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\* The Materials on International Law for Latvia are for the years 2011 and 2012 – ed.

# State Succession with Respect to Multilateral Treaties in the Context of Secession: From the Principle of *Tabula Rasa* to the Emergence of a Presumption of Continuity of Treaties

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## 1. Introduction

The issue of State succession to treaties is undoubtedly one of the most controversial ones in international law.<sup>1</sup> It has long been the battleground for opposing schools of thought.<sup>2</sup> In a nutshell, supporters of the theory of *tabula rasa* (clean slate) argue that a new State (the “successor” State) does not succeed to the treaties to which the predecessor State was a party. On the contrary, defendants of the theory of continuity believe that a succession to treaties by a new State is automatic. This paper examines the following question: is the new successor State automatically bound by the multi-lateral treaties to which the predecessor State was a party at the date of succession?<sup>3</sup> It must be emphasised at the outset that our analysis is limited to the question of succession to *multilateral* treaties and that it focuses only on one type of succession of States: *secession*.

We begin our analysis by defining the term “secession” in order to distinguish it from other cases of dismemberment of States (part two). The issue of succession to treaties in the event of secession will only be analysed after having succinctly examined the recent practice of States in the context of dissolution of States (part three). The third part of this paper examines the practice of secessionist States prior to the adoption of the 1978 Vienna Convention on Succession of States in Respect of Treaties.<sup>4</sup> The paper will investigate Pakistan, Singapore and Bangladesh as States that exemplify this practice. The practice adopted by these secessionist States has generally followed the principle of *tabula rasa*. The fourth part examines the regime established under the 1978 Vienna Convention in the specific case of secession. In this part, we will present a history of the work of the International Law Commission (ILC), including its numerous internal conflicts that have resulted in the adoption of the principle of continuity of treaties, which was in fact contrary to the practice of secessionist States at the time. Lastly, we will analyse State practice with regard to succession to treaties in the recent case of the secession of Montenegro (2006) (part five). Given the fact that there is very limited contemporary practice with regards to

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1 M. Bedjaoui, ‘Problèmes récents de succession d’États dans les États nouveaux’, in 130 *Recueil des cours de l’Académie de droit international* (Brill, Leiden, 1970) p. 455, at p. 463.

2 O. Udokang, *Succession of the New States to International Treaties* (Oceana Publications, Dobbs, Ferry, NY, 1972) at p. 485.

3 The present study is a modified and updated version of a paper published in 2003 by the present authors: P. Dumberry and D. Turp, ‘La succession d’États en matière de traités et le cas de la sécession: du principe de la table rase à l’émergence d’une présomption de continuité des traités’, 36:2 *RBDI* (2003) p. 377. The present version re-examines the question some ten years later in light of recent State practice in the context of the independence of Montenegro and the position adopted by Scotland (a candidate to secession).

4 Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, 1946 *UNTS* 3 (entered into force 6 November 1996) [hereinafter Vienna Convention].

secession, we will also analyse the position adopted by two eventual candidates for independence, that of Québec and Scotland.

## **2. The Distinction between Secession and the Other Cases of Dismemberment of States**

### **2.1. The Concept of Secession**

State succession is defined as “the replacement of one State by another in the responsibility for the international relations of territory”.<sup>5</sup> State succession issues generally arise when a *new* State replaces *another* in its international responsibility over one given territory.<sup>6</sup> These cases must be clearly distinguished from other situations where there is an “identity” of a State. In that situation, it is the *same* State that continues to exist despite changes affecting its constituent parts (government, territory or population).<sup>7</sup> Another important distinction is between the different types of State succession that result from the arrival of a new State on the international scene. Thus, in the case of “secession”, the emergence of a new State (the “successor” State) does not result in the extinction of the State from which it stemmed (the “predecessor” State). In other words, the predecessor State survives the birth of the new-born State, even with a partial loss of its original territory.<sup>8</sup> On the contrary, in the case of the “dissolution” of a State the arrival of new States results in the disintegration of the predecessor State (with no “continuator” State). The predecessor State ceases to exist and gives way to several new States. Cases of secession are also different from another type of State succession: “Newly Independent States”, for which the

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5 Vienna Convention, *ibid.*, Article 2(1)(b).

6 Events affecting the territorial integrity of the predecessor State may sometimes simply result in the enlargement of the territory of an existing State. This is the case of the cession or transfer of territory from one existing State to another existing State. A classic example is that of Alsace-Lorraine from Germany to France in 1919. This type of territorial transformation is somewhat different compared to other mechanisms of State succession in so far as it results neither in the extinction of a State nor in the creation of a new State. It is nevertheless clearly a distinct type of State succession.

7 There is a presumption under international law that a State continues its existence: J. Crawford, ‘The Criteria for Statehood in International Law’, 48:1 *BYIL* (1975) p. 93, at p. 139. On the question of State identity: K. Marek, *Identity and Continuity of States in Public International Law* (Droz, Geneva, 1968); G. Cansacchi, ‘Identité et continuité des sujets de droit international’, in 130 *Recueil des cours de l’Académie de droit international* (Brill, Leiden, 1970) p. 1; M. C. R. Craven, ‘The Problem of State Succession and the Identity of States under International Law’, 9:1 *EJIL* (1991) p. 142; B. Stern, ‘La succession d’États’, in 262 *Recueil des cours de l’Académie de droit international* (Brill, Leiden, 1996) p. 39.

8 In this context, the predecessor State should therefore be considered as the “continuator” State because its existence is not affected by the secession of part of its territory.

1978 Vienna Convention reserved a particular regime due to its unique historical and political characteristics in the context of decolonisation.<sup>9</sup>

It is important to mention that some authors distinguish the notion of “secession” from that of “separation”. In the first case the detachment of the new State would be contrary to the will of the predecessor State, whereas in the second case this detachment would be done with its agreement.<sup>10</sup> D. P. O’Connell uses a similar dichotomy by distinguishing cases of “revolutionary secession” from situations of “evolutionary secession”.<sup>11</sup> Finally, for other authors, the term “separation” refers to the situation where a region is detached from a unitary State, while that of “secession” concerns a detachment from a federal State.<sup>12</sup> However accurate they may be, these distinctions will not be taken into consideration in the present study. The term “secession” will therefore be used in its more general sense, encompassing all situations of “separation”.<sup>13</sup> Finally, we do not intend to examine the debate on the legality of secession. Suffice it to say in the context outside of colonialism that while there is no *right* to unilateral secession under international law, the practice of States “does

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- 9 Under the Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV), UNGAOR, 25th Sess, Supp No, UN Doc A/8082, (1970) 121, the territory of a colony is not considered as part of the territory of the colonial State under which it is being administrated. In that sense, a “Newly Independent State” is a new State which cannot be said to have “seceded” from the colonial power to the extent that its territory was never formally part of it. See A. Zimmermann, ‘Secession and the Law of State Succession’, in M. G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, Cambridge, 2006) at p. 208.
- 10 M. G. Kohen, ‘Le problème des frontières en cas de dissolution et de séparation d’États : quelles alternatives ?’, in O. Corten et al. (eds.), *Démembrement d’États et délimitations territoriales : L’uti possidetis en question(s)* (Bruylant, Brussels, 1999) at pp. 368–369.
- 11 D. P. O’Connell, *State Succession in Municipal Law and International Law*, vol II (Cambridge University Press, Cambridge, 1967) at p. 88.
- 12 J. Brossard and D. Turp, *L’accession à la souveraineté et le cas du Québec*, 2nd edition (Presses de l’Université de Montréal, Montréal, 1995) at p. 94; D. Turp, *Le droit de choisir : Essais sur le droit du Québec à disposer de lui-même / The Right to Choose : Essays on Québec’s Right of Self-Determination* (Thémis, Montréal, 2001) at p. 22.
- 13 The Supreme Court of Canada in the *Québec secession* case (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 83) also used the term “secession” without differentiating between situations where it is achieved with, or without, the accord of the predecessor State. The ILC also uses the terms “secession” and “separation” to refer to the same phenomenon: *Report of the International Law Commission to the General Assembly: Report of the International Law Commission on the work of its Twenty-Sixth Session*, UNGAOR, 29th Sess, Supp No 10, UN Doc 6 A/9610/Rev.1 (1974) in (1974) II(1) *ILC Yearbook* at pp. 260 et seq. [*Report of the International Law Commission, Twenty-Sixth Session*]. Article 34 of the Vienna Convention, however, uses the term “separation” to refer to both cases of secession and dissolution of State (this issue is further discussed below).

not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases”.<sup>14</sup> In any event, the Supreme Court of Canada rightly concluded that “international law may well adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation”<sup>15</sup> and that if a secession is “successful in the streets, it might well lead to the creation of a new state”.<sup>16</sup> In the end, the “ultimate success” of secession will “dependent on recognition by the international community.”<sup>17</sup>

## **2.2. Succinct Analysis of Contemporary State Practice of Succession of States to Treaties in the Context of Dissolution of States**

Although our study focuses on cases of secession, it is nevertheless useful to briefly review contemporary State practice in the context of dissolution of States. The principle of continuity of treaties has been adopted by several States in various cases of State dissolution that occurred in Eastern Europe in the 1990s, such as those of Czechoslovakia and Yugoslavia. Third party States, like the member States of the European Union, have also adopted the position of continuity of treaties.<sup>18</sup> Furthermore, the evolution of the American government’s position on the question is particularly interesting. Before the 1990s, the United States supported the application of the rule of *tabula rasa* in cases of State succession, as stated by the *Restatement (Third) of the Foreign Relations Law of the United States*.<sup>19</sup> This document was however strongly criticised for not reflecting contemporary international law on the question.<sup>20</sup> The United States now favours the application of the principle of continuity of treaties:

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14 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, [2010] ICJ Rep 403, at para. 79.

15 *Reference re Secession of Quebec*, *supra* note 13, at para. 141.

16 *Ibid.*, para. 142.

17 *Ibid.*, para. 155.

18 P. J. Kuyper, ‘The Community and State Succession in Respect to Treaties’, in D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, vol. II (Martinus Nijhoff, Dordrecht, 1994) at p. 640; G. Clariana, ‘La succession dans les Communautés européennes’, in G. Burdeau and B. Stern (eds.), *Dissolution, continuation et succession en Europe de l’Est* (Cedin-Paris I, Paris, 1994) at p. 132. States’ individual position on the matter is however not uniform. See, for instance, Austria’s position in favour of the principle of *tabula rasa*: G. Hafner and E. Kornfeind, ‘The Recent Austrian Practice of State Succession: Does the Clean Slate Rule Still Exist?’, 1 *Austrian Review of International and European Law* (1996) p. 1.

19 American Law Institute, *Restatement of the Law Third, the Foreign Relations Law of the United States*, vol. I (American Law Institute Publ., Philadelphia, 1987) at § 210 no 3, letter “f” (p. 110), “Reporters’ Notes” no 4 (p. 113) [*Restatement of the Law Third, the Foreign Relations Law of the United States*]

20 P. R. Williams, ‘The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?’, 23 *Denver J Int Law Pol* (1994) p. 1, at pp. 9–10.

U.S. interests in maintaining the stability of legal rights and obligations are, on balance, better served by adopting a presumption that treaty relations remain in force. This is consistent with the efforts of the United States to foster respect for the rule of law around the world. In the broadest sense, therefore, it is essential to develop international legal principles that tend to support the stability of legal rights and obligations. ... In sum, while we recognized that the law in this area is somewhat unsettled, we decided that the better legal position was to presume continuity in treaty relations.<sup>21</sup>

Some writers have noted that the adoption of this new US approach has been largely influenced by American foreign policy objectives.<sup>22</sup>

The vast majority of authors also recognise that the recent practice of new States emerging from dissolution of States *generally* follows the principle of automatic continuity of treaties.<sup>23</sup> This is certainly true for multilateral treaties of “universal character” as well as those treaties creating border regimes and territorial regimes.<sup>24</sup>

21 This is the position expressed by US State Department legal counsels E. D. Williamson and J. E. Osborn, ‘A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Break-up of the U.S.S.R. and Yugoslavia’, 33 *Virginia J Int Law* (1992) p. 264. See also E. D. Williamson, ‘State Succession and Relations with Federal States’, 86 *ASIL Proceedings* p. 10, at p. 12.

22 R. J. Zedalis, ‘An Independent Quebec: State Succession to NAFTA’, 2:4 *NAFTA: Law & Bus Rev Am* (1996) p. 3, at p. 14; Williams, *supra* note 20, at pp. 23–27, 31–33. On the contrary, for L. Love, ‘International Agreement Obligations After the Soviet Union’s Break-up: Current United States Practice and Its Consistency with International Law’, 26:2 *Vand J Transnat’l L* (1993) p. 373, at pp. 413–414, the United States’ position of automatic succession represents contemporary international law as reflected in Article 34 of the Vienna Convention.

23 Stern, *supra* note 7, at pp. 291–295; P. Pazartzis, *La succession d’États aux traités multilatéraux à la lumière des mutations territoriales récentes* (Pedone, Paris, 2002) at pp. 143–151, 158–159; International Law Association, *Rapport final sur la succession en matière de traités*, Committee on Aspects of the Law of State Succession, New Delhi Conference 2002, at pp. 14–15 [International Law Association, *Rapport final*]; H. Bokor-Szego, ‘Continuation et succession en matière de traités internationaux’, in G. Burdeau and B. Stern (eds.), *Dissolution, continuation et succession en Europe de l’Est* (Cedin-Paris I, Paris, 1994) at p. 54. Some writers believe that this practice clearly supports the principle of continuity: V. Degan, ‘La succession d’États en matière de traités et les États nouveaux (issus de l’ex-Yougoslavie)’, 42 *AFDI* (1996) p. 206 at p. 222; Williamson, *supra* note 21. Other writers believe that there are in fact many exceptions to this principle: Y. Gamarra, ‘Current Questions of State Succession Relating to Multilateral Treaties’, in P. M. Eisemann and M. Koskenniemi, *La succession d’États : la codification à l’épreuve des faits* (Martinus Nijhoff, The Hague, 2000) at pp. 434–435.

24 M. del Carmen Marquez Carrasco, ‘Régimes de frontières et autres régimes territoriaux face à la succession d’États’, in P. M. Eisemann and M. Koskenniemi, *La succession d’États : la codification à l’épreuve des faits* (Martinus Nijhoff, The Hague, 2000) at p. 493; Stern, *supra* note 7, at pp. 255–262.



The application of this principle of automatic continuity does not, however, extend to treaties concluded between a restricted number of partners,<sup>25</sup> such as regional or bilateral treaties.<sup>26</sup> The same is true for “political” or “personal” treaties.<sup>27</sup> Furthermore, issues of succession in the context of international organizations are governed by the particular regime set out by each institution. One controversial issue debated by writers is whether the successor State is automatically bound by the human rights instruments ratified by the predecessor State.<sup>28</sup>

The use of the term “automatic continuity” must nonetheless be nuanced. For instance, recent State practice reveals that successor States have generally given notifications of their will to “succeed” to the treaties of the predecessor State or to “continue” to be a party to them. As a matter of principle, the very fact that a new State notifies its intention to be bound by a treaty is proof in itself that there is no “automatic” succession to treaties. Thus, no such notification should logically be required if any principle of truly automatic succession were to exist. But the situation is slightly more complicated than that. Some States, for instance, have sent a notification precisely in order to express their desire to be *automatically* bound by a treaty.<sup>29</sup> In these cases, the aim of notification must be analysed as proof of continuity of treaty application rather than discontinuity. In this respect, reference should be made to the attitude of depositary States of multilateral treaties, as well as that of the Secretary-General of the United Nations. Their expectation has been to receive formal “confirmations” from States wishing to succeed to the treaties of their predecessors.<sup>30</sup> Therefore, it is best to speak of the application of a principle of continuity of treaties, which would, in fact, not be “automatic”.<sup>31</sup>

From this diverse practice in the context of dissolution of States, only a few writers have concluded to the emergence of a customary rule in favour of continuity of treaties.<sup>32</sup> In fact, a number of authors have, on the contrary, argued in favour of the application of the rule of *tabula rasa* whereby the new State would have complete

25 Pazartzis, *supra* note 23, at pp. 183–185; Bokor-Szego, *supra* note 23, at pp. 54–55.

26 Stern, *supra* note 7, at pp. 314–326.

27 Pazartzis, *supra* note 23, at pp. 185–191.

28 See *inter alia* I. Poupart, ‘Succession aux traités et droit de l’homme : vers la reconnaissance d’une protection ininterrompue des individus’, in P. M. Eisemann and M. Koskeniemi, *La succession d’États : la codification à l’épreuve des faits* (Martinus Nijhoff, The Hague, 2000) at pp. 465–490; M. T. Kamminga, ‘State Succession in Respect to Human Rights Treaties’, 7:4 *EJIL* (1996) p. 469.

29 Stern, *supra* note 7, at pp. 291–295; Pazartzis, *supra* note 23, at pp. 191–200, 206, 209–213.

30 International Law Association, *Conclusions of the Committee on Aspects of the Law on State Succession*, Resolution no. 3/2008, adopted at the 73rd Conference of the International Law Association, held in Rio de Janeiro, Brazil, 17–21 August, 2008, at point no. 6. [ILA, *Conclusions of the Committee on Aspects of the Law on State Succession*].

31 Pazartzis, *supra* note 23, at pp. 209–213; Stern, *supra* note 7, at p. 294.

32 This is discussed in Pazartzis, *supra* note 23, at p. 212.

freedom with regards to treaties entered into by the predecessor State.<sup>33</sup> The International Court of Justice (ICJ) has never ruled on the question of the customary nature of the principle of continuity of treaties in the context of dissolution of States.<sup>34</sup>

### 3. State Practice Prior to the Adoption of the 1978 Vienna Convention: The Consecration of the Principle of *Tabula Rasa*

There are many examples of State practice in the context of secession prior to the adoption of the 1978 Vienna Convention. Examples include the independence of the United States in 1776 (from Great Britain), that of Spanish colonies in South America during the 19th century, as well as those of Cuba in 1898 (from Spain), Belgium in 1830 (from the Netherlands), Texas in 1840 (from Mexico), Panama in 1903 (from Columbia), Greece in 1830 (from the Ottoman Empire), Finland in 1919 (from the Soviet Union), and Ireland in 1922 (from the United Kingdom). For the majority of authors,<sup>35</sup> as well as for the ILC,<sup>36</sup> it is the principle of *tabula rasa* that was applied in these older instances of secession prior to the creation of the United Nations (UN).<sup>37</sup>

33 P. M. Eisemann, 'Rapport du Directeur de la section de langue française du Centre', in P. M. Eisemann and M. Koskenniemi, *La succession d'États : la codification à l'épreuve des faits* (Martinus Nijhoff, The Hague, 2000) at pp. 48–54; T. Langstöm, 'The Dissolution of the Soviet Union in the Light of the 1978 Vienna Convention on Succession of States in Respect to Treaties', in P. M. Eisemann and M. Koskenniemi, *La succession d'États : la codification à l'épreuve des faits* (Martinus Nijhoff, The Hague, 2000) at p. 775.

34 The issue was, however, discussed by litigants in several ICJ cases, including: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, [1996] ICJ Rep 595 [Genocide case, Preliminary Objections]. See also *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 3 at p. 71.

35 P. K. Menon, *The Succession of States in Respect to Treaties, State Property, Archives and Debts* (Edwin Mellen Press, Lewiston, NY, 1991); Z. Meriboute, *La codification de la succession d'États aux traités: décolonisation, sécession, unification* (P.U.F., Paris, 1984) at pp. 41, 48; M. N. Shaw, *International Law*, 6th edition (Cambridge University Press, Cambridge, 2008) at p. 974; A. Zimmermann, *Staatenachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation* (Springer-Verlag, Berlin/Heidelberg, 2000) at pp. 138 *et seq.*, 143 *et seq.*, 166 *et seq.*; J. E. Murkens *et al.*, *Scottish Independence: A Practical Guide* (Edinburgh University Press, Edinburgh, 2002) at p. 160.

36 *Report of the International Law Commission, Twenty-Sixth Session*, *supra* note 13, at p. 265; *Report of the Commission to the General Assembly: Report of the International Law Commission on the Work of its Twenty-Fourth Session*, UNGAOR, 27th Sess, Supp No 10, UN Doc A/8710/Rev.1 (1972) in (1972) II ILC Yearbook at 296–297 [*Report of the Commission, Twenty-Fourth Session*].

37 D.P. O'Connell, *supra* note 11, at p. 88, considers that the principle of continuity of treaties applies for cases of "evolutionary secessions" (such as those of Brazil (1825), Muscat and Zanzibar (1856), Romania (1856–1878), Egypt (1873–1919) and Iceland (1918)).

In the present section, our analysis will focus in particular on the practice of States in relation to three cases of secession which have occurred since the creation of the UN, namely Pakistan, Singapore and Bangladesh. These three cases are generally recognised as being examples of secession.<sup>38</sup>

### **3.1. Pakistan**

In the months leading up to the independence of India from the British Indian Empire, several serious incidents of inter-religious violence took place (between Hindus and Muslims). It eventually led to the “partition” of British India into two distinct States: India and Pakistan. India has generally been considered as the continuing State of the British Indian Empire, while Pakistan was viewed as having seceded from India in 1947 right after India’s independence.<sup>39</sup> This qualification is rather superficial, as both India and Pakistan actually became independent States *at the same time* as a result of the adoption of a law by the British Parliament.<sup>40</sup>

Following this “secession”, the question arose as to whether Pakistan should automatically succeed to the treaties to which British India was a party. The devolution agreement provided that Pakistan would automatically succeed to these treaties.<sup>41</sup> While Pakistan had redeemed its position as an automatic successor to some of these treaties, it has not adopted such position with respect to all treaties to which British India was a party.<sup>42</sup> In fact, Pakistan’s position of automatic successor (for some treaties) was not accepted by the United Nations and other States.<sup>43</sup> Ultimately, Pakistan

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38 It should be noted that some comments from members of the ILC suggest that these three cases could in fact also be analyzed as examples of “Newly Independent States”. See *Report of the International Law Commission, Twenty-Sixth Session, supra* note 13, at p. 264.

39 Legal Department of the United Nations, *UN Press Release*, UN Doc PM/473 (12 August 1947). This question is examined in T. S. N. Sastry, *State Succession in Indian Context* (Dominant Publ. & Dist., New Delhi, 2004) at pp. 77 *et seq.*

40 Indian Independence Act (1947), 10 & 11 Geo. VI, c 30. On this point see D. P. O’Connell, *State Succession in Municipal Law and International Law*, vol. I (Cambridge University Press, Cambridge, 1967) at p. 8.

41 Indian Independence (International Arrangements) Order, Gazette of India Extraordinary, 14 August 1947, (document annexed to UNGAOR, 2th Sess, UN Doc. A/C 6/161 (1947) at 308–310) [Indian Independence (International Arrangements) Order] The treaty indicated that only India should be considered as the continuator of British India.

42 O’Connell, *supra* note 11, pp. 129, 226–227.

43 A legal opinion from 8 August 1947 by the Assistant Secretary-General for Legal Affairs (approved by the Secretary-General) explains as follows: “The territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and it will not, of course, have membership in the United Nations”. *The Succession of States in relation to Membership in the United Nations – Memorandum prepared by the Secretariat*, UN Doc A/CN.4/149 and Add.1 in (1962) II *ILC Yearbook* at p. 119. M. G. Marcoff, *Accession à l’indépendance et succession d’États aux traités internationaux* (Éditions Universitaires, Fribourg, 1969) at p. 335, indicates that the UN

had to act as though it had not automatically succeeded to the treaties concluded by British India and decided to ratify those treaties to which it wanted to accede.<sup>44</sup> Pakistan also made formal applications to become a member of international organisations.<sup>45</sup> The principle of the non-succession to treaties was also the position adopted by the Pakistan Supreme Court.<sup>46</sup> The question of the automatic succession of Pakistan to treaties concluded by British India was raised in the ICJ *Case concerning the Aerial Incident of August 10th, 1999* between Pakistan and India.<sup>47</sup> However, the

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later abandoned this position as explained in this document: *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc ST/LEG/7 (1959) at 47. For O'Connell, *supra* note 11, at p. 185, in any event, the UN position only refers to one treaty (the UN Charter) and does not result in a new State not being able to succeed to treaties entered into by the predecessor State.

- 44 This is the conclusion reached by the ILC: *Succession of States to Multilateral Treaties: Studies Prepared by the Secretariat*, UN Doc A/CN.4/200 and Add.1, 2 in (1968) II *ILC Yearbook* at pp. 16, 29–30, 40–41; *Succession of States to Multilateral Treaties: Sixth Study Prepared by the Secretariat*, UN Doc A/CN.4/210 in (1969) II *ILC Yearbook* at p. 37; *Succession of States to Multilateral Treaties: Seventh Study Prepared by the Secretariat*, UN Doc A/CN.4/225 in (1970) II *ILC Yearbook* at p. 71. This is also the position adopted by Meriboute, *supra* note 35, at pp. 145–147. *Contra* A. G. Pereira, *La succession d'États en matière de traités* (Pedone, Paris, 1969) at pp. 62–63, 97.
- 45 Pakistan wanted to automatically become a member of the UN. The Indian Independence (International Arrangements) Order provided otherwise. This last position which refused automatic admission to the UN was adopted more generally by the UN with regards to all new States: *Letter from the Chairman of the Sixth Committee to the Chairman of the First Committee*, 8 October 1947, UN Doc A/C.1/212 in UN Doc A/CN.4/149. See K. P. Misra, 'Succession of States: Pakistan's Membership in the United Nations', 3 *CYIL* (1965) p. 281, at pp. 281–289; O'Connell, *supra* note 11, at pp. 185–187; Udokang, *supra* note 2, at pp. 143–148.
- 46 *Barlas Brothers (Karachi) v. Yangtze (London) Ltd.*, All Pakistan Legal Decisions, vol. II (1961) SC 573, in *ILR* vol. 27 at p. 36. The Supreme Court held, *inter alia*, that Pakistan was not bound by the Indian Independence (International Arrangements) Order (adopted by the British House of Commons): "When a new country is created it is an entirely separate international entity and is not bound by agreement entered into by the State out of whose territories it is created merely because its territories were previously comprised in that State". *Ad hoc* Judge Pirzada in *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, [2000] *ICJ Rep* 12 at paras. 10–11, refers to another decision of the Supreme Court that seems to have adopted the position of continuity of treaties: *Superintendent, Land Customs (Khyber Agency) v. Zemar Khan*, All Pakistan Legal Decisions (1969) SC 485.
- 47 *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *ibid*. In this case, Pakistan invoked the Court's jurisdiction under Article 17 of the General Act for Pacific Settlement of International Disputes (signed at Geneva on 26 September 1928) to which the Dominion of India was a party. Pakistan argued that both India and Pakistan had succeeded to the Act in 1947 by way of automatic succession under both customary international law and

Court did not have to address this issue.<sup>48</sup> Only Judge *ad hoc* Pirzada, in his dissenting opinion, ruled in favour of the automatic succession of Pakistan to the General Act of 1928 as a result of the 1947 devolution agreement.

Different interpretations have been adopted by writers regarding Pakistan's practice. Some authors have used this example to support their claim that the rule of *tabula rasa* most accurately reflects post WWII State practice in the context of secession.<sup>49</sup> Other authors have adopted a more nuanced reading of this example.<sup>50</sup> Some have even argued that Pakistan's practice, in fact, supports the principle of continuity of treaties.<sup>51</sup> On balance, this practice appears to support the principle of *tabula rasa*.<sup>52</sup>

### 3.2. Singapore

Malaysia obtained its independence from the United Kingdom in 1957.<sup>53</sup> At the time, the territory of Singapore remained under British domination until 1963 when Singapore was attached to the Federation of Malaysia.<sup>54</sup> The union was of short duration. Only two years later, in 1965, Singapore peacefully seceded from Malaysia to become an independent State.<sup>55</sup> This process was interpreted as a case of secession (and not one of dissolution of State) insofar as the integration of Singapore in

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the Indian Independence (International Arrangements) Order. India relied, *inter alia*, on the *Barlas Brothers* case to argue that Pakistan had never been party to the Act.

48 The Court concluded that it did not have jurisdiction over the dispute based on India's reservation contained in its declaration of acceptance of the compulsory jurisdiction of the Court. The Court also concluded that it did not have jurisdiction as a result of India's notification of denunciation of the Act made in 1974.

49 Meriboute, *supra* note 35, at pp. 144–147. This is also the position adopted by the ILC, *Report of the International Law Commission, Twenty-Sixth Session, supra* note 13, at p. 264.

50 Udokang, *supra* note 2, at p. 178, for whom Pakistan's position was driven by political rather than legal factors.

51 For Pereira, *supra* note 44, at pp. 62–63, 97, other States have generally accepted Pakistan as the successor to the treaties to which the Dominion was a party. The United Nations' refusal to accept this position is therefore isolated. O'Connell, *supra* note 11, at pp. 128–129, believes that Pakistan generally succeeded to the treaty to which the Dominion was a party based on the devolution agreement (Indian Independence (International Arrangements) Order) rather than on the application of any principle of succession to treaties.

52 *Report of the Commission, Twenty-Fourth Session, supra* note 36, at p. 297.

53 Federation of Malaya Independence Act, 1957, 5 & 6 Eliz.2. c 60; Federation of Malaya Independence Order, in *Council, Statutory Instrument* 1957, no. 1533.

54 Agreement relating to Malaysia, 9 July 1963, 750 UNTS 242.

55 Singapore was admitted to the United Nations on 21 September 1965. See *Admission of Singapore to Membership in the United Nations*, GA Res 2010 (XX), UNGAOR, 20th Sess, UN Doc A/PV.1332 (1965), see also SC Res 213 (1965).

Malaysia in 1963 had been considered by the United Nations as a simple extension of Malaysia's territory, and not as a fusion of two States.<sup>56</sup>

The agreement of secession and devolution concluded between Malaysia and Singapore in 1965 provided for Singapore's automatic succession to treaties to which Malaysia was a party.<sup>57</sup> However, Singapore's actual practice appears to have deviated from the solution prescribed for in the devolution agreement. It followed instead the rule of *tabula rasa*.<sup>58</sup> Thus, instead of automatically succeeding to the treaties to which Malaysia was a party, Singapore denounced or revised the majority of them.<sup>59</sup> This also appears to be the case of the agreement concluded between Japan and Malaysia relative to aerial services.<sup>60</sup>

### 3.3. *Bangladesh*

Once Pakistan had become an independent State in 1947, it combined two entities that were territorially discontinued yet united by the same faith in Islam. In March of 1971, the eastern part of the country (populated by Bengalis) made a unilateral

56 Meriboute, *supra* note 35 at 148.

57 Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State, 7 August 1965, 563 UNTS 89 (also in *Singapore Govt Gazette*, vol. 7, no. 66, 9 August 1965). Annex B (Article 13) provides: "Any treaty, agreement or convention entered into before Singapore Day [*i.e.* the date of independence] between the Yang di-Pertuan Agong [*i.e.* head of State of Malaysia] or the Government of Malaysia and another country or countries, including those deemed to be so by article 169 of the Constitution of Malaysia shall in so far as such instruments have application to Singapore, be deemed to be a treaty, agreement of convention between Singapore and that country or countries ...". See L. C. Green, 'Malaya/Singapore/Malaysia : Comments on State Competence, Succession and Continuity', 4 *CYIL* (1966) p. 3.

58 Meriboute, *supra* note 35, at pp. 149–150; *Report of the Commission, Twenty-Fourth Session*, *supra* note 36, at p. 297.

59 This is the conclusion reached by the ILC, *Report of the International Law Commission, Twenty-Sixth Session*, *supra* note 13, at p. 264. See also S. Jayakumar, 'Singapore and State Succession : International Relations and Internal Law', 19:3 *ICLQ* (1970) p. 398, at p. 412, concluding that "it is clear that Singapore does not consider itself automatically bound by all the treaties its predecessors has extended or applied to Singapore".

60 On this treaty, see the study by the ILC: *Succession of States in Respect of Bilateral Treaties – Second and Third Studies Prepared by the Secretariat*, UN Doc A/CN.4/243 and Add.1 in (1971) II(1) *ILC Yearbook* at pp. 138–142, 145, 147. Singapore first indicated (letter of 20 September 1965) that it was bound by the agreement as a result of a rule of automatic succession to treaties without having deposited its instrument of ratification. It is only subsequently (letter of 28 May 1966) that Singapore indicated to Japan its willingness to put an end to the agreement. A new agreement was later signed by both parties on 14 February 1967. Writers have given different interpretations of these events: S. Tabata, 'The Independence of Singapore and Her Succession to the Agreement between Japan and Malaysia for Air Services', 12 *Japanese Ann. I.L.* (1968) p. 36; Udokang, *supra* note 2, at pp. 196–198.



declaration of independence to create a new State: Bangladesh.<sup>61</sup> This new situation was rendered effective by the intervention of Indian troops in favour of separatists in December of 1971. Bangladesh was later recognised by the other members of the international community.<sup>62</sup> Contrary to the two previous examples, in the case of Bangladesh there was no devolution agreement. In practice, Bangladesh considered itself a new State originating from the process of decolonisation and consequently adopted the *tabula rasa* position. Bangladesh has thus sent a number of declarations to international organisations indicating its willingness to succeed to a number of multilateral treaties.<sup>63</sup>

In conclusion, it appears that in the two cases where devolution agreements provided for the continuity of treaties, the actual practice of secessionist States has nonetheless been diversified. In one case (Singapore), the successor State preferred to adopt the rule of *tabula rasa* rather than to follow the regime prescribed for in the devolution agreement. In the other case (Pakistan), the rule of the *tabula rasa* was to some extent imposed by members of the international community. Finally, the example of Bangladesh seems to support the application of the rule of the *tabula rasa*.

Therefore, the practice of States in the context of secession after WWII indicates that successor States have generally applied the rule of *tabula rasa* whereby they do not have to assume the conventional obligations of the predecessor State, unless they freely accept such responsibilities.<sup>64</sup> Thus, according to the ILC,<sup>65</sup> as well as the International Law Association,<sup>66</sup> the practice of secessionist States prior to the adoption of the 1978 Vienna Convention reveals that there was no automatic succession to treaties concluded by the predecessor State.

#### **4. The Regime of the 1978 Vienna Convention: The Consecration of the Principle of Continuity of Treaties – Without Any Customary Value**

The Vienna Convention was adopted on 22 August 1978, but only came into force in 1996.<sup>67</sup> To date only 22 States have ratified the Convention and there have been

61 *I.L.M.*, vol. 11, 1972 at p. 119.

62 Bangladesh was also eventually recognised by Pakistan in 1974 and soon after admitted to the United Nations: SC Res 351 (1974); GA Res 3203 (1974). See J. A. Salmon, 'Nais-sance et reconnaissance du Bangladesh', in J. Tittel (ed.), *Mélanges Wengler*, vol. I (Inter Recht, Berlin, 1973) at p. 468.

63 Meriboute, *supra* note 35, at pp. 153–154.

64 Meriboute, *supra* note 35, at p. 154.

65 *Report of the Commission, Twenty-Fourth Session*, *supra* note 36, at pp. 295 *et seq.* This is also the position of Judge Kreca in his dissenting opinion in *Genocide* case, Preliminary Objections, *supra* note 34, at p. 779.

66 International Law Association, *Rapport final*, *supra* note 23, at p. 3.

67 The text was adopted at a conference convened pursuant to *Succession of States in Respect of Treaties*, GA Res 3496 (XXX), UNGAOR, 30th Sess, UN Doc A/PV.2440 (1975). The first five reports were submitted by Sir Humphrey Waldock (from 1968 to 1972) and the last one by Sir Francis Vallat in 1974. In 1974, the ILC adopted the first

no ratifications since 2009. The Vienna Convention gives effect to a fundamental distinction between “Newly Independent States” emerging from decolonisation (Articles 16 to 30 of the Convention) and other new States not emerging from decolonisation (Articles 31 *et seq.*). The principle of *tabula rasa* applies to Newly Independent States which are therefore not automatically bound by treaties entered into by the predecessor (colonial) State. The regime applicable to those other non-colonial situations will be analysed in the following section.

#### 4.1. *The Principle of Continuity of Treaties*

Article 34 of the Vienna Convention outlines the regime applicable to cases of “separation” of States. It provides for the application of the principle of continuity of treaties. This provision uses the term “separation” to actually refer to the different concepts that are “secession” and “dissolution” of States. The principle of continuity therefore applies to both cases. It should be noted that Article 34 endorses the principle of *automatic* succession to treaties whereby the successor State is *ipso facto* bound by treaties entered into by the predecessor State without the requirement of any notification by that State. However, this rule of continuity bears two exceptions where *tabula rasa* applies: when the implicated parties have specifically agreed for the application of the *tabula rasa* rule, and where the automatic application of the treaty to the successor State would be “incompatible with the object and purpose of the treaty or would radically change the conditions for its operation”.<sup>68</sup>

The final wording of Article 34, in terms of the applicable regime in the case of secession, is the result of several developments which can be succinctly summarised in the following three phases:

- First phase: A clear distinction is made between cases of secession and dissolution of States which are examined separately; secession cases are assimilated to “Newly Independent States”; the rule of *tabula rasa* applies to all secession cases;
- Second phase: Cases of secession and dissolution of States are now examined together; the principle of continuity generally applies to cases of secession, except for those situations where a secession can be assimilated to that of a “Newly Independent State”, in which case, the *tabula rasa* rule applies;
- Third phase: The above-mentioned exception is dropped; the principle of continuity of treaties applies to *all* secession cases.

In the initial phase of its work, the ILC’s Draft Articles of 1972 clearly distinguished between cases of dissolution of States (Article 27) and those of “separation of one part of a State” (Article 28). Article 28 provided as follows:

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draft of the Convention (hereinafter the 1972 Draft Articles). The final text was adopted in Vienna during different sessions which took place from 4 April to 6 May 1977 and from 31 July to 23 August 1978.

68 Vienna Convention, *supra* note 4, Article 34(2).



1. If part of the territory of a State separates from it and becomes an individual State, any treaty which at the date of the separation was in force in respect of that State continues to bind it in relation to its remaining territory, unless:
  - (a) It is otherwise agreed; or
  - (b) It appears from the treaty or from its object and purpose that the treaty was intended to relate only to the territory which has separated from that State or the effect of the separation is radically to transform the obligations and rights provided for in the treaty.
2. In such a case, the individual State emerging from the separation is to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty.

The first paragraph of this provision indicates that in the event of secession, the continuator State remains bound by the treaties it had entered into at the date of secession. The second paragraph states that the secessionist State must be considered as having the same position as a Newly Independent State with regards to all treaties.<sup>69</sup> This is because the ILC concluded that:

The available evidence of practice does not therefore support the thesis that in the case of a separation of part of a State, as distinct from the dissolution of a State, treaties continue in force *ipso jure* in respect of the territory of the separated State. On the contrary, evidence strongly indicates that the separated territory which becomes a sovereign State is to be regarded as a newly independent State to which in principle the rules of the present draft articles concerning newly independent States should apply.<sup>70</sup>

In other words, according to the Draft Articles of 1972, the rule of *tabula rasa* should apply not only to cases of “Newly Independent States”, but also to situations of secession. At the time, the Commission had thus decided that cases of secession should not be treated any differently than the special case of “Newly Independent States” since in both situations the detachment of a territory often occurred in the context of intense political tension, accompanied by violence.<sup>71</sup> There was indeed a presumption that in both cases the new State had not participated in the elaboration of the treaties concluded by the predecessor State and that consequently it would be unjust for the new State to be bound by such treaties. It was therefore decided that the application of the rule of *tabula rasa* was preferable in *all instances* of secession. This solution would prevent the “imposition” of any treaties upon the new State. Moreover, some

69 1190th Meeting of the ILC, 28 June 1972 (1972) I ILC Yearbook at p. 233; Report of the Commission, Twenty-Fourth Session, *supra* note 36, at p. 297.

70 Report of the Commission, Twenty-Fourth Session, *supra* note 35, at p. 297.

71 Meriboute, *supra* note 35, at pp. 216–217.

ILC members found support in State practice for the application of the rule of *tabula rasa* in situations of secession.<sup>72</sup> In sum, in the early 1970s, the application of the rule of *tabula rasa* to cases of secession was generally admitted by the members of the Commission, and in particular by members from Western States.<sup>73</sup>

At its 26th session, the ILC decided to re-examine the relevance of distinguishing between cases of dissolution of States and those of secession. It determined that examples of dissolution of State had been exclusively examined from the perspective of “union of States”, where “the component parts of the union retained a measure of individual identity during the existence of the union”.<sup>74</sup> The Commission therefore decided to analyse cases of dissolution of States as being one aspect of a more general category that would include those cases of secession.<sup>75</sup> In other words, for the Commission, both situations should be handled by one single provision. This was the solution adopted by the Commission in Article 33 of the final draft of 1974. Article 33 provided as follows:

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
  - (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
  - (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.
2. Paragraph 1 does not apply if:
  - (a) the States concerned otherwise agree; or
  - (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.
3. Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly inde-

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72 *Report of the International Law Commission, Twenty-Sixth Session, supra* note 13, at pp. 263, 266.

73 Meriboute, *supra* note 35, at pp. 156–157.

74 *Report of the International Law Commission, Twenty-Sixth Session, supra* note 13, at p. 265.

75 This is the analysis made by the US member of the ILC as described in: R. D. Kearney, ‘The Twenty-Sixth Session of the International Law Commission’, 69:3 *AJIL* (1975) p. 591 at p. 600.

pendent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.

The first paragraph of this provision provides for the same regime of continuity of treaties to apply in both cases of secession and dissolution.<sup>76</sup> An exception at the third paragraph of Article 33 was then inserted as an addition to this rule of continuity. This was because the ILC realised that “the available evidence of practice during the United Nations period appears to indicate that, at least in some circumstances, the separated territory which becomes a sovereign State may be regarded as a newly independent State to which in principle the rules of the present draft articles concerning newly independent States should apply”.<sup>77</sup> The new paragraph therefore stipulated that the principle of *tabula rasa* (and not that of continuity) would still apply to those special cases of secession “where the separation occurred in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State”.<sup>78</sup> In other words, the rule of continuity was to apply generally to cases of secession except for those specific situations where a separation could be compared to the decolonization context (and where *tabula rasa* would thus apply).

It is at this junction that the ILC’s analytical shift occurred. In order to determine the regime applicable to treaties concluded by the predecessor State, the Commission was now essentially focussing on the question of whether or not a new secessionist State could be assimilated to a “Newly Independent State”. This analysis was done by examining whether or not the new secessionist State had effectively participated in the elaboration of treaties concluded by the predecessor State. The evaluation of this degree of participation therefore became the focal point in deciding if a secessionist State should be bound by the predecessor State’s treaties.<sup>79</sup> For the Commission, the principle of continuity of treaties should apply to a secessionist State whenever (before secession) the territorial entity had participated in the decisional process leading to the ratification of a treaty by the predecessor State. In these circumstances, it could be said that the territorial entity had somewhat “consented” to such treaties and that the new State should, consequently, be bound by it. In the case of a “Newly Independent State” there would, on the contrary, be a presumption to the opposite effect. It was thus assumed that a new State emerging from decolonisation would not have participated in the elaboration of treaties concluded by the predecessor State. In these circumstances, it would be unjust to impose upon the new State the content of such treaties once it acquired independence.

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76 In the context of dissolution of State, the ILC concluded that State practice supported the principle of continuity of treaties: *Report of the International Law Commission, Twenty-Sixth Session, supra* note 13, at p. 265.

77 *Ibid.*, at p. 266.

78 *Ibid.*, at p. 266.

79 Zedalis, *supra* note 22, at p. 9.

As a result of this analytical shift, the rule of *tabula rasa* would no longer apply to secessionist States as a consequence of the codification of past State practice, which, as the Commission expressly acknowledged, supported the rule of *tabula rasa*.<sup>80</sup> The rule of *tabula rasa* would rather find application only because in some circumstances cases of secession could be assimilated to those of “Newly Independent States”. The content of this third paragraph was, however, openly criticised by representatives of developing States because it was (apparently) favouring secessionist movements.<sup>81</sup> It is essentially for this reason that the third paragraph of Article 33 was ultimately removed from the final version of the text in 1978.<sup>82</sup> The abandonment of this third paragraph of Article 33 (which would later become Article 34 during the adoption of the Convention in 1978) resulted in the integral application of the principle of continuity of treaties to *all cases* of secession, even those instances of secession that could be assimilated to “Newly Independent States”.

In sum, the Commission essentially based its decision regarding the legal regime applicable to treaties in situations of secession on eminently political motives. This is because States generally condemn the idea of secession in international law. States are consequently reluctant to create a legal regime that could in any way be perceived as favourable to groups or movements envisaging secession.<sup>83</sup> The regime of *tabula rasa* was perceived by many ILC members as being somehow too favourable to secessionist States. This general concern about not encouraging secessionist movements ultimately led to choosing the principle of treaty continuity as the applicable legal regime instead. In truth, it is not at all clear how the application of the rule of continuity can, in any way, have the effect of diminishing the willingness of a people to become an independent State by way of secession. Can the rather technical issue of succession to treaties realistically create a roadblock in a people’s path to independence? In the end, what is clear is that the wording of Article 34 was the result of a political decision. This is evident from the fact that State practice supported the application of the *tabula rasa* rule to instances of secession.

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80 *Report of the Commission, Twenty-Fourth Session, supra* note 36, at pp. 296–297; *Report of the International Law Commission, Twenty-Sixth Session, supra* note 13, at p. 265.

81 *See Nations Unies, Conférence des Nations Unies sur la succession d’États en matière de traités, comptes rendus analytiques des séances plénières et des séances de la Commission plénière, deuxième session, vol. II (1979) at pp. 53–73, 107–114; Meriboute, supra* note 35, at pp. 159–161.

82 *Conférence des Nations Unies sur la succession d’États en matière de traités, supra* note 81, at 114 (*see also* at 53 *et seq.*). *See also* Zedalis, *supra* note 22, at pp. 11–13.

83 Meriboute, *supra* note 35, at p. 163.

#### 4.2. *The Absence of Customary Value of That Principle*

The Vienna Convention has been widely criticised by the majority of authors.<sup>84</sup> The grounds for such criticism are diverse, including the Convention's emphasis on "Newly Independent States" arising from decolonisation at the time (1978) when this phenomenon was near its end.<sup>85</sup> Authors do not condemn the application of the principle of continuity of treaties to cases of dissolution of State insofar as this corresponds to State practice.<sup>86</sup> They are very critical, however, of the application of this principle in the different context of secession. The grouping together of cases of secession and dissolution of State is considered by many as being artificial. Moreover, the rule contained at Article 34 is said to be contrary to State practice in the context of secession.<sup>87</sup> We share the point of view adopted by Judge Kreca in his dissenting opinion in the *Case concerning the application of the Convention on the prevention and punishment of the Crime of Genocide* wherein the rule stated in Article

84 Degan, *supra* note 23, at p. 221, for whom the Convention "ressemble à une mauvaise épreuve écrite d'un étudiant en droit de troisième cycle". Other authors who are critical of Article 34 are nonetheless favourable to the Convention in general: Meriboute, *supra* note 35, at pp. 217–220; M. K. Yasseen, 'La Convention de Vienne sur la succession d'États en matière de traités', 24 *AFDI* (1978) p. 57; R. Szafarz, 'Vienna Convention on Succession of States in Respect to Treaties: A General Analysis', 10 *Polish Yearbook IL* (1979) at pp. 107–113; E. G. Bello, 'Reflections on Succession of States in the Light of the Vienna Convention on Succession of States in Respect to Treaties 1978', 23 *German Yearbook IL* (1989) p. 296, at p. 297.

85 P. Cahier, 'Quelques aspects de la Convention de 1978 sur la succession d'États en matière de traités', in B. Dutoit and E. Grisel (eds.), *Mélanges Georges Perrin* (Payot, Lausanne, 1984) at p. 76; Degan, *supra* note 23, at p. 213; D. P. O'Connell, 'Reflections on the State Succession Convention', 39:4 *ZaöRV* (1979) at p. 726; A. Gruber, *Le droit international de la succession d'États* (Bruylant, Paris, 1986) at p. 89.

86 Meriboute, *supra* note 35, at p. 216; O'Connell, *supra* note 11, at pp. 164–178; Cahier, *ibid.*, at p. 75.

87 Thus, for Szafarz, *supra* note 84, at pp. 104–105, "[i]t seems that the practice of States in this respect has been sufficiently extensive, consistent and sustained, and that the *opinio juris* of States and the opinion of the legal doctrine sufficiently concordant to warrant the conclusion that a customary rule emerged according to which the succession of treaties of separated States is governed by the clean slate rule". See also Meriboute, *supra* note 35, at p. 162; Cahier, *supra* note 85, at p. 76; R. Mullerson, 'Law and Politics in Succession of States: International Law on Succession of States', in G. Burdeau and B. Stern (eds.), *Dissolution, continuation et succession en Europe de l'Est* (Cedin-Paris I, Paris, 1994) at p. 34; I. Brownlie, *Principles of Public International Law*, 5th edition (Clarendon Press, Oxford, 1998) at pp. 663–664; Shaw, *supra* note 35, at pp. 689–690; *Restatement of the Law Third, the Foreign Relations Law of the United States*, *supra* note 19, at § 210, "Reporters' Notes" no. 4 (p. 113); Williamson and Osborn, *supra* note 21, at p. 263; S. A. Williams, *International Legal Effects of Secession by Quebec* (York University Centre for Public Law and Public Policy, North York, 1992) at p. 33; D. B. Majzub, 'Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec', 24 *Queen's Law J* (1998) p. 411, at p. 429.

34 can only be considered as a mere “progressive development of law”, and not as a codification of customary international law.<sup>88</sup>

Beyond these considerations, it must be asked whether or not any codification on the matter of State succession is, on the one hand, realistic and possible and, on the other hand, necessary and useful.<sup>89</sup> It should be recalled that the Convention stands as a supplementary mechanism, wherein it always allows States to conclude an agreement that derogates from its dispositions. This is expressly provided for at Article 34(2). In fact, the majority of disputes with regards to questions of succession of States are resolved on a consensual basis between the directly implicated States. These settlements are often more influenced by political considerations than by legal arguments. Also, it is not rare for equity to come into play in matters involving State succession.<sup>90</sup> The practical effect of any codification efforts in the area of succession of States is also limited. Thus, the text of the Vienna Convention is only binding on the few States that have become party to the treaty. Its content is thus not obligatory for third party States; unless of course, it can be concluded that a given provision codifies customary law on the topic. But this is clearly not the case of Article 34 with respect to secession which does not represent customary law. This means that in practical terms, a new secessionist State is simply not bound by the continuity principle as set out under this provision. This is because a new State is (by definition) not party to this Convention (but it can become party to it shortly after its independence).<sup>91</sup> This is what Brigitte Stern has rightly called the “hidden defect” inherent to any convention concerning matters of State succession.<sup>92</sup> Article 34 of the Vienna Convention may therefore be considered as a simple guideline, serving to help the actors during the process of negotiation following a declaration of independence.<sup>93</sup>

## 5. Limited Contemporary State Practice on Secession

Since the end of the Cold War, we have witnessed many cases of dissolution of States, such as those of Czechoslovakia and Yugoslavia. The cases of Namibia (1990) and

88 *Genocide case*, Preliminary Objections, *supra* note 34, at p. 779. See also G. Caggiano, ‘The I.L.C. Draft on Succession of States in Respect to Treaties: A Critical Appraisal’, 1 *Italian Yearbook IL* (1975) p. 69, at p. 76, for whom Article 34 is “a rule which revolutionizes existing law on the subject”; Szafarz, *supra* note 84, at pp. 104–105, 108. Zedalis, *supra* note 22, at p. 11, believes that nothing can be deducted from the ILC work on the customary nature of Article 34.

89 O’Connell, *supra* note 85, at p. 726 (“State succession is a subject altogether unsuited to the processes of codification”).

90 See S. Maljean-Dubois, ‘Le rôle de l’équité dans le droit de la succession d’États’, in P. M. Eisemann and M. Koskeniemi, *La succession d’États : la codification à l’épreuve des faits* (Martinus Nijhoff, The Hague, 2000) at pp. 137–184.

91 Mullerson, *supra* note 87, at pp. 16–17.

92 B. Stern, ‘Rapport de synthèse’, in G. Burdeau and B. Stern (eds.), *Dissolution, continuation et succession en Europe de l’Est* (Cedin-Paris I, Paris, 1994) at p. 385.

93 Szafarz, *supra* note 84, at p. 108; Kamminga, *supra* note 28, at p. 469.

East Timor (2002) are undeniable examples of “Newly Independent States”. The same can arguably be said about Eritrea (1991).<sup>94</sup>

The case of the dismemberment of the USSR in 1991 is controversial.<sup>95</sup> All States concerned (including Russia itself)<sup>96</sup> have viewed Russia as the “continuator” State of the USSR. Yet, this is clearly based on a legal fiction. Thus, the USSR did in fact cease to exist as a result of both the Declaration of Alma Ata and the Minsk Agreement.<sup>97</sup> Logically, Russia could not continue the existence of a State which had ceased to exist;<sup>98</sup> there is no “resurrection” of States in international law.<sup>99</sup> It should follow, logically, that the break-up of the USSR is a case of State dissolution.<sup>100</sup> Yet, it may be that these statements were merely *political* and not meant to result in the dissolution of the USSR.<sup>101</sup> In any event, the practice of States has considered the break-up of the USSR as a series of “secessions” by the former Soviet Republics (except for the three Baltic States).<sup>102</sup> <sup>103</sup> For this reason, a few words should be said about this very peculiar example of secession involving no less than 11 new States. Under the Minsk Agreement, all successor States agreed to respect obligations arising from treaties to which the USSR was a party.<sup>104</sup> In spite of this general statement

94 This question is examined in Dumberry and Turp, *supra* note 2, at pp. 402–403.

95 This question is examined in detail in I. Ziemele, ‘Is the Distinction between State Continuity and State Succession Reality or Fiction? The Russian Federation, the Federal Republic of Yugoslavia and Germany’, *Baltic Yearbook of International Law* (2001) at pp. 194 *et seq.* See also Dumberry and Turp, *supra* note 2, at pp. 400–401.

96 Letter of Russia to the UN Secretary-General, 24 December 1991, in UN Doc 1991/RUSSIA, Appendix, 24 December 1991, 31 *ILM* 138.

97 The preamble to the Minsk Agreement (The Agreement Establishing the Commonwealth of Independent States, UN Doc A/46/771 (13 December 1991), in 31 *ILM*, 1992, p. 138) clearly states that the USSR “as a subject of international law and geopolitical reality no longer exists”. The Alma Ata Declaration (21 December 1991, UN Doc A/46/60 (30 December 1991), in 31 *ILM*, 1992, p. 147) also mentions that “with the establishment of the C.I.S., the U.S.S.R. ceases to exist”.

98 For this reason, a number of writers have argued that Russia is *not* the “continuator” of the USSR but a new State: R. Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’, 4:1 *EJIL* (1993) at p. 45; Y. Z. Blum, ‘Russia Takes over the Soviet Union’s Seat at the United Nations’, 3:2 *EJIL* (1993) at pp. 357–359.

99 Marek, *supra* note 7, at p. 6.

100 Stern, *supra* note 7, at pp. 220–222.

101 M. Shaw, ‘State Succession Revisited’, 5 *Finnish Y.I.L.* (1994) at pp. 49–50; J. Crawford, *The Creation of States in International Law*, 2nd edition (Clarendon Press, Oxford, 2006) at pp. 677–678.

102 L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (A Study of the Tension between Normativity and Power in International Law)* (Martinus Nijhoff Publ., Leiden, 2003) at pp. 255–256.

103 Pazartzis, *supra* note 23, at p. 56; Ziemele, *supra* note 95, at p. 194.

104 Article 22, Agreement Establishing the Commonwealth of Independent States, *supra* note 97.



of continuity, the practice of secessionist States has been anything but uniform.<sup>105</sup> While some new States have become parties to the treaties of the USSR by way of accession,<sup>106</sup> others have declared to be automatically bound by these treaties.<sup>107</sup> Overall, this confusing practice does not support the principle of “automatic” succession to treaties.<sup>108</sup>

Since the end of the Cold War, the only “clear” case of secession has been that of Montenegro in 2006. Another very recent one, for which very limited information is currently available, is the secession of South Sudan in 2011. Given the very limited contemporary practice on secession, the present section also analyses the position adopted by two eventual candidates for independence, that of Québec and Scotland.

### 5.1. *Montenegro*

As a result of the different declarations of independence by Croatia, Slovenia, Macedonia, and Bosnia and Herzegovina in 1991–1992, what remained of the former Socialist Federal Republic of Yugoslavia (SFRY) were the two former republics of Serbia and Montenegro. In April 1992, both republics reorganised the old federation in the form of the smaller two-member federation now called the “Federal Republic of Yugoslavia” (FRY). The new Constitution proclaimed it to be the “continuator” of the former SFRY.<sup>109</sup> This claim of continuity was however rejected by other States and ultimately even the FRY abandoned this position (in 2000). On 14 March 2002, Serbia and Montenegro once again reorganised their constitutional framework with the creation of the “State Union of Serbia and Montenegro” (hereinafter “Serbia-Montenegro”).<sup>110</sup> The new Constitution, based on the principle of equality of each member State, provided Montenegro with a high degree of autonomy on the international scene.<sup>111</sup> Moreover, a right to secession was expressly given to each member

105 Pazartzis, *supra* note 23, at p. 78.

106 Zimmermann, *supra* note 9, at p. 215.

107 Pazartzis, *supra* note 23, at 78–80.

108 *Ibid.*

109 Declaration on the Formation of the Federal Republic of Yugoslavia, joint session of the Yugoslavia Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, 27 April 1992, annexed to UN Doc S/23877 of 5 May 1992. *See also Letter of the interim Chargé d’Affaires at the Permanent Mission of Yugoslavia at the United Nations to the U.N. Secretary-General*, 6 May 1993, UN Doc A/46/915, 7 May 1992.

110 Agreement on Principles of Relations Between Serbia and Montenegro within the Framework of a Union of States, signed in Belgrade on 14 March 2002 (*see in particular* Articles 1.2, 1.5 and 5.1).

111 Constitution of the State Union of Serbia and Montenegro, *see* Article 2. It is noteworthy that while the Constitution mentioned that “Serbia and Montenegro shall be a single personality in international law”, it also gave each member State the capacity to become member of international organizations which do not prescribe international personality as a prerequisite for membership (Article 14). Article 15(2) also allowed Montenegro to



State after the first three years of union.<sup>112</sup>

In accordance with the Constitution, a referendum on independence was held in Montenegro on 21 May 2006.<sup>113</sup> Before the referendum, all parties agreed to a European Union (EU) proposal whereby a majority of 55 per cent of the votes, with a minimum percentage of voting of 50 per cent, would be required for confirmation of independence.<sup>114</sup> In the end, 86.5 per cent of eligible voters cast their votes with 55.5 per cent in favour of independence. On 3 June 2006, the National Assembly of Montenegro made a formal declaration of independence.<sup>115</sup> The independence of the new State was soon recognised by several members of the international community.

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“enter into international relations, conclude international treaties, and found representative missions in foreign states” to the extent that this did not “infringe on competences of Serbia and Montenegro and interests of the other member-state [*i.e.* Serbia]”.

112 The provision not only provides for a right to unilateral secession, but also sets out its modalities and deals in advance with issues of State succession and continuity. The provision is further discussed below.

113 See J. Cazala, ‘L’accession du Monténégro à l’indépendance’, 52 *AFDI* (2006) at pp. 164 *et seq.*; S. Oeter, ‘The Dismemberment of Yugoslavia: An Update on Bosnia and Herzegovina, Kosovo and Montenegro’, 50 *German YIL* (2007) at p. 518. Some authors have also argued that Montenegro had a right to external self-determination under general international law. This question is examined by these writers: N. Vucinic, ‘Legal Aspects of the Exercise of the Right of Peoples to Self-Determination in the Case of Montenegro’, in *Legal Aspects for Referendum in Montenegro in the Context of International Law and Practice, Key note speeches from the international expert roundtable*, held in Podgorica, Montenegro, September 22–25, 2004 at pp. 9–23; R. Wilde, ‘Self-Determination in International Law and the Position of Montenegro’, in *Legal Aspects for Referendum in Montenegro in the Context of International Law and Practice, Key note speeches from the international expert roundtable*, held in Podgorica, Montenegro, September 22–25, 2004 at pp. 25–36. It has even been argued that Montenegro’s sovereignty was simply “restored” in 2006 because of its past status as an independent State from 1878 until 1918 when it joined the Kingdom of Serbs, Croats and Slovenes. This issue is discussed in: J. Vidmar, ‘Montenegro’s Path to Independence: A Study of Self-Determination, Statehood and Recognition’, 3:1 *Hanse Law Review* (2007) p. 73, at pp. 92, 99–100. He refers (at p. 89) to a declaration made by the Montenegrin foreign minister in December 1991 at the Badinter Commission: “When Montenegro, upon unification became part of Yugoslavia, the sovereignty and international personality of Montenegro did not cease to exist, but became part of the sovereignty of the new state. In case Yugoslavia disunited and ceased to exist as an international entity, the independence and sovereignty of Montenegro continue their existence in their original form and substance.” Vidmar concludes that Montenegro simply ceased to exist as an independent State when it joined the Kingdom in 1918 and that its international legal personality could not be “restored” in 2006. Montenegro therefore became a new State in 2006.

114 Article 6, Law on Referendum on State-Legal Status of the Republic of Montenegro.

115 The Decision on Proclamation of Independence of the Republic of Montenegro, Article 1, declaring that Montenegro is “an independent state with a full international legal personality”.

Serbia recognised the new State on 15 June 2006 and on 28 June 2006 Montenegro was admitted to the United Nations.<sup>116</sup>

The accession of Montenegro to independence must be considered in legal terms as a case of secession. Thus, Article 60(1) of Serbia-Montenegro's Constitution mentions the right for each entity to "secede from" the Union and paragraph 4 of the same provision expressly envisaged the "secession of the state of Montenegro from the State Union of Serbia and Montenegro".<sup>117</sup> Finally, Article 60(5) indicates that the member pursuing secession should be considered as a new State under international law, while the other member State would be continuing the international legal personality of Serbia-Montenegro.<sup>118</sup> The position adopted by Serbia also shows that Montenegro is a case of secession. Following Montenegro's declaration of independence, the National Assembly of Serbia declared that Serbia was the "successor State" to Serbia-Montenegro.<sup>119</sup> In the context of this declaration, the word "succession" was clearly meant to proclaim Serbia as the "continuator" of the Union as shown by a letter sent to the UN Secretary-General in June 2006.<sup>120</sup>

116 UN SC Res 1691 (2006); GA Res A/60/264 (2006).

117 Article 60 reads as follows: "[1] After the end of the period of three years, member-states shall have the right to begin the process for a change of the status of the state or to secede from the State Union of Serbia and Montenegro. [2] The decision on the secession from the State Union of Serbia and Montenegro shall be taken at a referendum. [3] The referendum law shall be adopted by a member-state, bearing in mind internationally-recognized democratic standards. [4] In case of secession of the state of Montenegro from the State Union of Serbia and Montenegro, international documents referring to the Federal Republic of Yugoslavia, especially Resolution 1244 of the Security Council of the United Nations, shall utterly apply to the state of Serbia as the successor. [5] The member-state which resorts to the right to secession shall not inherit the right to personality under international law, while all disputes shall be separately regulated by the state-successor and the seceded state. [6] In case that both states, based on referendum, will opt for change of the status of the states or independence, in the process of succession the disputable questions shall be regulated analogically to the case of the former Socialist Federative Republic of Yugoslavia."

118 M. Mendelson, 'Recognition of Referendum Results', in *Legal Aspects for Referendum in Montenegro in the Context of International Law and Practice*, Key note speeches from the international expert roundtable, held in Podgorica, Montenegro, September 22–25, 2004 at pp. 103, 111.

119 Decision on Obligations of Public Authorities of the Republic of Serbia in Assuming Powers of the Republic of Serbia as Successor State to the State Union of Serbia and Montenegro, 12 June 2006.

120 Letter of 3 June 2006 from the President of the Republic of Serbia to the UN Secretary-General (referred to in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Rep 43 [hereinafter *Genocide case*, Judgment] at para. 67): "[T]he membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, [will be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montene-

The independence of Montenegro (which had been admitted as a new member of the United Nations in June 2006), had some important consequences in the context of the on-going *Genocide Case* between Bosnia-Herzegovina and Serbia-Montenegro at the ICJ.<sup>121</sup> Bosnia argued that Serbia and Montenegro should both remain respondents in this case.<sup>122</sup> Montenegro rejected this position,<sup>123</sup> while Serbia simply took the view that this question should be decided by the Court.<sup>124</sup> In its final judgment, the Court first noted that “the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State”.<sup>125</sup> The Court also noted Serbia’s position of continuity and its commitment to be bound by international treaties concluded by Serbia and Montenegro.<sup>126</sup> For the Court, “the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case.”<sup>127</sup> Since Montenegro had not given its consent to the jurisdiction of the Court over this case,<sup>128</sup> the Court concluded that the Republic of Serbia would remain the only respondent in this case.<sup>129</sup> The Court therefore clearly analysed the independence of Montenegro as a case of secession.

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gro.”. The letter further stated that “in the United Nations the name ‘Republic of Serbia’ [was] to be henceforth used instead of the name ‘Serbia and Montenegro’”. Finally, the letter added that the Republic of Serbia “remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter”.

121 By letters dated 19 July 2006, the Court Registrar requested the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Foreign Minister of Montenegro to communicate to the Court the views of their governments on the consequences to be attached to the developments in the context of the case.

122 Bosnia first acknowledged that Serbia’s position as the continuator of Serbia-Montenegro had been accepted by both Montenegro and the international community. It nevertheless added that “at the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state” and that therefore both States “jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case”. (Letter to the Registrar dated 16 October 2006 by the Agent of Bosnia and Herzegovina, referred to in *Genocide case*, Judgment, *supra* note 120, at para. 71).

123 Letter dated 29 November 2006 by the Chief State Prosecutor of Montenegro, referred to in *ibid.*, at para. 72.

124 *Ibid.*, at para. 73. In a letter of 26 July 2006 (referred to in *ibid.*, at para. 70), the “Agent of Serbia and Montenegro” took the view that “there [was] continuity between Serbia and Montenegro and the Republic of Serbia”.

125 *Ibid.*, at para. 74.

126 *Ibid.*, at para. 75.

127 *Ibid.*, at para. 76.

128 *Ibid.*, at para. 76.

129 *Ibid.*, at para. 77.

Montenegro adopted a clear position in favour of succession to multilateral treaties to which Serbia-Montenegro had been a party before the date of succession. This position is well-illustrated by Article 2 of the Declaration of Independence where Montenegro indicated that it will “initiate the process for gaining a full-fledged membership” to a number of international organisations<sup>130</sup> and that it “shall accept and adhere to the rights and obligations that arise from existing arrangements” with these organisations. In other words, Montenegro stated its willingness to be party to multilateral agreements existing in the context of international organizations. Montenegro also indicated the same desire to adhere to existing bilateral agreements.<sup>131</sup> Article 3 of the Decision on Proclamation of Independence of the Republic of Montenegro passed by the National Assembly on 3 June 2006 states that “[t]he Republic of Montenegro shall apply and adhere to international treaties and agreements that the state union of Serbia and Montenegro was party to and that relate to the Republic of Montenegro and are in conformity with its legal order”. It is noteworthy that in these statements, Montenegro does not specifically use the expression “succession”. Thus, it does not indicate its willingness to “succeed” to these treaties, but rather its decision to “adhere” to these treaties.

Montenegro’s general statements were soon followed by concrete actions by the new State. It undertook the exercise of examining international treaties to decide which one it wished to accede to.<sup>132</sup> In October 2006, Montenegro sent a letter to the UN Secretary-General stating that it had “decided to succeed to the treaties to which

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130 Reference is made to the United Nations, the Council of Europe, the Organization for Security and Cooperation in Europe as well as “other international organisations”.

131 Article 3 of the Declaration of Independence states that Montenegro “shall establish and develop bilateral relations with the third states on the basis principles of the international law, accepting the rights and obligations stemming from existing arrangements and shall continue with active policy of good-neighbourly relations and regional cooperation”.

132 The website of the Ministry of Foreign Affairs explains the process, in some detail, in a document entitled *Information on international multilateral conventions that Montenegro accessed or is in process of accessing*: “Immediately after the proclamation of independence of Montenegro ... The Ministry of Foreign Affairs of Montenegro undertook activities to determine the manner of taking over international multilateral conventions, agreements and protocols, which the State Union of Serbia and Montenegro accessed, and which Montenegro has interest to access. In the first phase, the Ministry of Foreign Affairs commenced the procedure for accessing to relevant multilateral documents ... In the second phase the procedure for accessing to relevant multilateral conventions deposited with the UN Secretary General was initiated, which contracting party or signor also was the State Union of Serbia and Montenegro i.e. FRY. In the third phase the procedure was initiated for accessing to multilateral conventions which depositories are individual countries.” The document lists all treaties of different international organisations that have been acceded to as well as those treaties for which a State is the depository.

the State Union of Serbia and Montenegro was a party or signatory”.<sup>133</sup> Montenegro also sent a similar letter informing the United Nations Educational, Scientific and Cultural Organization (UNESCO) that it “wishes to succeed” to a long list of conventions and treaties to which Serbia-Montenegro was a party on 3 June 2006 (and that such succession took place retroactively from that date).<sup>134</sup> It is noteworthy that in these letters sent to the UN Secretary-General and UNESCO, Montenegro explicitly refers to its willingness to “succeed” to these treaties, and not merely to adhere to them. Soon after its independence, Montenegro also applied for membership to the Council of Europe to succeed to several treaties, which had been originally ratified by Serbia-Montenegro.<sup>135</sup> One year later, the Council of Europe decided that Montenegro was to be regarded as a party to the Convention and related Protocols

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- 133 Letter dated 10 October 2006, received by the UN Secretary-General on 23 October 2006. The letter also explains that Montenegro “succeeds to the treaties listed in the attached Annex and undertakes faithfully to perform and carry out the stipulations therein contained as from June 3rd 2006, which is the date the Republic of Montenegro assumed responsibility for its international relations and the Parliament of Montenegro”. It also indicates that Montenegro “maintain the reservations, declarations and objections made by Serbia and Montenegro”. Soon after, Serbia explained to the UN Secretary-General that it “continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro” and requested that “the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro” (Letter of 16 June 2006 sent to the UN Secretary-General, referred to in: *Genocide* case, Judgment, *supra* note 120, at para. 68). See also Letter addressed to the Secretary-General dated 30 June 2006 by the Minister of Foreign Affairs of Serbia.
- 134 Letter of 26 April 2007 sent by the Ministry of Foreign Affairs to UNESCO: “On behalf of the Government of the Republic of Montenegro, I have the honour to inform you that the Government of the Republic of Montenegro wishes to succeed to the Conventions and Protocols of the United Nations Educational, Scientific and Cultural Organization that State Union of Serbia and Montenegro was a party to, as of 3 June 2006. Furthermore, I hereby declare that the Government of the Republic of Montenegro succeeds to the treaties of the United Nations Educational, Scientific and Cultural Organization listed in the attached Annex and takes faithfully to perform and carry out the stipulations therein contained as from 3 June 2006, the date upon which the Republic of Montenegro assumed responsibility for its international relations.”
- 135 Letters of 6 and 12 June 2006 from Mr. Miodrag Vlahovic, Minister of Foreign Affairs of the Republic of Montenegro, to Mr. Terry Davis, Secretary General of the Council of Europe, stating that Montenegro “wished to become a member of the Council of Europe, to succeed to the Council of Europe conventions that had been signed and ratified by Serbia and Montenegro and to become a member of the Partial Agreements of which Serbia and Montenegro was a member” (in Accession of the Republic of Montenegro to the Council of Europe, Request for an opinion from the Committee of Ministers, Parliamentary Assembly, Doc 10968, 22 June 2006).

with a retroactive effect from 6 June 2006 (the date of succession).<sup>136</sup> Montenegro became a full member of the Council of Europe on 11 May 2007. In the recent case of *Bijelic v. Montenegro and Serbia*, the European Court of Human Rights held that the European Convention of Human Rights remained in force over the territory of Montenegro at all times from the date of independence.<sup>137</sup>

In sum, Montenegro is a clear example wherein the secessionist State adopted the principle of continuity of treaties to which the predecessor was a party.

## 5.2. *The Position of Québec*

The hypothesis of an independent Québec would undeniably be an example of secession. Thus, Québec's situation simply cannot be considered in the context of decolonisation. Also, in all likelihood, Québec's secession would not result in the collapse of Canada. In the 1998 *Quebec Secession* case, the Supreme Court of Canada considered this hypothetical case as one of secession.<sup>138</sup> Once elected into government on 12 September 1994, the *Parti Québécois* (pro-independence) proposed a Draft Bill on the Sovereignty of Québec as a platform of the position of an independent Québec in matters of foreign policy and negotiations with Canada.<sup>139</sup> Article 7 of the Draft Bill indicates the position of the government of Québec on the question of succession with regards to treaties:

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136 Council of Europe Committee of Ministers, Resolution CM/Res (2007) 7 inviting the Republic of Montenegro to become a member of the Council of Europe, Adopted by the Committee of Ministers on 9 May 2007 at the 994bis meeting of the Ministers' Deputies.

137 These issues are discussed in ECtHR, *Bijelic v. Montenegro and Serbia*, App. 11890/05, 28 April 2009, *see at para. 69*. This case is examined in P. Dumberry, 'La succession d'États en matière de responsabilité internationale et ses liens avec la responsabilité des États en matière de traités', in G. Distephano and G. Gaggioli (eds.), *Commentaire à la Convention de Vienne sur la succession d'États en matière de traités* (Bruylant, Brussels, 2013); B. E. Brockman-Hawe, 'Succession, the Obligation to Repair and Human Rights; The European Court of Human Rights Judgment in the Case of *Bijelic v. Montenegro and Serbia*', 59 *I.C.L.Q.*, (2010) pp. 858 *et seq.*

138 *Reference re Secession of Quebec*, *supra* note 13, at para. 83. *See* P. Dumberry, 'Lessons Learned from the *Quebec Secession Reference* before the Supreme Court of Canada', in M. G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, Cambridge, 2006) at pp. 416–452.

139 *Draft Bill on the Sovereignty of Québec*, tabled at the National Assembly on 6 December 1994 [hereinafter referred to as the *Draft Bill*], published in Turp, *supra* note 12, at p. 895. For an in-depth analysis of the *Draft Bill*, *see* D. Turp, *L'Avant-projet de loi sur la souveraineté du Québec: texte annoté* (Éditions Yvon Blais, Montreal, 2001).



Québec shall assume the obligations and enjoys the rights arising out of the treaties to which Canada is party and in the international conventions to which Canada is a signatory, in accordance with the rules of international law.<sup>140</sup>

The report prepared by the National Commission on the Future of Québec stated:

The Government of Québec chose to conform to the practice of continuity of treaties. It intends to continue to apply the treaties concluded by Canada and the international conventions adhered to or ratified by Canada, and which remain applicable to the territory of Québec in accordance with the rules of international law. This decision, rendered consecutively to the achievement of sovereignty, expresses Québec's clear will to fully participate in the international community's life and relations.<sup>141</sup>

Finally, this position was reflected in Article 15 of Bill 1, *An Act Respecting the Future of Québec*, which was adopted by the National Assembly of Québec on 7 September 1995:

In accordance with the rules of international law, Québec shall assume the obligations and enjoy the rights set forth in the relevant treaties and international conventions and agreement to which Canada or Québec is a party on the date on which Québec becomes a sovereign country, in particular in the North American Free Trade Agreement.<sup>142</sup>

A referendum on Québec's independence was held on 30 October 1995 and was narrowly defeated with 50.58 per cent voting "No" and 49.42 per cent voting "Yes". The Parti Québécois (back in power since 2012) still favours the application of the principle of continuity with respect to Canada's international treaties and Québec's inter-

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140 It should be noted that under Article 15 of the Draft Bill, Québec could conclude a devolution agreement with Canada therefore easing the application of Article 7.

141 Commission nationale sur l'avenir du Québec, *Rapport*, 19 April 1995, Québec, Gouvernement du Québec, 1995 at 75 (translation by the authors).

142 Bill 1, *An Act Respecting the Future of Québec*, 1st Sess., 35th Leg., Québec (in Turp, *supra* note 12, at p. 901). Article 15 of the Bill indicates that the principle of treaty continuity also applies to "international agreements" ("*ententes internationales*") to which Québec is party at the date of succession. In accordance with the so-called "Gérin-Lajoie" doctrine, Québec has entered into a large number of international agreements with other States on subject-matters within its constitutional powers. Québec considers these agreements as treaties under international law. As of 2012, Québec had entered into 709 such "*ententes internationales*" (376 of them have entered into force). The list of these agreements can be found at: Ministère des Relations internationales, de la Francophonie et du Commerce extérieur du Québec, *Ententes internationales*, online: <[www.mrifce.gouv.qc.ca/fr/ententes-et-engagements/ententes-internationales](http://www.mrifce.gouv.qc.ca/fr/ententes-et-engagements/ententes-internationales)>.

national agreements.<sup>143</sup> Quebec does not intend to call upon the principle of *tabula rasa* during its negotiations with Canada and its other international partners.<sup>144</sup> The adoption of this legal position created ample controversy. Thus, intense debates had opposed the two primary political parties of Québec regarding the particular question of the succession of Québec to the North American Free Trade Agreement (NAFTA).<sup>145</sup> Writers are also divided on the question of Québec's succession to treaties, and in particular, on whether Québec would succeed to the NAFTA.<sup>146</sup>

### 5.3. The Position of Scotland

It should be emphasised at the outset that the independence of Scotland would be considered as a clear case of secession. Thus, it is unlikely that the United King-

143 Continuity is the official position adopted by the Parti Québécois, in *Un pays pour le monde – Programme du Parti Québécois adopté lors du XIVe Congrès national*, Montréal, Parti Québécois- Direction des communications, 2001 at p. 23.

144 D. Turp, "Supplément 1995", in Brossard and Turp, *supra* note 12, at p. 806; D. Turp and P. Dumberry, 'L'accession du Québec à la souveraineté et la succession d'États en matière de traités', in Gouvernement du Québec, *Mises à jour des études originellement préparées pour la Commission sur l'avenir politique et constitutionnel du Québec (1990–1991)*, vol. III, 2002 at pp. 226–368. This study examines Québec's potential position with respect to 2,018 treaties to which Canada was a party (in 2002) and some 300 "ententes internationales" that had been concluded at the time by the government of Québec (see at pp. 273–368).

145 B. Landry, 'GATT et ALÉNA : un simple changement de statut pour le Québec après l'indépendance', *La Presse*, 2 February 1995, B-3; J. Ciaccia, 'Adhésion du Québec à l'ALÉNA : il ne faut pas trop se fier à la Convention de Vienne', *La Presse*, 11 February 1995, B-3. See also the legal opinions requested by different political parties: D. W. Bernstein and W. Silverman, *Avis sur les conséquences de l'indépendance du Québec en ce qui a trait aux traités et accords conclus avec les États-Unis d'Amérique*, 7 March 1995; C. N. Brower, *Memorandum on the March 7, 1995 "Advisory Memorandum Regarding the Effect of Independence of Quebec Upon Treaties and Agreements with the United States of America"*, 21 March 1995 (later published as C. N. Brower and A. C. Smutny, 'The Effect of the Independence of Quebec upon Treaties and Agreements with the U.S.A.', 27:1 *American Review of Canadian Studies* (1997) p. 51, at pp. 52–54).

146 See A. Grabell, 'New Northern Neighbor? An Independent Québec, the United States and the NAFTA', 2:1 *Southwestern Journal of Law and Trade in the Americas* (1995) p. 265, at pp. 281, 283, 290; F. Crepeau, 'The Law of Quebec's Secession', 27:1 *American Review of Canadian Studies* (1997) p. 27; C. E. Roh Jr., *The Implication for U.S. Trade Policy of an Independent Quebec*, Center for Strategic and International Studies, online <[https://csis.org/files/media/csis/pubs/ppustrade\[1\].pdf](https://csis.org/files/media/csis/pubs/ppustrade[1].pdf)>; J. Kasku-Jackson, 'Can Quebec Succeed at Secession?', 4 *NEICLA* (1998) p. 7, at p. 19; Majzub, *supra* note 87, at pp. 437–439; S. Dycus, 'Quebec Independence and United States Security: A Question of Continuing Rights and Duties', 15 *Ariz J Int Comp Law* (1998) p. 187, at p. 200; V. Loungnarath, 'Quelques réflexions d'ordre juridique sur la clause d'adhésion de l'ALENA', 40 *McGill LJ* (1994) p. 1.



dom (UK) would dissolve if Scotland were to withdraw from the Union.<sup>147</sup> The UK would simply continue to exist as a State (the “continuing” State), but with a reduced territory and population.<sup>148</sup> This is indeed the official position taken by the United Kingdom in a recent document dealing with legal issues which would arise from Scotland’s eventual independence: “in the event of Scottish independence the remainder of the UK would be considered the continuing state and Scotland would be a new state”.<sup>149</sup> The document is based on the expert opinion provided by professors Crawford and Boyle explaining in detail why Scotland’s case should be considered as one of secession.<sup>150</sup> Scotland is also not a case of “restoration” of sovereignty.<sup>151</sup> Logically, Scotland simply cannot “continue” the existence of a State which had ceased to exist three centuries ago (1707).

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147 The Scottish National Party (SNP) claimed in the 1990s that Scottish independence would result in the dissolution of the United Kingdom. This is because in 1707 England and Scotland joined together in the formation of a “union” State, the United Kingdom of Great Britain (later becoming in 1810 the United Kingdom of Great Britain and Ireland). It has been argued that if Scotland were to leave the Union the rest of the UK would be dissolved. This is, in fact, the position taken by the First Minister of Scotland, Alex Salmond, in an interview on 26 November 2012 (referred to in United Kingdom, *Scotland Analysis: Devolution and the Implications of Scottish Independence*, February 2013, at p. 36 [hereinafter *Scotland Analysis*]). This is also the position taken by some writers: R. Lane, ‘Scotland in Europe: An Independent Scotland in the European Community’, in W. Finnie, C. M. G. Himsworth and N. Walker (eds.), *Edinburgh Essays in Public Law* (Edinburgh University Press, Edinburgh, 1991). The argument is discussed and rebutted by these writers: M. Happold, ‘Independence: in or out of Europe? An Independent Scotland and the European Union’, 49:1 *ICLQ* (2000) p. 15, at pp. 16–20; Murkens *et al.*, *supra* note 35, at 106–113.

148 Happold, *ibid.*, at pp. 16–20; Murkens *et al.*, *supra* note 35, at p. 113.

149 United Kingdom, *Scotland Analysis*, *supra* note 147, at pp. 33–38. See also Written evidence from the Foreign and Commonwealth Office (SCO 8), Foreign Affairs Committee inquiry into the foreign policy implications of and for a separate Scotland, 24 September 2012, § 9.

150 J. Crawford and A. Boyle, *Opinion: Referendum on the Independence of Scotland – International Law Aspects*, attached as Annex A to United Kingdom, *Scotland Analysis*, *supra* note 147.

151 C. Murphy, *Scottish Independence: a Question of International Law or of the EU’s “New Legal Order?” (Part I)*, online European Law Blog: <<http://europeanlawblog.eu/?p=1551>>. Contra D. Scheffer, *International Political and Legal Implications of Scottish Independence*, Adam Smith Research Foundation, *Working Paper*, 2013, at p. 6. “The novel feature of the Scottish experience is that one is dealing primarily with a dual-state historical phenomenon, of two states joined in 1707 and now on the verge of potentially splitting apart. The sub-state of Scotland actually is the former independent state of Scotland, of more than three centuries past, reasserting its full sovereignty. There is no rule of international law preventing that restoration of sovereignty through peaceful means and within the context of modern self-determination theory.”

The two consecutive wins of the Scottish National Party (SNP) at the general elections of 2007 and 2011 are leading the path toward a referendum on the independence of Scotland. Scheduled for 2014, this referendum will be held under the rules which have been set out in an agreement signed in 2012 by the United Kingdom and Scottish government.<sup>152</sup> This agreement lays down the rules which will be included in a referendum legislation to be adopted by the Scottish Parliament and relating to such issues as the date of the referendum, the wording of the question, *etc.* The issue of Scotland's succession to international treaties is not covered by this agreement.

In a document published by the Scottish executive in August 2007,<sup>153</sup> the first SNP government presented its position on a certain number of issues dealing with international relations and foreign affairs. The document stated that "transition to independence would require negotiations between the Scottish and United Kingdom Governments in relation to the terms of independence, as well as the arrangements for the transition itself".<sup>154</sup> Yet, succession to international treaties is not listed as one of the topics likely to be covered by such negotiations.<sup>155</sup> To the best of the present authors' knowledge, Scotland has not made any official statement on the question of succession to multilateral treaties. It is true that members of the government have made some comments in recent years to the effect that "Scotland will inherit exactly the same international treaty rights and obligations as the rest of the UK, as equal successor states".<sup>156</sup> Yet, such statements were clearly made based on the (wrong) assumption that *both* Scotland and the rest of the United Kingdom would be considered as "new" States. At best, these comments tend to suggest some support for the general principle of continuity to treaties. This also seems to be confirmed by Scotland's explicit position on succession to international organisations.

In *Choosing Scotland's Future*, the Scottish executive is more loquacious when it comes to the question of Scotland's succession to treaties constituting international organisations (an issue outside the scope of this paper). In this regard, the position of the Scottish government is as follows: "An independent Scotland would continue in the European Union and bear the burdens and fulfil the responsibilities of membership."<sup>157</sup> This has been the position of the Scottish government ever since.

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152 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, signed in Edinburgh on 15 October 2012.

153 See Scottish Executive, *Choosing Scotland's Future – A National Conversation* (Scottish Executive, Edinburgh, August 2007) [hereinafter *Choosing Scotland's Future*].

154 *Ibid.*, at p. 22 para. 3.16.

155 *Ibid.*, at p. 22, para. 3.16.

156 Scottish Government spokesperson quoted in *The Guardian*, 24 October 2012, and referred to in United Kingdom, *Scotland Analysis*, *supra* note 147, at p. 36. In the document, reference is also made (at pp. 34, 36) to other similar statements made by Nicola Sturgeon, Scotland's Deputy First Minister, before the House of Commons Foreign Affairs Committee on 28 January 2013, and to comments made by Alex Salmond in an interview in March 2012.

157 See *Choosing Scotland's Future*, *supra* note 153, at p. 23.

Thus, in 1997 and 1999, the SNP released dossiers on the legal basis for independence in which it relied on the legal opinions of lawyers to defend its position to automatic succession to the EU.<sup>158</sup> The Scottish government has, however, refused to disclose the legal advice it has received on the issue.<sup>159</sup>

For the UK government, an independent Scotland would, on the contrary, be required to apply anew for membership to the EU while the UK's membership would continue.<sup>160</sup> Scotland's claim for automatic succession to the EU has also recently been addressed by the European Commission itself. In response to a European Parliamentary Question from Welsh MEP Eluned Morgan in 2004, the Commission answered (without specifically referring to Scotland) that a newly independent State would be outside the EU and would need to apply for membership of the EU in the same way as any other non-member.<sup>161</sup> In September 2012, the President of the European Commission José Manuel Barroso also stated that a new State would have to

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158 SNP Press Office, *Independence in Europe Dossier*, 28 May 1999. This is discussed in J. E. Murkens, *Scotland's Place in Europe* (The Constitution Unit, UCL, London, 2001) at p. 4. According to the legal opinion of Xavier de Roux, "Scotland is part of the Common Market territory by virtue of the United Kingdom's accession to the Treaty of Rome and by application of the Treaty of Union 1707. If the Treaty of Union was revoked and if Scotland recovered its international sovereignty, it would be accepted within the Common market without any formality." The document also refers to analogous opinions given by Professor Émile Noël, Lord MacKenzie-Stuart and former Director General of the European Commission and former EC Ambassador to the United Nations Eamonn Gallagher.

159 S. Johnson, 'SNP urged to publish secret legal advice on separate Scotland EU membership', *The Telegraph*, 10 September 2012.

160 *Scotland Analysis*, *supra* note 147, pp. 49–52. See also A. Thorp and G. Thompson, 'Scotland, Independence and the EU', International Affairs and Defence Section, Economic Policy and Statistics Section, United Kingdom House of Commons Library, Note SN/IA/6110, 8 November 2011, p. 6.

161 *Official Journal of the EU*, doc. C 84 E/422, 3 March 2004, Answer by Romano Prodi, 1 March 2004: "The European Communities and the European Union have been established by the relevant treaties among the Member States. The treaties apply to the Member States (Article 299 of the EC Treaty). When a part of the territory of a Member State ceases to be a part of the state, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory. Under Article 49 of the Treaty on European Union, any European State which respects the principles set out in Article 6(1) of the Treaty on European Union may apply to become a member of the Union. An application of this type requires, if the application is accepted by the Council acting unanimously, a negotiation on an agreement between the Applicant State and the Member States on the conditions of admission and the adjustments to the treaties which such admission entails. This agreement is subject to ratification by all Member States and the Applicant State."

apply for membership to get into the EU.<sup>162</sup> He took the same position in a letter to the Chairman of a Committee of the House of Lords,<sup>163</sup> as well as in an interview with the BBC.<sup>164</sup>

Based on Article 34 of the Vienna Convention, it has also been argued by some authors that “treaties in force for the UK would presumptively remain in force for Scotland”.<sup>165</sup> Others have held, on the contrary, that the regime set up under the Convention does not apply to the specific situation of Scotland.<sup>166</sup> What is clear is that Article 34 would, in any event, *not* govern the issue of Scotland’s succession to treaties in the context of an international organisation (the European Union).<sup>167</sup> This is because the question of membership to an international organisation is governed by its own rules. Article 4(a) of the Convention also makes it clear that those specific rules take priority over the general rule set out in Article 34. It is by no means clear whether or not Scotland would retain membership of the EU automatically if it gained independence. Nothing in the EU treaties sets out what happens in the event of part of a member State becoming independent. There are simply no precedents in the EU context of the break-up of a member State.<sup>168</sup> The majority of authors have come to the conclusion that Scotland would *not* automatically succeed to the membership of international organisations, including the EU.<sup>169</sup>

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162 See S. Carrell, ‘Barroso casts doubt on independent Scotland’s EU membership rights – EC president appears to contradict Alex Salmond’s claim that Scotland would automatically remain in European Union’, *The Guardian*, 12 September 2012, online: [The Guardian](http://www.guardian.co.uk/politics/2012/sep/12/barroso-doubt-scotland-eu-membership), <[www.guardian.co.uk/politics/2012/sep/12/barroso-doubt-scotland-eu-membership](http://www.guardian.co.uk/politics/2012/sep/12/barroso-doubt-scotland-eu-membership)>.

163 Letter of President José Maria Barroso to the Chairman of a Committee of the House of Lords, 10 December 2012, where he stated that “a new independent state would, by the fact of its independence, become a third country with respect to the E.U. and the Treaties would no longer apply on its territory” and added that “[u]nder Article 49 of the Treaty on European Union, any European state which respects the principles set out in Article 2 of the Treaty on European Union may apply to become a member of the EU. If the application is accepted by the Council acting unanimously, an agreement is then negotiated between the applicant state and the Member States on the conditions of admission and the adjustments to the Treaties which such admission entails. This agreement is subject to ratification by all Member States and the applicant state.”

164 See ‘Scottish independence: EC’s Barroso says new states need “apply to join EU”’, *BBC News*, 10 December 2012.

165 S. Tierney and T. Mullen, *Scotland’s Constitutional Future: The Legal Issues*, Report, 5 June 2012, at p. 41. See also Scheffer, *supra* note 151, at pp. 9–10.

166 Murkens, *supra* note 158, at pp. 6–7; Murkens *et al.*, *supra* note 35, at pp. 116–118.

167 Murkens *et al.*, *supra* note 35, at pp. 118–120; Crawford and Boyle, *supra* note 150, at pp. 91–95.

168 The issue is discussed in Tierney and Mullen, *supra* note 165, at pp. 35 *et seq.*; Murkens, *supra* note 158.

169 Happold, *supra* note 147, at pp. 29–34; M. Happold, *Scottish Independence and the European Union*, online: EJIL:Talk !, <[www.ejiltalk.org/scottish-independence-and-](http://www.ejiltalk.org/scottish-independence-and-)

In any event, suffice it to say for the purposes of this paper that Scotland's position on succession to international organizations suggests (to some extent) that it also supports the general principle of continuity to multilateral treaties. The official position of the UK government is that there would be no automatic succession and that Scotland would have to go through the process of becoming a party to each treaty.<sup>170</sup>

## **6. Conclusion: The Emergence of a Presumption of Continuity of Treaties**

What is the regime applicable to multilateral treaties in the case of secession? The situation may be summarised as follows: the few existing examples of State practice in the context of secession after the Second World War (Pakistan in 1947, Singapore in 1965 and Bangladesh in 1971) generally provided for the application of the rule of *tabula rasa*. However, it is the principle of continuity of treaties that has been retained in Article 34 of the 1978 Vienna Convention. In our view, there exists no rule of customary international law on the question of treaty succession in the context of secession. A new secessionist State is therefore entirely free to decide whether or not it wants to be bound by the treaties to which the predecessor State is a party.

In our opinion, the question of State succession with regards to treaties in the context of secession is a clear illustration of contradictory values in contemporary international law. On the one hand, the principle of the equality of sovereign States and that of liberty surely militates in favour of the application of the principle of *tabula rasa* to new States.<sup>171</sup> In fact, one of the most important attributes of State sovereignty is undoubtedly the ability to decide with whom and in which domain a State desires to maintain conventional relations. On the other hand, as sovereign as it may be, it nevertheless remains that a new State “devient partie intégrante du système international préexistant, dont il se doit de respecter l'intégrité et la cohérence”.<sup>172</sup> A new State not only benefits from rights under international law, but it also inherits

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the-european-union>; Murkens, *supra* note 158, at pp. 1–10; S. Schieren, ‘Independence in Europe: Scotland's Choice’, 31 *Scottish Affairs* (2000) p. 117, at pp. 124 *et seq.*; Murkens *et al.*, *supra* note 35, at pp. 114–127; Crawford and Boyle, *supra* note 150, at pp. 98–107.

170 *Scotland Analysis*, *supra* note 147, at p. 52.

171 According to Judge Weeramantry in his individual opinion in the *Genocide* case, Preliminary Objections, *supra* note 34, at p. 644: “Theoretically, the clean slate principle can be justified on several powerful bases: the principle of individual State autonomy, the principle of self-determination, the principle of *res inter alios acta*, and the principle that there can be no limitations on a State's rights, except with its consent.” He concluded that some exceptions to the application of the principle of *tabula rasa* should exist to the extent that this would not result in decreasing State sovereignty. He believes that the principle of continuity of treaties should apply to the 1951 Convention on genocide (p. 642).

172 Stern, *supra* note 7, at p. 119.

some obligations. For instance, new States are automatically bound by already existing rules of customary international law.

In our view, the integration of a new State within the international community and the requirement of stability in international relations support the application of the principle of continuity of treaties in the context of secession. This rule should take the form of a *presumption* whereby the successor State is bound by all treaties to which the predecessor State is a party.<sup>173</sup> Such succession would, however, *not* be “automatic” as set out in Article 34 of the Vienna Convention. Thus a new State would not *ipso facto* succeed to all existing treaties of the predecessor State. The new State must “confirm” its succession by notifying the depository of the treaty of its willingness to be a party to a particular treaty (or a group of treaties). This presumption of continuity together with the requirement of the need for some sort of positive action by a new State is in line with the practice of the UN Secretary-General, as well as that of several States acting as depository of treaties.<sup>174</sup> They request specific declarations by the successor States about their position with respect to existing treaties.<sup>175</sup> The practical effect of the presumption of continuity is that in the interim period between the date of succession and the confirmation by the State of its intention whether or not to succeed to a specific treaty, that treaty *should continue to apply* to the new State.<sup>176</sup> In other words, there is a presumption that the treaty continues to apply to the new State until that State has expressly takes position on the matter. A new State’s decision to succeed to a treaty would have a retroactive effect to the date of succession. Yet, it is a rebuttable presumption. Thus, the logical corollary of any such presumption of continuity is that a successor State is always free to decide not to be bound by a treaty to which the predecessor State was a party.<sup>177</sup> At the end

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173 A number of other authors also favour the application of such a general presumption to all cases of State succession (including secession): Williams, *supra* note 20, at p. 19; Williamson and Osborn, *supra* note 21, at p. 264; O. Schachter, ‘State Succession: the Once and Future Law’, 33:2 *Virginia JIL* (1993) p. 253, at pp. 258–260; J. Crawford, ‘State Succession and Relations with Federal States’, 86 *ASIL Proceedings* (1992) at p. 21; Love, *supra* note 22, at pp. 413–414; Dycus, *supra* note 146, at p. 196; Pazartzis, *supra* note 23, at pp. 150, 154, 212; Gruber, *supra* note 85, at pp. 266, 275; International Law Association, *Interim Report of the Committee of the Succession of the New States to the Treaties and other Obligations of their Predecessors*, Conference of Buenos Aires, 1968.

174 Pazartzis, *supra* note 23, at p. 210.

175 ILA, *Conclusions of the Committee on Aspects of the Law on State Succession*, *supra* note 30. This is also the conclusion reached by Stern, *supra* note 7, p. 294: “le principe de la continuité existe pour les traités multilatéraux, mais celui-ci sera (...) librement mise en œuvre par les États à travers leur notification de succession révélant et rendant opposable la situation de continuité; celle-ci a un caractère déclaratoire ainsi qu’il peut être induit du fait que la notification de succession est rétroactive au jour de la succession.”

176 Pazartzis, *supra* note 23, at p. 212.

177 ILA, *Rapport Final*, *supra* note 23, at p. 22.



of the day, actual State consent remains *central* to the question whether or not a new State is bound by treaties.

Our approach in favour of the adoption of a presumption of continuity of treaties in the case of secession relies on the recent practice adopted by States with regards to *dissolution* of States. In our opinion, despite the fundamental conceptual distinction between the notions of dissolution and secession, there is no reason to refuse to apply to future cases of secession the solution of continuity which was adopted in recent State practice in the context of dissolution of States. Although secession has unique characteristics, it should not follow that a different legal regime should necessarily prevail over the existing regime relative to the dissolution of States. This is all the more so considering that cases of dismemberment of States in recent years have demonstrated that qualifying a State as continuator or not is largely attributed to political considerations. These considerations have often more to do with the given circumstances of each case and with power politics rather than pure legal analysis. In fact, as pointed out by Brigitte Stern, geopolitical reasons prevailing at the time ultimately explain why the break-up process of the USSR and that of Yugoslavia were treated differently from a legal standpoint.<sup>178</sup>

In our view, the existence of a presumption of continuity of treaties in the case of secession is also supported by the recent practice of Montenegro. Upon its independence, the new State first made some general statements expressing its willingness to succeed to all multilateral treaties to which the union State of Serbia-Montenegro was a party. This was followed by notifications that were sent to the depositories of treaties whereby Montenegro specifically indicated to which treaties it was succeeding. This presumption of continuity of treaties is also clearly privileged by Québec – a potential candidate for secession (and to some extent also supported by the general position adopted by Scotland).

It is, however, in our opinion, premature to discuss the emergence of any *customary rule* of international law according to which the secessionist State would automatically succeed to the treaties concluded by the predecessor State.<sup>179</sup> This is also the position adopted by Judge Kréca (judge *ad-hoc* of the FRY) in his dissident opinion in the *Genocide* case.<sup>180</sup> It must be noted, however, that for some authors it is the rule of *tabula rasa* that should apply to contemporary cases of secession.<sup>181</sup>

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178 Stern, *supra* note 7, at pp. 78–79 (“les nécessités stratégiques et géopolitiques dans le cas de la Russie, et les prises de positions éthiques et juridiques dans le cas de la R.F.Y. engagée dans une politique de nettoyage ethnique en Bosnie-Herzégovine, ont conduit la communauté internationale à analyser différemment les deux processus ...”).

179 Zedalis, *supra* note 22, at p. 27.

180 *Genocide* case, Preliminary Objections, *supra* note 34, at p. 781.

181 Brower and Smutny, *supra* note 145, at pp. 52–54; Szafarz, *supra* note 84, at pp. 104–105; Brownlie, *supra* note 87, at pp. 663–664; *Restatement of the Law Third, the Foreign Relations Law of the United States*, *supra* note 19, at § 210, no 3, letter “f” (p. 110), “Reporters’ Notes” no 4 (p. 113).

For Shaw “it is far too early to be able to declare that continuity or a presumption of continuity is now the established norm”.<sup>182</sup>

Our approach in favour of a presumption of continuity of treaties appears justified by the necessity to preserve a minimum of stability in international relations.<sup>183</sup> We are of the opinion that the collective interests of all States, as well as their particular interests, support such a solution. In fact, the application of a presumption of continuity of treaties helps prevent the possibility of a legal vacuum that would otherwise arise following the independence of a new State if the principle of *tabula rasa* were to apply. For instance, the continuity of certain treaties by a new State (for example in matters of disarmament) is increasingly becoming a requirement for its international recognition by other States.<sup>184</sup> Continuity also appears to be in the particular interest of new States. This situation is strikingly different from what prevailed during the decolonisation phase that took place during the 1960s and 1970s. During this wave of decolonisation, it was considered unfair for these new States to be automatically bound by treaties that had been concluded by the predecessor States. Treaties were indeed considered by some as symbols of political and economic oppression during colonial time. This is clearly the position of Judge Mohammed Bedjaoui:

A la base de la création de l'État nouveau se trouve le principe d'autodétermination. L'atteinte à un tel droit que suppose nécessairement la protection de tous les intérêts et privilèges de l'ancienne puissance coloniale, reviendrait à hypothéquer ce droit même qui a été l'agent de la création de cet État. Cela reviendrait à la remise en cause de l'indépendance et de la souveraineté de l'État nouveau. Or donner et retenir ne vaut. Accorder l'indépendance et la confisquer ensuite par le jeu de prétendues règles conventionnelles ou autres de succession d'États, ne paraît pas licite. Ainsi, et c'est là que s'apprécie l'impact du principe de libre détermination sur la matière de la succession d'États, toute stipulation ou norme successorale qui serait contraire au droit des peuples à disposer d'eux-mêmes, devrait être réputée nulle.<sup>185</sup>

182 Shaw, *supra* note 35, at p. 977.

183 See Mullerson, *supra* note 87, at p. 44; Pazartzis, *supra* note 23, at p. 154; Shaw, *supra* note 35, at p. 690.

184 Pazartzis, *supra* note 23, at pp. 154–158. See, for instance, in the context of the EU the *Lignes directrices sur la reconnaissance des nouveaux États en Europe orientale et en Union soviétique*, in 97 *RGDIP* (1993) at p. 261, and the *Déclaration sur la Yougoslavie* (16 December 1991), in *RGDIP* (1992) at p. 261. See also the same position adopted by the US: Williams, *supra* note 20, at pp. 24–28; Love, *supra* note 22, at p. 395.

185 Bedjaoui, *supra* note 1, at p. 493. He concludes that “le critère réel nous paraît bien être celui de l'autodétermination. L'État successeur doit pouvoir assumer, dans les limites du droit des peuples à disposer d'eux-mêmes, tous les traités qui renforcent la collaboration internationale et considérer comme caducs, pour ce qui concerne, les accords de quelque nature qu'ils soient qui seraient contraires au principe de l'autodétermination” (at p. 526).



The situation is completely different in present post-colonial time. Today, a new State has a clear interest in being bound by the vast majority of treaties concluded by the predecessor State. In this context, the application of the rule of continuity could not be considered in any way as some sort “punishment” for the new State. To the contrary, the new secessionist States would be the beneficiaries of the application of such a rule. In this context, the political reasons that guided the ILC in the 1970s in adopting the continuity principle are simply no longer of any relevance in modern international law.

Finally, the approach in favour of a presumption of continuity of treaties is dictated by practical considerations. New States generally have few resources and little experience concerning complex questions of international law, such as those relative to succession to treaties.<sup>186</sup> Furthermore, these questions are not generally considered priorities in the context of the process leading to independence of the new State. For these reasons, new States would benefit from this presumption of continuity by allowing them a reasonable amount of time to take a final stand on matters related to succession to treaties of the predecessor State.

Commenting on the 1978 Vienna Convention, one of the most qualified legal experts with regards to State succession, Professor Daniel P. O’Connell, had already evoked in 1979 the possibility of applying such a presumption of continuity:

We have set up a system for successor States to avoid maintaining treaties and then an elaborated 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 reverse the matter, beginning with supposition that treaties remain in force for successor States, without distinction between the types of succession, and then leave the successor State to terminate them under the renunciation clauses.<sup>187</sup>

We do not hesitate to subscribe, some 33 years later, to a position in favour of a presumption of continuity of treaties in the case of secession to insure the stability of international relations.

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186 Studying each treaty to which the predecessor State is a party and determining whether or not a new State should succeed to it is undoubtedly a long and complex exercise. The present authors have conducted such a study of more than 2,000 treaties in the context of Québec: Turp and Dumberry, *supra* note 144.

187 O’Connell, *supra* note 85, at p. 736.