrospective effect. And governments are not motivated, and do not have the resources, to make decisions leading to agreement. So the State Succession Convention, while aiming at clarifying a situation that has become very unclear, in fact provides for perpetuation of the uncertainty.

I am told that the ILC was constrained politically to reach the conclusions it did reach. No other scheme would, it thought, be acceptable to a conference. That may well be so, and it may well exonerate the Commission from blame for an analysis that is far from scientific. But this only reveals the unsuitability State succession for codification.

For it is inevitable that a political conference could not grapple with concepts that are so various, subtle and jurisprudentially complex as those concerned with State succession.

Because the State Succession Convention is so obviously legislative in character, and unlikely to become universal unless its rules come to influence customary law, it is clearly important that the underlying doctrine of State succession be critically examined. The tendency is for jurists to abandon this task on the supposition that codification has rendered it unnecessary, whereas I would argue that the opposite is the case.

Let me, then, begin by enquiring whether, what the ILC calls the "traditional view", is really sustainable intellectually, or ever was sustainable. This depends upon the category of juristic concepts under which the question of State succession to treaties is put. If this is heritability that will involve one type of mechanism. If it is treaty law it will involve another. In the 19th century it was very unclear under which category the question was in fact to be put.

The obvious avenue of approach of jurists trained in Roman law was that of inheritance. If the ensemble of rights and obligations of a State were to be regarded as analogous to the *hereditas jacens* of Roman law, the emphasis would be put upon the integrity of the inheritance, and the outcome would tend to be a rule of universal succession. That approach is less evident among the international jurists of the 19th century than among judges, notably in Italy and France in the 1870's.

The jurists, influenced by Hegelian conceptions of the State, tended to approach the matter, at least from the time of Bluntschli onwards, from the point of view of the identification of the parties to the treaty. If the personality of a party was affected that was thought to affect the existence of the treaty. But not until Hall made personality the universal touchstone of succession did the jurists think that treaties were generally annulled by change of sovereignty. Calvo, Holzendorff and Kiatibian were much more cautious, recognizing that, jurisprudentially speaking, contracts may be heritable, and it is a question of analysing the effect of the change upon the treaty, rather than the question of the identity of the parties, that was significant.

Looking back I think that that was the right approach, although the doctrinal basis of it was never clearly elaborated. The absolutist rule of the clean slate appears to have been an aberration resulting from two different trends. The first was that following the Franco-Prussian War, when the transfer of Alsace-Lorraine was treated according to what the German jurists described as *bewegliche Vertragsgrenze,* that is, French

treaties vacated the provincies and German treaties replaced them. That was, however, to be explained on the basis of treaty interpretation, for it would have led to contradiction in many cases if French treaties had continued to apply along with German ones. But the rule was not absolutely applied, for Napoleon's Concordat with the Holy See continued to govern the ecclesiastical law of Alsace-Lorraine, and still does, although it ceased to apply in the rest of France in 1905. Nonetheless, the principle of moving treaty boundaries in cases of cession infected the whole doctrine of State succession.

The second trend was that of British jurists who considered the cases of annexation of colonial territories. They reinforced the view that the treaties of the expunged legal person died with it, by reference to the peculiarly English doctrine of act of State, that is, the doctrine which does not allow the courts to enquire as to the legal consequences of the acquisition of territory.

Both trends coincided to produce the notion of the "clean slate". But, of course, there were obvious exceptions to it. Treaties were considered to continue to apply in some cases, and when the jurists came to examine these they had to treat them as a category to which the general rule of the clean slate would not apply. Instead of approaching the question of treaty succession from the general point of view of the compatibility of the treaty with the changed situation, they approached it from *a priori* categorisation, and arbitrarily assigned treaties to one of the two categories, personal treaties and real treaties.

The latter were the treaties that were inherited, and what held them in conjunction within that category was the idea that they were connected with the territory. Every author who has critically examined this category has come to the conclusion that it is doctrinally difficult to explain. For, the test of local connection is elusive, both when applied to specific treaties, and when justified according to territorial theories. This idea of servitude or of rights running with the land was heavily criticised. But also when one went beyond treaties about coal mines or railway connections across boundaries one ran into difficulties about identifying the territorial element.

For example, the Swedish-Russian treaties about rafting timber down boundary rivers, or governing the migration of Lapps, which remain in force between Norway and Finland are, in a sense, territorial since they concern conduct on specific rivers or in specific territories, but they are not territorial in the sense of a dam built across a boundary river. It is evident that real and personal characteristics shade into one another.

That is the case in, for example, the boundary treaty which is at the basis of the Ethiopia-Somalia conflict: It not only fixed the boundary but it provided for British supervision of nomadic tribes crossing the border. Its territorial connection would make it apt for inclusion in the category of real treaties, but its supposition of a particular administrative regime makes it equally apt for inclusion in the category of personal treaties.

It is evident that the dichotomy between personal and real treaties is unworkable, yet that is exactly the essence of the State Succession Convention. It provides that treaties will bind successor States if they relate to the use of a particular territory, or place restrictions upon its use, established specifically for the benefit of a particular territory of a neighbouring State or a region, and considered as attaching to the territories in question.

That obviously begs the question. How it would apply to the Ethiopia-Somalia dispute is anyone's guess. What is striking about the State practice in respect of succession to treaties in recent years is that it is the territorially-connected treaties alone which have given rise to controversy. The clearly personal treaties, such as commercial or extradition treaties, have given rise to no problems. It is obvious, then, that the State Succession Convention does not have rules that are likely to reduce the occasions of dispute. On the contrary, its rules are more likely to stimulate dispute, not about the proper functioning of a treaty, but about its characterisation as personal or real.

More ink has been expended on the question of State succession than on almost any other branch of international law except the law of the sea since 1960 — not least by myself. But I sometimes wonder if we have not created an artificial edifice somewhat detached from diplomatic reality. We have set up a system for successor States to avoid maintaining treaties and then an elaborate machinery, which is time-consuming and administratively debilitating, to enable them to avoid the consequences of avoidance of the maintenance of treaties, that is, to enable them to continue treaties which they want to continue while adhering to the general idea of not being bound to do so.

I wonder whether there would be any practical difference if we reversed the matter, beginning with the supposition that treaties remain in force for successor States, without distinction between the types of succession, and then leave the successor States to terminate them under the denunciation clauses. About 95 % of treaties have such clauses, and a successor State could thus reach a clean slate position, if it wanted to, within

a year. There would remain the 5 % which would be the subject of controversy. But they are likely to be the very treaties that will be controversial anyway under the doctrine of State such as the Ethiopia-Somalia treaty.

There are arguments, of course, against this idea, and one must recall Papua New Guinea's refusal to be bound by the Law of the Sea Conventions because they cannot be denounced, but the idea would eliminate the need for a doctrine of State succession altogether, which is now, in reality, needed for only a marginal group of cases. However, that is not possible, and so we must return to the enquiry about the essence of the rule about succession to treaties.

Let me return to the jurists of the mid-19th century. They did not have a universal touchstone for resolving all questions of succession to treaties. They locked to the nature of the treaty and enquired how it would work in the changed situation, and I wonder if this is not the correct approach. It is obvious that there are many treaties which are made with a particular situation in mind. One test of whether the treaty survives is whether the situation is so changed that the purpose behind the treaty could not be realised, or would be distorted. An example is the case of the St. Germain Convention on Liquor in Africa of 1919. This involved an undertaking to prevent the imporation, manufacture and sale of alcohol in various African territories. Of course no one pays regard to it today. But is that because it lapsed by reason of State succession, or fell into desuetude? Another test is the wording of the treaty itself. British commercial treaties give commercial privileges to British subjects. They cannot give them to people who, as a result of State succession cease to be British subjects. Treaty interpretation may solve the problem.

The cognate character of these various possibilities for treaties ceasing to apply to successor States was brought into the open by the *Pakistan Prisoners of War* Case in the International Court in 1974, when Pakistan claimed that it had succeeded to the General Act for the Pacific Settlement of International Disputes 1928, and invoked it as a basis of jurisdiction of the Court. India replied that Pakistan had not succeeded to it, but, also, that the General Act was no longer in force because it had been impaired by the demise of the League of Nations. Australia, which was also at the time invoking the General Act in the *Nuclear Test* Case, entered the controversy by arguing that the General Act was not the sort of treaty that was susceptible of succession because it concerned judicial settlement. The argument was not that treaties generally are not succeeded

to, but that some treaties are not heritable in the changed circumstances.

That argument requires a case by case solution to the question of State succession, and not a solution by reference to general principle. It approaches the matter from a perspective of treaty law rather than from that of the law of inheritance.

In my experience in advising successor States I have found that administrative decisions as to succession to treaties tend to be taken on the basis of how the treaty would work in the changed circumstances. If it would work smoothly governments are prepared to continue it in force. If it would work in a distorted fashion they are likely to take the opposite view. This is really a matter of treaty interpretation, but then, of course, so also is *rebus sic stantibus* in a sense. The difference between the ways in which treaties are disposed of following change of sovereignty and other changes of circumstances is a matter of degree. *Rebus sic stantibus* requires the change to be fundamental. That might dispose of some treaties after change of sovereignty, but not of many. Yet successor governments will probably want to get rid of more treaties than just a few.

If change of sovereignty is to be subject to a more relaxed rule than other changes of circumstances, that means that we may need a category of State succession after all. But does that mean that we have no alternative to the universal rubrics of tradition and the ILC? My answer would be negative. It would be that we must analyse the matter case by case. In cases where the change has produced major disruption in the legal order we would expect maximal disruption in the treaty situation. Where it has produced minimal disruption in the one we would expect minimal disruption in the other.

Let me contrast the cases of Poland and Canada. Poland was formed out of parts of three predecessor States with, presumably, different treaty systems that might or might not overlap. It did so with considerable disruption due to revolution and war. One would expect the number of treaties to survive the change to be nearer the negative than the positive end of the spectrum. The case of Canada is the opposite, and has been one of universal succession, because Canada's evolution within the Empire and Commonwealth was one of minimal international and constitutional disruption.

In fact, the treaty situation in both countries is exactly what one would expect it to be. But that indicates that State practice tends to be drawn by the realities of each case, and cannot easily be forced into a rubric for all subsequent cases. How to express these variables in

coherent form is the problem. My solution has been to proceed upon a presumption of treaty continuity, and to allow the presumption to be rebutted case by case depending on the circumstances. That may be no more intellectually plausible than having a universal rule about succession, but it may be more practical.

I should like to conclude by bringing out further the link between the approach to State succession and the cognate questions about lapse of treaties. Although the Vienna Convention is supposed to have stabilised the law of treaties, in fact the principle of *pacta sunt servanda* has encountered new challenges on the hypothesis of changing circumstances. In the *Nuclear Tests* Cases and now in the *Aegean Continental Shelf* Case the contention is made that the General Act of 1928 lapsed because it was mechanically and ideologically connected with the defunct League of Nations. In the *Channel Continental Shelf* Case France argued unsuccessfully that the Geneva Conventions on the Law of the Sea were no longer in force because of the changing practices and demands of countries as evidenced at the Law of the Sea Conference.

In that Case the Court reaffirmed the principle that treaties can only come to an end informally if the parties agree. But, of course, tacit consent is always possible, and the termination of a treaty is only the obverse of its formation. In the *Nuclear Tests* Case the International Court said that international law commitments could be made unilaterally and in the most informal of ways, such as a press conference. If that is so, the way of entry into commitments has been considerably loosened, and it is likely to follow that the way of ending them will also be loosened. The problem is ascertainment of tacit consent to be bound no longer, not whether or not it is possible to imply that consent.

The question of State succession to treaties is thus part and parcel of a complex of cognate questions about the viability of treaties, and I suspect that we are just at the beginning of a new course of development in treaty law that will eventually make the Convention on State Succession obsolescent. Which is the reason why I am unrepentantly doubtful about the merits of codification, which can only arrest the historical development of the law and encapsulate it within a particular time-frame and a particular ideological milieu.