

Afghanistan

*Transmitted by a note verbale of the Permanent Mission
to the United Nations received on 11 September 1963*

A. OBSERVATIONS

[The question of succession by Pakistan to British treaty rights and to the Anglo-Afghan Treaty for the establishment of neighbourly relations, signed at Kabul on 22 November 1921 — 1947 Referendum in Pakhtunistan — Colonial treaties — Scope of the study on the law of State succession to be undertaken by the International Law Commission]

1. At the conclusion of the Third Anglo-Afghan War of 1919, a treaty was negotiated and finally signed on 22 November 1921, in Kabul, by Mahmud Tarzi, Chief of the Afghan Mission, and Henry R. C. Dobbs, Chief of the British Mission, a copy of which is enclosed along with a supplementary letter attached to it. (See section B, below.) This treaty, as is noted in the Preamble, was a treaty of friendship between Afghanistan on the one hand and the British Government (not the Indian Government) on the other.

2. Article II of this treaty deals with the so-called Durand Line which was imposed on Afghanistan in 1893, for dividing the spheres of influence of Afghanistan and the United Kingdom in the Tribal Area mentioned in the colonial Durand Treaty¹ imposed by political and military force on Afghanistan. History is a witness to the purpose of the British in establishing certain spheres of influence, that is to say, the military purpose for the preservation of her Indian colony.

Article XIV of this treaty states:

“The provisions of this treaty shall come into force from the date of its signature, and shall remain in force for three years from that date. In case neither of the High Contracting Parties should have notified, twelve months before the expiration of the said three years, the intention to terminate it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it. This treaty shall come into force after the signatures of the Missions of the two Parties, and the two ratified copies of this shall be exchanged in Kabul within 2 1/2 months after the signatures.”

It was in accordance with this provision that Afghanistan, on 21 November 1953, notified the British Government of the termination of the Anglo-Afghan Treaty of 22 November 1921.

¹ De Martens, *Nouveau Recueil Général de Traités*, deuxième série, tome XXXIV, p. 646. Signed at Kabul on 12 November 1893.

3. When Pakistan came into being in August 1947, as a consequence of the division of India into India and Pakistan, she claimed to be successor to the treaty rights of the United Kingdom, and therefore to the Anglo-Afghan Treaty of 22 November 1921. Afghanistan maintains that this claim is legally unfounded on the following grounds:

(a) Pakistan is not a successor to British treaty rights because Pakistan is a new State. In accordance with international law, when a part of a State breaks off and becomes a new State, it does not have the treaty rights and obligations of the old State. It was on this basis that the Secretary-General of the United Nations, on the request of Pakistan for admission to membership in the United Nations, denied the right of succession,¹ and the General Assembly and the Security Council acted on the question of the request of Pakistan as a new State, undertaking completely new obligations.

(b) Even if Pakistan were a successor to British treaty rights, which she is not, and Afghanistan having implemented its right as a party to the Treaty under Article XIV of the Treaty of 22 November 1921, no treaty remains to which Pakistan can succeed.

4. No bilateral treaty will be transferable to a third party by the unilateral action of one party to a treaty without the consent of the other original party to the treaty, and there is no provision in the 1921 treaty under which Afghanistan has given prior acceptance to the transfer of the treaty to a third party, in this case, Pakistan.

5. The Indian Independence Act of 15 August 1947 also states in regard to the Pakhtun areas of the so-called North-West Frontier Province of India, which were separated from Afghanistan by British military and colonial intervention, that a referendum will take place, and thus all treaties between Afghanistan and Britain concerning this region were terminated. (See section D, below.) It should be mentioned that the referendum of 1947, contrary to the Indian Independence Act, did not leave any alternative open to the Pakhtun people to vote for their national independence, as demanded by their political leaders, and they were forced to choose, against their natural aspirations, annexation to India or Pakistan. This arrangement was opposed to the last moment, and more than fifty per cent of the population in the so-called administered part did not participate in the referendum. Such forcible

¹ The following extract from the legal opinion by the Secretary-General was annexed by the Government of Afghanistan to its observations:

"1. From the viewpoint of international law, the situation is one in which part of an existing State breaks off and becomes a new State. On this analysis there is no change in the international status of India; it continues as a State with all treaty rights and obligations of membership in the United Nations. The territory which breaks off, Pakistan, will be a new State, it will not have the treaty rights and obligations of the old State, and it will not of course have membership in the United Nations.

"In international law the situation is analogous to the separation of the Irish Free State from Britain, and of Belgium from the Netherlands. In these cases the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before." [*Legal opinion of 8 August 1947 by the Assistant Secretary-General for Legal Affairs, approved and made public by the Secretary-General in United Nations Press Release PM/473, 12 August 1947 (Yearbook of the International Law Commission, 1962, vol. II, p. 101).*]

imposition make the so-called referendum completely void of any legal or human value. It should also be noted here that this "referendum" was thus imposed in occupied Pakhtunistan alone, with no consideration of the views of Free Pakhtunistan. The majority of the people of occupied Pakhtunistan, and the predominant party which was then in office, boycotted the referendum because of its strictly conditioned nature. Any results claimed by such a referendum are therefore null and void, and can by no means be recognized as the decision of the Pakhtunistan nation. It was a colonial decision enforced under the colonial election act of 1925.

6. Afghanistan believes that colonial treaties which have been imposed by military force are invalid on the basis of the new waves of emancipation of colonial peoples in recent years, and particularly after the adoption of resolutions 1514 [(XV), Declaration on the granting of independence to colonial countries and peoples] and 1654 [(XVI), The situation with regard to the implementation of resolution 1514 (XV)] by the General Assembly of the United Nations.

7. Afghanistan believes that the colonial treaties of Lahore, 1838,¹ Gandamak, 1879,² and finally of Kabul [establishing the Durand Line between India and Afghanistan], 1893,³ because of the circumstances under which they were imposed on Afghanistan, are illegal according to various principles of international law, particularly those adopted by the International Law Commission during its fifteenth session, contained in article 33 on fraud, articles 35 and 36 on coercion of States or their representatives, article 37 on *jus cogens*, article 38 on termination of treaties through the operation of their own provisions, article 43 on impossibility of performance and article 44 on fundamental change of circumstances (*rebus sic stantibus*).⁴

8. Afghanistan generally believes that the International Law Commission should take into account the fact that in the law of treaties a new field has emerged, the law of State succession. World War II brought a number of frontier changes, and many nations in Asia and Africa and

¹ De Martens, *Nouveau Recueil de Traités*, tome XV, p. 620. Signed on 26 June 1838.

² De Martens, *Nouveau Recueil Général de Traités*, deuxième série, tome IV, p. 536. Signed on 26 May 1879.

³ *Ibid.*, tome XXXIV, p. 646. Signed on 12 November 1893.

⁴ See *Yearbook of the International Law Commission*, 1963, Vol. II, pp. 194-211. In final text of draft articles on the Law of Treaties adopted by the International Law Commission, at its eighteenth session (1966), these articles were revised and renumbered as follows: article 33 (Fraud) became article 46; article 35 (Coercion of a representative of the State) became article 48; article 36 (Coercion of a State by the threat or use of force) became article 49; article 37 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)) became article 50; article 38 (Termination of treaties through the operation of their own provisions) became article 51 (Termination of or withdrawal from a treaty by consent of the parties) and article 52 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force); article 43 (Supervising impossibility of performance) became article 58; and article 44 (Fundamental change of circumstances) became article 59. [See *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1)*, pp. 73-78 and 84-88.]

other parts of the world achieved independence and assumed new obligations in the expanding community of nations. A number of frontier and territorial changes took place by force or by agreement. New circumstances were created and it became necessary to find the effects of treaties after cession, annexation, fusion with another State, entry into federal union, dismemberment, partition, and finally separation or secession. The question of the codification of the law of State succession therefore needs very careful study. The solution of such problems cannot be left to the mercy of the strong nations, or the bargaining of military powers. As in private law such problems have found solution, it is much more important to find means and devices for the solution of this important question. The International Law Commission should search practical devices. The term "State succession" should not be used vaguely or loosely, but should be used in questions of territorial re-organization accompanied by a change of sovereignty. The scope of the study on State succession should be limited and precise, and must cover the essential elements which are necessary for the creation of practical devices to solve the present difficulties arising out of the results of colonialism and the imposition of territorial and boundary changes which were contrary to the will of the inhabitants and in contradiction to the right of self-determination. It is important also that these devices be studied on the basis of those treaties of "personal" nature, because the treaty falls to the ground at the same time as the State. This question is particularly important because the fate of many treaties concluded by colonial powers depends on it. The aftermath of independence has created many problems which should be solved. It is also necessary for any special rapporteur to search on the main road, which is the "personality of the State", and changed conditions and the will of the contracting parties, about the right of succession.

B. TREATIES

TREATY BETWEEN THE GOVERNMENT OF AFGHANISTAN AND HIS BRITANNIC MAJESTY'S GOVERNMENT FOR THE ESTABLISHMENT OF NEIGHBOURLY RELATIONS. SIGNED AT KABUL, ON 22 NOVEMBER 1921¹

Preamble

The British Government and the Government of Afghanistan with a view to the establishment of neighbourly relations between them have agreed to the Articles written hereunder whereto the undersigned duly authorised to that effect have set their seals:

Article I

The British Government and the Government of Afghanistan mutually certify and respect each with regard to the other all rights of internal and external independence.

¹ League of Nations, *Treaty Series*, Vol. XIV, p. 47. Articles III to XIII, which are not reproduced here, provide for the rights and obligations of the parties relating to such matters as diplomatic and consular relations, importation of goods and arms, customs exemption, trade agents, postal arrangements and an advance notice on military operations to be given to frontier tribes.

Article II

The two High Contracting Parties mutually accept the Indo-Afghan frontier as accepted by the Afghan Government under Article 5 of the Treaty concluded at Rawalpindi on August 8, 1919, corresponding to the 11th Ziqada, 1337 Hisra and also the boundary West of the Khiber laid down by the British Commission in the months of August and September 1919, pursuant to the said Article, and shown on the map attached to this treaty by a black chain line; subject only to the realignment set forth in Schedule I annexed, which has been agreed upon in order to include within the boundaries of Afghanistan the place known as Tor Kham, and the whole bed of the Kabul River between Shilman Khwala Banda and Palosai and which is shown on the said map by a red chain line. The British Government agrees that the Afghan authorities shall be permitted to draw water in reasonable quantities through a pipe which shall be provided by the British Government from Landi Khana for the use of Afghan subjects at Tor Kham, and the Government of Afghanistan agrees that British officers and tribesmen living on the British side of the boundary shall be permitted without let or hindrance to use the aforesaid portion of the Kabul River for purposes of navigation and that all existing rights of irrigation from the aforesaid portion of the river shall be continued to British subjects.

...

Article XIV

[See above, section A, paragraph 2]

APPENDIX

...

IV. *Letter from the British Representative to Sardar-i-Ala, the Afghan Foreign Minister*

After compliments — As the conditions of the frontier tribes of the two Governments are of interest to the Government of Afghanistan I inform you that the British Government entertains feelings of good will towards all the frontier tribes and has every intention of treating them generously, provided they abstain from outrages against the inhabitants of India. I hope that this letter will cause you satisfaction. (Usual ending.)

C. DECLARATIONS

STATEMENT BY THE GOVERNMENT OF THE UNITED KINGDOM, 3 JUNE 1947

...

North-West Frontier Province

11. The position of the North-West Frontier Province is exceptional. Two of the three representatives of this Province are already participating in the existing Constituent Assembly. But it is clear, in view of its geographical situation, and other considerations, that if the whole or any part of the Punjab decides not to join the existing Constituent Assembly, it will be necessary to give the North-West Frontier Province an opportunity to reconsider its position. Accordingly, in such an event, a referen-

dum will be made to the electors of the present Legislative Assembly in the North-West Frontier Province to choose which of the alternatives mentioned in paragraph 4 above they wish to adopt. The referendum will be held under the aegis of the Governor-General and in consultation with the provincial Government.

. . .

The Tribes of the North-West Frontier

17. Agreements with tribes of the North-West Frontier of India will have to be negotiated by the appropriate successor authority.

D. LAWS AND DECREES

INDIAN INDEPENDENCE ACT, 1947

[See below PAKISTAN, section B. Laws and Decrees, 1. Indian Independence Act, 1947, 2(2) and 7(1)]

Argentina

Transmitted by a letter dated 13 March 1963 of the Permanent Mission to the United Nations¹

A. OBSERVATIONS

[Succession of States in the case of partition of British India — Extradition Treaty of 22 May 1889 between Argentina and the United Kingdom extended to Pakistan by virtue of a new agreement — The question of India's claim to enjoy the benefits of the Treaty of Amity, Commerce and Navigation of 1825 between Argentina and the United Kingdom]

1. The problems which the Argentine Government has encountered in the matter of succession of States relate specifically to the independence of India and Pakistan and to the partition between those two countries.

2. In 1953 it was agreed with the Government of Pakistan that the extradition treaty signed with the United Kingdom in 1889² would be regarded as being in force in relation to Pakistan. It should be explained, however, that the Argentine Ministry of Foreign Affairs had previously, in 1952, informed the Embassy of the Republic at Washington that the extradition treaty concluded between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland could not be considered to be in force with Pakistan because the latter was an independent State. The following year, the Government of Pakistan requested the Argentine Government to reconsider the view it had expressed concerning the validity of the extradition treaty. This approach was regarded by the Argentine Government as the expression of a wish that the treaty in question should remain in force between Pakistan and

¹ Original Spanish. Translation by the Secretariat of the United Nations.

² De Martens, *Nouveau Recueil Général de Traité*s, deuxième série, tome XX, p. 193. Signed at Buenos Aires on 22 May 1889.