***La succession d'Etats: la codification à l'épreuve des faits*/State Succession: Codification Tested against the Facts** by PM Eisemann and M Koskenniemi (editors) [2000, Hague Academy of International Law, Martinus Nijhoff Publishers, The Hague, xxxiii + 968 pages, ISBN 90-411-1392-4]

This book, *State succession: Codification Tested against the Facts,* which also bears the title, *La succession d'Etats: la codification à l'épreuve des faits,* belongs to a series published by The Hague Academy of International Law. The chapters are written in either English or French, recalling the fact that these two languages are the languages of international law. The use of both languages in a single publication is quite typical of the works of the Academy as seen in its *Recueil des cours,* for example.

There are presently four books in the series, the other three being *A Handbook on International Organisations* edited by RJ Dupuy,[1] *A Handbook on the Law of the Sea* (two volumes) edited by RJ Dupuy and D Vignes,[2] and *The External Debt* edited by D Carreau and MN Shaw.[3] This book, the fourth, represents the work of The Academy Centre for Studies and Research in International Law and International Relations at its 1996 Session where 24 participants discussed the topic of state succession. It is a collection of the better papers (appearing as 16 chapters) presented at this Session by academics and/or international legal practitioners drawn mainly from Europe. The chapters reiterate the importance of state practice and the effect and role of international conventions on state succession.[4] Collated into a technically harmonised form, the chapters are divided into three sections.

The first section consists of two introductory chapters, the two Reports of the Directors of Studies of the French and English-speaking Sections of the Academy Centre for Studies and Research, Professors Pierre Michel Eisemann and Martti Koskenniemi respectively. The other two

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[1] The first edition was published in 1988; the second in 1998.
[2] The first edition was published in 1990; the second in 1992.
[3] Published in 1995.
[4] See United Nations, Report on Basic Facts About The United Nations (1998, United Nations Department of Public Information, New York) 287-294.

sections are entitled Part I on General Studies and Part II on National Studies. The end of the book is dedicated to the reader's convenience as seen in the Selected Bibliography[5] and Tables and Indexes,[6] which are quite comprehensive in fact.

Part I (General Studies) discusses state succession from the perspective of equity, international organisations, treaties, territorial questions, and private rights and the following is an outline of the chapters:

- Chapter 1 by Sandrine Maljean-Dubois (France)
  Le rôle de l'équité dans le droit de la succession d'Etats[7]
- Chapter 2 by Konrad G Bühler (Austria)
  State Succession, Identity/Continuity and Membership in the United Nations[8]
- Chapter 3 by Andrea Gioia (Italy)
  State Succession and International Financial Organizations[9]
- Chapter 4 by Yolanda Gamarra (Spain)
  Current Questions of State Succession Relating to Multilateral Treaties[10]
- Chapter 5 by Fabrizio Pagini (Italy)
  Identité de succession d'Etats aux instruments conventionells relatifs au désarmement et à la maîtrise des armements[11]
- Chapter 6 by Isabelle Poupart (Canada)
  Succession aux traités et droits de l'homme: vers la reconnaissance d'une protection ininterrompue des individus[12]
- Chapter 7 by Maria del Carmen Márquez Carrasco (Spain)
  Régimes de frontières et autres régimes territoriaux face à la succession d'Etats[13]
- Chapter 8 by Abdourahmane Dioukhane (Senegal)
  Les problèmes de succession d'Etats dans l'affaire de la détermination de la frontière maritime entre la Guinée-Bissau

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[5] At 927-968.
[6] At 969-1012.
[7] At 137-184.
[8] At 188-326.
[9] At 327-383.
[10] At 387-435.
[11] At 437-464.
[12] At 465-490.
[13] At 493-577.

et le Sénégal[14]
- Chapter 9 by Andreas Zimmermann (Germany)
  State Succession and the Nationality of Natural Persons: Facts and Possible Codification[15]
- Chapter 10 by Maria Isabel Torres Cazorla (Spain)
  Rights of Private Person on State Succession: An Approach to the Most Recent Cases[16]

Part II (National Studies) primarily discusses two case studies, the former Soviet Union and the former Yugoslavia. More specifically, the chapters are:

- Chapter 1 by Tarja Långström (Finland)
  The Dissolution of the Soviet Union in the Light of the 1978 Vienna Convention on Succession of States in Respect of Treaties[17] (1978 Vienna Convention)
- Chapter 2 by Natalia V Dronova (Russian Federation)
  The Division of State Property in the Case of State Succession in the Former Soviet Union[18]
- Chapter 3 by Alexis Vahlas (France)
  A propos de trois questions récurrentes en matière de succession de'Etats: application au cas Yougoslave[19]
- Chapter 4 by Juan Miguel Ortega Terol (Spain)
  The Bursting of Yugoslavia: An Approach to Practice Regarding State Succession[20]

In accordance with the European focus of the 1996 Session, Professor Koskenniemi states that his Report "attempts to present an overview of the role of state succession in the reproduction of the political transformation in Europe and in the management of the diplomatic problems that has ensued".[21] He adds:[22]

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[14] At 580-607.
[15] At 611-661.
[16] At 663-717.
[17] At 723-779.
[18] At 781-826.
[19] At 829-887.
[20] At 889-926.
[21] At 65-66.
[22] Ibid.

> Even if one really did not believe that history had ended, one could still not afford to ignore the force of change and be cast as someone who has missed the boat – at least not with the spread of electoral machinery and the pattern of publicity that feeds it. Indeed echoes of transformation are heard as far away as Namibia, Eritrea, and the two Yemens.
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> ...
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> [W]ith the result that old political structures disappeared, new ones are being proclaimed and communities whose political identity had been held in abeyance during the long years of the cold war are reasserting themselves. "Europe" is being re-imagined in the East as well as in the West with the distinct message: real socialism had failed, the future lies with liberal politics and the free market.

About two decades ago, the doctrine of state succession was in decline globally and even "pronounced dead (or at least comatose) in the 1980s...after the vogue of decolonisation had passed and the attempts at codification had ended in a relative failure".[23] In Western Europe and the United States, the notion of self-determination drew its inspiration primarily from the generally accepted notions of sovereignty and representative government. In contrast, this attitude is not clearly demonstrated in the political uprising in central and Eastern Europe because the concept existed against different factors including ethnicity, culture and repression (including its aftermath).[24] As a result, the international community found it hard to formulate the principles and rules to govern their behaviour within the context of European political transformation, the management of any ensuing diplomatic conflict, and state succession.[25] This may explain why there exists a host of theories and definitions surrounding state succession resulting in controversy.[26] At the same time, the problem is enhanced because the subject is no more than a politically motivated phenomenon where,

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[23] Ibid.

[24] The presence of the United Nations Peace Keeping Forces in Central and Eastern Europe indicates the need to restore democratically elected governments and bring about the people's will against existing socialist regimes.

[25] This means that state succession does not provide ready made solutions for particular problems based on the distinction between succession and continuity and the codification of the applicable rules in the 1969 Vienna Convention on the Law of Treaties (1969 Vienna Convention).

[26] At 191.

in practice, "issues of state succession and identity/continuity are primarily guided not by legal, but extra-juridical pragmatic considerations".[27]

While state succession *per se* may not provide immediate solutions to particular problems, its significance lies in two other directions. First, it is a source of existing principles of identification by which new communities may establish themselves. For example, Latvia made a statement to the United Nations General Assembly on 26 February 1993 that it "d[id] not regard itself as a party by virtue of the doctrine of treaty succession to any bilateral or multilateral treaties entered into by former USSR."[28] By moving away from the Soviet socialist regime to the present system, Latvia reasserted its political and economic position and claimed the exercise of rights as a sovereign State. Lithuania was another State to emerge from the same circumstances. Politically transformed, it claimed membership in the International Labour Organisation on 27 September 1991, stating:[29]

> The fact that the government of the Republic of Lithuania has applied for membership with the International Labour Organisation shall in no way affect the legal consequences proceeding from membership of the Republic of Lithuania therein as the Republic of Lithuania could not avail itself thereof due to foreign occupation of the Republic of Lithuania in the period between 1940-1990.

Secondly, the absence of clear-cut rules on the continuation or disruption of treaty relations has enabled States to continue existing at an abstract level in spite of the important changes to their specific rights and duties. These rights are founded in Article 2(1) of the United Nations Charter affirming that the organisation "is based on the principle of the sovereign equality of all its Members." Being juridically equal, all States enjoy the same rights and have the same capacity to exercise them.[30] The rights do not depend on the power of the individual State "but upon the simple fact of its existence as a

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[27] At 201.

[28] At 67.

[29] Ibid. Also, it is not easy for the new entities to reunite with their former regimes on the basis of their newly found identity once the disintegration occurs.

[30] See United Nations, Report on Basic Facts About The United Nations (1998, United Nations Department of Public Information, New York) 287-294.

person under international law."[31] Sandrine Maljean-Dubois explains how this operates within the context of equity and state succession in her chapter.[32]

Although the 1978 Convention took 19 years to come into force,[33] it is deemed a codification of customary international law as reflected in its Preamble. Relying on the official records of the United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna in 1962,[34] Tarja Långström states "that to a large extent this Convention is a codification of existing State practice and as such declaratory of customary law".[35] For example, the Czech and Slovak Republics confirmed the Convention's authoritative nature on the dissolution of States and the processes involved, both using the Convention to determine their respective positions with state succession or continuity as possibilities.[36] However, since the attitude of States is generally complex and the terminology often used loosely, the degree to which a new State's accession to a treaty may be interpreted as an express repudiation of succession or an endorsement of continuity is far from certain.

It is not possible to discuss state succession without reference to state practice. The book therefore discusses this aspect and the underlying relationship with the 1978 Vienna Convention in the case studies. State practice in treaty succession is an important issue and this applies to the practice in both multilateral and bilateral treaties as illustrated in the emergence of the Czech and Slovak Republics from the former Czech and Slovak Federal Republic. On 31 December 1992, both successor States affirmed unequivocally their willingness to continue their predecessor's multilateral treaties. Their act was not discretionary but based on the recognition that a relevant rule of customary international law had applied to them.[37]

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[31] Ibid.
[32] At 137 et seq. See also Sharma S, Territorial Acquisition, Disputes and International Law (1997, Kluwer Law, The Hague) Volume 26 at 129.
[33] At 69.
[34] At 756 note194.
[35] At 756.
[36] Ibid.
[37] At 72.

The Convention has been criticised because it is deemed more focused on decolonisation than succession.[38] Simultaneously, it has been said that the application of the *tabula rasa* or 'clean slate' doctrine[39] may be inappropriate in certain circumstances.[40] For example, Germany's unification is more a case of absorption than succession where a State becomes part of another to continue its existence.

Notwithstanding certain aspects of the law on state succession,[41] Article 4 of the 1978 Convention expresses the established principles and procedures governing membership in international organisations thereby excluding automatic membership. Reflecting this norm and in accordance with established procedures, the Czech and Slovak Republics deposited instruments of accession when they sought to become members of the United Nations and other international organisations.[42] This clearly shows that their admission was not automatic but subject to the applicable rules found in the constitutions

[38] The attitude of Western States during the first half of the 20th century changed, as shown by Belgium, France and Portugal asserting their positions: Musgrave T, Self-Determination and National Minorities (1997, Clarendon Press, Oxford) 92-93. Towards the latter half of the 20th century, the Soviet Union and its communist allies placed great emphasis on decolonisation after World War II that was quite evident in their response to Yugoslavia's disintegration: ibid 93-94. See also Cassese A, Self-Determination of Peoples: A Legal Reappraisal (1995, Cambridge University Press, Cambridge) 44-47.

[39] Broadly, this means that a newly independent State is not automatically bound by the continuation of its predecessor's treaties so that what it inherits is a 'clean slate'. However, if the treaties of the predecessor accord with the successor State's objects and purposes, it may elect to continue with the treaties. For example, pursuant to Article 34 of the 1978 Convention, Yemen sent a letter dated 9 May 1990 addressed to the United Nations Secretary-General stating that "[a]ll treaties and agreements concluded by either the Yemen Arab Republic or the people's Democratic Republic of Yemen and other States and International Organisations in accordance with international law which are in force on 22 May 1990, will remain in effect and international relations existing on May 1990 between the People's Democratic Republic of Yemen Arab Republic and these States will continue": Musgrave T, Self-Determination and National Minorities (1997, Clarendon Press, Oxford) 92-93. See also Cassese A, Self-Determination of Peoples: A Legal Reappraisal (1995, Cambridge University Press, Cambridge) 44-47; Report of the 68th International Law Association Conference, Taipei, 1998 at 646.

[40] At 72 et seq.

[41] At 856.

[42] See United Nations General Assembly resolution 47/221 of 19 January 1993; Report of the 68th International Law Association Conference, Taipei, 1998 at 633-634, 638-639, 645-646.

of the international organisations they joined. The same is true regarding succession to treaties that requires new negotiations to be conducted if a change occurs, unless it is shown that the *rebus sic stantibus* (fundamental change of circumstances) principle applies.[43]

The book is generally critical of the transformation process from the old to the new State.[44] Recent state practice in one respect seems to rely on the 1983 Convention on Succession of States in Respect of State Property, Archives and Debts. However, recent European practice on the continuation of treaties seems to indicate that the fate of state property and debts is heterogenous in character.[45]

Broadly speaking, the 1983 Convention established a twin standard of agreement-equity for the passing of state property and debts, but in practice the application may be difficult. First, it is highly likely that it may be inoperative in situations where it is needed most. For example, if succession occurs during a political or military conflict, the prospects of agreement are unlikely if the successor's view of what is equitable does not accord with the predecessor's view. Secondly, owing to the degree of fluidity existing in the interpretation of equity and its measurement between the parties, it is likely that difficulties will arise here as well, unless the parties agree on the various criteria to be used.[46]

The book demonstrates that the theories on sovereignty and state succession are interlinked. However, the 'clean slate' principle is metaphorically inaccurate when used to describe a situation in which newly independent States find themselves. This is particularly so in

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[43] O'Connell, "The problem of state succession and the identity of States under international law" at <www.ejil.org/journal/Vol9/No1/art5-04.html> (visited October 2001).

[44] At 95.

[45] At 66.

[46] For example, on 4 June 1996 a special committee of the European Council held a meeting with senior Bosnian officials in Sarajevo to discuss the division of the assets and liabilities of the Socialist Republic of Yugoslavia. The Chairman, Sir Arthur Watts, stated: "We had many discussions and covered every aspect of the succession problem and the rights of former Yugoslav countries...but we did not make any decision. The aim of these talks in my opinion is to ask questions, get answers and explanations. Before I start to think of possible solutions I must understand the facts and the different approaches of each republic of the former country": at 924.

treaties that affect third party States as provided in Articles 34-38 of the 1969 Vienna Convention.[47] On the other hand, provisions for a similar boundary and territorial regime are found in Articles 11-12 of the 1978 Vienna Convention.[48] This Convention came about when the International Law Commission (ILC) feared that the application of the 'clean slate' rule could lead to successor States repudiating treaties establishing boundaries or other territorial régimes, thus necessitating the rights of third party States to be safeguarded.[49] In support, Tarja Långström refers to the judgment of the International Court of Justice in *Frontier Dispute*[50] between Burkina Faso and Mali that "[t]here is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the form of *uti possidetis*".[51]

Confirming Ian Sinclair's position on treaties affecting third States[52] and using the example of the neutralisation and demilitarisation of the Aaland Islands, Tarja Långström emphasises that succeeding to such a treaty is not important; what is important is succeeding to the regime it establishes. Långström states:[53]

> A substantial part of the doctrine holds that there is in international law a special category of treaties establishing so called "objective régimes" that are valid *erga omnes*. In treaties discussing the law of treaties this category is usually included as an example of treaties having an effect on third States. The 1969 Vienna Convention on the Law of treaties does not, however, contain a special provision

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[47] Tarja Långström re-asserts the well-known position of Ian Sinclair at 756. Note that the guidelines for the criteria to be applied in resolving territorial boundary disputes are derived from numerous sources as reflected in Article 38 of the Statute of the International Court of Justice. Article 38(1) refers to international conventions, international customs, general principles of law, judicial decisions and teachings of the most highly qualified publicists as the sources of international law that the Court should apply. See also Konrad G Bühler's contribution at 191.

[48] At 758.

[49] At 758-759.

[50] (1986) International Court of Justice Reports 3, 566.

[51] At 759.

[52] Sinclair I, The Vienna Convention on the Law of Treaties (1984, 2nd edition, Manchester University Press, Manchester).

[53] At 765-766.

> for treaties of this kind. It was held that such a clause would not be necessary, since actually it is not the treaty that has effects on third States, but rather these States' recognition of the rules contained in such a treaty as binding customary law. "In short, for these (third) States the binding force of the rules is custom, not the treaty".[54]

In practice, a third State's rights regarding boundaries are not deemed as critical as the rights of the successor State.[55] In this context, it is rules of customary international law and not the treaty that bind third party States. In a similar vein, Konrad Bühler analyses the attainment of statehood by a successor State in his chapter.[56] He concludes that new entities have to confront the pre-existing structures governing legal relationships including the meaning of their rights and obligations and for them to continue enjoying the benefits they have to accept the pre-existing structures to maintain the *status quo.*[57]

Professor Koskenniemi states that the weakness of state succession is related to its close relationship with other international law doctrines,[58] such as the doctrines on the nature of statehood (legal personality), the emergence and the dissolution of States, sovereignty, recognition, self-determination, territorial title (including the basic principles governing human rights), the law of treaties, and freedom of action. In contrast, there was no question of state succession when Iraq occupied Kuwait in 1990. As a case involving the violation of territorial sovereignty and the use of force, state succession doctrines were not applicable.[59]

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[54] (1966) II Yearbook of the International Law Commission 231: at 766 note 268.

[55] This is evidenced in cases such as Anglo-Norwegian Fisheries case [1951] International Court of Justice Reports 116; North Sea Continental Shelf cases [1969] International Court of Justice Reports 3; Minquiers and Ecrehors case [1953] International Court of Justice Reports 47; Temple of Preah Vihear (Merits) case [1962] International Court of Justice Reports 67; and Jaworzina (Advisory Opinion) case, Permanent Court of International Justice Series B, No 8, 6 December 1923. Note the boundary awards where the decisions were not only based on interpretations of treaty but also on other considerations such as the parties' various interests: The Cordillera of the Andes Boundary case (1902) 9 Reports of International Arbitral Awards 31; Argentina-Chile Frontier case (1966) 38 International Law Reports 10. See also Sharma S, Territorial Acquisition, Disputes and International Law (1997, Kluwer Law, The Hague) volume 26 at 129.

[56] See generally pp 188-326.

[57] At 217.

[58] At 96.

[59] Ibid. Refer Crawford J, The Creation of States In International Law (1979, Oxford

Likewise, there was no transfer of treaty rights and obligations during the long years of the Soviet occupation of the Baltic Republics.[60]

To discover if a predecessor State's right or obligation survives or lapses in state succession, Maria Isable Torres Cazorla refers to the controversial views on the generally binding character of customary international law.[61] Often, the right or obligation is the result of political values at the relevant time. In this respect, the United Nations' role was vital immediately after World War II because it recognised the right to self-determination and the special status of minorities.[62] This had been the international community's response to the disintegration of oppressed and minority groups.[63]

In practice, seeking the balance between self-determination on the one hand and freedom and order on the other is a political task. The international system in the eras after both World Wars favoured self-determination albeit limited to entities under European colonial rule. However, the 'clean slate' principle was not only the abstract endorsement of a rule but the recognition of the injustice of colonialism also.[64] Towards the end of the last century, other considerations such as legal security, the need to avoid a legal vacuum, the honouring of agreements and the maintenance of the stability of legal rights and obligations had represented just international politics, or so it seemed.[65]

Professors Eisemann and Koskenniemi conclude that state succession grew out of a general treaty law problem concerning the *rebus sic stantibus* principle.[66] However, there are exceptions to this proposition, not least its limited application to third party States. For example, it is doubtful if the rules on treaty succession are really independent of the general law on the effects of changed circumstances.[67] The same may

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University Press) 106-108.

[60] At 96.

[61] At 663 et seq.

[62] Ibid.

[63] Ibid.

[64] See Koskenniemi, "National self-determination today: problems of legal theory and practice" (1994) 43 International and Comparative Law Quarterly 260.

[65] See Mushkat, R. "Hong Kong and succession of treaties" (1997) 46 International and Comparative Law Quarterly 183-187.

[66] At 22; 103.

[67] See Article 62 of the 1969 Convention.

be said of the application of the *pacta teriis* doctrine on the techniques to cope with situations of fundamentally changed circumstances.[68]

Academics and practitioners alike have accepted that state succession may impact on private rights, particularly economic rights and human rights.[69] In relation to economic rights that are essentially acquired in nature, the doctrine on state responsibility has sought to establish an equitable balance between the interests of private persons and other entities in the successor State and the need to endow some scope for economic regulation by the new State. In this respect, it is arguable that state responsibility as a topic has been quite resistant to interpretation, and hence codification, partly resulting from the difficulty in defining what is equitable or inequitable.

The essence of the book reveals correctly that state succession is just a label for the legal conception of statehood. In this respect, the following fundamental point that puts the book in perspective should be recalled:[70]

> In this connection, the term 'state succession'[71] is a misnomer, as it presupposes that the analogies of private law, where on death or bankruptcy, etc, rights and obligations pass from extinct or incapable persons to other individuals, are applicable as between states. The truth, however, is that there is no general principle in international law of succession as between states, no complete juridical substitution of one state for the old state which has lost or altered its identity. What is involved is primarily a change of sovereignty over territory, through concurrent acquisitions and loss of sovereignty, loss to the states formerly enjoying sovereignty, and acquisition by the states to which it has passed wholly or partially. It is not feasible to carry over to international law analogies concerned with the transmission of a *universitas juris* under domestic law. So far as rights and duties under international

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[68] Ibid Articles 34-38.
[69] At 663.
[70] Shearer IA, Starke's International Law (1994, 11th edition, Butterworths, Sydney) 291.
[71] This is contrasted with 'succession of governments' that involves a purely internal change of sovereignty through either a constitutional or revolutionary process: ibid.

> law are concerned, no question whatever of succession to these is involved. The state which has taken over is directly subject to international law, simply by virtue of being a state, not by reason of any doctrine of succession.

Thus, generally speaking, the laws that States do not agree with or do not accept will not be binding in state succession unless the law is considered more superior than a claim to statehood, such as *jus cogens* (a rule of law from which there can be no derogation).[72] When this happens, the bundle of rights, powers and competences found in treaties (general or specific) or customary international law may be affected.

This book displays the various and complex elements linked to state succession. It shows that it is hard to define the expression at times when used to transfer territorial authority or transfer rights and obligations from a predecessor State to a successor State. This may extend to the procedures and processes to be followed by a State anxious to minimise the inconvenience that may result from its transformation to a successor State when dealing with other States and international organisations including the United Nations. When this happens, the book attempts to provide the best possible solutions, thus reflecting much of the recent debate on the legal aspects of the political transformation in Europe. However, the entire discussion is premised on the assumption that the first issue to be resolved is whether the entity can acquire a new persona.

The book also highlights the great divergence in the dilemmas faced at the global level by the new political leaders in the successor States when attempting to find the best possible solution in their common struggle for independence. However, the concept of identity and continuity upon succession is based on an abstract definition, a gnawing challenge for the international community and the legal mind, at least for the present.

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[72] See Articles 53 and 64 of the1969 Vienna Convention.

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