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Succession of States in Respect of Treaties on Human Rights

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Abstract: This Chapter analyses the effects of succession of States in respect of international human rights treaties. This matter is not codified by the Vienna Convention on Succession of States in respect of Treaties. We have to bear in mind that human rights treaties have been adopted by international organizations, which have developed their own practice regarding both the succession of States as Members of an international organization and the succession of States as Contracting Parties to treaties that the United Nations, the Council of Europe or the European Union have adopted in the field of human rights.

Key words: Succession of States, international treaties, treaties on human rights

1. Preliminary Remarks

The succession of States in respect of treaties was codified more than forty years ago, under the auspices of the United Nations on the basis of prior drafts prepared by the

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International Law Commission (ILC). However, the 1978 Vienna Convention on Succession of States in respect of Treaties[1] has been accepted only by a small number of States.

Despite its limited scope of application in practice, we must recognize that some provisions of this Convention also enjoy a consuetudinary status and hence they have a universal scope of application. Moreover, the fact that human rights treaties have been adopted within the framework of different international organizations is also relevant. The constituent treaties of international organizations have different rules concerning membership and even succession of States, and those rules may limit or condition the participation of States in the treaties adopted in the framework of such organizations. Finally, it is also important to highlight that some treaty provisions concerning human rights have also acquired the status of international consuetudinary norms, or even peremptory norms (norms of ius cogens), and hence they maintain their legal binding character for all States, with full independence of the rules laid down by the 1978 Vienna Convention on Succession of States in respect of Treaties.

2. The Vienna Convention on Succession of States in respect of Treaties

2.1 Scope of Application

As stated before, the 1978 Vienna Convention on Succession of States in respect of Treaties has been accepted only by a small number of States. This Convention only has 23 Contracting Parties[2] and, in fact, its provisions have been applied only to the dissolutions of the former Republic of Yugoslavia and the former Republic of Czechoslovakia. As stated in the United Nations Treaty Collection, Bosnia and Herzegovina became a Contracting Party to this Convention by succession on 22 July 1993, Croatia on 22 October 1992, Montenegro on 23 October 2006, North Macedonia on 7 October 1996, Serbia on 12 March 2001, and Slovenia on 6 July 1992[3]. In the case of Czechoslovakia, on the one hand Slovakia became a Contracting Party to this Convention by succession on 24 April 1995. On that date, Slovakia stated that:

[1] See: https://legal.un.org/ilc/texts/instruments/word_files/english/conventions/3_2_1978.doc

[2] Bosnia and Herzegovina, Brazil, Croatia, Cyprus, Czech Republic, Dominica, Ecuador, Egypt, Estonia, Ethiopia, Iraq, Liberia, Montenegro, Morocco, North Macedonia, Republic of Moldova, Serbia, Seychelles, Slovakia, Slovenia, St. Vincent and the Grenadines, Tunisia, and Ukraine.

[3] See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en#EndDec

> "The Slovak Republic declares, under article 7, paragraphs 2 and 3 of [the said] Convention, that it will apply the provisions of the Convention in respect of its own succession which has occurred before the entry into force of the Convention in relation to any signatory State (paragraph 3), contracting State or State Party (paragraphs 2 and 3) which makes a declaration accepting the declaration of the successor State."

On the other hand, the Czech Republic became a State Party to this Convention by succession on 26 July 1999, upon making a similar declaration and accepting the declaration made by the Slovak Republic[4].

The Convention envisages four different cases to which it applies different regulations: a) succession in respect of a part of the territory of a State that becomes part of the territory of another State (Article 15); b) newly independent States (Articles 16 – 30); c) uniting of States (Articles 31 – 33); and d) separation of a part or parts of the territory of a State, whether or not the predecessor State continues to exist (Article 34 – 38). In the case of newly independent countries (through the exercise of the right to self-determination by colonial or assimilated peoples), the tabula rasa principle (or the clean slate principle) applies, whereby the successor State is not necessarily bound by the treaties concluded by the predecessor State, except for those relating to borders. In the other cases, the general criterion is to favour the continuity of the treaties, through a differentiated regulation for the several cases[5].

2.2 Reduction in its Scope of Application

In all four cases enunciated above, there are two important exceptions that deserve to be commented upon. Firstly, the 1978 Vienna Convention does not apply to the constituent treaties of international organizations. The rules concerning acquisition of membership and any other relevant rules of the organization are considered lex specialis (Art. 4(a)). As the ILC indicated:

[4] "Pursuant to Article 7, paragraph 2 and 3, of the Vienna Convention on Succession of States in respect of Treaties, adopted in Vienna on August 23, 1978, the Czech Republic declares that it will apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other Contracting State or State Party to the Convention accepting the declaration. The Czech Republic simultaneously declares its acceptance to the declaration made by the Slovak Republic at the time of its ratification of the Convention pursuant to Article 7, paragraph 2 and 3 thereof".

[5] Juste-Ruiz, Castillo-Daudi, Bou-Franch, (2018), p 174.

> "International organizations take various forms and differ considerably in their treatment of membership. In many organizations, membership, other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and a member of the organization as a successor State, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization"[6].

The practice excluding succession is clearer in cases where membership in the organization is dependent on a formal process of admission. In other words, regarding membership in this kind of organizations, the new State cannot simply notify the depositary of its succession by a notification made, for instance, in accordance with article 21 of the 1978 Vienna Convention. It must proceed by the route prescribed for membership in the constituent treaty -i.e., deposit of an instrument of acceptance.

The second exception affects treaties adopted within an international organization. It is important to highlight that this is the case of almost all human rights treaties. In these cases, the 1978 Vienna Convention applies to "any treaty adopted within an international organization without prejudice to any relevant rules of the organization" (Article 4(b)). As the ILC explained:

> "With regard to treaties adopted within an international organization, membership may again be a factor to be taken into account in regard to a new State's participation in these treaties. This is necessarily so when participation in the treaty is indissolubly linked with membership of the organization. In other cases, where there is no actual incompatibility with the object and purpose of the treaty, admission to membership may be a precondition for notifying succession to multilateral treaties adopted within an organization, but the need for admission does not exclude the possibility of a new State's becoming a party by "succession" rather than by "accession".
> As to treaties "adopted within an international organization", the possibility clearly exists that organizations should develop their own rules for dealing with questions of succession (…) the Commission considers that a general reservation of relevant rules of organizations is necessary to cover such practices with regard to treaties adopted within an international organization"[7].

[6] ILC, Draft articles on Succession of States in respect of Treaties with commentaries, Yearbook of the International Law Commission, 1974, vol. II, Part One, p 177-178, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/3_2_1974.pdf
[7] Ibid., p 179-180.

The 1978 Vienna Convention has a second provision that also limits its scope of application and that is relevant for the purposes of this chapter.

> "Article 6. Cases of succession of States covered by the present Convention
> The present Convention applies only to the effects of a succession of States occurring in conformity with International Law and, in particular, the principles of International Law embodied in the Charter of the United Nations."

The ILC considered that "it was right in principle to restrict the application of the present articles to situations occurring in conformity with International Law"[8]. This provision may be very relevant in some extraordinary cases. For instance, for succession of States by means of separation of parts of a State, Article 34.1(a) provides that:

> "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."

By virtue of Article 6, this provision will not apply when the separation of parts of a State do not occur "in conformity with International Law and, in particular, the principles of International Law embodied in the Charter of the United Nations".

We must remember that the UN General Assembly Resolution 2625 (XXV), of 26 October 1978, entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" established the principle of respect of "the territorial integrity or political unity of sovereign and independent States". This Resolution also declared that "the territorial integrity and political independence of the State are inviolable"[9]. If a segregation of part of the territory of a State takes place infringing the National Constitution and Laws, or without the consent of the sovereign State, this is a case that will fall outside the scope of application of the 1978 Vienna Convention. It is a different situation not covered by that Convention. It is what Lopez-Martin and Perea-Unceta call "secession" as opposed to "succession" of States[10]. Armas-Pfirter and Gonzalez-Napolitano indicated that: "secession will be defined as the separation of a part of the

[8] Ibid., p. 181.
[9] See: https://undocs.org/en/A/RES/2625(XXV)
[10] Lopez-Martin and Perea-Unceta (2018), p 95.

territory of a State by its population with the purpose of creating an independent State or being subsumed by another existing State, carried out without the consent of the sovereign"[11]. It is this lack of consent of the sovereign State that converts secession into an illegal situation which falls outside the 1978 Vienna Convention.

2.3 Increased Scope of Application

The 1978 Vienna Convention also contains an explicit provision broadening its scope of application:

> "Article 5. Obligations imposed by International Law independently of a treaty
> The fact that a treaty is not considered to be in force in respect of a State by virtue of the application of the present Convention shall not in any way impair the duty of that State to fulfil any obligation embodied in the treaty to which it is subject under International Law independently of the treaty."

Article 5 is in line with article 43 of the Vienna Convention on the Law of Treaties. Article 43 is one of the general provisions of that Vienna Convention, concerning invalidity, termination, and suspension of the operation of treaties. The ILC's commentary on its draft article explained its reason for including that article as follows:

> "... The Commission considered that although the point might be regarded as axiomatic, it was desirable to underline that the termination of a treaty would not release the parties from obligations embodied in the treaty to which they were also subject under any other rule of International Law."

For the same reason, the ILC deemed it desirable to include a general provision in the 1978 Vienna Convention, making it clear that the non-continuance in force of a treaty upon a succession of States as a result of the application of this Convention in no way relieved a State of obligations embodied in the treaty which were also obligations to which it would be subject under International Law independently of the treaty[12]. As I have already mentioned, some treaty provisions concerning human rights have also acquired the status of international consuetudinary norms, or even peremptory norms (norms of ius cogens), and hence they maintain their legal binding character for all States, with full independence of the rules laid down by the 1978 Vienna Convention on Succession of States in respect of Treaties.

[11] Armas-Pfirter and Gonzalez-Napolitano (2006), p 375.
[12] ILC, Draft articles on Succession of States in respect of Treaties with commentaries, cit. p 181.

3. Succession of States Practice in respect of United Nations Human Rights Treaties

3.1 Membership in the United Nations Organization and Succession of States

The Charter of the United Nations provides for the membership in the UNO, as well as for the admission procedure in its Articles 3 and 4. Although the UN Charter does not regulate succession of States to membership in this international organization, the UN has developed significant practice in this regard.

3.1.1 Membership in the United Nations Organization

Articles 3 and 4 of the Charter distinguish between original Members and Members admitted to the UN. Both categories of Members enjoy the same rights and obligations under the Charter: the distinction relates only to the admission procedure.

According to Article 3, original Members are those States which fulfil a double condition: 1) having participated in the United Nations Conference on International Organization at San Francisco or having previously signed the Declaration by United Nations of 1 January 1942; and b) having signed and ratified the UN Charter in accordance with its Article 110. Thus, the original Members of the UN were 51 States: the 50 States participating in the San Francisco Conference and Poland which, although it did not participate in that Conference, had previously signed the Declaration by United Nations.

For the admission of new Members, Article 4 of the Charter requires five substantive conditions and sets out the procedure to be followed. The substantive conditions are the following: 1) to be a State, i.e., to meet the constituent elements of a State; 2) to be a “peace-loving” State, a condition which currently has no concrete meaning, as “enemy States” during the Second World War have already been admitted to UN membership and this condition is therefore presumed for all States; 3) to accept the obligations contained in the UN Charter. In practice, the fulfilment of this condition requires an express declaration to this effect from the applicant State. This condition is now of particular significance in the case of States that have adopted a policy of permanent neutrality; 4) to be able and willing to fulfil these obligations, which must be specifically stated by the UN organs deciding on the application for membership; and 5) to be prepared to fulfil them.

These five substantive conditions are the only ones required for admission to UN membership. These conditions are subject to the judgement of the UN. The UN's judgement in this case means the judgement of its two organs mentioned in Article 4.2 (the Security Council and the General Assembly) and, ultimately, the judgement of its Members.

However, at an early moment in UN practice, the Soviet Union demanded that the admission of a State be made dependent on the additional requirement that other States of the communist bloc also be admitted as UN Members. The General Assembly therefore posed two questions to the International Court of Justice (ICJ), which responded in its first Advisory Opinion, of 28 May 1948, on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*. The first question concerned whether the conditions set out in Article 4, paragraph I, are exhaustive in nature, in the sense that an affirmative reply would lead to the conclusion that a Member is not legally entitled to make admission dependent on conditions not expressly provided for in that Article; while a negative reply would, on the contrary, authorise a Member to make admission dependent also on other conditions.

The ICJ's response was as follows:

> "The natural meaning of the words used [in Article 4] leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph I of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.
> Nor can it be argued that the conditions enumerated represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them and prevent the admission of an applicant which fulfils them. Such an interpretation would be inconsistent with the terms of paragraph 2 of Article 4, which provide for the admission of "*tout Etat remplissant ces conditions*" - "*any such State*". It would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions. Such a power would be inconsistent with the very character of paragraph I of Article 4 which, by reason of the close connexion which it establishes between membership and the observance of the principles and obligations of the Charter, clearly constitutes a legal regulation of the question of the admission of new States"[13].

[13] *ICJ Reports 1948*, p 62-63.

The second question concerned, in particular, a demand on the part of a Member State making its consent to the admission of an applicant dependent on the admission of other applicants. The ICJ was forceful in its response:

> "Judged on the basis of the rule which the Court adopts in its interpretation of Article 4, such a demand clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category from those conditions, since it makes admission dependent, not on the conditions required of applicants, qualifications which are supposed to be fulfilled, but on an extraneous consideration concerning States other than the applicant State.
> The provisions of Article 4 necessarily imply that every application for admission should be examined and voted on separately and on its own merits; otherwise, it would be impossible to determine whether a particular applicant fulfils the necessary conditions. To subject an affirmative vote for the admission of an applicant State to the condition that other States be admitted with that State would prevent Members from exercising their judgment in each case with complete liberty, within the scope of the prescribed conditions. Such a demand is incompatible with the letter and spirit of Article 4 of the Charter"[14].

Despite the Court's clear pronouncement, the Soviet Union's veto in the Security Council could only be overridden by a political agreement that allowed the joint admission of 16 new Members on 14 December 1955, among them Spain, as well as several States from the communist bloc and several "enemy States" during the Second World War.

The procedure for the admission of new Member States is regulated in Article 4, paragraph 2, which provides that "the admission of such States to membership in the United Nations shall be effected by a decision of the General Assembly upon the recommendation of the Security Council". Faced with the exercise of the Soviet Union's veto for not admitting its "demand", the General Assembly again asked the Court whether the admission of a State to UN membership could be effected by a decision of the General Assembly when the Security Council has not adopted a recommendation for admission because the candidate did not obtain the required majority of votes in the Security Council or because of the negative vote of a permanent member of the Security Council. The ICJ, in its Advisory Opinion of 3 March 1950 on the *Competence of the General Assembly for the Admission of a State to the United Nations*, responded negatively to the General Assembly's question and, referring to Article 4, paragraph 2, stated that:

[14] Ibid., p 65.

> "The Court has no doubt as to the meaning of this text. It requires two things to effect admission: a "recommendation" of the Security Council and a "decision" of the General Assembly. It is in the nature of things that the recommendation should come before the decision. The word "recommendation", and the word "upon" preceding it, imply the idea that the recommendation is the foundation of the decision to admit, and that the latter rests upon the recommendation. Both these acts are indispensable to form the judgment of the Organization to which the previous paragraph of Article 4 refers. The text under consideration means that the General Assembly can only decide to admit upon the recommendation of the Security Council; it determines the respective roles of the two organs whose combined action is required before admission can be effected: in other words, the recommendation of the Security Council is the condition precedent to the decision of the Assembly by which the admission is effected"[15].

Since the admission of the Republic of South Sudan on 9 July 2011, the UN has a total of 193 Member States[16].

3.1.2 Succession of States to Membership in the United Nations Organization

Although the UN Charter does not regulate succession of States to membership in this international organization, the UN has established an important practice in this regard. This practice began with the Indian Independence Act, adopted on 18 July 1947[17]. The Indian Independence Act set up in the British Indian Colony, from 15 August 1947 onwards, two independent "Dominions", "to be known respectively as India and Pakistan" (section 1(I)). Gonzalez-Campos underlined that "at the same time, membership of all international institutions in which the British India Colony participated would pass to the new dominium of India, while Pakistan would have to take appropriate steps to apply for membership in the Organisations it wished to join"[18].

On I5 August 1947, the date on which Pakistan became independent, the Minister for Foreign Affairs of Pakistan asked the UN Secretary General that Pakistan be considered a Member of the UN as a successor State to another UN Member State such as the British colony of India, so that the two dominions of India and Pakistan would automatically become Members of the UN from the day of their independence. Fernandez-Casadevante highlights that the Secretariat General's view was that, in the case of the emergence of a new State (Pakistan) from another UN Member State (India),

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[15] *ICJ Reports 1950*, p 7-8.
[16] See: https://www.un.org/es/member-states/index.html
[17] See: https://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf
[18] Gonzalez-Campos (1962), p 475.

it could not claim the membership of its predecessor[19]. This criterion was the one that triumphed in the Security Council, which recommended to the General Assembly that Pakistan join the UN in accordance with the requirement set out in Article 4 of the UN Charter (Resolution 29 (1947), of 21 August 1947). The General Assembly decided to admit Pakistan as a new Member of the UN on 30 September 1947 (Resolution 108 (II)).

During the debates that took place in the First Committee of the General Assembly on this question, it was decided to ask the Sixth Committee (Legal) the following question: "What are the legal rules to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject?" After having considered the problem, on 8 October 1947 the Sixth Committee agreed on the following principles:

> "1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
> 2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.
> 3. Beyond that, each case must be judged according to its merits.
> 4. It was agreed by the Sixth Committee that these principles are to be transmitted to the First Committee as suitable to give general guidance to the United Nations in connexion with future cases, with the understanding that each case will be considered in accordance with its particular circumstances[20]".

After analysing the practice followed by the international organizations that constitute the UN system, Oanta has concluded that seven decades later, these principles are still valid within the framework of the UN (and also for the other Organizations and Agencies of the UN system) in relation to the succession of States or the continued enjoyment of their membership in this Organisation[21].

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[19] Fernandez-Casadevante C (2020), p 359.
[20] Document A/CN.4/149 and Add.1. The Succession of States in relation to Membership in the United Nations - Memorandum prepared by the Secretariat (of the ILC), pp. 103-104, para. 16. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_149.pdf See: Mathias S, Trengove S (2016), p 972; O'Connell DP (1967), p 183; Shaw MN (2017), p 745-746.
[21] Oanta GA (2020), p 97.

For the purposes of this chapter, I would like to comment only on the case of Bangladesh. In March 1971, Bangladesh unilaterally declared its independence from Pakistan. In this case, Pakistan was considered a continuing State in UN membership, while Bangladesh had to follow the procedure for admitting new States to the UN. Bangladesh's admission to the UN only took place on 17 September 1974 (Security Council Resolution 351 (1974), of 10 June 1974, recommending the admission of Bangladesh; General Assembly Resolution 3203 (XXIX), of 17 September 1974, deciding the admission of Bangladesh in the UN), after the State of Bangladesh was recognized by the predecessor State (Pakistan)[22]. As Crawford noted, this case was a very clear manifestation of the fact that in the UN, the admission of a new State resulting from a secession process is largely conditioned by the position adopted by the predecessor State[23].

3.2 Succession of States and United Nations Human Rights Treaties

International Human Rights Law (IHRL) has a special aim and finality consisting in the protection of the fundamental, basic, or essential rights of human beings. This fact configures IHRL as a sector of International Law with vertical relations (individual claims on human rights against a State) instead of horizontal relations (claims between States). From this premise, several scholars consider that a case of State succession would not result in any interruption, either in the enjoyment of the protected rights, or in the level of protection for the population resident in the territory[24].

I consider that a distinction should be made between norms that have a universal scope of application and the effects of succession of States in universal human rights treaties.

It is well known that earlier on, the ICJ recognized the existence of norms of a universal scope of application even without any conventional obligation. In its Advisory Opinion on the *Reservations to the Convention of Genocide*, the Court stated that:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General

[22] Thio LA (2006), p 304-308.
[23] Crawford J (1998), p 92, 113 and 116.
[24] Ruiz-Ruiz F (2001), p 113-183.

> Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States"[25].

This statement referred to certain provisions ("the principles underlying the Convention") and not to the full text of the Convention of Genocide. Moreover, in this Advisory Opinion, the Court analysed the effects of reservations made by some Contracting Parties that were objected to by other Contracting Parties ("it is inconceivable that the Contracting Parties readily contemplated that an objection to a minor reservation should produce such a result", that is, "the complete exclusion from the Convention of one or more States")[26]. At all times, the Court dealt with the effects of succession of States on universal human rights treaties in this Advisory Opinion.

Years later, the ICJ developed its own construction on the relations between customary norm and treaty provisions. In its Judgment of 27 June 1986, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States). Merits, Judgment*, the Court declared that:

> "even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question "were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (*ICJ Reports 1969*, p 39, para. 63). More generally, there are no

[25] *ICJ Reports 1951*, p. 23. Available at: https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf
[26] Ibid., p 24.

> grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary International Law has no further existence of its own"[27].

However, a different question concerns the effects of succession of States on universal human rights treaties. As previously noted, several scholars consider that a case of State succession would not result in any interruption, either in the enjoyment of the protected rights, or in the level of protection for the population resident in the territory. In fact, within the UN framework, the Human Rights Committee has defended the idea of the continuity of obligations to the International Covenant on Civil and Political Rights, despite whatever case of succession of States. In its General Comment No. 26, the Human Rights Committee stated that:

> "The rights enshrined in the [International] Covenant [on Civil and Political Rights] belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its longstanding practice, that once the people are accorded the protection of the rights under the Covenant, such protection evolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.
> The Committee is therefore firmly of the view that International Law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it"[28].

We may wonder whether the thesis affirming that the rights enshrined in the International Covenant on Civil and Political Rights "belong to the people living in the territory of the State party", with full independence of whatever case of succession of States has been recognized as an international norm. It is true that a member of the ICJ, Judge Weeramantry, argued that automatic State succession has become "a principle of contemporary International Law". In his Separate Opinion in the Judgment of 11 July 1996 on Preliminary Objections in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Judge Weeramantry held that:

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[27] *ICJ Reports 1986*, p 94-95, para. 177. Available at: https://www.icj-cij.org/en/case/70

[28] UN doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (8 December 1997). Human Rights Committee. General Comment No. 26. General comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights, paras. 4-5. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.8%2fRev.1&Lang=en

> "All of the foregoing reasons combine to create what seems to me to be a principle of contemporary International Law that there is automatic State succession to so vital a human rights convention as the Genocide Convention. Nowhere is the protection of the quintessential human right - the right to life -more heavily concentrated than in that Convention.
> 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. The international legal system cannot condone a principle by which the subjects of these States live in a state of continuing uncertainty regarding the most fundamental of their human rights protections. Such a view would grievously tear the seamless fabric of international human rights protections, endanger peace, and lead the law astray from the Purposes and Principles of the United Nations, which all nations, new and old, are committed to pursue"[29].

However, the idea of automatic State succession to a human rights treaty has not been recognized yet as a general norm of International Law. When Montenegro separated from the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY), Serbia was considered a continuing State - thus preserving its UN membership -, while Montenegro was qualified as a successor State, and was admitted to UN membership on 28 June 2006, after going through the full procedure for the admission of new States (Security Council Resolution 1691/2006, of 22 June 2006, recommending the General Assembly to admit the Republic of Montenegro to membership in the UN. General Assembly Resolution 60/264, of 28 June 2006, deciding to admit the Republic of Montenegro to membership in the UN). Moreover, Mr. Weeramantry ended his mandate as a Judge of the ICJ in the year 2000, so he could not defend his ideas on this topic when the Court finally delivered its Judgment in the case concerning the application of the Genocide Convention in 2007. The ICJ, principal judicial organ of the UN, in its Judgment of 26 February 2007 on the merits in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* took the opposite view. The ICJ took into account that Montenegro, upon its separation from Serbia, had not continued in the international legal personality of the FRY and therefore considered that Montenegro could not be considered a defendant in that case. As the Court stated:

[29] Separate Opinion of Judge Weeramantry. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, *ICJ Reports 1996*, p 63-64, available at: https://www.icj-cij.org/public/files/case-related/91/091-19960711-JUD-01-05-EN.pdf

> "The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court's "jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it ..." (Preliminary Objections, Judgment, ICJ Reports 1992, p. 260, para. 53). In its Judgment of 11 July 1996 (see paragraph 12 above), the significance of which will be explained below, the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which subsequently assumed the name of Serbia and Montenegro, without however any change in its legal personality. The events related in paragraphs 67 to 69 above clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. It is also clear from the letter of 29 November 2006 quoted in paragraph 72 above that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. Furthermore, the Applicant did not in its letter of 16 October 2006 assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.
> The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative part of the present Judgment are to be addressed to Serbia"[30].

Hence, the idea of automatic State succession in universal human rights treaties has not become yet a norm of general International Law. Ruiz-Ruiz has described the State's practice on this issue as "diverse, even a contradictory practice"[31]. As Chinchon-Alvarez has pointed out, while the former Yugoslav States of Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia declared themselves to be continuing Yugoslavia's obligations, the former Soviet States did not consider themselves bound by the treaties concluded by the Soviet Union and chose to accede to them[32]. Thus, with regard to the International Covenant on Civil and Political Rights, of the States that have emerged since the end of the 10th century, eleven States became Contracting Parties by accession (all from the former Soviet Union, including the three Baltic Republics) and eight States by succession (all the States that emerged from the former Yugoslavia, as well as from the dissolution of Czechoslovakia). As to the International Covenant on Economic, Social and Cultural Rights, twelve States expressed their consent through accession (the same

[30] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgment of 26 February 2007. Judgment, *ICJ Reports 2007*, p 76, paras. 76-77, available at: https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf
[31] Ruiz-Ruiz F (2001) p 155.
[32] Chinchon-Alvarez J (2020), p 421.

as above, plus Eritrea) and the eight States mentioned above through notification of succession. Even in the most recent case of South Sudan, this State has consented to be bound by all human rights treaties to which the State of Sudan was a Contracting Party through accession, not through State succession.

Moreover, it is evident that the theory of automatic State succession to international human rights treaties cannot be applied to all cases of emerging new States. This theory requires at least that the predecessor State be a Contracting Party to that treaty in order to consider the automatic State succession to that treaty. For instance, I have already mentioned that Bangladesh unilaterally declared its independence from Pakistan in March 1971, but Bangladesh's admission to the UN only took place on 17 September 1974. When Bangladesh became a UN Member State, the only way Bangladesh had to be bound by the International Covenant on Civil and Political Rights was through accession, not by notification of a succession of States. Indeed, Bangladesh acceded to this Covenant on 6 September 2000, while Pakistan, the predecessor State, ratified this treaty several years later, on 23 June 2010[33].

4. Succession of States Practice in respect of Human Rights Treaties Concluded by the Council of Europe

4.1 Membership in the Council of Europe and Succession of States

The Statute of the Council of Europe[34] provides for the admission of new Member States and also contemplates the eventual withdrawal of any Member State from this organization (Article 7). There is, however, no provision in the Statute concerning the succession of States to membership in the Council of Europe.

4.1.1 Membership in the Council of Europe

Pursuant to Article 2 of its Statute: "The Members of the Council of Europe are the Parties to this Statute". Article 3 establishes the requirements to be met by any European State aspiring to become a Member of the Council of Europe. Thus:

> "Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of

[33] See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

[34] See: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680935bd0

> human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

These principles shall be verified for any admission of a new Member State. Fernandez-Casadevante has correctly stated that the thwarted attempt at illegal secession of the "Catalonian Republic" from the Kingdom of Spain did not meet these criteria, which would have prevented it from acquiring membership in the Council of Europe[35]. This attempt at illegal secession was carried out in violation of more than a dozen judgments of the Spanish Constitutional Court. On 11 March 2017, the European Commission for Democracy through Law (also known as the Venice Commission), concluded that:

> "The Venice Commission recalls that judgments of Constitutional Courts have a final and binding character. As a corollary of the supremacy of the Constitution, judgments of Constitutional Courts have to be respected by all public bodies and individuals. Disregarding a judgment of a Constitutional Court is equivalent to disregarding the Constitution and the Constituent Power, which attributed the competence to ensure this supremacy to the Constitutional Court. When a public official refuses to execute a judgment of the Constitutional Court, he or she violates the principles the rule of law, the separation of powers and loyal cooperation of State organs. Measures to enforce these judgments are therefore legitimate…"[36].

In its argument on this conclusion against Catalonian pro-independence supporters, the European Court of Human Rights (ECHR) also held that compliance with the judgements of the Constitutional Courts is mandatory, the latter being competent to take whatever measures they deem appropriate to achieve it[37].

From 1990 onwards, the Consultative Assembly of the Council of Europe began to require all States formerly under the influence of the Soviet Union that applied for admission to the Council of Europe to undertake to ratify the European Convention on Human Rights in order to recommend their admission to the Committee of Ministers.

[35] Fernandez-Casadevante (2020), p 368-369.

[36] European Commission for Democracy through Law (Venice Commission). Opinion 827/2015. CDL-AD (2017)003-e. Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), para. 69. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)003-e

[37] European Court of Human Rights, Decision on admissibility of 7 May 2019. Decision on admissibility of 7 May 2019. Application no. 75147/17. Maria Carme Forcadell i Lluis and others v. Spain, para. 36.

From 1993, it also required a commitment to ratify Protocol No. 6 concerning the Abolition of the Death Penalty[38].

If all these requirements are fulfilled, then, pursuant to Article 4:

> "Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute."

4.1.2 Succession of States to Membership in the Council of Europe

The Statute of the Council of Europe has no provision concerning the effects of succession of States either on the Membership in the Council of Europe, or on the Council of Europe human rights treaties. However, this regional organization has established a relevant practice in two recent cases: the dissolution of the former Republic of Czechoslovakia and the emergence of two new States; and the agreed separation of Montenegro from the former Federal Republic of Yugoslavia (Serbia and Montenegro).

The Dissolution of the Former Republic of Czechoslovakia

The dissolution of the former Republic of Czechoslovakia and the emergence of two new States took place on 31 December 1992. Only 8 days later, the Committee of Ministers held a meeting to deliver on the particular nature of the requests for accession made by the Czech Republic and the Slovak Republic, since the former Republic of Czechoslovakia, the dissolution of which on 31 December 1992 was the origin of these two applications, had already been a member of the Council of Europe. At this Meeting, the Chairman said that two major issues would have to be decided by the Deputies: "was the Committee of Ministers to transmit the two requests for accession to the Parliamentary Assembly for an opinion, and, if so, how was the request for accession to various Council of Europe Conventions to be dealt with?"[39].

During the debates, the Chairman noted that "a consensus had emerged within the Committee of Ministers as to the procedure to be followed on this matter". The Deputies accepted that the two applicant States would have to go through the following stages:

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[38] See: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114 Bou-Franch V (2002), p 207-213.

[39] Committee of Ministers. Doc. CM/Del/Concl(93) 484ter and 484quater. Conclusions of the 484ter Meeting of the Ministers' Deputies held in Strasbourg on 8 January 1993, p. 7. Available at: https://rm.coe.int/native/09000016804cf088

expression of their desire for membership of the Council of Europe, rapid transmission of their requests to the Assembly for an opinion and, lastly, decision of the Committee of Ministers and issuing of a certificate of amendment to the Statute to take account of the new situation following the dissolution of Czechoslovakia. Several delegations underlined the need to deal with both States as equals[40].

At the end of this Meeting, the Deputies of the Committee of Ministers concluded that they:

> 2. took note of the declarations made by the Czech Republic and the Slovak Republic which appear in the letters reproduced in documents CM(93)1 and CM(93)2 to the effect that they wish to assume the succession of the Czech and Slovak Federal Republic;
> 3. decided that, regarding the Statute of the Organisation, the status of Member could only be granted once the Committee of Ministers, in the light of the opinion of the Parliamentary Assembly, had established that the conditions for Membership of the Organisation were respected;
> 4. decided to transmit the requests for accession from the Czech Republic and from the Slovak Republic to the Parliamentary Assembly for opinion, and invited the Secretariat to prepare, on the basis of the discussions which had taken place at the present meeting, draft Resolutions to this end[41].

After following this procedure, both the Czech Republic and the Slovak Republic became new Members of the Council of Europe by accession, not by succession of States, on 30 June 1993.

The Separation of Montenegro from the Former Federal Republic of Yugoslavia (Serbia and Montenegro)

The agreed separation of Montenegro from the former Federal Republic of Yugoslavia (Serbia and Montenegro) took place on 3 June 2006. As regards the Republic of Serbia, the Deputies of the Council of Ministers noted the contents of the letters of 5 June 2006 in which Mr. Boris Tadić, President of the Republic of Serbia, informed respectively Mr. Sergey Lavrov, Chairman-in-office of the Committee of Ministers, and Mr. Terry Davis, Secretary General of the Council of Europe, that on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro, activated by the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, the Republic of Serbia will continue the Membership of the Council of Europe hitherto exercised by the Union of States of Serbia and Montenegro, and the obligations and commitments arising from it. Therefore, they adopted the following decision:

[40] Ibid., p 12-13.
[41] Ibid., p 23-24.

> "The Committee of Ministers of the Council of Europe noted today that, following the declaration of independence of the Republic of Montenegro on 3 June 2006, and in accordance with Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, the Republic of Serbia will continue Membership of the State Union in the Council of Europe and will assume the attendant obligations and commitments"[42].

At the same Meeting, the Deputies of the Committee of Ministers noted the letters of 6 and 12 June 2006[43] in which Mr. Miodrag Vlahovic, Minister for Foreign Affairs of the Republic of Montenegro, informed Mr. Terry Davis, Secretary General of the Council of Europe, that the Republic of Montenegro wished to become a Member of the Council of Europe, to succeed to the Council of Europe conventions that had been signed and ratified by Serbia and Montenegro and to become a Member of the Partial Agreements of which Serbia and Montenegro was a Member. They stated that, in accordance with the Organization's Statute, Membership could be granted once the Committee of Ministers, after consulting the Parliamentary Assembly, had found that the conditions for Membership were satisfied. Hence, they decided to transmit the Republic of Montenegro's application for Membership to the Parliamentary Assembly for an opinion. Therefore, concerning the request by the Republic of Montenegro for accession to the Council of Europe, the Deputies adopted the following statement:

> "The Committee of Ministers refers to its declaration of 24 May 2006 on the referendum organised in Montenegro on 21 May, and to the declaration of independence of the Republic of Montenegro on 3 June 2006.
> The Committee of Ministers took note with satisfaction of the request for accession of the Republic of Montenegro to the Council of Europe and transmitted it – in accordance with the usual procedure – to the Parliamentary Assembly for opinion.
> The Committee of Ministers welcomes the intention expressed by the authorities of the Republic of Montenegro to respect and implement the obligations and commitments contracted by the State Union of Serbia and Montenegro as a Member State of the Council of Europe"[44].

> Moreover, they agreed that:

> "Between the moment in which the Council of Europe will take note of the separation of Montenegro from Serbia and its accession as a new Member of the Council of Europe, the Republic of Montenegro will not be a Member State of the Council of Europe. Following the letter of the Minister of Foreign Affairs of 6 June 2006, the Republic of Montenegro has already

[42] Committee of Ministers. Doc. CM/Del/Dec(2006)967 (16 June 2006): Ministers' Deputies Decisions. 967th meeting, 14 June 2006. Decisions adopted, p 15-18. Available at: https://rm.coe.int/16805d7c54
[43] These two letters are available at: https://rm.coe.int/16805d801f
[44] Committee of Ministers. Doc. CM/Del/Dec(2006)967, cit., p 18-19.

> requested to become a Member of the Council of Europe. The request will be examined in accordance with the usual procedure (opinion of the Parliamentary Assembly and Resolution of the Committee of Ministers inviting the Republic of Montenegro to become a Member State)"[45].

After the opinion of the Parliamentary Assembly[46], the Republic of Montenegro became a Member State of the Council of Europe by accession, not by succession of States, on 11 May 2007.

4.2 Succession of States and Council of Europe Human Rights Treaties

In the two cases previously commented on, the Member States and the main organs of the Council of Europe have followed the thesis of automatic succession of States in respect of treaties on human rights drawn up by the Council of Europe.

4.2.1 The Dissolution of the Former Republic of Czechoslovakia

In the case of the dissolution of the former Republic of Czechoslovakia and the emergence of two new States (Czech Republic and the Slovak Republic) on 31 December 1992, its agreed character favoured the application of the automatic succession of States to the human rights treaties adopted by the Council of Europe. During the Meeting of the Committee of Ministers to deliver its initial response to the requests for accession made by the Czech Republic and the Slovak Republic, the Director of Legal Affairs said that "the idea underlying the document prepared by the Directorate of Legal Affairs was that the two States were effectively successors. The two States had expressed their desire to be successors in their respective letters dated 1 January". He added that: "it was for the Committee of Ministers to decide whether it was able to accept that the two States considered themselves successors of the Czech and Slovak Federal Republic with regard to the European Convention on Human Rights"[47].

The conclusion of the Ministers' Deputies on this point was:

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[45] Council of Europe. Ministers' Deputies. CM Documents. CM(2006)104-rev (14 June 2006): 967 Meeting, 14 June 2006. 2 Political questions. 2.3 State Union of Serbia and Montenegro, p 2. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d804b

[46] Political Affairs Committee. Parliamentary Assembly. Doc. 11204 (12 March 2007): Accession of the Republic of Montenegro to the Council of Europe, Report. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11457&Lang=EN

[47] Committee of Ministers. Doc. CM/Del/Concl(93) 484ter and 484quater, cit., p 21.

> "The Deputies (…)
> 10. took note with satisfaction of the declarations by the Czech Republic and the Slovak Republic by which they consider themselves bound, as from 1 January 1993, by the Convention for the Safeguard of Human Rights and Fundamental Freedoms and by Protocols Nos. 1, 4, 6, 7, 9 and 10 thereto and by the declarations provided for under Articles 25 and 46 of the Convention."

The Parliamentary Assembly also maintained the same idea in its opinion. Additionally, the Treaty Office of the Council of Europe reported that the Convention for the Safeguard of Human Rights and Fundamental Freedoms entered into force both for the Czech Republic and for the Slovak Republic on 1 January 1993, that is, the first day of the independence of both States. Moreover, Explanatory note nº. 17 reveals that the dates of signature and ratification of this Convention for both States are the same made "by the former Czech and Slovak Federal Republic"[48]. Therefore, in this case it is very clear that all the parties concerned wished to apply the automatic succession of States in the Convention for the Safeguard of Human Rights and Fundamental Freedoms.

4.2.2 The Separation of Montenegro from the Former Federal Republic of Yugoslavia (Serbia and Montenegro)

I have already mentioned that the Committee of Ministers considered that "the Republic of Serbia will continue Membership of the State Union in the Council of Europe and will assume the attendant obligations and commitments". Delving further into the idea that the Republic of Serbia was the continuator of the former State Union of Serbia and Montenegro, the Ministers' Deputies considered that none of the three exceptions scheduled in Article 35 of the Vienna Convention on the Succession of States in respect of Treaties applied to the present case and, therefore, considered as valid the provision stating that "when, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory". The Deputies added that:

> "Therefore, since the President of the Republic of Serbia has informed that the Membership of the Council of Europe of the State Union Serbia and Montenegro is continued by the Republic of Serbia, and after a decision of the Committee of Ministers with regard to this information, Serbia will remain a Party to all the Conventions and Agreements ratified or

[48] See Council of Europe. Treaty Office. Convention for the Protection of Human Rights and Fundamental Freedoms. Chart of signatures and ratifications. Status as of 07/02/2021. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=6r0AGeyL

> having been the subject of an accession by Serbia and Montenegro. Concerning treaties signed and not ratified by Serbia and Montenegro, the Republic of Serbia will be able, at any time, to ratify them"[49].

The situation regarding the Republic of Montenegro was a little different. In two letters from Mr. Miodrag Vlahovic, Minister for Foreign Affairs of Montenegro, to the Secretary General of the Council of Europe, Mr Terry Davis, dated 6 and 12 June 2006, Montenegro made it known that, as a newly independent State, "it would like to establish its successor status to all conventions, charters or agreements of the Council of Europe to which Serbia and Montenegro was Party or Member". In its initial response, the Committee of Ministers "welcome(d) the intention expressed by the authorities of the Republic of Montenegro to respect and implement the obligations and commitments contracted by the State Union of Serbia and Montenegro as a Member State of the Council of Europe[50].

The Parliamentary Assembly adopted a similar attitude:

> "The Assembly welcomes the intention of the authorities of the Republic of Montenegro to honour the international treaties and other agreements to which the State Union of Serbia and Montenegro was a party. The Assembly is particularly satisfied to note in this connection that Montenegro considers that since 3 June 2006 it is bound by the obligations stemming from the European Convention on Human Rights"[51].

Hence, the Parliamentary Assembly required the Republic of Montenegro:

> "to confirm in writing, at the latest on the date of accession that, by virtue of the notification of succession contained in the letters of 6 and 12 June 2006 of the Minister of Foreign Affairs of the Republic of Montenegro to the Secretary General of the Council of Europe, Montenegro considers itself bound, with effect from 6 June 2006, by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocols Nos.1, 4, 6, 7, 12, 13 and 14 to the Convention and the European Convention on the Suppression of Terrorism (ETS No. 090)"[52].

The Committee of Ministers did consider different challenges in relation to the Republic of Montenegro desire to consider itself bound by the Convention for the

[49] Council of Europe. Ministers' Deputies. CM Documents. CM(2006)104-rev, cit., p. 2. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d804b
[50] Committee of Ministers. Doc. CM/Del/Dec(2006)967, cit., p 18-19.
[51] Political Affairs Committee. Parliamentary Assembly. Doc. 11204 (12 March 2007): Accession of the Republic of Montenegro to the Council of Europe, Report, point 10. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11457&Lang=EN
[52] Ibid., point 19.1.1.

Safeguard of Human Rights and Fundamental Freedoms from the very first day of its independence:

> "The Vienna Convention on the Succession of States in respect of Treaties states in Article 16 that "a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates". However, it appears from the letter of 6 June 2006 that the Republic of Montenegro is determined to respect and implement all Conventions and Protocols of the Council of Europe that the State Union of Serbia and Montenegro has signed and ratified so far.
> With regard to the treaties ratified by Serbia and Montenegro, the same Convention specifies (in Article 17) that subject to certain conditions, "a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates." However, in practice this succession would not be automatic, and would require a decision of the Committee of Ministers concerning the fact that this State is party to the Treaties and the Partial Agreements to which the predecessor State was party (…)."

Finally, the Committee of Ministers opted for the automatic succession of the Republic of Montenegro to this Convention:

> "In the case of *Conventions open only to Council of Europe member States*, the Committee of Ministers may decide to consider the Republic of Montenegro as a Party to these Conventions only at the moment of its accession to the Council of Europe. However, it should be considered that the Republic of Montenegro has already expressed its intention to consider itself bound by these Conventions from the date of the notification of succession. In this case, the Committee of Ministers may decide to consider the Republic of Montenegro as a Party to these Conventions, with retroactive effect to the date of the notification of succession. The advantage of this solution (which was adopted in the case of Czech Republic and Slovakia) would be to ensure uninterrupted application to one or more of the conventions concerned, which are the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention on the Suppression of Terrorism, as well as the General Agreement on Privileges and Immunities."

Although the Republic of Montenegro became a State Member of the Council of Europe by accession, not by succession of States, on 11 May 2007, the Treaty Office of the Council of Europe reported that the Convention for the Safeguard of Human Rights and Fundamental Freedoms entered into force for the Republic of Montenegro on 6 June 2006, that is, the first day of its independence. Moreover, Explanatory note nº. 56 reports

that the dates of signature and ratification of this Convention for the Republic of Montenegro are the same "dates of signature and ratification by the State Union of Serbia and Montenegro"[53].

In fact, as Chinchon-Alvarez has pointed out, even the ECHR, expressly following the UN Human Rights Committee General Comment No. 26: Continuity of obligations[54], has defended the automatic succession both of the Czech Republic and the Slovak Republic, as well as of the Republic of Montenegro, in respect of the European Convention for the Safeguard of Human Rights and Fundamental Freedoms:

> "The Court observes, as regards the present case, that:
> (i) the only reasonable interpretation of Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro (see paragraph 42 above), the wording of Article 44 of the Montenegrin Right to a Trial within a Reasonable Time Act (see paragraphs 46-48 above), and indeed the Montenegrin Government's own observations, would all suggest that Montenegro should be considered bound by the Convention, as well as the Protocols thereto, as of 3 March 2004, that being the date when these instruments had entered into force in respect of the State Union of Serbia and Montenegro;
> (ii) the Committee of Ministers had itself accepted, apparently because of the earlier ratification of the Convention by the State Union of Serbia and Montenegro, that it was not necessary for Montenegro to deposit its own formal ratification of the Convention;
> (iii) although the circumstances of the creation of the Czech and Slovak Republics as separate States were clearly not identical to the present case, the Court's response to this situation is relevant: namely, notwithstanding the fact that the Czech and Slovak Federal Republic had been a party to the Convention since 18 March 1992 and that on 30 June 1993 the Committee of Ministers had admitted the two new States to the Council of Europe and had decided that they would be regarded as having succeeded to the Convention retroactively with effect from their independence on 1 January 1993, the Court's practice has been to regard the operative date in cases of continuing violations which arose before the creation of the two separate States as being 18 March 1992 rather than 1 January 1993 (see, for example, *Konečný v. the Czech Republic*, nos. 47269/99, 64656/01 and 65002/01, § 62, 26 October 2004).
> In view of the above, given the practical requirements of Article 46 of the Convention, as well as the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State Party concerned, notwithstanding its subsequent dissolution or succession (see, *mutatis mutandis*, paragraph 58

[53] See Council of Europe. Treaty Office. Convention for the Protection of Human Rights and Fundamental Freedoms. Chart of signatures and ratifications. Status as of 07/02/2021. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=6r0AGeyL

[54] European Court of Human Rights, Case of Bijelić v. Montenegro and Serbia (Application no. 11890/05). Judgment 28 April 2009, para. 58. Available at: http://hudoc.echr.coe.int/spa?i=001-92484 Chinchon-Alvarez J (2020), p 410 and 424-425.

> above), the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter"[55].

5. Succession of States and the Charter of Fundamental Rights of the European Union

The effects of succession of States in respect of the Charter of Fundamental Rights of the European Union (EU) depend on the constituent Treaties of the EU rather than on the provisions that constitute the Law of succession of States. Article 4 of the 1978 Vienna Convention on Succession of States in respect of Treaties establishes that this Convention "applies to the effects of a succession of States in respect of: (a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization". Therefore, the rules concerning acquisition of EU membership, as well as any other relevant rule of the EU deserve special attention.

5.1 Relevant Rules of the European Union Other than Those Concerning Membership

We must take into account that the Charter of Fundamental Rights of the EU does not enjoy a legally binding nature as such. The EU Charter was adopted as a political agreement, not as an international treaty. In fact, it was not published in series L (Legislation) of the Official Journal of the EU, but in its series C (Information and Notices)[56].

The European Parliament, the Council and the European Commission solemnly proclaimed the Charter of Fundamental Rights of the EU on 12 December 2007. The EU Charter was not incorporated into the Lisbon Treaty. In fact, the Lisbon Treaty was adopted a day later, on 13 December 2007[57]. However, pursuant to Article 6.1 of the amended Treaty on EU (TEU):

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000,

[55] Ibid., paras. 68-69.
[56] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:303:TOC
[57] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:306:TOC

> as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

As far as this provision grants legal value to the EU Charter, that is, the same legal value as the constituent Treaties, only State Parties to those Treaties may be bound by the EU Charter. This assertion excludes Third States to benefit from the rights, freedoms and principles set out in the EU Charter.

But the situation is a little more complex. The victory of the fundamental rights recognized in the EU Charter has been overshadowed by the concessions made to some Member States: Poland and United Kingdom obtained, in the Lisbon reform, an exception to the application of the EU Charter which is set out in Protocol No. 30 and which seeks to prevent Polish or British courts from hearing cases concerning rights contained in the EU Charter if they are not provided for in their respective national laws (Article 1(2)). This provision reflects the fears of these two Member States regarding the inclusion of a mention of social rights in the EU Charter. Poland even tried to explain its attitude with two Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. On the one hand, in Declaration 61 Poland stated that "the Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity". On the other hand, in Declaration 62 Poland asserted that it "fully respects social and labour rights, as established by EU law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the EU".

Even the Czech Republic also attempted, unsuccessfully, to heighten the trend towards the flexibility of rights and obligations between the different Member States[58]. As Gutierrez-Espada, Cervell-Hortal and Piernas-Lopez have pointed out, the European Council held in Brussels on 29 and 30 October 2009, taking into account the Czech Republic's demands for ratification of the Treaty of Lisbon, agreed that at the time of the conclusion of the next accession treaty of a new Member State (i.e. Croatia in 2013) a protocol would be annexed to the TEU and the Treaty on the Functioning of the EU (TFEU) whereby Protocol No. 30 would also apply to the Czech Republic in the same terms as it refers to Poland and to the United Kingdom[59]. However, the European Parliament refused (by 574 votes to 82) to amend the constituent Treaties in this respect.

[58] Bou-Franch (ed) (2014), p 156.
[59] See: https://data.consilium.europa.eu/doc/document/ST-15265-2009-INIT/en/pdf point I.2 and Annex I. Gutierrez-Espada, Cervell-Hortal and Piernas-Lopez (2015), p 65.

On the contrary, the Protocol on the concerns of the Irish people on the Treaty of Lisbon, adopted on 13 June 2012[60], provides in its Article 1 that nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the EU, affects in any way the scope and applicability of the protection of the right to life (Article 40.3.1, 40.3.2 and 40.3.3), the protection of the family (Article 41) and the protection of the rights in respect of education (Articles 42 and 44.2.4 and 44.2.5) provided by the Constitution of Ireland.

Therefore, it seems easy to conclude that the EU Charter does not belong to the EU acquis. This means that when in the future a third country accedes to the Treaties establishing the EU, it will still be free to decide whether or not it is bound by the Charter of Fundamental Rights of the EU.

5.2 Rules Concerning Acquisition and Loss of European Union Membership

The TEU only contemplates the possibilities of admission of new Member States (Article 49) and, as a novelty introduced by the Lisbon Treaty, the withdrawal of any Member State (Article 50).

For becoming a new Member State, Article 49 TEU requires three legal conditions. First, the applicant must be a "State" and not a minor territorial entity. In practice, this means that if, for example, Scotland wants to accede to the European Union, it would first have to become an independent State from the United Kingdom. Second, it must be a "European State". I must point out that the concept of what is a European State is not clear at all. In practice, the geographical criterium has not been followed strictly. Cyprus has been accepted as a new Member State although it is a Mediterranean island contiguous to the Anatolia peninsula that, according to the criterion of greater proximity to the continent, is geographically Asian. In 1987 Morocco's application was rejected, despite the fact that it is only less than 12 kilometres away from Spain. Malta, an archipelagic State located more than 100 kilometres away from Sicily, was subsequently considered a "European State". Nor has the fact that a State is only "minimally" European, from a geographical point of view, been an obstacle to being considered as a candidate State for EU accession. This would be the case of Turkey, which possesses only

[60] See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2013_060_R_0129_01&from=FR

a small portion of its territory, less than five percent, in what would be considered geographically as Europe. Last, but not least, the applicant State must respect the EU values. Even before of the inclusion of this legal requirement in the TEU, the accession of Greece (1979), as well as Spain and Portugal (1985), took place under the express requirement to respect democratic pluralism, the rule of law and fundamental human rights[61].

Once the accession agreement enters into force, the new EU Member State shall be bound by the EU Charter, unless it has expressly declared its intention to the contrary and a Protocol similar to that of Poland and the United Kingdom, or of Ireland, has been adopted.

A novelty introduced by the Lisbon Treaty allows any Member State to decide to withdraw from the EU in accordance with its own constitutional requirements and with Article 50 TEU. The constituent Treaties, included the Charter of the Fundamental Rights of the EU, shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the withdrawal notification, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period (Article 50.3). However, the EU Court of Justice, in its Judgment of 10 December 2018[62], also recognized the possibility of unilateral revocation of the withdrawal notification. The Court of Justice ruled that:

> "Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that Member State — for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired — to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status

[61] Article 49 TEU also states that: "The conditions of eligibility agreed upon by the European Council shall be taken into account". In this way, see the Copenhaguen criteria in: https://www.consilium.europa.eu/media/21225/72921.pdf (point 7.A) and the Madrid criterium in: https://www.consilium.europa.eu/media/21179/madrid-european-council.pdf (point III.A).

[62] Judgment of the Court (Full Court) of 10 December 2018. Andy Wightman and Others v Secretary of State for Exiting the European Union. Request for a preliminary ruling from the Court of Session, Inner House, First Division (Scotland). Case C-621/18. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0621

> as a Member State, and that revocation brings the withdrawal procedure to an end."

Article 50.5 also contemplates the hypothesis that a State, which has withdrawn from the EU, may request to re-join the EU. In the case of this highly improbable hypothesis, at least for the moment, its request shall be subject to the procedure referred to in Article 49. As is well known, United Kingdom is the only Member State that has already withdrawn from the EU[63]. This provision means that if the United Kingdom in the future asks to re-join the EU, the United Kingdom and the EU would have to conclude a new accession agreement. It also means that the eventual future status of membership of the United Kingdom would not be necessarily the same (i.e., with the same exceptions or special treatments) that it enjoyed before its withdrawal. The conditions of its membership would be set down in the new accession agreement.

In the case of the United Kingdom withdrawal agreement, it expressly applied to the Charter of Fundamental Rights of the EU [Article 2(a)(i)]. This agreement established a "transition or implementation period". Pursuant to Article 126, this period started on the date of its entry into force and ended on 31 December 2020. The EU Charter ended its application in the United Kingdom on this date. Moreover, during the transition period, Articles 39 (right to vote and to stand as a candidate at elections to the European Parliament) and 40 (right to vote and to stand as a candidate at municipal elections) of the Charter of Fundamental Rights of the EU, and the acts adopted on the basis of those provisions, were not applicable to and in the United Kingdom [Article 127.1(b)].

5.3 Other Cases of Succession of States and European Union Membership

There are other cases of succession of States not contemplated in the foundation Treaties. These are cases such as the separation of one part of a Member State or the creation of a new independent State. Mr. Romano Prodi, President of the European Commission, laid out the official attitude of the EU on these cases. Answering a question raised in the European Parliament, President Prodi responded on 1 March 2004, on behalf of the European Commission, stating the following:

[63] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. Published at *OJ*, L 029, 31.1.2020, p 7, see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12020W/TXT

> "The European Communities and the European Union have been established by the relevant treaties among the Member States. The treaties apply to the Member States (Article 299 of the EC Treaty). When a part of the territory of a Member State ceases to be a part of that State, e.g., because that territory becomes an independent State, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory.
> Under article 49 of the Treaty on European Union, any European State which respects the principles set out in Article 6(1) of the Treaty on European Union may apply to become a Member of the Union. An application of this type requires, if the application is accepted by the Council acting unanimously, a negotiation on an agreement between the Applicant State and the Member States on the conditions of admission and the adjustments to the treaties which such admission entails. This agreement is subject to ratification by all Member States and the Applicant State"[64].

Similar questions have been raised since then, concerning a hypothetical separation of Scotland from the United Kingdom or of Catalonia from the Kingdom of Spain. The responses of the European Commission have always been the same. For instance, when the European Commission was queried in 2012 about the situation if the Scottish electorate were indeed to vote in 2014 to leave the United Kingdom and Scotland were subsequently to become an independent country, President Mr. Jose Manuel Durao Barroso replied that "the legal context has not changed since 2004 as the Lisbon Treaty has not introduced any change in this respect". Therefore, the Commission confirmed its position as expressed in President Prodi's statement made in 2004[65].

Concerning the situation in Catalonia, several Presidents of the European Commission have responded to similar questions and have always insisted that:

> "Certain scenarios such as the separation of one part of a Member State or the creation of a new State would not be neutral as regards the EU Treaties. Hence, even any legally newly created States on the current territory of the EU could not automatically become new Member States of the EU straightaway. On the contrary, such entities would in any event first be outside the EU, given that the Treaties would have ceased to apply to their territory, and then be subject to all the procedures and requirements of the accession process as other candidate countries have been, such as notably those Member States which have joined the Union after 2004. Inter alia, the

[64] See: Parliamentary questions. 1 March 2004. Answer given by Mr. Prodi on behalf of the Commission. Question reference: P-0524/2004, available at: https://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2004-0524&language=EN

[65] Parliamentary questions. 3 December 2012. Joint response given by Mr. Barroso on behalf of the Commission. Written questions: P-009756/12, P-009862/12. Question reference: P-009862/2012 https://www.europarl.europa.eu/doceo/document/P-7-2012-009756-ASW_EN.html

> accession of new States to the EU requires unanimous approval by all existing Member States.
> (…) the said conclusion that «if a referendum were to be organised in line with the Spanish Constitution it would mean that the territory leaving would find itself outside of the European Union» follows directly from EU law"[66].

To sum up, in cases of separation of one part of a Member State or the creation of a new independent State, there will be a different legal situation for the new independent State and for the remainder of the former Member State. The remainder of the former Member State will automatically continue to be an EU Member State, while the segregated State will cease to be a Member State. The foundation Treaties, including the EU Charter, will still continue to apply to the remainder territory of the former Member State, while their application will cease for the new independent State, unless this State reapplies for membership of the EU and until a new agreement of accession enters into force.

This stand was also shared by the Presidents of other EU institutions. Both Mr. Herman Van Rompuy, President of the European Council[67], and Mr Antonio Tajani, President of the European Parliament[68], have reiterated these same ideas.

Even before the Parliamentary questions concerning Scotland and Catalonia were answered at the European Parliament, a precedent occurred concerning Algerian independence from France in 1962. We must bear in mind that the Treaty establishing the European Coal and Steel Community was only applicable to the European territories of the Member States (Article 79 ECSC Treaty). However, certain provisions of the Treaty establishing the European Economic Community, in particular those on the free movement of goods, agriculture, the liberalisation of services, the rules on competition and the institutions, were applicable to Algeria and the French overseas departments from

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[66] See: *ibid*., 12 November 2012. Answer provided by Mr. Barroso on behalf of the Commission. Question reference: E-008133/2012, available at: https://www.europarl.europa.eu/doceo/document/E-7-2012-008133-ASW_EN.html; *ibid*., 20 November 2013. Answer given by Mr. Barroso on behalf of the Commission. Question reference: E-011023/2013, available at: https://www.europarl.europa.eu/doceo/document/E-7-2013-011023-ASW_EN.html; *ibid*., 7 July 2017. Answer given by President Juncker on behalf of the Commission. Question reference: E-003486/2017, available at: https://www.europarl.europa.eu/doceo/document/E-8-2017-003486-ASW_EN.html; *ibid*., 1 December 2017. Answer given by President Juncker on behalf of the Commission. Question reference: E-006212/2017, available at: https://www.europarl.europa.eu/doceo/document/E-8-2017-006212-ASW_EN.html

[67] European Council. The President (Madrid, 12 December 2013) EUCO 267/13 PRESSE 576 PR PCE 241: Remarks by President of the European Council Herman Van Rompuy, on Catalonia, available at: https://www.consilium.europa.eu/media/25895/140072.pdf

[68] See response in English of Mr. Antonio Tajani to Ms. Beatriz Becerra's letter of 19 June 2017, available at: https://elpais.com/politica/2017/09/07/actualidad/1504779972_170590.html

the entry into force of that treaty; the conditions under which the other provisions of that treaty would apply to Algeria and the French overseas departments were to be determined by the Council (Article 227(2) EEC Treaty). As President Mr. Jose Manuel Durao Barroso recalled before the European Parliament:

> "The EEC Treaty ceased to be applicable to Algeria when, upon its independence on 3 July 1962, its territory was not any more part of the territory of the French Republic.
> The TEU and TFEU apply to the Member States (Article 52(1) TEU), and in the territories of the Member States under the conditions laid down in the treaties, in particular Article 35 x
> 5 TFEU. As a consequence, when a territory ceases to be part of the territory of a Member State, the Treaties cease to apply in that territory"[69].

6. Final Considerations

The effects of succession of States in respect of treaties on human rights is highly conditioned by the fact that most of these treaties have been adopted within the framework of different international organizations. This fact requires prior examination of the rules concerning acquisition of membership and of any other relevant rules of each international organization concerned.

International organizations have very different norms concerning membership. In general, as occurs in the three cases analysed (United Nations, Council of Europe, and EU) the constituent treaties of each international organization establish their own formal process for admission as a new Member State, and their own requirements that States candidates to membership ought to fulfil. Normally, the constituent treaties of international organizations have no provision dealing with the effects of succession of States in respect of membership in the organization. The practice followed by several international organizations establishes that a new State is not entitled automatically to become a Contracting Party to the constituent treaty and also a State Member of the organization as a successor State, simply because its predecessor State was already a Member State in the organization concerned. The practice followed by the United Nations, the Council of Europe and the EU shows that new States must always fulfil the requirements for admission, as well as follow the formal process for admission.

[69] Parliamentary questions. 30 September 2014. Joint answer given by Mr Barroso on behalf of the Commission. Written questions: E-005693/14 , E-005694/14 , E-005692/14. Question references: E-005692/2014, E-005693/2014, E-005694/2014, available at: https://www.europarl.europa.eu/doceo/document/E-8-2014-005692-ASW_EN.html

Automatic succession to membership in these three international organizations has never been accepted.

With the continuing States, there has been no problem in considering them as Contracting Parties to human rights treaties, if they had acquired this condition before the succession of States took place. But once the new States acquire the condition of State Members in each one of these three international organizations, the question of its participation in the human right treaties adopted within the framework of these organizations arises. As regards this matter, there is no common practice followed by the UNO, the Council of Europe, and the EU.

The United Nations has followed a diverse, even a contradictory practice on this issue. The Human Rights Committee has from 1997 onwards, even before, defended the idea of the continuity of obligations to the International Covenant on Civil and Political Rights, despite whatever case of dismemberment in more that one State or State succession. The Human Rights Committee has consistently taken the view that once the people are accorded the protection of the rights under the Covenant, such protection evolves with territory and continues to belong to them, notwithstanding whatever case of succession of States. However, the ICJ, the main judicial organ of the UN, has not received this thesis of automatic succession to universal human rights treaties. In its Judgment on the Merits in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the ICJ took the opposite view. The ICJ took into account that Montenegro, upon its separation from Serbia, had not continued in the international legal personality of the FRY and therefore considered that Montenegro could not be considered a defendant in that case. The Court based this decision on the fundamental principle that no State may be subject to its jurisdiction without its consent. The ICJ noted that, as far as the Republic of Montenegro did not continue the legal personality of Serbia and Montenegro, it could not therefore have acquired, on that basis, the status of Respondent in this case. It is obvious that, if the thesis of automatic succession had been followed in this case, Montenegro would have recognized the jurisdiction of the ICJ by virtue of Article IX of the Genocide Convention.

Even the practice followed by successor States in relation to the two International Covenants on human rights is highly fragmented. As already mentioned, the number of new States that have emerged from a succession of States and that have decided to express their consent to be bound by these two Covenants through accession is slightly higher

than the number of new States that have become Contracting Parties to them through a notification of succession. A different matter is that almost all new States have tried to make their expression of consent retroactive to the date of their independence.

The Council of Europe has followed a different practice on this matter. The concerned States, the main organs of the Council of Europe, and even the ECHR, have followed the thesis of automatic succession that was defended by the UN Human Rights Committee and, therefore, there has been no time gap where the European Convention on Human Rights has not applied to cases of succession of States.

Finally, the case of the European Union practice as regards this question is very different from the UN and Council of Europe practice. Once a new State has acquired the condition of Member State in the EU, and as far as the Charter of Fundamental Rights of the EU does not belong to the EU acquis, this new Member State will be in a unique position, provided it will still be free to decide whether or not it is bound by the Charter of Fundamental Rights of the EU.

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