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# Consensual Merger as a Means of State Succession and its Relation to Treaty Obligations

by Ronald J. Klein\*

## I. INTRODUCTION

MODERN DAY STATES have become increasingly affected by various nation's implementation of social, economic, and military aid and subsequent regulation. As a result, maintenance of internationally agreed upon rights and obligations has become a vital goal, achievement of which should be sought through daily intergovernmental contact. This need for international stability has been threatened by the accelerated rate of state succession. The twentieth century has witnessed consecutive decolonization and self-determination efforts fostered by various nationality groups. Each time a state succession occurs, the new state exhibits a completely new identity. This factor raises the question of how international relations can progress without a guarantee of bilateral or multilateral compliance with established rights.

This note will examine some of the various forms of state succession, with particular emphasis on consensual merger. In addition, the analysis will specifically examine successor states' treaty rights in relation to customary international law and the newly drafted Vienna Convention on the Succession of States in Respect of Treaties.<sup>1</sup> The United Arab Republic (U.A.R.), a past consensual merger between Egypt and Syria, will be used as an example for the purpose of analysis throughout the note. The U.A.R., which was established in 1958 with the intent of creating a pan-Arab empire, has been the most successful of the many Mideast merger attempts and will therefore serve as a helpful model.<sup>2</sup>

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<sup>1</sup> Vienna Convention on Succession of States in Respect of Treaties, U.N. Doc. A/CONF. 80/31, as corrected by A/CONF. 80/31 Corr. 2 of October 27, 1978, reprinted in 17 INTERNATIONAL LEGAL MATERIALS 1488 (1978).

<sup>2</sup> Since the aborted attempt by Nasser to form a pan Arab state, a large number of other mergers have been set up and have failed. They are: Iraq and Jordan from February, 1958 to July, 1958; the United Arab Republic and the Kingdom of Yemen, which was never implemented; Egypt, Syria, and Iraq in April, 1963 also never implemented; Egypt and Iraq in May, 1964 and Egypt and Yemen in July, 1964, neither of which were ever put into effect; Egypt, Libya, Sudan, and Syria reached an accord in April, 1971, but it too was annulled; Libya and Egypt in August, 1972 also failed; Libya and Tunisia in January, 1974 was never

## II. STATE SUCCESSION AND ITS VARIATIONS

The term succession of states is commonly used to describe the evolution of a state into a new or already established sovereign containing an increased or diminished land mass.<sup>3</sup> Personal unions, real unions, federations, confederations and consensual mergers are but a few of the catalysts through which state succession occurs.<sup>4</sup> Personal unions exist when states are independent, self-governing entities, but linked by the same ceremonial leader or ruler.<sup>5</sup> A modern example of this form is the aggregate of Commonwealth countries under the British crown. Both Canada and Australia, although separate states, owe allegiance to the crown of England because of their common historical tradition.<sup>6</sup> Alternatively, real unions consist of two or more states possessing an intertwined governmental structure. The states share a leader, and many of their institutions are merged to deal as a single unit at the international level.<sup>7</sup> For example, the Austria-Hungary empire, during the years 1867 to 1918, was ruled by a monarchical leader. However, the two states maintained separate legislatures which were required to grant authority for the states to act jointly.<sup>8</sup>

A confederation exists when two or more states remain separate and independent, but aggregate under a common central body to which they

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acted upon; North Yemen and South Yemen in March, 1977 was negotiated upon, but never agreed to; Libya and Syria in November, 1980 also reached an accord, but detailed arrangements were never developed; and finally most recently, a merger between Libya and Chad was announced at the beginning of 1981. The list of attempted mergers illustrates that most recently Libya, under the erratic direction of Col. Muammar al-Qaddafi, has become the new catalyst for 'alleged' Middle East unity. Qaddafi, a self styled protégé of Nasser, sees himself at the helm of the empire he is trying to forge. His latest activity was a military invasion of neighboring Chad which he claims wants to merge with Libya. The consequences of his actions will be for future international law to categorize. But it seems, to this writer, that the Chad connection may be more accurately termed an annexation, or *anchluss*, instead of a consensual merger.

<sup>3</sup> D. GREIG, *INTERNATIONAL LAW* 155-157 (2d ed. 1976).

<sup>4</sup> J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 290-295 (1979).

<sup>5</sup> *Id.* at 290.

<sup>6</sup> The Commonwealth is a voluntary grouping of states formerly under British rule. Some commentators declare that the Commonwealth is a personal union under the British monarchy, while others believe that it is a loose association of states. Either way, each state is wholly independent of the crown and possesses its own foreign and domestic policies. Whatever the interrelationship of the Commonwealth countries, all will agree that the states are tied to the crown which is the focal point of their historical heritage. See R. WILSON, *INTERNATIONAL LAW AND CONTEMPORARY COMMONWEALTH ISSUES* 3-6 (1971).

<sup>7</sup> J. CRAWFORD, *supra* note 4, at 290.

<sup>8</sup> Identical military and economic programs had to receive approval from both the Austrian and Hungarian legislative bodies before the Union could act. See [1956] *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION* 404 (United Nations).

delegate certain limited powers.<sup>9</sup> As a whole the local units retain international acceptance as individual entities. The European Economic Community, which unites Western Europe and beyond, is an example of a successful economic confederation. On the other hand, the necessary elements of a federation are: "(1) division of powers between the central and regional governments, (2) a certain degree of independence between the central and regional governments, (3) direct action on the people by the central and regional governments, and (4) some means of preserving the Constitutional division of power."<sup>10</sup> The central or federal government usually retains complete authority over foreign policy. In other words, an individual component of a federation cannot represent or bind the entire federation under a treaty. One scholar, Dr. James A. Crawford, explicitly requires a fifth criterion, that the central government's powers include jurisdiction over all foreign affairs, as well as autonomous authority integrating aspects of the local states internal policies.<sup>11</sup> By stipulating this element, more structure is added to the federated unit. The United States is a working example of this theory in practice.

In addition, there is consensual merger, consisting of two or more states having separate international personalities united under a common Constitution, with a common head of state competent to represent them in their relations with other states.<sup>12</sup> This type of unification is one in which both states negotiate on at least semi-equal terms to form a successor state. Subsequent to negotiations a plebiscite may be conducted in the predecessor states to assure that the merging is voluntarily accepted by the people, not just the governments. Approval is indicated by an affirmative vote by a majority of the citizenry.<sup>13</sup>

As shall be pointed out later in this note, numerous factors are used to classify a state as being in one of the above forms. Among the characteristics which make one type of state more appropriate than another are land mass, culture, history, and population. The various combinations of

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<sup>9</sup> BERNIER, *INTERNATIONAL LEGAL ASPECTS OF FEDERALISM* 5 (1973).

<sup>10</sup> These criteria are flexible enough to encompass any number of diverse government structures. The United States distinguishes between federations and confederations as follows: A federation is able to act with direct effect on the citizenry, while the governing unit in a confederation is only able to act upon the state as an entity. Today, unlike the U.S., most of the international community uses a less rigid test looking instead to the degree of control to differentiate between the two terms. See J. CRAWFORD, *supra* note 4, at 291-292.

<sup>11</sup> J. CRAWFORD, *supra* note 4 at 292.

<sup>12</sup> As will be discussed later in this note, there are different theories which aid in the determination of how the successor state stands in relation to other states under customary international law. There is a possibility of conflict if the successor state terminates all predecessor obligations, while the third party state interprets the situation as merely a continuity of the state and thus maintenance of all responsibilities. See 1 D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 5 (1967).

<sup>13</sup> S. WAMBAUGH, *A MONOGRAPH ON PLEBISCITES* 31 (1920).

criteria cause each evolution of succession to be treated differently.

### III. THEORETICAL APPROACH TO STATE SUCCESSION

It is important to make a distinction between complete state succession and other abbreviated forms of succession. Complete state succession, which is the extinction of a predecessor state and the formation of a new one, entails the position that the successor state's obligations to maintain previous rights and obligations maybe altered or terminated.<sup>14</sup> Other types of succession indicate mere continuity of the predecessor state since the personality of the state usually remains the same.<sup>15</sup>

Customary international law and international judicial decisions have not created a standard test to make such a determination, which has made this area one of longstanding confusion. It has been suggested that if certain individual segments of a state, such as population, land mass, or legal order are eliminated, replaced, or substantially altered, then the old state ceases to exist.<sup>16</sup> The tangible elements of readjustment of citizens or territory are simple concepts to grasp, but the term "legal order" is unclear. What are the term's requirements: coup d'état, creation of a new constitution, modification of legislative, administrative, or judicial branches, or alteration of class structure?<sup>17</sup> Each of these criteria on its own is not sufficiently complete to aid in the determination of whether there has been a complete state succession, but they may be helpful, if added to the overall pool of probative characteristics.

Professor Kelson believes that if a state has lost control of the effectiveness of its legal order, particularly in its influence and representation in international law, then it may be subject to extinction as a state in its present form.<sup>18</sup> However, his standard is not universally applicable. For example, when two states merge a new legal culture may temporarily replace the old one, but when the merger terminates, an automatic reversion to the previous political and legal environment occurs.<sup>19</sup> The Syria-

<sup>14</sup> D. O'CONNELL, *supra* note 12, at 6.

<sup>15</sup> J. CRAWFORD, *supra* note 4, at 74-76, 404-406.

<sup>16</sup> Shifts in population or territory may be exemplified by a natural climatic or geophysical disaster which submerges an island state and wipes out its population. This is an example of a state becoming extinct, even if a new population subsequently migrates into the territory. See P. FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 373 (1922), reprinted in K. MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 7 (1968). See also J. CRAWFORD, *supra* note 4 at 36-48; cf. R. CRANE, *THE STATE IN CONSTITUTIONAL AND INTERNATIONAL LAW* 65 (1907).

<sup>17</sup> Each of these elements will be dealt with individually in section III of this note.

<sup>18</sup> H. KELSON, *GENERAL THEORY*, 220, reprinted in K. MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 8 (1968).

<sup>19</sup> The same criticism applies to many of the different forms of state succession. For example, a state which is conquered or annexed, such as Austria was in 1938, may lose all

Egypt merger is a case in point. Syria's legal order was totally displaced by the formation of the U.A.R. in 1958. However, upon its dissolution in 1961 Syria's pre-unification international status returned.<sup>20</sup>

Raestad, another theorist, advocates a test based on whether third party nations recognize the subjugation of the state, and will therefore adhere to representations by the successor state.<sup>21</sup> This proposal also contains serious flaws. The main problem is the lack of a consistent international pattern in recognition of a new state, because each country's standard is based on its own strategic interests.<sup>22</sup> For instance, if a Communist state falls victim to a revolution and a democratic leader rises to lead the nation, the Western bloc states would probably recognize it as a new state so as to release it from obligations to the Communist bloc. Simultaneously, the Union of Soviet Socialist Republics' led Eastern bloc states would probably charge the United States with intervention and meddling in the domestic affairs of other states, and would indignantly only recognize the 'new' state in its predecessor form. All in all, there has been no consistent international view on whether a new government has taken over, versus a new state foundation formed. As a result, Raestad's views are not conclusory but may be added to the list of characteristics to determine a particular state's status.

Another school of thought lists two formalized rules of state continuity: territorial change and internal revolution.<sup>23</sup> Territorial gain or loss, the better secured of the two cannons, does not affect the international status of states.<sup>24</sup> Strong historical policy supports this rule. Practically speaking, the international community profits by maintaining the status quo, because preserving the balance of power between any number of states will not be jeopardized by a state's gain or loss of territory which was part of a negotiated agreement. Internal judicial bodies of many

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traces of its legal/political system during the occupation. But once the conqueror, Nazi Germany, surrendered, Austria internationally proclaimed it once again was the same state as before World War II. The state merely picked up where it left off with regard to treaty obligations with third party states. R. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 115 (1944), reprinted in J. CRAWFORD, *supra* note 4, at 310. See also Austrian State Treaty of 1955, 49 U.N.T.S. 747; 1 C. HYDE, *INTERNATIONAL LAW* 176 (1922).

<sup>20</sup> O. UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* 294-296 (1972).

<sup>21</sup> A. RAESTAD, *LA CESSATION DES ETATS D'APRÈS LE DROIT DES GENS* 449 (1939), reprinted in K. MAREK, *supra* note 18, at 8.

<sup>22</sup> K. MAREK, *supra* note 18 at 8.

<sup>23</sup> D. ANZILOTTI, *LA FORMAZIONE DEL REGNO D' ITALIA NEI RIQUARDI DEL DIVITTO INTERNAZIONALE* 9 (1912), reprinted in K. MAREK, *supra* note 18, at 15.

<sup>24</sup> The bottom line concern is to preserve and protect any bilateral or multilateral agreement that had been painstakingly negotiated and ratified by the respective states. If every time a state changed its physical size, whether by coercive or noncoercive means, it could unilaterally disclaim a past agreement, international law would be useless.

states, throughout history, have affirmed this policy.<sup>25</sup> For example, the German Supreme Court, on August 13, 1923, announced that, "A state continues to exist as such even though large portions of its territory are taken from it."<sup>26</sup> More recently the Harvard Draft Convention on the Law of Treaties stated, "A change in the territorial domain of a state, whether by addition or loss of territory, does not, in general, deprive the state of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as the result of the change."<sup>27</sup>

The second traditional canon regards revolutionary changes within the state. Because of the same concern for international stability, changes of government, whether they are accomplished by a substitution of leaders, political parties, or any other structural modifications, usually are held to be a continuity of the original state. The main focus revolves around the extent of the revolution.<sup>28</sup> A revolution might involve complete economic, political, and social change, but the question which is important to the continuity issue is the procedural manner in which the change occurred. The international legal community must look to see if the revolutionary changes were brought about under conditions which potentially violate the prescribed procedure of revisions.<sup>29</sup>

As stated above, international judicial decisions by the courts of various states have attempted to uphold state continuity at all cost. One of the most famous cases, respected and adhered to internationally, was decided by the United States Supreme Court in 1871. The case, *The Sapphire*,<sup>30</sup> dealt with a sea collision between a French vessel, the *Euryale*, and an American ship, the *Sapphire*. The suit was filed in a United States court in the name of Napoleon III, as owner of the *Euryale*, but by the time the case was litigated the Emperor had been overthrown. The issue naturally was whether the suit became moot because the party seeking

<sup>25</sup> See *Lazard Brothers and Company v. Midland Bank*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES (A.D.) 1931-1932, Case no. 69 (Great Britain); *Roselius and Company v. Dr. Karsten and the Turkish Republic intervening*, A.D. 1925-1926, case no. 26 (Amsterdam); *In re Ungarische Kriegsprodukten Aktiengesellschaft*, A.D. 1919-1922, case no. 45 (Switzerland).

<sup>26</sup> FONTES, *Ser. A, Sectio II, Thomus 1*, Pg. 29 (1923), reprinted in K. MAREK, *supra* note 18, at 17.

<sup>27</sup> *Harvard Draft Convention on the Law of Treaties*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW (Supp. No. 4) 662 (1935).

<sup>28</sup> K. MAREK, *supra* note 18, at 25-26.

<sup>29</sup> A revolution's legality does not wholly depend upon the amount of material change that occurs, or how much violence is involved. The real question pertains to the quantity and quality of the legal order that is retained. For example, much of the Code Napoleon, which was drawn up during the reign of Napoleon Bonaparte III, was sustained even after the Emperor's second dethroning. The change in French sovereigns was regarded merely as a succession of states, not a succession of governments, in part as a result of legal stability.

<sup>30</sup> *The Sapphire*, 11 Wall. 164 (1870).

damages was no longer in existence. The court, in a historic judgment, stated:

We think it has not. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France . . . . On his deposition the sovereignty does not change, but merely the person or persons in whom it resides . . . . The reigning emperor, or National Assembly, or other actual person or party in power is but the agent and representative of national sovereignty. A change in such representative works no change in the national sovereignty or its rights.<sup>31</sup>

*The Sapphire* represents the longstanding view of the United States that governments may change but the continuity of ones sovereignty stays the same. Napoleon's political downfall provided the U.S. court with an opportunity to dismiss the case, thereby protecting an American citizen from liability. But the Justices, realizing the importance of reasonable reliance on international responsibility, opted for an approach which would maintain the court's own international integrity, as well as promote the general importance of international law.

In 1936, the Institute of International Law met and resolved that each individual case of potential state successions must be measured in its own right, and that caution must be exercised to prevent a hasty or quick determination.<sup>32</sup> It must be remembered that a predecessor state's existence may potentially be maintained throughout a period of substantial disruption. Therefore, any decision must be tempered to the situation at hand, and only after a careful and thorough investigation should a decision by international bodies or states be made.<sup>33</sup>

The importance of the determination of continuity of sovereignty with regard to succession of states directly affects international agreements and treaty obligations. Thus, the next section deals with the theories and practices which make up present customary international treaty law.

#### IV. HISTORICAL BACKGROUND OF A SUCCESSOR STATE'S TREATY RESPONSIBILITIES

The twentieth century has seen a host of radical to moderate political upheavals. An examination of the history of the law of state succession

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<sup>31</sup> *Id.* at 168.

<sup>32</sup> The Institute submitted that it is more of a hindrance, to the international determination of succession, to lay down rigid rules of succession than if general guidelines are created with the flexibility to be modified if certain circumstances arise. See II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 212 (1936), as reprinted in K. MAREK, *supra* note 18, at 8-9.

<sup>33</sup> *Id.*



will further an understanding of the international law which was applied to the environment surrounding the unification of Egypt and Syria.

The succession discussed in this section only applies to succession of states, not succession of governments. It is often difficult to determine which of the two alternatives has occurred and as a result there is substantial international confusion whenever any type of succession takes place. A full state succession occurs when a distinct political and juridical entity emerges from the rubble of one or more predecessor states.<sup>34</sup> Additional characteristics of full state succession may include, but are not limited to, the afore mentioned new political leader or coup. However, these factors alone, usually indicate merely a change in governments.<sup>35</sup>

State succession, as we know it today, can be traced back to the era of the Roman empire (510 B.C. to 535 A.D.).<sup>36</sup> At that time, when a state ceased to exist because of conquest, merger, federation, or annexation, the succession of states was treated analogously to the death of an individual.<sup>37</sup> All responsibilities and obligations of the predecessor state were handed down, *ipso jure*, to the successor state. In other words, the respective rights and duties followed by way of traditional inheritance law and derived from absolute natural rights carried on continuously regardless of the identity of the bearer.<sup>38</sup> This theory is known as universal succession and was adhered to until the middle of the nineteenth century. At that time communication between states and regions greatly improved, resulting in a dramatic increase in the number of international treaties and obligations. Nations began to view the universal theory as over simplistic and therefore not realistic enough to deal with the modern intertwined world.<sup>39</sup>

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<sup>34</sup> D. O'CONNELL, *supra* note 12, at 11.

<sup>35</sup> J. CRAWFORD, *supra* note 4, at 402-406.

<sup>36</sup> H. GROTIUS, ON THE LAWS OF WAR AND PEACE, Book II, Chap. XVI, § XVII (1846) (translation by Francis Kelsey, 1925); See also S. PUFFENDORF, OF THE LAW OF NATURE AND NATIONS, Book VIII, Chap. XII, Para. II (1729) (translation by Basil Kennett).

<sup>37</sup> Note, *Succession of States in Respect of Treaties: The Vienna Convention of 1978*, 19 VIRGINIA JOURNAL OF INTERNATIONAL LAW 886 (1978).

<sup>38</sup> D. O'CONNELL, *supra* note 12, at 9.

<sup>39</sup> Before the era of the industrial revolution, constructive communication between states was in its infancy. Trade was the major catalyst for whatever agreements were established. It was therefore easy for nation-states to assume their predecessor state's obligations because there were very few that carried over. In addition, a lack of organized international law made enforcement of any such agreements non-existent.

The nineteenth century, however, saw a marked increase in international reliance between states. Transportation was greatly improved and the need for raw materials and food made ongoing trade relations between states of vital interest to all parties concerned. As a result, the need for an international legal system, which could be practically applied to state succession, became an important international objective. See, *Succession of States in Respect of Treaties*, *supra* note 37, at 887.

Searching for a new theory, Professor Arthur Keith developed the concept of negativism.<sup>40</sup> This theory also relied on the idea that international obligations were directly tied into personal obligations. However, the result was the opposite to that of the universal theory. Negativists, drawing an analogy from contract law, believed that treaties terminated upon complete succession of states.<sup>41</sup> When an individual contracted to perform personal services for another such that only he could fulfill the obligations, the contract would be declared void if he died or became incapacitated. Similarly, if a state no longer existed, its successor state could not respond to its predecessor's commitment since the successor state probably could not adequately substitute that particular service.

The dispositive theory modifies the negative/nullification theory.<sup>42</sup> This particular type of treaty fixes boundaries, creates easements, or generally sets aside natural rights which are considered to have a permanent and enduring character.<sup>43</sup> The basis for these exceptional agreements is purely respect for an acquired right which goes beyond any change in government or state. An example is the treaty establishing the U.S. naval base at Guantónamo Bay, Cuba.<sup>44</sup> It is apparent that even though Castro's Cuba and the U.S. government are at odds politically, and Castro has made occasional demands that the United States withdraw from the military base, the Cuban government has never attempted, militarily, to reclaim the base and the United States has not taken the issue seriously.<sup>45</sup>

The U.S. Canal Zone in Panama, until recently, was another example. This land mass was considered property of the United States even though it intruded on the physical sovereignty of Panama. All subsequent

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<sup>40</sup> A. KEITH, *THE THEORY OF STATE SUCCESSION* 17 (1907); C. FENWICK, *INTERNATIONAL LAW* 118 (1924), reprinted in *Succession of States in Respect of Treaties*, *supra* note 37, at 887.

<sup>41</sup> *SUCCESSION OF STATES IN RESPECT OF TREATIES*, *supra* note 37, at 888.

<sup>42</sup> E. DEVATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF NATURAL LAWS*, Book I, Introduction, § 25 (1758), reprinted in *Note, Succession of States in Respect of Treaties*, *supra* note 37, at 888.

<sup>43</sup> E. DEVATTEL, *supra* note 42, at § 25.

<sup>44</sup> The treaty gave the United States Navy a perpetual lease to the bay area. According to its terms the United States possessed this right until such time as it unilaterally abandons the facility. *Treaty of Relations with Cuba*, signed May 29, 1934, 48 Stat. 1682, T.S. 866.

<sup>45</sup> On September 26, 1961, Fidel Castro, in a speech before the U.N., stated that he intended to use the international legal system to remove the U.S. base at Guantónamo Bay. Similarly, in 1962, at the height of the Cuban Missile Crises, Castro attempted to thrust himself into the international spotlight by once again demanding U.S. withdrawal from the base. Both times the United States did not bother to respond, and Castro did not push the issue at the international level. M. HALPERIN, *THE RISE AND DECLINE OF FIDEL CASTRO* 81 (1972).

governments since the canal was built have abided by the U.S. sovereign right over the territory as set forth in the original treaty for construction of the canal in 1904.<sup>46</sup>

The universal succession and negativism theories have given way to modern varieties of treaty law. The first, is a descendant of the universal succession theory, and advocates assumption of all the prior state's treaties by the newly formed state. A fear that world lawlessness will occur if changes of sovereignty are constantly abrogating established treaties leads commentators who maintain support of this theory to urge its adoption for the maintenance of world order.<sup>47</sup> This approach is not uncommon in today's modern world. For example, many of the new states that have emerged since World War II have been conversions from former colonies under British, French, Portuguese, or Spanish rule. The only significant change in the succession of many of these states is the right to self rule, as opposed to foreign imposed rule; while other characteristics of the states remain the same. Therefore, it can be argued, that since they, as pieces of the world puzzle, maintain a synonymous presence as their former colony status, they should assume all their established responsibilities at the international level.<sup>48</sup>

A second, new approach to treaty law is a modernized neo-negativist theory.<sup>49</sup> Since succession of states is a matter of policy, not law, there is a great deal of conflict regarding the premise that states succeed to the obligations of their predecessors. The controversy arises for two reasons: (1) there is no succinct body of international law of state succession which successor states must follow as a result of international agreement, and (2) political and economical realities of successor states prevent com-

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<sup>46</sup> Article 24 of the 1903 Convention between Panama and the United States providing for construction of a ship canal stated: "No change either in the government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the U.S. under the present convention or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention. Convention on Isthmian Canal, signed Nov. 18, 1903, United States-Panama, Art. 24, 33 Stat. 2234, T.S. 431.

The Canal Zone, as this region has been known, was a U.S. territory governed under U.S. law and protected by its military personnel. On September 7, 1977, a treaty was signed between the United States and Panama whereby the Canal Zone, along with all buildings and assets, was to be turned over to Panama free of charge. This treaty extends until 12/31/99. See A. NORMAN, *THE PANAMA CANAL TREATIES OF 1977: A POLITICAL EVALUATION* 20-47 (1978).

<sup>47</sup> D. O'CONNELL, *INDEPENDENCE AND PROBLEMS OF STATE SUCCESSION* reprinted in O'BRIEN, *THE NEW INTERNATIONAL LAW AND DIPLOMACY* 7 (1965); K. Keith, *Succession to Bilateral Treaties by Seceding States*, 61 AM. J. OF INT'L L. 521 (1967).

<sup>48</sup> G. Verbit, *State Succession in the New Nations*, [1966] PROC. AM. SOC'Y INT'L L. 120.

<sup>49</sup> A. McNAIR, *THE LAW OF TREATIES* 601 (2d ed. 1961).

plete enforcement of various obligations of the previous sovereign.<sup>50</sup> Therefore, the new negativist attitudes rely on a practical assessment of state succession. As Professor O'Connell articulately stated:

a treaty with elaborate machinery for performance by the predecessor state is not as a matter of pure construction susceptible to performance by its successor, . . . . The conclusion that most treaties do not devolve upon successor states, is a conclusion yielded by the ordinary law of treaties that looks to the effective fulfillment of the parties' intentions—intentions ordinarily frustrated by a change of sovereignty.<sup>51</sup>

As a result, a treaty cannot be artificially binding upon a party which had no part in its origin, and does not possess the personal means to enforce it. This new negativist theory, to the extent that many treaties operate on a principle of *Rebus sic stantibus*,<sup>52</sup> has a great deal of merit to it. New states, formed by a merger, generally want to enter the international society of states on reasonable terms. Denouncing all previous treaties is not a self-serving alternative because most established states will subsequently view the successor state with low credibility and little good will.

The third modern concept is a two option compromise based on the traditional theories. These options take into consideration the interest of the old, established states which demand stability through succession of treaties, while protecting the emerging states which do not want to be burdened with obligations inconsistent with their new political and economic policies.

The first option focuses upon the differences between dispositive treaties and ordinary treaties and attempts to identify criteria which would help new states to determine whether a treaty should survive a change of sovereignty. Some commentators feel that law making treaties, such as transit rights, fishing boundaries, and water rights-treaties which advance the growth of international law and order are dispositively oriented and should transcend sovereignty because they reflect a transnational body of opinion.<sup>53</sup>

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<sup>50</sup> This concept is particularly true with respect to states which succeeded from colonial backgrounds. These states came into existence wary of any international law or norm which would require them to perpetuate policies of their former colonial masters. Verbit, *supra* note 48, at 122.

<sup>51</sup> D. O'CONNELL, *THE LAW OF STATE SUCCESSION* 15 (1956); D. O'CONNELL, *supra* note 47, at 14.

<sup>52</sup> The doctrine of *rebus sic stantibus* literally means, "in these circumstances." When applied to the devolution of treaties it mandates the validity of carryover treaties, so long as there are no material changes in the relevant facts and circumstances that would make performance of the agreement an inequitable responsibility. BLACK'S LAW DICTIONARY 1139 (5th ed. 1979); *Succession of States in Respect of Treaties*, *supra* note 37, at 893.

<sup>53</sup> Jenks, *State Succession in Respect of Law Making Treaties*, [1952] BR. Y. B. INT'L

The second option has been labelled the Nyerere approach, after the Prime Minister of Tanganyika who theorized it.<sup>54</sup> This option calls for a unilateral statement from the successor state that all treaties binding upon the predecessor government will remain in effect for two years beyond the independence date. During this period each agreement is reevaluated for its consistency with current national goals. Those treaties which the government wishes to maintain are continued and prospectively renegotiated, while the balance of treaties are terminated after the grace period. This approach interjects rationality into a critical decision by allowing the new state to make in depth studies and careful choices regarding the respective treaties.

In general, the above principles apply to both bilateral and multilateral treaties. Yet there has been a stronger trend of continuity with respect to multilateral agreements since there are many parties at stake.<sup>55</sup> In each case, the successor state must look to the provisions and policies of the convention of which the predecessor state was a signatory. Usually the Secretary General of the United Nations is the depository for most of the conventions. Following the state succession he presents the new state with a list of treaties to which the predecessor state was a party and territorially bound. He then requests affirmation by the successor state as to which treaties it considers to still be in force.<sup>56</sup>

This polarization of theories has pitted the newly formed third world states against the old established states. Whereas the states that have been in existence for some period of time realize the importance of long term obligations, the newly evolved states simply see such responsibility as burdensome in their attempts to establish domestic credibility. These two opposing viewpoints must be resolved in order to solidify international law.

## V. CONSENSUAL MERGER AS PRACTICED IN THE MIDDLE EAST

The region of the world where most attempted unifications have taken place is the Middle East. Over the centuries many Middle East leaders have attempted to unify the various states into an all inclusive republic. The major obstacle has been that some states want complete

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L. 105 (1952); La Forest, *Towards a Reformulation of the Law of State Succession*, [1966] PROC. AM. SOC'Y INT'L L. 103 (1966), reprinted in Note, *Succession of States in Respect of Treaties*, *supra* note 37, at 894.

<sup>54</sup> J. Nyerere, *Problems of State Succession in Africa: Statement of the Prime Minister of Tanganyika*, 11 INT'L & COMP. LAW QUARTERLY 1210 (1962).

<sup>55</sup> 2 D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 229 (1967).

<sup>56</sup> INTERNATIONAL LAW ASSOCIATION, *THE EFFECT OF INDEPENDENCE ON TREATIES* 170-190 (1965).

unification, while others are only interested in a confederation government.

In 1945, as a result of a reawakening of a need for Arab unity, the Arab League was founded.<sup>57</sup> It was made up of almost all of the existing Arab states and its purpose was to unite the Arab nations both economically and militarily. Though the philosophy of the Arab League remains, few of its policies were ever implemented. In the mid 1950s, Col. Gamal Abdel Nasser, President of Egypt, began advocating the fundamentals of pan-Arabism. A rift soon developed, however, when some of the larger Arab countries signed the Baghdad Pact, an alternative alliance, thereby isolating Egypt.<sup>58</sup> Nasser went ahead with his unification plan by merging with the Syrian Arab Republic to form the United Arab Republic.

The U.A.R., the only modern Mideast merger to proceed with implementation of some of its policies, was recognized in the international community as a successor state. It will be useful for analysis in that it provides a good example of the necessary elements required for a successful merger.

As it can be imagined it is very difficult and complicated to unify two independent, functioning states. Each has its own assets, liabilities, and established policies which represent their military, economic, and social capabilities. The U.A.R.'s components, Egypt and Syria, were countries with a history and culture completely independent of one another. Syria's economy was operated by an educated merchant middle class in a free enterprise system, which had functioned effectively for hundreds of years.<sup>59</sup> At the same time, her agricultural community was run by small to medium size landowners made up of tribesman and other minorities.<sup>60</sup> On the other hand, Egypt was a completely socialized dictatorial state. Nasser, assuming Syria was ready for his modification process, known as Egyptianization, began implementing socialization policies by nationalizing parts of the Syrian economic sector. Similarly, as part of his agrarian reform, he confiscated land from the respective owners in the Syrian territory causing great resentment. Additional Syrian resentment surfaced when most of the top leadership positions, in the merged military, were staffed by Egyptian Officers.<sup>61</sup> Many of the conflicts were exaggerated as a

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<sup>57</sup> One of the major reasons for the creation of the Arab League was the resettling of Palestine. It was felt that if a united stand was taken against the establishment of a Jewish state, both from a military and diplomatic standpoint, then emigration of Jews to the area would be halted and the British-Palestinian control would be maintained. Lenczowski, *Syria: A Crises in Arab Unity*, CURRENT HISTORY 200 (April, 1962).

<sup>58</sup> The states which joined the Baghdad Pact were Iraq, Iran, Pakistan, Great Britain, and Turkey, Ateyo, *Arab Politics and Pacts*, CURRENT HISTORY 339 (June, 1956).

<sup>59</sup> *Syria: A Revolt at the Top*, 193 NATION 239 (October 14, 1961).

<sup>60</sup> Ellis, *Can Nasser Hold Syria?*, 24 REPORTER 33-35 (March 16, 1961).

<sup>61</sup> *Syria: A Revolt at the Top*, *supra* note 59, at 242.

result of each state having its own historical traditions which developed into different modern day environments.<sup>62</sup> Other examples of conflict were: (1) Egyptians were accustomed to a lack of political freedom, while Syrians thrived on a political structure wrought with turmoil, as different political parties strove to attain control; (2) Egypt and Syria's culture had different roots based on British and French rule respectively, (3) Each state had significant minority problems which caused various weaknesses in their overall social and political structure; and (4) a lack of a common physical border between the two territories presented strategical problems for the military, and also prevented the natural socialization processes from taking place because of the limited physical contact between the peoples of both states.

By 1961 the split between the two territories was irreparable. A group of Syrian military personnel staged a quick, but effective coup retaking control of the Syrian territory.<sup>63</sup> Nasser made a brief attempt to retake Syria, but quickly retreated realizing the futility of a reconciliation. Once again, varying concepts of unification resulted in an unsuccessful merger.<sup>64</sup>

As the example of the U.A.R. illustrates, it is not an easy task to merge two independent sovereigns when both parties' interests have to be catered to equally. It is a much simpler process to acquire territory by purchase, conquest, or annexation, because then societal changes are strictly made to suit the acquiror's needs.

## VI. APPLICATION OF CUSTOMARY INTERNATIONAL LAW TO THE U.A.R. MERGER

As stated above, upon the consensual merger of Syria and Egypt in 1958, a new government was set up comprised of an executive branch with authority vested in President Nasser, and a single Parliament made up of delegates from both regions. Even though the successor state was publicly proclaimed as a single international personality, each region maintained certain independent power.<sup>65</sup> The draftsman of the U.A.R. Provisional Constitution realized the importance of international recognition of the new state as a unitary body. In order to assure this recognition, an attempt was made to appease the international community by adding the contents of Article 69 into the Provisional Constitution. This

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<sup>62</sup> K. DEUTSCH, *NATION BUILDING* 113 (1963).

<sup>63</sup> Lenczowski, *supra* note 577, at 202.

<sup>64</sup> This Note, note 2.

<sup>65</sup> For example, there was a certain amount of economic autonomy in the two territories, only because the banking and merchant foundations of Syria were so different than those of Egypt. It would have been physically impossible to unite the two systems in one broad sweep without causing financial havoc to both regions.

article stated that:

the coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between each of Syria and Egypt, and the foreign powers. Those treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their inclusion according to the rules and regulations of international law.<sup>66</sup>

The international community of states was officially informed of this policy when the Foreign Minister of the U.A.R. sent a letter to the Secretary General of the United Nations, restating the above principles.<sup>67</sup> The international reaction was well represented by the U.S. government's response to the U.A.R. The Department of State took positive notice of Article 69 because it affirmed the international status quo by not abrogating any previous obligation the predecessor states had incurred.<sup>68</sup> In addition, the United States felt that it would be unfair and a potential disadvantage to both original signatories of a treaty to allow the other one-half of the new state to be bound by a treaty to which its merging partner had been a party. The obvious solution to this situation was that once the union was achieved, the successor state would sit down and renegotiate the treaty on terms which encompassed the whole state or which completely terminated the agreement. Although it was not expressly set forth in the Provisional Constitution, this policy was applied to both multilateral and bilateral agreements.<sup>69</sup>

Subsequent to the letter sent to the Secretary General regarding treaty rights came a letter officially informing the U.N. of the will of the Egyptian and Syrian peoples to unite, and declaring the U.A.R. as a single member of the U.N. bound by its charter.<sup>70</sup> The whole procedure of membership was treated by the General Assembly as a mere administrative change since each of the preunion states had been original members of the U.N. in their own right. In addition, the fact that the U.A.R. unified so gracefully, accepting all obligations of the predecessor states by acting on a theory of continuity, helped dissipate any ill will in interna-

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<sup>66</sup> Destour (constitution) art. 69 *United Arab Republic Provisional Constitution*, 1958, amended 1961).

<sup>67</sup> 13 U.N. SCOR, Supp. (Jan.-Mar. 1958) 31, U.N. Doc. A/CN.4/149, S/3976 (1958).

<sup>68</sup> 38 Dep't State Bull. 418 (1958).

<sup>69</sup> All of the following treaties were in effect between the United States and Egypt or Syria before the merger. They maintained their operational status during the union, and had it lasted longer they probably would have been subjected to revision. See Civil Aviation, Use of Payne Field, June 15, 1946, United States-Egypt, U.S.T. 363, T.I.A.S. No. 2397; see also Informational Media Guaranty Program, March 3 - March 7, 1955, U.S.-Egypt, 6 U.S.T. 691, T.I.A.S. No. 3206; Air Transport Services Agreement, October 22, 1956, U.S.-Syrian Arab Republic, 8 U.S.T. 673, T.I.A.S. No. 3818.

<sup>70</sup> 13 U.N. SCOR, Supp. (Jan.-Mar. 1958) 13, U.N. Doc. S/3976, annex II (1958).



tional circles.<sup>71</sup>

Upon dissolution of the U.A.R. in 1961, when the constituent elements returned to independent sovereign states, and the central entity disappeared, all international obligations returned to their pre-union status. Article 69 which provided for continuing validity of pre-union treaties estopped Syria and Egypt from now denying their validity.<sup>72</sup> In addition, the few bilateral treaties promulgated and ratified during the union were split into two bilateral treaties; one between Syria and the foreign state, and the other between Egypt and the foreign state.<sup>73</sup>

The reapplication of the Syrian Arab Republic to the United Nations in 1961, as an independent member, also was treated in an abbreviated fashion. Premier Kouzbari, of Syria, sent a letter to the General Secretary requesting a seat under independent status because its relationship with Egypt had terminated. He claimed, under Article III of the United Nations Charter, that Syria was an original member who continued that status under the guise of the U.A.R., from 1958 to 1961. Since there were no objections by member states, Syria was readmitted without formality.<sup>74</sup>

Since the Egyptian territory of the U.A.R. retained the merger name, United Arab Republic, there were no adjustments to be made in its United Nations status.<sup>75</sup>

## VII. CODIFICATION OF INTERNATIONAL LAW OF STATE SUCCESSION WITH RESPECT TO TREATIES

The purpose of modern international law is to establish compromise laws to which all states will adhere, thus, the trend has been to codify such arguments to give them enforceable substance. It is an endless task with countless obstacles along the path, but such codification is vital in order to overcome the indecisiveness of current customary international law. The most serious threats to the accomplishment of this job are the

<sup>71</sup> Under most circumstances non-members or successor states must follow the regular procedure for admission. It is a long drawn out process of acceptance by the General Assembly following a recommendation from the Security Council. See U.N. CHARTER, art. 4, para. 1,2.

<sup>72</sup> Destour (constitution) art. 69 (*United Arab Republic Provisional Constitution*, 1958, amended 1961).

<sup>73</sup> For example, the Surplus Agricultural Commodities Agreement between the United States and the United Arab Republic signed in 1960, was renegotiated between Syria and the U.S. following the dissolution in 1961. Surplus Agricultural Commodities Agreement, Aug. 1, 1960, United States-United Arab Republic, 11 U.S.T. 1931, T.I.A.S. No. 4542; Agricultural Commodities Agreement, November 9, 1962, United States-Syria, 13 U.S.T. 97, T.I.A.S. No. 4944.

<sup>74</sup> U.N. Doc. A/CN. 4/149, 11 (1961).

<sup>75</sup> The U.N. treated the dissolution of the U.A.R. as a quasi-secession by Syria, thereby leaving the Egyptian portion of the state intact. O. UDOKANG, *supra* note 20, at 296.

various interests to be dealt with; Communist states versus Western bloc states, industrialized states versus third world states, old world, established states versus newly evolved states, and the list goes on. Because each state protects its own interests, whether that involves preservation of the status quo, or radical departures from present custom, the establishment of an acceptable compromise is a very precarious venture.

In 1949 the United Nations formed the International Law Commission, as a committee to investigate the idea of codifying international law in various fields.<sup>76</sup> In 1962, soon after the dissolution of the U.A.R., a subcommittee was named to debate and draft a proposal of rules regarding the rights and responsibilities of successive states and governments.<sup>77</sup> The subcommittee's work was divided into subsections, one of which was succession of states with respect to treaties.<sup>78</sup> After many years of arduous debate, a final draft was completed and submitted to the International Law Commission.<sup>79</sup> Upon circulation of the draft to the United Nations body of states, and subsequent to solicitation of comments, the United Nations Conference on the Succession of States in Respect of Treaties was convened in Vienna. Finally on August 23, 1978, the draft was adopted subject to ratification by the member states.<sup>80</sup>

The final draft was heavily influenced by the recent influx of third world states into the United Nations. These developing countries strongly advocated self-determination, equality of states, and general non-interference in domestic affairs.<sup>81</sup> As a result, the negativist doctrine is utilized throughout the document. However, one variation of this theme is found in the relevant consensual merger section where a modified continuity doctrine emerges. Thus, Article 31 states that any treaty in force as of the date of unification between either of the predecessor states and a third party continues to bind the successor state by way of *ipso jure* continuity, unless: (1) the successor state and third party state agree to terminate such agreement, or (2) the application of the treaty would be incompatible with the object or purpose of uniting the two predecessor states, or (3) the unification radically changes the operation or effects of the treaty.<sup>82</sup> The second abrogation mechanism has undertones of the Nyerere doc-

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<sup>76</sup> U.N. Doc. A/CN. 4/SEC. A/1949 (1949).

<sup>77</sup> 17 U.N. GAOR, Supp. (No. 9) 32 U.N. Doc. A/5209 (1962).

<sup>78</sup> 23 U.N. GAOR, Supp. (No. 9) 24, U.N. Doc. A/7209/Rev. 1 (1969).

<sup>79</sup> 27 U.N. GAOR Supp. (No. 10) 9 U.N. Doc. A/8710/Rev. 1 (1972).

<sup>80</sup> Approximately 94 member states participated in the Vienna Conference. As of February 1, 1981, 20 countries were signatories, while only five states have ratified the instrument. Those states are Iraq, Uruguay, Seychelles, Yugoslavia, and Ethiopia. According to Article 49 of the Convention, upon the fifteenth state ratifying the treaty, it will enter into force 30 days later.

<sup>81</sup> 27 U.N. GAOR Supp. (No. 10) 6-7, U.N. Doc. A/8710/Rev. 1 (1972).

<sup>82</sup> Vienna Convention, *supra* note 1, at art. 31.

trine, and only time and experience will show how narrowly or broadly this language will be construed. Due to these provisions, the issue of recognition of pre-merger treaties becomes a unilateral decision of the successor state. If the state feels that the treaty 'violates' its new policies, the treaty is terminated without any formal action.

An additional clause to this article states that treaties continuing in force following unification are enforceable only in the territory of the original state that was a party to the agreement.<sup>83</sup> The exception to this rule is that the successor state may notify the other treaty participant of its desire to apply the treaty to the entire successor state and if that state agrees to this overall assumption of the treaty, it will then be considered binding.

In the case of multilateral treaties, if the successor state wishes to fully incorporate the treaty, it must give important notice to the depositary of the convention.<sup>84</sup> Generally, the state must look to the instrument itself for requirements of incorporation since many multilateral agreements require unanimous consent to such a request. If approval is granted, the successor state as a whole becomes a signatory to the instrument.<sup>85</sup> Lastly, if certain treaties are in the approval or ratification stage at the time of the merger, the treaty in its frozen form succeeds to the new state subject to the same stipulated rules.<sup>86</sup>

The Vienna Convention, as a whole, integrates the clean slate/negativist doctrine. But, as shown above, an appropriate exception has been carved out by the International Law Commission for the section on consensual merger of states. One explanation for this exception is that since the predecessor states were established functioning states prior to the merger, it would be unfair to allow them to avoid international commitments by simply creating a new entity. The predecessor states are escaping from a past in which they had no control over national policymaking. The successor state is created from a carefully negotiated combination of two or more operating states. Thus, the successor state should be allowed to avoid previous obligations only within the narrow exceptions established by the Vienna Convention.

The Vienna Convention combines the U.A.R.'s Article 69 with the Nyerere Doctrine,<sup>87</sup> to produce a strong policy for continuity. However, it contradictorily allows an escape from international liability if a particu-

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<sup>83</sup> This provision has the same effect as Article 69 of the U.A.R. Provisional Constitution. See *Destour, U.A.R. Constitution*, *supra* note 66; See also Vienna Convention, *supra* note 1, at art. 31.

<sup>84</sup> Vienna Convention, *supra* note 1, at art. 32, 33.

<sup>85</sup> 27 U.N. GAOR, Supp. (No. 10) 33, U.N. Doc. A/8710/Rev. 1 (1972).

<sup>86</sup> Vienna Convention, *supra* note 1.

<sup>87</sup> *U.A.R. Constitution*, *supra* note 64; J. NYERERE, *supra* note 54.

lar treaty is diametrically opposed to the new policies of the successor state. Overall, the codification of customary international law on consensual merger of states appears to have been successfully accomplished, and done in a fair and equitable way in which the United Nations can justifiably enforce. However, as is true with all actions taken by the United Nations, the problem is one of practicality of enforcement. While the Convention provides for sanctions against a new state which refuses to obey international norms, most member states probably cannot agree on an appropriate form of punishment. The bottom line with regard to international promulgation of laws is that such laws can only be as effective as the correlative power of enforcement.

### VIII. CONCLUSION

As the world progresses toward the end of the twentieth century most of the former nineteenth century colonies have achieved independence. As a result, although there will continue to be nationalistic struggles, there will be a significant increase in attempted consensual mergers of established states into larger regional powers. Leaders, in regions such as the Middle East, will attempt to unify peoples with similar ideological goals by advocating the force and power of large numbers.

Of course, in order for a merger to occur there needs to be specific catalysts for change. Economic problems, such as food and basic necessity shortages certainly are problems which plague even the oil rich states of the Middle East, and make a perfect fomenting force for radical change. Additionally, a propagandized common enemy, such as Israel and Egypt serve as an effective rallying call for unifying under one flag.

It is the author's opinion, however, that along with the increase in attempted mergers will come an equal amount of failures. States which have deeply rooted domestic problems will not automatically solve them with a gratuitous capital influx or a shipment of military hardware from a merger candidate. The many characteristics which make up one nation must be suitably matched to its receptor. States cannot and will not successfully unify on the basis of common ideological goals alone.

What this all means is greater instability at the international level as states frivolously change their international facade. With each alteration, one must look to the ties that are maintained, or dissolved, with third party states. Thus, is the importance of the Geneva Conference's codification of state succession law with respect to treaties. The International Law Commission has formulated laws which, on the basis of solicitation of criticism and debate, are the best possible compromises for the immediate future.

In a world which has the capability of destroying itself many times over, communication and respect for established rights must be a funda-

mental objective. The future of all nations depends on their adhering to these efforts at codifying international law so that each state understands its role in a balanced and stable international community.