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# *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*

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*When the law is able to distinguish clearly between the different categories of treaties in terms of purpose and function, it will have taken an important step forward . . . When that stage is reached, those treaties which are immediately available to a new State will, it is safe to predict, be so because of their purpose and function and not because of a 'succession' from the parent State; it is precisely because law at present makes provision only for succession that the decision to become party or not is primarily a political one. Seen in this context, then, there is much more to be said for the 'pick and choose' attitude than has been commonly assumed.*

Robert Jennings<sup>1</sup>

*Without automatic succession to such a Convention, we would have a situation where the worldwide system of human rights protections continually generates gaps in the most vital part of its framework, which open up and close, depending on the break up of the old political authorities and the emergence of the new.*

Judge Christopher Gregory Weeramantry<sup>2</sup>

## **Abstract**

*A belief formed over the last decade, both within and outside the academic community, that humanitarian treaties are subject to a special regime in the law of state succession, known as 'automatic succession'. This article seeks to critically re-examine the accuracy of this belief.*

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<sup>1</sup> R. Y. Jennings, *General Course on Principles of International Law*, RCADI, vol. 121 (1967-II) 323, at 445.

<sup>2</sup> Separate opinion of Judge Weeramantry, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia)*, Judgment on Preliminary Objections (hereinafter *Application of the Genocide Convention*), ICJ Reports (1996) 595, at 654–655.

*By analysing the state practice generated during the recent wave of state succession, this article comprehensively elucidates the current customary regime of succession applicable to humanitarian treaties. With minor exceptions, the final verdict appears pessimistic: not only have the successor states not behaved as though succession to humanitarian treaties were automatic, but on the general level there also has not been any de facto continuity in succession patterns. The opinio juris currently held by the successor states strongly disfavours any automaticity of succession. Even the human rights bodies seem to vacillate in their opinion. Nevertheless, the idea of automatic succession to humanitarian treaties, strengthened by the doctrine of ‘acquired rights’, possesses enough legitimacy to be incorporated into positive international law. The major requirement at this stage, therefore, is to boost the spirit of accountability. Depositaries and treaty-monitoring bodies must become more active in discharging their watchdog functions.*

## 1 Introduction

That humanitarian treaties occupy a special position in contemporary international law has been asserted as often as it has been claimed that the goals enshrined in such treaties have a direct bearing on the fate of the world and its order.<sup>3</sup> The observance of human rights standards has long been recognized to have a direct bearing on the maintenance of international peace and security,<sup>4</sup> the potential implications of non-observance varying from mass influxes of refugees to the expansionist policies of totalitarianism. Human rights are one of the foundations of international peace and security;<sup>5</sup> they are part of the goals defining the world public order. Guidance as to how to achieve these goals comes from international human rights law (IHRL) and international humanitarian law (IHL).

According to common perceptions, IHRL is that part of international law which stipulates that obligations are owed by states directly to their own citizens.<sup>6</sup> It is rooted in the international bill of human rights, comprising the Universal Declaration of Human Rights<sup>7</sup> and the two UN Covenants.<sup>8</sup> IHL, in its turn, is commonly defined as the branch of international law that owes its inspiration to a feeling for humanity and

<sup>3</sup> *Reservations to the Genocide Convention*, Advisory Opinion, ICJ Reports (1951) 15; *Ireland v. United Kingdom*, ECHR (1978) Series A, No. 25, 90, at §239; UN Doc. E/CN.4/1995/80; Human Rights Committee (HRC), General Comment No. 24, CCPR/C/21/Rev.1/Add.6. See also M. Shaw, *International Law* (4th ed., 1997), at 695; Kamminga, ‘State Succession in Respect of Human Rights Treaties’, 7 *EJIL* (1996) 469.

<sup>4</sup> See, for instance, O. Schachter, *International Law in Theory and Practice* (1991), at 331; Van der Stoep, ‘Human Dimension Commitments Are Matters of Direct and Legitimate Concern to All Participating States’, in W. Zellner and F. Lange (eds), *Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities* (1999) 49.

<sup>5</sup> See, for instance, SC Res. 253 (1968), for an illustration of how gross human rights violations have been viewed as a threat to international peace and security.

<sup>6</sup> See R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 95; P. Sieghart, *The International Law of Human Rights* (1983), at xix.

<sup>7</sup> GA Res. 217A (III), 10 December 1948.

<sup>8</sup> International Covenant on Civil and Political Rights 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

is centred on the protection of the individual in times of armed conflict.<sup>9</sup> It represents the body of law known as the ‘Geneva law’, combining the four Geneva Conventions and the two additional Protocols thereto and, together with the law of warfare, comprises *jus in bello*.

Half a decade ago, an article appeared in this Journal, in which the author, reflecting on the issues of state succession, asserted that the

state practice during the 1990s strongly supports the view that obligations arising from a human rights treaty are not affected by a succession of States. This applies to all obligations undertaken by the predecessor State, including any reservations, declarations and derogations made by it. The continuity of these obligations occurs *ipso jure*. The successor State is under no obligation to issue confirmations to anyone.<sup>10</sup>

This statement, although not the first of its kind, has become the illustration *par excellence* of a trend that was then developing in international legal doctrine, centred around a belief that a particular legal regime<sup>11</sup> of state succession has come to apply to humanitarian treaties: the regime of automatic succession. The belief was taken up by many in the academic community, as various scholars advanced in various formulations what can be termed, after the above-quoted author, the *Kamminga* model.<sup>12</sup> It was also endorsed in the jurisprudence of the International Court of Justice (ICJ) by Judge Weeramantry<sup>13</sup> and, to a lesser extent, by Judge Shahabuddeen,<sup>14</sup> and was also welcomed by a number of other international bodies.<sup>15</sup>

This article aims to provide what has long been overdue — a comprehensive analysis of the special position of humanitarian treaties in the law of state succession. Ten years after the demise of the Soviet bloc, the timing for this scrutiny could not be more appropriate. With secessionism still popular in different parts of the world, given the substance of humanitarian treaties, the examination of Kamminga’s claim has become an increasingly important task.

If humanitarian treaties are indeed subject to automatic succession, then we may claim that another victory has been secured for the human rights cause in the last decade. If, however, they are not, then the quest is further from being complete than some academics would have us believe. Repeated scholarly pronouncements may then be misleading and harmful, creating a false sense of security about the reliability of certain important international legal regimes.

Before proceeding to a re-evaluation of Kamminga’s argument, it is necessary to clarify the term ‘humanitarian treaties’ employed here. For present purposes, this

<sup>9</sup> See I. Detter, *The Law of War* (2nd ed., 2000), at 160, quoting Jean Pictet.

<sup>10</sup> Kamminga, *supra* note 3, at 482.

<sup>11</sup> For present purposes, a regime is defined as a system of norms governing a certain sphere of international and other social relations. A treaty’s regime emanates from its substance, which is the totality of those provisions of the treaty that immediately deal with the treaty’s subject matter(s).

<sup>12</sup> Müllerson, ‘New Developments in the Former USSR and Yugoslavia’, 33 *VJIL* (1993) 299, at 319–320; B. Stern, *La Succession d’Etats*, RCADI, vol. 262 (1996) 297; Shaw, *State Succession Revisited*, 5 *FYIL* (1994) 34, at 84.

<sup>13</sup> See *supra* note 2.

<sup>14</sup> *Application of the Genocide Convention*, *supra* note 2, at 634.

<sup>15</sup> See e.g. HRC General Comment No. 26, UN Doc. A/53/40, §4.

category of treaties is understood to include those multilateral treaties that uphold and promote humanitarian principles and the human dignity of the individual, treaties that are normally to be found under the rubrics of IHRL and IHL. Although the relationship between the two branches — IHRL and IHL — is not uncontroversial,<sup>16</sup> they may be seen at least as overlapping<sup>17</sup> and at most as requiring conceptually to be merged into one body.<sup>18</sup> As a final answer to this question remains far outside the scope of this study, suffice it to say that for the purposes of developing generic rules applicable to treaties fusing IHL and IHRL conventions into a single category is absolutely legitimate.<sup>19</sup>

The second section of this paper provides a brief historical background to the analysis. The third section clarifies some of the general legal concepts involved. Section four analyses the claim of humanitarian treaties to the automaticity of succession from a theoretical perspective. Section five presents an analysis of relevant state practice. Finally, before passing to the concluding remarks, the article considers, in Section six, some peculiar sub-regional developments in Eastern Europe.

## 2 Historical Backdrop: The Recent Wave of State Succession

The recent wave of state succession occurred against the backdrop of the demise of the Soviet bloc that started in 1989 and included the disintegration of the Union of Soviet Socialist Republics (USSR), Czechoslovakia, and the Socialist Federal Republic of Yugoslavia (SFRY). It also included the unification of Germany and that of Yemen. Only the three cases involving dismemberment, however, have challenged the existing dogmas and have led to a significant revival in academic debates.

Twenty-four successor states have emerged in the wake of this wave of state succession. Of them only 16 properly qualify for the status of ‘successor state’: Armenia, Azerbaijan, Bosnia-Herzegovina, Croatia, the Czech Republic, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Slovakia, Slovenia, Tajikistan, the former Yugoslav Republic of Macedonia (FYROM), Turkmenistan, Uzbekistan, and the united Yemen. This latter state, which arose from the merging of the Yemen Arab Republic and the People’s Democratic Republic of Yemen, declared itself a party to all treaties that had been applicable to at least one of its predecessors,<sup>20</sup> which eliminated all of the potential problems, simultaneously making the case uninteresting for the purposes of the current analysis.

Both the unified Germany and the Russian Federation claimed to be the continuations of their predecessor states, which was unanimously accepted by the

<sup>16</sup> Partsch, ‘Human Rights and Humanitarian Law’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Inst. 8 (1985) 292.

<sup>17</sup> N. S. Rodley, *The Treatment of Prisoners under International Law* (2nd ed., 1999), at 57.

<sup>18</sup> A. H. Robertson and J. G. Merrills, *Human Rights in the World* (4th ed., 1996), at 310–314; Partsch, *supra* note 16, at 293; Detter, *supra* note 9, at 161.

<sup>19</sup> See Article 60(5) of the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331 (hereinafter *Convention on the Law of Treaties*), which mentions ‘treaties of humanitarian character’. According to the commonly accepted interpretation, this category includes both IHL and IHRL conventions.

<sup>20</sup> P. Malanczuk (ed.), *Akehurst’s Modern Introduction to International Law* (7th ed., 1997), at 168.

international community. While the German case was largely viewed as the absorption of the GDR by the FRG,<sup>21</sup> the academic assessment of Russia's continuation of the former USSR's identity turned out to be controversial.<sup>22</sup>

Estonia, Latvia and Lithuania claimed a clean slate position and succeeded in having this recognized,<sup>23</sup> basing their argument on the illegality of their annexation by the Soviet Union and asserting a return to their pre-World War II legal identity.<sup>24</sup> Belarus and the Ukraine, both being founding members of the United Nations, already had a significant degree of international personality of their own at the moment of independence, being parties in their own right to many treaties that otherwise would become objects for their succession. Although not absolutely insignificant, their practice of succession is, thus, not extensive (as it practically did not have a chance to occur due to the overlaps between the lists of treaties to which they and the Soviet Union adhered separately) and, hence, not as conclusive as the practice of the other former Soviet republics. Finally, the practice of succession of the Federal Republic of Yugoslavia (FRY) has been so perplexing that very few useful generalizations may be made from it.

Initially, in 1992, the FRY claimed continuator status. This claim, however, was comprehensively rejected. In September 1992, the Security Council and the General Assembly came to the conclusion that the post-April 1992 entity could not automatically continue the membership of the former SFRY in the UN and it had to apply for membership anew.<sup>25</sup> The decision was then replicated throughout the UN structure. As no one state could be admitted twice to one organization, in reality it meant that in the General Assembly's eyes the SFRY ceased to exist and the FRY was a new state. Interestingly, however, the Legal Counsel took the view that the former Yugoslavia's membership in the UN was neither terminated nor suspended. It further directed the Secretary-General that the latter was not in a position to pronounce on the FRY's claim as to its continuation of the SFRY's personality.<sup>26</sup> The country's legal position as a party to treaties deposited with the UN Secretary-General thus remained unclear until October 2000.<sup>27</sup>

<sup>21</sup> See Beemelmans, 'State Succession in International Law: Remarks on Recent Theory and Statepraxis', 15 *Boston University International Law Journal* (1997) 71, at 77, 98.

<sup>22</sup> For a supportive view, see Müllerson, *supra* note 12, at 302 *et seq.* For criticism, see Blum, 'Russia Takes over the Soviet Union's Seat at the United Nations', 3 *EJIL* (1992) 354. See also Lukashuk's remark in *ASIL Proceedings* (1992) at 23, stating that Russia's recognition as the continuator state was a pragmatic, not a legal, decision.

<sup>23</sup> Müllerson, *supra* note 12, at 308 *et seq.*

<sup>24</sup> *Ibid.*, at 309–310.

<sup>25</sup> See GA Res. 47/1, 22 September 1992; SC Res. 777 (1992).

<sup>26</sup> See UN Doc. A/47/485.

<sup>27</sup> See Craven, 'The Genocide Case, the Law of Treaties and State Succession', 68 *BYIL* (1997) 127, at 131–134. O'Lloyd made an interesting submission to the extent that the reason why Russia's claim to be the continuing state of the USSR was accepted while the FRY's identical claim as regards the SFRY was not lies in the fact that Russia willingly chose to abide by the principles of the UN Charter, respecting the established borders, partaking in international cooperation, and respecting human rights, while the FRY failed to do so. See O'Lloyd, 'Succession, Secession, and State Membership in the United Nations', 26 *New York University Journal of International Law and Politics* (1993–4) 761, at 783.

Despite the non-recognition of the FRY's claim by the international community, depositaries' records consistently kept listing 'Yugoslavia' as a party to the respective multilateral treaties, with the dates in the respective entries corresponding to those of the SFRY, thus *de facto* treating the FRY as a continuing state. We will return later to the evidentiary significance of depositaries' records. For now, suffice it to say that the Legal Counsel's findings and the position taken by the Secretary-General caused much confusion. As the Secretary-General's summary of depositary practice then explained, for Secretary-General's depositary purposes 'the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia.'<sup>28</sup> This came despite the virtually universally accepted findings of the Badinter Commission<sup>29</sup> and, which is more intriguing, the new official position of the Yugoslav state itself, which following the democratic end of the Milosevic regime, was admitted to the United Nations as a new state on 1 November 2000.<sup>30</sup> On the same day, incidentally, the FRY renounced its claim to the international legal personality of the SFRY, creating further confusion in the depositaries' records. Even now depositaries continue to list the SFRY as a party to the treaties in their custody.<sup>31</sup>

Whether or not the FRY is a successor state is no longer a contested issue. The value of its practice, however, remains seriously undermined, especially because the main source of evidence available — the depositaries' records — is devastated by incoherence.

To illustrate this uncertainty in relation to the Yugoslav case, the current records for the Vienna Convention on the Diplomatic Relations<sup>32</sup> list Yugoslavia as a party by succession (the date of the communication of succession is 12 March 2001). Previously, the records indicated 1 April 1963, the date when the Convention came into force for the SFRY.

With respect to the Genocide Convention,<sup>33</sup> the new records list Yugoslavia as a party by accession from 12 March 2001, whereas the previous records showed an unbroken continuum since 1950, when the Convention entered into force for the SFRY.

It is not absolutely clear whether the two other fairly recent cases of transfer of territory — Hong Kong and Macau — are, strictly speaking, cases of state succession. The United Kingdom and Portugal leased the territories from China, without exercising *stricto sensu* any *de jure* sovereignty over them; as a result, it appears there

<sup>28</sup> Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1 (hereinafter *Summary of Practice*) at 88, §297.

<sup>29</sup> Arbitration Commission of the European Communities (later Arbitration Commission of the International Conference on the former Yugoslavia). See Opinions 8–10, reprinted in 31 ILM (1992) 1521; Opinion 11, reprinted in 32 ILM (1993) 1587.

<sup>30</sup> See GA Res. 55/12, 1 November 2000.

<sup>31</sup> See, e.g., the depositary records for the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage at <http://www.unesco.org/whc/debut>.

<sup>32</sup> 500 UNTS 95; <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty26.asp>.

<sup>33</sup> 78 UNTS 277.

was no change of sovereignty involved when the respective transfers were accomplished.<sup>34</sup> Nevertheless, according to the litmus test of state succession, the United Kingdom and Portugal were responsible for the international relations of the two territories, which could bring the two transfers into the state succession field. Still, China has consistently taken the position that neither case involved a change in sovereignty. Thus, paragraph 1 of the Macau Joint Declaration stated that Macau ‘form[s] part of Chinese territory’ and that from 20 December 1999 China ‘will resume the exercise of sovereignty’ over it.<sup>35</sup> In any event, neither transfer raised any problematic issues of succession, both being fairly unique occurrences, carried out according to special agreements<sup>36</sup> negotiated long before the actual transfers took place.<sup>37</sup>

Accordingly, as only the cases of dismemberment of the three socialist federations raised challenges to the existing vision and have caused a stir in the *corpus juris*, the transfers of Hong Kong and Macau, as well as the unifications of Yemen and Germany, will not be examined in the present paper.

### 3 General Remarks on the Law of State Succession

‘State succession’ in international law is a process during which a certain competence — usually defined as the ‘responsibility for international relations of territory’<sup>38</sup> — is transferred between two or more states. In other words, as a result of state succession, one state (the ‘successor state’) replaces another (the ‘predecessor state’) as the representative of a certain territory and its population in the international arena.<sup>39</sup>

The legal doctrine behind the law of state succession represents one of the most controversial aspects of international law.<sup>40</sup> For a long time, this branch of international law remained a ‘grey zone’, arguably ‘altogether unsuited to the processes of codification, let alone of progressive development’.<sup>41</sup>

Its most developed area is succession in respect of treaties, whose theoretical gist is formed by the interplay of two driving objectives: the need to ensure the continuity of obligations beyond the changes of sovereignty and the need to observe the principle of

<sup>34</sup> A. Aust, *Modern Treaty Law and Practice* (2000), at 323.

<sup>35</sup> *Infra* note 36 (emphasis added).

<sup>36</sup> See the Joint Declaration on the Question of Hong Kong, 1984, 1399 UNTS 33, and the Joint Declaration on the Question of Macau, 1987, 1498 UNTS 229.

<sup>37</sup> Neither of the two agreements mentions the term ‘state succession’.

<sup>38</sup> Vienna Convention on Succession of States in Respect of Treaties, 1978, UN Doc. A/CONF.80/31, reprinted in 17 ILM 1488 (1978) (hereinafter Vienna Convention), Art. 2(b).

<sup>39</sup> D. P. O’Connell, *The Law of State Succession* (1956), at 3.

<sup>40</sup> See A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd ed., 1984), at §973.

<sup>41</sup> O’Connell, ‘Reflections on the State Succession Convention’, 39 *ZaöRV* (1979) 725, at 726.

consent. Accordingly, two conceptual mechanisms<sup>42</sup> of state succession can be distinguished: ‘continuity’ and the ‘clean slate’ (*tabula rasa*).<sup>43</sup>

The rationale behind the principle of consent dictates that a state can be bound by an international obligation only if it so agrees.<sup>44</sup> Unless the successor state consented in its pre-independence era to the treaties in question, acting *qua* itself, or *qua* an entity with largely the same, even if not international, personality, it emerges on the international arena with a clean slate, free of any of the treaty obligations of its predecessor.

The international system, however, cannot afford an abrupt abortion of its internal links on whose balanced connection its stability rests. A cessation of the legal existence of an international subject by itself is a major disruption in the fabric of the international system. The discontinuity of its obligations has an even greater destabilizing effect. As observed by Crawford: ‘the international community cannot allow the negation of the extensive body of legal relations built up over time. It cannot allow communities simply to opt out of obligations and responsibilities, even by so fundamental and difficult a process as dissolution of or secession from a State.’<sup>45</sup> Therein lies the justification for the ‘continuity’ mechanism, according to which the successor state inherits all the treaties of its predecessor which had been applicable to its territory before the succession, unless such inheritance is impossible or objectively unjustified. States incur considerable opportunity costs in arriving at and committing themselves to treaties; as a result, they should be entitled to rely on the observance of commitments residing therein,<sup>46</sup> presumably beyond all but the most extraordinary political upheavals.

Although historically the support of scholars was divided between the two mechanisms,<sup>47</sup> in recent years scholarly preference has tended towards ‘continuity’, as being more responsive to the needs of the international community.

Practically, however, neither mechanism has been applied in its pure form, and it would be erroneous to expect otherwise. Since the law of state succession always

<sup>42</sup> ‘Mechanism’ for present purposes is defined as a set of dynamically connected legal norms (in which the application of a preceding norm triggers the application of the subsequent norm) whose overall applicability is subject to the occurrence of certain legally relevant conditions. A mechanism is thus a transcription of a certain route of behaviour into legal norms, where each norm reflects a stage or an aspect of the route.

<sup>43</sup> The concept of ‘continuity’ as used in the context of succession to treaties should be distinguished from the concept of ‘continuity’ as used in the context of describing the change in the legal identity of a state. The state that continues the personality of its predecessor is a continuator state, whereas the state that only continues its predecessor’s treaties is a successor state.

<sup>44</sup> Convention on the Law of Treaties, Art. 2 and Art. 34. On the principle of consent, see generally L. Henkin, *International Law: Politics and Values* (1995), at 26 *et seq.*; G. Schwarzenberger and E. D. Brown, *A Manual of International Law* (6th ed., 1976), at 119 *et seq.*

<sup>45</sup> Crawford’s remarks in *ASIL Proceedings* (1992) at 21.

<sup>46</sup> Vagts, ‘State Succession: the Codifiers’ View’, 33 *VJIL* (1993) 275, at 288.

<sup>47</sup> See Lord McNair, *The Law of Treaties* (1961), at 601. Compare Lauterpacht, ‘Succession of States with Respect to Private Law Obligations’, in E. Lauterpacht (ed.), *International Law being the Collected Papers of Hersch Lauterpacht*, vol. 3 (1977) 121, at 126, who argues that the very purpose of law generally applicable to succession is ‘to maintain the continuity of law, independent of the physical or legal death of the natural or juridical person concerned’.



occurs in highly politicized contexts,<sup>48</sup> case-by-case arrangements and negotiations invariably take place.<sup>49</sup>

The norms on state succession in contemporary international law, as in its classical predecessor, come from international customs. Although as a result of an arduous codification process, two international treaties<sup>50</sup> were produced to govern the issues of state succession, neither gained much support. The Vienna Convention on state succession in respect of treaties only came into force in 1996.<sup>51</sup> From the outset, it was perceived not as a codification of the existing law, but as a progressive development, and one which was not welcome at that.<sup>52</sup> The state practice that followed its adoption largely deviated from its provisions.<sup>53</sup> Although the Convention failed to achieve customary status as a whole, some of its provisions are commonly believed to reflect norms of a customary nature.<sup>54</sup>

Custom, as a source of international law, is state practice that is perceived as being legally obligatory.<sup>55</sup> It represents 'a particular pattern of behaviour ... engaged in with sufficient uniformity and consistency and ... explained in terms appropriate to consider [this pattern] as one dictated by or in accordance with a rule of law.'<sup>56</sup> Customary international law results from an accretion of practices and convictions (*opinio juris*).<sup>57</sup> This last element is elusive in terms of its empirical ascertainment and frequently has to be inferred, partly on the basis of existing practice and partly on the basis of the absence of objections.<sup>58</sup>

Automatic succession, as the term is used in international law, is succession that occurs regardless of the volition of the successor state and without any steps being

<sup>48</sup> Crawford, *supra* note 45, at 18.

<sup>49</sup> *Ibid.*, at 21. Cf. Schwarzenberger and Brown, *supra* note 44, at 71, and O'Connell, *supra* note 41, at 729.

<sup>50</sup> *Supra* note 38. There also exists a Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983, reprinted in 24 ILM (1983) 306.

<sup>51</sup> As of October 2001, the following states were parties to the Convention: Bosnia-Herzegovina, Croatia, the Czech Republic, the Dominican Republic, Egypt, Estonia, Ethiopia, Iraq, Morocco, Saint Vincent and the Grenadines, the Seychelles, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia, Tunisia, the Ukraine and Yugoslavia.

<sup>52</sup> See *Third Restatement of the Foreign Relations Law of the United States* (1987), at §208, Reporters' Note 4. See also I. Brownlie, *Principles of Public International Law* (5th ed., 1998), at 663–664; Müllerson, *supra* note 12, at 299; Malanczuk, *supra* note 20, at 161.

<sup>53</sup> See I. Shearer, *Stärke's International Law* (11th ed., 1994), at 294; Crawford, *supra* note 45, at 17.

<sup>54</sup> When it comes to such cases as the unification of states, boundary treaties, and membership in international organizations, scholars agree that the Vienna Convention is a sufficiently close reflection of customary law. See P. M. Dupuy, *Droit International Public* (2nd ed., 1993), at 40; Tichy, 'Two Recent Cases of State Succession — An Austrian Perspective', 44 *Austrian Journal of Public and International Law* (1992) 117, at 122; Shaw, *supra* note 3, at 683.

<sup>55</sup> *North Sea Continental Shelf cases* (FRG v. Denmark/Netherlands), ICJ Reports (1969) 3, at 43–46, paras 73–81.

<sup>56</sup> Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: the Legal Framework', in N. S. Rodley (ed.), *To Loose the Bands of Wickedness* (1992) 14, at 16.

<sup>57</sup> Henkin, *supra* note 44, at 34.

<sup>58</sup> See M. Villiger, *Customary International Law and Treaties* (2nd ed., 1997), at 53; K. Wolfke, *Custom in Present International Law* (2nd ed., 1993), at 128–131.

taken by that state. It is a succession that is both implied and obligatory.<sup>59</sup> Its effect consists of the transfer of treaty rights and obligations not as a result of the will of the successor state, but on the basis of the operation of international law.<sup>60</sup> It is a succession *ipso jure*, and no formalities, such as the sending of diplomatic notes, need to be fulfilled in order to confirm it.<sup>61</sup>

In international law, the term ‘automatic succession’ is used in two contexts, depending on the taxonomy of succession. In one context, automatic succession is also known as ‘universal succession’.<sup>62</sup> This refers to a succession that occurs along the lines of the mechanism envisaged in Article 34 of the Vienna Convention:

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. [. . .]<sup>63</sup>

Alternatively, the automaticity of succession is tied not to the nature of the successor state, but to that of the treaty. In this context, automatic succession occurs in respect of certain categories of treaties. It is in this sense that ‘automatic succession’ is employed in the Kamminga model.

With respect to ‘universal succession’, it must be noted that no successor state ever behaved as if state succession to all treaties were *ipso jure*. In those cases where succession occurred and the general positions of successor states were communicated to the international community, successor states always found it appropriate to announce their succession expressly. The CIS states, for example, chose to state in the Alma-Ata Declaration that they undertook to guarantee ‘the discharge of the international obligations deriving from treaties and agreements concluded by the former [USSR]’.<sup>64</sup> Had they believed in automatic succession along the lines of Article 34, such a paragraph would not have been included.

<sup>59</sup> Stern, *supra* note 12, at 269–270; see also Rosenne, ‘Automatic Treaty Succession’, in J. Klabbers and R. Lefeber (eds), *Essays on the Law of Treaties: a Collection of Essays in Honour of Bert Vierdag* (1998) 97.

<sup>60</sup> See the dissenting opinion of Judge Kreca in the *Application of the Genocide Convention* case, *supra* note 2, at 784, para. 115.

<sup>61</sup> ‘[L]a succession automatique signifie qu’aucun acte formel n’est prévu pour que les effets de la succession se réalisent.’ Stern, *supra* note 12, at 269. The author later went on to clarify that automaticity presupposes ‘inutilité d’une notification de succession’.

<sup>62</sup> O’Connell, *supra* note 39, at 6–7.

<sup>63</sup> Citing Article 34 of the Vienna Convention, Slovakia claimed that ‘the principle of automatic succession [is a] . . . rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist’. (*Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgment of 25 September 1997, www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs\_ijudgment\_970925\_frame.htm, at para. 121).

<sup>64</sup> See 31 ILM 148 (1992) at 149.

## 4 Can Humanitarian Treaties Qualify for Automatic Succession?

Given that respect for sovereignty lies at the heart of the international legal system today, automatic succession appears as an alien element in the international legal order. Should it be proved to exist, the systemic principles of international law would require that its scope of applicability be construed as narrowly as possible, for it is a clear restriction on the liberty of states.

Considering this link between automatic succession and the systemic requirements of international law, we can conclude that in order to qualify for automatic succession, the treaty or treaties at issue must be, by virtue of their purpose and functions, directly related to international values of the greatest importance, sufficient to override the principles of sovereignty and consent. Moreover, the treaty or treaties must be removed as far as possible from the personality of the states parties, for, as Koskenniemi correctly observed, the more 'intimate' the link between the treaty and the 'self' of the predecessor state, the weaker the case for automatic succession to that treaty.<sup>65</sup>

Another point worth considering is the notion of the 'working capital of legal relationships', with which every new state entering the international arena needs to be equipped.<sup>66</sup> Traditionally, international law held that this 'working capital' was all contained in customary law. However, Robert Jennings, lecturing at the Hague Academy in 1967, posited that 'multilateral conventions of humanitarian character' also belonged to 'the necessary working capital of international jural relationships that a new State needs at the outset.'<sup>67</sup> Having said that, however, he immediately made a reservation: 'Whether the distinction between these and other kinds of treaty can yet be expressed in terms of legal criteria is more than doubtful.'<sup>68</sup>

Today, the general opinion appears to be that this hurdle has been cleared. Even the most modest claims made about humanitarian treaties seem to suggest that they enjoy a special status as a category of treaties under international law:

- humanitarian treaties have been classified as treaties under which obligations are owed primarily and directly to individuals, not other states;
- contracting states in humanitarian treaties, it is believed, do not have any interests of their own, but only a common interest, which is the accomplishment of the standards enshrined in these treaties;<sup>69</sup>

<sup>65</sup> Koskenniemi, 'The Present State of Research', in *State Succession: Codification Tested against the Facts* (1997) 89, at 156.

<sup>66</sup> Jennings, *supra* note 1, at 442–443.

<sup>67</sup> *Ibid.*, at 444–445.

<sup>68</sup> *Ibid.*

<sup>69</sup> 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.' *Reservations to the Genocide Convention, supra* note 3, at 23.

- humanitarian treaties often provide for direct access of individuals to international redress mechanisms;
- compliance with humanitarian treaties, it is claimed, is immune to the principle of reciprocity;<sup>70</sup>
- humanitarian treaties create public orders between groups of states rather than webs of bilateral obligations;<sup>71</sup>
- humanitarian treaties cannot be terminated on grounds of material breach by another party;<sup>72</sup>
- humanitarian treaties do not contain termination clauses;
- increasing the number of its parties inheres in the object and purpose of every humanitarian treaty, as the universality of cooperation in the humanitarian sphere requires universality of participation;<sup>73</sup>
- special rules apply to reservations made to humanitarian treaties.<sup>74</sup>

Humanitarian treaties have differed so frequently in their regime from other types of treaties that to expect a special status for them in the law of state succession would only seem natural.

In fact, in his separate opinion in the *Application of the Genocide Convention* case, Judge Shahabuddeen tried to make precisely this point. According to him, the humanitarian nature of a treaty, together with its humanitarian objects and purposes, can create a juridical mechanism that will support a certain legal construction in which successor states are made parties to a humanitarian treaty by virtue of the adherence expressed by the predecessor state.<sup>75</sup> He also observed that the break in protection that would arise in the absence of automaticity would appear to be *a priori* incompatible with the object and purpose of humanitarian treaties which, in the first place, exist to safeguard the fundamental rights and freedoms of the individual and endorse the most elementary principles of morality.<sup>76</sup>

Apart from considerations of human dignity, there are also a number of political factors that support automaticity in the case of humanitarian treaties. One of them is linked to the recognition that during periods of political instability, which tend to accompany state succession, human rights violations and flagrant atrocities occur.<sup>77</sup>

<sup>70</sup> *Prosecutor v. Kupreskic et al.*, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, available at <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>, at paras 511, 517–519; HRC General Comment No.24, *supra* note 3, at para. 17; see, however, Provost, 'Reciprocity in Human Rights and Humanitarian Law', 65 *BYIL* (1994) 383. See also D. Gomien *et al.*, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996), at 432–433, observing that the European Social Charter tends to favour reciprocity.

<sup>71</sup> *Ireland v. United Kingdom*, *supra* note 3; Shaw, *supra* note 3, at 696.

<sup>72</sup> Convention on the Law of Treaties, Article 60(5).

<sup>73</sup> See e.g. GA Res. 368 (IV), 1949, affirming that the Genocide Convention is intended for universal participation (thereby inviting as many states as possible to join it). See also the separate opinion of Judge Shahabuddeen, *supra* note 14, at 635, and *Reservations to the Genocide Convention*, *supra* note 3, at 24.

<sup>74</sup> HRC General Comment No.24, *supra* note 3, at paras 17 and 19. See also *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132.

<sup>75</sup> Judge Shahabuddeen, *supra* note 14, at 637.

<sup>76</sup> *Ibid.*, at 635.

<sup>77</sup> Kamminga, *supra* note 3, at 469.

Such violations are concomitant with mass refugee inflows, which can constitute a threat to international peace and security. As a systemic principle of international law, the preservation of international peace and security is sufficiently weighty to override the principles of sovereignty and consent which oppose the introduction of the mechanism of automatic succession.

However, as Judge Weeramantry showed in his separate opinion in the *Application of the Genocide Convention* case it is not imperative to limit sovereignty to create room for automatic succession. The principle of sovereignty can be bypassed, rather than curtailed. As Judge Weeramantry explained, humanitarian treaties by their very nature transcend the concept of state sovereignty, since their subject matter is of universal concern.<sup>78</sup> Where a case of state succession occurs, a *bona fide* successor state should not, therefore, cite the intrusion of its sovereignty as a ground for discarding its predecessor's humanitarian treaties. Unfortunately, Judge Weeramantry's argument does not provide a route for bypassing the principle of consent in the same manner. Or, rather, what he identifies as a route is in fact a dead end. His argument that under humanitarian treaties individuals are made into beneficiaries, not third parties, and therefore the *res inter alios acta* principle should not prevent these treaties from automatic succession,<sup>79</sup> is flawed. Equally flawed is a parallel three-step argument, which Judge Weeramantry did not make, but which would be a logical outgrowth of his position, *viz.*: (1) because the principle of consent is a systemic requirement of international law, not just a customary rule, it should not operate where there is no systemic need for negotiating sovereign interests, and (2) since humanitarian treaties relate to human dignity and not to the political stances of states, the interests of predecessor states do not differ from those of their successors,<sup>80</sup> that is, no systemic need is apparent for a separate consent on their part, which means that (3) humanitarian treaties ought to be made subject to automatic succession. The flaw of both of these arguments lies in substituting the vector of treaty obligations with that of the substantive rules which these treaties encompass. Humanitarian treaties are dual in nature: they act both as contractual instruments and as sources of substantive normative orders. Individuals are not third parties to humanitarian treaties in any manner whatsoever. They are simply beneficiaries of these treaties' regimes. The *res inter alios acta* argument in their respect, therefore, is not simply invalid, as Judge Weeramantry argues, but is simply out of place. Furthermore, to argue that there is no systemic need for a separate consent on the part of successor states would mean to overlook the contractual nature of treaties altogether. There is always a systemic need for consent in the case of treaties, if only because treaties represent more than just sums of their substantive provisions.

<sup>78</sup> Judge Weeramantry, *supra* note 2, at 646.

<sup>79</sup> *Ibid.*, at 651.

<sup>80</sup> *Ibid.*, at 646–647.

## 5 Examination of the Relevant State Practice: the Position of the *Kamminga* Model in Customary Law

### A *Evidence of State Practice in the Field of State Succession*

State succession is a difficult field in which to search for state practice. To begin with, there are almost no authoritative decisions on the subject.<sup>81</sup> In addition, the acts that make up the relevant state practice consist for the most part of succession notes and various declarations, i.e. verbal statements, which in some teachings on custom are regarded as ‘bad evidence’, since they reflect only the subjective beliefs of the entities that issue them, not the picture of legal reality.<sup>82</sup> However, those acts which these teachings would treat as ‘good evidence’ are an extremely rare occurrence in the field of state succession. Humanitarian treaties are rarely executed in such a way so as to produce ‘physical deeds’, since states for the most part do not carry any positive obligations that would be relevant for these purposes. How is it possible, for example, to determine whether Slovakia acceded or succeeded to the Apartheid Convention, without considering the notes it sent to the depositary?<sup>83</sup> How would one find the cases of actual execution of such a Convention’s provisions that indicate with a sufficient degree of finality the presence of a certain pattern of state practice? The truth is that in most cases the actual fulfilment<sup>84</sup> of humanitarian treaties does not take place at all, or does not take place in such a manner<sup>85</sup> which would provide an unequivocal answer to the question whether a given state succeeded or acceded to a particular humanitarian treaty.

It must also be borne in mind that even when the substantive part of the treaty is fulfilled it does not necessarily mean that the successor state has succeeded to the treaty in question. It may well have fulfilled the substantive provisions following a conviction that they are part of customary law. Consequently, only the fulfilment of

<sup>81</sup> In the two recent cases pertaining to the matter — *Gabcikovo-Nagymaros*, *supra* note 63, and *Application of the Genocide Convention* — the ICJ avoided making a meaningful pronouncement on controversial points of the law of state succession, dismissing them on the ground that there was no need to discuss them. See also Castaneda’s remarks in *Yearbook of the International Law Commission*, 1970 (1) 156 (the field of state succession is in a state of anarchy, there is a great wealth of precedent and legal opinion on the subject, but both are far from uniform).

<sup>82</sup> See Wolke, *supra* note 58, at 41–44. Cf. A. D’Amato, *International Law: Process and Prospect* (1995), at 122–124, 132–133, 141.

<sup>83</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, 1015 UNTS 243.

<sup>84</sup> In the instant case, the actual fulfilment would not be the adoption of relevant domestic legislation — it already had been in place in the former Czechoslovakia and, presumably, passed on since then to the new state — but the prosecution of an alleged perpetrator, e.g. on the charges of ‘exploitation of the labour of the members of a racial group’. A prosecution for this offence would clearly indicate factual succession to the Apartheid Convention, since it could not occur on any other ground, as the offence in question is not *per se* a crime under customary international law.

<sup>85</sup> The only act of fulfilment that can indicate whether a succession, rather than an accession, has occurred is one which occurs within a period of time during which the succeeded regime would be in force (by virtue of its retroactive effect), but the acceded regime would not.

clearly non-customary provisions of a treaty — such as, for instance, the submission of reports to a treaty-monitoring body — would comprise a ‘physical deed’ clearly indicating a case of succession.

Apart from a handful of cases, the ascertainment of customary law on state succession to humanitarian treaties therefore demands the examination of verbal acts, notes and declarations submitted by the successor states.<sup>86</sup> Hence, the central evidentiary role in the field of state succession is played by the depositary records in which such notes and declarations are registered.

Having said that, it must be clarified that in practice depositaries never rely on any theory of automatic succession as such, but always require successor states to make formal statements confirming their succession.<sup>87</sup> The UN Secretary General, whose depositary practice because of its sheer volume and influence on other depositaries makes him the most important depositary in international law, rejects in his practice all general succession notes and accepts only treaty-specific notes.<sup>88</sup> It is hardly surprising, against the background of such formalism, that an environment conducive to the birth of automatic succession never formed. Formalistic though depositaries may be, their records still present the most valuable source of evidence in the law of state succession.

Ignoring the depositary records could lead to rather absurd consequences, such as a situation where Ruritania’s case for automatic succession remains under consideration despite Ruritania’s sending an accession note. Automatic succession by definition is supposed to occur without any formal confirmation.<sup>89</sup> The only way to ascertain that no such confirmation has occurred is to look at the depositaries’ records. Brigitte Stern, however, seems to offer another answer. She asserts that although the succession in question may not be implicit, it is still obligatory.<sup>90</sup> Even if we leave aside all other objections to such a finding,<sup>91</sup> it nonetheless remains unclear

<sup>86</sup> ‘Depositary practice must provide valuable guidance for identification of rules relating to [state] succession.’ *Yearbook of the International Law Commission* 1970 (1) 133.

<sup>87</sup> Rosenne, *supra* note 59, at 102. See also *Yearbook of the International Law Commission* 1970 (2) 34. Cf. *Summary of Practice*, *supra* note 28, at 89, para. 304: ‘it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty solely on the basis of a formal document similar to instruments of ratification, accession, etc . . .’

<sup>88</sup> UNESCO adopted a different approach in this respect; it decided to recognize general declarations of succession, such as the Alma-Ata Declaration, *supra* note 64. See, for instance, [http://ramsar.org/key\\_cp\\_e.htm](http://ramsar.org/key_cp_e.htm).

According to Article 2(g) of the 1978 Vienna Convention, the form of notification is not of essential importance, as long as the consent of the notifying state to be bound by the treaty clearly transpires from it.

<sup>89</sup> “‘Automatic succession’ and ‘notification of succession’ are mutually exclusive.” Judge Kreca, dissenting opinion, *supra* note 60, at 784, para. 115. See also *supra* note 61.

<sup>90</sup> ‘Ne pas accepter une succession implicite ne signifie pas nier le caractère obligatoire de la succession.’ Stern, *supra* note 12, at 270.

<sup>91</sup> Subscribing to Stern’s argument basically means suggesting that the difference between notes of accession and notes of accession is meaningless. This could only hold true if both types of notes were declaratory and had no legal effect. That, however, would contradict the established principles of the law of treaties, which views notes of accession as important constitutive acts that epitomize the principle of consent, since through them states signify their consent to adhere to a given treaty.

exactly how Stern intends to use this argument in favour of automaticity, as she herself expressly describes the latter as requiring both obligatoriness and implicitness.

Turning to depositary records for answers about the state practice, however, must not be misapprehended. Such records do not bind the parties to any treaty, nor do they have any legal bearing on the treaty's status as a formal instrument.<sup>92</sup> Furthermore, they do not contain any element of customary international law either. What they do contain is a picture of treaty adherence, and it is to this extent that they possess evidentiary value.

The only time when depositary records fail to provide conclusive evidence about the status of a given treaty is when the potential successor state does not take any steps in this regard. Legal doctrine remains silent on whether a successor state should lose its right of succession to an inheritable treaty after a certain period of time. The silence of a successor state does not necessarily rule out succession.<sup>93</sup> Blank entries in depositary records in this regard reflect unsettling gaps. It has been held that where no succession takes place, it is impossible to infer an automatic succession.<sup>94</sup> This conclusion, however, does not strike one as logically inevitable. It is not impossible to treat blank entries as indicators of automatic succession, since the absence of any formal communication on the part of a state may be a sign of its treating the succession as implicit. In any event, no magic formula is available, which means that the final answer must depend on the particular circumstances of the case. To this extent depositary records are somewhat probatively inadequate for our purposes.

The situation, however, is different for unambiguous accessions. Then depositary records are at their best as an evidentiary source. They unambiguously convey the nature of adherence and the position a given state party takes with regard to the inheritable treaty. Even if we accept that the automaticity argument is not necessarily undermined by the non-submission of a note of succession, it is impossible to disagree that the submission of an accession instrument effectively ends the argument. Accession notes have an unequivocally constitutive effect. They always indicate support for a 'clean slate', and are squarely irreconcilable with the concept of continuity and, hence, automatic succession.

Some commentators remark that it is 'unclear what effect can be given to the use of technical expressions such as "accession" or "succession" in the instruments sent by successor states to depositaries'.<sup>95</sup> However, it is submitted here that, to the extent to which the concept of legal formality applies in international law, the employment of

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Furthermore, at least within the meaning of Article 17 of the Vienna Convention, notes of succession are also seen as definitive expressions of consent to be bound. Thus, Judge Kreca comments that a note of succession is 'a unilateral act of the State, constitut[ing] a basis for a collateral agreement in simplified form between the new State and the individual parties to its predecessor's treaties.' Judge Kreca, *supra* note 60, at 785–786, para. 116.

<sup>92</sup> *Summary of Practice*, *supra* note 28, at 89, para. 306.

<sup>93</sup> Thus, FYROM deposited its note of succession to the World Heritage Convention (see *infra* note 144) only in 1997.

<sup>94</sup> Klabbers, 'State Succession and Reservations to Treaties', in Klabbers and Lefeber, *supra* note 59, 107, at 115.

<sup>95</sup> Koskenniemi, *supra* note 65, at 105.



such 'technical expressions' can be relied on as being conclusive, for any other variant would indicate a denial of predictability of terminology in the international legal discourse, which would effectively mean the cessation of the legal nature of the said discourse.

### **B Automatic Succession to Humanitarian Treaties — Observations on the Real *Opinio Juris***

An attentive review of the documents containing the *opinio juris* shared by those organs that ought to be the most receptive to the *Kamminga* model leads to an unambiguous conclusion about the model's accuracy as a descriptive statement about the reality of international law.

On 5 March 1993, the UN Commission on Human Rights issued Resolution 1993/23, entitled 'Succession of States in respect of international human rights treaties', in which it called upon successor states to confirm their succession to the relevant treaties with the appropriate depositaries.<sup>96</sup> On 25 February 1994<sup>97</sup> and 25 February 1995,<sup>98</sup> it repeated this appeal. In 1993, the Committee on the Elimination of Racial Discrimination adopted General Recommendation XII (42) that also encouraged all successor states that had not yet done so to confirm their succession to the Convention on the Elimination of All Forms of Racial Discrimination.<sup>99</sup> The fifth meeting of the persons chairing the human rights treaty bodies in December 1994 addressed the successor states with the same request.<sup>100</sup> The Human Rights Committee in turn has continually taken a position that rejects any theory of automatic succession, as it required the successor states to manifest their succession in a formal way.<sup>101</sup>

Thus, human rights bodies, through their practice, have elected to view succession notes as constitutive acts, which, of course, leaves no place for the *Kamminga* model in the framework of whatever *opinio juris* they may have.<sup>102</sup> Intriguingly, some of these bodies have persisted in repeating that the obligations under various humanitarian treaties continue automatically to bind successor states.<sup>103</sup> Unless the said treaties are believed to reflect customary international law in their entirety, it is unclear how such statements can be reconciled with the statements mentioned earlier. The most optimistic diagnosis in any case is that the treaty-monitoring bodies seem to have second thoughts about the invalidity of the *Kamminga* model.<sup>104</sup> Considering that these bodies should be the staunchest defenders of this model, such a state of affairs leaves the model's proponents little cause for optimism.

As though that were not enough, the depositary formalism delivers a further blow.

<sup>96</sup> UN Doc. E/CN.4/1994/68, at para. 1.

<sup>97</sup> UN Doc. E/CN.4/1995/80, at para. 2.

<sup>98</sup> UN Doc. E/CN.4/1996/76, at para. 1.

<sup>99</sup> UN Doc. E/CN.4/1995/80, at para. 7.

<sup>100</sup> UN Doc. A/49/537, at para. 31.

<sup>101</sup> Rosenne, *supra* note 59, at 105.

<sup>102</sup> *Ibid.*, at 100; Koskenniemi, *supra* note 65, at 106.

<sup>103</sup> UN Doc. A/49/537, at para. 32.

<sup>104</sup> See also *Yearbook of the International Law Commission* 1974 (2) 172.

The observation made three decades ago that ‘despite the humanitarian objects of the [1949 Geneva Conventions] and the character of [the provisions] they contain . . . the [Swiss] Federal Council has not treated a newly emerged State as automatically a party in virtue of its predecessor’s ratification or accession’<sup>105</sup> still holds true and applies in respect of *all* humanitarian treaties.<sup>106</sup>

As not even human rights bodies appear to support the *Kamminga* model, it is hardly surprising that successor states themselves do not hold it in favour. Even the most discursive examination reveals a persistent enthusiastic support for a ‘clean slate’ that does not discriminate against the treaties’ substance.

First, all of the successor states that emerged from the dissolution wave that swept over the Socialist bloc ten years ago have formally announced the lists of inherited humanitarian treaties. Such a pattern of succession clearly reflects a pick-and-choose approach, characteristic only of the ‘clean slate’ position. Succession to treaties in such conditions becomes a matter of political decision-making as opposed to rule application. A relatively small difference it may be in practical terms, but in the theoretical reality of international law this is a vast abyss.<sup>107</sup>

Then, on a few occasions some successor states chose to file reservations together with their succession notes. This happened, for example, with the Convention on the Rights of the Child<sup>108</sup> when Slovenia and Bosnia-Herzegovina succeeded to it.<sup>109</sup> Such actions are also more indicative of a ‘clean slate’ approach than any variation of automatic succession.<sup>110</sup> Notwithstanding the dubious lawfulness of such reservations in the law of treaties,<sup>111</sup> the fact of their filing clearly reveals a conviction on the part of successor states that succession notes have a constitutive effect for humanitarian treaties. Jennings’ verdict thus remains valid: the ‘tendency to carry over certain categories of treaties seems to be based on voluntary novation rather than a rule of succession’.<sup>112</sup>

In fact, an in-depth inquiry reveals that in the whole recent wave of state succession there was only one case of a genuine automatic succession to a humanitarian treaty. It occurred in 1992, when Bosnia-Herzegovina submitted, at the request of the Human Rights Committee, its first report under the International Covenant on Civil and Political Rights, without having first confirmed its succession thereto.<sup>113</sup> It is noteworthy, however, that the immediate reaction of the Committee was to request the Bosnian government to formalize its succession to the Covenant by a succession note,<sup>114</sup> which implies that it saw the automatic succession it induced as illegitimate

<sup>105</sup> See *Yearbook of the International Law Commission* 1970 (2) 35.

<sup>106</sup> ‘To arrive from [the extant state practice] into a general position regarding automatic succession [to humanitarian treaties] . . . require[s] a bold interpretation.’ Koskenniemi, *supra* note 65, at 105.

<sup>107</sup> Jennings, *supra* note 1, at 445.

<sup>108</sup> Convention on the Rights of the Child 1989, 1577 UNTS 3.

<sup>109</sup> UN Doc. E/CN.4/1994/68, at paras 13, 20.

<sup>110</sup> Vienna Convention, Art. 20.

<sup>111</sup> Beemelmans, *supra* note 21, at 91, note 79 (arguing such qualifiers are out of place in international law); cf. Klabbers, *supra* note 94, at 113.

<sup>112</sup> Jennings, *supra* note 1, at 446.

<sup>113</sup> UN Doc. E/CN.4/1995/80.

<sup>114</sup> HRC Concluding Observations (Bosnia-Herzegovina), CCPR/C/79/Add.14.

or deficient. The precise content of the Committee's *opinio juris* in this case remains a mystery, although it is clear that it did not favour the *Kamminga* model. The lack of appropriate conviction on the part of the main actors involved renders statements pronouncing automatic succession for humanitarian treaties *prima facie* invalid. However, in order to settle the issue conclusively, it is necessary to examine the actual practice of successor states in more detail.

### C Automatic Succession to Humanitarian Treaties — The Real State Practice

Not all scholars who agree with the basic assertions underlying the *Kamminga* model subscribe to its radical version. Some of them endorse a more moderate claim of *de facto* continuity. They argue that even though formalities in treaty succession are practically performed, states view them as nothing more than just formalities, which means that from a legal perspective they continue treaties in a quasi-automatic mode. Naturally, this argument applies only to so-called law-making treaties, of which humanitarian treaties are a subclass.<sup>115</sup> The link between this line of reasoning and the *Kamminga* model comes from a promise that the normal will turn into the norm: there is no customary rule yet to support *Kamminga's* argument, but it is taking shape, soon it will materialize. In other words, according to this light version of the *Kamminga* model, automatic succession to humanitarian treaties may start as a matter of convenience rather than as law. At some stage, however, because every state chooses to continue its humanitarian treaties, some successor states will start to believe they are under a legal duty to succeed. Then a full-blown *Kamminga* model will come into existence.

Obviously, the practical relevance of this argument hinges on the availability of supporting evidence. If it is shown that successor states uniformly prefer to continue their inheritable humanitarian treaties, even though this succession may not be *ipso jure*, there is a future for the *Kamminga* model. To verify, we must, as discussed earlier, examine depositary records.

Since, as we mentioned before, the recent wave of state succession produced only 15 'proper' successor states, we limited our sampling of depositary entries only to them. To obviate an unnecessary inspection of several dozen treaties as well as to avoid departing from the immediate subject of our inquiry, we further limited ourselves at this stage to examining only the records kept in respect of humanitarian treaties. Defining our 'search' options this way, the results we obtained have been summarized in the form of two tables below. The first table contains the records for some exemplary IHRL conventions: the Convention on the Prevention and Punishment of the Crime of Genocide (GC) 1948,<sup>116</sup> the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

<sup>115</sup> See, e.g., Stefan Oeter's arguments, as quoted in Koskenniemi, *supra* note 65, at 104. See also R. Jennings, *Collected Writings*, vol. 1 (1998), 113, at 115; Shearer, *supra* note 53, at 295.

<sup>116</sup> *Supra* note 32. In the *Application of the Genocide Convention* case, Judge Kreca commented that the Genocide Convention is not humanitarian in nature, but penal. See the dissenting opinion of Judge Kreca, *supra* note 60, at 774, para. 108. His reading of the term 'humanitarian' in that context, however, appears too narrow.

(SC) 1956,<sup>117</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1966,<sup>118</sup> the International Covenant on Civil and Political Rights (ICCPR) 1966,<sup>119</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966,<sup>120</sup> the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) 1979,<sup>121</sup> the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) 1984,<sup>122</sup> and the Convention on the Rights of the Child (CC) 1989.<sup>123</sup> The second table contains the records relevant to the core IHL documents, the four Geneva Conventions and the protocols thereto. The tables are drawn up on the basis of depositary records held by the UN Secretary-General and the information provided by the International Committee of the Red Cross.<sup>124</sup>

### State Succession to International Human Rights Law Treaties

<i>State</i>	<i>DC</i>	<i>SC</i>	<i>CERD</i>	<i>ICESCR</i>	<i>ICCPR</i>	<i>CEDAW</i>	<i>CAT</i>	<i>CC</i>
Armenia	A	X	A	A	A	A	A	A
Azerbaijan	A	A	A	A	A	A	A	A
Kazakhstan	A	X	A	X	X	A	A	R
Kyrgyzstan	A	A	A	A	A	A	A	A
Moldova	A	X	A	A	A	A	A	A
Tajikistan	X	X	A	A	A	A	A	A
Turkmenistan	X	A	A	A	A	A	A	A
Uzbekistan	A	X	A	A	A	A	A	A
Georgia <sup>125</sup>	A	X	A	A	A	A	A	A
Czech Republic	S	S	S	S	S	S	S	S
Slovakia	S	S	S	S	S	A	S	S
Bosnia-Herzegovina	S	S	S	S	S	S	A	S
Croatia	S	S	S	S	S	S	S	S
Slovenia	S	S	S	S	S	S	A	S
FYROM	S	S	S	S	S	S	S	S

S — succession A — accession R — ratification X — not reported as party

<sup>117</sup> 266 UNTS 3.

<sup>118</sup> 660 UNTS 195.

<sup>119</sup> *Supra* note 8.

<sup>120</sup> *Ibid.*

<sup>121</sup> 1249 UNTS 13.

<sup>122</sup> 1465 UNTS 85.

<sup>123</sup> *Supra* note 108.

<sup>124</sup> Available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI> and <http://www.icrc.org/ihl.nsf/WebNORM?OpenView> respectively.

<sup>125</sup> Georgia is set apart from the rest of the USSR successor states, as it is not a party to the Alma-Ata Declaration, *supra* note 64, and is therefore not bound by its provisions. Arguably, therefore, its position should be relatively more symptomatic of the stance the former Soviet republics took *vis-à-vis* the *Kamminga* model, as its choices in treaty succession were not in any way affected by the Alma-Ata undertakings.

The first conclusion that can be made by looking at the two tables is that there is not much evidence to support a claim of de facto continuity with respect to the listed treaties. The highest number of succession notes was 10, in the case of the IHL conventions. This indicates a one-third deviance rate, which, other considerations aside, seriously undermines the case for constant and uniform practice.<sup>126</sup> That IHL fared better than IHRL (IHRL conventions gathered only six succession notes apiece, with the exception of the CEDAW and the CAT, which received only five and four succession notes respectively<sup>127</sup>) can be explained as a special achievement of the ICRC,<sup>128</sup> or as a consequence of the Geneva Conventions generally being the most adhered to treaties in the reality of conventional international law.<sup>129</sup> In any event, the main conclusion is obvious: there is no general factual pattern of continuity for humanitarian treaties.

**State Succession to International Humanitarian Law Treaties**

<i>State</i>	<i>Gen. Con. 'I</i>	<i>Gen. Con. 'II</i>	<i>Gen. Con. 'III</i>	<i>Gen. Con. 'IV</i>	<i>Prot. I</i>	<i>Prot. II</i>
Armenia	A	A	A	A	A	A
Azerbaijan	A	A	A	A	X	X
Kazakhstan	S	S	S	S	S	S
Kyrgyzstan	S	S	S	S	S	S
Moldova	A	A	A	A	A	A
Tajikistan	S	S	S	S	S	S
Turkmenistan	S	S	S	S	S	S
Uzbekistan	A	A	A	A	A	A
Georgia	A	A	A	A	A	A
Czech Republic	S	S	S	S	S	S
Slovakia	S	S	S	S	S	S
Bosnia-Herzegovina	S	S	S	S	S	S
Croatia	S	S	S	S	S	S
Slovenia	S	S	S	S	S	S
FYROM	S	S	S	S	S	S

S — succession A — accession X — not reported as party

Broadening the scope of examination to include more treaties further corroborates this conclusion:

<sup>126</sup> See *Asylum Case (Peru v. Colombia)*, ICJ Reports (1950) 266.

<sup>127</sup> Note Kazakhstan's ratification of the Child Convention.

<sup>128</sup> Kamminga, *supra* note 3, at 480.

<sup>129</sup> According to the ICRC, the number of states parties to the four Geneva Conventions has reached 189: [www.icrc.org/eng/party\\_gc#7](http://www.icrc.org/eng/party_gc#7).

- Georgia, Moldova, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan have ignored the Apartheid Convention altogether;<sup>130</sup>
- in the case of the International Convention against Apartheid in Sports,<sup>131</sup> the nine former USSR republics, Slovenia, FYROM, and Slovakia are not listed as parties at all, whether by succession or accession, although the USSR, the SFRY, and Czechoslovakia had all ratified the Convention between 1987 and 1989, and, what is even more confusing, Bosnia-Herzegovina, Croatia, and the Czech Republic notified their succession to the treaty in 1992–93;<sup>132</sup>
- all five Central Asian states have ignored the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity,<sup>133</sup> and of the remaining 10 ‘proper’ successor states only five succeeded to this treaty;<sup>134</sup>
- although the USSR adhered in 1955 to all ‘Hague law’ instruments ratified by Tsarist Russia, of the former USSR republics only Belarus and Russia are listed as parties today.<sup>135</sup>

The actual scale of *de facto* continuity thus appears increasingly insufficient to secure the establishment of a general custom favouring the *Kamminga* model. Nevertheless, consistent patterns of continuity do exist. But they do not exist for treaties.

A recurring feature that is immediately observable in both tables is the concentration of succession marks in their middle and lower parts, where the successors to the former Czechoslovakia and the SFRY are listed. The pro-succession trend which these marks reflect is, however, limited to particular states, not treaties. What is more, it cuts across the board, i.e., is valid for all multilateral treaties.

With a few exceptions (such as the CEDAW and the Apartheid in Sports Convention), the Czech Republic and Slovakia succeeded to all the treaties of their predecessor state, producing what is arguably the most orderly and civilized example of a large-scale state succession to date. The SFRY successor states also attempted consistently to pursue the succession path. In their case, however, deviations and exceptions were more numerous. Thus, although the four ‘proper’ successors succeeded to the Genocide Convention, Yugoslavia chose to accede.<sup>136</sup> In the case of the CAT, only Croatia (1992), the FYROM (1994), and Yugoslavia (2001) succeeded. Bosnia-Herzegovina and Slovenia both chose to accede. In the light of a strong presumption that all successors with a common predecessor are supposed to have identical lists of inherited treaties, these discrepancies are difficult to explain,

<sup>130</sup> <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty8.asp>.

<sup>131</sup> 1500 UNTS 161.

<sup>132</sup> <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>.

<sup>133</sup> 754 UNTS 73.

<sup>134</sup> <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty7.asp>.

<sup>135</sup> See, for example, the records for the Hague Convention IV respecting the Laws and Customs of War on Land at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=30&Expand=15.1#15.1>.

<sup>136</sup> UN Secretary General Depository Notification Ref. No. C.N.164.2001.TREATIES-1.

especially since both conventions incorporate *jus cogens* norms. Likewise, while all other SRFY successors succeeded to the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity,<sup>137</sup> Slovenia chose to accede.<sup>138</sup>

It still remains to be seen what bearing the FRY's decision to accede anew to the Genocide Convention may have on the implicit finding by the Badinter Commission that the FRY as SFRY's successor is (was) bound by the latter's treaties, including the Genocide Convention, as of 27 March 1992,<sup>139</sup> which was echoed in the ICJ's decision that the FRY was bound by the Genocide Convention as of 1993.<sup>140</sup> It is not readily apparent which of these three positions ought to be given greater weight. In any event, the Yugoslav note of 12 March 2001 not only augurs complications for the *Application of the Genocide Convention* case,<sup>141</sup> but also gravely undermines Kamminga's argument.

Finally, the case of the former Soviet republics merits a special mention. The chaos that accompanied the dissolution of the USSR will long haunt any proponent of the *Kamminga* model. Acceding and succeeding to their inheritable treaties in the spirit of pure voluntarism, the ex-USSR republics ditched, without any apparent regrets, the Alma-Ata Declaration, which incidentally was their general note of succession. If anything else, their behaviour clearly reflected a 'clean slate' mindset.<sup>142</sup> Thus, the government of Armenia, for example, announced that 'Armenia does not succeed to [the] Soviet Union in regard to international treaties and has no practice of succession [but] follows a constitutional procedure of accession to multilateral treaties.'<sup>143</sup> Even Tajikistan and Kazakhstan, the two most pro-succession states in the CIS, have been more prone to accede to the inheritable treaties. On several occasions some of the republics even opted for ratification while others were succeeding and acceding.<sup>144</sup> As

<sup>137</sup> *Supra* note 131.

<sup>138</sup> *Supra* note 132.

<sup>139</sup> *Supra* note 29.

<sup>140</sup> *Application of the Genocide Convention*, at 610, para. 17.

<sup>141</sup> See further the ICJ's Press Release 2001/12, at [http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-12\\_20010424.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-12_20010424.htm). It is unclear what further effect this note may have on the similar case of *Croatia v. Yugoslavia*, currently before the Court, in which Croatia alleges violations of the Genocide Convention by the FRY between 1991 and 1995.

<sup>142</sup> Klabbers, *supra* note 94, at 113.

<sup>143</sup> See Koskenniemi, *supra* note 65, at 102, quoting a letter by Y. Chanchurjan, the acting head of the Legal Department of Armenia's Ministry of Foreign Affairs. Koskenniemi later reports a similar pattern for Azerbaijan (*ibid.*, at 112).

<sup>144</sup> See the records in respect of the Child Convention. For proof that such disparity is not limited only to humanitarian treaties, see the Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. (Azerbaijan and Uzbekistan ratified, Kyrgyzstan acceded, Armenia, Georgia, and Tajikistan succeeded, and Kazakhstan, Moldova, and Turkmenistan chose to remain silent.) See [http://www.unesco.org/culture/laws/1970/html\\_eng/page3.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml).

The same depositary in respect of the Convention concerning the Protection of the World Cultural and Natural Heritage, 1972, 1037 UNTS 151, lists Armenia, Turkmenistan, and Uzbekistan as parties through succession, Kazakhstan and Kyrgyzstan as parties through accession, and Azerbaijan as a party through ratification. See [www.unesco.org/whc/wldrat.htm#debut](http://www.unesco.org/whc/wldrat.htm#debut).

a result of such variation, lengthy accountability gaps were created in a number of cases. Thus, Georgia acceded to the Genocide Convention only in 1999, the same year that Tajikistan acceded to the two Covenants.<sup>145</sup>

But even if one claimed there are signs of a regional pattern of *de facto* continuity in Eastern and South-eastern Europe, it would still be inappropriate to trumpet the arrival of the *Kamminga* model in that region. The *opinio juris* observed in Czechoslovakia and the SFRY in the early 1990s did not fit the normative formula that would lay down the necessary foundation. There is sufficient evidence to suggest that both the Czech Republic and Slovakia believed they were bound not by a ‘Kammingian’ norm, but by the substantive provisions of the Vienna Convention.<sup>146</sup> The former Yugoslav republics did likewise.<sup>147</sup>

\* \* \* \* \*

Jennings was correct in stating that state succession is a subject which presents too rich a diversity of state practice.<sup>148</sup> The accuracy of his observation that ‘it is a bewilderingly hopeless exercise to seek to spell out from this practice any new general customary principles’<sup>149</sup> has not diminished with time.

Although many learned authors have subscribed to the opinion that new states tend to continue the multilateral treaties of a humanitarian character concluded by their predecessors,<sup>150</sup> state practice does not support this view. Nothing in state practice suggests that ‘the assumption of [the] predecessor’s human rights obligations constitutes an implied condition of membership of international community’ either.<sup>151</sup> Even where successor states had breached their undertakings to continue their predecessor’s treaties,<sup>152</sup> the international community did not bother to

<sup>145</sup> <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp>; <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp>

<sup>146</sup> See Koskenniemi, *supra* note 65, at 94; Status of the Multilateral Treaties Deposited with the UN Secretary General, Chapter XXIII, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp>.

<sup>147</sup> Opinion 9 of the Badinter Commission, reprinted in 31 *ILM* (1992) 1521, mentions that all the ex-SFRY republics agreed to take the 1978 Vienna Convention and its twin convention of 1983 as the legal foundation for resolving the issues arising out of their succession to the SFRY. See also Koskenniemi, *supra* note 65, at 100.

<sup>148</sup> Jennings, *supra* note 115, at 112.

<sup>149</sup> Shearer, *supra* note 53, at 297.

<sup>150</sup> Schachter, ‘State Succession: The Once and Future Law’, 33 *VJIL* (1993) 253, at 259; Jennings, *supra* note 115, at 115; Shearer, *supra* note 53, at 295.

<sup>151</sup> Mushkat, ‘Hong Kong and Succession of Treaties’, 46 *ICLQ* (1997) 181, at 191.

<sup>152</sup> It is beyond doubt that the Alma-Ata Declaration, *supra* note 64, represents a binding undertaking under international law. At a minimum, it binds its parties as unilateral declaration (see *Nuclear Tests case (Australia v. France)*, ICJ Reports (1974) 253). One, however, could also argue that it carries the characteristic features of a treaty within the meaning of Art. 2(a) of the Convention on the Law of Treaties.



protest.<sup>153</sup> Now, one may argue that this was not the right thing for the successor states and the international community to do: the former should have lived up to their promises and the latter should have insisted on that. But international law today is what governments do, not what academics think governments should have done. This is not to deny the importance of doctrinal teachings — every diplomat and legal counsel listens to lectures and reads textbooks at some stage in his work and every top government adviser consults a university professor at least once in his career. But the reality of international law — or, rather, its official myth — is that it is up to the community of states to choose the direction of law's development. In the 1990s this community chose not to insist on automatic succession for its new members, ignoring Jennings' advice that humanitarian treaties should belong to the minimum 'working capital of international jural relationships', i.e. that successor states ought to start their international existence being parties to those treaties.<sup>154</sup>

## 6 Czechoslovakia and the European Convention on Human Rights — A Case for a *Kamminga* Model?

In the confusing aftermath of the 1990s, one case stands out that ought to give hope to those who sympathize with the humanistic thrust of the *Kamminga* model. The fact that this case occurred within a framework in which one would have never expected any succession at all should be even more encouraging.

The European Convention on Human Rights (ECHR) is a closed multilateral treaty. Succession to such treaties requires the consent of other parties and therefore cannot occur *ipso jure*. In addition to being a closed treaty, the ECHR is a treaty that operates within the framework of the Council of Europe (COE), which poses another theoretically insurmountable obstacle to the *Kamminga* model, since the membership of international organizations is not inheritable by state succession.<sup>155</sup>

The Czech Republic and the Slovak Republic acceded to the COE on 30 June 1993, according to the decision of the Committee of Ministers, following the COE Parliamentary Assembly's invitations.<sup>156</sup> Under normal circumstances, the ECHR would not have entered into force for either state before that date. In fact, however, both states are listed as parties to the ECHR and its protocols from 1 January 1993,<sup>157</sup> the date when Czechoslovakia ceased to exist.

<sup>153</sup> The Dutch government, for example, decided that the practice of the recent wave of state succession supported the 'clean slate' in respect of all states. See Kamminga, *supra* note 3, at 471, note 14. The United States, on the other hand, espoused the presumption of continuity. See Williamson and Osborn, 'A US Perspective on Treaty Succession and Related Issues in the Wake of the Break-up of the USSR and Yugoslavia', 33 *VJIL* (1993) 261, at 264–265.

<sup>154</sup> Jennings, *supra* note 1, at 443.

<sup>155</sup> O'Connell, *supra* note 39, at 65; Koskenniemi, *supra* note 65, at 107, 146; Vagts, *supra* note 46, at 293; Craven, *supra* note 27, at 134.

<sup>156</sup> PACE, Opinions 174 (1993) and 175 (1993) on the applications by the Czech Republic and Slovakia for membership of the Council of Europe, available at <http://stars.coe.fr/ta/ta93/EOP1174.htm> and <http://stars.coe.fr/ta/ta93/EOP1175.htm>.

<sup>157</sup> <http://conventions.coe.int/treaty/EN/searchsig.asp?NT=005&CM=&DF=>.

The explanation provided by the Committee of Ministers states that a decision was taken based on the expressed wishes of both states to list them as parties and to extend the application of their declarations under Article 25 of the ECHR retroactively, so as to bypass the six-month admissibility rule.<sup>158</sup> Under this arrangement, the three ECHR regimes — the single Czechoslovak regime on one side and the two separate Czech and Slovak regimes on the other side — were to be treated as being back-to-back in temporal terms. So far, so good. The practice of the European Commission on Human Rights, one of the then judicial bodies of the COE, complicated the situation. The Commission perceived the situation of the three regimes remarkably differently and silently erased the hypothetical dividing line drawn by the Committee of Ministers on 1 January 1993.

In *Nohejl v. Czech Republic*, the Commission, dealing with a claim of property right violations, accepted the date of the Convention's entry into force for the Czech Republic as 18 March 1992<sup>159</sup> (the date when the ECHR came into force for Czechoslovakia), treating the two consecutive regimes as one continuous regime. In *Kajba v. Czech Republic*,<sup>160</sup> the Commission accepted the *prima facie* admissibility of a claim of violation of Articles 5, 6 and 8 in respect of events that took place between 30 March 1992 and 15 January 1994. It thus found the alleged violations justiciable *ratione temporis* in the months preceding 1 January 1993, ignoring the limits of its temporal jurisdiction as the Committee of Ministers would have drawn them.

In *Gasparez v. Slovak Republic*<sup>161</sup> and *Sulko v. Slovak Republic*,<sup>162</sup> the Commission, while invoking the *ratione temporis* ground in defining the limits of its jurisdiction, equivocally referred to both 18 March 1992 and 1 January 1993 as the possible starting points of its temporal jurisdiction. In *Malfatti v. Slovak Republic*<sup>163</sup> and *P.S. v. Slovak Republic*,<sup>164</sup> the Commission expressly accepted as the limitation of its temporal jurisdiction — and Slovakia's accountability — the date when the ECHR came into force for Czechoslovakia,<sup>165</sup> citing *Brezny and Brezny v. Slovak Republic* as authority for

<sup>158</sup> COE Doc. H/INF (94)1, at 1. Other examples of retroactive admission of the Czech Republic and Slovakia are the IMF and the ILO. See Beemelmans, *supra* note 21, at 83.

<sup>159</sup> 'The Commission notes that the transfer of the property to the applicant's sister was registered on 8 January 1992, which was before 18 March 1992, the date of the entry into force of the Convention in respect to the Czech Republic (Czech and Slovak Federal Republic), and nothing since then has changed the applicant's position.' *Nohejl v. Czech Republic*, Appl. No. 00023889/93, Admissibility Decision of 13 May 1996. This and other subsequently cited ECHR cases are all available at <http://www.echr.coe.int>.

<sup>160</sup> Appl. No.00024211/94, Admissibility Decision of 11 January 1995, declared inadmissible on grounds of non-exhaustion of domestic remedies.

<sup>161</sup> Appl. No.00024506/94, Admissibility Decision of 28 June 1995.

<sup>162</sup> Appl. No.00026962/95, Admissibility Decision of 6 September 1995.

<sup>163</sup> '[T]he Commission can only deal with applications against the Slovak Republic concerning matters which are subsequent to 18 March 1992.' Appl. No.00038855/97, Admissibility Decision of 1 July 1998.

<sup>164</sup> Appl. No.00029024/95, Admissibility Decision of 16 April 1998.

<sup>165</sup> 'The Commission first notes that the relevant period did not begin with the institution of the proceedings in December 1990, but only as from 18 March 1992, when the former Czech and Slovak Federal Republic ratified the Convention and recognised the right of individual petition.' (*Ibid.*)

this approach.<sup>166</sup> In this last case, the Commission, examining its *ratione personae* competence with respect to Slovakia over the period between 18 March and 31 December 1992,<sup>167</sup> hesitantly concluded that Slovakia is Czechoslovakia's successor to the ECHR,<sup>168</sup> finding the basis for this conclusion in Slovak domestic legislation and the letter sent by the Slovak government to the COE Secretary-General, in which Slovakia confirmed its successor status to COE treaties.<sup>169</sup>

The significance of these findings goes far beyond the exercise by the Commission of its jurisdiction. What happened, in fact, is that the Commission 'made' the Czech Republic and Slovakia succeed to the ECHR. If this assessment is correct, then what we have here is a case of automatic succession, since succession notes, due to their impossibility, have not been submitted. Moreover, as the reasoning on which the Commission based its findings included a recognition of the special nature of the ECHR as a treaty, one can arguably see the first signs of the curtain being raised so as to let the *Kamminga* model step onto the stage.

## 7 Conclusion

A critical review of state practice in the 1990s invalidates *Kamminga's* conclusions about the succession patterns for human rights treaties. In international law, the treaties of humanitarian character are not subject to automatic succession. Apart from one unique case, no successor state has acted as if succession to a humanitarian treaty could occur regardless of its will. Notwithstanding general academic support for the *Kamminga* model, states in practice jealously guard the 'clean slate' paradigm, even where the actual patterns of their succession reveal *de facto* continuity. There is indeed much more to be said for the 'pick and choose' approach than generally has been assumed.<sup>170</sup> In a similar vein, various international bodies, in dealing with succession matters, have been reluctant to allow the principle of consent to be bypassed. Most of them have repeatedly emphasized the requirement for successor states to formalize their succession, thus undermining any claims that succession in those cases could occur *ipso jure*. Only in one situation did an international body take a pro-active stance on the issue; but even then the creation of the *Kamminga* model-like situation was more of an accidental by-product of the judicial process, and has since remained unpublicized.

<sup>166</sup> *Brezny and Brezny contre la République Slovaque*, Appl.No.00023131/93, Admissibility Decision of 4 March 1996.

<sup>167</sup> 'La Commission doit tout d'abord examiner la question de sa compétence *ratione personae*, en l'occurrence, si la République slovaque, en tant que l'un des Etats successeurs de la République fédérative tchèque et slovaque est liée par la Convention et ses Protocoles pour la période du 18 mars 1992... au 31 décembre 1992... période au cours de laquelle l'Etat fédéral était Partie contractante à la Convention.' (*Ibid.*)

<sup>168</sup> '[L]a Commission estime qu'elle est compétente *ratione personae* pour examiner cette affaire.' (*Ibid.*)

<sup>169</sup> The Commission's reasoning is open to challenge, since the issue of obtaining the consent of the other parties to the ECHR was ignored, and the significance of domestic acts for resolving purely international issues remains highly questionable.

<sup>170</sup> See the first epigraph to this article.

As the law of state succession is essentially rooted in customary law, the fate of the *Kamminga* model depends on the contents of state practice. Since all potentially constructive recent developments in this regard have been limited to Eastern Europe, the most optimistic assessment could do no more than assert that a regional custom favouring the *Kamminga* model is now in formation.<sup>171</sup> This is unfortunately spoiled by the fact that almost all successor states in the 1990s qualified their promises of continuity with remarks such as ‘if these treaties do not contradict the Constitution or the domestic legal order’.<sup>172</sup> However illegitimate one may consider such statements to be, they unmistakably reveal an *opinio juris* that is not anywhere close to what the model’s supporters would need to bring the model into existence.

For international law this is a reality that, as unpleasant as it is, cannot be ignored. Complaints and condemnations are hardly productive here. Constructive solutions need to be sought in order to change the system. The *Kamminga* model possesses enough inherent legitimacy to make its way into positive international law. Purposive customary law-making on the basis of the available building materials seems to be the only plausible answer.

Thus, the ‘acquired rights’ theory may be transformed in favour of the *Kamminga* model.<sup>173</sup> In the *German Settlers* case,<sup>174</sup> the Permanent Court of International Justice pronounced that private property rights acquired by individuals did not cease simply by virtue of a change of sovereignty, but continued under the successor regime until modified according to regular procedures. Although ‘acquired rights’ and ‘human rights’ are not identical notions, reasonable analogies can be drawn here. After all, ‘an acquired right is any right which, were there no territorial changes, would be protected by the courts in a lawful State’.<sup>175</sup>

History provides several examples of situations where human rights were treated on the basis of an ‘acquisition logic’. Capitulatory treaties, signed by the Sublime Porte after several major wars up to the end of the eighteenth century, contained clauses stipulating religious freedoms for the populations residing in the parties’ territories. Later, the treaties were seen as granting rights of a somewhat permanent nature, enforceable against the grantors’ successors.<sup>176</sup> In the nineteenth century, when Alsace and Lorraine were transferred from France to Germany as the result of the

<sup>171</sup> Even then, the anti-succession position taken by the Baltic States, justifiable as it may be in other terms, is a weighty argument against the status of the *Kamminga* model as an Eastern European custom.

<sup>172</sup> Koskenniemi, *supra* note 65, at 100. See the Croatian Act of 26 July 1991 (cited *ibid.*), as well as the Alma-Ata Declaration, *supra* note 64.

<sup>173</sup> See Kamminga, *supra* note 3, at 473, stating that the acquired rights doctrine is *a fortiori* applicable to humanitarian treaties. Cf. Müllerson, *supra* note 12, at 319.

<sup>174</sup> *Settlers of German Origin in the Territory Ceded by Germany to Poland*, 1923 PCIJ Series B, No. 6. Schwarzenberger and Brown cite the inheritability of acquired rights as the only unquestionable rule of state succession (*supra* note 44, at 70). According to Lauterpacht, this rule is unbroken in state practice and represents a ‘great principle of the rule of law’ (see Lauterpacht, *supra* note 47, at 136). See further D. P. O’Connell, *State Succession in Municipal Law and International Law*, vol. 1 (1967) 237 *et seq.* Cf., however, *Gosalia v. Agrawal and others* (1981), reported in 118 ILR 429.

<sup>175</sup> Lauterpacht, *supra* note 47, at 136.

<sup>176</sup> N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (1994), at 78–79.

Franco-Prussian War, all French treaties applicable to the territories lapsed and were replaced with the German treaties. Nonetheless, Napoleon's Concordat with the Holy See, a document granting, *inter alia*, certain religious rights to the populations of Alsace-Lorraine, continued to apply.<sup>177</sup> After World War I, when Alsace-Lorraine returned to France, the Concordat again survived the change of sovereignty, continuing to apply in that region, despite having ceased to operate in the rest of France in 1905.<sup>178</sup>

Although extending the 'acquired rights' doctrine to humanitarian treaties would not necessarily make the treaties themselves automatically inheritable, such a measure could undoubtedly improve the overall legal environment, which is currently unresponsive to the *Kamminga* model.

One of the factors that prevents the *Kamminga* model from making its way into *lex lata* is the general spirit of unaccountability when it comes to state succession. In practice, different institutional channels are available to reverse this tendency. The key institution, it seems, is the depositary.

A peculiar phenomenon in international law, the depositary is rarely seen as an actor whose stance on a particular issue can have any bearing on its legal resolution. Nevertheless, recent practice in the field of state succession reveals that depositaries can profoundly influence succession patterns, if not by their actions, then by the lack thereof. How many times could the Alma-Ata Declaration have been taken by the depositaries for what it is worth? How many more 'successor' entries would there be today in depositaries' records? How many depositaries eventually chose to ignore it,<sup>179</sup> waiting for specific notes of succession and thus creating leeway for a harmful desuetude? Considering the influence they exert on matters of state succession, the role of depositaries under international law is in need of profound review.

The legal regime applicable to depositaries in contemporary international law is defined by their duty 'to act impartially'.<sup>180</sup> This duty, however, does not entail a prescription to remain passive. The obligations to register every occasion on which a would-be successor state sends a potentially wrong instrument of accession and to bring this discrepancy to the attention of all interested parties so as to enable them to take the necessary action is not in itself uncondusive to impartiality. It would not destroy the institutional trust placed in depositaries. However, it can certainly boost the case for the *Kamminga* model and would generally promote the rule of law in the international arena.

Furthermore, the power to comment on the legitimacy of accession/succession notes should not remain the prerogative of the other parties to the treaty. Insofar as they exist, treaty-monitoring bodies appear to be well-suited to undertake this task as well. It would only be logical if the bodies overseeing the substantive realization of humanitarian treaties also monitored the observance of the treaties' procedural

<sup>177</sup> Judge Weeramantry, *supra* note 2, at 643–644; O'Connell, *supra* note 41, at 735.

<sup>178</sup> *Ibid.*

<sup>179</sup> It appears that the only depositary that correctly interpreted the Alma-Ata Declaration as a confirmation of succession was the WIPO. See [www.wipo.org/eng/ratific/index.htm](http://www.wipo.org/eng/ratific/index.htm).

<sup>180</sup> Convention on the Law of Treaties, Art. 76(2).

aspects. Recent practice of the Human Rights Committee shows some positive developments in this regard: in at least two cases the Committee, reviewing state reports under Article 40 of the ICCPR, observed that the ex-USSR republics should be treated as having succeeded, rather than acceded, to the Covenant.<sup>181</sup>

## Postscript

In April 2002, after this article was written, the International Law Association released its *Rapport final sur la succession en matière de traités*.<sup>182</sup> While space constraints preclude an adequate discussion of this lengthy document, it should be noted that the conclusions drawn in the Report on the present state of customary law of state succession with respect to humanitarian treaties do not in their essence differ from those offered in this article.<sup>183</sup>

<sup>181</sup> HRC Concluding Observations (Azerbaijan), CCPR/C/79/Add.38, at para. 3, and HRC Concluding Observations (Georgia), CCPR/C/79/Add.75, at para. 10. See also the *Belilos* case, *supra* note 74, at 23, para. 47: silence on the part of the depositary and the contracting states does not deprive the convention organs of the power to make their own assessment.

<sup>182</sup> Available at <http://www.ila-hq.org/pdf/Aspects%20of%20State%20Succession/Aspects%20of%20State%20Succession%202002.pdf>.

<sup>183</sup> After discussing the recent state practice in this field, the authors of the Report conclude: 'si la doctrine a généralement tendance à être favorable à la continuité dans ce domaine (droit coutumier *in statu nascendi*), la pratique étatique n'est pas homogène. De nombreux Etats ont opté pour une adhésion à ces accords et non pour une succession automatique. En effet, ils tentent de conserver un degré de liberté de décision dans ces questions' (at 28).