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State Succession to International Responsibility

Patrick Dumberry

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State Succession to International Responsibility

By

Patrick Dumberry

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CONTENTS

[A detailed table of Contents is found at the end of this study]

PART IV
GENERAL CONCLUSION

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This study is the result of over five years of research. It is a slightly modified version of my Ph.D. thesis submitted in February 2006 to the Graduate Institute of International Studies in Geneva, Switzerland.

I would like to dedicate this study to my parents. They gave me the insatiable will to never stop learning. I am also very grateful for their unconditional support in my decision to study abroad. Many thanks as well to my friends in both Geneva and Montreal who have always been there for me over the years. Special thanks to Ann-Julie for her love and support in the last miles of this journey.

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Patrick Dumberry
Montreal, Canada
March 2007

ABBREVIATIONS

A.F.D.I.	Annuaire français de droit international
African Y.I.L.	African Yearbook of International Law
A.J.I.L.	American Journal of International law
A.L.J.	Australian Law Journal
Am.J.Comp.L.	American Journal of Comparative Law
Am.U.J.Int'l L.& Pol'y	American University Journal of International Law and Policy
Annuaire I.D.I.	Annuaire de l'Institut de Droit international
Annual Digest	Annual Digest of Public International Law Cases: Being a Selection from the Decisions of International and National Courts and Tribunals, ed. by Sir Hersch Lauterpacht, London, Longmans, Green & Co., 1919–1949
Ariz.J.Int'l & Comp.L.	Arizona Journal of International and Comparative Law
A.S.D.I.	Annuaire suisse de droit international
ATF	Arrêts du Tribunal Fédéral Suisse (judgment of the Swiss Supreme Court)
Baltic Y.I.L.	Baltic Yearbook of International Law
Berkeley J. Int'l L.	Berkeley Journal of International Law
BGBl.	Bundesgesetzblatt (German Federal Law Gazette)
Brigitte STERN, Responsabilité	Brigitte STERN, "Responsabilité internationale et succession d'Etats", in: Laurence BOISSON DE CHAZOURNES & Vera GOWLLAND-DEBBAS (eds.), *The International Legal System in Quest of Equity and Universality/L'ordre juridique international, un système en quête d'équité et d'universalité. Liber amicorum Georges Abi-Saab*, The Hague, M. Nijhoff, 2001, pp. 327–355
British Y.I.L.	British Yearbook of International Law
Bull. C.E.	Bulletin des communautés européennes
BVerfGE	Bundesverfassungsgericht
Can.Bar Rev.	Canadian Bar Review
Canadian Y.I.L.	Canadian Yearbook of International Law

Cecil J.B. HURST	Cecil J.B. HURST, "State Succession in Matters of Tort", 5 *British Y.I.L.*, 1924, pp. 163–178
Chinese J.I.L.	Chinese Journal of International Law
C.I.S.	Commonwealth of Independent States
C.M.L. Rev.	Common Market Law Review
Colum.L.Rev.	Columbia Law Review
Comp. & Int'l L.J. S. Afr.	Comparative & International Law Journal of Southern Africa
Conn.L.Rev.	Connecticut Law Review
Cornell L.Q.	Cornell Law Quarterly
Dick.J.Int'l L.	Dickinson Journal of International Law
D.P. O'CONNELL, *State Succession*, vol. I	D.P. O'CONNELL, *State Succession in Municipal Law and International Law*, vol. I, Cambridge, Cambridge Univ. Press, 1967
E.E.C.R.	East European Constitutional Review
E.J.I.L.	European Journal of International Law
Emory Int'l L.Rev.	Emory International Law Review
EuGRZ	Europäische Grundrechte-Zeitschrift
F.F.	Feuille fédérale (Switzerland legislative acts)
Finnish Y.I.L.	Finnish Yearbook of International Law
F.L.N.	Front de libération nationale
F.O.C.P.	United Kingdom Foreign Office Confidential Paper
F.R.Y.	Federal Republic of Yugoslavia
F.R.G.	Federal Republic of Germany
For. Rel.	American State Papers, Foreign Relations, Foreign Relations (United States)
Ga.J.Int'l.& Comp.L.	Georgia Journal of International and Comparative law
G.D.R.	German Democratic Republic
Georgia L.R.	Georgia Law Review
Geo. Wash. Int'l L. Rev.	George Washington International Law Review
German Y.I.L.	German Yearbook of International Law
G.P.O.	Government Printing Office (United States)
Harv.Int'l L.J.	Harvard International Law Journal
Harv.L.Rev.	Harvard Law Review
Hastings Int'l & Comp.L.Rev.	Hastings International and Comparative Law Review
Hawaiian Claims case	*F.H. Redward and Others (Great Britain) v. United States*, U.S.-Great Britain Arbitral Commission, Award of 10 November 1925, in: *U.N.R.I.A.A.*, vol. 6, p. 157; in: 20 *A.J.I.L.*, 1926, p. 382; in: *Annual Digest*, 1925–1926, case no. 59, p. 80
Hazem M. ATLAM	Hazem M. ATLAM, *Succession d'Etats et continuité en matière de responsabilité internationale*, doctoral thesis, Université de droit, d'économie et des sciences d'Aix-Marseille (France), 1986, 526 p

H.J.L.P.	Hawaiian Journal of Law and Politics
I.C.J.	International Court of Justice
I.C.J. Reports	International Court of Justice Reports of Judgments, Advisory Opinions and Orders
I.C.L.Q.	International and Comparative Law Quarterly
ICSID Rev.	ICSID Review—Foreign Investment Law Journal
I.L.C.	International Law Commission
I.L.M.	International Legal Materials, Washington, American Society of International Law
I.L.R.	International Law Reports
Indian J.I.L.	Indian Journal of International Law
Int'l J. Hum. Rts.	International Journal of Human Rights
Int'l Law	International Lawyer
Iran-U.S. C.T.R.	Iran-United States Claims Tribunal Reports, several vols. Cambridge, Grotius Publications Ltd., 1990
Jap.Ann.Int'l L.	Japanese Annual of International Law
J.D.I.	Journal du droit international (Clunet)
Jean Philippe MONNIER	Jean Philippe MONNIER, "La succession d'Etats en matière de responsabilité internationale", 8 *A.F.D.I.*, 1962, pp. 65–90
J.H.W. VERZIJL	J.H.W. VERZIJL *International Law in Historical Perspective*, t. VII *(State Succession)*, Leiden, A.W. Sijthoff, 1974
J.Int'l Econ.L.	Journal of International Economic Law
J.O.R.F.	Journal Officiel de la République Française (France)
La.L.Rev.	Louisiana Law Review
Leiden J.I.L.	Leiden Journal of International Law
Lesotho L.J.	Lesotho Law Journal
Lighthouse Arbitration case	*Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d'arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce*, French-Greek Arbitral Tribunal, Award of 24/27 July 1956, in: *U.N.R.I.A.A.*, vol. 12, p. 155; in: 9 *R.H.D.I.*, 1956, p. 176; in: 23 *I.L.R.*, 1956, p. 81
L.N.T.S.	League of Nations Treaty Series
Loy.L.A.Int'l & Comp.L.Rev.	Loyola of Los Angeles International and Comparative Law Review
M.A.T.s	Mixed Arbitral Tribunals
Max Planck Yrbk. U.N.L.	Max Planck Yearbook of United Nations Law
Md.L.Rev.	Maryland Law Review
Mich.J.Int'l L.	Michigan Journal of International Law

Michael John VOLKOVITSCH	Michael John VOLKOVITSCH, "Righting Wrongs: Toward a New Theory of State Succession to Responsibility for International Delicts", 92(8) *Colum. L.Rev.*, 1992, pp. 2162–2214
Miriam PETERSCHMITT	Miriam PETERSCHMITT, *La succession d'Etats et la responsabilité internationale pour fait illicite*, Mémoire de DES, Université de Genève/Institut Universitaire de hautes études internationales (Switzerland), 2001, 87 p
Netherlands I.L.R.	Netherlands International Law Review
Netherlands Y.I.L.	Netherlands Yearbook of International Law
NiemeyersZ	Niemeyers Zeitschrift für internationales Recht
N.J.W.	Neue Juristische Wochenschrift
Nordic J.I.L.	Nordic Journal of International Law
N.Y.Sch.J.Int'l.& Comp.L.	New York Law School Journal of International and Comparative Law
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law & Politics
O.A.S.	Organisation armée secrète
Oxford J.Legal Stud.	Oxford Journal of Legal Studies
ÖBGBl.	Österreichische Bundesgesetzblatt (Austrian Federal Law Gazette)
Ö.Z.ö.R.	Österreichische Zeitschrift für öffentliches Recht
Ö.Z.ö.R.V.	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (Austrian Journal of Public and International Law)
Pace Int'l L.Rev.	Pace International Law Review
P.C.A.	Permanent Court of Arbitration
P.C.I.J.	Permanent Court of International Justice
R.A.A.C.E.	Recueil des arrêts et avis du Conseil d'Etat (Belgium)
R.B.D.I.	Revue belge de droit international
R.C.A.D.I.	Collected Courses of the Hague Academy of International Law
R.D.H.	Revue des droits de l'homme
R.D.I.	Rivista de diritto internazionale
R.D.I.L.C.	Revue de droit international et de législation comparée
R.E. Brown case	*R.E. Brown (United States) v. Great Britain*, U.S.-Great Britain Arbitral Commission, Award of 23 November 1923, in: *U.N.R.I.A.A.*, vol. 6, p. 120; in: 5 *British Y.I.L.*, 1924, p. 210; in: *A.J.I.L.*, 1925, p. 193; in: *Annual Digest*, 1923–1924, case no. 35, p. 69
Recueil des décisions des tribunaux arbitraux mixtes	Recueil des décisions des tribunaux arbitraux mixtes institués par le Traité de Paix, 10 vols., Paris, Librairie de la société du recueil sirey, 1922–1930

Recueil Lebon	Recueil des décisions du Conseil d'Etat (France)
R.E.D.I.	Revista Española de Derecho Internacional
R.F.D.A.	Revue française de droit administratif
Rev. égyptienne d.i.	Revue égyptienne de droit international
R.G.D.I.P.	Revue générale de droit international public
R.H.D.I.	Revue hellénique de droit international
R.J.D.A.	Recueil de jurisprudence du droit administratif et du Conseil d'Etat (Belgium)
R.J.P.U.F.	Revue juridique et politique de l'Union française
R.U.D.H.	Revue universelle des droits de l'homme
S.F.R.Y.	Socialist Federal Republic of Yugoslavia
SJ Res.	Senate Joint Resolution (United States)
South African Y.I.L.	South African Yearbook of International Law
St. Thomas L.R.	St. Thomas Law Review
Trb.	Tractatenblad van het Koninkrijk der Nederlanden (Treaty Journal of the Kingdom of the Netherlands)
Trans. Grot. Soc.	Transactions of the Grotius Society
U.C. Davis L. Rev.	University of California, Davis, Law Review
U.C.L.A. J.I.L.F.A.	University of California in Los Angeles Journal of International Law & Foreign Affairs
U.K.T.S.	United Kingdom Treaty Series
U.Haw.L.Rev.	University of Hawaii Law Review
U.N.	United Nations
U.N.C.C.	United Nations Compensation Commission
U.N.T.S.	United Nations Treaty Series
U.S.S.R.	Union of Soviet Socialist Republics
U.S.T.S.	United States Treaty Series
U.S.T.	United States Treaties and Other International Agreements
U.Ill.L.Rev.	University of Illinois Law Review
U.N.R.I.A.A.	United Nations Reports of International Arbitral Awards
T.I.A.S.	Treaties and Other International Acts Series
Va.J.Int'l L.	Virginia Journal of International Law
Vanderbilt J. Transnatl L.	Vanderbilt Journal of Transnational Law
V.R.U.	Verfassung und Recht in Ubersee (Law and Politics in Africa, Asia and Latin America)
VVDStRL	Veroffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
Wladyslaw CZAPLINSKI	Wladyslaw CZAPLINSKI, "State Succession and State Responsibility", 28 *Canadian Y.I.L.*, 1990, pp. 339–359
W.Va.L.Rev.	West Virginia Law Review
Yale L.J.	Yale Law Journal
Yale Stud.World P.O.	Yale Studies in World Public Order

Yearbook I.L.C.	Yearbook of the International Law Commission
Z.a.ö.R.V.	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

FOREWORD

State succession became a neglected topic of international law after the most important wave of decolonisation had reached its peak towards the end of the 1960s. The subject of State succession attracted again the interest of scholars after the fall of the Berlin Wall with the emergence of new States, mainly as a result of the collapse of federal "Socialist" States, such as the Soviet Union and Yugoslavia, or the unification of other States, such as Germany and Yemen. However, less attention was given by authors to the emergence of two so-called "newly independent States" (Namibia in 1990 and Timor Leste in 2002).

The subject of succession of States has been analysed by the International Law Commission (ILC) and partially codified by two treaties: the Vienna Convention of 1978, dealing with State succession in respect to treaties and the Vienna Convention of 1983 concerning State property, archives and debts. In 1993, soon after the end of the Cold War, the ILC undertook the study of the issue of State succession to matters of nationality of natural and legal persons. Even then, little interest was paid in the literature (with some significant exemptions, however) to the interaction between the issue of State succession and another topic, which had been thoroughly analysed by the ILC: State responsibility. Indeed, in the context of the ILC's draft Articles on State Responsibility, Special Rapporteur James Crawford highlighted the difficulties and uncertainties surrounding the issue of State succession to international responsibility: "[i]t is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory".[1] Patrick Dumberry's remarkable book fills this important analytical gap and sheds some most welcomed light into a controversial subject, which had until now not received all the attention it deserved.

The book I have the great pleasure to introduce is a Ph.D. thesis which was submitted by the author to the Graduate Institute of International Studies of Geneva in 2006. The first merit of the book is that it correctly addresses the interaction

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1 Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at Its Fifty-Third Session (2001), *Report of the International Law Commission on the Work of Its Fifty-third Session. Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 119, para. 3.

between State succession and State responsibility for internationally wrongful acts. Thus, the relevant question does not involve any succession of States with respect to *responsibility per se*, but instead deals with whether or not there is succession to the *rights and obligations arising from internationally wrongful acts* committed or suffered by the predecessor State. In other words, the issue is whether or not the successor State has (after the date of succession) an obligation to repair or a right to reparation in relation to unlawful acts committed before the date of succession. This clear perspective adopted by the author avoids at the outset simplistic solutions proposed by some writers in doctrine such as the existence of a general rule of non-succession based on the so-called *intuitu personae* character of responsibility for wrongful acts.

The book's second major merit is its systematic analysis of State practice which takes into account the different types of succession of States (dissolution, secession, unification, etc.). Indeed, the different types of succession of States require separate analysis and are subject to specific solutions. For instance, the fact that the predecessor State continues to exist after the date of succession has important consequences with respect to the determination of whether there is any succession to international responsibility. The author also analyses different factors and circumstances and concludes that they lead to distinct solutions of succession. For instance, he examines in detail factors such as the acceptance by the successor State of its responsibility, the fact that the act was committed by an insurrectional movement or by an autonomous government (which subsequently became an independent State), the enrichment of a State as a result of the act, etc.

Finally, I should mention that the book is the only existing comprehensive study which examine in detail both ancient and contemporary international (and municipal) case law and State practice. In fact, some of the examples analysed by Dr. Dumberry have never been dealt with previously by scholars. The extensive research undertaken by the author makes this book a major source of information for all practitioners and scholars interested in issues of State succession.

The book is presented in a clear and straightforward manner. The introductory part of the book contains a general introduction delimitating the scope of the study and outlining the author's perspective on State succession and international responsibility. The book is divided in two parts, the first dealing with State succession to the obligation to repair and the second concerning State succession to the right to reparation. Both parts follow the same scheme: a comprehensive presentation of the doctrinal positions on each issue which is followed by the examination of State practice and case law (which is examined separately for each different types of State succession). Finally, the author presents different factors and circumstances which are relevant to determine whether or not there is succession to international responsibility. An impressive and precious bibliography, including references to case law and national and international documents, completes this excellent picture.

The fact that the author concludes that there is no general rule on the issue of State succession to the obligation to repair and that, in fact, specific solutions prevail depending on the different types of succession involved (as well as on a variety of different factors and circumstances), does not prevent him from ultimately

presenting a systematic and all-embracing conclusion. He highlights three fundamental principles with respect to the obligation to repair: 1) that an international wrongful act must not remain unpunished simply because of the application of the mechanisms of State succession, 2) that the actual wrongdoer State should be the one responsible for the obligations arising from commission of the wrongful act and 3) that the State that has beneficiated from the consequences arising from an international wrongful act should be responsible for the obligations resulting from such act. The author considers that the other question of succession to the right to reparation is much more straightforward and favours succession. In sum, the general trend observed by the author is the acceptance by States of the principle of succession to rights and obligations arising from the commission of internationally wrongful acts. The great merit of this book is that it disproves the view generally held in doctrine in favour of non-succession. The author's conclusion is that the doctrine of strict and automatic non-succession is simply not representative of contemporary State practice and case law. The author's comprehensive analysis of State practice also leads him to conclude that several rules of customary international law have developed.

In conclusion, this is a timely and fascinating book. The need for a comprehensive study of the issue of State succession to international responsibility is illustrated by the fact that in 2003, the *Institut de droit international* has set up a commission in charge of addressing this topic (i.e. while Dr. Dumberry was working on his Ph.D. doctoral thesis). I believe that this book will be of extraordinary help to the work of the *Institut*.

The book "*State Succession to International Responsibility*" does a great service to the doctrine of international law and will undoubtedly become an indispensable reference in the field of State succession.

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Professor of International Law
Graduate Institute of International Studies, Geneva
19 January 2007

PART I

GENERAL INTRODUCTION

GENERAL INTRODUCTION

1. *The Issue Addressed in this Study*

The issue of "succession of States" (or "State succession") is defined as "the replacement of one State by another in the responsibility for the international relations of territory".[1] Since the end of the Cold War, problems of State succession have been the object of significant developments. This area of research is vast and complex, and it is undoubtedly also one of the most controversial and disputed areas in international law. It has recently been the object of tremendous attention by scholars.[2] The rarity (at least before the 1990s) and the great variety of events involving the mechanisms of succession of States account for both a contradictory practice and different and mutually exclusive theories in doctrine. State practice is thus largely based on political opportunity rather than on the strict observation of legal concepts.[3] Only very few issues relating to State succession can be qualified as

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1 This definition is given in: Article 2(1)b) of the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488; Article 2(1)a) of the *1983 Vienna Convention on Succession of States in Respect of State Properties, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306. The same definition can also be found at Article 2 of the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*, adopted by the I.L.C. on second reading in 1999, I.L.C. Report, U.N. Doc. A/54/10, 1999, chp. IV, paras. 44 and 45, in: *Yearbook I.L.C.*, 1997, vol. II, p. 13.

2 The literature on this question and its recent developments since the end of the Cold War is abundant. For a selective bibliography on past and recent literature on the question, see: F. MARKX-VELDHUIJZEN, *State Succession: Codification Tested against the Facts*, The Hague, Center for Studies and Research of the Hague Academy of International Law, 1996. This bibliography was updated in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits/State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 929–968.

3 D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 272; D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, pp. 117–118, 199.

Patrick Dumberry, State Succession to International Responsibility, pp. 1–30.

norms of customary international law.[4] There is no *general* rule on State succession, and any attempt to define a *general* theory of State succession is by definition bound to be uncertain.[5] As explained by one author: "Les diverses situations de mutations territoriales sont tellement riches de conséquences qu'elles excluent a priori la possibilité de l'apparition de règles juridiques simples et uniformes en matière de succession d'Etats."[6]

The study of the many problems arising from the process of succession of States is usually divided into several different aspects: succession to treaties, to debts, to assets, to archives, to international organisations, etc. The present study addresses another area of the analysis of succession of States: whether there is a succession to the *consequences of international responsibility* arising from an internationally wrongful act committed before the date of succession. More specifically, the question is whether there is a succession of States to the *rights and obligations arising from the commission of an internationally wrongful act*. Contrary to other areas of succession of States, the question addressed in the present study has not been the object of great attention by past and contemporary legal scholars.

The issue analysed in the present study arises from the commission of an "internationally wrongful act"[7] *before* the "date of succession".[8] The present study will examine what are the consequences of an internationally wrongful act committed *by the predecessor State(s)* against another State(s).[9] Before the date of succession, the predecessor State(s) is therefore the *debtor of an obligation to repair* towards the injured third State(s). The present study will also address the opposite situation, when an internationally wrongful act was committed by a State(s) *against the predecessor State(s)*. In such case, before the date of succession, the predecessor State(s) is the creditor of the *right to reparation* against the State(s) responsible for the commission of the internationally wrongful act. The question at the heart of the present study is what happens in the context of a succession of States to the *rights and obligations* arising from an internationally wrongful act committed before the date of succession.

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4 See Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, pp. 164–173, for a description of some of these customary norms.

5 D.P. O'CONNELL, "Reflections on the State Succession Convention", 39(4) *Z.a.ö.R.V.*, 1979, p. 726.

6 Vladimir D. DEGAN, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *R.C.A.D.I.*, t. 279, 1999, p. 300.

7 The concept of an "internationally wrongful act" is further explained at *infra*, p. 25.

8 Article 2(1)e) of the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488, defines the "date of the succession of States" as "the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

9 Article 2(1)c) of the *1978 Vienna Convention on Succession of States in Respect of Treaties, Id.*, defines the "predecessor State" as "the State which has been replaced by another State on the occurrence of a succession of States".

There are essentially two questions which arise from the commission of an internationally wrongful act in the context of succession of States:

(a) Which of the predecessor State(s) or the successor State(s)[10] should be held responsible for the obligations arising from an internationally wrongful act committed by the predecessor State(s) *against a third State*? In other words, which of the predecessor State(s) or the successor State(s) is the debtor of the *obligation to repair* towards the injured third State?[11]
(b) Which of the predecessor State(s) or the successor State(s) should have the right to claim reparation as a consequence of an internationally wrongful act committed *by a third State* against the predecessor State(s)? The issue is then, which of the predecessor State(s) or the successor State(s) is the creditor of the *right to reparation* against the third State?[12]

The answers to these two questions revolve around the other essential question whether or not positive international law allows for the "transfer" from the predecessor State(s) to the successor State(s) of the rights and the obligations arising from an internationally wrongful act committed before the date of succession.[13] Here again this issue is twofold:

(a) Whenever an internationally wrongful act is committed by the predecessor State(s) *against a third State,* can the *obligation to repair*, for which the predecessor State(s) is the debtor before the date of succession, be "transferred" to the successor State(s)?[14]

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10 Article 2(1)d) of the *1978 Vienna Convention on Succession of States in Respect of Treaties, Id*, defines the "successor State" as "the State which has replaced another State on the occurrence of a succession of States".

11 This is what Brigitte STERN, "Responsabilité internationale et succession d'Etats", in: Laurence BOISSON DE CHAZOURNES & Vera GOWLLAND-DEBBAS (eds.), *The International Legal System in Quest of Equity and Universality / L'ordre juridique international, un système en quête d'équité et d'universalité. Liber amicorum Georges Abi-Saab*, The Hague, M. Nijhoff, 2001, pp. 327–355 [hereinafter referred to as Brigitte STERN, Responsabilité], p. 335, refers to as "la responsabilité internationale active".

12 The "responsabilité internationale passive" according to Brigitte STERN, Responsabilité, p. 353.

13 The concept of the "transfer" of obligations arising from the commission of internationally wrongful acts is expressed in doctrine in different ways. Thus, Jean Philippe MONNIER, "La succession d'Etats en matière de responsabilité internationale", 8 *A.F.D.I.*, 1962 [hereinafter referred to as Jean Philippe MONNIER], p. 66, speaks of "droits et obligations dérivant de la responsabilité internationale", while Brigitte STERN, Responsabilité, p. 338, refers to the "transmission des conséquences de la responsabilité". In *Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d'arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce, U.N.R.I.A.A.*, vol. 12, p. 155 [hereinafter referred to as the *Lighthouse Arbitration* case], at p. 197, the Arbitral Tribunal used the concept of "transmission of responsibility". Michael John VOLKOVITSCH, "Righting Wrongs: Toward a New Theory of State Succession to Responsibility for International Delicts", 92(8) *Colum. L.Rev.*, 1992, [hereinafter referred to as Michael John VOLKOVITSCH], p. 2173, uses the concept of "transfer".

14 In the own words of Jean-Philippe MONNIER, p. 67: "L'Etat successeur assume-t-il l'*obligation* de réparer qui incombait à l'Etat prédécesseur, auteur de la violation de la norme

(b) Whenever an internationally wrongful act is committed *by a third State* against the predecessor State(s), can the *right to reparation*, for which the predecessor State(s) is the creditor before the date of succession, be "transferred" to the successor State(s)?[15]

There is one essential point that is the object of much controversy and misunderstanding in doctrine and which needs to be mentioned at this early juncture.[16] This study does not seek to address the question whether or not the successor State(s) should be "*responsible*" for internationally wrongful acts committed by the predecessor State(s) before the date of succession. As a matter of principle, the successor State(s) cannot be *liable for* internationally wrongful acts committed by *another State* (the predecessor State(s)). The issue central to the present analysis is whether obligations (as well as rights) *arising from* the commission of an internationally wrongful act may (in some circumstances) be "transferred" to the successor State(s). In other words, the issue is not one of transfer of *responsibility* for internationally wrongful acts *per se*, but of transfer of the *consequences* of international responsibility (i.e. international rights and obligations) *arising from* the commission of such acts. These are two fundamentally different questions which have often not been treated as such in doctrine. The failure to make this essential distinction blurs the analysis by many authors of the issue. It should be noted that the expression State succession to "international responsibility" will nevertheless be used throughout this study to facilitate the reading.

Part II of the present study deals with the question of succession of States to the *obligation to repair*, while Part III will address the other issue of succession of States to the *right to reparation*. Part I is a general introduction to this study.

2. *The Objective of this Study*

The aim of the present study is to provide a general framework of analysis of the issue of State succession to international responsibility. The intention is, however, not to advance any *general theory* which will encompass entirely this question. The development of such a *general theory*, as in any other area of succession of

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internationale?" (emphasis in the original). Hazem M. ATLAM, *Succession d'Etats et continuité en matière de responsabilité internationale*, Thesis, Université de droit, d'économie et des sciences d'Aix-Marseille (France), 1986, [hereinafter referred to as Hazem M. ATLAM], p. 24, indicates "quel serait le sort des obligations internationales engendrées par une action de responsabilité internationale dirigée contre l'Etat prédécesseur".

15 Jean-Philippe MONNIER, p. 67 ("[l]'Etat successeur peut-il faire valoir contre l'Etat à qui est imputé l'acte illicite le *droit* qu'avait l'Etat prédécesseur, lésé par cet acte de demander réparation?" emphasis in the original); Hazem M. ATLAM, p. 24 ("quel serait le sort des droits de réclamations reconnus à l'Etat prédécesseur à raison d'un fait internationalement illicite mettant en cause la responsabilité internationale d'un autre sujet tiers de l'ordre juridique international?").

16 The question is further discussed in detail at *infra*, p. 43.

States, would be both uncertain and unsatisfactory.[17] This is clearly expressed as follows by the Arbitral Tribunal in the *Lighthouse Arbitration* case:

> [T]he question of the transmission of responsibility in the event of a territorial change presents all the difficulties of a matter which has not yet sufficiently developed to permit solutions which are both certain and applicable equally in all possible cases.[18]
>
> It is impossible to formulate a general, identical solution for every imaginable hypothesis of territorial succession, and any attempt to formulate such a solution must necessarily fail in view of the extreme diversity of cases of this kind.[19]

In clear, the present study does not intend to build a strict and self-contained general theory either *in favour of or against* the *automatic transfer* of the right to reparation and the obligation to repair from the predecessor State(s) to the successor State(s). Such generalisation is impossible to make, and any attempt in that direction is bound to be inconsistent with the much more complex reality of the issue. This point is supported in doctrine.[20] Again, quoting the Arbitral Tribunal in the *Lighthouse Arbitration* case:

> It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors.[21]

Indeed, many different factors are to be taken into account in order to determine whether the transfer of any rights and obligations arising from the commission of an internationally wrongful act is possible under contemporary international law.

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17 P.M. EISEMANN, "Rapport du Directeur de la section de langue française du Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, p. 64: "Le phénomène de la succession d'Etats n'est nullement rebelle au droit mais il conduit naturellement vers des solutions spécifiques adaptées à la variété des situations plutôt que vers l'application automatique de règles générales".

18 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 91. J.H.W. VERZIJL, *International Law in Historical Perspective*, vol. VII (*State Succession*), Leiden, A.W. Sijthoff, 1974 [hereinafter referred to as J.H.W. VERZIJL], p. 223, who was acting as President of the Arbitral Tribunal in the *Lighthouse Arbitration* case, expressed the same opinion in subsequent writings.

19 *Id.*

20 This is, for instance, the position of D.P. O'CONNELL, *State Succession in Municipal Law and International Law*, vol. I, Cambridge, Cambridge Univ. Press, 1967, pp. 482–493 [hereinafter referred to as D.P. O'CONNELL, *State Succession*, vol. I], p. 486, for whom "there is no universal criterion for distinguishing claims which may be made against the successor State from those which may not". Similarly, according to Michael John VOLKOVITSCH, pp. 2198–2199, the "application of any single, rigid rule in every possible circumstance is doomed to produce results that are at times inherently inequitable and ultimately untenable". The same view is held by Hazem M. ATLAM, pp. 15, 235–236.

21 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 91. See also: J.H.W. VERZIJL, p. 223; Hazem M. ATLAM, p. 239.

The analysis of the relevant State practice and international (and municipal) case law will be made based on the essential distinction between the *different types* of succession of States (i.e. secession, the creation of "Newly Independent States", dissolution of State, unification of States, integration of State and cession and transfer of territory). The basic assumption is that one solution to the question of State succession to rights and obligations arising from the commission of internationally wrongful acts which may very well be appropriate for one type of succession of States may, however, not be adapted to another. One major aim of the present study is therefore to examine State practice and international case law and to determine whether there is any set of rules and principles for each different type of succession of States.

Another important goal of the present study is to determine the *factors and circumstances* (other than the different types of succession of States) used in State practice and international case law, and referred to in doctrine, to justify the transfer of the obligation to repair and of the right to reparation from the predecessor State(s) to the successor State(s). As previously observed, there is no *general solution* which may resolve *all questions* in the context of State succession to international responsibility. The basic assumption is that *specific problems* of State succession to rights and obligations will indeed require *specific solutions*. The aim of the present study is therefore to determine whether there is any such set of *specific rules and principles* for some of these *specific problems*.

3. *Relevance of this Study*

The need for a comprehensive survey of the issue of succession of States to international responsibility arises from the fact that this topic has never been the object of any general study by the International Law Commission (I.L.C.) or by any international law scientific institution. The topic has also only rarely been addressed in doctrine. Finally, no comprehensive survey of both State practice and international and municipal case law has yet been conducted.

3.1 *The Question Has Never Been Addressed by the I.L.C. or by any International Law Scientific Institution*

The I.L.C. has never dealt with the question of succession of States to international responsibility.[22] The work of the I.L.C. on the codification of questions of State succession first started in 1963. Interestingly, at that time, the issue of State

22 See the comments by Wladyslaw CZAPLINSKI, "State Succession and State Responsibility", 28 *Canadian Y.I.L.*, 1990 [hereinafter referred to as Wladyslaw CZAPLINSKI], at pp. 353–355.

responsibility for "torts" was included by Lachs as one of the topics for discussion.[23] However, when in 1967 the work of codification of the Commission was further defined, the topic was left aside.[24]

Thus, at that time three different areas of research were proposed.[25] The first one was the question of State succession in respect of treaties, which eventually led to the adoption of the 1978 *Vienna Convention on Succession of States in Respect of Treaties*.[26] Article 39 of this Convention specifically indicates that the question of succession of States to responsibility is reserved.[27] The second area of research to be undertaken by the I.L.C. was State succession in respect to membership in international organisations, which was never the object of a convention. Finally, the I.L.C. decided to address another issue generally defined as "succession of States in respect of matters other than treaties". Special Rapporteur Bedjaoui later decided to concentrate the effort of the I.L.C. on the question of succession to State property, archives and debts, which led to the adoption of the 1983 *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*.[28] Subsequently, the issue of nationality also became the object of the work of the I.L.C. and led to the adoption of a Declaration.[29] The issue of State succession with respect to State responsibility was therefore left aside by the I.L.C.

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23 *Report by Mr Manfred Lachs, Chairman of the Sub-Committee on Succession of States and Governments on the 15th Session of the International Law Commission*, 1963, U.N. Doc. A/CN.4/160, I.L.C. Report, A/5509 (A/18/9), 1963, annex II) 1963, ch. IV(B), para. 56, in: *Yearbook I.L.C.*, 1963, vol. II, p. 261 (see in particular Annex II: Memoranda submitted by members of the Sub-Committee, "Delimitation of the Scope of Succession of States and Governments" by T.O. Elias at p. 282).

24 The reason given was that the topic of "torts" was one of municipal rather than international law: *Report by Mr Roberto Ago, Chairman of the Sub-Committee on State Responsibility on the 15th Session of the International Law Commission*, 1963, U.N. Doc. A/CN.4/152, I.L.C. Report, A/5509 (A/18/9), 1963, annex I) chp. IV, paras. 51–55, in: *Yearbook I.L.C.*, 1963, vol. II, p. 187, at p. 287, para. 10.

25 *Report of the International Law Commission on the Work of its Nineteenth Session*, 8 May to 14 July 1967, I.L.C. Report, A/6709/Rev.1 (A/22/9), 1967, chp. III(A)(1), paras. 36–41, in: *Yearbook I.L.C.*, 1967, vol. II. The I.L.C. appointed Sir Humphrey Waldock as Special Rapporteur to deal with State succession in respect of treaties and Mr Mohammed Bedjaoui as Special Rapporteur on the topic of succession in respect of rights and duties resulting from sources other than treaties.

26 *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488.

27 Article 39 reads as follows: "The provisions of the present Convention shall not prejudge any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States".

28 *1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, in: 22 I.L.M., 1983, p. 306 (not yet entered into force).

29 *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*, adopted by the I.L.C. on second reading in 1999, I.L.C. Report, U.N. Doc. A/54/10, 1999, chp. IV, paras. 44 and 45, in: *Yearbook I.L.C.*, 1997, vol. II, p. 13. The I.L.C. decided to recommend to the U.N. General Assembly the adoption of the *Draft Articles* in the form of a declaration. The U.N. General Assembly (Res. 54/111 (1999) and Res. 54/112 (1999) of 9 December 1999) decided to include the item on the provisional

Only very sporadic mention of the question is found in the codification work of the I.L.C. on State succession.[30]

Similarly, only a few references to the issue of State succession to international responsibility can be found in the work of the I.L.C. on State responsibility for internationally wrongful acts.[31] One such reference is found in the I.L.C.'s 2001 Commentaries by Special Rapporteur Crawford:

> In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[32]

It is precisely because this issue is, in the words of Special Rapporteur Crawford, "unclear" that the present study is relevant.

International organisations[33] and academic institutions such as the *Institut de Droit international* and the International Law Association have addressed many issues of State succession but have never dealt specifically with the question of State succession to rights and obligations arising from the commission of internation-

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agenda of its Fifty-fifth Session with a view to the consideration of the draft articles and their adoption as a declaration at that session.

30 See, for instance: *Report of the International Law Commission on the Work of its Twenty-Ninth Session*, 9 May to 29 July 1977, I.L.C. Report, A/32/10, 1977, chp. III, paras. 32–60, ("Summary Records of the 1421st Meeting"), in: *Yearbook I.L.C.*, 1977, vol. I, at pp. 27–28; *Sixth Report on Succession of States in Respect of Matters Other than Treaties*, by Mr Mohammed Bedjaoui, Special Rapporteur, 25th Session of the I.L.C., 1973, U.N. Doc. A/CN.4/267, I.L.C. Report, A/9090/Rev.1 (A/28/10), 1973, chp. III(A)(1)(c), paras. 71–77, in: *Yearbook I.L.C.*, 1973, vol. II, p. 3, at p. 19.

31 This is, for instance, the case at Article 10(2) of the Final Articles dealing with the situation where an insurrectional movement succeeds in its struggle and create a *new State* (and not merely a new government). This principle is examined in detail at *infra*, p. 224. However, the work of the I.L.C. does not envisage the devolution of responsibility from the successful rebels to the new State based on the mechanism of succession of States but, rather, from the perspective of State responsibility: "[These wrongful] acts committed by agents of the insurrectional movement before the movement takes power are attributed to the state because there is continuity between the apparatus of the insurrectional movement and the new governmental apparatus of the state, *not a succession of the state as one subject of international law to the insurrectional movement as another*" (emphasis added) (in: *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 101, para. 8).

32 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2), pp. 59 et seq., at p. 119, para. 3.

33 For instance, no mention is made of the problem of succession of States to international responsibility in the pilot project of the Council of Europe: Jan KLAPPERS (ed.), *State Practice Regarding State Succession and Issues of Recognition*, The Hague, Kluwer Law International, 1999, see at pp. 147–153.

ally wrongful acts.[34] However, the *Institut de Droit international* recently decided at its 2003 Bruges session that the question of "State Succession in matters of State Responsibility" will be the object of a study by a Commission set up for the occasion (the 14th Commission).[35]

3.2 *The Doctrinal Analysis is Very Limited and Generally Unsatisfactory*

The need for a comprehensive survey of the question of succession of States to rights and obligations arising from internationally wrongful acts committed before the date of succession is all the more obvious when considering that very few scholars have directly and thoroughly tackled the issue. Thus, no book has ever been published on the issue, and only five articles,[36] one doctoral thesis[37] and one master's thesis[38] have directly focused on this question. Only a handful of general

34 For instance, see the *Institut de Droit international*'s Resolution on *State Succession in Matters of Property and Debts*, Session of Vancouver, 2001, in: 69 *Annuaire I.D.I*, 2000–2001, at pp. 713 et seq. See also the 1952 Resolution entitled *Les effets des changements territoriaux sur les droits patrimoniaux*, in: 44–II *Annuaire I.D.I.*, 1952, p. 471. The International Law Association has a Committee on "Aspects of the Law of State Succession". The 2004 Report of the Committee deals with State succession with respect to State property and State debts, while the 2002 Report focused on State succession to treaties. See also the 1968 Conference of Buenos Aires and the *Interim Report of the Committee of the Succession of the New States to the Treaties and other Obligations of their Predecessors*.

35 *Annuaire I.D.I.*, vol. 71, t. II, at pp. 59 & 354. See the comments by V.-D. DEGAN, at pp. 65 & 73, and S. TORRES BERNARDEZ, at p. 66, both expressing great reservation as to whether this issue should be the object of a study by the *Institut*. On the contrary, J. SALMON, at p. 73, who is at the origin of the proposition to investigate this question, was of the view that the topic should be studied because it has rarely been addressed in case law and never been dealt with by the I.L.C. The proposition to create a Commission to study this topic was finally adopted (see in: *Ibid*., p. 74) with 35 votes in favour, 2 against and 5 abstentions.

36 Brigitte STERN, Responsabilité, pp. 327–355; Sir Cecil J.B. HURST, "State Succession in Matters of Tort", 5 *British Y.I.L*., 1924, [hereinafter referred to as Cecil J.B. HURST] pp. 163–178; Jean Philippe MONNIER, pp. 65–90; Wladyslaw CZAPLINSKI, pp. 339–359; Michael John VOLKOVITSCH, pp. 2162–2214. See also: Dimitrijević DUŠKO, "Sukcesija država u odnosu na deliktnu odgovornost" (in Serbian, translation: State Succession to International Responsibility), 87 (2–3) *Arhiv za pravne i društvene nauke*, 2001, pp. 187–214.

37 Hazem M. ATLAM.

38 Miriam PETERSCHMITT, *La succession d'Etats et la responsabilité internationale pour fait illicite*, Mémoire de DES, Université de Genève/Institut Universitaire de hautes études internationales, 2001, 87 pp [hereinafter referred to as Miriam PETERSCHMITT].

international law textbooks have properly addressed this issue,[39] while most of them have simply devoted a few lines to it.[40]

The Arbitral Tribunal in the *Lighthouse Arbitration* case stressed the unsatisfactory nature of the theoretical analysis of this issue, speaking of the "chaotic state of authoritative writings".[41] The doctrinal analysis suffers from two serious shortcomings.

The first shortcoming concerns the limited investigation of State practice and international and municipal case law. The very few scholars who have tackled the issue at the heart of the present study usually refer to only three international arbitral decisions[42] and a very limited number of municipal law cases. The research conducted by the present author led to the "discovery" (or rather the rediscovery) of a great number of other relevant international arbitration cases and municipal law decisions which had either been previously overlooked in doctrine or simply never been referred to. Similarly, most of the examples of State practice examined in the present study have never been analysed in doctrine (in the context of State succession to international responsibility). One reason for this shortcoming may be the fact that an important number of these relevant cases of State practice arose in the context of the last wave of succession of States of the 1990s. Yet there seems to be a certain lack of interest of scholars in the post-Cold War most recent State practice on this question. Only three studies have been written on this issue since the end of the Cold War.[43]

The second shortcoming concerns methodology. It is generally agreed in doctrine and by international arbitration tribunals that State practice and international and municipal case law are confused and contradictory.[44] For instance, O'Connell concludes that it is "exasperating not to be able to propose a synthetic structure

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39 See, for instance: D.P. O'CONNELL, *State Succession*, vol. I, pp. 482–493; J.H.W. VERZIJL, pp. 219–228; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, pp. 504–511.

40 A complete list of writers who briefly mention the issue is provided at *infra*, pp. 35–37.

41 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 91. This case is discussed in detail at *infra*, p. 130 and p. 136.

42 *Ibid.*, p. 155; *R.E. Brown* (United States v. Great Britain), Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129 [Hereinafter referred to as the *R.E. Brown case*]; *F.H. Redward and Others* (Great Britain v. United States), Award of 10 November 1925, U.N.R.I.A.A., vol. 6, p. 158 [Hereinafter referred to as the *Hawaiian Claims* case], p. 157.

43 Brigitte STERN, Responsabilité; Michael John VOLKOVITSCH; Miriam PETER-SCHMITT. The present author's conclusions on Modern State Practice can be found in: Patrick DUMBERRY, "The Controversial Issue of State Succession to International Responsibility in Light of Recent State Practice" 49 *German Y.I.L.*, 2006 (to be published).

44 This assessment is made by the Arbitral Tribunal in the *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 91: "The variety of possible hypotheses of territorial succession, the political considerations which often govern the solution of juridical problems relative thereto, and the rarity of arbitral or judicial decisions resolving the problem in a really clear and unequivocal manner after convincing argument heard, explain both the vagaries of international practice and the chaotic state of authoritative writings". See also, Michael John VOLKOVITSCH, p. 2172: "The relative

of State succession doctrine which can accommodate the problem of torts".[45] This may be so for a reason which, however, is not inherent in the subject matter under investigation but which is, rather, a consequence of the methodology generally used in doctrine to conduct the investigation. Scholars do not usually conduct their analysis based on the two fundamental assumptions adopted in the present study.[46]

Current doctrinal analysis of both State practice and international and municipal case law is generally not conducted *in the light of the essential distinction between different types of succession of States*. Most authors do not seem to base their research on the fundamental assumption that for each type of State succession there will exist different specific solutions to the issue of succession to international responsibility. No general principle can apply indiscriminately to all types of succession of States. Another shortcoming of the current doctrinal analysis is the fact that it does not base its research on another fundamental assumption (which is adopted in the present study): solutions to questions of State succession to international responsibility will largely depend *on a variety of criteria and circumstances*. The assumption is that *specific problems* of State succession will require *specific solutions*.

The present study intends to show that, *based on these two fundamental assumptions*, State practice and international case law *is not chaotic and confused*. Quite the contrary, the present study will demonstrate the existence of some basic rules and principles of State succession to rights and obligations arising from the commission of internationally wrongful acts depending on the different types of succession of States and different circumstances.

4. *Scope of this Study*

At this juncture, it is important to define in the most rigorous terms the actual scope of the present study. In doing so, we will determine some aspects of the issue which will not be covered by this study.

4.1 *Meaning of State Succession*

The first fundamental observation is that the present study deals with the subject of "State succession" (or "succession of States"), which clearly needs to be distinguished from other cases where there is "identity" (despite some changes with

lack of attention is a scattered, often confused, and sometimes contradictory jurisprudence from which it is extremely difficult to extract a coherent doctrine".

45 D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 164.

46 This comment *does not* apply to the research conducted by Brigitte STERN, Responsabilité; Miriam PETERSCHMITT and Hazem M. ATLAM.

regard to the elements of the State).[47] Thus, a State may be affected by important changes but its legal identity can nevertheless remain intact. The present study does not deal with such cases where there is identity in the existence of the State and where no question arises as to the continuity of its rights and obligations.[48] It does not address the question of succession of "governments".

This study only focuses on those other situations where the identity of the State is fundamentally altered as a result of losses of sovereignty over (part or the entirety) of its territory. In these cases of succession of States, the question arises as to whether the factual changes affecting a State lead to continuity or discontinuity of its legal rights and obligations that existed prior to the date of succession.

One conceptual remark should be made at this juncture. Throughout the present study, the analysis of State practice and case law of certain types of succession of States will inevitably address to some extent questions of continuity of obligations and rights. Thus, for instance, in the analysis of examples of secession, the question will be which of the "continuing" State or the secessionist State should have the right to reparation and the obligation to repair. In this specific context, issues of identity and continuity of obligations and rights will need to be addressed. Questions of identity and continuity will, however, not be the object of the analysis *per se*. This issue will only be discussed to the extent that it arises from clear cases where there is indeed a succession of States.

Another observation which needs to be made at the outset is that the very term "State succession" is somewhat misleading.[49] In the context of the present study, the term "State succession" makes reference to "the replacement of one State by

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47 On the concept of "identity" of States, see: Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968; G. CANSACCHI, "Identité et continuité des sujets de droit international", *R.C.A.D.I.*, t. 130, 1970–I, pp. 1–94; Matthew C.R. CRAVEN, "The Problem of State Succession and the Identity of States under International Law", 9(1) *E.J.I.L.*, 1998, pp. 142–163. See also: Brigitte STERN, "La succession d'Etats", R.C.A.D.I., t. 262, 1996, pp. 39–87.

48 Krystyna MAREK, *Ibid.*, p. 5, defines the legal identity of a State as "the identity of the sum total of its rights and obligations under both customary and conventional international law". Marek suggests (*Ibid.*, p. 189) that from the fact that there is an identity of rights and obligations, it should be concluded that there is an identity of State. The same view is held by Martti KOSKENNIEMI, "Report of the Director of Studies of the English-Speaking Section of the Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, p. 120. L. CAFLISCH, "The Law of State Succession: Theoretical Observations", *Netherlands I.L.R.*, 1963, p. 340, observes that "the continued existence of all legal relationships is a consequence of a State's identity, not *vice versa*". For Caflisch, it is because there is an identity of State that rights and obligations are unchanged, and not the other way around.

49 In the words of Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, p. 463, the expression State succession "recèle surtout une ambiguïté dans le fond, le terme employé suggérant toujours une *continuité* de situation là où la pratique des Etats enregistre parfois une *rupture*. On

another in the responsibility for the international relations of territory".[50] Therefore, the term "State succession" should not be understood as meaning that the successor State "becomes invested with all the juridical consequences of its predecessor's acts".[51] These two very distinct ideas should not be mixed.[52] Professor Stern rightly distinguishes the first situation as a "succession in fact" and the second as a "succession in law".[53] In the course of this study, the term "State succession" will only refer to succession "in fact". The word "transfer" will be used to describe a "succession in law" where the rights and obligations of the predecessor State(s) are taken over by the successor State(s).

4.2 *Classification of the Different Types of Succession of States*

As previously explained, the present study intends to analyse the relevant State practice and case law based on the essential distinction between the *different types* of succession of States. It is thus assumed that specific solutions to the issue of State succession to international responsibility will prevail depending on the different types of succession of States. It is therefore essential to establish at this juncture a classification of the different types of succession of States and to define them. There is support in doctrine for the importance of making such distinction between different types of State succession.[54] Such distinction is especially

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entendrait ainsi exprimer certains réalités par un terme porteur d'un signe contraire" (emphasis in the original).

50 This definition is given in: Article 2(1)b) of the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488; Article 2(1)a) of the *1983 Vienna Convention on Succession of States in Respect of State Properties, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306. The same definition can also be found at Article 2 of the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*, adopted by the I.L.C. on second reading in 1999, I.L.C. Report, U.N. Doc. A/54/10, 1999, chp. IV, paras. 44 and 45, in: *Yearbook I.L.C.*, 1997, vol. II, p. 13.

51 D.P. O'CONNELL, *State Succession*, vol. I, p. 3.

52 According to Hans KELSEN, "Théorie générale du droit international public. Problèmes choisis", R.C.A.D.I., t. 42, 1932–IV, pp. 314–315: "On entend donc par succession des Etats aussi bien cette succession juridique que constitue la modification territoriale elle-même que la succession juridique qui intervient à la suite de la dite modification. Mais il s'agit là de deux phénomènes distincts". See also: J. BASDEVANT, *Dictionnaire de la terminologie du droit international*, Paris, Sirey, 1960, p. 587; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", R.C.A.D.I., t. 44, 1933–II, p. 679.

53 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 90.

54 This is the position adopted by Malcolm N. SHAW, *International Law*, 4th ed., Cambridge, Cambridge Univ. Press, 1997, pp. 676–677; Kay HAILBRONNER, "Legal Aspects of the Unification of the Two German States", 2(1) *E.J.I.L.*, 1991, p. 33. This is also the view of D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 164, who, however, indicates in another publication (in: D.P. O'CONNELL, "Reflections on the State Succession Convention",

relevant in the context of State succession to rights and obligations arising from the commission of internationally wrongful acts.[55] This is the conclusion reached by the Arbitral Tribunal in the *Lighthouse Arbitration* case.[56] This contrasts with the opposite position taken by the U.S.-Great Britain Arbitral Commission in the *Hawaiian Claims* case.[57]

The first essential distinction between the different types of succession of States concerns the *consequences that an event may have on the predecessor State(s)*. There are cases where the predecessor State will *continue to exist* following the event affecting its territorial integrity and should therefore be considered as the

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39(4) *Z.a.ö.R.V.*, 1979, pp. 730–731) that the different types of succession of States as established in the Vienna Convention "are sometimes only formally distinguishable" from each other. *Contra*: Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 209, for whom these different types of succession of States are not "terms of art with them carrying clearly established legal consequences".

55 This is, for instance, the position of Hazem M. ATLAM, pp. 15, 235–236, 268 et seq.; J.H.W. VERZIJL, pp. 219–220. Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 110, has some doubts concerning the relevance of the distinction between cases of secession and dissolution but not in the field of succession to international responsibility where she believes this difference remains necessary. Ian BROWNLIE, *Principles of Public International Law*, 5th ed., Oxford, Clarendon Press, 1998, p. 668, is generally of the opinion that the distinction between different types of succession of States is of "little or no value". He, nevertheless, recognises the importance of such a distinction in the field of State succession to obligations arising from the commission of internationally wrongful acts. See also the work of Miriam PETERSCHMITT. The position of Michael John VOLKOVITSCH is more ambiguous. He first indicates (p. 2164) that "the rule to be applied in any particular case may be determined by the kind of transformation that State has experienced, be it secession, merger, or decolonization". However, later in his paper (see at pp. 2191–2192) he expresses doubts on any rule which determines an outcome based on a categorisation between different types of succession of States. This is so because he sees the distinction between the different types of succession as "largely formalistic, at once masking the significant similarity between States in different categories and ignoring the substantial diversity of States of any one type". He is also of the view that "it is almost impossible to conceive of all of the possible factual permutations in advance of their occurrence".

56 According to the Arbitral Tribunal in the *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 I.L.R., 1956, p. 81, at p. 93, these different types of succession of States "cannot but exercise a decisive influence on the solution of the problem of State succession even in cases of delictual obligation". The Tribunal indicated (at p. 91): "Is it a matter of the complete dismemberment of a pre-existing State, of the secession of a colony or of a part of a State, or is it rather a matter of the merger of two previously independent States, of the incorporation of one State in another? To what point, in the last-mentioned hypothesis, should one, in order to resolve the problem, take into account the more or less close relationship between the incorporating State and the incorporated State, or the voluntary or involuntary nature of their union?"

57 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 158, where the Arbitral Commission concluded that there was no "valid reason" to distinguish between these different types of succession of States, since in all cases "the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it".

"continuing" State. The concept of "continuing" State will be used in the present study to refer to such situations. This is the term most often used in doctrine. (The author notes, however, that at the time of writing this study, the I.C.J. rendered in February 2007 its final judgment in the Genocide Case between Bosnia-Herzegovina and Serbia-Montenegro where the term "continuator" State is used). On the contrary, in other cases the predecessor State will *cease to exist*. This distinction is recognised in doctrine;[58] it is sometime referred to as "partial" and "total" State succession.[59] The second essential distinction between different types of succession of States concerns the question whether or not the events affecting the territorial integrity of the predecessor State lead to the *creation of a new State(s)*.[60] These two fundamental distinctions are further examined in the following paragraphs.

In the event that the *predecessor State ceases to exist* following an event affecting its territorial integrity, there are *three* different scenarios which need to be differentiated (and which will be analysed separately in this study).

Firstly, the extinction of the predecessor State may result in the *creation of one new State*. This is the case of a *unification of States*, whereby (at least) *two* existing States will merge to form a new State. It is different from cases of "union of States" where each State keeps its international personality and where no new State emerges.[61] The most recent case of unification is that of Yemen in 1990.[62] Another case, which will often be referred to in this study, is the unification of Egypt and Syria into a single State in 1958 (the United Arab Republic).[63]

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58 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, pp. 111–112; Brigitte STERN, Responsabilité, p. 335; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 677–678. Michael John VOLKOVITSCH, pp. 2164–2165, qualifies this distinction as the most significant one to be made. See also: Vladimir D. DEGAN, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *R.C.A.D.I.*, t. 279, 1999, pp. 300–301.

59 Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 209; Yilma MAKONNEN, "State Succession in Africa: Selected Problems", *R.C.A.D.I.*, t. 200, 1986–V, at pp. 102–103; D.P. O'CONNELL, *State Succession*, vol. I, p. 4.

60 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, pp. 111–112.

61 Cases of union of States are analysis in doctrine by: Charles ROUSSEAU, *Droit international public*, vol. II, Paris, Sirey, 1977, pp. 114–115; Massimo PILOTTI, "Les unions d'Etats", *R.C.A.D.I.*, t. 24, 1928–IV, pp. 445–546. In 2002, Serbia and Montenegro decided to form a "union of the States", see: *Agreement on Principles of Relations Between Serbia and Montenegro within the Framework of a Union of States*, signed in Belgrade on 14 March 2002 (see in particular, Articles 1.2, 1.5 and 5.1).

62 The Yemen Arab Republic (North Yemen) and the People's Democratic Republic of Yemen (South Yemen) merged on 22 May 1990 to form a unified Republic of Yemen. Article 1 of the *Agreement on the Establishment of the Republic of Yemen and the Organisation of the Thirty-Month Interim Period*, 22 April 1990, entered into force on 21 May 1990, in: 30 *I.L.M.*, 1990, p. 820, indicates that: "There shall be established between [the two Yemen]…a full and complete union, based on a merger, in which the international personality of each of them shall be integrated in a single international person called 'the Republic of Yemen'".

63 This case is discussed in detail at *infra*, p. 95.

Secondly, the extinction of the predecessor State may results in the *creation of many new States* on its original territory. This is the case of *dissolution of State*. Recent examples of dissolution are those of Czechoslovakia, the Union of Soviet Socialist Republics (U.S.S.R.) and the Socialist Federal Republic of Yugoslavia (S.F.R.Y.).[64]

Thirdly, the extinction of the predecessor State sometimes results not in the creation of a new State but in the *enlargement of the territory of an existing State*. This is the case of *incorporation* (or "absorption") of State where the territory of a State (the successor State) is enlarged as a result of the integration of the *entirety* of the territory of the predecessor State. There are also very few examples where the extinction of the predecessor State resulted in the enlargement of the territory of not *one* existing State but of *many* States.[65] The most recent example of an incorporation of State is when in 1990 the German Democratic Republic ceased to exist as an independent State and its territory comprising five *Länder* was integrated into the already existing Federal Republic of Germany.[66]

In cases where the predecessor State *continues to exist* following an event affecting its territorial integrity, there are *three* different scenarios which also need to be differentiated (and which will be analysed separately in this study).

Firstly, the event affecting the territorial integrity of the predecessor State may result in the *creation of a new State*. This is the case of *secession*, where a new State emerges from the break-up of an already existing State which nevertheless continues its existence after the loss of part of its territory. There is some controversy as to the proper terminology that should be used to make reference to this phenomenon and whether the term "separation" should not be used instead.[67] In doctrine, the two terms are sometimes used as distinct concepts describing different situations. Thus, for some writers, the term "secession" should be reserved more specifically to describe instances where the removal of one part of the territory is made *without the consent* of the predecessor State.[68] These writers use the term

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64 The question whether the cases of Yugoslavia and the U.S.S.R. are, indeed, examples of dissolution of States is controversial in doctrine. The issue is further discussed at *infra*, p. 117 and p. 150.

65 This is, for instance, the case of the extinction of Poland in 1775. The former territory of Poland was divided among Austria, Prussia and Russia.

66 This case is discussed in detail at *infra*, p. 84.

67 Both the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488 (at Article 34) and the *1983 Vienna Convention on Succession of States in Respect of State Properties, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 298 (Article 17), use the term "separation". This is also the case of the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*, adopted by the I.L.C. on second reading in 1999, I.L.C. Report, U.N. Doc. A/54/10, 1999, chp. IV, paras. 44 and 45, in: *Yearbook I.L.C.*, 1997, vol. II, p. 13.

68 These writers make such a distinction: Marcelo G. KOHEN, "Le problème des frontières en cas de dissolution et de séparation d'Etats: quelles alternatives ?", in: Olivier CORTEN, Barbara DELCOURT, Pierre KLEIN & Nicolas LEVRAT, *Démembrement d'Etats et délimitations territoriales: L'uti possidetis en question(s)*, Brussels, Bruylant, 1999, pp. 368–369; Marcelo G. KOHEN, "Introduction", in: Marcelo G. KOHEN (ed.),

"separation" to refer instead to those other instances where such removal is *accepted* by the predecessor State.[69] It may very well be that such agreement between the continuing State and the secessionist State can have some consequences in the context of the determination of each State's responsibility arising from internationally wrongful acts committed before the date of succession. What matters in the context of this study is that cases of both "separation" and "secession" result in the *creation of a new State* and the continuity of the existence of the predecessor State. Therefore, however valid such distinction between the two terms may be, in the present study the term "secession" will be used in its general sense.

Secondly, there is another type of succession of States which is similar to cases of secession in so far as the events affecting the territorial integrity of the predecessor State results in the creation of a new State while the predecessor State continues to exist. This is the case of the creation of "*Newly Independent States*" in the context of decolonisation. It is generally admitted that the territory of a colony should not be considered as part of the territory of the colonial State administrating it.[70] In that sense, a "Newly Independent State" is a new State which, however, cannot be said to have "seceded" from the colonial power to the extent that its territory was never formally part of it.[71]

There is some controversy in doctrine as to whether Newly Independent States should at all be viewed as a distinct type of succession of States.[72] Supporters of the distinction rely on the specific circumstances of decolonisation and the fact that different rules of State succession should apply to these States in order for them to freely exercise their right to self-determination and to break the vicious circle of

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Secession: International Law Perspectives, Cambridge, Cambridge Univ. Press, 2006, pp. 2–3; James CRAWFORD, *The Creation of States in International Law*, Oxford, Clarendon Press, 1979, p. 247; James CRAWFORD, "State Practice and International Law in Relation to Secession", *British Y.I.L.*, 1998, p. 85. Similarly, D.P. O'CONNELL, *State Succession*, vol. II, p. 88, speaks of "revolutionary secession" and "evolutionary secession".

69 It should be noted that other writers use the term "separation" in the context of "unitary" State, while "secession" is used for cases involving "federal" States. For instance, see: Jacques BROSSARD & Daniel TURP, *L'accession à la souveraineté et le cas du Québec*, 2nd ed., Montreal, Presse de l'Université de Montréal, 1995, p. 94; Daniel TURP, *Le droit de choisir: Essais sur le droit du Québec à disposer de lui-même/ The Right to Choose: Essays on Québec's Right of Self-Determination*, Montreal, Ed. Thémis, 2001, p. 22.

70 *Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, adopted by U.N. General Assembly Res. 2625 (XXV), of 24 October 1970.

71 Zidane MERIBOUTE, *La codification de la succession d'États aux traités: décolonisation, sécession, unification*, Paris, P.U.F., 1984, p. 174.

72 Some writers do not view Newly Independent States as a distinct category: Vladimir D. DEGAN, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *R.C.A.D.I.*, t. 279, 1999, p. 298–299. See also: *Restatement (Third), Foreign Relations Law of the United States*, Vol. I, St. Paul, American Law Institute Publ., 1987, § 210, Reporters' notes no. 4 (p. 113).

economic domination.[73] The work of the I.L.C. on State succession has recognised the specificity of this category of State succession.[74] Both Vienna Conventions on matters of State succession have thus adopted different rules applicable to Newly Independent States.[75] The I.L.C. Draft Articles on nationality in relation to State succession did not.[76] A recent example of a Newly Independent State, which will be discussed at length in this study, is the independence of Namibia in 1990. The most recent case is that of the independence of Timor Leste in 2002.

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73 See, for instance, the position held by Yilma MAKONNEN, "State Succession in Africa: Selected Problems", *R.C.A.D.I.*, t. 200, 1986–V, pp. 130–131, for whom "the guiding principles governing the consequences of State succession are the complete elimination of 'colonialism' in all form and manifestation and creating the conditions for the realization of the right to self-determination by the newly independent States". Similarly, the position of Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, pp. 468–469: "Un Etat nouveau, pour remplir sa mission interne et sa fonction internationale, doit s'affermir et s'affirmer en tant que tel, faute de quoi son indépendance serait pleine d'illusion et sa viabilité, d'artifice. L'objectif essentiel consiste à purger les rapports anciens de leur contenu inégalitaire. Cela, on le pressent, doit conférer une tonalité spécifique à la succession d'Etats par décolonisation, par rapport à la succession du type classique où ne décelait pas l'existence de liens de subordination". See also the same writer's comment (at p. 530): "L'impératif catégorique pour l'Etat nouveau demeure l'élimination des causes réelles de la colonisation ou de la colonisabilité par la suppression du sous-développement. Le droit de la succession d'Etats peut y contribuer ou non selon qu'il intègre les principes nouveaux, notamment de la Charte des Nations unies, ou qu'il demeure l'expression des intérêts impériaux".

74 This is discussed in: Zidane MERIBOUTE, *La codification de la succession d'États aux traités: décolonisation, sécession, unification*, Paris, P.U.F., 1984, pp. 29–30, 49, 56, 63.

75 Thus, Article 16 of the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488, indicates that treaties entered into by the predecessor State are not binding on a Newly Independent State, while other new States emerging from a dissolution of State or separation/secession are bound by such treaties (Article 34 of the Convention). Article 38 of the *1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306, indicates that, in principle, and without any agreement to the contrary, debts of the predecessor State do not pass to the Newly Independent State. A different regime applies to cases of unification of States (where debts pass to the successor State, Article 39) and cases of separation and dissolution of State (where an "equitable share" of the predecessor State's debts pass to the new State(s), Articles 40 and 41).

76 *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*, adopted by the I.L.C. on second reading in 1999, I.L.C. Report, U.N. Doc. A/54/10, 1999, chp. IV, paras. 44 and 45, in: *Yearbook I.L.C.*, 1997, vol. II, p. 13, at p. 41, paras. 1 & 3 (dealing with Article 26). The Commentary to the Articles recognises the theoretical distinction between Newly Independent States and "separation of part or parts of the territory" (i.e. secession). However, it also indicates that the "substantive rules" established for cases of secession (i.e. Articles 24 to 26) would be applicable *mutatis mutandis* to any remaining cases of decolonisation in the future. Therefore, no separate section was included in the Draft Articles to deal specifically with Newly Independent States.

Thirdly, the event affecting the territorial integrity of the predecessor State may sometimes result not in the creation of a new State but in *the enlargement of the territory of an existing State*. This is the case of the *cession or transfer of territory* from one existing State to another existing State. Although the term "cession" is sometime used in doctrine as including the concept of "transfer",[77] in this study the former will only refer to cases where the territorial change is made pursuant to a treaty to which the predecessor State is a party, while the latter will apply only to situations where there is no agreement between the predecessor State and the successor State. This semantic distinction having been explained, it remains that both cases of cession and transfer of territory will be analysed in this study as *a single* type of succession of States. This type of territorial transformation is somewhat different compared to other mechanisms of State succession in so far as it results neither in the extinction of a State nor in the creation of a new State.[78] It is nevertheless clearly a distinct type of State succession.[79] It is analysed as such by the work of the I.L.C. on matters of State succession.[80] A classic example of cession of territory dealt with in this study is that of Alsace-Lorraine from Germany to France in 1919.

The relevant State practice and international case law will be examined *separately* for the following six different types of succession of States:[81]

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77 Malcolm SHAW, *International Law*, 4th ed., Cambridge, Cambridge Univ. Press, 1997, p. 688.

78 There is one main difference between cases of "cession" of territory and cases of "incorporation". Cases of cession of territory only deal with *part of a territory* of a State which passes to another State, while cases of incorporation involve the *whole territory* of the State which is integrated into another State. Another difference is that in the context of cession of territory, the predecessor State is not extinguished as a result of the loss of part of its territory.

79 This is emphasised by Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 105.

80 Article 15 of the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488, does not make use of the concept of "cession" but refers instead to the situation "[w]hen part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State". See also: Article 14 of the *1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306; Article 20 of the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*, adopted by the I.L.C. on second reading in 1999, I.L.C. Report, U.N. Doc. A/54/10, 1999, chp. IV, paras. 44 and 45, in: *Yearbook I.L.C.*, 1997, vol. II, p. 13.

81 It should be noted, however, that State practice and case law will *not be examined separately* for the different types of succession of States in the context of succession to the right to reparation for damage affecting new nationals of the successor State (Part III, Chapter 2). This is so because of the limited existing State practice and international case law.

- Unification of States;
- Dissolution of State;
- Incorporation of State;
- Secession;
- Creation of Newly Independent States; and
- Cession and transfer of territory.

This typology is by no means authoritative, and many different ones have been used in the past.[82] For instance, the two Vienna Conventions on succession of States and the I.L.C. Draft Articles on nationality in relation to State succession have adopted their own typologies. Doctrine is also rich with a great variety of such typologies.[83]

4.3 *Fundamental Principles of State Responsibility in International Law*

Since the present study deals with the issue of State succession to international responsibility, it is appropriate to briefly examine the regime of State responsibility in international law. The basic rule of the regime is provided at Article 1 of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the Drafting Committee on Second Reading on 26 July 2001: "Every internationally wrongful act of a State entails the international responsibility of that State."[84] According to the I.L.C., this principle "is one of the principles most strongly upheld by State practice and judicial decisions and most deeply rooted in the doctrine of international law".[85] It goes without saying that this principle

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82 This typology is essentially based on the work of Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 113. Vladimir D. DEGAN, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *R.C.A.D.I.*, t. 279, 1999, pp. 298–299, uses a similar typology with the exception of Newly Independent States, which are not analysed as a distinct category.

83 A survey of some typologies used in doctrine can be found in: Brigitte STERN, *Ibid.*, pp. 104–116; Annie GRUBER, *Le droit international de la succession d'Etats*, Paris, Publ. faculté de droit de l'Université René Descartes (Paris V) & Brussels, Ed. Bruylant, 1986, pp. 17–18.

84 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

85 I.L.C.'s Commentary to the *Draft Articles on State Responsibility Adopted by the Commission on First Reading*, 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May–26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, chp. III, in: *Yearbook I.L.C.*, 1996, vol. II (Part Two), pp. 58–65, which can be found in: *Report of the International Law Commission on the Work of its Twenty-Fifth Session*, 7 May to 13 July 1973, I.L.C. Report, A/9090/Rev.1 (A/28/10), 1973, chp. II, paras. 12–58, in: *Yearbook I.L.C.*, 1973, vol. II, p. 161, at pp. 173–176, para. 1.

applies to every internationally wrongful act committed *by every* State. Thus, no State is immune from engaging its international responsibility.[86]

Article 1 makes reference to two concepts, "internationally wrongful act" and "international responsibility", which will each be examined in the next sections.

International wrongful act. Article 2 of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts* indicates the conditions required to establish the existence of an "internationally wrongful act". The constituent elements of an "internationally wrongful act" consist of a "subjective" and an "objective" element. There is an "internationally wrongful act" of a State when conduct consisting of an action or an omission:

(a) is attributable to that State under international law; and
(b) constitutes a breach of an international obligation of that State.[87]

These two elements are the only necessary components of an internationally wrongful act; there is no general requirement of the existence of a material (or moral) "damage".[88]

The first requirement (the "objective" element) is the commission by a State of a breach of an "international obligation" by an action or an omission. Liability arises from the commission of "internationally wrongful acts" and not from acts not prohibited under international law. It also needs to be a breach of an "international" obligation and not merely the failure of a State to fulfil an obligation imposed by its own legal system (Article 3). A State also cannot escape liability for the breach of an obligation imposed by international law based on the ground

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86 Article 2 the *Text of the Draft Articles on State Responsibility Adopted by the Commission on First Reading*, 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May–26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, chp. III, in: *Yearbook I.L.C.*, 1996, vol. II (Part Two), pp. 58–65, provides that: "Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility". This provision is not contained in the 2001 final version because it was "unquestioned and unquestionable": *First Report on State Responsibility* (*addendum* no. 4), by Mr James Crawford, Special Rapporteur, 26 May 1998, U.N. Doc. A/CN.4/490/Add.4, at para. 134.

87 It should be noted that a State commits an "internationally wrongful act" only to the extent that there are no circumstances precluding wrongfulness.

88 *First Report on State Responsibility* (*addendum* no. 4), by Mr James Crawford, Special Rapporteur, 26 May 1998, U.N. Doc. A/CN.4/490/Add.4, at para. 116. See also: I.L.C.'s Commentary to the *Draft Articles on State Responsibility Adopted by the Commission on First Reading*, 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May-26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, chp. III, in: *Yearbook I.L.C.*, 1996, vol. II (Part Two), pp. 58–65, which can be found in: *Report of the International Law Commission on the Work of its Twenty-Fifth Session*, 7 May to 13 July 1973, I.L.C. Report, A/9090/Rev.1 (A/28/10), 1973, chp. II, paras. 12–58, in: *Yearbook I.L.C.*, 1973, vol. II, p. 161, at pp. 179 et seq., para. 12.

that such conduct is in conformity with its domestic law. Since the *Articles on Responsibility of States for Internationally Wrongful Acts* deal only with the "secondary" rules of State responsibility, and not with the "primary" rules, they do not "attempt to define the content of the international obligations breach of which gives rise to responsibility".[89] The Articles only determine the "general conditions under international law for the State to be considered responsible for wrongful actions or omissions" and the consequences arising from such violation.[90] Article 12 states that an international obligation is breached by a State "when an act of that State is not in conformity with what is required of it by that obligation".

The second requirement (the "subjective" element) for the existence of an "internationally wrongful act" is that the breach of an international obligation can be "attributable" to a State. Since the State is an organised entity which cannot act in itself but only through its agents and representatives, the question of attribution needs to be answered by considering "which persons should be considered as acting on behalf of the State, i.e. what constitutes an act of the State for the purposes of State responsibility".[91]

International responsibility. According to Article 1 of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts*, the commission of an internationally wrongful act by a State entails its international responsibility.[92] The commission of such act gives rise to new international legal relations characterised by a subjective legal situation distinct from that which existed before the act took

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89 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2), pp. 59 et seq., at p. 59, para. 1. Reference should be made to the clear explanation given by the I.L.C.'s Special Rapporteur Ago in an earlier draft of the Articles: "[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation": *Report of the International Law Commission on the Work of its Twenty-Second Session*, 4 May to 10 July 1970, I.L.C. Report, A/8010/Rev.1 (A/25/10), 1970, chp. IV. paras. 64–83, in: *Yearbook I.L.C.*, 1970, vol. II, p. 271, at p. 306, para. 66 (c).

90 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001), Id.*

91 *Ibid*., at p. 71, para. 5. According to Article 4 of the Articles, the conduct of a State "shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".

92 A special regime prevails in cases where the internationally wrongful act constitutes a "serious breach" by a State of an obligation arising under a peremptory norm of general international law. The particular legal consequences of a breach of such an obligation are set out at Article 41.

place.[93] The new legal relations "are grouped under the common denomination of international responsibility".[94] A State that committed an internationally wrongful act is nevertheless under the continuous obligation to perform the obligation breached (Article 29). The responsible State is also obliged to cease the wrongful conduct or, in some circumstances, to offer appropriate assurances and guarantee of non-repetition (Article 30).

The responsible State has to make full reparation for the injury caused by the internationally wrongful act (Article 31). The present study will constantly refer to the "obligation to repair" as well as to the "right to reparation" arising from internationally wrongful acts committed before the date of succession. In the present context, the "reparation" will often take the form of *compensation*. However, instances where the proper means of reparation will be *restitution* or *satisfaction* should not be excluded. There may even be cases where counter measures may be an appropriate form of reparation.

4.4 *The Term "Internationally Wrongful Act" Should Be Used instead of "Tort"*

The present study will use the term "internationally wrongful act" to refer to the illegal act committed by a State against another State. As previously observed, this is the expression used by the I.L.C. in its final *Articles on Responsibility of States for Internationally Wrongful Acts*.[95] In the work of the I.L.C., this expression is preferred to other terms such as delinquency or torts.[96]

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93 I.L.C.'s Commentary to the *Draft Articles on State Responsibility Adopted by the Commission on First Reading*, 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May-26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, chp. III, in: *Yearbook I.L.C.*, 1996, vol. II (Part Two), pp. 58–65, which can be found in: *Report of the International Law Commission on the Work of its Twenty-Fifth Session*, 7 May to 13 July 1973, I.L.C. Report, A/9090/Rev.1 (A/28/10), 1973, chp. II, paras. 12–58, in: *Yearbook I.L.C.*, 1973, vol. II, p. 161, at pp. 173–176, paras. 4–6.

94 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 123.

95 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

96 I.L.C.'s Commentary to the *Draft Articles on State Responsibility Adopted by the Commission on First Reading,* 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May-26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, chp. III, in: *Yearbook I.L.C.*, 1996, vol. II

It is, indeed, important to differentiate the concept of "internationally wrongful act" from the common law notion of "torts".[97] The two concepts have different meanings. Thus, the concept of "internationally wrongful act" includes *all types of breaches of international obligations*, whatever their sources (treaty, contract, rule of customary international law, general principle of international law). In common law, the concept of tort is limited to "extra contractual liability". There is no distinction in international law between "contractual" (*ex contractu*) and "tortious" (*ex delicto)* responsibility; the same legal regime of State responsibility applies for both.[98]

Another essential distinction is that an "internationally wrongful act" is defined and exists solely under international law, while "torts" are rooted in municipal law.[99] Earlier writing on State succession used the expression "torts".[100] The use of such term creates great confusion, as it is not clear whether the proposition advanced by some authors that there is no succession to "torts" is in fact a reference to the limited scope of the concept under common law or to the more general notion of "internationally wrongful act".[101] This confusion in terminology makes

(Part Two), pp. 58–65, which can be found in: *Report of the International Law Commission on the Work of its Twenty-Fifth Session*, 7 May to 13 July 1973, I.L.C. Report, A/9090/Rev.1 (A/28/10), 1973, chp. II, paras. 12–58, in: *Yearbook I.L.C.*, 1973, vol. II, p. 161, at pp. 173–176, para. 14.

97 This important distinction is made by writers such as: D.P. O'CONNELL, *State Succession,* vol. I, pp. 482–483; Wladyslaw CZAPLINSKI, p. 356; Michael John VOLKOVITSCH, p. 2167; Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, p. 688.

98 *Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of two Agreements, Concluded on 9 July 1986 Between the two States and which Related to the Problems Arising from the Rainbow Warrior Affair*, [The Rainbow Warrior II case] (New Zealand v. France), Award of 30 April 1990, in: *U.N.R.I.A.A.*, vol. XX, p. 217, at para. 75.

99 The importance of the distinction is highlighted by D.P. O'CONNELL, *State Succession,* vol. I, p. 482; Michael John VOLKOVITSCH, p. 2167. Torts also generally survive changes of sovereignty only to the extent that the successor State adopts its predecessor's municipal law without any changes. A tort in municipal law may, however, also constitute an "internationally wrongful act" as in the case of the wrongful deprivation (without any reparation) by a State of private property owned by aliens.

100 For instance, Cecil J.B. HURST; A.B. KEITH, *The Theory of State Succession with Specific Reference to English and Colonial Law*, London, 1907, p. 74.

101 Thus, some writers, such as Ernest H. FEILCHENFELD, Public Debts and State Succession, New York, Macmillan, 1931, p. 688, endorse a rule of non-succession to "torts" in the common law sense of "delictual liability" (ex delicto) as opposed to "contractual" acts. Other writers, such as Arrigo CAVAGLIERI, "Règles générales du droit de la paix", R.C.A.D.I., t. 26, 1929–I, at p. 374, refer, however, to the notion of "torts" in the sense of international wrongful acts. This issue is further discussed in: D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", R.C.A.D.I., t. 130, 1970–II, p. 164.

uncertain the analysis of some of the older doctrine on the question at the heart of this study.[102]

4.5 *This Study does not Deal with the Regime of State Responsibility for Breaches of Rules of State Succession*

Another important remark that should be made at the outset is that the present study does not deal with the *interaction* between "State succession" and "State responsibility", which are two fundamentally different areas of international law. Thus, the present study *does not* deal with the legal consequences of the breach of rules of State succession by a new State *after its independence*. It will not determine the legal consequences of such violation under the appropriate rules of State responsibility.[103] The present study deals with the situation where an internationally wrongful act was committed *before the date of succession* and examines the legal consequences in the event that the State perpetrator or victim of such an act is *subsequently* affected by the mechanisms of State succession.

4.6 *This Study does not Deal with the Issue of "Odious Debts" and "War Damage" between the Predecessor State and the Successor State*

The present study will only focus on rights and obligations arising from internationally wrongful acts suffered by or caused by *third States*. The question of reparation for damage *between* the predecessor State and the successor State, or even *between* the different new successor States (such as in the case of a dissolution of State) will not be addressed *per se* in the course of the present study. The principal reason being that in such cases the issue at stake only deals with problems of State responsibility *per se* and not with any questions of State succession. Therefore,

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102 Similarly, Wladyslaw CZAPLINSKI, p. 356, states that "the most important difficulty is that usually responsibility for international delicts is not correctly distinguished from liability for torts in municipal law". For D.P. O'CONNELL, *State Succession*, vol. I, p. 482, "this failure to characterise the event properly has produced a defective jurisprudence". He concludes (in: D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 164) that the "obvious intellectual confusion" of the analysis "has prompted the question whether the proposition that there is no succession to torts is not, perhaps, spurious".

103 Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, p. 531: "La succession d'Etats n'a pour objet que de déterminer l'existence ou non d'une obligation internationale mise à la charge de l'Etat successeur. Elle laisse à la matière de la responsabilité le soin d'assurer le relai et d'étudier la possibilité, la nature et la mise en jeu des sanctions d'une violation de ce devoir international s'il existe".

so-called "odious debts" and "war damage" will not be addressed specifically in the present study.

The so-called "odious debts" include war debts contracted by the predecessor State in its war effort against the successor State and "enslavement" debts, which are debts contracted with the aim of the colonisation of a territory.[104] It is only to the extent that such "odious debts" actually refer to third States (as the victim or the perpetrator of the wrong) that they will be taken into account in this study.

Similarly, questions of "war damage" *between* the predecessor State and the successor State (or between the different new successor States in the context of a dissolution of State) will not be addressed *per se* in the course of the present study. Questions of war damage are generally excluded from the analysis of issues of State succession.[105] In the context of the aftermath of the Yugoslav civil war in the 1990s, Slovenia and Croatia, co-chairing the Peace Conference, asked the Badinter Arbitral Commission to determine whether any amounts owed by one or more States in the form of war damage could affect the distribution of the debts and assets of the former Yugoslavia.[106] The former Republics were divided on this issue depending on whether or not they had been the victims of such damage.[107] In its Decision no. 13, the Commission decided that the question of State succes-

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104 There is support in doctrine for the principle that "odious debts" are non-transmissible from the predecessor State to the successor State as a matter of customary international law: Brigitte STERN, Responsabilité, p. 341; Brigitte STERN, "General Concluding Remarks", in: Brigitte STERN (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, The Hague, Martinus Nijhoff Publ., 1998, at p. 205; Annie GRUBER, *Le droit international de la succession d'Etats*, Paris, Publ. faculté de droit de l'Université René Descartes (Paris V) & Brussels, Ed. Bruylant, 1986, p. 120.

105 This is, for instance, the position of Brigitte STERN, Responsabilité, pp. 342–343, as well as that of Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 751.

106 The question is further examined in: M. MRAK (ed.), *Succession of States*, The Hague, Martinus Nijhoff Publ., 1999, at pp. 189 et seq.

107 Brigitte STERN, Responsabilité, pp. 342–343. Thus, Slovenia, which had suffered only minor war damage as a result of a short period of conflict with the federal authorities of Yugoslavia, refused that the question be included in the negotiations leading to a comprehensive agreement on pending questions of State succession. On the other hand, Bosnia, undoubtedly the victim of many war exactions, was, for obvious reasons, strongly in favour of the inclusion of the question of war damage in the negotiations. The position of Bosnia is explained in this negotiation document: "Principles and Attitudes Regarding Drawing Up the Contract on Succession of the Property, Archives and Debts of Former SFRY" (see at point no. 20), 24 December 1990, in: Snezana TRIFUNOVKA, *Former Yugoslavia Through Documents—From Its Dissolution to the Peace Settlement,* Dordrecht, Martinus Nijhoff Publ., 1999, at pp. 1280–1286. A similar view was also held by Croatia stating that "as principal victims [with Bosnia] of the aggression" it "cannot agree to an overall settlement that would not take into account the reparation of war damages inflicted on them and their population": "Statement to the Working Group on Succession Issued of the ICFY by the Delegation of Croatia" attached to a letter dated 17 May 1994 from the Head of the Delegation of Croatia to the Working Group on Succession Issued of the ICFY addressed to the Co-Chairman

sion to debts and assets and the other question of reparation for war damage were governed by two distinct fields of international law:

> The rules applicable to State succession, on the one hand, and the rules of State responsibility, on which the question of war damages depends, on the other, fall within two distinct areas of international law.[108]

In the *Agreement on Succession Issues* (dated 29 June 2001)[109] entered into between the successor States to the former Yugoslavia, questions of war damage were deliberately excluded from other issues of State succession.[110]

4.7 *This Study does not Deal with Internationally Wrongful Acts Committed by the Predecessor State against its own Nationals/Corporations*

The present study *principally* focuses on internationally wrongful acts committed by a State *against other States* (and nationals/corporations of other States). It does not intend to treat in great detail the other situation of acts committed by the predecessor State against *its own* nationals and corporations before the date of succession. The basic aim of the present study is therefore not to address human rights abuses committed by the predecessor State and the question of whether the successor State is bound to provide reparation for such internationally wrongful acts committed against its new nationals.

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of the International Conference, UN Doc. S/1994, 624, Annex, in: Snezana TRIFUNOVKA, *Ibid.*, at pp. 1260–1267.

108 Arbitration Commission *Opinion no. 13,* 16 July 1993, in: *I.L.M.*, 1993, p. 1592. The Commission, nevertheless, acknowledged the possibility that the transfer of debts and assets could be set off against war damage: "The possibility cannot be excluded in particular of setting off assets and liabilities to be transferred under the rules of State succession on the one hand against war damage on the other".

109 *Agreement on Succession Issues* of 29 June 2001, in: 41 *I.L.M.*, 2002, p. 3. This Agreement is discussed in detail at *infra*, p. 119.

110 This is the position of Professor Vladimir-Djuro Degan, who participated in the negotiations leading to this Agreement as a representative of Croatia. In a reply to a letter sent by the author, Degan explained (letter dated 21 October 2002, on file with the present author) that the reference at Article 7 of the Agreement to "certain other non-succession matters" was a clear reference to questions of war damage that the successor States deliberately decided to exclude from this Agreement on issues of State succession. In a letter (dated 13 November 2002, on file with the author) sent to the present author, Sir Arthur Watts, who was the "Special Negotiator for Succession Issues" and under whose supervision the Agreement was signed, indicated that issues of war damage were not included in the negotiations but were, nevertheless, very much present in the background as they "coloured the attitudes of the negotiating States whenever the words 'international responsibility' cropped up". The present author was given permission from Professor Degan and Sir Arthur to make reference to the content of these letters in the context of the present study.

However, many of the municipal court decisions examined in this study will indeed deal with cases where internationally wrongful acts were committed by a State against its nationals before the date of succession and where such nationals subsequently became nationals of another State. Throughout this study, these cases will be identified as such and distinguished from those other cases involving *international* responsibility for internationally wrongful acts committed against other States (or nationals of other States). The reasons for treating them differently is that the solution adopted by local courts will often be dictated by the successor State's own *internal political agenda* which has little to do with any international law considerations. It is not indifferent to the result reached by some municipal courts that the damage was suffered by a new national of the successor State as opposed to a foreigner.

PART II

SUCCESSION OF STATES TO THE OBLIGATION TO REPAIR

General Introduction

This First Part explores the issue of State succession to the *obligation to repair*.[1] The issue analysed in this Part arises from the commission of an internationally wrongful act by the predecessor State(s) against another State. Before the date of succession, the predecessor State(s) is thus the debtor of the *obligation to repair* towards the injured third State. The question addressed in this Part is what happens to the international obligation arising from the commission of the internationally wrongful act in the context of a succession of States. In other words, after the date of succession, who from the predecessor State(s) or the successor State(s) should be held responsible for the international obligation arising from the commission of the internationally wrongful act. Can the obligation to repair, for which the predecessor State(s) is the debtor before the date of succession, be "transferred" to the successor State(s)? It is undisputed that nothing in international law prevents a successor State(s) from freely deciding to take over the internationally wrongful acts committed by the predecessor State(s) before the date of succession.[2] The other question, which remains "unclear", to paraphrase the I.L.C. Special Rapporteur Crawford,[3] is the situation prevailing *in the absence of such consent by the successor State(s)*.[4] This is the topic addressed in the present Part.

The first Chapter (Chapter 1) of this Part explores the theoretical dimension of the question whether the transfer of the obligation to repair from the predecessor State(s) to the successor State(s) is accepted in international law. It examines in detail (at Section 1) the legal arguments advanced by many writers for whom there can be no succession to international responsibility. It also explores the criticisms and challenges which have been expressed by scholars against this strict doctrine of non-succession (Section 2).

The next Chapter (Chapter 2) examines the relevant State practice and international and municipal case law where questions of State succession to obligations arising from the commission of internationally wrongful acts arose. Such analysis will be made separately for the different types of succession of States. It also examines

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1 The other question of State succession to the *right to reparation* is the object of the next Part (Part III).

2 This question is analysed at *infra*, p. 215.

3 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2), pp. 59 et seq., at p. 119, para. 3.

4 L. CAFLISCH, "The Law of State Succession: Theoretical Observations", *Netherlands I.L.R.*, 1963, p. 358, observed (in 1963) that "the doctrinal controversy concerning the eventual succession to tortious liabilities" "has never been clarified".

the position of doctrine and presents this author's own position on which of the principles of succession or non-succession should apply for each situation.

Based on this investigation of State practice and case law, this Part examines (in Chapter 3) specific factors and circumstances (other than the different types of mechanism of succession of States, discussed in Chapter 2) that are relevant to determine which of the principles of succession or non-succession should apply. There are, indeed, specific issues of State succession to obligations, which will be resolved by specific solutions.

1

ANALYSIS OF DOCTRINE

Introduction

This Chapter analyses doctrine on the question whether the "transfer" of the obligation to repair from the predecessor State(s) to the successor State(s) is accepted in international law. Section 1 examines the legal arguments advanced by the dominant doctrine of non-succession, according to which there can be no transfer of the obligation to repair to the successor State(s). This section critically assesses the soundness of these arguments. Section 2 deals with the criticisms and challenges that have been expressed in doctrine against this strict principle of non-succession.

1. *The Doctrine of Non-Succession*

1.1 *General Overview of the Doctrine*

As already mentioned, the issue of succession of States to international responsibility is rarely addressed in general textbooks of international law and, when it is, only a few lines are usually devoted to the question. In almost all of these general textbooks, the applicable "rule" is stated as being the principle of non-succession, whereby the successor State(s) is not bound by internationally wrongful acts committed by the predecessor State(s) before the date of succession.[1] Similarly,

1 For example, see the following writers: NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 550; Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 54; Ian BROWNLIE,

Patrick Dumberry, State Succession to International Responsibility, pp. 31–58.

Principles of Public International Law, 6th ed., Oxford, Clarendon Press, 2003, p. 632 (making an exception for cases of voluntary merger and voluntary dissolution); Peter MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th ed., London, Routledge, 1997, p. 169; Paul GUGGENHEIM, *Traité de Droit international public*, t. I, Geneva, Librairie de l'Université, 1953, p. 474; H. LAUTERPACHT, *Oppenheim's International Law*, vol. I, London, Longmans Green & Co., 1955, p. 162; Arrigo CAVAGLIERI, "Règles générales du droit de la paix", *R.C.A.D.I.*, t. 26, 1929–I, p. 374; Malcolm SHAW, *International Law*, 4th ed., Cambridge, Cambridge Univ. Press, 1997, p. 713; Georg SCHWARZENBERGER, *A Manual of International Law*, vol. I, 4th ed., London, Stevens & Sons, 1960, p. 81; Louis CAVARE, *Le droit international positif*, vol. I, 2nd ed., Paris, Pedone, 1961, p. 379; J.L. BRIERLY, *The Law of Nations, An Introduction to the International Law of Peace*, Oxford, Clarendon Press, 1928, pp. 89–90; J.L. BRIERLY, "Règles générales du droit de la paix", *R.C.A.D.I.*, t. 58, 1936–IV, p. 69; Bin CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens & Sons, 1953, pp. 167–168; A. VERDROSS, *Völkerrecht*, 4th ed., Vienna, Springler Verlag, 1959, p. 198; A. VERDROSS & B. SIMMA, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, Dunker & Humblot, 1984, p. 633–634; Hans KELSEN, *Principles of International Law*, 2nd ed. (rev. and ed. By Robert W. TUCKER), New York, Holt, Rinehart & Winston Inc., 1966, p. 419 (at footnote 114); Lord McNAIR, *International Law Opinions*, vol. I, Cambridge, Cambridge Univ. Press, 1956, p. 166. Charles De VISSCHER, *Théories et réalités en droit international public*, Paris, Pedone, 1953, p. 210; Coleman PHILLIPSON, *Termination of War and Treaties of Peace*, New York, E.P. Dutton & Cie., 1916, p. 331; Louis DELBEZ, *Principes généraux du droit international public*, 3rd ed., Paris, L.G.D.J., 1964, p. 275; John O'BRIEN, *International Law*, London, Cavendish Publ. Ltd., 2001, p. 604; Jackson H. RALSTON, *The Law and Procedure of International Tribunals (Supplement to 1926 Revised Edition)*, Stanford, Stanford Univ. Press, 1936, pp. 146–147; Louis HENKIN, Richard CRAWFORD PUGH, Oscar SCHACHTER & Hans SMIT, *International Law, Cases and Materials*, 3rd ed., St. Paul, West Publ. Co., 1993, p. 293; Herbert W. BRIGGS, *The Law of Nations: Cases, Documents, and Notes*, New York, F.S. Crofts & Co., 1947, p. 132; Angelo Piero SERENI, *Diritto Internazionale*, vol. 2, Milan, Dot. A. Giuffré Ed., 1958, p. 399; J.P. MÜLLER & L. WILDABER, *Praxis des Völkerrechts*, 2nd ed., Bern, Stämpfli, 1982, p. 172; Emile GIRAUD, "Arbitrage international", in: A. de LAPRADELLE & J.-P. NIBOYET, *Répertoire de droit international*, t. I, Paris, Sirey, 1929, p. 687; Hugh M. KINDRED (ed.), *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed., Toronto, Emond Montgomery Publ. Ltd., 1993, p. 71; Green Haywood HACKWORTH, *Digest of International Law*, vol. I, 1940, Washington, G.P.O., p. 560–561; Suzanne BASTID, *Droit international public, Principes généraux*, Fasc. II, Univ. de Paris, les Cours de droit, 1966–1967, at p. 170; R.C. HINGORANI, *Modern International Law*, 2nd ed., Dobbs Ferry, N.Y., Oceana Publications, 1984, p. 109; Michel WAELBROECK, "Arrêt no. 8160 du Conseil d'Etat Belge, note d'observations", *R.J.D.A.*, 1961, no. 1, at p. 35 (making an exception for unjust enrichment); Wesley L. GOULD, *An Introduction to International Law*, New York, Harpers & Brothers Publ., 1957, p. 428; David RUZIE, *Droit international public*, 14th ed., Paris, Dalloz, 1999, at p. 90; Georg DAHM, *Völkerrecht*, vol. 1, Stuttgart, W. Kohlhammer Verlag, 1958, at p. 121; Marcel SINKONDO, *Droit international public*, Paris, Ellipses, 1999, p. 327; Oscar SVARLIEN, *An Introduction to the Law of Nations*, New York, McGraw-Hill Book Co. Inc., 1955, p. 119; Kurt VON SCHUSCHNIGG, *International Law: An Introduction to the Law of Peace*, Milwaukee, Bruce Publ. Co., 1959, p. 158; Charles Cheney HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 2nd ed., Boston, Little, Brown & Co., 1945, p. 437 (the author is, however, also quite critical of

other books and articles more specifically related to the study of questions of State succession also generally support this principle of non-succession.[2] Those writings are herein referred to collectively as the doctrine of non-succession.

It seems that amongst the writers who have *not* made an extensive study of the issue of succession of States to international responsibility, the position almost unanimously held is in favour of the non-transferability to the successor State(s) of the obligation to repair. However, it should be noted that only a portion of those

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this rule which "leaves something to be desired"); John DUGARD, *International Law; a South African Perspective*, 2nd ed., Kenwyn, Juta, 2000, pp. 232–233.

2 For example, see the following writers: D. BARDONNET, *La succession d'Etats à Madagascar: succession au droit conventionnel et aux droits patrimoniaux*, Paris, L.G.D.J., 1970, pp. 315–316; Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, pp. 1, 11, 189; Konrad G. BÜHLER, "State Succession, Identity/Continuity and Membership in the United Nations", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 193–194; Oskar LEHNER, "The Identity of Austria 1918/19 as a problem of State Succession", 44 *Ö.Z.ö.R.V.*, 1992, p. 76; Isaac PAENSON, *Les conséquences financières de la succession d'Etats (1932–1953)*, Paris, Domat-Montchrestien, 1954, at p. 19; Max HUBER, *Die Staatensuccession: völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert*, Leipzig, Duncker & Humblot, 1898, pp. 65–66; A.B. KEITH, *The Theory of State Succession with Specific Reference to English and Colonial Law*, London, 1907, pp. 74–75, 77; W. SCHöNBORN, *Staatensuccession, Handbuch des Völkerrechts*, vol. 2, Part. 5, Stuttgard, 1913, p. 49; Matthew C.R. CRAVEN, "The Problem of State Succession and the Identity of States under International Law", 9(1) *E.J.I.L.*, 1998, pp. 149–150; Natalino RONZITTI, *La successione internazionale tra stati*, Milan, Dott. A. Giuffrè, 1970, p. 216; Ulrich FASTENRATH, "Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", 44 *Ö.Z.ö.R.V.*, 1992, at p. 39; Florian DRINHAUSEN, *Die Auswirkungen der Staatensukzession auf Verträge eines Staates mit privaten Partnern*, Frankfurt, Peter Lang, 1995, p. 151; Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, p. 368; S.K. AGRAWALA, "Law of Nations as Interpreted and Applied by Indian Courts and Legislature", 2 *Indian J.I.L.*, 1962, p. 431, at p. 442; Zyade MOTALA, "Under International Law, Does the New Order in South Africa Assume the Obligations and Responsibilities of Apartheid Order? An Argument for Realism over Formalism", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, pp. 291–292; Neville BOTHA, "To Pay or Not to Pay?: Namibian Liability for South African Delicts", 16 *South African Y.I.L.*, 1990–1991, p. 162; Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, p. 207; Jiri MALENOVSKY, "Problèmes juridiques liés à la partition de la Tchécoslovaquie", 39 *A.F.D.I.*, 1993, p. 334; Lauri MÄLKSOO, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (A Study of the Tension between Normatively and Power in International Law)*, Leiden, Martinus Nijhoff Publ., 2003, at p. 257 (stating that the principle of non-succession is a rule of customary international law); Volinka REINA, "Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide for Better Resolution of Successor State Responsibility?", 22 *Berkeley J. Int'l L.*, 2004, p. 583, at p. 595.

other scholars who have in fact conducted extensive analysis on this issue favour the principle of non-succession.[3] It would therefore seem that the more time a writer spends on this question of succession of States, the more likely he/she is to reject a *strict and automatic* "rule" of non-succession.

Supporters of this doctrine of non-succession can be found amongst all the different schools of thought on State succession.

Writers who support the "universal succession theory" ("*théorie de la succession universelle de droit privé*") based on Roman law generally believe that all rights and obligations of the "defunct" State automatically pass to the successor State. This theory goes back to Grotius and was the leading doctrine of State succession up until the 19th Century.[4] However, an exception is made with respect to internationally wrongful acts of the predecessor State based on the fact that under Roman law *ex delicto* liability does not pass from the *cujus* to the heirs. A good example of that theory is the work of Lauterpacht.[5]

Supporters of the theory of "organic substitution" ("*théorie de la succession universelle de droit public*") are also of the opinion that the rights and obligations of the defunct State do not simply disappear as a result of State succession.[6] This

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3 This is the case with Cecil J.B. HURST, p. 178; Jean Philippe MONNIER, p. 86 ("il n'existe pas en droit des gens de règle coutumière ou de principe général postulant le transfert automatique à l'Etat successeur des obligations découlant de la responsabilité internationale"); Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 505; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 767, 770.

4 H. GROTIUS, *De jure belli as pacis*, lib. 2, chap. IX, no. 12; E. de VATTEL, *Le droit des gens ou les principes de la loi naturelle*, vol. II, xii, no. 191; Samuel PUFENDORF, *De jure naturae et gentium*, 1698, lib. VIII, chap. 5; W.E. HALL, *A Treatise on International Law*, 8th ed. (by A. Pearce HIGGINS), Oxford, Clarendon Press, 1924, pp. 114–115; H. WHEATON, *Elements of International Law*, 8th ed. (by R.H. DANA), London, 1866, pt. I, sect. 29; William Oke MANNING, *Commentaries on the Law of Nations*, London, 1875 (ed. By Sheldon AMOS), p. 91; Robert PHILLIMORE, *Commentaries on International Law*, 2nd ed., vol. I, London, 1871, p. 168; F. De MARTENS, *Traité de droit international*, Paris, Marescqains, 1883, p. 369; F. DESPARGET, *Cours de droit international public*, 4th ed., Paris, Recueil Sirey, 1910, p. 117; E. NYS, *Le droit international: les principes, les théories, les faits*, vol. II, 2nd ed., Brussels, Castaigne, 1904, p. 31; H.W. HALLEK, *International Law*, London, Kegan, 1893, vol. I, p. 91; A. MERIGNHAC, *Traité de droit international public*, vol. II, Paris, L.G.D.J., 1907, p. 14. T.D. WOOLSEY, *Introduction to Study of International Law*, 6th ed. (Rev. by Theodore Salisbury WOOLSEY), New York, 1899, pp. 38–39. See also other writers mentioned in: D.P. O'CONNELL, *State Succession*, vol. I, p. 10.

5 H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London, Longmans, 1927, pp. 131–132, 283.

6 According to J.C. BLUNTSCHLI, *Das Modern Völkerecht der civilisierten Staaten*, Nördlingen, 1878, translated in French as: *Le droit international codifié*, Transl. by M.C. LARDY, Paris, Librairie Guillaunin et Cie., 1895, p. 75: "Lorsqu'un Etat est annexé à un autre Etat, le premier cesse d'exister, ainsi son anéantissement n'entraîne pas nécessairement l'extinction de ses droits et de ses obligations vis-à-vis des autres Etats, parce que

doctrine has received much support both from classical doctrine[7] and modern writers.[8] However, based on the maxim *actio personalis moritur cum persona*,[9] they argue that internationally wrongful acts are considered to be too "personal" to the predecessor State for them to be the object of any transfer to another State at the time of succession.[10]

Finally, scholars supporting the "negative school" of State succession, quite logically, also refute any transfer of the consequences of international responsibility from one State to another.[11] For the supporters of this theory, the principle of sovereignty implies that upon its arrival on the international scene, a new State is free of any obligations incumbent upon the predecessor State; it starts with a clean slate (*tabula rasa*). This voluntarist theory was largely supported in classical doctrine by the end of the 19th Century.[12] The classical clean slate theory was subsequently adopted by Newly Independent States in the context of decolonisation of the 1960s: they argued that any other solution would undermine their newly

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le peuple et le territoire de cet Etat continuent en substance à exister et n'ont fait que passer dans l'autre Etat. Ces droits et obligations passeront même à l'autre Etat, toutes les fois que le maintien sera possible et pourra être concilié avec le nouvel ordre des choses". See also : For P. FIORE, *Le droit international codifié et sa sanction juridique*, Paris, Pedone, 1911, no. 137, p. 141.

7 Max HUBER, *Die Staatensuccession: völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert*, Leipzig, Duncker & Humblot, 1898, p. 3, 18, 24, 73; John WESTLAKE, *International Law*, Cambridge, Cambridge Univ. Press, 1904, p. 69; A. RIVIER, *Principes du droit des gens*, vol. I, Paris, Arthur Rousseau, 1896, p. 70; H. APPLETON, *Des effets des annexions sur les dettes de l'Etat démembré ou annexé*, Paris, L. Larose, 1894, no. 14 et seq.; P. PRADIER-FODERE, *Traité de droit international public européen et américain*, vol. I, Paris, Bibliothèque internationale et diplomatique, 1885, no. 160, p. 276; S. KIATIBIAN, *Conséquence juridiques des transformations territoriales des Etats sur les traités*, Paris, Giard & Brière, 1892.

8 For instance: Marco G. MARCOFF, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Fribourg, Ed. Universitaires Fribourg Suisse, 1969, pp. 19–20.

9 This point is further discussed at *infra*, p. 46.

10 This is the case, for instance, of Max HUBER, *Die Staatensuccession: völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert*, Leipzig, Duncker & Humblot, 1898, p. 65, who makes a specific exception for "torts".

11 This is clearly the position of Jean Philippe MONNIER, p. 86: "Comme la notion de succession universelle ne trouve pas application en droit international positif lors de la substitution d'un ordre juridique étatique à un autre sur un territoire déterminé, il suit que l'Etat nouveau ne succède pas, sauf convention contraire, aux obligations incombant à l'Etat antérieur à raison de ses actes contraires au droit". The same idea is stated in: A. VERDROSS, *Völkerrecht*, 4th ed., Vienna, Springler Verlag, 1959, p. 198.

12 Arrigo CAVAGLIERI, "Règles générales du droit de la paix", *R.C.A.D.I.*, t. 26, 1929–I, pp. 378, 416 et seq.; W. SCHÖNBORN, *Staatensuccession, Handbuch des völkerrechts*, 2 band, 5 Abteilung, Stuttgard, 1913, pp. 95, 49, 76; A.B. KEITH, *The Theory of State Succession with Specific Reference to English and Colonial Law*, London, 1907, pp. 6, 102. See also the list of writers mentioned in: D.P. O'CONNELL, *State Succession*, vol. I, pp. 15–16.

attained self-determination by maintaining a relationship of dependence with the former colonial State.[13]

1.2 *The Arguments Invoked in Support of the Doctrine*

This section critically analyses in detail only the *two most important* legal theories which have been invoked by writers supporting the establishment of a "rule" of non-succession. Two other justifications, which are clearly outdated and not representative of contemporary international law, will not be analysed in detail.

One such outdated theory is developed by Sir Cecil Hurst, for whom "what the conqueror annexes is the territory of the former state, not the State itself, still less its government" and, consequently, "it is impossible to hold the conqueror liable for the torts of the government which he has displaced, because the torts were the torts of the government and not the torts of the territory".[14] This theory is undoubtedly influenced by the "theory of property" (*Eigentumstheorie*, "*théorie de l'objet*"), according to which the territory was part of the patrimonial property of the prince and could be exchanged between sovereigns in contracts or as part of a succession as a mere property, an object, dissociated from the State and without any relationship with the concept of sovereignty.[15] This "theory of property" is, however, clearly outdated.[16] The modern interpretation of the element of territory in international law is represented by the *Kompetenztheorie* ("*théorie de la competence*"), according to which the territory is where the State exercises its

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13 An illustration of this approach can be found in: Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, at p. 493: "A la base de la création de l'Etat nouveau se trouve le principe d'autodétermination. L'atteinte à un tel droit que suppose nécessairement la protection de tous les intérêts et privilèges de l'ancienne puissance colonial, reviendrait à hypothéquer ce droit même qui a été l'agent de la création de cet Etat. Cela reviendrait à la remise en cause de l'indépendance et de la souveraineté de l'Etat nouveau. Or, donner et retenir ne vaut. Accorder l'indépendance et la confisquer ensuite par le jeu de prétendues règles conventionnelles ou autres de succession d'Etats, ne paraît pas licite". See also the author's analysis (at pp. 485, 503–504, 519–527) of the issue of succession to treaties and his conclusion (at p. 526) that there is a succession *ipso jure* to treaties reinforcing international cooperation between States and a rule on non-succession for treaties contrary to the principle of self-determination.

14 Cecil J.B. HURST, p. 178.

15 J.H.W. VERZIJL, pp. 298 et seq. In the past, many writers supported this theory: Paul FAUCHILLE, *Traité de droit international public*, vol. I (1st part), 8th ed., Paris, Librairie A. Rousseau, 1922, p. 450; W.E. HALL, *A Treatise on International Law*, 8th ed. (by A. Pearce HIGGINS), Oxford, 1924, p. 125; T.J. LAWRENCE, *The Principles of International Law*, 7th ed., London, MacMillan, 1925, p. 136.

16 Brigitte STERN, Responsabilité, p. 329. See also: Michael John VOLKOVITSCH, p. 2197.

jurisdiction.[17] This theory is largely accepted in doctrine.[18] Modern doctrine of international law therefore rejects State succession as *a mere transfer of territory* from one State to another.[19]

Another theory put forward in doctrine is deeply rooted in the age of colonialism, when the use of force was still lawful and when annexation of "backward" States was still considered legitimate.[20] For Sir Cecil Hurst, the imposition of a rule of succession to the obligations arising from internationally wrongful acts upon the "better governed and more advanced" States would have discouraged them from

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17 This theory was first elaborated by Ernst RADNITZKY, "Die rechtliche Natur des Staatsgebietes", 20(3) *Archiv für öffentliches Recht*, 1906, pp. 313 et seq. Other authors, such as Hans KELSEN, *Allgemeine Staatslehre*, Berlin, Springer, 1925, pp. 137 et seq.; W. HENRICH, *Theorie des Staatsgebietes entwickelt aus der Lehre von den lokalen Kompetenzen der Staatsperson*, Vienna-Leipzig, 1922, pp. 31 et seq.; A. VERDROSS, "Staatsgebiet, Staatengemeinschaft und Staatengebiet", 37 *NiemeyersZ*, 1927, pp. 298 et seq., have subsequently further developed this theory and determined that there was no perfect equation between the spatial jurisdiction of a State and its actual territory. In some circumstances, a State can exercise its jurisdiction outside its territory (i.e. within the territory of another sovereign State). Hans KELSEN, *Principles of International Law*, 2nd ed., New York, Holt, Rienhart & Winston Inc., 1966, p. 308, has defined the territory of a State as "a space within which the acts of the State, and especially its coercive acts, are allowed by general international law to be carried out, a space within which the acts of a State may legally be performed". These theories are further explained in: Benedetto CONFORTI, "The Theory of Competence in Verdross", 6(1) *E.J.I.L.*, pp. 70–77; Erik SUY, "Réflexions sur la distinction entre la souveraineté et la compétence territoriale", in: R. MARCIC, H. MOSLER, E. SUY & K. ZEMANEK, *Internationale Festschrift für Alfred Verdross*, Munich, Wilhem Fink Verlag, 1971, pp. 493–508; Julio A. BARBERIS, "Les liens juridiques entre l'Etat et son territoire: perspectives théoriques et évolution du droit international", *A.F.D.I.*, 1999, pp. 132–147.

18 W. SCHOENBORN, "La nature juridique du territoire", *R.C.A.D.I.*, t. 30, 1929–V, p. 124; L. DELBEZ, "Du territoire dans ses rapports avec l'Etat", *R.G.D.I.P.*, 1932, p. 712; Paul GUGGENHEIM, *Traité de Droit international public*, t. I, Geneva, Librairie de l'Université, 1953, p. 374; Charles ROUSSEAU, *Droit international public*, vol. II, Paris, Sirey, 1977, p. 51; Charles De VISSCHER, *Theory and Reality in Public International Law*, Princeton, Princeton Univ. Press, 1957, p. 197; J.H.W. VERZIJL, pp. 12–13; OPPENHEIM, *International Law*, vol. 1, 8th ed., 1955, p. 452; NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 411.

19 For Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 680, in the context of a succession of States "il y a substitution matérielle d'un Etat à l'autre dans le territoire donné et non pas transfert du territoire, car le territoire ne peut être matériellement transféré". Similarly, J.H.W. VERZIJL, pp. 11–13, speaks of the transfer not of a "real" right of a proprietary nature but of "the aggregate of public competencies respecting the territory and its inhabitants which the ceding State used, or was entitled under international law, to exercise until the cession". In other words, for Verzijl, what is transferred is the "total of State competencies inherent in the concept of territorial sovereignty". See also: Jean Philippe MONNIER, pp. 87–89.

20 This theory is examined by Brigitte STERN, Responsabilité, p. 329; Jean Philippe MONNIER, p. 88; Michael John VOLKOVITSCH, p. 2185.

intervening in "backward States" to put an end to the "anarchy and misrule" existing in such countries; such rule would set a "premium on misgovernment".[21] Sir Cecil, who acted as Counsel to Great Britain, made use of the same argument in the *R.E. Brown* case.[22] Another scholar, Hyde, writing in 1947, argued that one positive consequence of the establishment of a rule of succession in this context would be to "diminish the interest of strong powers in seeking to annex and so obliterate the statehood of weaker and backward neighbours".[23]

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21 Cecil J.B. HURST, p. 178: "A principle which would render a conqueror liable for damages for all the unliquidated claims based on wrongful acts of the State he is driven to subdue would be neither just nor reasonable, and would entail consequences which would be fruitful of mischief. Such a principle would enable a small and backward State to withstand all pressure from a better governed and more advanced neighbour, and would act as a direct encouragement to any such backslider among the family of nations to render itself secure from intervention and absorption by perpetuating anarchy and misrule within its borders. The more the condition of such a State cried aloud for intervention for the sake of the inhabitant of the country, whether native of foreign, the more would neighbouring Governments be held back for necessary action by the contemplation of the burdens it might entail. In short, if there were any such rule of international law, it would merely set a premium on misgovernment".

22 *Brief filed by Fred K. Nielsen, American Agent*, *R.E. Brown Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 165 et seq., at p. 184. In relation to the possibility he raised during the pleading that European Powers could invade newly Communist Russia to stop the atrocities committed there at that time, he stated that any rule of succession to obligations arising from the commission of internationally wrongful acts would make "Governments hesitate long before they set out to redress very grievous wrongs that may be committed in any particular part of the world". In its pleading in the *R.E. Brown* case, Great Britain provides this other example: "Supposing the Ruler of Government of a country is grossly extravagant, is wasting the substance of the people in some riotous form of spending, and it is creating trouble and the Government of one of the big Powers says: This must stop, we cannot allow this to go on, it is a danger to civilization and we are going to stop it, if, in such circumstances, a country or several countries in alliance, stepped in and tried to provide good and decent and proper Government in that particular State that was behaving wrongly, can it be said that they would have to pay all the damages that had been wrongfully incurred by the country that, at the time they took it over, had rendered itself bankrupt and helpless so far as money matters are concerned? I submit that would be wrong; I submit it would not be in the interests of civilization, and certainly it would not be moral in the circumstances. If one comes to deal with the subject, and think it out, I submit there can obviously be no general rule regard to State succession" (in: *Answer of His Britannic Majesty's Government in the Robert E. Brown Claim*, at pp. 253–256, quoted in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *Ibid.*, pp. 95 et seq., at p. 97).

23 Charles Cheney HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 2nd ed., Boston, Little, Brown & Co., 1945, p. 438.

a) *A State is only Responsible for its Own Internationally Wrongful Acts and Not for those Committed by Other States*

The central argument of the doctrine of non-succession is that a State is generally not responsible for acts committed by other States. This has, in fact, been described as the *only* relevant theoretical justification for this doctrine.[24] This is, for instance, the position of Cavaglieri:

> Quelle que soit la source d'une obligation internationale, celle-ci est presque toujours déterminée par des circonstances et des situations, qui appartiennent à l'Etat, qui les a contactées et qui par conséquent doivent nécessairement s'éteindre avec lui… Il est absurde de penser qu'un Etat puisse être tenu responsable d'un délit, commis par un autre Etat.[25]

This fundamental principle that a State is generally not responsible for acts committed by other States is said to be based on the principle of the independence of States[26] and on the principle of the equality of States.[27] It has also been argued, more simply, that the successor State should not take over the consequences of internationally wrongful acts committed by the predecessor State because the two States do not have the same "international legal personality".[28]

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24 Jean-Philippe MONNIER, p. 89.

25 Arrigo CAVAGLIERI, "Effets juridiques des changements de souveraineté territoriale", in: *Annuaire I.D.I.*, 1931–I, p. 190.

26 Michel WAELBROECK, "Arrêt no. 8160 du Conseil d'Etat Belge, note d'observations", *R.J.D.A.*, 1961, no. 1, at p. 35.

27 Louis CAVARE, *Le droit international positif*, vol. I, 2nd ed., Paris, Pedone, 1961, pp. 415–416: "En D.I.P. la responsabilité délictuelle ou quasi-délictuelle du fait d'autrui est exceptionnelle. L'égalité juridique des Etats rend chacun d'entre eux pleinement capable et en conséquence seul responsable. Sauf exception, un Etat ne répond pas des actes dommageables d'un autre. Voilà du moins ce qu'implique la logique". Cavare also indicates (at p. 408) that "ces droits ont existé ou ces obligations ont été conclues en fonction des circonstances spéciales à l'Etat disparu et ne se conçoivent pas d'une façon indépendante de lui". See also: Jean Philippe MONNIER, p. 89.

28 Hazem M. ATLAM, at p. 487: "Notion indissociable du droit successoral, la personnalité internationale est, selon nous, l'un des paramètres qui doivent être toujours présents lors de l'appréciation des implications de la réalisation d'une transformation territoriale sur les prérogatives de la responsabilité internationale du sujet du droit international—Etat ou mouvement révolutionnaire—affecté par la succession d'Etats". See also this comment (at pp. 289–290): "[L]es conséquences que l'on pourrait éventuellement tirer de la notion de personnalité internationale sur le plan de l'identité ou de la rupture dans la qualité internationale du sujet juridique affecté par la succession d'Etats doivent être notamment présentes lors de l'appréciation du sort devant être retenu quant aux prérogatives de la responsabilité internationale de ce dernier". Atlam argues (at pp. 283–284) that in cases of dissolution of State, where there is no *identity of the international legal personality* between the predecessor State and the successor States, there should, consequently, be no transfer of the obligation to repair to the new States: "La reconnaissance de la rupture dans la personnalité internationale entre l'Etat démembré et les Etats successeurs issus de son démembrement constituerait ici le prélude à l'application de la règle de la table rase à l'égard du passif de la responsabilité internationale du premier".

Only the State which has actually committed an internationally wrongful act should engage any responsibility for it.[29] This does not create any difficulty when the predecessor State continues to exist after the changes affecting its former territory have occurred; it should, in principle, remain responsible for its own internationally wrongful acts.[30] In the event that the predecessor State ceases to exist (such as in cases of dissolution, unification and incorporation of States), the legal liability for internationally wrongful acts would be extinguished at the same time.[31] This was the position taken by the U.S.-Great Britain Arbitral Commission in the *Hawaiian Claims* case: "[T]he legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it."[32]

The argument is no doubt logically sound. This basic rule is stipulated at Article 1 of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts*: "Every internationally wrongful act of a State entails the international responsibility of that State."[33] According to Special Rapporteur Crawford, this provision "affirms the basic principle that each State is responsible for its own wrongful conduct".[34]

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29 NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 550: "Les principes généraux de la responsabilité internationale, en particulier les règles sur l'attribution des faits internationalement illicites, excluent toute idée de continuité en matière de responsabilité passive et active". See also the same position taken by these writers: Jiri MALENOVSKY, "Problèmes juridiques liés à la partition de la Tchécoslovaquie", 39 *A.F.D.I.*, 1993, p. 334; Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 54; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences)*, Paris, Sirey, 1977, p. 505; Charles De VISSCHER, *Théories et réalités en droit international public*, Paris, Pedone, 1953, p. 210; Louis DELBEZ, *Principes généraux du droit international public*, 3rd ed., Paris, L.G.D.J., 1964, p. 275; Marcel SINKONDO, *Droit international public*, Paris, Ellipses, 1999, p. 327; Hazem M. ATLAM, p. 285.

30 Jean Philippe MONNIER, p. 67; Wladyslaw CZAPLINSKI, p. 357; NGUYEN Quoc Dinh *et al., Id.*; Pierre-Marie DUPUY, *Id.*; Charles ROUSSEAU, *Id.*

31 Marcel SINKONDO, *Droit international public*, Paris, Ellipses, 1999, p. 327; Wesley L. GOULD, *An Introduction to International Law*, New York, Harpers & Brothers Publ., 1957, p. 428; W.K. WILBURN, "Filing of U.S. Property Claims in Eastern Germany", *Int'l Law.*, 1991, at pp. 660–661. This seems to be also be the position of Thos. BATY, "Division of States: Its Effect on Obligations", 9 *Trans. Grot. Soc.*, 1923, pp. 122, 125–126, even though the author does not make specific reference to responsibility for internationally wrongful acts.

32 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 158.

33 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

34 *First Report on State Responsibility* (*addendum* no. 4), by Mr James Crawford, Special Rapporteur, 26 May 1998, U.N. Doc. A/CN.4/490/Add.4, at para. 110. It should be noted that the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts* envisages two exceptional cases where an internationally wrongful act committed by a State entails the responsibility of another State (see Article 17 dealing with cases where a State directs and controls another State in the commission of an internationally wrongful act and Article 18 concerning cases where a State exerts coercion on another).

It is indeed true that, as a matter of principle, the successor State should not be "responsible" for internationally wrongful acts committed by *another State*.[35]

This argument (however correct it may be) is nevertheless beside the point. Thus, as already explained, the question dealt with in the present study *is not whether the successor State should be "responsible" or not for internationally wrongful acts it has not itself committed*. As explained by Verhoeven: "Il va de soi que la responsabilité n'est pas celle de l'Etat successeur, auquel aucune faute ne peut être directement imputée. C'est ce qui fait la spécificité du problème de succession d'Etats."[36] Thus, the successor State cannot be liable for internationally wrongful acts committed by another State. This is undisputed.

What matters in the context of the present study is whether the *international obligations resulting from an internationally wrongful act* committed by the predecessor State can, in some circumstances, be "transferred" to the successor State. Rousseau rightly speaks of the question whether there is in international law a principle imposing on the successor State "l'obligation de prendre à sa charge la réparation des actes illicites imputables à l'Etat prédécesseur".[37] Similarly, Stern envisages the present issue as being that of the "transmission des conséquences de la responsabilité, plus que de transmission de la responsabilité elle-même".[38] In other words, the *responsibility* for the commission of an internationally wrongful act remains with the predecessor State; it is the only State which is "responsible" for such act. The other question, which is at the heart of this study, is whether the

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35 Thus, the writers who reject the transferability of the obligation to repair to the successor State base such a conclusion on the fact that the successor State cannot be responsible for *the acts of another State*. This is clear from these selected quotations: Paul GUGGENHEIM, *Traité de Droit international public*, t. I, Geneva, Librairie de l'Université, 1953, p. 474 ("[l]'Etat successeur n'est pas responsable des actes illicites commis par l'Etat auquel il succède"); Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 54 ("[l]e principe général découlant des règles gouvernant l'imputabilité des actes illicites internationaux est celui de la non transmissibilité de la responsabilité de l'Etat prédécesseur à l'Etat successeur"); Louis DELBEZ, *Principes généraux du droit international public*, 3rd ed., Paris, L.G.D.J., 1964, p. 275 ("l'Etat nouveau n'est pas tenu de réparer les suites dommageables des actes imputables à l'Etat disparu"); Louis CAVARE, *Le droit international positif*, vol. I, 2nd ed., Paris, Pedone, 1961, pp. 415–416 (speaking of "la responsabilité délictuelle…du fait d'autrui"); Jean Philippe MONNIER, p. 89, ("[l]'Etat n'est pas responsable, en principe, pour le fait d'autrui"). See also: Suzanne BASTID, *Droit international public, Principes généraux*, Fasc. II, Univ. de Paris, les Cours de droit, 1966–1967, at p. 170.

36 Joe VERHOEVEN, *Droit international public*, Brussels, Larcier, 2000, p. 189, who criticises the argument of the doctrine of non-succession based on the said impossibility to attribute the internationally wrongful acts of the predecessor State to the successor State.

37 Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences)*, Paris, Sirey, 1977, p. 505. He is of the view that there exists no such general principle of succession to obligations arising from the commission of internationally wrongful acts.

38 Brigitte STERN, Responsabilité, p. 338. See also: Miriam PETERSCHMITT, pp. 10, 72.

successor State can take over the *international obligations arising from responsibility* for an internationally wrongful act committed before the date of succession.

b) *Actio personalis moritur cum persona*

Many writers have based their support for the principle of non-succession on the so-callled "personal character" of internationally wrongful acts which would not enable their transfer from one State to another: *actio personalis moritur cum persona*.[39] This position is well-illustrated by these two quotations, the first from Cavaglieri and the second by Udina:

> En ce qui concerne les obligations du droit international… il n'y a pas, suivant la *communis opinio*, de transmission à l'Etat annexant. Il s'agit de rapports si personnels, si étroitement liés à la situation, aux qualités, aux intérêts de l'Etat disparu, si conclus *intuitu personae*, qu'il est parfaitement logique qu'ils cessent d'exister avec lui.[40]

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39 This concept was introduced by Max HUBER, *Die Staatensuccession: völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert*, Leipzig, Duncker & Humblot, 1898, pp. 65, 95. It was subsequently adopted at the beginning of the 20th Century by many authors such as: W. SCHöNBORN, *Staatensuccession, Handbuch des Völkerrechts*, vol. 2, Part. 5, Stuttgard, 1913, pp. 49, 76, 95; Georg DAHM, *Völkerrecht*, vol. 1, Stuttgart, W. Kohlhammer Verlag, 1958, at p. 121; A. VERDROSS, *Völkerrecht*, 4th ed., Vienna, Springler Verlag, 1959, p. 198. A number of contemporary scholars still rely on this argument to support their position in favour of non-succession: A. VERDROSS & B. SIMMA, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, Dunker & Humblot, 1984, pp. 633–634; Peter MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th ed., New York, Routledge, 1997, p. 169; Wilfred FIEDLER, "State Succession", in: R. BERNHARDT (ed.), *Encyclopaedia of Public International Law*, vol. 10, North Holland, Max Planck Institute, 1984, p. 454; D. BARDONNET, *La succession d'Etats à Madagascar: succession au droit conventionnel et aux droits patrimoniaux*, Paris, L.G.D.J., 1970, p. 316; Ulrich FASTENRATH, "Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", 44 *Ö.Z.ö.R.V.*, 1992, at p. 39; Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, Clarendon Press, 2003, p. 632; I. SEIDL-HOHENVELDERN, *Völkerrecht*, Cologne, Carl Heymanns Verlang KG, 1987, at p. 288; Knut IPSEN, *Völkerrecht: ein Studienbuch*, 4th ed., Munich, C.H. Beck, 1999, p. 322 (quoted in: Miriam PETERSCHMITT, p. 10); NGUYEN Quoc Dinh, *Droit international public*, Paris, L.G.D.J., 1975, p. 434 (this argument is no longer made in subsequent editions of the textbook, such as in: NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999); Louis DELBEZ, *Principes généraux du droit international public*, 3rd ed., Paris, L.G.D.J., 1964, p. 275; Volinka REINA, "Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide for Better Resolution of Successor State Responsibility?", 22 *Berkeley J. Int'l L.*, 2004, p. 583, at p. 587.

40 Arrigo CAVAGLIERI, "Règles générales du droit de la paix", *R.C.A.D.I.*, t. 26, 1929–I, p. 374. His position is also clearly expressed in: "Rapport sur les effets juridiques des changements de souveraineté territoriale", in: *Annuaire I.D.I.*, 1931–I, p. 189: "Les obligations internationales de l'Etat disparu, d'après l'opinion la plus repandue et la plus conforme à la pratique, disparaissent en principe avec lui. Il s'agit, en effet, de

> [Il] est évident, état donné le caractère strictement personnel des droits et obligations découlant de ces délits ou quasi-délits, qu'ils ne peuvent faire l'objet d'une succession. Les auteurs et la pratique internationale sont unanimes en ce sens.[41]

These writers draw a parallel with the concept of succession under Roman law, where liability for an action *ex delicto* does not pass to the heir.[42] This is the position which was adopted by Great Britain in its pleadings in the *R.E. Brown* case:

> I need not to remind you that so far as individuals are concerned under Roman Law the successor was never liable for torts; under our English law and American law for torts the successor was never liable, or with very rare exceptions, so rare as to say, I think, never is liable for the torts of the dead person. The liability for torts dies with the person, and it would be an extraordinary thing, in my submission, if it were found that in International law, there was a law which did not exist when you are dealing with local law as applied to individuals.[43]

The U.S.-Great Britain Arbitral Commission in the *Hawaiian Claims* case relied (at least partially) on the private law doctrine of non-succession for action *ex delicto* to refute any transfer of the obligation to repair to the successor State:

> The analogy of universal succession in private law, which is much relied upon by those who argue for a large measure of succession to liability for obligations of the extinct State, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts.[44]

This theory of the personal character of the internationally wrongful act is, however, contested in doctrine.[45] It has been depicted as being "based on erroneous

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rapports conclus *intuitu personae*… La nature de ces rapports et des obligations, qui en découlent, est en opposition avec l'idée de la succession, laquelle suppose des droits et des devoirs doués d'une autonomie qui leur permet de survivre et de continuer malgré le changement de leur sujet". See also: Arrigo CAVAGLIERI, "Note in materia di successione di Stato a Stato", 16 *R.D.I.*, 1924, p. 26 at pp. 34–37.

41 Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 767.

42 THE INSTITUTES OF JUSTINIAN, Book IV, Title 12: "Actions which will lie against a man under either the civil or the praetorian law will not always lie against his heir, the rule being absolute that for delict—for instance, theft, robbery, outrage, or unlawful damage—no penal action can be brought against the heir" (in: J.B. MOYLE, *The Institutes of Justinian Translated into English*, 3rd ed., Oxford, Clarendon Press, 1913).

43 *Synopsis of Argument in behalf of Great Britain*, *R.E. Brown Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 183 et seq., at pp. 185–186.

44 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 158.

45 Pierre D'ARGENT, *Les réparations de guerre en droit international public*, Brussels, Bruylant, 2002, p. 814.

generalisation"[46] and "overly simplistic".[47] It is even rejected by scholars who are strong supporters of the doctrine of non-succession.[48] There are, indeed, at least two reasons to reject this theory.

The first reason to reject the theory of the personal character of the internationally wrongful act is the analogy it draws between private law and international law.[49] This is, for instance, the position of the "universal succession theory", which resolves problems of State succession by making reference to the situation prevailing for individuals under private law.[50]

It has been rightly submitted that the consequences of the extinction of an individual and a State are simply not comparable.[51] Thus, if the death of an individual is a *sine qua non* prerequisite to the application of the rule of succession under private law, the same cannot be transposed automatically into the field of succession of States.[52] Thus, as a result of a change in its territory, a State does

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46 Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, p. 690. It should be noted, however, that the author is not referring to "internationally wrongful acts" but to "torts" in accordance to the terminology used in common law. He believes that "torts debts" are not necessarily personal obligations and that it all depends on whether they are described as such *under the laws of the debtor State*. If the "torts debts" are deemed to be personal obligations under the laws of the debtor State, the writer is of the view that "they would frequently be excluded from international law protection in case of State succession, not because of any specific rule of international law applying to tort debts, but because, according to the laws under which they were created, such debts could not survive the destruction of the debtor". On the contrary, he adds that if "the debtor is not destroyed by the territorial change, these debts would remain valid as long as the debtor continues to exist".

47 Michael John VOLKOVITSCH, p. 2196.

48 Cecil J.B. HURST, pp. 177–178; Jean Philippe MONNIER, p. 87.

49 One example in doctrine of a scholar using such an analogy is H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London, Longmans, 1927, pp. 129–130. Another example is: Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, pp. 208–210. *Contra*: Jean Philippe MONNIER, p. 87: "Une construction reposant sur une analogie avec une institution propre au droit privé interne n'a pas, en effet, sa place naturelle sur le terrain du droit international public, où une terminologie recouvre une situation tout à fait différente".

50 Paul FAUCHILLE, *Traité de droit international public*, vol. I (1st part), 8th ed., Paris, Librairie A. Rousseau, 1922, p. 391: "Quand un Etat est absorbé par un autre, il se produit une succession du premier au profit du second, en tous points assimilable à celle du droit privé: l'extinction d'un Etat est, dans la mesure où elle se produit, une mort comparable à celle d'un particulier; et, comme un individu, l'Etat défunt a un successeur qui continu sa propre personnalité: le gouvernement en faveur de qui a lieu la cession est à l'égard du gouvernement cédant un véritable héritier, un successeur à la personne".

51 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, pp. 37–38; Michael John VOLKOVITSCH, p. 2196.

52 Annie GRUBER, *Le droit international de la succession d'Etats*, Paris, Publ. faculté de droit de l'Université René Descartes (Paris V) & Brussels, Ed. Bruylant, 1986, pp. 30, 35.

not necessarily lose its international legal personality.[53] Territorial losses *per se* do not affect a State's identity and do not necessarily result in its "death".[54] Indeed, many types of State succession (for instance, secession and cession and transfer of territory) do not involve the "death" of a State but only the loss of part of its territory. Therefore, and contrary to the situation prevailing in private law, the complete disappearance (or "death") of a State is not a formal condition to the application of the rules of State succession.[55]

It would also be wrong to qualify the extinction of a State as a "death" comparable to one affecting individuals.[56] This is well-explained by the "theory of organic substitution" ("*théorie de la succession universelle de droit public*").[57] If it is unquestionable that a State losses its legal personality as a result of its extinction (its "death"), it remains that its "organic forces" or its "constitutive elements" (its territory and its population) survive such disintegration.[58] The constitutive elements of a State are only *affected*, to different degrees, by the process of State

53 W. SCHOENBORN, "La nature juridique du territoire", *R.C.A.D.I.*, t. 30, 1929–V, p. 119 ("une autorité ne subit aucun changement dans sa nature propre et particulière lorsque sa compétence locale est étendue ou restreinte"); L. DELBEZ, "Du territoire dans ses rapports avec l'Etat", *R.G.D.I.P.*, 1932, p. 719 ("[l]a modification territoriale aura bien entendu pour effet de déplacer les bornes de la compétence étatique, le sol national se trouvant agrandi ou restreint. Mais l'autorité de l'Etat ne se trouvera pas, par cela même, atteint dans sa nature. Aucun changement ne sera apporté dans l'identité de l'Etat. Il est clair en effet qu'une autorité ne subit aucune modification dans sa nature lorsque sa compétence territoriale est étendu ou restreinte"). See also: D. ANZILOTTI, *Cours de droit international public*, Sirey, Paris, 1929, pp. 183–184. This is also the position of the *Institut de Droit international*, in: *Ann. I.D.I.*, 1939, p. 252.

54 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 38; Erik SUY, "Réflexions sur la distinction entre la souveraineté et la compétence territoriale", in: R. MARCIC, H. MOSLER, E. SUY & K. ZEMANEK, *Internationale Festschrift für Alfred Verdross*, Munich, Wilhem Fink Verlag, 1971, p. 494.

55 Annie GRUBER, *Le droit international de la succession d'Etats*, Paris, Publ. faculté de droit de l'Université René Descartes (Paris V) & Brussels, Ed. Bruylant, 1986, p. 33.

56 J.H.W. VERZIJL, p. 129: "The 'person' the State is quite another entity than a human being. In various cases, the State which succeeds in the sovereignty of a territory continues for all purposes the personality of its predecessor".

57 This theory is influenced by the work of O. von GIERKE, *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, Berlin, 1887, p. 876, for whom the State is conceived as a "social organism", which as any organism, rarely disappears as a result of death. Max HUBER, *Die Staatensuccession: völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert*, Leipzig, Duncker & Humblot, 1898, p. 3, subsequently imported this theory into the analysis of questions of State succession.

58 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 38. The three constitutive elements of the State are the territory, the population and the government. It was first stated at Article 1 of the *Montevideo Convention on the Rights and Duties of States* (signed on 26 December 1933, entered into force on 26 December 1934; in: 28 *A.J.I.L.*, 1934, Supp. 75). The Badinter Arbitration Commission in its *Opinion no. 1* (29 November 1991, in: 92 *I.L.R.*, 1993, p. 166) also recognised the three constitutive elements of the State in the context of the dissolution of Yugoslavia.

succession; they are not extinguished as a result of this fundamental change.[59] This is the position prevailing in doctrine.[60]

Even if one were to accept the analogy with private law, it remains that modern private law rules of succession no longer follow the principle of Roman Law of non-succession of the heirs for "personal" delictual acts of the *cujus*. This is indeed the situation under English law.[61] This argument is made by Volkovitsch.[62] It has also been expressed by the Arbitral Tribunal in the *Lighthouse Arbitration* case as follows:

> If that argument did in truth set out a general principle of law, it ought to be equally valid in civil law, but that is far from being the case. On the contrary, delictual obligations of private individuals, which appear to present the same 'highly personal' nature, normally pass to the heirs. That is not to say that the principles of private law are applicable as

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59 The only (very unlikely) situation which could (at least theoretically) be envisaged where the constitutive elements of a State would be extinguished would if an Island-State simply disappeared from the face of the Earth or if the whole population of a State is exterminated.

60 Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 43, for whom State succession does not result in the disappearance of the constitutive elements of the State but only in their "reorganisation" into a new schema. A good explanation is also found in: Marco G. MARCOFF, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Fribourg, Ed. Universitaires Fribourg Suisse, 1969, p. 15: "Contrairement à ce qu'on constate à la suite de la mort d'une personne physique, L'Etat qui "meurt" ne disparaît pas totalement; ce n'est que sa personnalité morale qui prend fin, mais les autres éléments qui composent son "corps matériel" n'en continuent pas moins à exister. L'Etat ancien continue de vivre dans le territoire et le peuple de l'Etat nouveau; il ne recueille donc pas la personnalité de l'Etat antérieur, mais les éléments—un ou plusieurs—qui le constituent". See also this other comment (at p. 257): "Si la mort signifie, en droit, l'extinction totale de la personne physique du défunt, l'extinction d'un Etat, même en cas de *debellatio* (à l'exception du cas purement hypothétique de la disparition physique d'une entité étatique), ne déclenche pas la perte de tous les éléments constituants la personnalité de l'Etat. L'organisation juridique antérieure disparaît, mais le territoire et les personnes humaines qui en constituaient le *substratum* réel resteront. Ce sont eux qui représenteront, avec l'organisation politique et juridique nouvelle après l'indépendance, l'Etat nouveau".

61 See in doctrine: P.H. WINFIELD, *Textbook of the Law of Tort*, 3rd Ed., London, Sweet & Maxwell, 1946, at pp. 178 et seq.; R.W.M. DIAS & B.S. MARKESINIS, *Tort Law*, Oxford, Clarendon Press, 1984, at pp. 416 et seq.

62 Michael John VOLKOVITSCH, p. 2196. For the author, "modern case law and code provisions have almost universally reversed the very Roman doctrine on which the personality theory was based". He maintains (at p. 2211) that "almost all states [are] now providing for the survivability of actions against deceased tortfeasors, in both common law and civil law countries". The writer analyses the reversal of the rule on the survivability of torts actions as a shift "from a system centered on the punishment of tortfeasors to one that focuses on the compensation of the victims and the avoidance of incidents". For him this shift is relevant to the question of the survival of internationally wrongful acts in international law because it involves the same "competing equities"; the situation prevailing in private law can illuminate the solution to be adopted in international law.

> such in cases of State succession, but only that the one argument which is sometimes invoked against the transmission of delictual obligations is without force.[63]

The second reason for rejecting the theory of the personal character of the internationally wrongful act is that it is founded on the outdated concept of *culpa* ("*faute*") in State responsibility.[64] For those writers who maintain that a *faute* needs to be proven for a State to engage its international responsibility,[65] an internationally wrongful act has conceivably a "personal character". However, it is generally recognised in doctrine that the element of *faute* is not a necessary condition to determine the liability of a State under contemporary international law.[66] The work of the I.L.C. on State responsibility no longer makes use of the concept of *culpa*.[67]

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63 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 93.

64 Brigitte STERN, Responsabilité, p. 335. See also: Miriam PETERSCHMITT, p. 10. Ian BROWNLIE, *State Responsibility, Part I*, Oxford, Clarendon Press, 1983, pp. 44–45, describes the notion of "fault" in the following words: "In the more general sense the fault principle rests upon the proof of intention (dol, dolus) or negligence (faute, culpa). The term faute (or culpa) is used to describe types of blameworthiness based upon reasonable forseeability, or foresight without desire of the consequences (recklessness, culpa lata)".

65 See, for instance, Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 767, for whom "c'est toujours la faute de l'Etat qui donne lieu à sa responsabilité internationale". See also: Charles De VISSCHER, *Théories et réalités en droit international public*, Paris, Pedone, 1953, p. 210.

66 Ian BROWNLIE, *State Responsibility, Part I*, Oxford, Clarendon Press, 1983, p. 39 ("the practice of States and the jurisprudence of arbitral tribunals and the ICJ have followed the theory of objective responsibility as a general principle (which may be modified or excluded in certain cases)"); NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 742 ("faire appel à des éléments aussi subjectifs est difficilement compatible avec la responsabilité des personnes morales, surtout lorsqu'il s'agit d'Etat souverains. Un tel fondement limite à l'excès la portée de la responsabilité internationale et les conditions de sa mise en œuvre. Cette manière de voir n'est pas retenue dans la pratique internationale ni dans la jurisprudence dominante"); Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 437 ("[l]e droit international a en principe évacué la notion de 'faute' connue des droits internes pour consacrer celle de 'fait illicite'. Cette transformation, aujourd'hui [est] très généralement acceptée non seulement par la grande majorité des auteurs mais aussi dans la pratique des Etats").

67 *First Report on State Responsibility* (*addendum* no. 4), by Mr James Crawford, Special Rapporteur, 26 May 1998, U.N. Doc. A/CN.4/490/Add.4, at para. 122. However, the *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2), pp. 59 et seq., at p. 70, also indicates that the Articles lay down no general standards with respect to the question whether State responsibility in some context involves some degree of fault, culpability, negligence or want of due diligence.

It has been rightly observed by Brigitte Stern that when international responsibility is conceived as an *objective* concept rather than a *personal internationally wrongful act involving culpa or intention*, the transferability of the obligation to repair to the successor State becomes possible:

> Il n'est pas exclu, en particulier, que ces analyses [of the doctrine of non-succession rejecting any transfer of obligations] restent liées à une conception ancienne de la responsabilité, dans laquelle l'idée de *culpa* était forte, et ne prennent pas en compte l'évolution de concept de la responsabilité internationale vers une plus grande objectivation: on ne voit pas, dans une conception de la responsabilité internationale fondée sur l'existence d'un acte illicite, compris comme violation objective du droit positif existant, de raison majeurs conduisant à exclure la transmission des obligations naissant d'une telle responsabilité dans le cadre d'une succession d'Etats.[68]

2. *Challenges and Criticisms of the Doctrine of Non-Succession*

For the most part of the 20th Century, very few authors challenged the doctrine of non-succession to obligations arising from the commission of internationally wrongful acts. In the words of O'Connell, it had "been taken for granted that a successor State is not liable for the delicts of its predecessor".[69] Thus, as previously mentioned, almost all general international law textbooks adopted the position of non-succession.[70]

Feilchenfeld was probably one of the first to express a dissenting voice in this apparent unanimity. According to him, a successor State cannot reject its responsibility for a "tort" committed by the predecessor State solely on the ground that this "tort" is not strictly speaking a "debt".[71] He concluded that "the rule of maintenance of tort claims" after a succession of States had "not been excluded by the growth of a general new custom" and that it was "not justified by the theories which are advanced in favour of such exclusion".[72] His conclusion is that the right to reparation of injured States is "protected in case of State succession in the same way as other debts".[73]

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68 Brigitte STERN, Responsabilité, p. 335. See also: Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, at p. 174, indicating that the rule of non-succession to obligations arising from the commission of internationally wrongful acts "ne tient pas nécessairement compte des évolutions contemporaines concernant le concept de responsabilité internationale".

69 D.P. O'CONNELL, *State Succession*, vol. I, p. 482.

70 The list of those scholars is provided at *supra*, pp. 35–37.

71 Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, pp. 689, 728. It should be noted, however, that Feilchenfled is not referring to "internationally wrongful acts" but to "torts" in the common law sense of the term.

72 *Ibid.*, p. 690. He rejects the theory of the personal character of the internationally wrongful act.

73 *Id.* He notes (at p. 689, footnote 46) that the work of Gentilis, Grotius, Pufendorf and de Vattel does not make any exception for "torts" claims.

Hyde has also been particularly critical about the doctrine of non-succession because it disassociates State responsibility from the territory affected by State succession.[74] He favours instead a principle under which there would be a "connection between the territory as such and certain forms of conducts committed thereon as to cause the [new State] to afford under some conditions a means of redress regardless of a change of sovereignty that marks the extinction of the tort feasor".[75]

The issue was also mentioned by the Tripartite Claims Commission set up under a 1924 Treaty entered into by the United States, Hungary and Austria to determine the amount of reparation to be paid by the last two States (considered as "continuators" of the Austria-Hungary Dual Monarchy) to U.S. nationals as a result of internationally wrongful acts committed by Austria-Hungary during the First World War.[76] The Commission acknowledged that doctrine was divided on the question whether there was succession to obligations arising from the commission of internationally wrongful acts.[77]

The 1956 Award of the Arbitral Tribunal in the *Lighthouse Arbitration* case[78] appears to be a milestone in that respect.[79] It clearly rejects the position of non-succession traditionally taken by doctrine:

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74 Charles Cheney HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 2nd ed., Boston, Little, Brown & Co., 1945, pp. 437–438.

75 *Id.*

76 *Agreement between the United States and Austria and Hungary for the Determination of the Amounts to be Paid by Austria and Hungary in Satisfaction of their Obligations under the Treaties Concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921*, signed on 26 November 1924, in: *L.N.T.S.*, vol. 48, p. 70, in: *U.N.R.I.A.A.*, vol. VI, p. 199.

77 This is the relevant paragraph of *Administrative Decision no. 1*, Tripartite Claims Commission, 25 May 1927, in: *U.N.R.I.A.A.*, vol. VI, p. 203; in: 21 *A.J.I.L.*, 1927, p. 599: "The answer must be found in the provisions of the Treaties of Vienna and of Budapest. It will not be profitable to examine the divergent views maintained by European continental writers on continental law as compared of Great Britain and the United States with respect to the liability of a Successor State for the obligations either ex contractu or ex delicto of a dismembered State. It is, however, interesting to note in passing that while one group maintains that such obligations pass with succession and are apportioned between the Successor States, and while the other group maintains that the obligations do not pass with succession, neither group maintains that a joint liability rests upon two or more Successor States where the territory of a dismembered State has been divided between them".

78 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81. This case is examined in detail at *infra*, p. 130 and p. 136.

79 For Michael John VOLKOVITSCH, p. 2190, this case "represents a clear evolution of doctrine from the imperialism-tainted decisions" of cases of *R.E. Brown* (United States v. Great Britain, Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129) and the *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 157. See also: Hazem M. ATLAM, p. 248.

> The thesis, one of theory rather than of practice, that there can never be a question of transmission—or more accurately, of transfer… is not, in general, well founded.[80]
>
> Certain tendencies among writers clearly necessitate reconsideration by reason of the different kinds of possible delictual obligations and the diversity of possible hypotheses of territorial succession.[81]

In subsequent writing, Verzijl, who acted as the President of the Arbitral Tribunal in the *Lighthouse Arbitration* case, has also expressed very strong criticisms of this doctrine of non-succession. He stated that "public international law is haunted by [this] unyielding and wide-spread thesis" which is "unacceptable as a general rule" as it tends "to become, as a result of unjustified generalisation, an assertedly unassailable dogma though it is in fact no more than a legal myth".[82] The author therefore rejects the principle of non-succession in its "absolute variant, because there are situations conceivable in which its application would be unreasonable".[83]

Another similar approach is that of O'Connell, who refutes the strict theory of non-succession on the ground that "there is no great intellectual incubus behind this supposed rule of international law"[84] and that "the net is too widely cast if it is proposed that there can be no succession to international delicts".[85] He also notes that any comprehensive theory would be impossible to the extent that "there is no universal criterion for distinguishing claims which may be made against the successor State from those which may not".[86] The same position is adopted by Atlam, who devoted a doctoral thesis to the subject.[87] Czaplinski is more prudent in his conclusion.[88]

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80 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 92.

81 *Ibid.*, p. 93.

82 J.H.W. VERZIJL, pp. 219–220. He has expressed the same opinion in another article: J.H.W. VERZIJL, "Droit de la mer et succession d'Etats", in: *Hommage d'une génération de juristes au président Basdevant* [*Mélanges Basdevant*], Paris, Pedone, 1960, pp. 523–524.

83 J.H.W. VERZIJL, pp. 219–220.

84 D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 162.

85 D.P. O'CONNELL, *State Succession*, vol. I, p. 486. See also in: *Ibid.*, at p. 164, where he indicates that any proposition of non-succession to obligations arising from the commission of internationally wrongful acts (as opposed to "torts" in the common law sense of the term) would be "patently erroneous".

86 D.P. O'CONNELL, *State Succession*, vol. I, p. 486.

87 Hazem M. ATLAM, pp. 15, 235–236. However, he does not deny altogether the relevance of the doctrine of non-succession. For instance (see at pp. 281 et seq.), he adopts the principle of non-succession for cases where the predecessor State ceases to exist (such as dissolution of State) but accepts the rule of succession in cases of unification of States (see at pp. 274, 286–288).

88 Wladyslaw CZAPLINSKI, p. 356. For him, State practice, judicial decisions (which are said to be "neither clear nor unanimous" (p. 346)) and the writings of scholars on the issue "[do] not provide a sufficient basis on which to formulate the principles governing succession in respects of delictual responsibility". Similarly, Menno T. KAMMINGA,

Volkovitsch is undoubtedly the most outspoken critical commentator on the doctrine of non-succession, which he believes:

> Lacks the necessary foundation in practice and theory to be accepted as a customary norm of international law. Both the provisions of international agreement and the history of diplomatic practice on the subject are inconsistent and have been frequently misunderstood. Nor do the varied decisions of international tribunals or municipal courts provide sufficient support for a theory of nonsuccession. Moreover, the various theoretical bases proposed for such a principle are each plagued by fundamental flaws.[89]

Thus, not only does he reject the existence of any customary norm in favour of the principle of non-succession but he goes a step further in the establishment of "a customary norm of international law providing for a rebuttable presumption of succession to liability".[90]

Stern is particularly critical of the doctrine of non-succession in so far as an internationally wrongful act committed by the predecessor State would simply disappear along with its perpetrator.[91] She denies the existence of any strict "rule" of non-succession:

> Sans pour autant affirmer, en l'absence de précédents significatifs, qu'existe une règle générale de transmission de la responsabilité, je souhaite tout de même souligner qu'il est facilement concevable de considérer que certains obligations financières, en quoi se résout le plus souvent la réparation, pourraient être transmises au moment d'une succession d'Etats de l'Etat prédécesseur à l'Etat successeur de la même façon que le sont les dettes d'Etats. On pourrait parler des transmission des conséquences de la responsabilité, plus que de transmission de la responsabilité elle-même.[92]

"State Succession in Respect of Human Rights Treaties", 7(4) *E.J.I.L.*, 1996, p. 483, who is of the view that the question is "controversial".

89 Michael John VOLKOVITSCH, p. 2198. See also at pp. 2172–2173.

90 *Ibid.*, p. 2162. See also at pp. 2172–2173. He believes (at p. 2198) that "sufficient support exists in jurisprudential theory and in evolving diplomatic and judicial practice of sovereign states" for the establishment of such a presumption, which is also the "most practical and logically consistent solution". For him (see at p. 2198), such a presumption is also supported by a "series of well-established principle of both international and municipal law, including the concept of acquired rights, the linkage between rights and obligations, the doctrine of international servitudes, the principle of unjust enrichment, and the principle of responsibility for torts". He is of the view (see pp. 2199–2200) that a *strict rule* of transfer of the obligation to repair to the successor State, which could not be rebutted in any circumstances, should apply in some specific cases. He also provides (at pp. 2100–2103) several examples where, on the contrary, no such transfer should apply.

91 Brigitte STERN, Responsabilité, p. 336: "Une absence systématique de succession en matière de responsabilité choque cependant l'esprit de justice".

92 *Ibid.*, p. 338. In her conclusion (at p. 355), Stern affirms the existence of a rebuttable presumption of succession to obligations arising from the commission of internationally wrongful acts. In a previous general study on the question of succession of States (Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, pp. 173–174), she concluded that the principle of non-succession to obligations arising from the commission of internationally wrongful acts was a rule "dont l'existence en droit international contemporain reste à prouver".

For Peterschmitt, there is no general "rule" providing for the non-transferability of the consequences of international responsibility.[93] Many principles of international law, such as good faith, equity, the protection of human rights, the territorial link between the State and the commission of internationally wrongful acts, may require, in some circumstances, the successor State to take over the obligations arising from the commission of internationally wrongful acts.[94] She concludes that:

> Il ressort clairement de notre analyse que le dogme doctrinal qui nie la succession en matière de responsabilité et qui heurte le sentiment de justice ne correspond pas au droit international contemporain. Il est vrai que la pratique étatique n'est pas abondante et qu'elle ne permet pas d'établir l'existence d'une règle unique de droit coutumier affirmant la succession dans tous les cas. Cependant, le système du droit international, les règles qu'il contient et les tendances décelées dans la pratique étatique récente ont permis d'établir des critères de succession aux conséquences de la responsabilité internationale qui mènent à une solution juste et équitable.[95]

It can therefore safely be concluded that earlier statements making reference to the "unanimity" of doctrine against the principle of State succession to international responsibility are no longer valid.[96] Thus, several modern writers have rejected the application of a strict principle of non-succession and adopted the view that the principle of State succession to obligations arising from the commission of internationally wrongful acts may be an acceptable solution in some circumstances.[97]

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93 Miriam PETERSCHMITT, p. 72.

94 *Id.*

95 *Ibid.*, p. 73.

96 See, for instance, statements made in 1933 by Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 767, and in 1961 by Jean Philippe MONNIER, p. 86.

97 This is the case of Pierre D'ARGENT, *Les réparations de guerre en droit international public*, Brussels, Bruylant, 2002, p. 814 (rejecting the principle of non-transferability "dans sa formulation absolue" but of the view that there is probably no presumption of succession to obligations arising from the commission of internationally wrongful acts); Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, at pp. 60–62, and at p. 77 ("le droit international contemporain admet la succession à la responsabilité internationale"); Mark THOMPSON, "Finders Weepers Losers Keepers: United States of America v. Steinmetz: the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama", 28 *Conn.L.Rev.*, 1996, p. 481 ("although opinions diverge greatly, a significant body of case law and commentary would require a power in succession to assume the obligations of the predecessor, including its liability for international torts"); Joe VERHOEVEN, *Droit international public*, Brussels, Larcier, 2000, pp. 189–190 (criticising the arguments developed by the doctrine of non-succession and concluding that it cannot be totally excluded that responsibility can be transferred from the predecessor State to the successor State); Oscar SCHACHTER, "State Succession: the Once and Future Law", 33(2) *Va.J.Int'l L.*, 1993, p. 256 ("the old view that such responsibility should not be transferable to successor is by no means self-evident and persuasive arguments based on general principles of law (including unjust enrichment)

A good example of such evolution is no doubt reflected in the work of the I.L.C. on State responsibility. Thus, in its *First Report on State Responsibility* (*addendum* no. 5) of 1998, Special Rapporteur Crawford mentioned that "there is a widely held view that a new State does not, in general, succeed to any State responsibility of the predecessor State with respect to its territory".[98] However, in the official 2001 Commentaries to the *Articles on Responsibility of States for Internationally Wrongful Acts*, the Special Rapporteur indicated that it was "unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory".[99] It is in this context rather surprising to note that in their pleadings

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can be made to support succession of liability in some situations"); Ivan A. SHEARER, *Starke's International Law*, 11th ed., Sydney, Butterworths, 1994, p. 303 (of the general opinion that "there is no general principle of succession to delictual responsibility" but also expressing doubts as to whether this rule should be considered to be an "invariable proposition" and concluding that "it may in some circumstances be reasonable to bind the successor State to respect the unliquidated claim against its predecessor"); Andreas ZIMMERMANN, *Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation*, Berlin, Springer-Verlag, 2000, at p. 68 (of the position that there is no automatic obligation of the successor State to take over the responsibility of the predecessor State but also making reference to some new State practice which seem to suggest that increasingly there is an assumption by the successor State that there is a transfer of the obligation to repair from the predecessor State); H.A. STRYDOM, "Namibian Independence and the Question of the Contractual and Delictual Liability of the Predecessor and Successor Governments", 15 *South African Y.I.L.*, 1989–1990, at p. 112 (indicating that "in absolute terms, neither of [the theories rejecting or accepting succession to obligations arising from the commission of internationally wrongful acts] is compatible with the complex variety of legal relationships and corresponding liabilities usually associated with territorial transfers"); Naomi ROHT-ARRIAZA, "Reparations Decisions and Dilemmas", 27 *Hastings Int'l & Comp. L. Rev.*, 2004, p. 157, at p. 212 ("[i]n cases where the State or Government under whose authority the violation occurred is no longer in existence, the State or Government successor in title should provide reparation to the victims"); Gregory TOWNSEND, "The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & U.S. Remedies", 17 *Loy.L.A.Int'l & Comp.L.Rev.*, 1995, p. 973, at pp. 979–980 ("[m]any members of the international community would like to see a change in Iraq's government or even the partition of Iraq into several smaller states, including a Kurdish one. A new Iraqi government or subsequent successor state, however, still would be responsible for paying the claims against Iraq under international law"); Ineta ZIEMELE, "State Continuity, Succession and Responsibility: Reparations to the Baltic States and their Peoples" 3 *Baltic Y.I.L.*, 2003, p. 176 ("[i]t is therefore not excluded that through the joint efforts of third States, in some cases a new State is considered to be bound by some international obligations and bear responsibility thereof"). See also the analysis made by Michael SILAGI, *Staatsuntergang und Staatennachfolge: mit besonderer Berücksichtigung des Endes der DDR*, Frankfurt, Peter Lang, 1996, at pp. 352 et seq., 372–373.

98 *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 282.

99 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*,

before the International Court of Justice in the 1997 *Gabčíkovo-Nagymaros Project* case,[100] both Slovakia and Hungary made reference to the "widely accepted"[101] and "well-established"[102] principle of non-succession to obligations arising from the commission of internationally wrongful acts.

A review of the relevant State practice and international and municipal case law in the next Chapter shows that despite some earlier claims of near unanimity in doctrine for the "rule" of non-succession,[103] the actual practice is much more diversified. The *strict and automatic* principle of non-succession is not representative of contemporary international law practice.

November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 119, para. 3.

100 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3.

101 *Counter-Memorial of the Slovak Republic*, vol. I, 5 December 1994, at para. 3.59. Slovakia even made reference to "the practically unanimous view of the doctrine" on this question (*Ibid.*, at para. 3.60).

102 *Reply of the Republic of Hungary*, vol. I, 20 June 1995, at para. 3.163. Hungary also adds that there would exist one "key exception" where the successor State, by its *own* conduct, continues the internationally wrongful act committed by its predecessor. The question whether this case truly is an "exception" is further discussed at *infra*, p. 218.

103 For instance, see: Jean-Philippe MONNIER, p. 86; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences)*, Paris, Sirey, 1977, p. 507.

2

ANALYSIS OF STATE PRACTICE AND CASE LAW

Introductory Remarks on the Doctrinal Analysis of State Practice

The doctrine of non-succession usually refers to two international arbitral awards which were decided in the context of incorporation of State: the *R.E. Brown* case[1] and the *Hawaiian Claims* case.[2] These scholars consider these international decisions to be in support of the doctrine of non-succession.[3]

Other writers have been more critical in their assessment of these two precedents, referring to them as "neither clear nor unanimous".[4] It has also been suggested that

1 *R.E. Brown* (United States v. Great Britain), Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129. This case is further discussed at *infra*, p. 73.

2 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 157. This case is further discussed at *infra*, p. 78.

3 As observed above, Jean-Philippe MONNIER, p. 86, states that "l'homogénéité que présente la jurisprudence internationale en cette matière ne se retrouve en effet dans aucun des autres domaines où se pose le problème de la succession d'Etats". He also believes that "sans doute les décisions rendues ici sont-elles peu nombreuses. Mais ce fait est sans importance tant il est vrai que la valeur normative de la jurisprudence est moins fonction de décisions qui la composent que de leur coherence". Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 507, also speaks of a "unanimité impressionnante" concerning these decisions.

4 Wladyslaw CZAPLINSKI, p. 346. Similarly, for Michael John VOLKOVITSCH, p. 2182, these decisions "cannot be characterised as either unanimous or definitive" and do not establish a customary rule in favour of a principle of non-succession. He believes (at p. 2186) that the fact that the United States and Great Britain advocated diametrically opposite positions in these two cases prove the non existence of a rule of non-succession. See also J.H.W. VERZIJL, p. 219, referring to these cases as a "few isolated precedents". This is also the position of Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et*

Patrick Dumberry, State Succession to International Responsibility, pp. 59–206.

these two arbitral awards were "relatively outdated"[5] and "obsoletes",[6] that their authority was "doubtful",[7] and that they ultimately echoed the age of colonialism in international relations.[8] This is, for instance, the position of Volkovitsch, for whom "if international law is to have any relevance, it must abjure rhetoric and the pernicious theories on which it rests by denying such decisions any persuasive authority".[9] These two decisions rendered by the same international tribunal will be examined later in this Chapter.[10] A somewhat different reading of these cases will be proposed.[11] Another case of great importance which will be analysed in this Chapter is the *Lighthouse Arbitration* case.[12] A number of other awards rendered by international tribunals will also be examined in this Chapter.

In doctrine, reference is also often made to decisions of municipal courts that had to directly tackle the issue of State succession to obligations arising from the commission of internationally wrongful acts.[13] Writers are generally divided on the significance and the weight to be given to these judicial precedents before national courts and on whether they actually support the doctrine of non-succession.[14]

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le règlement du contentieux financier franco-russe, Paris, Cedin Cahiers internationaux n°16, 2002, at p. 60, for whom the so-called rule of non-succession (the existence of which he disputes) is based on an incorrect reading of these two cases.

5 Wladyslaw CZAPLINSKI, p. 356.

6 Sir Robert JENNING, "General Course on Principles of International Law", *R.C.A.D.I.*, t. 121, 1967–II, p. 449. See also Miriam PETERSCHMITT, p. 11.

7 The *Restatement (Third), Foreign Relations Law of the United States*, Vol. I, St. Paul, American Law Institute Publ., 1987, § 209, Reporters' notes no. 7, p. 108.

8 *Ibid.*, pp. 107–108: "These cases date from the age colonialism when colonial powers resisted any rule that would make them responsible for the delicts of States which they regarded as uncivilized". Similarly, Michael John VOLKOVITSCH, p. 2185, is of the view that these two arbitral awards are "representative of the ideology of the Great Power at the height of the imperialist era" and that "the basic rationale of these decisions was simply that a civilized nation should never be responsible for the delicts of a backward state".

9 Michael John VOLKOVITSCH, p. 2186. This is also the position of Mark THOMPSON, "Finders Weepers Losers Keepers: United States of America v. Steinmetz: the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama", 28 *Conn. L.Rev.*, 1996, at p. 542, for whom these two arbitral awards "should not be the basis for a per se rule rejecting succession to predecessor delicts".

10 See *infra*, p. 73 and p. 78.

11 See, in particular, the *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 157.

12 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81.

13 Cecil J.B. HURST, pp. 173–177; D.P. O'CONNELL, *State Succession*, vol. I, pp. 492–493; J.H.W. VERZIJL, pp. 224–227; Wladyslaw CZAPLINSKI, pp. 346–351; Michael John VOLKOVITSCH, pp. 2192–2195; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 510; Hazem M. ATLAM, pp. 217–222.

14 Wladyslaw CZAPLINSKI, pp. 346, 351, indicates that the impact of these decisions is somewhat limited and does not establish the existence of any customary rule. Michael John VOLKOVITSCH, pp. 2193–2195, maintains that the "contemporary precedents

Another writer has simply decided to exclude their examination from his study.[15] This Chapter will examine in detail all relevant municipal court decisions, many of which have simply never been analysed in doctrine. These cases will prove to be a very valuable source of information which has, unfortunately, often been discarded in the past by writers.

Scholars supporting the doctrine of non-succession generally make reference to State practice.[16] It has been suggested that the few existing examples of State practice do not permit to draw any clear, positive or negative conclusions.[17] This Chapter will analyse several relevant examples of State practice, many of which have simply never been examined in the past in doctrine.[18] It is necessary to indicate at this juncture that only those examples of State practice for which publicly available information exists are dealt with here. It may very well be that there exist several other examples of State practice, for which no public information is, unfortunately, available.

Introductory Remarks on the Methodology Used in this Study

As previously observed, one basic assumption adopted in the present study is that it is simply unrealistic (and admittedly also quite illogical) to state *en bloc* that State practice and decisions of international tribunals and municipal courts either support the doctrine of non-succession or reject it. A proper analysis of State practice and case law can only be made taking into account the *different types of*

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demonstrate the development and reinforcement of a customary norm in favour of succession".

15 This is the reasoning of Jean-Philippe MONNIER, p. 72: "Les raisons qui ont conduit les juges nationaux tantôt à admettre, tantôt à nier la responsabilité de l'Etat successeur sont si diverses et, très souvent, si éloignées du droit international qu'il serait vain de vouloir y chercher des précédents". He concludes that these decisions should not be considered "comme la traduction répétée d'une pratique étatique générale ou d'un usage créateur de droit".

16 See the following writers: Cecil J.B. HURST; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 505; Hazem M. ATLAM, pp. 204, 216.

17 Wladyslaw CZAPLINSKI, p. 343, is of the view that State practice "shows a tendency to transfer delictual liability, but it is not consistent" and that "the conclusion is that this practice does not prove the existence of a customary rule concerning the succession in respect of delictual obligations". See also the conclusion reached by Jean Philippe MONNIER, p. 73, for whom these precedents of State practice must be "jugés avec une certaine prudence en raison des considérations extra-juridiques qui, le plus souvent, ont poussé les Etats à assurer ou au contraire à rejeter les obligations de la responsabilité internationale des Etats auxquels ils ont succédé".

18 A summary of the present author's conclusions is found in: Patrick DUMBERRY, "The Controversial Issue of State Succession to International Responsibility in Light of Recent State Practice" 49 *German Y.I.L.*, 2006 (to be published).

mechanism of State succession involved.[19] It should simply be recalled the statement of the Arbitral Tribunal in the *Lighthouse Arbitration* case: "It is impossible to formulate a general, identical solution for every imaginable hypothesis of territorial succession, and any attempt to formulate such a solution must necessarily fail in view of the extreme diversity of cases of this kind."[20] The Tribunal concluded: "Toute ces différences ne peuvent pas ne pas exercer une influence décisive sur la solution du problème de la succession d'Etats même en matière délictuelles."[21]

In the following Chapter, *relevant* State practice and international and municipal case law will be examined for the following different types of mechanism of succession of States:[22]

- Incorporation of State;
- Unification of States;
- Dissolution of State;
- Cession and transfer of territory;
- Secession; and
- Creation of Newly Independent States.

For each type of succession of States, the reader is provided with a summary of our findings at the beginning of the section. We will also examine the position of doctrine and present our own position on which of the principles of succession or non-succession should apply for each type of succession of States.

1. *Incorporation of State*

There are several examples of State practice and international and municipal case law where the question of succession to responsibility arose in the context of incorporation of State. Two principles emerge from this analysis:

- Older cases of *annexation of States* support the principle that the successor State is *not responsible* for the obligations arising from internationally wrongful acts committed by the predecessor State (Section 1.1);

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19 The different other factors and circumstances calling for specific solutions to specific problems of State succession to international responsibility are examined at *infra*, p. 207.

20 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 91.

21 *Ibid.*, in: *U.N.R.I.A.A.*, vol. 12, p. 155, at p. 199.

22 The classification of the different types of succession of States has already been examined at *supra*, p. 15.

– Modern practice tends to support the principle that the successor State is *responsible* for the obligations arising from internationally wrongful acts committed by the predecessor State (Section 1.2).

1.1 *Older Examples of Annexation of States Support the Principle of Non-Succession*

Many of the older examples of State practice and international and municipal case law can be assimilated to cases of *annexation of States* characterised by the use of force. As a consequence of the general prohibition of the use of force in international relations following the adoption of the *Charter of the United Nations* (Article 2(4)), annexation of territory is illegal.[23] The 1978 *Vienna Convention on Succession of States in Respect of Treaties* specifically indicates at its Article 6 that the Convention does not apply to cases of annexation.[24]

State practice in the context of older cases of annexation of States clearly supports the principle that the successor State is *not responsible* for the obligations arising from internationally wrongful acts committed by the predecessor State prior

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23 The 1970 *Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, adopted on 24 October 1970 by U.N. General Assembly Res. 2625 (XXV) stipulates that: "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal". Article 5(3) of the *Definition of Aggression* adopted by U.N. General Assembly Res. 3314 (XXIX) of 14 December 1974 indicates that: "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful".

24 Article 6 of the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488, indicates that the Convention only applies "to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". The same provision is contained at Article 3 of the 1983 *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306, and also at Article 3 of the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*, adopted by the I.L.C. on second reading in 1999, I.L.C. Report, U.N. Doc. A/54/10, 1999, chp. IV, paras. 44 and 45, in: *Yearbook I.L.C.*, 1997, vol. II, p. 13. The debate leading to the adoption of this provision is discussed in: Zidane MERIBOUTE, *La codification de la succession d'États aux traités: décolonisation, sécession, unification*, Paris, P.U.F., 1984, pp. 177–178. The other question as to whether Article 6 excludes not only cases of annexation but also cases of *secession* is discussed in detail in: Théodore CHRISTAKIS, *Le droit à l'autodétermination en dehors des situations de décolonisation*, Paris, La documentation française, 1999, pp. 168–173.

to the annexation. This is also the view held in doctrine.[25] Such practice is clear in the context of the unity of Italy (1860–1861), in the context of the annexation of Burma by Great Britain (in 1886), the annexation of Madagascar by France (in 1896) and the annexation of the Boer Republic of South Africa by Great Britain (in 1902).[26] However, it should be noted that in the last three cases the successor States have nevertheless made some payments to the injured third State, but only on a *ex gratia* basis without any formal acceptance of the principle of responsibility. Some writers have argued that such payments in fact undermine the principle of non-succession advanced by the dominant doctrine.[27]

Decisions of municipal law courts and international tribunals in the context of annexation of States have also adopted the principle of non-succession. This is, for instance, the position of English courts in the context of the annexation of the Boer Republic of South Africa.[28] This principle of non-succession was also applied on two occasions by an arbitral commission, the U.S.-Great Britain Arbitral Commission. In the *R.E. Brown* case (1923), the Arbitral Commission made statements which constitute the very first *dictum* of an international tribunal in support of the principle of non-succession to obligations arising from the commission of internationally wrongful acts.[29] It indicated that it could not endorse a doctrine based on "an assertion that a succeeding state acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrong by the former state".[30] In the *Redward* case (better known as the *Hawaiian Claims* case, 1925), the same arbitral commission followed its own precedent in the *R.E. Brown* case and held that there was no general principle of succession to international responsibility since "the legal unit which did the wrong no longer exists" and, consequently, "legal liability for the wrong has been extinguished with it".[31]

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25 Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, Clarendon Press, 2003, p. 632; Charles Cheney HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 2nd ed., Boston, Little, Brown & Co., 1945, p. 437; Wladyslaw CZAPLINSKI, p. 342.

26 Cecil J.B. HURST, at pp. 166–167, makes reference to other cases of annexation of State supporting the principle of non-succession.

27 Michael John VOLKOVITSCH, p. 2181.

28 *West Rand Central Gold Mining Company Ldt. v. The King*, decision of 1 June 1905, in: L.R., 1905, 2 K.B., p. 391; *British International Law Cases*, vol. II, London, Stevens, 1965, p. 283. See also the other cases discussed in: D.P. O'CONNELL, *State Succession*, vol. I, pp. 487–488.

29 *R.E. Brown* (United States v. Great Britain), Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, at p. 130.

30 *Id.*

31 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 158.

a) *The Unity of Italy (1860–1861)*

The formation of the unity of Italy is considered in doctrine as a series of annexations of States by the Kingdom of Piemont-Sardagna.[32] Hurst makes reference to several cases which were decided by Italian courts in the context of its unity which, according to him, do not "support the proposition that a State annexing territory is bound to pay unliquidated claims arising out of internationally wrongful acts on the part of the Government which is extinguished".[33] It should be mentioned that these cases do not deal with questions of succession to *international* responsibility; they only concern claims submitted by *Italian nationals* (who became nationals of Italy as a result of annexations).[34]

The Court of Cassation of Rome held in an 1885 decision that since the predecessor State (the Dutchy of Este) had declined to admit any liability for an alleged wrong committed before the annexation, Italy (the successor State) should also have no liability for it.[35] In its pleading in the *R.E. Brown* case,[36] Great Britain analysed this case as supporting the principle of non-succession.[37] In a decision

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32 Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 340. See the list of Italian writers he quotes in favour of this proposition.

33 Cecil J.B. HURST, at pp. 176–177. The same conclusion is reached by A.B. KEITH, *The Theory of State Succession with Specific Reference to English and Colonial Law*, London, 1907, pp. 74–75; Hazem M. ATLAM, at p. 221. These cases are also discussed in: John WESTLAKE¸ *International Law*, 2nd ed., vol. I, Cambridge, Cambridge Univ. Press, 1910, at pp. 79–80. A number of other cases are discussed in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at p. 115. D.P. O'CONNELL, *State Succession*, vol. I, p. 483, mentions the existence of a case before a municipal court in Italy where it was decided that the successor State was held liable for acts committed by the predecessor State.

34 The reasons for treating these types of cases differently have been explained at *supra*, p. 30.

35 This is the relevant quote from the decision of the Court (in: Cecil J.B. HURST, at p. 175): "Seeing that the reinstated Government of Este declared that it did not recognize that the Commune of Capri was entitled to be compensated for the supplies furnished by it to the volunteers of the Provisional Government, it will be clear to everyone that by the annexation of the Duchy of Este by the Italian State, an obligation to which even the late preceding Government was not subject in civil law could not be transmitted to that State. There cannot be any doubt that the Government of Este, being eminently absolute and despotic, by the fact of not acknowledging that it was bound as against the commune with respect to the above-mentioned claim, established in a judicial manner that the commune did not posses the legal right of action for claiming from the State the payment for the supplies: it is therefore equally evident that if it was not entitled to such action during the Ducal Government, it cannot acquire such right by the political reunion of the Province of Modena with the Italian Government which has taken place".

36 *R.E. Brown (United States) v. Great Britain*, Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 120,

37 *Answer of His Britannic Majesty's Government in the Robert E. Brown Claim*, pp. 14–16 (quoted in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*,

by the Court of Appeal of Florence in the *Walter v. Minister of War* case, it was held that the principle of succession to obligations arising from the commission of internationally wrongful acts constituted only a "moral obligation".[38] In the context of the annexation of Venice to Italy, it was decided in the case of *Orti-Manara v. Italian Government and Austrian Government* that the consequences of an expropriation of land committed by Austria before the date of succession should not pass to Italy.[39]

On the contrary, in the case of *Orcesi v. The Ministry of War*, the Court of Cassation of Florence held that the Italian government was liable to pay compensation for damage which occurred before the annexation and for which the predecessor State (Parma) had already admitted its responsibility (but had paid no compensa-

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in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at pp. 114–115). Great Britain argued that this case was not "support[ing] the contention that Great Britain is liable to pay compensation for the torts of the South African Republic" since "the claim had been definitely rejected by an autocratic Government which was supreme within its territory, and there was, therefore, no claim in the existence at the time of the annexation".

38 *Walter v. Minister of War*, decision of 1871 by the Court of Appeal of Florence, in: *Monitore dei tribunali*, 1872, p. 133, in: *Brief filed by Fred K. Nielsen, American Agent, Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at pp. 115–116. This is the relevant quote from the decision of the Court: "The claim that Walter has stated against the Italian Government as successor to the preceding Bourbon Government would certainly never have been the subject of a civil proceeding within the competence of the courts, for even if the principle can be admitted as true that the Government succeeding another is bound to satisfy the obligations of the preceding, it is likewise true that the indicated principle constitutes nothing more than a moral obligation, for the fulfilment of which the courts are not competent to entertain an action".

39 *Orti-Manara v. Italian Government and Austrian Government*, decision of 1877 by the Court of Appeal of Venice, in: *Giurisprudenza Italiana*, vol. 30, Pt. 1, Sec. 2, column 1, in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at p. 119. This is the relevant quote from the decision of the Court: "It is certainly a fact that the damages complained of in the petition were done to the lands of the claimant while the Austrian Government, ruling those provinces, had the Verona-Brescia railway line constructed for its own account, and the thought immediately occurs that the liability naturally rests on that Government and that the alleged responsibility of the national [Italian] Government would not depend upon an act of its own, would not be direct, but only indirect and consequence upon its succeeding to all the obligations of the Austrian Government or at least to the special obligation here dealt with. Now, nothing could be added to these conclusions unless on the basis of the maxims of public international law or by reason of special express stipulations, which in this case would have to be found either in the treaty of peace of October 3, 1866, approved by the Act of April 25, 1867, n°3665, or in the relative financial conventions approved by Act of March 23, 1874, n°137. But the alleged responsibility of the national Government towards the claimant emanates from neither of these sources. The very fact that the two Governments made special agreements on the subject with a view to precisely regulate along financial lines the succession of one to the other is against the hypothesis of a general and absolute succession of the second to the first".

tion).[40] Hurst explains the decision of the Court by the fact that "the claim had been admitted [by the predecessor State] and had become a debt".[41] The same explanation is given by Great Britain in its pleading in the *R.E. Brown* case.[42] A similar conclusion was reached by the Court of Cassation of Florence in the case of *Verlengo v. Finance Department*.[43]

b) *Burma (1886)*

The State of Burma was annexed by Great Britain in 1886 to become part of the British Empire of India.[44] This example supports the principle of non-succession.[45] After the annexation, France and Italy made claims to Great Britain (as the successor State) for internationally wrongful acts committed by the Burmese government against their nationals during the war which took place prior to the annexation.[46]

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40 *Orcesi v. The Ministry of War*, Court of Cassation of Florence, 21 December 1881, in: Cecil J.B. HURST, at p. 177.

41 Cecil J.B. HURST, *Id.*

42 *Answer of His Britannic Majesty's Government in the Robert E. Brown Claim*, pp. 14–16 (quoted in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at pp. 114–115).

43 *Verlengo v. Finance Department*, decided in 1878 by the Court of Cassation of Florence, in: *Giurisprudenza Italiana*, 3rd Series, vol. 30, Pt. 1, Sec. 1, column 1206, in: *Brief filed by Fred K. Nielsen, American Agent, Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at pp. 119–120. The Court held that "whereas, assuming that Austria, through the expropriation in question, had contracted and assumed the obligation to the indemnity Verlengo, it can not seriously be denied that this obligation is now transferred to the Italian Government. Moreover, even Article VIII of the treaty of peace of October 3, 1866, does not lead to a different conclusion".

44 Great Britain annexed portions of the territory of Burma in 1826 and in 1852 (the "Second Anglo-Burmese War"). In 1862, some of these territories were united to form British "Lower" Burma (part of British India). As a result of the "Third Anglo-Burmese War", which started in 1885, the remnant of the Kingdom of Awa (known as "Upper Burma") was conquered by Great Britain on 1 January 1886. On 26 February 1886, it was annexed to British India (a colony of Great Britain). This example of annexation is briefly discussed by the following writers: D.P. O'CONNELL, *State Succession*, vol. I, pp. 486–487; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 506; Cecil J.B. HURST, pp. 170–172; Hazem M. ATLAM, p. 206; Jean Philippe MONNIER, p. 75.

45 This is, for instance, the position held by these authors: D.P. O'CONNELL, *State Succession*, vol. I, pp. 486–487; Wladyslaw CZAPLINSKI, p. 342; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 506; Sir Cecil HURST, pp. 170–172. *Contra*: Michael John VOLKOVITSCH, p. 2181, for whom the fact that *ex gratia* payments were made by the successor State actually undermines the rule of non-succession.

46 One such claim was submitted by an Italian national (Mr Fea), a naturalist who was working for an Italian museum, for the seizure of his collection of specimens by the Burmese government during the War. Another claim was submitted by two traders,

Great Britain refused to be held responsible for the acts of the predecessor State based on a legal opinion by the Solicitor of the Government of (British) India in which he indicated that he was not aware:

> [O]f any such proposition of law as renders a new government responsible for losses caused by depredations committed by or under the orders of the former government when in a state of war or otherwise.[47]

However, mention should be made of the fact that some payments were made by Great Britain to an Italian national, but only on an *ex gratia* basis without any acceptance of responsibility.[48]

Two U.S. missionaries (Mr Freiday and Mr Roberts) claimed compensation for the taking of their properties and that of their mission by the Burmese army. Great Britain refused to be held responsible for the acts of the predecessor State but agreed to pay compensation on an *ex gratia* basis on grounds of equity:[49]

> The British Government cannot undertake to compensate people for losses they may have suffered at the hands of robbers, or at the hands of Burmese troops during or in consequence of the war. But in view of the fact that these reverend and self-denying missionaries have suffered great losses, that the losses occurred mainly in consequence of the war, and that the missionaries may be trusted to spend anything granted to them on the rehabilitation of their churches and missions, the Chief Commissioner advises that a sum of Rs. 10,000 be granted to the Bishop for the repair of his churches and mission buildings, it being made clear that the British Government admits no liability to pay for injuries done by dacoits, or for loss inflicted by the Burmese soldiery.[50]

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a French national (Mr Rey) and an "Eurasian" (Mr Calogreedy), who's property had been seized and destroyed by the Burmese government and who had been arrested, imprisoned and compelled to pay certain sum to secure the favour of their jailors. Finally, another French national (Mr D'Avera) claimed for the taking of his house by the local authorities.

47 Letter of the Solicitor to the Government of India to the Chief Commissioner, 30 January 1886 (quoted in: D.P. O'CONNELL, *State Succession*, vol. I, at pp. 486–487).

48 Sir Cecil HURST, p. 171.

49 Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences)*, Paris, Sirey, 1977, p. 506. On the contrary, Cecil J.B. HURST, p. 172, and D.P. O'CONNELL, *State Succession*, vol. I, p. 487, indicate that Great Britain rejected the claim and declined to pay compensation, even on an *ex gratia* basis.

50 Communication dated 8 June 1886 addressed by Mr H. Thirkell White (Secretary of Upper Burma to the Chief Commissioner) to the Secretary to the Government of India, Foreign Department. This quote is found in Annex VI to the *Answer of His Britannic Majesty's Government in the Robert E. Brown Claim*, p. 140 (quoted in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at p. 112).

c) *Madagascar (1896)*

Another example of annexation is that of Madagascar by France on 6 August 1896.[51] It supports the view that a State annexing another should not be held accountable for internationally wrongful acts committed before the annexation.[52]

France rejected the only claim submitted by a foreign government (Great Britain) for an internationally wrongful act committed by the authorities of Madagascar before the formal annexation in 1896.[53] However, it should be noted that France rejected the claim based on the ground that it was of a private nature and that it should have been directed against the individuals which committed the internationally wrongful act and not against the previous government, which had nothing to do with it.[54] France did not reject the claim based on any theory of non-succession. A few years prior to the annexation, a debate emerged in France between the partisans of the status of protectorate for Madagascar and those supporting its annexation.[55] At the time, some had argued that in the case of annexation France would not have to pay any compensation for illegal acts committed by the local authorities, based on the ground that the former State would no longer exist.[56] France finally agreed to pay some compensation to Mr Warrick on an *ex gratia* basis; it nevertheless refused to assume any responsibility for the acts committed

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51 The most complete analysis of questions of State succession in the context of the annexation of Madagascar is the work of D. BARDONNET, *La succession d'Etats à Madagascar: succession au droit conventionnel et aux droits patrimoniaux*, Paris, L.G.D.J., 1970, pp. 311–316. An extensive analysis of the facts of this case is provided in: "Chronique des faits internationaux", *R.G.D.I.P.*, 1897, pp. 228 et seq. See also in: Hazem M. ATLAM, p. 208; Michael John VOLKOVITSCH, p. 2181; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 506.

52 D. BARDONNET, *Id.*; Wladyslaw CZAPLINSKI, p. 342; Charles ROUSSEAU, *Id.*; Cecil J.B. HURST, p. 172. *Contra*: Michael John VOLKOVITSCH, p. 2181, for whom the *ex gratia* payments made by the successor State in this case undermines the rule of non-succession.

53 In 1890 (i.e. before the annexation), Mr Warrick, a British national, submitted a claim to the local authorities of Madagascar for several "torts" (robberies) which, as it turned out after an enquiry, involved the participation of army personnel. After the annexation, the claim was espoused by Great Britain and directed against France as the successor State. This case is discussed in detail in: D. BARDONNET, *Ibid.*, p. 307. The relevant documents can be found in: *Archives nationales, section d'outre mer, Mad.* 427 (1143).

54 D. BARDONNET, *Ibid.*, pp. 312 et seq.

55 *Ibid.*, p. 304. An overview of the debate can be found in: "Chronique des faits internationaux", *R.G.D.I.P.*, 1897, p. 228, at pp. 243 et seq.

56 The argument is developed by Mr LE MYRE DE VILERS, "Le traité hova", *La Revue de Paris*, 15 November 1895. The full argument is summarised as follows in: "Chronique des faits internationaux", *R.G.D.I.P.*, 1897, p. 248: "Le maintien de la personnalité de l'Etat malgache aurait ce résultat que celui-ci, et par voie de conséquence le protecteur, devrait payer des indemnités aux étrangers lésés par la guerre; en cas d'annexion, la France n'aurait rien à payer".

by the predecessor State.[57] Apparently, the payment made by France was almost the equivalent of a complete satisfaction of the claim.[58]

In another case, a French national (Mr Orville) had suffered from tortious acts committed by the authorities of Madagascar during the war of rebellion of 1894–1895 against France. Following the annexation in 1896, Mr Orville submitted a claim to France for compensation. The matter was finally settled out of court. The French government did not, however, consider itself responsible for the acts attributable to the predecessor State, and the amount of compensation paid to the claimant was apparently solely based on equitable principles.[59]

d) *Boer Republic of South Africa (1902)*

The Boer Republic of South Africa was annexed to the British Empire in 1902 at the end of the Boer War (1899–1902).[60] In the context of this annexation, there are several examples of State practice and one municipal court case where the question of succession to obligations arising from the commission of internationally wrongful acts arose.[61] The British government rejected any responsibility for internationally wrongful acts committed by the conquered State before the annexation.[62] These examples will be briefly examined in the next paragraphs.

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57 D. BARDONNET, *La succession d'Etats à Madagascar: succession au droit conventionnel et aux droits patrimoniaux*, Paris, L.G.D.J., 1970, p. 307.

58 *Ibid.*, at pp. 311–312, indicates that the claimant originally sought an amount of US$ 926 in compensation and was finally given US$ 816.

59 *Ibid.*, p. 310.

60 Some comments need to be made on South Africa's turbulent history. In 1877 Great Britain annexed the Transvaal. After a revolt, Great Britain restored its independence in 1881. In 1889, the Cape colony and the Orange Free State joined in a customs union but the Transvaal (led by Mr Paul Kruger) refused to take part. In 1896, the Transvaal and the Orange Free State formed an alliance. In 1899, they declared war on Great Britain. The so-called Boer War ended in 1902 with the victory of Great Britain. The Afrikaners settlements (the Boer Republic of South Africa) were then annexed to the British Empire. In 1910, the Union of South Africa, with Dominion status, was established by Great Britain.

61 A few words should be said here about another municipal court case: *Union Bridge Co. (United States) v. Great Britain*, U.S.-Great Britain Arbitral Tribunal, Award of 8 January 1924, in: *U.N.R.I.A.A.*, vol. VI, at p. 138; 19 *A.J.I.L.*, 1925, p. 215; *Annual Digest*, 1923–1924, p. 170. This case is commented in: J.H.W. VERZIJL, at p. 221. This case dealt with the internationally wrongful acts committed by officials of the Orange Free State against a U.S. company. The United States invoked diplomatic protection for the company on the ground of the succession of Great Britain to contractual liability of the Orange Free State. This position was soon abandoned. The United States pursued its claim instead on the ground of Great Britain's direct liability for acts committed *after* the annexation. The Tribunal therefore did not discuss any issues of State succession.

62 Wladyslaw CZAPLINSKI, p. 342; Hazem M. ATLAM, p. 220. *Contra*: Michael John VOLKOVITSCH, p. 2181, for whom the fact that *ex gratia* payments were made by Great Britain in some cases undermines the rule of non-succession.

i) *State Practice and Case Law*

In one case, an English company was the holder of a concession from the Boer Republic of South Africa and was subject to a judgment debt in its favour against the Republic.[63] After the annexation, the company requested that the British government takes over the debt. The Government replied that it was a tortious debt and that therefore no liability should be admitted.[64] Reference is also made in doctrine to a similar attitude adopted by the British government with respect to the claim submitted by an Italian company.[65]

O'Connell also gives the example of claims that Great Britain had on behalf of its nationals against the Boer Republic of South Africa for tortious acts committed by the latter before the war.[66] After the annexation, the claimants sought reimbursement from the British government. Great Britain provided compensation to certain claimants on an *ex gratia* basis. The reasoning of the British government concerning one of these claims by a British national can be found in a communication of the Law Officers dated 21 December 1900:

> It has never been laid down that the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered Country and any such contention appears to us to be unsound in principle.[67]

Similarly, in another communication of the Law Officers, dated 27 November 1901, dealing with another claim of a British national for torts committed by the predecessor State, it is indicated that the "assumption of the liabilities of the extinct [South African] Government is a matter of international usage, but cannot be enforced in Municipal Courts".[68] Mention is also made of the fact that Great Britain "ought to recognize any legal obligation arising out of the contract of the late Government of the South African Republic with the company", but that "if it was a mere tort of which the South African Republic was guilty, His majesty's Government would not be liable".[69]

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63 This case is discussed in: D.P. O'CONNELL, *State Succession*, vol. I, pp. 487–488. This case is also referred to in doctrine by these writers: Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 507; Michael John VOLKOVITSCH, p. 2179; Jean Philippe MONNIER, p. 75; A.B. KEITH, *The Theory of State Succession with Specific Reference to English and Colonial Law*, London, 1907, pp. 76 et seq.; Hazem M. ATLAM, p. 209.

64 *F.O.C.P.* no. 8144, pp. 6, 7 (quoted in: D.P. O'CONNELL, *State Succession*, vol. I, p. 488).

65 D.P. O'CONNELL, *Id.*

66 *Id.*

67 *F.O.C.P.*, no. 8144, Annex no. 2 (quoted in: D.P. O'CONNELL, *State Succession*, vol. I, p. 488).

68 *F.O.C.P.* no. 8144, Annex no. 3 (quoted in: D.P. O'CONNELL, *Id.*).

69 *Id.*

In the case of *West Rand Central Gold Mining Company Ltd. v. The King*, the High Court of Justice of England dealt with a case where before the outbreak of the Boer War gold produced in a mine in the Republic of Transvaal owned by the claimant had been confiscated by officials acting on behalf of the Government of that Republic.[70] The claimant argued that the Republic was liable to return the gold or its value. It further claimed that as a result of the conquest and annexation of the territories of the Republic by Great Britain, such obligation was now binding upon the successor State based on a presumption in favour of the transfer of liabilities.[71] Counsel for Great Britain argued, on the contrary, that there was "no principle of international law by which a conquering State becomes *ipso facto* liable to discharge all the contractual obligations of the conquered State."

Lord Alverstone C.J., writing for the Court, rejected the application by the claimant. He indicated that the proposition submitted by the claimant "that by international law the conquering country is bound to fulfil the obligations of the conquered" could not be sustained. He added that: "When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them." The Lord Justice also indicated that there was no "reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State". The decision was summarised as follows in the headnote of the case:

> There is no principle of international law by which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war."

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70 *West Rand Central Gold Mining Company Ltd. v. The King*, decision of 1 June 1905 of the King's Bench, in: *L.R.*, 1905, in: 2 *K.B.* 391 [1905], in: Clive PARRY, *British International Law Cases*, vol. II, London, Stevens, 1965, p. 283. This case is discussed in: Sir Cecil HURST, at p. 173. The decision is quoted in: *Answer of His Britannic Majesty's Government in the Robert E. Brown Claim*, p. 13 (quoted in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at pp. 113–114).

71 This is the full quotation of the argument developed by Counsel for the claimant: "The Sovereign has, it is admitted, power when annexing a conquered State to impose what terms and conditions he pleases as to the taking over of the obligations of the conquered State; but if nothing is said about a particular obligation then it must be deemed to have been taken over, and it can be enforced in the municipal Courts of the conquering State". Counsel for the claimant also submitted that "by international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State, except liabilities incurred for the purpose of or in the course of the particular war".

ii) *The* R.E. Brown *Case (1923)*

The decision by the U.S.-Great Britain Arbitral Commission in the *R.E. Brown* case was the first statement of an international tribunal in support of the principle of non-succession to obligations arising from the commission of internationally wrongful acts.[72]

The *R.E. Brown* case involves a U.S. national who had "pegged out" in 1895 some 1,200 mining claims for gold mining concessions in the Boer Republic of South Africa at the time it was still an "independent" republic. The Government of the Boer Republic of South Africa later made three proclamations by which it rejected Mr Brown's applications for these concessions. Mr Brown alleged that he had been deprived of his licence rights to which he believed he was entitled. He subsequently brought an unsuccessful law suit before the High Court of the Boer Republic of South Africa.

After the Boer Republic of South Africa was annexed by Great Britain in 1902, the United States presented a claim in 1903 on behalf of its national to Great Britain. Great Britain rejected any responsibility for the alleged internationally wrongful acts. Thus, in a letter addressed to the U.S. Ambassador, Lord Lansdowne, Chief of the British Foreign Office, noted that he was not aware of any rule of international law whereby "the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such construction appears to be unsound in principle".[73] It was only much later (in 1923) that the claim was brought before the U.S.-Great Britain Arbitral Commission, which had been set up in 1910 to deal with pecuniary outstanding claims between the two States following the "Boer War" (1899–1902).[74]

It should be noted that the United States did not clearly and definitively invoke as an argument the principle of succession to international responsibility to convince the Arbitral Commission that Great Britain should take over the Boer Republic of South Africa's (alleged) responsibility. At the start of the proceedings, the United States did invoke the argument, as shown from this extract of its written submission:

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72 *R.E. Brown (United States) v. Great Britain*, Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 120, also in: 5 *British Y.I.L.*, 1924, p. 210; *A.J.I.L.*, 1925, p. 193; *Annual Digest*, 1923–1924, case no. 35, p. 69. Documents about the case can be found in: Fred K. NIELSEN, *American and British Claims Arbitration*, Washington, G.P.O., 1926, pp. 187–202.

73 Letter of Lord Lansdowne, Chief of the British Foreign Office, to the U.S. Ambassador, in: Fred K. NIELSEN, *Ibid.*, at p. 197.

74 *Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain, signed at Washington on 18 August 1910*, in: Fred K. NIELSEN, *Ibid.*, p. 3; Cecil J.B. HURST, p. 168.

> [I]nasmuch as Great Britain has acquired the entire and complete territory of the South African Republic by conquest, and has succeeded to and holds the full and entire sovereignty thereof, thereby replacing and substituting itself for the South African Republic which has by such acts wholly ceased to exist, Great Britain is bound to pay the debts of the defunct Republic, and especially so when such debts are in the nature of judgement debts.[75]

The United States, however, later decided to drop the argument.[76] The United States thus conceded that, generally speaking:

> The broad rule stated by eminent authorities and supported with forceful reasons, relative to the inheritance by an absorbing State of all the obligations of an extinguished State are not conceded to be an established rule of international law.[77]

The United States in fact even admitted at a later stage of the proceedings that "there is no general liability for torts of a defunct state".[78] Instead, the United States based its argumentation on the so-called "acquired rights" of Mr Brown which, it was argued, Great Britain had the obligation to respect after its annexation of the Boer Republic of South Africa. This is the relevant passage of the brief filed by the United States:

> International law requires that, when a nation absorbs another nation through conquest, the absorbing State shall respect and safeguard rights of person and of property in the conquested State.[79]
>
> . . . it is well-established that appropriate judicial acts of an extinguished State, defining such rights, should not be disregarded by the absorbing State.[80]

The United States also maintained that Great Britain should be liable for acts committed *after* the annexation by its own officials against Mr Brown. Finally, the United States argued that Great Britain should also be held accountable for the acts committed by the local authorities of the Boer Republic of South Africa because of the peculiar relation of suzerainty which it maintained in the region at the time of the commission of the illegal acts.

Great Britain's contention was that Mr Brown had actually never acquired such rights because of the internationally wrongful acts committed by local authorities of the Boer Republic of South Africa. It maintained that it had no control at the time over the local South African authorities and that it should therefore not be

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75 *United States' Memorial*, quoted in: Cecil J.B. HURST, at p. 164.

76 Cecil J.B. HURST, p. 165.

77 *Brief filed by Fred K. Nielsen, American Agent, R.E. Brown Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 165 et seq., at p. 182.

78 The Arbitral Commission quotes this passage at p. 130 of its Award. It can be found in: *Transcript of the 17th Sitting*, 9 November 1923, at p. 339.

79 *Brief filed by Fred K. Nielsen, American Agent, R.E. Brown Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 165 et seq., at p. 167.

80 *Ibid.*, p. 180.

held responsible for the obligations arising from the commission of such internationally wrongful acts.

According to Sir Cecil Hurst, who acted as Counsel for Great Britain in this case, Great Britain also dealt with the question of the transfer of the consequences of international responsibility and showed that "the proposition that liability passed in such circumstances was unsound, that the rules of international law embodied no such principle and that it would be contrary to justice and to reason".[81] The general background to the whole question was described as follows by Great Britain in its written submission:

> During the period in which Brown was engaged in difficulties with authorities of the South African Republic, that country was a free and independent State. To establish Brown's right to compensation as against Great Britain, it is necessary for the United States to show not only that there was an obligation on the part of the South African Republic to pay compensation in respect to the injury suffered by Brown, but also that liability for such failure of duty on the part of the Government of a conquested State passed to the conqueror upon annexation of the conquested State.[82]

On the specific problem of succession to internationally wrongful acts, Counsel for Great Britain made this observation:

> [I]f you look through all the authorities which deal with State succession you do find expressions of opinion I agree in individual writers that the doctrine of State succession applies to claims for tort or in tort, but I have been unable to find, and I have made a careful search, a single case where in practice that has been carried into effect. It may be that in some case by special agreement the Governments of one or another country have dealt with claims that arise out of tort, but in those cases I venture to submit in every case, if you look carefully into the subject, it has been an *ex gratia* payment, and not one in which right has been admitted at all, and if you come to think of the subject a little carefully, in my submission, that position must be correct; there can not be State succession, treating it, first of all, as a broad rule with regard to torts.[83]

In order to illustrate his position, Counsel for Great Britain gave the example of Soviet Russia, where the Government "has done some dreadful things during the last five or six years" and where "hundreds of foreigners have been murdered, and the property of thousands of foreigners confiscated and dealt with, and improperly deal with, by that government".[84] Counsel then discussed the possibility that some European States could decide to invade Russia in order to stop the atrocities committed by the Soviet government. He then asked the question whether it could be said that "any country who took possession of Russia under these circumstances would be liable to provide damages for all the torts committed by the Soviet

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81 Cecil J.B. HURST, p. 165.

82 *Brief filed by Fred K. Nielsen, American Agent, R.E. Brown Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 165 et seq., at p. 183.

83 *Ibid.*, at pp. 183–184.

84 *Ibid.*, at p. 184.

Government".[85] For Counsel, the answer was obviously in the negative. He further added that such solution would "make Governments hesitate long before they set out to redress very grievous wrongs that may be committed in any particular part of the world."[86]

The most important theoretical argument advanced by Great Britain in support of its claim of non-succession was based on the Roman law doctrine of the personal character of "torts" (*actio personalis moritur cum persona*):

> I need not to remind you that so far as individuals are concerned under Roman Law the successor was never liable for torts; under our English law and American law for torts the successor was never liable, or with very rare exceptions, so rare as to say, I think, never is liable for the torts of the dead person. The liability for torts dies with the person, and it would be an extraordinary thing, in my submission, if it were found that in International law, there was a law which did not exist when you are dealing with local law as applied to individuals.[87]

Great Britain summarised its position on the matter as follows:

> [T]here is no rule of international law imposing liability for the wrongful acts of the government of the extinct State upon a State which conquers and annexes the territory of another. Such a theory is supported by no precedents and would be contrary to sound principle and mischievous in effect.[88]

The Arbitral Commission came to the conclusion that Mr Brown had indeed acquired a right and that the authorities of the Boer Republic of South Africa had denied his right. It however followed Great Britain's line of argumentation and decided that Mr Brown had suffered a "denial of justice" from the Government of the Boer Republic of South Africa but not from the British authorities after annexation.[89] Consequently, no damages were awarded. In an important passage of its decision, the Arbitral Commission stated that:

> …If there had never been any war, or annexation by Great Britain, and if these proceedings were directed against the South African Republic, we should have no difficulty in awarding damages on behalf of the claimant…We are equally clear that this liability

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85 *Id.*

86 *Id.*

87 *Synopsis of Argument in behalf of Great Britain, R.E. Brown Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 183 et seq., at pp. 185–186.

88 *Answer of His Britannic Majesty's Government in the Robert E. Brown Claim*, p. 19, quoted in: D.P. O'CONNELL, *State Succession*, vol. I, p. 489.

89 The Arbitral Commission also rejected the U.S. contention on British suzerainty over the Boer Republic of South Africa. Thus, according to the Arbitral Commission, the British government did not have "any rights to interest herself in the internal administration of the country, legislative, executive of judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way": *R.E. Brown* (United States v. Great Britain), award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 131.

> never passes to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces, nor in the Proclamation of Annexation, can there be found any provision referring to the assumption of liabilities of this nature.[90]

This decision is important because, as previously mentioned, it is the first statement of an international tribunal on the issue of State succession to obligations arising from the commission of internationally wrongful acts. According to Sir Cecil Hurst, who acted as Counsel for Great Britain, the decision "shows that liability for the torts of the Government of a former State does not pass to a State conquering and annexing its territory".[91]

The importance to be given to this Award as supporting the principle of non-succession to international responsibility is, however, undermined by two factors.[92] The first one is the fact that the claimant (the United States) did not base its argumentation on the existence of any doctrine of non-succession. The Arbitral Commission's Award is clear on this point when it states that "[n]or is there, properly speaking any question of State succession here involved."[93] Another inherent limitation of this Award is that the often-quoted passage of the decision allegedly supporting the principle of non-succession is in fact a mere *obiter dictum*, where the Arbitral Commission only notes that it could not endorse a doctrine based on "[a]n assertion that a succeeding state acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrong by the former state".[94] In other words, the Arbitral Commission did not decide the issue before it by resorting in any way to the doctrine of non-succession to international responsibility.[95]

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90 *R.E. Brown, Ibid.*, p. 129.

91 Cecil J.B. HURST, p. 165. The same opinion was expressed by Wladyslaw CZAPLINSKI, p. 345; Jean Philippe MONNIER, p. 85.

92 Michael John VOLKOVITSCH, p. 2184; Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, at p. 61.

93 *R.E. Brown* (United States v. Great Britain), Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129.

94 *Ibid.*, at p. 130.

95 Mark THOMPSON, "Finders Weepers Losers Keepers: United States of America v. Steinmetz: the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama", 28 *Conn.L.Rev.*, 1996, at p. 542.

e) *The* Hawaiian Claims *Case (1925) in the Context of the Annexation of Hawaii by the United States (1898)*

A few years after having rendered its decision in the *R.E. Brown* case, which has been analysed above,[96] the same Arbitral Commission (the U.S.-Great Britain Arbitral Commission) had to deal with a case of a similar nature, only with the position of the parties reversed. In the *Redward* case, better known as the *Hawaiian Claims* case,[97] a group of British nationals were illegally detained and expelled from Hawaii by the "Republic of Hawaii" in 1895 before the Islands were formally annexed by the United States in 1898. Great Britain exercised its diplomatic protection for its nationals and claimed damages against the "Republic of Hawaii", which rejected such claim on 17 December 1897. After the annexation, Great Britain submitted the same claim, but this time against the United States. The claim was rejected by the United States in 1898. Finally, in 1925, the claim was brought before the Arbitral Commission.[98]

The argument submitted by Great Britain was partly based on an analogy with company partnership in private law:

> [A]nnexation surely entails the continuation of the life of the State under new auspices. In a sense, the State to which the territory is ceded has taken in a new partner, and in taking in a new partner surely the obligations of the individual person who is taken in would become the obligation of the firm into which he entered into partnership.[99]

Great Britain admitted that no support could be found in State practice or in doctrine on this point: "…there is very little authority on the question of obligation arising out of tortious acts" and "most writers and most of the decision are completely silent."[100] It seems that Great Britain ultimately based its argument on principles of equity and justice:

> What I am contending here is that one must look at the circumstances, the political circumstances of the coalition [between the United States and the independent Republic

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96 See at *supra*, p. 73.

97 *F.H. Redward and others (Great Britain) v. United States*, Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 157, and also in: 20 *A.J.I.L.*, 1926, p. 382; *Annual Digest*, 1925–1926, case no. 59, p. 80. Documents about the case can be found in: Fred K. NIELSEN, *American and British Claims Arbitration*, Washington, G.P.O., 1926, pp. 382–402.

98 The Commission was set up in 1910 to deal with pecuniary outstanding claims between the two States: *Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain, signed at Washington on 18 August 1910*, in: Fred K. NIELSEN, *American and British Claims Arbitration*, Washington, G.P.O., 1926, p. 3; Cecil J.B. HURST, p. 168.

99 *Synopsis of the Argument of Counsel for Great Britain, Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 87 et seq., at p. 94.

100 *Ibid.*, pp. 88–89.

> of Hawaii], and then consider the question really from the point of view of common sense, equity, and justice.[101]
>
> It is surely unjust and inequitable to the highest degree that all obligations should simply perish. Surely it is repugnant to natural justice when a person has a perfectly just claim against the Hawaiian Government that it simply be extinguished because that Government and the United States choose to enter into a voluntary union.[102]

One of the arguments put forward by Great Britain in support of its claim for the transfer of obligations arising from the commission of an internationally wrongful act from the predecessor State to the successor State was that the present case had to be distinguished from the *R.E. Brown* case. Thus, Great Britain contended that in the *R.E. Brown* case, the Republic of South Africa was annexed "by force", while in the present case of the "Republic of Hawaii" it was a "voluntary cession" to the United States. For the British government, in case of "voluntary cession", the principle of succession to obligations arising from the commission of internationally wrongful acts should be recognised:

> I suggest that the United States by acquiring the territory of Hawaii has acquired with it the obligations which Hawaii … is bound to pay. I suggest that in case of this sort, where there has been a voluntary coalition of two States in the union, all obligations pass whether they arise out of contract or out of tort.[103]

The United States first stated that there were "practically no rules of international law defining obligations of a State that absorbs another State".[104] The main argument advanced was that "support for a rule such as that on which the British Government must rely to fix liability on the United States for wrongful acts of a defunct state is not found in any of the sources of evidence of international law".[105] In other words, "an absorbing State is of course not guilty of wrongs committed by a defunct State towards another State".[106] The United States lastly argued that even if the Commission was to conclude that it was required under international law to pay compensation for the imprisonment of British subjects by the authorities of the "Hawaiian Republic", the claims should nevertheless be rejected "because no claims valid under international law ever arose against the Republic of Hawaii on account of the imprisonment of the claimants".[107]

The Arbitral Commission rejected the argument put forward by Great Britain and concluded that:

> We are unable to accept such distinction contended for. In the first place, it assumes a general principle of succession to liability for delicts, to which the case of succession

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101 *Ibid.*, p. 88.
102 *Ibid.*, p. 92.
103 *Ibid.*, p. 91.
104 *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at p. 95.
105 *Ibid.*, p. 100.
106 *Ibid.*, p. 107.
107 *Ibid.*, p. 132.

> of one State to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown case and has never been contended for to any such extent…nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it.[108]

The Arbitral Commission therefore followed its own precedent in the *R.E. Brown* case and held, in an *obiter dictum*, that there was no general principle of succession to liability for internationally wrongful acts. It decided that the United States (as successor State) could not be held responsible for obligations arising from the internationally wrongful acts committed by a legal entity that no longer existed.[109]

In our opinion, the Arbitral Commission should have found the United States responsible for the acts committed by the "Republic of Hawaii" on two different grounds, which were not at all discussed in the Award.

The first reason is that in the present case the internationally wrongful acts were not committed by the predecessor independent State (Hawaii), but by the so-called "Republic of Hawaii", a U.S.-installed and controlled "puppet" government which had taken power in a coup d'État in 1893. A few words should be said here about the historical background of the annexation of Hawaii.[110]

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108 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 158.

109 *Id.*

110 See, in doctrine: David Keanu SAI, "American Occupation of the Hawaiian State: a Century Unchecked", 1 *H.J.L.P.*, 2004, pp. 46–81; Matthew CRAVEN, "Hawai'I, History and International Law", 1 *H.J.L.P.*, 2004, pp. 6–22; Matthew CRAVEN, *Continuity of the Hawaiian Kingdom*, Legal brief provided for the *acting* Council of Regency, 12 July 2002, in: 1 *H.J.L.P.*, 2004, pp. 453–489; Jennifer M.L. CHOCK, "One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation, and Possible Reparations", 17 *U.Haw.L.Rev.*, 1995, p. 463; Poka LAENUI, "A Primer on International Activities as Related to the Quest for Hawaiian Sovereignty", Paper of the Institute for the Advancement of Hawaii Affairs; Mililani B. TRASK, "Historical and Contemporary Hawaii Self-determination: A Native Hawaiian Perspective", 8 *Ariz.J.Int'l & Comp.L.*, 1991, p. 77; Elizabeth Pa MARTIN, "Hawaiian Natives Claims of Sovereignty and Self-determination", *Ariz. J.Int'l & Comp.L.*, 1991, p. 273; S. James ANAYA, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs", 28 *Georgia L.R.*, 1994, p. 309; Noelle M. KAHANU & Jon M. VAN DYKE, "Native Hawaiian Entitlement to Sovereignty: An Overview", 17 *U.Haw.L.Rev.*, 1995, p. 427; Jon M. VAN DYKE & Carmen di AMORE-SIAH, "Self-determination for Non Self-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii", 18 *U.Haw.L.Rev.*, 1996, p. 623.

Hawaii was an independent State prior to its annexation in 1898.[111] In 1893, a group of conspirators led by U.S. nationals and supported by U.S. military representatives proclaimed the establishment of a "provisional" government, without the consent of the local native population. The ultimate goal of the conspirators was the annexation of the Islands to the United States.[112] The new President of the United States recognised the illegality of the acts and called for the restoration of the Hawaiian Monarchy.[113] Notwithstanding the official position of the U.S.

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111 Hawaii was recognised by a number of other States, including the United States (in 1842). It also ratified several international treaties. A list of the bilateral treaties which Hawaii entered into with more than 20 States can be found at: <http://www.alohaquest.com/archive/treaties.htm>. Hawaii also became a member of the Universal Postal Union in 1882. In the case of *Lance Larsen v. the Hawaiian Kingdom*, PCA case no. 99–001, Award of 5 February 2001, in: 119 *I.L.R.*, p. 566, at p. 581, the Arbitral Tribunal (presided by James Crawford) recognised the existence of Hawaii as an independent State prior to its annexation (see at para. 7.4 of the Award). This case is analysed in: Patrick DUMBERRY, "The *Hawaiian Kingdom Arbitration Case* and the Unsettled Question of the Hawaiian Kingdom's Claim to Continuity as an Independent State under International Law", 2 *Chinese J.I.L.*, 2002, pp. 655–684.

112 At that time, a treaty of annexation was even signed by this U.S. led provisional government and the U.S. Secretary of State; the treaty was submitted to the U.S. Senate for ratification.

113 A change of government in the United States led to the establishment of an official investigation on the events surrounding the insurrection. The conclusion reached by the investigation was that U.S. diplomatic and military representatives were responsible for the coup and the overthrow of the lawful government in Hawaii: *Report of U.S. Special Commissioner James Blount to U.S. Secretary of State Walter Gresham*, 17 July 1893, in: *Executive Documents of the United States House of Representatives*, 53D Congress, 1894–95, Appendix II, Foreign Relations, (1894), p. 567; also in: 1 *H.J.L.P.*, 2004, pp. 136–192. In a message to Congress on 18 December 1893, U.S. President Cleveland described the United States government's actions as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress". President Cleveland also emphasised that the "provisional" government did not have "the sanction of either popular revolution or suffrage" and that it was "neither a government de facto nor de jure" (U.S. President *Grover Cleveland's Message to the Joint Houses of Congress*, 18 December, 1893, in: James D. RICHARDSON, *A Compilation of the Messages and Papers of the Presidents: 1789–1908*, vol. IX, Washington, Bureau of National Literature and Art, 1909, pp. 5, 12, 18, 26; in: 1 *H.J.L.P.*, 2004, pp. 201–213. This is discussed in: J.B. MOORE, *A Digest of International Law*, vol. I, Washington, G.P.O., 1906, p. 501. The interpretation of events has since been confirmed by the U.S. government in its *Apology Resolution* of 23 November 1993, whereby the U.S. Congress and Senate admitted that elements of the U.S. government had "conspired with a small group of non-Hawaiian residents of the Hawaiian Kingdom, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii" (*Apology Bill*, Joint Resolution of the U.S. Congress of 23 November 1993, Public Law 103–105, *SJ Res.* 19, in: 103rd Congress, 107 Stat. 1510, 1993, 7; in: 1 *H.J.L.P.*, 2004, pp. 235–240. The "Apology" Law supports "reconciliation efforts" between the United States and the native Hawaiian people and contains a disclaimer indicating that "nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States". According to Francis A. BOYLE, "Restoration of the Independent Nation State

government, the "provisional" government declared itself a "Republic of Hawaii" in 1894 and was even eventually recognised as the *de facto* government by the United States.[114] In the midst of the Spanish-American War, the U.S. Congress passed a Joint Resolution on 6 July 1898, which was duly signed by U.S. President McKinley the following day, purporting to finally annex[115] the "Republic of Hawaii" to the United States.[116]

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of Hawaii under International Law", 7 *St. Thomas L.R.*, 1995, pp. 723–756, as a result of this apology the people of Hawaii would be entitled to the restoration of their independent status as a sovereign State and entitled to some form of compensation.

114 *For. Rel.* 1894, pp. 358–360. The new U.S. President, Mr William McKinley, even entered into a second treaty of annexation with the "Republic of Hawaii" on 16 June 1897: *American-Republic of Hawaii Treaty of Annexation*, 16 June 1897, in: 1 *H.J.L.P.*, 2004, pp. 224–225. The preamble to the Treaty reads as follows: "The United States and the Republic of Hawaii, in view of the natural dependence of the Hawaiian Islands upon the United States, of their geographical proximity thereto, of the preponderant share acquired by the United States and its citizens in the industries and trade of said Islands and of the expressed desire of the government of the Republic of Hawaii that those Islands should be incorporated into the United States as an integral part thereof and under its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare". The Queen of Hawaii transmitted an official protest to the United States. The Treaty of annexation was not ratified by the U.S. Senate.

115 J.H.W. VERZIJL, *International Law in Historical Perspective*, t. II, Leiden, A.W. Sijthoff, 1969, p. 129, is of the view that this is not a case of annexation but a process of voluntary merger between the "Republic of Hawaii" and the United States.

116 *U.S. Congress Joint Resolution no. 55* (to Provide for Annexing the Hawaiian Islands to the United States; the "Newlands" Resolution"), 6 July 1898, in: 30 Stat. 750; 2 Supp. R.S. 895 12, 20; in: G. FR. De MARTENS, *Nouveau recueil général de traités*, 2nd series, vol. XXXII, p. 72; in: 1 *H.J.L.P.*, 2004, p. 230. As a result of the Joint Resolution passed before the U.S. Congress, the self-proclaimed "Republic of Hawaii" ceded sovereignty over the Hawaii Islands to the United States without the consent of the native population or any compensation in return. The Resolution mentioned that the Republic of Hawaii consented "to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind". Similarly, President McKinley subsequently indicated that "by that resolution the Republic of Hawaii as an independent nation was extinguished, its separate sovereignty destroyed, and its property and possessions vested in the United States" (President McKinley, "Third Annual Message", 5 December 1899, in: J.B. MOORE, *A Digest of International Law*, vol. I, Washington, G.P.O., 1906, p. 511). In 1900, the U.S. Congress passed the Organic Act (*Organic Act, An Act to Provide a Government for the Territory of Hawaii*, U.S. Congress, 30 April 1900, in: C 339, 31 Stat 141) establishing Hawaii as an "incorporated territory" of the United States. In 1946, Hawaii (and other U.S. colonies such as Alaska, the Philippines, Puerto Rico, American Samoa and Guam) was placed under Article 73(e) of Chapter XI of the *Charter of the United Nations* as a "non-selfgoverning territory" administered by the United States. As a result of an overwhelming vote in a Special Election in favour of a proposition, Hawaii was officially admitted as the 50th State of the Union on 21 August 1959 by Proclamation no. 3309.

The fact that the internationally wrongful acts were in fact committed by the so-called "Republic of Hawaii" is clear in the Award.[117] At the time the events took place, the United States was no doubt exercising a political domination over this "puppet" government. In accordance with Article 17 of the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts*, a State which "directs and controls another State in the commission of an internationally wrongful act" is held internationally responsible for this act.[118] This principle of law certainly existed at the time of the events (the end of the 19th Century).[119] Therefore, the United States should have been held accountable for the acts committed by the so-called "Republic of Hawaii" against British nationals based on the application of basic principles of State responsibility.

There is also a second reason that leads us to believe that the United States should have been held responsible for the acts committed by the "Republic of Hawaii" prior to the annexation. The measures taken by this puppet government can be assimilated to those of rebels which were aimed at having the Islands of Hawaii annexed to the United States. There is a well-recognised principle of State responsibility (which will be examined below) whereby the successor State should be responsible for obligations arising from internationally wrongful acts committed by rebels in their fight to achieve independence.[120] Nothing prevents applying this principle in situations where internationally wrongful acts of rebels are committed with the aim of annexing a territory to an already existing State.

1.2 *Modern State Practice Supports the Principle of Succession*

In modern cases of incorporation of State, the successor State should be held responsible for the obligations arising from internationally wrongful acts committed

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117 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, pp. 157–588, referring to acts committed by "the authorities of the Hawaiian Republic prior to the annexation by the United States" which occurred during a "monarchist rebellion in Hawaii on January 6, 1895". Similarly, Fred K. NIELSEN, *American and British Claims Arbitration*, Washington, G.P.O., 1926, p. 85, described the events as follows: "On January 6 [1895] open rebellion broke out in that Country [i.e. Hawaii], the purpose of the uprising being to overthrown the existing republican form of government and to restore the former monarchy. An attack was begun outside the city of Honolulu by an armed force of natives. On January 7, martial law was proclaimed by the President of the Republic, and military forces promptly proceeded to arrest persons suspected of implication in the attempt to overthrow the government. Approximately 200 persons, including the claimants, were arrested and imprisoned".

118 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

119 *Affaire des biens britanniques au Maroc Espagnol* (Great-Britain v. Spain), Award of Umpire Huber of 23 October 1924, in: *U.N.R.I.A.A.*, vol. II, p. 639, at pp. 648–649.

120 This principle is examined in detail at *infra*, p. 224.

by the predecessor State. This is the solution adopted by some writers in doctrine.[121] In such cases, the right to compensation of injured third States should be respected by the successor State.[122] Thus, the successor State will no doubt benefit (at least to some extent) from the incorporation of a formerly independent State within its territory. A successor State should not, as a matter of principle, benefit from some rights enjoyed by the predecessor State without equally taking over some of its international obligations. In the words of Reuter, "les droits et les obligations vont de pair" and "l'on ne peut recueillir les uns et rejeter les autres".[123] Ultimately, any other solution would lead to the following unfair consequence: The internationally wrongful act committed before the date of succession would remain unpunished and the injured State victim of such an act would be left (after the date of succession) with no debtor against whom it could file a claim for reparation. The application of the principle of succession in the context of incorporation of State prevents such unjust result.

There are several examples of State practice in the context of the incorporation of the German Democratic Republic (G.D.R.) into the Federal Republic of Germany. In all three relevant examples that were found, the Federal Republic of Germany (the successor State) decided to take over the obligations arising from internationally wrongful acts committed by the G.D.R. (the predecessor State) before the date of succession.[124]

a) *The Integration of the German Democratic Republic into the Federal Republic of Germany (1990)*

At the end of the Second World War, the United States, France, the United Kingdom and the U.S.S.R. occupied militarily the defeated German Reich. In 1949 two German States were established: the G.D.R. (or East Germany) and the Federal Republic of Germany (F.R.G., or West Germany). The official position taken by the Federal Republic of Germany was that it did not constitute a new State and that it had the same international legal personality as the German Reich.[125] Therefore,

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121 This is, for instance, the position of Miriam PETERSCHMITT, pp. 67–69.

122 *Ibid.*, p. 33: "Dans le cas d'une fusion ou d'une incorporation, la succession se fait par accord entre les Etats prédécesseurs. Ces Etats ne sauraient procéder à leur unification sans se soucier du sort de leurs obligations. Soit ils les liquident avant la date de l'unification, soit le nouvel Etat les assume par la suite".

123 Paul REUTER, *Droit International Public*, 4th ed., Paris, P.U.F., coll. Thémis, 1973, p. 155. Similarly, for Michael John VOLKOVITSCH, p. 2206, a successor State which finds it desirable "to exercise certain of its predecessor's rights bring with it the obligation to fulfil related responsibilities".

124 This principle that the successor State is always free to accepts responsibility for the obligations arising from internationally wrongful acts committed by the predecessor State is further discussed at *infra*, p. 215.

125 This was confirmed by the Constitutional Court of the Federal Republic of Germany in, *inter alia: Re Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic*, 31 July 1973, Case no. 2 *BVerfG*

questions of State succession to responsibility for internationally wrongful acts committed during the Second World War and *before 1949* do not arise in the context of the Federal Republic of Germany since there is a legal continuity between the German Reich and West Germany.[126]

On 31 August 1990 was signed the *Treaty on the Establishment of German Unity* between the G.D.R. and the F.R.G., providing for the "unification" of the two States by 3 October 1990.[127] On that date, the G.D.R. ceased to exist as an independent State and its territory comprising five *Länder* was *integrated* into the already existing Federal Republic of Germany. In other words, the G.D.R. acceded to the Federal Republic under Article 23 of the Basic Law (the Constitution of the Federal Republic of Germany).[128] Therefore, one cannot speak of a merger of States, since no new State was created in the process. The term "unification" (or "reunification"), which has been widely used to describe the process, should not be regarded as the proper legal definition. Germany truly is a case of the "integration" of one State (East Germany) into another already existing State (West Germany), which continued its legal personality under international law.[129] This is the view held in doctrine.[130] There is therefore a continuity of State between the Federal Republic of Germany before and after the accession of the *Länder* forming the G.D.R.[131] The present section of this study therefore only deals with questions

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1/73, in: 78 *I.L.R.*, p. 149. The question of the legal status of the two Germany after the Second World War is the object of many articles in doctrine. See, for instance: G. RESS, "Germany, Legal Status after World War II", in: R. BERNHARDT (ed.), *Encyclopaedia of Public International Law*, vol. 10, North Holland, Max Planck Institute, 1984, pp. 191 et seq.

126 Issues of succession to obligations arising from the commission of internationally wrongful acts in the context of the "secession" of the G.D.R. in 1949 are examined at *infra*, p. 148.

127 *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands [Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity]*, 31 August 1990, *BGBl.* 1990–II, 885; English version reprinted in: 30 *I.L.M.* 30, 1991, p. 463. The relevant documents on the German "unification" are published in: 51(2) *Z.a.ö.R.V.*, 1991, p. 494. On the constitutional aspects of the unification, see: Peter E. QUINT, "The Constitutional Law of German Unification", 50 *Md.L.Rev.*, 1991, p. 475.

128 Before the "unification", Article 23 of the Basic Law contemplated the possibility that "other parts" of Germany (a clear reference to the former G.D.R.) could join the Federal Republic.

129 Thus, Article 1 of the *Treaty on the Establishment of German Unity* provides that "upon the accession of the German Democratic Republic to the Federal Republic of Germany…the *Länder* of [the German Democratic Republic] shall become *Länder* of the Federal Republic of Germany".

130 Kay HAILBRONNER, "Legal Aspects of the Unification of the Two German States", 2(1) *E.J.I.L.*, 1991, p. 33; Ulrich FASTENRATH, "Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", 44 *Ö.Z.ö.R.V.*, 1992, pp. 1–54; Stefan OETER, "German Unification and State Succession", 51(2) *Z.a.ö.R.V.*, 1991, pp. 351–352.

131 Jochen A. FROWEIN, "Die Verfassungslage Deutschlands im Rahmen des Volkerrechts", 49 *VVDStRL* 7, 1990, pp. 25–26.

of international responsibility in the context of the integration of East Germany within West Germany.[132]

i) *Article 24(1) of the* Treaty on the Establishment of German Unity

The *Treaty on the Establishment of German Unity* contains a controversial provision, Article 24(1), which reads as follows:

> In so far as they arise from the monopoly on foreign trade and foreign currency or from the performance of other state tasks of the German Democratic Republic vis-à-vis foreign countries and the Federal Republic of Germany up to 1 July 1990, the settlement of the claims and liabilities remaining when the accession takes effect shall take place under instruction from, and under the supervision of, the Federal Minister of Finance…[133]

This provision indicates that the Federal Republic of Germany will endorse claims of third States regarding "claims and liabilities" arising from "the performance of State tasks" by the G.D.R. It has rightly been interpreted by some in doctrine as the acceptance by the Federal Republic of Germany of obligations arising from internationally wrongful acts committed by the former East Germany.[134] This would

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132 Questions of State succession in the context of the "unification" of Germany have been the object of an important literature: Wladyslaw CZAPLINSKI, "Quelques aspects juridiques de la réunification de l'Allemagne", *A.F.D.I.*, 1990, pp. 89–105; F. ELBE, "Resolving the External Aspects of German Unification: The 'two-plus-four' Process", 36 *German Y.I.L.*, 1993, pp. 371–384; U. FASTENRATH, "Der Deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", 44 *Ö.Z.ö.R.V.*, 1992, pp. 1–54; U. FASTENRATH, "Die Regelungen uber die Staatennachfolge bei der Vereinigung der beiden deutschen Staaten", 25 *V.R.U.*, 1992, pp. 67–83; Jochen A. FROWEIN, "Current Development: The Reunification of Germany", 86 *A.J.I.L.* 1992, pp. 152–163; T. GIEGERICH, "The European Dimension of German Reunification: East Germany's Integration into the European Communities", 51 *Z.a.ö.R.V.*, 1991, pp. 384–450; Note "Taking Reichs Seriously: German Unification and the Law of State Succession", 104 *Harv.L.Rev.*, 1990, pp. 588–606; K. HEILBRONNER, "Legal Aspects of the Unification of the Two German States", 2 *E.J.I.L.*, 1991, pp. 18–41; S. OETER, "German Unification and State Succession", 51 *Z.a.ö.R.V.*, 1991, pp. 349–383; C. TOMUSCHAT, "A United Germany Within the European Community", 27 *C.M.L. Rev.*, 1990, pp. 415–436; F.G. VON DER DUNK, & P.H. KOOIJMANS, "The Unification of Germany and International Law", 12 *Mich.J.Int'l L.*, 1991, pp. 510–557; R. WITTOWSKI, "Die Staatensukzession in volkerrechtliche Vertrage unter besonderer Berucksichtigung der Herstellung der staatlichen Einheit Deutshlands", 48 *Schriften Zum Staats- und Volkerrecht*, 1992.

133 *Treaty on the Establishment of German Unity*, 31 August 1990, in: 30 *I.L.M.*, 1991, p. 457.

134 This is the position of the following authors: Stefan OETER, "German Unification and State Succession", 51(2) *Z.a.ö.R.V.*, 1991, p. 381; Michael John VOLKOVITSCH, p. 2177; Brigitte STERN, Responsabilité, p. 352. *Contra*: Florian DRINHAUSEN, *Die Auswirkungen der Staatensukzession auf Verträge eines Staates mit privaten Partnern*, Frankfurt, Peter Lang, 1995, p. 151 (who approves the position of non-transfer of obligations he believes the Federal Republic of Germany adopted). For Ulrich FASTENRATH,

certainly be the case of illegal expropriation undertaken by the G.D.R., whereby Germany would have to offer compensation in return.[135] This last case is further discussed in the following section.

ii) *Restitution/Compensation for Expropriated Property in the G.D.R.*

At the time of the "unification", one very important pending legal issue was the status of many years of expropriation and nationalization of property which took place in the territory of the former East Germany. Acts of expropriation and nationalization had been committed by the Nazi regime,[136] by the Soviet Union during its military occupation (1945–1949)[137] and by the G.D.R. after 1949.[138] For many decades, the G.D.R. refused to provide any compensation for acts of nationalization which it committed.[139]

"Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", 44 *Ö.Z.ö.R.V.*, 1992, p. 39, the Treaty does not contain any provision dealing with the question of succession to international responsibility. Similarly, Peter E. QUINT, "The Constitutional Law of German Unification", 50 *Md.L.Rev.*, 1991, p. 534 (footnote no. 217), seems to limit the scope of this provision to "international contractual obligations".

135 This is the position of: Stefan OETER, "German Unification and State Succession", 51(2) *Z.a.ö.R.V.*, 1991, p. 381; L. HORN, "Völkerrechtliche Aspekte der deutschen Vereinigung", *N.J.W.* 1990, p. 2176.

136 When the Nazi regime was in power in Germany (from 30 January 1933 to 8 May 1945), the German government passed many laws which prohibited Jewish ownership of property. As a result, their properties were subject to forced sale, confiscation or other types of seizure.

137 See, for instance, the Soviet Military Administration Command no. 124 of 30 October 1945 and no. 126 of 31 October 1945 which focused on government and Nazi property as well as those of war enemies and "other persons identified by the Soviet Command". Soon after, the Soviet Military Administration carried out an important "land reform", whereby many properties were expropriated.

138 It should be noted that Article 23 of the G.D.R.'s Constitution of 1949 specifically declared that fair compensation should be paid in return for measures of expropriation taken by the Government. The different laws passed by the G.D.R. are described in: Jonathan J. DOYLE, "A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court's 'Land Reform' Decision of April 23, 1991", 13 *Mich. J.Int'l L.*, 1992, pp. 834 et seq.

139 It should be noted, however, that the G.D.R. concluded some lump sum agreements with several States for compensation resulting from expropriation: Denmark (*Abkommen zwischen der Regierung des Königreichs Dänemark und der Regierung der Deutschen Demokratischen Republik zur Regelung vermögensrechtlicher und finanzieller Fragen*, 3 December 1987, in: G. FIEBERG & H. REICHENBACH (eds.), *Enteignung und Offene Vermögensfragen in der ehemaligen DDR*, vol. II, Cologne, 1991, under 5.5.), Austria (*Vertrag zwischen der Republik Österreich und der Deutschen Demokratischen Republik zur Regelung offener vermögensrechtlicher Fragen*, 21 August 1987, Bundesgesetzblatt v. 12. 1. 1988, S. 128 ffl; text in: G. FIEBERG & H. REICHENBACH (eds.), *Ibid.*, under 5.4.) and Sweden (*Abkommen zwischen der Regierung des Königreichs Schweden und der Regierung der Deutschen Demokratischen Republik*, 24 October 1986,

Faced with such a long history of unlawful expropriation against both German nationals and foreigners, the first changes started to occur in the G.D.R. just before its integration into the Federal Republic of Germany.[140] On 12 January 1990, the G.D.R. amended its Constitution and removed the prohibition against private ownership interest of the means of production. It also enacted many laws for the restitution of private property expropriated *after 1949*. One such law was the *Law for the Settlement of Open Property Questions (Property Act)* of 29 June 1990.[141] This Property Act, which later became part of German law,[142] was the object of several subsequent amendments.[143] This body of laws stipulates that assets which had been confiscated, expropriated or taken by the authorities of the former G.D.R. (during the years 1949–1990) should be restored to their former owners. Some categories of cases were, however, excluded from restitution.[144] The law also pro-

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text in: G. FIEBERG & H. REICHENBACH (eds.), *Ibid.*, under 5.3.). Other treaties were also entered into with Finland and Yugoslavia. According to Andreas ZIMMERMANN, *Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation*, Berlin, Springer-Verlag, 2000, p. 270, unified Germany continued the obligations arising out of these treaties after the accession of East Germany. This is, however, a question of succession to treaties more than an issue of succession to obligations arising from the commission of internationally wrongful acts.

140 A number of articles have been published in doctrine dealing with this issue: Andreas ZIMMERMANN, "Restitution of Property after German Reunification", in: R.W. PIOTROWICZ & S.K.N. BLAY (eds.), *Unification of Germany in International and Domestic Law*, Amsterdam, Rodopi, 1997, pp. 103 et seq.; O. PASSAVENT & G. NOSSER, "The German Reunification—Legal Implications for Investment in East Germany", *Int'l Law.*, 1991, pp. 875 et seq.; A. ELINGER, "Expropriation and Compensation: Claims to Properly in East Germany in Light of German Unification", *Emory Int'l L.Rev.*, 1992, pp. 215 et seq.; Peter E. QUINT, "The Constitutional Law of German Unification", 50 *Md.L.Rev.*, 1991, pp. 475 et seq.; W.K. WILBURN, "Filing of U.S. Property Claims in Eastern Germany", *Int'l Law.*, 1991, pp. 649 et seq.; Jonathan J. DOYLE, "A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court's 'Land Reform' Decision of April 23, 1991" 13 *Mich.J.Int'l L.*, 1992, pp. 832–865.

141 *Gesetz zur Regelung offener Vermögensfragen (Vermögensgesetz)* [*Law for the Settlement of Open Property Questions (Property Act)*] in: *BGB1*., 1990, vol. II, p. 1159.

142 It was incorporated as Annex II to the *Treaty on the Establishment of German Unity* (Ch. III, Sect. B. I, No. 5 to the Treaty).

143 *Gesetz zur Beseitigung von Hemmnissen bei der Privatisierung von Unternehmen und zur Förderung von Investitionen* (Hemmnisbeseitigungsgesetz) [*Investment Acceleration Law*], 22 March 1991, in: *BGBl.*, 1991, vol. I, p. 766. See also the *Zweites Vermögensrechtsänderungsgesetz* [Second Investment Priority Law], 14 July 1992, in: *BGBl.*, 1992, vol. I, p. 1257. Other changes can also be found in the *Gesetz über besondere Investitionen in der DDR* [*Law on Certain Investments in the G.D.R.*], 26 June 1990, in: *BGBl.*, 1990, vol. II, p. 1157, which was included in the *Treaty on the Establishment of German Unity* (as Annexe II, ch. III, Sect. B, para. I(4)).

144 These exclusions are discussed in: Andreas ZIMMERMANN, "Restitution of Property after German Reunification", in: R.W. PIOTROWICZ & S.K.N. BLAY (eds.), *Unification of Germany in International and Domestic Law*, Amsterdam, Rodopi, 1997, pp. 103 et seq. One such exception is for individuals who had already been compensated by the G.D.R. for loss of property under the relevant laws of the G.D.R. Another exception

vides that in some circumstances restitution of property to the owners is replaced by compensation.[145] About 2.3 million applications were filed (including 208,000 by firms) for the restitution of real estate.[146]

On 15 June 1990, a *Joint Declaration* on the settlement of outstanding issues of property rights was entered into by the F.R.G. and the G.D.R.[147] It was later incorporated as an integral part of the laws of the Federal Republic of Germany.[148] Section 3 of the *Joint Declaration* indicates that property confiscated *after 1949* should be returned to the original owner. However, under Section 1 of the *Joint Declaration*, expropriations which occurred on the territory of the G.D.R. during the period of Soviet military occupation (1945–1949) should not be reversed and restitution should not take place (only an "equalization" payment could be received).[149] The legality of such an exclusion was addressed by the German Constitutional Court in its "Land Reform" decision of 23 April 1991.[150] It was decided

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is for foreigners who had also been compensated through the lump sum agreements entered into by the G.D.R. and several States (these agreements are mentioned at *supra*, note 139).

145 These different exceptions, as well as the restitution procedures, are analysed in: A.B. SHINGLETON, V. AHRENS & P. RIES, "Property Rights in Eastern Germany: An Overview of the Amended Property Law", 21 *Ga.J.Int'l.& Comp.L.*, 1991, pp. 345–57; David B. SOUTHERN, "Restitution or Compensation. The Land Question in East Germany", 42(3) *I.L.C.Q.*, 1993, pp. 690–697; Dorothy A. JEFFRESS, "Resolving Rival Claims on East German Property Upon German Unification", 101(2) *Yale L.J.*, 1991, pp. 527–549.

146 According to the Web Site of the Federal Office for Central Services and Unresolved Property Issues (<http://www.badv.bund.de>), 98% of the applications concerning the restitution of real estate had been decided by 31 December 2005.

147 *Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen [Joint Declaration between the Governments of the Federal Republic of Germany and the G.D.R. on the Settlement of Outstanding Issues of Property Rights]* of 15 June 1990, in: *BGBl.* 1990, vol. II, p. 1237.

148 The Declaration was made part of the *Treaty on the Establishment of German Unity* (Annex III). Under Article 41(3) of the Treaty, the Federal Republic of Germany is under the obligation not to enact legislation contrary to the contents of the Declaration.

149 It should be noted that the text of the *Joint Declaration* is the result of a compromise between not only the F.R.G. and the G.D.R., but also the U.S.S.R. In fact, on the explosive question of the measures to be taken with respect to property expropriated before 1949, the *Joint Declaration* explicitly states that the Soviet Union and the G.D.R. "see no possibility of revising the measures that were taken" during the period of Soviet occupation. In the Declaration, the Federal Republic of Germany only "takes note of this [result] in light of the historical development" but also declares "a final decision over possible government compensation payments must remain reserved for a future all-German parliament".

150 *Land Reform*, German Federal Constitutional Court (First Senate), 23 April 1991, in: *BVerfGE* 84, 90, reprinted in: 18 *EuGRZ*, 1991, p. 121. This case is further discussed in: Jonathan J. DOYLE, "A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court's 'Land Reform' Decision of April 23, 1991" 13 *Mich. J.Int'l L.*, 1992, pp. 842 et seq.; Charles E. STEWART, "The Land Reform Decision", 85 *A.J.I.L.*, 1991, pp. 690–696.

that "unified" Germany could not assume responsibility for actions undertaken by the Soviet Union before the Basic Law had come into force in 1949. The Court did not, however, view the question in light of principles of State succession.[151] The same conclusion was reached in a recent case decided by the European Court of Human Rights.[152]

The question of State succession for acts of expropriation committed by East Germany was addressed in a decision of 1 July 1999 by the Federal Administrative Court.[153] The Court rejected, as a matter of principle, the responsibility of the Federal Republic of Germany for obligations arising from internationally wrongful acts (expropriation of real property) committed by the former G.D.R. against a Dutch national. However, the Court also stated that because the expropriated property was now part of "unified" Germany, the unfulfilled obligations of the G.D.R. to pay compensation to the injured individual had now passed to the successor State. The Court stated that the successor State's obligation would be limited to the payment of compensation and not extend to the restitution of property.[154]

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151 In doctrine, however, it has been suggested that the refusal of "unified" Germany (as the successor State) to take over the obligations arising from acts committed by the *occupant* (the U.S.S.R.) during that period (1945–1949) was based on the principle of non-succession to international responsibility. This is the position of Jonathan J. DOYLE, "A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court's 'Land Reform' Decision of April 23, 1991" 13 *Mich.J.Int'l L.*, 1992, p. 858 ("well accepted principles of public international law dictate that one nation State takes over the territory of another without being bound by any legal strictures whatever, so that West Germany was free to assume or deny any or all prior obligations incurred by the East German government"). In approval of this interpretation, he quotes the work of Walter LEISNER, "Das Bodenreform-Urteil des Bundesverfassungs-gerichts", 1991, *N.J.W.*, p. 1570.

152 In its decision of 2 March 2005, the Court declared inadmissible the applications made in the cases of *von Maltzan and Others v. Germany* (application no. 71916/01), *von Zitzewitz and Others v. Germany* (application no. 71917/01) and *Man Ferrostaal and Alfred Töpfer Stiftung v. Germany* (application no. 10260/02) (European Court of Human Rights, Press release issued by the Registrar on 30 March 2005). The Court held that Germany did not have any responsibility for acts committed by the Soviet occupying forces (1945–1949) or for those perpetrated by another State against its own nationals. The Court indicated that any right to restitution had been expressly ruled out by the *Joint Declaration* of 15 June 1990 and that the Federal Constitutional Court had confirmed that the exclusion of any right to restitution did not breach the Basic Law.

153 German Federal Administrative Court, Decision of 1 July 1999, *BVerwG* 7 B 2.99, reprinted in: 52 *NJW*, 1999, p. 3354.

154 It should be noted that the claim was ultimately dismissed by the Court on the ground that the injured Dutch national had already received some sort of compensation for his lost property by the G.D.R. To the extent that the victim had no valid claim for expropriation against the G.D.R. *before the date of succession*, the Court simply decided that no such valid claim also existed against the Federal Republic of Germany after the date of succession.

These different laws, which were first passed by the G.D.R. and were subsequently incorporated as part of the laws of "unified" Germany, are all examples where the successor State (Germany) decided to take over the obligations arising from internationally wrongful acts committed by the predecessor State (the G.D.R.) between 1949 and 1990.[155] One can truly speak of succession to obligations arising from *international* responsibility, since these different laws apply not only to all German nationals (whether or not from the former East Germany) but to foreigners as well.

iii) *The 1992 Agreement for the Settlement of Property Claims between the Federal Republic of Germany and the United States*

The question of expropriated property of U.S. nationals in the territory of the former G.D.R. remained unresolved for many years after the Second World War. In 1974, the United States and the G.D.R. established diplomatic relations and agreed to enter into negotiation "for the settlement of claims and other financial and property questions which remained unsolved…"[156] These claims were to include property questions which arose prior to or since 1945.

Since no agreement was reached with the G.D.R. on the question of compensation, the United States decided in 1976 to pass legislation creating a "Claim Program" under which the U.S. Foreign Claims Settlement Commission would process outstanding G.D.R. property claims.[157] By 1981, the U.S. Foreign Claims

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155 This is the position of the following writers: Stefan OETER, "German Unification and State Succession", 51(2) *Z.a.ö.R.V.*, 1991, p. 381; L. HORN, "Völkerrechtliche Aspekte der deutschen Vereinigung", *Neue Juristische Wochenschrift (NJW)*, 1990, p. 2176; A. ELINGER, "Expropriation and Compensation: Claims to Properly in East Germany in Light of German Unification", *Emory Int'l L.Rev.*, 1992, p. 250 ("the claims resulting from forty years of East German refusal to compensate claimants for its expropriatory acts, are being paid by the unified Germany"); Cynthia Day WALLACE, *The Multinational Enterprise and Legal Control Host State Sovereignty in an Era of Economic Globalization*, 2nd ed., The Hague, Martinus Nijhoff Publ., 2002, p. 1000 ("with German reunification, the Federal Republic undertook to honour the outstanding G.D.R. obligations, involving both domestic and foreign claims"). *Contra*: Florian DRINHAUSEN, *Die Auswirkungen der Staatensukzession auf Verträge eines Staates mit privaten Partnern*, Frankfurt, Peter Lang, 1995, p. 151, for whom this legislation does not indicate that the Federal Republic of Germany has accepted the obligations of the predecessor State.

156 *Agreed Minutes on Negotiations Concerning the Establishment of Diplomatic Relations, with Exchange of Notes*, 4 September 1974, in: 25 *U.S.T.*, p. 2597; *T.I.A.S.* no. 7937, quoted in: W.K. WILBURN, "Filing of U.S. Property Claims in Eastern Germany", *Int'l Law.*, 1991, p. 650). This article provided the background of these historical developments. See also in: 27 *Int'l Law.*, 1993, pp. 220–221.

157 The legislation (United States Public Law 94–542 of 18 October 1976, 90 Stat. 2509–25111 (1976), codified as 22 U.S.C. no. 1644a-1644m (1982)) led to the enactment of "Subchapter VI: Claims against German Democratic Republic" to the "International Claims Settlement Act" of 1949 (22 U.S.C. 1621–1627, (1982)). Under this legislation, the U.S. Foreign Claims Settlement Commission was to "receive and determine

Settlement Commission had formally recognised the validity of 1,899 claims by U.S. individuals, corporations, and trusts (worth approximately some US$ 78 million).[158] The United States and the G.D.R. having failed to enter into a lump sum settlement, these claims remained unsettled until the incorporation of the G.D.R. into the Federal Republic of Germany in 1990.

An agreement was finally signed on 13 May 1992 by the Federal Republic of Germany and the United States concerning "the settlement of certain property claims". The Agreement was for an amount of up to US$ 190 million (with an initial payment of US$ 160 million).[159] It provided that:

> The Agreement shall cover claims of nationals of the United States (including natural and judicial persons) arising from any nationalization, expropriation, intervention, or other taking of, or special measures directed against, property of nationals of the United States before October 18, 1976, covered by the United States German Democratic Republic Claim Program established by the United States Public Law 94–542 of October 18, 1976.

The Agreement only covers internationally wrongful acts committed by the G.D.R. between 1949 and 1976.[160] It does not cover expropriation committed during the period of occupation by the Soviet Union (1945–1949).[161] In an exchange of dip-

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in accordance with applicable substantive law, including international law, the validity and amounts of claims by nationals of the United States against the German Democratic Republic for losses arising as a result of the nationalization, expropriation, or other taking of (or special measures directed against) property, including any rights or interests therein, owned wholly or partially, directly or indirectly, at the time by nationals of the United States whether such losses occurred in the German Democratic Republic or in East Berlin".

158 These figures are taken from W.K. WILBURN, "Filing of U.S. Property Claims in Eastern Germany", *Int'l Law.*, 1991, p. 651.

159 *Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Settlement of Certain Property Claims*, 13 May 1992, in: *T.I.A.S.* no. 11959; 1911 *U.N.T.S.*, 27; also in: Jan KLAPPERS (ed.), *State Practice Regarding State Succession and Issues of Recognition*, The Hague, Kluwer Law International, 1999, p. 240; Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements*, 1975–1995, Ardsley, N.Y., Transnational Publ., 1999, p. 333.

160 Thus, the Agreement indicates that it covers claims of U.S. nationals arising from any nationalisation which are "covered by the United States German Democratic Republic Claim Program established by the United States Public Law 94–542 of October 18, 1976". Under Article 3(7) of the Agreement, the expropriation claims of U.S. nationals arising on or *after* 18 October 1976 are to be treated as any other claims by German nationals or any other foreigners.

161 Thus, Section 1644a of the "Subchapter VI: Claims Against German Democratic Republic" defines the term "property" as including those which were "nationalized, expropriated, or taken" by the G.D.R. It makes no reference to acts committed by the Soviet occupant from 1945 to 1949.

lomatic notes in April 1997 between the United States and Germany, the amount of the final transfer was settled at some US$ 102 million.[162]

In this Agreement, the Federal Republic of Germany (the successor State) expressed its willingness to provide compensation for obligations arising from internationally wrongful acts committed by the G.D.R. before 1976 with regard to lost properties of nationals of the United States. This is an example where the successor State accepted to take over the obligations arising from internationally wrongful acts committed by the predecessor State against a third State.[163]

2. *Unification of States*

2.1 *State Practice Supports the Principle of Succession*

The present author has found only one relevant example of State practice where the question of succession to obligations arose in the context of unification of States.[164] This is the case of the creation of the United Arab Republic, which was the result of the unification of Egypt and Syria in 1958. This example supports the principle of succession to obligations arising from internationally wrongful acts committed before the date of succession.

In the context of unification of States, succession to international responsibility is the solution usually adopted in doctrine,[165] as well as by the I.L.C.'s Special

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162 *Annual Report, 2000*, Foreign Claims Settlement Commission of the United States, Washington, U.S. Department of Justice. Under Article 2(9) of the Agreement, the United States is the exclusive responsible for the distribution of the transferred amount. U.S. nationals whose property had been expropriated by the G.D.R. authorities could choose between accepting the payment awarded by the U.S. Foreign Claims Settlement Commission in the context of this Agreement, or to pursue their claims under the German property claims program (Article 3(1)).

163 Miriam PETERSCHMITT, p. 68. The position of W.K. WILBURN, "Filing of U.S. Property Claims in Eastern Germany", *Int'l Law.*, 1991, pp. 660–661 (whose article was published *before* the 13 May 1992 Agreement) was that unified Germany could decide not to recognise the obligations of the G.D.R. with respect to the outstanding 1,899 claims by U.S. nationals based on the ground that a State should not be responsible for the internationally wrongful acts committed by another State.

164 No case law (either international or municipal) was found concerning the question of State succession to international responsibility in the context of unification of States.

165 This is, for instance, the position of J.H.W. VERZIJL, pp. 219–220, giving the following example: "One single State emerges from the voluntary fusion of two separate States, one or both of which have previously been guilty of an international wrong committed to the detriment of a third State". In such cases of merger, the author believes that "it would really be absurd to assume that the successor State can nevertheless take shelter behind the argument put forward by the dominant doctrine, according to which the offences of its predecessor(s) do not regard it". Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, Clarendon Press, 2003, p. 632, indicates

Rapporteur Bedjaoui.[166] Underlying this principle is the fact that as the successor State may have found it desirable to exercise the rights which were those of its predecessor States, it should equally have to fulfil their responsibilities and obligations.[167] The application of the principles of good faith and equity would also certainly call for the transfer of the obligations arising from the commission of internationally wrongful acts to the extent that cases of unification of States are the result of an *agreement* between them.[168] In such scenario, the injured third States' right to compensation should be respected by the successor State.[169] A similar argument based on the voluntary nature of the agreement was developed by Great

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that his general position on the question (i.e. the application of the principle of non-succession) "clearly cannot have general application and is less cogent in relation to voluntary merger". See also: T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, p. 209. Michael John VOLKOVITSCH, p. 2200, believes that in cases of unification of States, a non-rebutable *strict rule* of succession to obligations arising from the commission of internationally wrongful acts should apply. This is also the position of Miriam PETERSCHMITT, pp. 67–69. On the contrary, Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 218, believe that there is "good authority" for the rule of non-succession to unliquidated damages in cases of merger of States.

166 *First Report on Succession of States in Respect of Rights and Duties Resulting from Sources other than Treaties*, by Mr Mohammed Bedjaoui, Special Rapporteur, 20th session of the I.L.C., 1968, U.N. Doc. A/CN.4/204, I.L.C. Report, A/7209/Rev.1 (A/23/9), 1968, chp. III(C)(a), paras. 45–50, in: *Yearbook I.L.C.*, 1968, vol. II, p. 94, at p. 101, para. 47: "The two merging State have decided to join forces in the future and the liabilities of each are fully assumed by the new political entity they have created".

167 Michael John VOLKOVITSCH, p. 2206. Wladyslaw CZAPLINSKI, p. 357, is also of the view that in cases of merger of States the transfer of obligations arising from the commission of an internationally wrongful act should occur in situation where "the successor State takes over all rights of the predecessors and thus obtains measurable advantages from the delicts. In these cases delictual obligations should be treated as contractual debts".

168 Miriam PETERSCHMITT, p. 33. For Hazem M. ATLAM, p. 286, the obligation of the unified State to compensate third parties for internationally wrongful acts committed by the predecessor State(s) prior to the unification is based on the "volonté unificatrice librement et effectivement exprimée par l'infrastructure réelle de celui-ci" and on the general principle of good faith (at p. 289). Atlam arrives at this conclusion based on a (questionable) assumption. For the writer (see at pp. 274, 286–288), a unification of States is simply a territorial mutation on the whole of the territory of the predecessor States, whereby the predecessor States keep their own international legal personality intact. For him (see at pp. 76–78), there is actually no creation of a new State in cases of unification of States. Therefore, the question of any transfer of the obligation to repair simply does not arise. He is of the view (see at pp. 287–288) that the unified State should always remain liable for the commission of "its" own internationally wrongful acts based on rules of State responsibility (and not on rules of State succession).

169 Miriam PETERSCHMITT, p. 33.

Britain in its pleadings in the *Hawaiian Claims* case (which Great Britain viewed as one example of merger of States and not as one of annexation[170]).[171]

Ultimately, any other solution would lead to the unfair consequence that the internationally wrongful act committed before the date of succession would remain unpunished and the injured State victim of such an act would be left (after the date of succession) with no debtor against whom it could file a claim for reparation. As in the context of incorporation of State, the application of the principle of succession in the context of unification of States prevents such unjust result.

a) *United Arab Republic (1958)*

The creation of the United Arab Republic was the result of the unification of Egypt and Syria in 1958.[172] This unification lasted for only three years.[173] There are at least three examples where the United Arab Republic (as successor State) decided to take over the responsibility for obligations arising from internationally wrongful acts committed by the predecessor States and to provide compensation to injured third States.[174] All cases involved actions taken by Egypt against Western

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170 This case, which is undoubtedly one of annexation (and not one of unification of States), was discussed in detail at *supra*, p. 78.

171 *Synopsis of the Argument of Counsel for Great Britain*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 87 et seq., at p. 92: "It is surely unjust and inequitable to the highest degree that all obligations should imply perish. Surely it is repugnant to natural justice when a person has a perfectly just claim against the Hawaiian Government that it simply be extinguished because that Government and the United States choose to enter into a voluntary union".

172 The "United Arab Republic" should not be confused with the "United Arab States" which was a Confederation established between the United Arab Republic (comprised of Egypt and Syria) and North Yemen. This Confederation existed from 1958 to 1961.

173 The Proclamation of 1 February 1958 makes it clear that this is not merely a "union of States"; it expressly mentioned that the two States were uniting "into one State". However, Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, pp. 349–350, is of the view that this case is not one of State succession but one of "amalgamation", whereby the legal personality of the two predecessor States are not extinguished. This point of view has been (quite rightly) qualified as a "problem of semantics" by Karl ZEMANEK, "State Succession after Decolonization" *R.C.A.D.I.*, t. 116, 1965–III, p. 212. For D.P. O'CONNELL, *State Succession*, vol. II, p. 74, it is difficult to place this *sui generis* case within any of the traditional categories.

174 All three examples which are discussed in the following pages are described in: Eugene COTRAN, *Ibid.*, p. 366. However, the author, having made reference to these examples, concludes just a few pages later (at p. 368) that no claims for alleged internationally wrongful acts committed by the predecessor States were presented by third States. He believes that had such case been presented, the rule should have been that the new State is not bound by internationally wrongful acts committed by the predecessor States. However, he interprets the creation of the United Arab Republic not as a case of succession of States, but as one of "amalgamation". He concludes that "there is no

properties in the context of the nationalisation of the Suez Canal in 1956 and the "Egyptianisation" of foreign-owned properties.[175] In none of these cases, which will now be examined, did the United Arab Republic argue that, as a matter of principle, it could not succeed as a new State to the obligations arising from internationally wrongful acts committed by its predecessors.[176]

The first example deals with the nationalisation of the *Société Financière de Suez* by Egypt in July 1956.[177] An agreement was entered into on 13 July 1958 between the United Arab Republic and the private corporation under which the former undertook, *inter alia*, to pay some EGY£ 28.3 million to the shareholders of the latter.[178] This is clearly a case of a new State being held liable for the obligations arising from internationally wrongful acts committed by the predecessor State.[179]

The second example involves an agreement of 22 August 1958 between the United Arab Republic and France resuming cultural, economic and financial relations between the two States, which had been broken off as a result of the military actions taken by France in 1956 at the time of the nationalisation of the Suez Canal ("les événements d'octobre et de novembre 1956" as referred to in the agreement).[180] The agreement provided (at Articles 3 and 4) that the United Arab Republic, as the successor State, would restore the goods and property of French nationals which had been taken by Egypt and that compensation would be paid

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authority for saying that in such case [of "amalgamation"] any pre-existing liability of the parts does not rest in newly created whole".

175 No case was found concerning internationally wrongful acts committed by Syria before the unification. In an article dealing essentially with the dissolution of the United Arab Republic in September 1961 (this case is further dealt with at *infra*, p. 107). Charles ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1962, at p. 414, seems to be of the opinion that the United Arab Republic could not be responsible for any obligations arising from internationally wrongful acts committed by Syria before the unification.

176 Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, p. 367: "It does not appear that any question was raised during the negotiations leading to these Agreements as to the nature and effect of the change, if any, in the personality of Egypt".

177 This example is dealt with in Eugene COTRAN, *Ibid.*, at p. 366. The background of this example is discussed in detail by L. FOCSANEANU, "L'accord ayant pour objet l'indemnisation de la compagnie de Suez nationalisée par l'Egypte", *A.F.D.I.*, 1959, pp. 161–204.

178 UN Doc. A/3898, S/4089, September 23, 1958.

179 This is also the position of L. FOCSANEANU, "L'accord ayant pour objet l'indemnisation de la compagnie de Suez nationalisée par l'Egypte", *A.F.D.I.*, 1959, at p. 196, who refers to the United Arab Republic as the acting successor to the Egyptian government.

180 *Accord général entre le gouvernement de la République française et le gouvernement de la République arabe unie*, in: *La documentation française*, 18 October 1958, no. 2473; *R.G.D.I.P.*, 1958, pp. 738 et seq. The Agreement was followed by the adoption by the United Arab Republic of Decree no. 36 promulgated on 18 September 1958. This example is also explained in: Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, at p. 366; Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1958, p. 681.

for those goods and property not restituted.[181] This is one example of succession to obligations arising from the commission of internationally wrongful acts.[182]

Contrary to what has been stated in doctrine,[183] a similar agreement was also signed on 28 February 1959 by the United Arab Republic and the United Kingdom.[184] The preamble to the agreement expressly provided that it was entered into by the United Arab Republic "as successor of the Government of the Republic of Egypt, and acting so far only as concerns the territory of the Republic of Egypt". Under this agreement, the United Arab Republic undertook to terminate all sequestration measures taken against British property.[185] The agreement also provided for a lump

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181 The French government also undertook to stop any measures it had taken relating to Egyptian interests. Under Article 7, the Agreement is considered by the Parties to be a final settlement of the reciprocal claims of the two States arising from the Suez Canal Crisis. It should be noted that the question of the implementation of this Agreement was only finally settled a few years later (after the dissolution of the United Arab Republic in 1961). The first agreement was entered into on 5 November 1964 between France and the United Arab Republic on the question of the settlement of claims arising out of the Egyptian sequestrations which occurred after 1956, in: *J.O.R.F.*, 1964, 11149; also mentioned (and briefly described) in: Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, at p. 371. Another agreement was entered into by the two States on 28 July 1966 (and was in force as of 1 September 1967): *Agreement between the Government of the French Republic and the Government of the United Arab Republic Concerning the Settlement of Problems Relating to Estates of French Nationals Situated on the Territory of the United Arab Republic*, in: *J.O.R.F.*, 1967, p. 9939; *R.G.D.I.P.*, 1968, at p. 289; Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley, N.Y., Transnational Publ., 1999, p. 324. This last agreement actually dealt with the implementation of the two previous agreements. Thus, it provides (at Article 2) for the "property, rights and interests for which French owners have demanded restoration" in accordance with the first 1958 Agreement to be "remitted to the claimants within 6 months". It also dealt with compensation to be paid to French nationals whose properties have been confiscated by Egypt.

182 This is also the position of Habib GUERARI, "Quelques observations sur les Etats éphémères", *A.F.D.I.*, 1994, at p. 424, for whom this Agreement shows that the United Arab Republic "a pris la suite de l'Egypte en matière de responsabilité internationale".

183 For instance, Wladyslaw CZAPLINSKI, p. 342.

184 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt*, in: *U.K.T.S.* 1959, no. 35 (Cmd. 723); 343 *U.N.T.S.*, p. 159; 14 *Rev. égyptienne d.i.*, 1958, p. 364; 54 *A.J.I.L.*, 1960, pp. 511–519; Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, pp. 57 et seq. This Agreement is also referred to in: Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, at p. 366.

185 Article 3(a) of the Agreement indicates that the United Arab Republic shall "terminate the application of all measures of sequestration taken by the United Arab Republic against British property between October 30, 1956, and the date of the signature of the present Agreement, and all restrictive measures taken against United Kingdom nationals during

sum of UK£ 27.5 million to be paid by the United Arab Republic as compensation "in full and final settlement" of British claims.[186]

3. *Dissolution of State*

State practice and international and municipal case law where the question of succession to international responsibility arose in the context of dissolution of State is not uniform. There are examples in favour of both the principles of succession and non-succession. No case was found where a judicial body decided in favour of both the transfer of the obligation to repair in the absence of the *consent* by the successor States concerned. It cannot be firmly established what solution should be adopted by a judicial body faced with a question of State succession to international responsibility in the context of dissolution of State.

There are, nevertheless, certain tendencies in State practice and international and municipal case law that may be identified:

- Older examples of State practice and municipal courts cases support the principle that the successor State is not responsible for the obligations arising from internationally wrongful acts committed by the predecessor States (Section 3.1);
- There are several recent examples of State practice where the successor State has accepted to take over the obligations arising from internationally wrongful acts committed by the predecessor States (Section 3.2).

3.1 *Ancient State Practice Supports the Principle of Non-Succession*

Older examples of State practice have adopted the doctrine of non-succession to obligations arising from the commission of internationally wrongful acts. This is, for instance, clearly the case in the context of the dissolution of the Kingdom of

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the same period". According to Article 3(b), the United Arab Republic shall "return all British property (or the proceeds of any such property sold between October 30, 1956, and the date of the signature of the present Agreement) to the owners thereof". Article 3(e) deals with the "full payment and transfer of Egyptian Government pensions to United Kingdom nationals". The question of the termination of the sequestration measures is further explained in: X, "Sequestration of Enemy Property in Egypt. A Note on Current Development & Procuration no. 5 on Trade Relations with British and French Nationals and Measures Applying to their Properties", 14 *Rev. égyptienne d.i.*, 1958, pp. 137 et seq.

186 Article 4(1) b) of the Agreement refers to "all claims in respect of injury or damage to property suffered" from sequestration and restrictive measures "taken by the United Arab Republic against British property between October 30, 1956, and the date of the signature of the present Agreement".

Westphalia in 1813, where the Treaty expressly excluded the passing of delictual debts from the predecessor State to the successor States. Similarly, in the context of the dissolution of Austria-Hungary after the First World War, several Austrian municipal court decisions support the principle that a new State (as Austria was considered in these decisions) should not be held responsible for obligations arising from internationally wrongful acts committed before the date of succession.

a) *Kingdom of Westphalia (1813)*

Authors often refer to an old example of State practice: the Treaty of Westphalia of 1842 between Prussia, Hanover, Hesse, Lüneburg and Brunswick regulating the dissolution of the Kingdom of Westphalia in 1813.[187] In this Treaty (Article 13), the successor States decided to share the debts of the Kingdom but expressly excluded delictual debts, which had not been recognised by the predecessor State (the Kingdom of Westphalia).[188]

This example has been analysed by most in doctrine as an illustration of the principle of non-succession to obligations arising from the commission of an internationally wrongful act.[189] This seems to be the proper interpretation to be given to this example. Others have concluded, on the contrary, that the fact that the parties have explicitly excluded the delictual debts from the Treaty shows that they wanted to avoid the application of a general principle of succession to international responsibility.[190]

b) *Austria-Hungary Dual Monarchy (1918)*

A much more controversial case of dissolution of State is the break-up of the Austria-Hungary Dual Monarchy after the First World War. The case is controversial

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187 *Vertrag di Regulierung der Central-Schuldverhältnisse des vormaligen Königreichs Westphallen betreffend*, 29 July 1842, in: G. FR. De MARTENS, *Nouveau recueil général de traités*, vol. III, p. 410.

188 See the analysis of Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, pp. 156–162. The relevant passage of the provision is reprinted in: Jean-Philippe MONNIER, pp. 73–74. See also: Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences)*, Paris, Sirey, 1977, p. 505; D.P. O'CONNELL, *State Succession*, vol. I, p. 486.

189 Jean-Philippe MONNIER, pp. 73–74; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences)*, Paris, Sirey, 1977, p. 505; Hazem M. ATLAM, p. 205.

190 For instance, Michael John VOLKOVITSCH, p. 2176, concludes that this example "is probably viewed as an exception to the general rule [of succession of States to international responsibility] rather than its confirmation". This argument is explicitly rejected by Jean Philippe MONNIER, p. 74, for whom "on peut conclure dès lors qu'en soustrayant les demandes d'indemnités des dettes réparties entres elles, les Puissances signataires du Traité de Berlin n'avaient pas l'intention d'exclure des obligations qui, à défaut, auraient pesé sur elles".

to the extent that it is not so clear whether it must be understood as the dissolution of a State or instead as a case of the secession of Poland, Czechoslovakia and Yugoslavia (with both Austria and Hungary being considered as the continuing States). The majority of doctrine is of the opinion that the case of Austria-Hungary is one of dissolution of State.[191] The question whether the case of the Austria-Hungary Dual Monarchy was indeed one of a dissolution of a State is in fact directly linked to the issue of State succession to international responsibility.

The "Allied and Associated Powers" (the British Empire, France, Italy, Japan, the United States, etc.) held that this was not a case of a dissolution of a State. They viewed post-War Austria and Hungary as *identical* with the now extinct Dual Monarchy.[192] The Allies insisted on both States being considered as continuing States in order to make sure that they would be held responsible for the internationally wrongful acts committed by the Dual Monarchy during the War.[193] They feared that if the break-up of Austria-Hungary was to be interpreted as a case of a dissolution of a State, the "rule" of non-succession would apply.

The Peace Treaty of St. Germain (entered into by the Allied Powers and Austria) thus contained a provision indicating Austria's responsibility for the War (Article 177).[194] This was also the position adopted by the United States, which concluded a separate peace treaty with Austria in 1921.[195] That Treaty contained an important provision specifying that all property of the Imperial Austro-Hungarian Government would be retained by the United States until suitable provision would be set up by Austria to compensate nationals of the United States who had suffered "loss, damage, or injury to their persons or property, directly or indirectly" or "in consequence of hostilities or of any operations of war" for acts committed during the War by Austria-Hungary.[196] The United States also considered Hungary to be the

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191 An overview of the legal arguments advanced by both sides in doctrine is found in: Oskar LEHNER, "The Identity of Austria 1918/19 as a problem of State Succession", 44 *Ö.Z.ö.R.V.*, 1992, pp. 63–84, at p. 81.

192 See the discussion in: Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, pp. 220 et seq.

193 J.H.W. VERZIJL, at p. 126.

194 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, St. Germain-en-Laye, 10 September 1919, entered into force on 16 July 1920, in: *U.K.T.S.* 1919 No. 11 (Cmd. 400). Article 177 reads as follows: "The Allied and Associated Governments affirm and Austria accepts the responsibility of Austria and her Allies for causing the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Austria-Hungary and her Allies".

195 *Treaty between the United States and Austria, signed on August 24, 1921, to establish Securely Friendly Relations between the two Nations*, in: 16 *A.J.I.L.*, 1922, Suppl., pp. 13–16. The 1919 Peace *Treaty of St. Germain-en-Laye* entered into by Austria and the other European Powers was not ratified by the United States. This is essentially the reason why the United States signed a separate peace treaty with Austria.

196 Charles Cheney HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 2nd ed., Boston, Little, Brown & Co., 1945, p. 438. Article 1 of

continuing State of Austria-Hungary and signed with it a separate peace treaty in 1921 which contains the exact same clause as that in the above-mentioned treaty with Austria.[197]

The United States ratified a treaty in 1924 with Hungary and Austria dealing with the "determination of the amounts to be paid" by these two States as a result of the previous treaties it had entered into with them in 1921.[198] The Commission set up under this treaty decided that compensation for damage suffered by U.S. nationals during the War would be borne by Austria in the percentage of 63.6% and by Hungary for 36.4%.[199] The Commission specifically indicated that the other States (i.e. Poland, Czechoslovakia and Yugoslavia) should bear no responsibility for such damage.[200] The same position was taken by Polish municipal courts, which

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the Treaty mentioned that "Austria undertakes to accord to the United States and the United States shall have and enjoy all the rights, privileges, indemnities, reparations or advantages" which are specified in the Joint Resolution passed by the United States Congress and approved by the President on 2 July 192l. The relevant part of the Joint Resolution dealing with Austria reads as follows: "…all property, of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as…the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, whosesoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the…Imperial and Royal Austro-Hungarian Government or its agents since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in…Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise and also shall have granted to persons owing permanent allegiance to the United States of America most-favoured-nation treatment whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce, and industrial property rights and until the…Imperial and Royal Austro-Hungarian Government or its successor or successors shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the…Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America".

197 *Treaty Establishing Friendly Relations between the United States of America and Hungary*, signed in Budapest on 29 August 1921, in: *U.S.T.S.*, no. 660; in: 16 *A.J.I.L.*, 1922, Suppl., pp. 13–16.

198 The Agreement of 26 November 1924 can be found in: *L.N.T.S.*, vol. 48, p. 70; *U.N.R.I.A.A.*, vol. VI, p. 199.

199 *Administrative Decision no. 1*, 25 May 1927, Tripartite Claims Commission, *U.N.R.I.A.A.*, vol. VI, p. 203, at p. 207.

200 *Ibid.*, at p. 210: "All of the Successor States other than Austria and Hungary are classed as 'Allied or Associated Powers' and under the Treaties it is entirely clear that

held that Austria was the "continuator" of the Dual Monarchy and that, accordingly, it should be held accountable for the illegal acts committed by Austria-Hungary before that date.[201]

Austria took the position that it was a *new* State in 1918. The break-up of Austria-Hungary was interpreted by Austria as a case of a dissolution of a State in order precisely not to have to assume any obligations arising out of the War.[202] This claim of non-continuity was approved by the Austrian Constitutional Court in several cases dealing with issues of State succession. In these cases, it was decided that Austria was not responsible for the obligations of Austria-Hungary and for the claims against it, with the exception of those for which the new State had expressly announced its desire of succession.[203] Thus, the new State of Austria would be bound to take over an appropriate part of the liabilities of Austria-Hungary only based on a statute or an international treaty.[204]

The break-up of the Austria-Hungary Dual Monarchy is an illustration of the principle of non-succession to international responsibility. Thus, the position of all parties on the controversial question of Austria's and Hungary's continuity with the Dual Monarchy was dictated by their own perception that in a case of dissolution of State, a new State could not be bound by wrongful acts committed before the date of succession.

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none of them is held liable for any damage suffered by American nationals resulting from acts of the Austro-Hungarian Government or its agents during either the period of American neutrality or American belligerency".

201 These Polish municipal law cases are further discussed at *infra*, p. 146.

202 Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, p. 199, see also at pp. 218–219.

203 *Military Pensions (Austria) Case*, Austrian Constitutional Court, 7 May 1919, case no. 126, in: *Sammlung der Erkenntniss des österreichischen Verfassungsgerichtshofes*, vol. I (1919), no. 9, p. 17, in: *Annual Digest*, 1919–1922, at p. 66. See also another case decided by the Austrian Constitutional Court on 20 October 1919, case no. 253–254, in: *Sammlung der Erkenntniss des österreichischen Verfassungsgerichtshofes*, vol. I (1919), no. 18–19, pp. 36–37, referred to in: *Annual Digest*, 1919–1922, at p. 67. The same conclusion was also reached in the *Austrian Empire (Succession) Case*, Austrian Constitutional Court, 11 March 1919, case no. 18, in: *Sammlung der Erkenntniss des österreichischen Verfassungsgerichtshofes*, vol. I (1919), no. 2, p. 5, in: *Annual Digest*, 1919–1922, at p. 67.

204 *Case Relating to the Revalorization of Annuity Awarded against Austrian Railways before World War I (1923)*, Austria, Supreme Court, in: *Entsheidungen des Obersten Gerichtshofs in rechtssachen*, vol. 5 (1923), no. 271, p. 666, in: *Annual Digest*, 1923–1924, case 34. In this case, by a judgment given in 1909 the plaintiff was awarded an annuity as damages for a railway accident for which the Austrian State Railways had been held responsible. The Supreme Court confirmed the judgment of the lower Court of Innsbruck dismissing the action for valorisation of the annuity (following a currency depreciation) on the ground that the Austrian Republic could not be regarded as the successor to the Treasury of the Dual Monarchy.

3.2 *Modern State Practice Supports the Principle of Succession*

There are three examples of State practice where *the successor States* have accepted to take over the obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession. The oldest case is in the context of the dissolution of the Union of Colombia. The most recent case is the 2001 *Agreement on Succession Issues* entered into among all the successor States to the former S.F.R.Y.[205] The dissolution of the United Arab Republic in 1961 is also a clear example of State practice whereby one of the two successor States (Egypt) took over the international obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession.

The principle of succession to international responsibility seems to be recognised (at least implicitly) in the *Compromis* entered into between Slovakia and Hungary to refer a dispute to the International Court of Justice. The validity of the principle was also recognised (at least implicitly) by the I.C.J. in the *Case Concerning the Gabčíkovo-Nagymaros Project*, in which it stated that the successor State (Slovakia) "may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia" (i.e. the predecessor State).[206] However, it should be noted that the Court's finding was solely based on the specific language contained in the *Compromis* between the Parties. The Court did not endorse any *general* principle of succession to international responsibility. At the most, it can be argued that the Court did not reject the validity of the possibility of the transfer of the obligation to repair from the predecessor State to the successor States.

One example of State practice was found where the *injured State* submitted a claim for compensation to one of the successor States based on the principle that a new State can be held liable for the obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession. This is the *Tokic* case in the context of the dissolution of the former S.F.R.Y.

Our position is that in cases of dissolution of State the possibility of a transfer of the obligation to repair to the successor States *should not be rejected as a matter of principle*.[207] This proposition is in accordance with some trends observed

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205 *Agreement on Succession Issues* of 29 June 2001, in: 41 *I.L.M.*, 2002, p. 3.

206 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 151.

207 Some authors in doctrine have adopted a different view, whereby they reject the possibility of any transfer of the obligation to repair in the context of dissolution of State. See, for instance: Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 222. See also the argument developed by Hazem M. ATLAM, at p. 283, for whom "[L]e passif de la responsabilité internationale de l'Etat démembré ne pourrait, d'après nous, que s'éteindre à la suite de la dislocation de son propre titulaire. En d'autres termes, aucune succession de l'un ou de l'autre des Etats issus du démembrement d'Etats ne nous paraît ici admise". For the author (see at p. 284), this solution

in modern State practice, as is illustrated by the 2001 *Agreement on Succession Issues* entered into among all the successor States to the former S.F.R.Y.[208] and by the position taken by the I.C.J. in the *Case Concerning the Gabčíkovo-Nagymaros Project*.[209]

A *strict and automatic* application of the principle of non-succession in the context of dissolution of State would be in complete contradiction with the very idea of justice. Thus, the injured third State would be found to be left with no debtor to provide compensation for the damage it suffered as a result of the commission of the internationally wrongful act. The successor State(s) would also benefit from the consequences of the commission of the acts of the predecessor State.

The unfairness which would result from the application of such a strict and automatic principle of non-succession in cases of dissolution of State has been acknowledged by the Arbitral Tribunal in the *Lighthouse Arbitration* case.[210] It has also found some support in doctrine.[211] It has been argued that it is precisely because of the unjust nature of the consequences of the application of such a strict "rule" of non-succession that States tend to provide *ex gratia* reparation to injured States.[212] The adoption of a strict principle of non-succession would be

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of non-succession is, firstly, in accordance with principles of State succession, whereby (in his opinion) the absence of continuity of the international legal personality between the predecessor State and its successors calls for the application of the principle of *tabula rasa* with respect to international responsibility. According to Atlam (see at p. 285), this solution of non-succession is, secondly, also in accordance with principles of State responsibility, whereby a State is only responsible for the acts it has committed and not for those committed by other States.

208 *Agreement on Succession Issues* of 29 June 2001, in: 41 *I.L.M.*, 2002, p. 3.

209 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 151.

210 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 93: "What justice, or even what juridical logic, would there be, for example, in the hypothesis of an international wrong committed against another Power by a State which subsequently splits up into two new independent States, in regarding the later as being free from an international obligation to make compensation which would without any doubt have lain on the former, predecessor, State which had committed the wrong?".

211 According to J.H.W. VERZIJL, pp. 219–220, in the situation where a "State responsible for such a wrong splits into two before the reparation due is adjusted", "it would really be absurd to assume that the successor State can nevertheless take shelter behind the argument put forward by the dominant doctrine, according to which the offences of its predecessor(s) do not regard it". Georg SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, vol. I, 3rd ed., London, Steven & Sons, 1957, pp. 175–176, is of the view that whenever a State "split into two States" after the commission of an "international tort", the successor States should be held responsible for that internationally wrongful act "based on ground of estoppel" and "on the rules governing the principle of good faith".

212 For Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 505, the principle of non-succession to international responsibility applies to cases of dissolution of State. He concedes, however, that this situation is "évidem-

particularly unfair whenever the dissolution is the result of an *agreement* between the different successor States.[213] In such a case, the concept of good faith would call for the right of the injured third State for compensation to be respected by the successor States.[214]

The position that the *strict and automatic* application of the principle of non-succession should be rejected in cases of dissolution of State should, however, not be understood as an endorsement of the opposite radical solution of the *automatic transfer* of the obligation to repair to the new States. Whether the obligations arising from the commission of internationally wrongful acts may be transferred to the successor States (which is accepted in the present study as a matter of principle) will ultimately depend on the *particular circumstances* of each case; it should not be applied automatically and mechanically. Thus, not *all* new successor States should *always* be held accountable for the obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession. Such mechanical application of a principle of succession would undoubtedly be unfair, for instance, for one successor State which had simply nothing to do with the commission of the internationally wrongful act. As will be examined in detail in a subsequent Chapter of this study,[215] the actual behaviour and involvement of each of the authorities of the successor States (when they were still part of the predecessor State) in the commission of the internationally wrongful act should be taken into account. The unjust enrichment of the successor States as a result of the commission of internationally wrongful acts should also be examined.[216] Chapter 3 below examines the different criteria and circumstances that may be relevant to determine which of the different successor States should be held accountable for obligations arising from internationally wrongful acts committed by the predecessor State.[217]

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ment injuste" and that therefore "la pratique a admis à diverses reprises la possibilité d'une réparation *ex gratia* fondée sur l'équité et qui ne correspond à aucun degré à l'exécution d'une obligation antérieure".

213 Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, Clarendon Press, 2003, p. 632, indicates that his general position of non-succession to international responsibility "clearly cannot have general application and is less cogent" in relation to "voluntary dissolution". See also: T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, at p. 209.

214 Miriam PETERSCHMITT, p. 33.

215 The question is discussed in detail at *infra*, p. 259.

216 The question is discussed in detail at *infra*, p. 263.

217 For Georg SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, vol. I, 3rd ed., London, Steven & Sons, 1957, pp. 175–176, the "share of the liability" between the successor States for internationally wrongful acts committed by the predecessor State before the date of succession "can be determined only by equitable considerations".

a) *Union of Colombia (1829–1831)*

Reference is often made in doctrine[218] to the dismemberment of the Union of Colombia (*Gran Colombia*), which took place from 1829 to 1831.[219] A few years later, the United States submitted a claim for the seizure in 1827 of a U.S. ship by the Union of Colombia, which was then still a unified State. The United States claimed that all three successor States (Venezuela, Ecuator and New Grenada) had a "joint and several" obligation to provide compensation.[220]

The three successor States agreed to recognise and share among themselves the compensation related to the damage alleged by the United States. Venezuela (in 1852), Colombia (in 1857) and Ecuador (in 1862) all signed separate treaties with the United States whereby they apparently agreed to divide the responsibility among themselves in proportion to the division of the national debt of the Union of Colombia as established in 1834 soon after the dissolution of the Union (i.e. New Granada 50%, Ecuador 21.5% and Venezuela 28.5%[221]).[222]

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218 See the comments made by: Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences)*, Paris, Sirey, 1977, p. 506; Jean-Philippe MONNIER, pp. 75–76; Wladyslaw CZAPLINSKI, p. 341; Hazem M. ATLAM, p. 206; Michael John VOLKOVITSCH, pp. 2175–2176. The general backgound to the case can be found in: Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, pp. 296–299.

219 In 1830, both Venezuela and Ecuator left the Union of Colombia. What remained of the Union of Colombia was New Grenada (composed of present day Colombia and Panama). New Grenada later changed its name to the "United States of Colombia" in 1863. It was re-organised in 1886 under the name of "Republic of Colombia". On these historical developments, see: Frida Armas PFIRTER & Silvina González NAPOLITANO, "Secession and International Law: Latin American Practice", in: Marcelo G. KOHEN (ed.), *Secession: International Law Perspectives*, Cambridge, Cambridge Univ. Press, 2006, pp. 374–415.

220 This is clearly expressed in: Letter of U.S. Secretary of State Mr Forsyth to Mr Semple, the Chargé d'affaires to New Grenada, 12 February 1839, in: John Bassett MOORE, *A Digest of International Law*, vol. V, Washington, G.P.O., 1906, at p. 342: "Upon the dissolution of that Confederacy (that of Colombia) its members became, and have been informed that we hold them, jointly and severely liable for our claims".

221 D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 158.

222 *Protocol between the United States of America and Venezuela* (1 May 1852, Caracas), in: William M. MALLOY, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776–1909*, vol. II, Washington, G.P.O., 1910–1938, p. 1842. Both treaties signed by the United States with Ecuator and New Grenada can be found in: William M. MALLOY, *Ibid.*, vol. I, at pp. 319, 432. According to Michael John VOLKOVITSCH, at footnote no. 56 (quoting documents taken from: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II, Washington, G.P.O., 1898, at pp. 1576, 1384–1396, 1415–1420), the agreements with Ecuador and New Grenada only provided for the creation of international commissions which would

Some authors in doctrine has interpreted the example of the dissolution of the Union of Colombia as a case supporting the principle of the transfer of the obligation to repair from the predecessor State to the successor States.[223] Indeed, none of the parties involved (the three successor States and the injured State) seem to have doubted the application of the principle of succession in the present case. Some in doctrine have attenuated the importance that should be given to this example by making reference to the fact that apparently the United States did not obtain full compensation and that the amount recovered in the three agreements did not cover the total amount claimed.[224] It has also been suggested that the position of succession adopted by the three successor States could be explained based on the overwhelming power of the United States in the region at that time and that the solution arrived at could have simply been imposed upon them.[225]

b) ***United Arab Republic (1961)***

As previously observed, the United Arab Republic was created in 1958 by the unification of Egypt and Syria into a single State.[226] The marriage was short-lived, as on 28 September 1961, following a coup in Damascus, Syria left the United Arab Republic.

The United Nations considered Syria not as a new State but as an "old" State which was simply readmitted to the organisation and reinstalled in its seat as if its membership had simply been "suspended" during the three years during which it had merged with Egypt to form the United Arab Republic.[227] The procedure adopted by the United Nations and the international community in general has been

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have to adjudicate the claims. He indicates that the Ecuadorian Commission applied the same system of proportionate liability provided for in the U.S.-Venezuela Treaty. As for the New Grenada Commission, he notes that available records are not clear on the conclusion it reached. For Volkovitsch, what is more relevant is the fact that the records of the work of these commissions show no general rejection of the principle of succession to responsibility.

223 Michael John VOLKOVITSCH, pp. 2175–2176. Jean Philippe MONNIER, p. 76 and Hazem M. ATLAM, p. 216, analyse this case as one rare exception to the general rule of non-succession, in the sense that absent this explicit recognition by the successor States, no such succession could have occurred.

224 Wladyslaw CZAPLINSKI, pp. 341–342. On this point, Michael John VOLKOVITSCH, p. 2176, indicates that this assertion is unsupported by any evidence.

225 Hazem M. ATLAM, p. 216; Jean Philippe MONNIER, p. 76.

226 The circumstances of the unification have already been explained at *supra*, p. 95.

227 Syria requested its "readmission" to the United Nations in a letter dated 8 October 1961 (UN Doc. A/4914, 9 October 1961). On the morning of 13 October 1961, the President of the U.N. General Assembly called the content of the Syrian letter to the attention of the member States during a plenary meeting. Since no objection was raised against Syria being given a seat "as a member of the United Nations", Syria was duly seated in the afternoon of the same day: U.N. General Assembly, Provisional Verbatim

criticised in doctrine as contrary to all rules of succession of States.[228] In 1961, Syria was clearly *a new State*. This is the prevailing view in doctrine[229] and the one adopted by at least one municipal court decision.[230] The events of September 1961 in Damascus led to the *dissolution* of the United Arab Republic as both Syria and Egypt went their own ways. After that date, Egypt nevertheless continued to use the name "United Arab Republic" until September 1971, at which time it became known as the "Arab Republic of Egypt".

After the dissolution of State, Egypt (as one of the two successor States) entered into several agreements with other States whereby it provided compensation to foreign nationals whose property had been nationalised by the United Arab Republic (the predecessor State) before the date of succession (i.e. during the period 1958–1961). The decision of Egypt to provide compensation to injured third States is most likely based on the ground that the acts of nationalisation were actually committed *in the territory of Egypt itself* and not in Syria. The principle of unjust enrichment may have played a role in the outcome of these cases.[231]

A lump sum agreement in the amount of EGY£ 2 million was concluded between Italy and the United Arab Republic in 1965.[232] The agreement covered

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Record of the 1035th Meeting, UN Doc. A/P.V. 1035, Oct. 13 1961, pp. 2–3; *ibid*, 1036th Meeting, UN Doc. A/P.V. 1036, Oct. 13 1961, pp. 21–22.

228 Strong criticisms can be found in: Charles ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1962, pp. 413–417; Lucius CAFLISCH, "Les Nations Unies et le respect du droit international, le retour de la Syrie à l'O.N.U., une procédure critiquable", *Tribune de Genève*, 21 October 1961.

229 Charles ROUSSEAU, *Id.*; Habib GUERARI, "Quelques observations sur les Etats éphémères", *A.F.D.I.*, 1994, at pp. 426–429. *Contra*: Richard Young, "The State of Syria: Old or New ?", 56 *A.J.I.L.*, 1962, pp. 482–488, for whom post-September 1961 Syria was the same State as pre-1958 Syria. It may be true that these "two Syria" have, indeed, the same territory and other similar characteristics. However, from a legal stand point, it is not the same entity because it had ceased to exist for some three years. As so rightly pointed out by Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, p. 6, "there is no legal resurrection in international law. Once a State has become extinct, it cannot resume a continued existence".

230 *Arab Republic of Syria v. Arab Republic of Egypt*, Supreme Court of Brazil (Plenary Session), case no. 298–DF, 14 April 1982, in: *RTJ*, vol. 104, 1983, p. 889, in: 91 *I.L.R.*, p. 288. See in particular the position adopted by Judge Alves in his concurring opinion (see at pp. 311–313).

231 The concept of unjust enrichment is examined in detail at *infra*, p. 264.

232 *Agreement Between Italy and the United Arab Republic Relative to the Indemnisation of Italian Interests in Egypt with Protocol for the Application of the Exchange of Notes*, 23 March 1965, entered into force on 5 September 1966, in: *Gaz. Off.*, No. 215, 1 April 1966; in: 7 *Diritto Internazionale*, 1966, Pt. II, at p. 231; Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley, N.Y., Transnational Publ., 1999, p. 139. An exchange of notes dated 20 August 1968 extended the Agreement (in: 10 *Diritto Internazionale*, 1969, Pt. II, at p. 254). The Agreement is discussed in: Andrea GIAR-

Italian properties, rights and interests which were affected by measures taken by the United Arab Republic before and after the dissolution of State in 1961.[233] Another example is the Agreement of 13 September 1971 between the Arab Republic of Egypt and Great Britain with respect to compensation for British properties, rights and interests affected by the measures of nationalisation taken by the Government of the United Arab Republic.[234] A similar agreement was also signed in 1971 between the Arab Republic of Egypt and Sweden "concerning the compensation of Swedish interests affected by the measures of nationalisation and other restrictive measures enacted in the Arab Republic of Egypt".[235] An agreement was entered into between the Arab Republic of Egypt and the United States on 1 May 1976 for a claim settlement in the amount of US$ 10 million "in full settlement and discharge of all the claims of nationals of the United States against the Egyptian

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DINA, "International Claims: Contemporary Italian Practice", in: Richard B. LILLICH & Burns H. WESTON (eds.), *International Claims: Contemporary European Practice*, Charlottesville, Univ. Press Virginia, 1982, p. 97, at p. 110.

233 Article 2 of the Agreement.

234 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt Regarding Compensation for British Property, Rights and Interests Affected by Arab Republic of Egypt Measures of Nationalisation and other Matters Concerning British Property in the Arab Republic of Egypt*, entered into force on 28 March 1972, in: *U.K.T.S.* 1972, no. 62 (Cmd. 4995); 858 *U.N.T.S.*, p. 3; Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley, N.Y., Transnational Publ., 1999, p. 179. Under the Agreement (at Article 2), the Arab Republic of Egypt agreed to pay the amount of GB£ 2.1 million in "settlement of claims for compensation in respect of British properties, rights and interests nationalised". Such payments were final and covered all British claims against the Arab Republic of Egypt (Article 2(5)). It is true that the title of the Agreement refers to the nationalisation acts committed by the *Arab Republic of Egypt* and not to those of the United Arab Republic. However, at Article 1 the expression "relevant Arab Republic of Egypt measures" is designed to include all nationalisation laws promulgated by the Government of the Arab Republic of Egypt *between the years 1960 and 1964*, therefore including those nationalisation acts committed by the United Arab Republic before the dissolution of State in 1961.

235 *Agreement between the Kingdom of Sweden and the Arab Republic of Egypt Concerning the Compensation of Swedish Interests*, signed on 10 November 1971, entered into force on 7 August 1972, in: 969 *U.N.T.S.* p. 317; Burns H. WESTON et al., *Id*, at p. 185. Here again, the mention in the Agreement of acts committed by the "Arab Republic of Egypt" should not disguise the fact that some of the items covered by the Agreement were actually concerning measures of nationalisation which took place before the dissolution of State (see Article 2 of the Agreement).

Government".[236] Other different types of agreements [237] were also entered into by the United Arab Republic with Switzerland (1964),[238] Lebanon (1964),[239] Denmark (1965),[240] Greece (1966)[241] and the Netherlands (1971).[242]

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236 *Agreement between the Government of the United States of America and the Government of the Arab Republic of Egypt Concerning Claims of United States Nationals*, entered into force on 27 October 1976, in: 4 *U.S.T.*, 1976, p. 4214; *T.I.A.S.*, no. 8446; Burns H. WESTON et al., *Id*, at p. 235. The scope of the Agreement is as follows: "Property, rights and interests in Egypt affected by Egyptian measures of land reform, sequestration, nationalisation, expropriation, confiscation, and other restrictive measures against such property rights and interests, as well as financial and fiscal matters decreed *by the Arab Republic of Egypt*, which occurred *since January 1, 1952*, and before the entry into force of this Agreement" (emphasis added). The Agreement therefore covers nationalisation acts committed by the United Arab Republic from 1958 to 1961. Pursuant to Article 4 of the Agreement, the U.S. Foreign Claims Settlement Commission of the United States adjudicated the claims against the Government of Egypt. The legislation (United States Public Law 455, 81st Cong.) codified as 22 U.S.C. no. 1623(a) led to the enactment of "Subchapter I: Claims Against Egypt" to the "International Claims Settlement Act" of 1949. The Commission issued decisions on a total of 85 claims, out of which 83 were found to be compensable. The proceedings were completed in June 1990. The Commission made awards for the total amount of US$ 5.2 million (in: *Annual Report, 2001*, Foreign Claims Settlement Commission of the United States, Washington, U.S. Department of Justice). One example of such claim decided by the Commission is *Claim no. E8* (in: *Digest of United States Practice in the International Law 1977*, Washington, G.P.O., at p. 693).

237 Those agreements all gives the possibility for nationals to recover compensation for 65% of what they would be entitled to under the laws of the United Arab Republic. These agreements also acknowledge that all claims are not finally settled and provide for the establishment of mixed commissions.

238 *Accord entre la Suisse et la République Arabe Unie concernant l'indemnisation des intérêts suisses*, signed on 20 June 1964, entered into force on 16 June 1965, in: *Recueil officiel des lois fédérales*, 1965, p. 502*; R.G.D.I.P.*, 1964, p. 731. The text of the Agreement is extensively quoted in a Message of the Swiss government (*Conseil fédéral*) of 9 October 1964 (in: *F.F.* 1964 II, pp. 941 et seq.), in: Paul GUGGENHEIM, "La pratique suisse, 1964", *A.S.D.I.*, 1965, at p. 175. The Agreement (at Article II) covers acts of nationalisation committed before September 1961.

239 Agreement of 18 November 1964, in: H. ABOU-FADEL, J. MALHA & I. KRAIDY, *Lebanon, its Treaties and Agreements*, vol. 3, at p. 89. The Agreement is mentioned (and briefly described) in: Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, at p. 371.

240 Agreement of 12 June 1965, in: *Lovtidende* C, 1966, p. 208; The Agreement is mentioned (and briefly described) in: Burns H. WESTON et al., *Ibid.*, at p. 372.

241 Agreement of 26 September 1966, in: *Greek Government Gazette*, 1967, p. 474. The Agreement is mentioned (and briefly described) in: Burns H. WESTON et al., *Id.*

242 Agreement of 25 February 1971, in: *Trb.* 1971, p. 96. The Agreement is mentioned (and briefly described) in: Burns H. WESTON et al., *Id.* This Agreement is slightly different from the others to the extent that it provides for the possibility for Dutch nationals to recover compensation at 50% (and not 65%) of an award under the laws of the United Arab Republic.

c) *The* Gabčíkovo-Nagymaros Project *Case (1997) in the Context of the Dissolution of Czechoslovakia (1992)*

A recent example of dissolution of State is the break-up of Czechoslovakia on 1 January 1993.[243] Two new States emerged as successor States to Czechoslovakia: the Czech Republic and the Republic of Slovakia.[244] There is almost no controversy on the question whether the break-up of Czechoslovakia is a case of a dissolution of a State.[245] As one of the two successor States, the Czech Republic stated its willingness to take over "rights and obligations" deriving from the predecessor State (Czechoslovakia) to the extent that they were committed in the territory of the former Czech Federal Republic.[246] It has been argued in doctrine that the language used is not wide enough to cover obligations arising from internationally wrongful acts committed by the predecessor State.[247]

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243 On 25 November 1992, the Czechoslovak Federal Assembly voted the Constitutional Act no. 542/1992 (which came into force on 8 December 1992) indicating that the Federation would cease to exist on 31 December 1992.

244 On the question of State succession, the legislative bodies of the two constituent Republics enacted the relevant acts prior to the dissolution. On 17 July 1992, the Slovak National Council adopted the *Declaration on the Sovereignty of the Slovak Republic*, which was shortly followed by the proclamation of the Constitution of the Slovak Republic on 3 September 1992 (which came into force on 1 October 1992). Both Republic's National Council adopted proclamations aiming at giving the international community assurances as to the stability of treaty relations after the dissolution of Czechoslovakia: *Proclamation of the National Council of the Slovak Republic to Parliaments and Peoples of the World* (dated 3 December 1992); *Proclamation of the National Council of the Czech Republic to all Parliaments and Nations of the World* (dated 17 December 1992). See also: Letter of the Permanent Representative of Czechoslovakia to the United Nations to the U.N. Secretary-General, 31 December 1992, U.N. Doc. A/47/848, 31 December 1992.

245 On the contrary, Jiri MALENOVSKY, "Problèmes juridiques liés à la partition de la Tchécoslovaquie", 39 *A.F.D.I.*, 1993, p. 317, believes that Slovakia seceded from Czechoslovakia.

246 Article 5 of the *Constitutional Law No. 4/1993* proclaimed by the Czech Republic's National Council: "The Czech Republic takes over rights and obligations…deriving from [Czechoslovakia] on the date of its extinction from international law, except those…relating to the territory which was under [Czechoslovakia's] sovereignty but is not under the sovereignty of the Czech Republic".

247 This is the position of Vaclav MIKULKA, "The Dissolution of Czechoslovakia and Succession in Respect to Treaties" in: Mojmir MRAK (ed.), *Succession of States*, The Hague, Martinus Nijhoff Publ., 1999, p. 110, for whom "this formulation covers the rights and obligations deriving from both customary international law and international treaties". Similarly, for Jiri MALENOVSKY, "Problèmes juridiques liés à la partition de la Tchécoslovaquie", 39 *A.F.D.I.*, 1993, at pp. 334–335, the principle remains that the new States are not bound by Czechoslovakia's internationally wrongful acts. The only exception is in the context of the *European Convention for the Protection of Human Rights and Fundamental Freedom* (in: 213 *U.N.T.S.*, p. 222), where the new States made

Reference to the issue of State succession to international responsibility in the context of the dissolution of Czechoslovakia can be found in the *Gabčíkovo-Nagymaros Project* case.[248] This case concerned a 1977 Treaty between Czechoslovakia and Hungary envisaging a joint investment for the construction and joint operation of a large, integrated and indivisible complex of structures and installations for a barrage system on specific parts of the territories of the two parties along the Danube.

The question involving issues of State succession that the I.C.J. had to decide was whether Slovakia had become a Party to the 1977 Treaty between Czechoslovakia and Hungary as a successor State to one of the original Parties to the Treaty.[249] Hungary contended that the 1977 Treaty, being simply a joint investment, had ceased to be in force as of 31 December 1992 as a result of the disappearance of one of the Parties as a subject of international law.[250] According to Slovakia, the 1977 Treaty remained in force between itself, as successor State, and Hungary since it could not have been terminated through the disappearance of one of the original Parties.[251]

The Court did not tackle the many interesting arguments put forward by both Parties on several issues of State succession.[252] Instead, it focused its analysis on the particular nature and character of the 1977 Treaty, which was found to be of a

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declarations to that effect. This is discussed in the Czech Republic's National Report on "State Succession in Respect of Treaties" submitted to the Council of Europe (and published in: Jan KLAPPERS (ed.), *State Practice Regarding State Succession and Issues of Recognition*, The Hague, Kluwer Law International, 1999, p. 402).

248 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at paras. 116–124.

249 *Ibid.*, para. 117.

250 According to Hungary (in: *Ibid.*, para. 118), "there is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a Party". Hungary contended that it never accepted Slovakia as successor to the 1977 Treaty. Furthermore, Hungary argued that it was not a Party to the *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488, and that the so-called rule of automatic succession to treaties contained at Article 34 of the Convention was not a statement of general international law.

251 Slovakia argued that the "general rule of continuity" would apply in cases of dissolution of State as provided by Article 34 of the *1978 Vienna Convention on Succession of States in Respect of Treaties, Id.* Slovakia was of the opinion that the principle of automatic succession to treaties was a statement of customary international law and that State practice in cases of dissolution of State tends to support continuity.

252 These issues are discussed in doctrine by: Jan KLABBERS, "Cat on a Hot Tin Roof: The World Court, State Succession, and the Gabčíkovo-Nagymaros Case", 11 *Leiden J.I.L.*, 1998, pp. 345–355.

"territorial character".[253] It finally concluded that the 1977 Treaty became binding upon Slovakia (as successor State) on 1 January 1993.[254]

The Court determined that before the date of succession, Czechoslovakia (the predecessor State) had committed an internationally wrongful act[255] and that it was under the obligation to pay compensation to Hungary (the injured State).[256] The Court *did not address* the question of transfer of obligations arising from such acts to Slovakia (the successor State). The Court simply made reference to the second paragraph of the Preamble to the Special Agreement (*Compromis*) of 2 July 1993 entered into between Slovakia and Hungary, which indicates that:

> *Bearing in mind* that the Slovak Republic is one of the two successor states of the Czech and Slovak Federal Republic and the sole successor state in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project.

The Court interpreted the Preamble to the Special Agreement to mean that Slovakia was the successor to Czechoslovakia's international responsibility:

> According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.[257]

What is clear is that the Court's conclusion as to the responsibility of Slovakia for internationally wrongful acts committed by Czechoslovakia was admitted solely on the ground that the Parties to the Special Agreement had already agreed that Slovakia was "the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project".[258] The Court did not make any determination on the question of the transfer of the obligation to repair from one State to another. This conclusion is all the more obvious when considering that both Parties in their Memorials, as well as during the oral proceedings, explicitly rejected the existence of any such *general* principle of succession to international responsibility.

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253 Thus, according to the Court, the Treaty had established the navigational regime for the Danube and created a situation where the interests of other users of the Danube were affected. Therefore, the Treaty being of a "territorial character", the rights and obligations which were "attached" to part of the Danube were unaffected by the succession of States. The Court therefore followed Slovakia's argumentation on this point.

254 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 123.

255 *Ibid.*, at paras. 82, 87, 88.

256 *Ibid.*, at para. 152. The Court also concluded that before the date of succession Hungary had committed an internationally wrongful act and that it was under the obligation to pay compensation to Czechoslovakia (see at paras. 108–110).

257 *Ibid.*, at para. 151.

258 *Id.*

The argument advanced by Hungary was that "the Special Agreement draws a distinction between the 1977 Treaty as such…and the Gabčíkovo-Nagymaros Project" for the reason that Slovakia was never part of the 1977 Treaty and that "breaches of that Treaty committed by the Czech and Slovak Federal Republic were not attributable to [Slovakia]".[259] For Hungary, Slovakia's responsibility must be based on the rule of attribution under State responsibility: "Slovakia's responsibility towards Hungary *depends on the attribution of Czechoslovakia's wrongful conduct* in the implementation of the Original Project and of Variant C *to Slovakia*."[260] Hungary's contention was that Slovakia (as successor State) remained bound by "the obligation to repair the damage caused by the wrongful acts" in violation of the 1977 Treaty as well as in breach of other international obligations contained in other treaties and in customary international law.[261] In other words, the "secondary obligations" resulting from the violation of the 1977 Treaty committed by Czechoslovakia would simply not vanish with the break-up of Czechoslovakia (and the termination of the 1977 Treaty).

A closer look at the analysis put forward by Hungary, however, shows that it did not base its conclusion on the responsibility of Slovakia on a *general* principle of succession to international responsibility. In its Memorial, Hungary refers to the "well-established principle that there is in general no succession to international responsibility".[262] However, to this negative principle would remain an "exception": "…the key exception is where a successor State, by its *own* conduct, has acted in such a way as to assume the breaches of the law committed by its predecessor."[263] The principle and the exception were described as follows at the oral proceedings by Professor Pierre-Marie Dupuy, Counsel for Hungary:

> La Slovaquie prétend constamment qu'à l'égard du traité de 1977, elle a succédé à la Tchécoslovaquie et qu'elle est donc à son tour partie à ce traité. Si l'on suivait le raisonnement slovaque, il y aurait bien entendu là un fondement suffisant pour établir sa responsabilité, si toutefois on évitait d'appliquer le *principe général selon lequel il n'y a pas succession à la responsabilité*.
>
> *A ce dernier principe, il est toutefois une exception*. Celle qui se trouve réalisée lorsqu'un Etat revendique et poursuit les faits illicites de son prédécesseur. Or, c'est

259 *Memorial of the Republic of Hungary*, vol. I, 2 May 1994, at para. 6.06. See also at para. 8.02, 10.108, 10.109.

260 *Ibid.*, at para. 8.01 (emphasis added).

261 *Ibid.*, at para. 8.03: "The first legal consequence is that Slovakia cannot be deemed responsible for breaches of treaty obligations attributable only to Czechoslovakia, which no longer exists. Nevertheless, Czechoslovakia's breaches of the 1977 Treaty, other bilateral treaties, various multilateral conventions and customary international law created a series of secondary obligations; namely, the obligation to repair the damage caused by the wrongful acts. These secondary obligations were neither extinguished by the termination of the 1977 Treaty nor by the disappearance of Czechoslovakia".

262 *Reply of the Republic of Hungary*, vol. I, 20 June 1995, at para. 3.163.

263 *Id.* (emphasis in the original text).

> bien sur ce second fondement que la Slovaquie est responsable des manquements au droit accomplis par la Tchécoslovaquie.[264] (emphases added)

The reasoning of Hungary thus indicates that it was of the view that there should be a transfer of the obligation to repair to the new State *only* because *the new State had endorsed and continued the internationally wrongful act* (i.e. the derivation of the Variant C project) originally committed by the predecessor State before the date of succession.[265] Thus, by endorsing and continuing the internationally wrongful act initially committed by Czechoslovakia, Slovakia was not only responsible for the damage resulting from its *own illicit act* committed after its creation in January 1993, but also for the internationally wrongful act committed by *the predecessor State* before January 1993.[266]

The argument put forward by Hungary indicates that although it does not support any *general* principle of succession to international responsibility, it has in fact endorsed the soundness of such solution in *one circumstance*. Thus, Hungary's position is that the successor State (Slovakia) should be held responsible for wrongful acts committed *before* its creation as an independent State. The issue of succession to continuous internationally wrongful acts will be further discussed below.[267]

Slovakia mostly focused its attention on rules of State succession to treaties. It nevertheless briefly dealt with the question whether there exists any rule of State

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264 Oral Pleadings, 7 March 1997, see at para. 6 of Pierre-Marie Dupuy's transcript of his pleadings.

265 *Memorial of the Republic of Hungary*, vol. I, 2 May 1994, at para. 8.04: "Slovakia continues to be responsible for these secondary obligations because Variant C continued to exist and to be operated after 1 January 1993. Indeed it was further developed under the control and responsibility of Slovakia and within its exclusive territorial jurisdiction. From the first day of its existence as a sovereign State, Slovakia uninterruptedly continued the operation of Variant C, as earlier implemented by Czechoslovakia. From 1 January 1993, Slovakia's actions have effectively endorsed its international responsibility for Variant C". A similar explanation is given at *Ibid.*, at para. 8.05: "The second preambular paragraph of the Special Agreement therefore simply reflects a known fact. It is an explicit way of delineating a legal relationship that was already in existence. In short, this preambular paragraph is nothing but a declaratory statement, showing that, from its beginning, Slovakia assumed the obligations, as operator of variant C, to repair damage caused by present and prior breaches of international law. Further, Slovakia immediately accepted this heritage, first by its action, then by its statement in preambular paragraph 2 of the Special Agreement".

266 *Memorial of the Republic of Hungary*, vol. I, 2 May 1994, at para. 8.06: "Slovakia is therefore responsible for damage and loss caused by Czechoslovakia in relation to the implementation of Variant C until the disappearance of Czechoslovakia on 31 December 1992. This responsibility extends to damage caused by any part of the material of the Original Project that was wrongfully converted or taken over for use in Variant C. From 1 January 1993 onwards, Slovakia is of course responsible, as a successor, for damage created by its own conduct". This aspect is also dealt with in: *Reply of the Republic of Hungary*, vol. I, 20 June 1995, at para. 3.164, and in: Oral Pleadings, 7 March 1997, see at paras. 6 to 8 of Pierre-Marie Dupuy's transcript of his pleadings.

267 See at *infra*, p. 218.

succession to obligations arising from the commission of internationally wrongful acts. Slovakia thus refered to the "widely accepted thesis of non-succession to delictual responsibility",[268] quoting here the work of Monnier to "recall" "the practically unanimous view of the doctrine" on this question.[269] Slovakia did not further explore the argument submitted by Hungary on this point,[270] nor did it discuss Hungary's argument on its responsibility for continuous internationally wrongful acts.[271]

In conclusion, the Court's brief mention of the issue cannot be analysed as a clear endorsement of the principle of State succession to international responsibility. At the most, it can be argued that the Court, unlike other international tribunals in the past, did not reject the validity of the possibility of the transfer of the obligation to repair from the predecessor State to the successor States.[272] In essence, however, the Court simply confirms what was already recognised by international case law and accepted by doctrine, namely that nothing prevents the successor State from freely deciding to take over the consequences of internationally wrongful acts committed by the predecessor State.[273] The (limited) reasoning of the Court does not provide any guidance as to the solution to be adopted in the absence of such consent by the successor State. In that sense, the *Gabčíkovo-Nagymaros Project* case is of limited value in the analysis of the question at the centre of this study.

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268 *Counter-Memorial of the Slovak Republic*, vol. I, 5 December 1994, at para. 3.59.

269 *Ibid.*, at para. 3.60. Logically, Slovakia admited (*Ibid.*, at para. 3.60, again quoting the work of Monnier) that as a new State it does not take up the *rights* belonging to the predecessor State as a result of any internationally wrongful acts committed before the date of succession. Thus, Slovakia's right to obtain compensation from Hungary in the context of the Gabčíkovo-Nagymaros Project "is not based on succession to Czechoslovakia *per se*, it is based on the [1977] Treaty" (*Ibid.*, at para. 3.61). This question is further examined at *infra*, p. 319.

270 *Ibid.*, at para. 3.69. Slovakia concluded that there was "no need to rebut the Hungarian thesis for *ipso iure* succession to the secondary obligations deriving from an internationally wrongful act" because Slovakia had committed "no breach of the 1977 Treaty or other international obligations [of] Czechoslovakia".

271 The argument is simply mentioned in: *Ibid.*, at para. 3.59.

272 This point is discussed by the following authors: Brigitte STERN, Responsabilité, pp. 346–347; Sir Arthur WATTS, "State Succession: Some Recent Practical Legal Problems" in: Volkmar GöTZ, Peter SELMER & Rüdiger WOLFRUM (ed.), *Liber amicorum Günther Jaenicke*, Berlin, Springer, 1999, p. 405; Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, at p. 61.

273 Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 54. This point is further discussed in detail at *infra*, p. 215.

d) *Socialist Federal Republic of Yugoslavia (1991–1992)*

i) *This is a Case of a Dissolution of State*

Issues of State succession arising from the collapse of the Socialist Federal Republic of Yugoslavia (S.F.R.Y.) are both complex in their formulation and tragic in their consequences.[274] The process of dissolution took place over a period of several months as each Republic proclaimed its independence one after the other.[275] In its *Opinion no. 1* (29 November 1991), the Arbitration Commission (the Badinter Commission) declared that the S.F.R.Y. was in a "process of dissolution",[276] and by

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274 The relevant documents on the break-up of Yugoslavia referred to hereinafter were mostly found in: Snezana TRIFUNOVKA, *Yugoslavia Through Documents—From its Creation to its Dissolution*, Dordrecht, Martinus Nijhoff Publ., 1994; Snezana TRIFUNOVKA, *Former Yugoslavia Throught Documents—From Its Dissolution to the Peace Settlement*, Dordrecht, Martinus Nijhoff Publ., 1999; Brigitte STERN (ed.), *Le statut des Etats issus de l'ex-Yougoslavie à l'O.N.U.: Documents*, Paris, Montchrestien, 1996; B.G. RAMCHARAN (ed.), *The International Conference on the Former Yugoslavia: Official Papers*, 2 vols., The Hague, Kluwer Law International, 1997.

275 The Republics of Croatia and Slovenia declared their independence on 25 June 1991 (but its implementation was postponed until 8 October 1991). The declarations of independence of both Republics were first recognised by Germany on 23 December 1991 and soon after by the member States of the European Union. Both Republics were admitted to the United Nations on 22 May 1992 (U.N. General Assembly Res. no. 46/236 and 46/238). The Republic of Macedonia declared its independence on 17 September 1991. It was recognised by the member States of the European Union on 16 December 1993. It was admitted to the United Nations on 8 March 1993 under the name "Former Yugoslav Republic of Macedonia" (F.Y.R.O.M.) (U.N. Security Council Res. 817 (1993), 7 April 1993). The Republic of Bosnia-Herzegovina declared its independence on 15 October 1991. It was recognised by the members of the European Union on 6 April 1992. It was admitted to the United Nations on 22 May 1992 (U.N. General Assembly Res. 46/237). On this question, see: Rahim KHERAD, "La reconnaissance des États issus de la dissolution de la R.S.F.Y. par les membres de l'Union Européenne", 101 *R.G.D.I.P.*, 1997, pp. 663–693; Michael C. WOOD, "Participation of the Former Yugoslav States in the United Nations and in Multilateral Treaties", 1 *Max Planck Yrbk. U.N.L.*, 1997, pp. 231–258.

276 *Opinion no. 1*, 29 November 1991, in: 92 *I.L.R.*, 1993, p. 166. The European Community Peace Conference on Yugoslavia, which was convened on 27 August 1991, established an Arbitration Commission for the settlement of disputes (Joint Statement, 28 August 1991, in: *E.C. Bull.* No. 7/8, p. 115 (1991)). The Commission was made up of five presidents of five European Union's constitutional courts; it was chaired by Judge Badinter. The Commission delivered 15 (non-binding) "opinions". For an assessment of the work of the Commission, see the series of articles by Alain PELLET, "Note sur la Commission d'arbitrage de la Conférence Européenne pour la paix en Yougoslavie", 37 *A.F.D.I*, 1991, pp. 329–348; "L'actualité de la Commission d'arbitrage de la Conférence Européenne pour la paix en Yougoslavie", 38 *A.F.D.I*, 1992, pp. 220–238; "L'actualité de la Commission d'arbitrage de la Conférence internationale pour l'ancienne Yougoslavie", 39 *A.F.D.I*, 1993, pp. 286–303. See also: Matthew C.R. CRAVEN, "The European Community Arbitration Commission in Yugoslavia", 66 *British Y.I.L.*, 1995, pp. 333–413.

4 July 1992, in its *Opinion no. 8*, that this process was now completed and that the S.F.R.Y. no longer existed.[277] It should be noted that by that time (on 27 April 1992), the former Republics of Montenegro and Serbia had established the Federal Republic of Yugoslavia (F.R.Y.) with a new constitution proclaiming it to be the "continuator" of the former S.F.R.Y.[278] Other former Republics strongly opposed such pretension by the F.R.Y.[279] The same position was also adopted by the majority of States.[280] The U.N. Security Council and the U.N. General Assembly,[281] as well as the Badinter Commission,[282] refused to recognise the F.R.Y. as the "continuator" of the former S.F.R.Y.[283] The F.R.Y., however, adopted a different position after the political changes which occurred in 2000 and no longer pretends to be the

277 *Opinion no. 8*, 4 July 1992, in: 92 *I.L.R.*, 1993, p. 202. See also *Opinion no. 9*, 4 July 1992, in: 92 *I.L.R.*, 1993, p. 203, and *Opinion no. 10*, 4 July 1992, in: 92 *I.L.R.*, 1993, p. 206.

278 *Declaration on the Formation of the Federal Republic of Yugoslavia*, joint session of Yugoslavia Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, 27 April 1992, annexed to Letter of 27 April 1992 from the Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council (1992) U.N. Doc. S/23877 (1992). See also: Letter of the interim Chargé d'Affaires at the Permanent Mission of Yugoslavia at the United Nations to the U.N. Secretary-General, 6 May 1992, U.N. Doc. A/46/915, 7 May 1992.

279 Letter of the Minister of Foreign Affairs of the Republic of Slovenia to the U.N. Secretary-General, 27 May 1992, U.N. Doc. A/47/234, S/24028, 28 May 1992; Letter of the Permanent Representatives of Bosnia-Herzegovina and Croatia to the United Nations to the U.N. Secretary-General, 25 September 1992, U.N. Doc. A/47/474, 27 September 1992; Letter of the Interim Chargé d'Affaires at the Permanent Mission of Croatia to the United Nations to the U.N. Secretary-General, 2 August 1995, U.N. Doc. A/50/333, 7 August 1995. However, it should be noted that subsequently the former Republics all formally recognised each other as independent States and recognised the F.R.Y.'s claim to continuity. See, for instance: *Agreement on Normalisation between the Federal Republic of Yugoslavia and Republic of Croatia*, Article 5, 23 August 1996, U.N. Doc. A/51/318-S/1996/706, in: 35 *I.L.M.*, 1996, p. 1219. Some commentators have rightly noted, however, the ambiguity of the language contained in these recent declarations: Sir Arthur WATTS, "State Succession: Some Recent Practical Legal Problems", in: V. GÖTZ, P. SELMER & R. WOLFRUM (eds.), *Liber amicorum Günther Jaenicke-Zum 85. Geburstag*, Berlin, Springer, 1999, p. 412; Vladimir D. DEGAN, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *R.C.A.D.I.*, t. 279, 1999, pp. 324–326.

280 This is, for instance, the case of the European Union: *Déclaration du Conseil Européen concernant l'ancienne Yougoslavie*, 28 May 1992, UN. Doc. A/47/234, S/24028, in: *Bull. C.E.* 6.1992.

281 U.N. Security Council Res. 777 (1992), 19 September 1992, which was followed by U.N. General Assembly Res. 47/1 (1992), 22 September 1992.

282 *Opinion no. 10*, 4 July 1992, in: 92 *I.L.R.*, 1993, p. 206.

283 For an analysis of the different arguments used by all sides on the question of the F.R.Y.'s claim of continuity over the former S.F.R.Y., see: Juan Miguel ORTEGA TEROL, "The Bursting of Yugoslavia: An Approach to Practice Regarding State Succession", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested*

"continuator" of the former S.F.R.Y.[284] The break-up of the former S.F.R.Y. should therefore be analysed as a case of dissolution.[285]

ii) *The 2001* Agreement on Succession Issues *among the Successor States*

After the dissolution of the former S.F.R.Y., the Badinter Arbitral Commission,[286] the U.N. Security Council[287] and the "United Nations/European Communities International Conference on the Former Yugoslavia"[288] all came to the conclusion that the

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Against the Facts, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 892–900.

284 The F.R.Y. was officially admitted (as a new State) to the United Nations on 1 November 2000: U.N. General Assembly Res. 55/12. See also the position adopted by the F.R.Y in this recent case before the I.C.J.: *Application for Revision of the Judgement of 11 July 1996 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections* (Yugoslavia v. Bosnia-Herzegovina), Judgment of 3 February 2003, *I.C.J. Reports 2003*, p. 6. In this case, the Court observed (at para. 70) that the F.R.Y.'s claim of continuity of the international legal personality of the former Yugoslavia was not "generally accepted". In the *Agreement on Succession Issues* of 29 June 2001 (in: 41 *I.L.M.*, 2002, p. 3, which is examined in the next section), entered into among all former Republics, the preamble refers to all new States (including the F.R.Y.) as "being in sovereign equality the five successor States to the former Yugoslavia". In 2002, Serbia and Montenegro decided to create the State Union of Serbia and Montenegro (see: *Agreement on the Union of Serbia and Montenegro*, dated 14 March 2002). In May 2006, the Montenegrins voted in a referendum in favour of independence and on 3 June 2006, the Parliament of Montenegro made a Declaration of Independence. On 5 June 2006, the National Assembly of Serbia declared Serbia as the successor State to the Union. On 28 June 2006, the Republic of Montenegro was admitted to the United Nations (U.N. General Assembly Res. 60/264).

285 This is also the position of the majority of writers on the question. However, some writers had taken a different stand on the question (it is important to note that these views were expressed *before* the F.R.Y. shifted its position in 2000): Marcelo G. KOHEN, "Le problème des frontières en cas de dissolution et de séparation d'États: quelles alternatives ?", in: Olivier CORTEN, Barbara DELCOURT, Pierre KLEIN & Nicolas LEVRAT, *Démembrement d'États et délimitations territoriales: L'uti possidetis en question(s)*, Brussels, Bruylant, 1999, pp. 370–371; W. CZAPLINSKI, "La continuité, l'identité et la succession d'États—évaluation de cas récents", 26 *R.B.D.I.*, 1993, pp. 391–392. For a critical analysis of the different doctrinal positions on this question, see: Konrad G. BÜHLER, "State Succession, Identity/Continuity and Membership in the United Nations", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 307–314. *Agreement on the (…).*

286 *Opinion no. 9*, 4 July 1992, in: 92 *I.L.R.*, 1993, p. 203.

287 U.N. Security Council Res. 1022 (1995), 22 November 1995.

288 See its *Statement on Principles* of 26 August 1992, whereby as a requirement for a final settlement of all questions of succession to the former S.F.R.Y., the International Conference stressed that all parties should "share the duties and responsibilities of successor states" (Principles ix), in: 31 *I.L.M.*, 1992, p. 1527.

successor States to the former S.F.R.Y. had to resolve by agreement all questions relating to succession of States. The F.R.Y. has also concluded several bilateral agreements with the former Republics whereby this principle is recognised.[289] After some 10 years of negotiations, a final settlement was eventually reached among the successor States.[290]

On 29 June 2001 was entered into among all the successor States (including the Federal Republic of Yugoslavia) an *Agreement on Succession Issues*.[291] The preamble indicates that the Agreement was reached after discussions and negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". Article 7 indicates that this Agreement "finally settles the mutual rights and obligations of the successor States in respect of succession issues covered by this Agreement".

Article 2 of Annex F of the Agreement (entitled "Other rights, interests and liabilities")[292] specifically deals with the issue of internationally wrongful acts

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289 *Agreement on Normalisation between the Federal Republic of Yugoslavia and Republic of Croatia*, 23 August 1996, U.N. Doc. A/51/318-S/1996/706 35 *I.L.M.*, 1996, p. 1219; *Agreement on the Regulation of Relations and Promotion of Cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia*, 8 April 1996, U.N. Doc. S/1996/291 in: 35 *I.L.M.*, 1996, p. 1246; Joint Statement of President Milosevic and President Izetbegovic, Paris, 3 October 1996, U.N. Doc. A/51/461-S/1996/830.

290 In 1991 was set up the "European Community Conference on Yugoslavia" (in: 31 *I.L.M.*, 1992, pp. 1421 et seq.) which was shortly after replaced by the United Nations/European Communities "International Conference on Former Yugoslavia" (which met in London in August 1992, see in: 31 *I.L.M.*, 1992, pp. 1527 et seq.). This Conference established various Working Groups, including a "Succession Issues Working Group" which produced on 23 August 1994 a *Draft Treaty Concerning Succession to the Former S.F.R.Y.* After the signing of the *Dayton Peace Agreement* (in: 35 *I.L.M.*, 1996, p. 75), the High Representative of the international community in Bosnia and Herzegovina (Mr Carl Bildt) ended the work of the Conference and replaced it with a "Peace Implementation Council". The working group on State succession issues nevertheless continued its work. In March 1996, the High Representative appointed a "Special Negotiator for Succession Issues" (Sir Arthur Watts). After very limited progress in the first few years and an interruption during the Kosovo War (1999), the negotiations finally resumed with the change of regime in Belgrade (2000) and the abandonment by the Federal Republic of Yugoslavia of its position as the legal "continuator" of the S.F.R.Y. (this point was discussed at *supra*, note 284).

291 The Agreement can be found in: 41 *I.L.M.*, 2002, pp. 1–39. The Agreement was ratified by Croatia on 3 May 2004. It was the fifth (and last) instrument deposited to the U.N. Secretary General acting as depositary of the Treaty. In accordance with Article 12(1) of the Agreement, it entered into force on 12 June 2004. For an analysis of this Agreement in doctrine, see: Castren STAHN, "The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia", 96(2) *A.J.I.L.*, 2002, pp. 379–397; Jenny STAVRIDI & Alexandros KOLLIOPOULOS, "L'Accord du 29 juin 2001 portant sur des questions de succession entre les Etats issus de la dissolution de l'ex-Yougoslavie", *A.F.D.I.*, 2002, pp. 163–184; Ryszard PIOTROWICZ, "Status of Yugoslavia: Agreement at Last", 77 *A.L.J.*, 2001, pp. 95–99.

292 According to Article 6 of the Agreement, annexes are an integral part of the Agreement.

committed by the S.F.R.Y. against third States before the date of succession. It reads as follows:

> All *claims against the SFRY* which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement. The successor States shall inform one another of all such claims against the SFRY."[293] (emphasis added)

The fact that "[a]ll claims against the SFRY" will be "considered" by the Standing Joint Committee indicates clearly that the obligations of the predecessor State toward third States do not simply disappear as a result of the dissolution of the S.F.R.Y. This is an example of the application of the principle of the transfer of the obligation to repair from the predecessor State to the successor States. This position is admittedly controversial.[294]

One interesting feature of the Agreement is the fact that it establishes a mechanism for settlement of disputes whereby the Standing Joint Committee, consisting of senior representatives of each successor State,[295] will not only do the "monitoring of the effective implementation of the Agreement"[296] but also settle any "differences"

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293 Annex F of the Agreement also contains a provision (Article 1) in favour of the transfer of the *right to reparation* from the predecessor State to the successor States. This point is discussed at *infra*, p. 322.

294 Thus, conflicting doctrinal opinions on the interpretation to be given to this provision have been advanced in private letters exchanged between the present author and legal scholars involved in the drafting of the Agreement. Compare, for instance, the position adopted by Sir Arthur Watts, who was the "Special Negotiator for Succession Issues" and under whose supervision the Agreement was signed, with that of Professor Vladimir-Djuro Degan, a representative of Croatia during the negotiations which led to the Agreement. In a letter dated 13 November 2002 sent to the present author by Sir Arthur Watts (on file with the author), he indicates that "it was understood by all concerned (at least, if it wasn't, it should have been!) that Articles 1 and 2 of Annex F included within their scope such items of international responsibility as might exists, whether involving outstanding claims by the SFRY against other States (Article 1) or outstanding claims by other States against the SFRY (Article 2)". A completely different view is adopted by Professor Vladimir-Djuro Degan, in a letter dated 21 October 2002 sent to the present author (on file with the author). He believes that Annex F to the Agreement does not deal with any issue of succession of States to international responsibility: "During the negotiations on succession issues since 1992 nobody raised question of any possible claim by a third State as a consequence of [the SFRY's] internationally wrongful acts. And vice versa, no party raised any possible claim on the same legal ground on behalf of the former SFRY against any third State. Because in ten years that elapsed since its demise there were no actual allegations on this basis, it is reasonable to assume that no such serious legally grounded claims exist at all". Therefore, according to Degan, the Agreement does not deal with such issues "simply because there were no such claims against the predecessor State (SFRY), or on its behalf". The present author was given permission from both scholars to make reference to the content of these letters in the context of the present study.

295 Article 4(1).

296 Article 4(2). The other task of the Committee is to serve "as a forum in which issues arising in the course of [the implementation of the Agreement] may be discussed" (Article 4(2)).

among the successor States arising over the "interpretation and application" of the Agreement.[297] The role of the Standing Joint Committee in dealing with claims against the S.F.R.Y. is explained as follows by Sir Arthur Watts in a letter sent to the present author:

> In respect of any given claim against the SFRY the Committee might decide that it was now a matter solely for one or other of the successor States, or that it was a matter for two or more of them jointly, or that it [has] nothing to do with any of them—i.e. in the last case their position would be that the claim died with the SFRY.[298]

The powers of the Committee are, however, limited in so far as it may only make "appropriate recommendations to the Governments of the successor States".[299] The Committee does not act as a court or an arbitral tribunal. This apparent lack of power of the Committee should nevertheless be read in conjunction with Article 9, which indicates that this Agreement "shall be implemented by the successor States in good faith in conformity with the Charter of the United Nations and in accordance with international law". Article 8 is also relevant, as it imposes an obligation on the successor States to implement the Agreement in their national legal orders.[300]

iii) *The* Tokic v. Government of Yugoslavia *Case*

The case arose out of an incident which took place in 1988 outside the premises of the Yugoslav Consulate in Sidney, Australia, during which an Australian national (Mr Tokic) was shot and wounded by an unidentified person firing from within the Consulate's premises.[301] On 28 August 1990, Mr Tokic submitted a claim for damage against the Government of Yugoslavia before the Supreme Court of New South Wales. On 12 December 1991, Mr Justice McInerney of the Supreme Court of New South Wales found that the person who had fired the shot was an

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297 Under Article 5, differences should be first settled through "discussions" amongst the States. If such discussions fail, the matter may be referred to either "an independent person of their choice" or to the Standing Joint Committee for resolution. However, any other agreement among the successor States providing for another mechanism for the settlement of disputes may prevail over the one indicated at Article 5 (Article 5(5)).

298 Letter dated 13 November 2002 by Sir Arthur Watts to the present author (on file with the author).

299 Article 4(2).

300 Article 8 reads as follows: "Each successor State, on the basis of reciprocity, shall take the necessary measures in accordance with its internal law to ensure that the provisions of this Agreement are recognised and effective in its courts, administrative tribunals and agencies, and that the other successor States and their nationals have access to those courts, tribunals and agencies to secure the implementation of this Agreement".

301 The background information on this case is found in: 12 *Australian Y.I.L.*, at pp. 455–463; 13 *Australian Y.I.L.*, at p. 258. This case is referred to in: Andreas ZIMMERMANN, *Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation*, Berlin, Springer-Verlag, 2000, at p. 68.

employee of the Consulate and that the defendant was not immune for its action. The claimant was awarded the sum of AU$ 46,854 in damages against the State of Yugoslavia.

In 1992, Australia notified the International Conference on the Former Yugoslavia of "the existence of a debt owed by the former S.F.R.Y. to an Australian national" arising out of an "unsatisfied judgement of an Australian Court of Competent Jurisdiction against the 'Government of Yugoslavia' ".[302] The letter further explains that "neither the Government of the S.F.R.Y. before its dissolution nor any of its successor States have paid the assessed damages and costs in accordance with the judgement".

This case is clearly one where the injured State (Australia, in the person of one of its nationals) requested that the new successor States take over the obligations arising from the internationally wrongful act committed by the predecessor State. The outcome of this dispute is, however, not known, and no information was found as to whether any of the successor States did provide compensation to the injured State.[303]

4. *Cession and Transfer of Territory*

The analysis of State practice and international and municipal case law in the context of cession and transfer of territory clearly shows the existence of a *general principle*. It also indicates the existence of one important *exception* to this general principle:

- The *general principle* is that the continuing State remains responsible for the commission of *its own* internationally wrongful acts before the date of succession. The obligations arising from the commission of such acts should therefore not be transferred to the successor State (Section 4.1);
- There is one *exception* to this principle. In cases where the internationally wrongful act is committed by a local administration having great autonomy from the predecessor State prior to the date of succession, the successor State should take over the obligations arising from the commission of such act (Section 4.2).

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302 Letter of Australia's Permanent Representative to the United Nations in Geneva, Mr Ronald Walker, to the Co-Chairmen of the Steering Committee for the International Conference on the Former Yugoslavia, Lord Owen and Mr Cyrus Vance, 15 September 1992, in: P. HEWITSON, "Australian Practice of International Law", 14 *Australian Y.I.L.*, at pp. 417–418.

303 The present author sent several letters to the relevant Australian authorities to enquire about the outcome of this case. All letters have remained unanswered.

4.1 *The Continuing State Remains Responsible for Internationally Wrongful Acts Committed before the Date of Succession*

The principle that clearly emerges from the analysis of many municipal law cases, one case before an international arbitral tribunal and one example of State practice is that when the predecessor State continues to exist after the cession of part of its territory to another State (the successor State), it should remain responsible for *its own* internationally wrongful acts committed before the date of succession. Thus, as a matter of principle, the continuing State should continue its previous responsibility for these acts notwithstanding the transformation affecting its territory. This principle is also supported in doctrine.[304]

This principle was thus accepted and applied by *municipal courts* of the *successor State* to which the ceded territory was now attached, for instance, in the cases of *Mordcovici v. P.T.T.*,[305] *Sechter*[306] and *Vozneac*,[307] all decided by the Court of Cassation of Romania, and in the cases of *Alsace-Lorraine Railway v. Ducreux Es-qualité*[308] and *Kern v. Chemin de fer d'Alsace-Lorraine*, decided by French courts.[309] The principle was also adopted by one municipal court of a *continuing* State (from which the ceded territory was detached): the case of *Kalmar v. Hun-*

304 Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 227; Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, Clarendon Press, 2003, p. 632; Philippe DRAKIDIS, "Succession d'Etats et enrichissements sans cause des biens publics du Dodécanèse", 24 *R.H.D.I.*, 1971, pp. 72–123. See also: T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, at p. 209. It should be noted, however, that scholars usually analyse this issue in the light of their findings with respect to similar cases of secession (where the predecessor State also does not cease to exist as a result of the changes affecting its territory). See the long list of writers (at *infra*, note 398) who made similar statements in the context of secession.

305 *Mordcovici v. P.T.T.*, Romania, Court of Cassation, 29 October, 1929, in: *Buletinul deciziunilor Inaltei Curti de Casatie*, LXVI (1929), Part 2, p.150, in: *Annual Digest*, 1929–1930, at p. 62.

306 *Sechter v. Ministry of the Interior*, Romania, Court of Cassation, 1929, in: *Jurisprudenta Românâ a Inaltei Curti de Casatie si Justitie*, vol. XVII, N°. 4 (1930), p. 58, in: *Annual Digest*, 1929–1930, case no. 37.

307 *Vozneac v. Autonomous Administration of Posts and Telegraphs*, Romania, Court of Cassation, 22 June 1931, in: *Jurisprudenta Românâ a Inaltei Curti de Casatie si Justitie*, 1932, pp. 36–38, in: *Annual Digest*, 1931–1932, case no. 30.

308 *Alsace-Lorraine Railway v. Ducreux Es-qualité*, French Court of Cassation, Civil Chamber, 30 March 1927, in: 55 *J.D.I.*, 1928, at p. 1034; *Sirey*, 1928, Part. I, p. 300; *Annual Digest*, 1927–1928, p. 85.

309 *Kern v. Chemin de fer d'Alsace-Lorraine*, Cour de Colmar (Première Ch, civile), 16 May 1927, in: *J.D.I.*, vol. 56, 1929, at pp. 446 et seq.

garian Treasury before the Supreme Court of Hungary.[310] A different solution was adopted in only one significant case (examined below under f)).

One important observation which should be made here is that all these municipal law cases *do not involve questions of succession to international responsibility*. In all these cases, the wrongful acts were committed by the predecessor State not against another State (or a national of another State) but against *its own nationals* which became nationals of the successor State after the date of succession (with one exception[311]).[312] The fact that these cases dealt with claims by nationals for past internationally wrongful acts may in fact explain the verdict reached by some municipal courts. It is therefore with a great level of prudence that any extrapolation can be made as to how municipal courts would have reacted in the different circumstances of an internationally wrongful act committed against another State (or a national of another State). In other words, the findings of the present section may not be automatically applicable to "real" cases of *international* responsibility involving internationally wrongful acts committed against non-nationals. The only existing guidance for such situation remains the *Lighthouse Arbitration* case, which was decided by an *international* arbitral tribunal.[313]

The *Lighthouse Arbitration* case is a good illustration of the principle that the continuing State should remain responsible for *its own* internationally wrongful acts committed before the date of succession.[314] This is expressed by the Arbitral Tribunal in its reasoning concerning Claim no. 12–a, whereby France sought compensation against Greece (the successor State) for acts committed directly by the authorities of the Ottoman Empire (the predecessor State). The Arbitral Tribunal ruled that no internationally wrongful act had been committed in the present case but added that had the Ottoman Empire actually committed that internationally wrongful act, Greece could not be held liable for it and that it should be for Turkey (the "continuator" of the Ottoman Empire) to compensate the injured French company for its "own" acts committed before the loss of a portion of its territory.

Finally, the principle that the continuing State should remain, in principle, responsible for *its own* internationally wrongful acts committed before the date of succession was also affirmed by a neutral French-German Mixed Arbitral Tribunal in

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310 *Kalmar v. Hungarian Treasury*, Supreme Court of Hungary, 24 March 1929, case no. P.VI.5473/1928, in: *Maganjog Tara*, X, no. 75, in: *Annual Digest*, 1929–1930, at p. 61.

311 The only exception is the case of *Kalmar v. Hungarian Treasury, Id.*, where the injured individual opted for the nationality of the continuing State at the date of succession.

312 The reasons for treating these types of cases differently have been explained at *supra*, p. 30.

313 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81.

314 *Id*. This case is also an illustration of the existence of one *exception* to that principle, see at *infra*, p. 136.

a series of awards, including the case of *Levy v. German State*.[315] It has also been applied in *State practice*, for instance, in the *Paris Peace Treaty* of 1947.[316]

a) *Romanian Court Cases in the Context of the Transfer of Bessarabia to Romania (1918)*

Three cases have been decided by Romanian courts in the context of the transfer of the territory of Bessarabia from Soviet Russia to Romania in April 1918.[317] Russia was not a party to the Treaty providing for the transfer of territory imposed by the "Allied and Associated Powers" (the British Empire, France, Italy, Japan, the United States, etc.).[318] In all three cases, it was held that the continuing State (in the present case, Russia) should remain responsible for the internationally wrongful acts it committed in the territory of Bessarabia before the transfer of territory.[319]

In the case of *Mordcovici v. P.T.T.*, the Court of Cassation of Romania stated that the transfer of Bessarabia to Romania did not result in a succession of Romania to the obligations of Soviet Russia in respect of Bessarabia since there was no convention between the two States to that effect and no declaration of Romania recognising such obligations.[320] The same Court rendered a similar decision in the

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315 *Levy v. German State*, French-German Mixed Arbitral Tribunal, Award of 10 July 1924, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, at p. 726, in: *Annual Digest*, 1923–1924, case no. 27. J.H.W. VERZIJL, p. 223, mentions that the same reasoning was applied in several other cases decided by the French-German Mixed Arbitral Tribunal.

316 *Paris Peace Treaty*, signed on 10 February 1947 at Paris, entered into force on 15 September 1947, in: 49 *U.N.T.S.*, p. 126; *U.K.T.S.* 1948, no. 50 (Cmd. 7481).

317 As an aftermath of the Russian Revolution, the territory of Bessarabia declared its independence as the "Moldavian Democratic Republic" on 24 January 1918. Soon after (in April 1918), the Bessarabian legislature voted in favour of unification with Romania. The union was confirmed by Romania's Western allies in the *Treaty between the Principal Allied Powers and Romania respecting Bessarabia*, Paris, 28 October 1920, in: *U.K.T.S.* 1922, No. 15 (Cmd. 1747).

318 Article 9 of the Treaty (*Id.*) states: "The High Contracting Parties will invite Russia to adhere to the present Treaty as soon as a Russian Government recognised by them shall be in existence". Russia and subsequently the U.S.S.R. never recognised the transfer of territory. During the Second World War (in June 1940), the U.S.S.R. annexed the territory of Bessarabia. This annexation was later recognised at Article 1 of the *Treaty of Peace Concluded between the Allied and Associated Powers and Romania*, signed on 10 February 1947, entered into force on 15 September 1947, in: *U.K.T.S.* 1948, No. 55 (Cmd. 7486); *U.N.T.S.* 42, p. 3.

319 This is also the conclusion reached by Wladyslaw CZAPLINSKI, p. 350. On the contrary, Hazem M. ATLAM, at p. 221, interprets these Romanian cases as supporting, more broadly, the principle of non-succession to obligations arising from the commission of internationally wrongful acts.

320 *Mordcovici v. P.T.T.*, Romania, Court of Cassation, 29 October 1929, in: *Buletinul deciziunilor Inaltei Curti de Casatie*, LXVI (1929), Part 2, p. 150, in: *Annual Digest*, 1929–1930, at p. 62. This case dealt with events which took place in January 1918, when parts of Bessarabia (at the time still formally a Russian territory) were occupied

case of *Sechter v. Ministry of the Interior*.[321] Similarly, in the *Vozneac* case, it was held that according to doctrine and State practice the responsibility for debts to individuals was the concern of the continuing State (Russia).[322]

b) *French Court Cases and French-German Mixed Arbitral Tribunal Cases in the Context of the Cession of Alsace-Lorraine to France (1919)*

The cession of Alsace-Lorraine by Germany to France after the First World War is also a source of some interesting decisions by municipal courts.[323] The issues dealt with by the courts were all concerned with railway-related incidents. The solution adopted by the courts was no doubt the result of the application of Article 67 of the *Versailles Treaty*, which indicated that France was taking over railways in Alsace-Lorraine but not the responsibility for any payments.[324]

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by Romanian Troops. The plaintiff had paid at the post office in Chisinau (Bessarabia) the sum of 2,784 Russian roubles to be transfered to an addressee in another part of Bessarabia. The transfer was not made and the money was lost. After Bessarabia became part of Romania, the plaintiff commenced legal proceedings against the Romanian Administration of Posts and Telegraphs. He maintained that his transaction constituted a contract between him and the Russian Administration and that the contract had passed unaltered to the Romanian postal administration as a result of the transfer of the territory of Bessarabia to Romania in April 1918.

321 *Sechter v. Ministry of the Interior*, Romania, Court of Cassation, 1929, in: *Jurisprudenta Româná a Inaltei Curti de Casatie si Justitie*, Vol. XVII, N°. 4 (1930), p. 58, in: *Annual Digest*, 1929–1930, case no. 37. In this case, the plaintiff had been commissioned by the governing authorities of Bessarabia (then part of Russia) to print the voting papers for the election of the Russian Constituent Assembly in 1917. Having not being paid, the plaintiff submitted his claim to Romanian courts after the territory of Bessarabia was transferred to Romania. The Court of Cassation dismissed the plaintiff's claim. It stated that international law sanctions the principle of universal succession to rights and obligations only in the case of a total annexation. In cases of partial annexation (such as in the present case), the Court stated that questions of succession to debts should be settled by means of a direct arrangement between the States concerned. In the absence of an arrangement between Romania and Russia, the Court concluded that the claim could therefore not be admitted before Romanian courts.

322 *Vozneac v. Autonomous Administration of Posts and Telegraphs*, Romania, Court of Cassation, 22 June 1931, in: *Jurisprudenta Româná a Inaltei Curti de Casatie si Justitie*, 1932, pp. 36–38, in: *Annual Digest*, 1931–1932, case no. 30. This case was also dealing with an amount of money which was paid by the plaintiff at the post office in a city situated in Bessarabia (then part of Russia) and which was subsequently lost.

323 In accordance with Article 51 of the *Treaty of Versailles* (Paris, signed on 28 June 1919, entered into force on 10 January 1920, in: *The Treaties of Peace 1919–1923*, New York, Carnegie Endowment for International Peace, 1924; in: *U.K.T.S.* 1919, No. 8 (Cmd. 223)), the territories of Alsace-Lorraine which were "ceded" by France to Germany in accordance with the Preliminaries of Peace and the *Treaty of Frankfurt* (1871) were "restored to French sovereignty as from the date of the Armistice of November 11, 1918".

324 Article 67 of the *Versailles Treaty*, *Id*., indicates: "The French Government is substituted in all the rights of the German Empire over all the railways which were

In the case of *Alsace-Lorraine Railway v. Ducreux Es-qualité*, the French Court of Cassation held that France (as the successor State) was not bound by pre-succession obligations based on the general principle of international law that a State is not responsible for acts which it has not committed.[325] The same result was also reached by another French court in the case of *Kern v. Chemin de fer d'Alsace-Lorraine*.[326] Finally, this solution of non-succession was also adopted by a series of decisions by the French-German Mixed Arbitral Tribunal, such as in the case of *Levy v. German*.[327]

c) *A Hungarian Court Case in the Context of the Cession of Transylvania to Romania (1920)*

The *Kalmar* case was decided by the Supreme Court of Hungary.[328] It dealt with an act committed in 1914 by policemen against an ethnic Hungarian in the territory of Transylvania, which at the time was still part of the Austria-Hungary Dual Monarchy. Before the end of the First World War, the local courts had ordered the Treasury of Austria-Hungary to pay a life annuity to the plaintiff. At the end of the War, and as a result of the break-up of the Dual Monarchy, the territory of Transylvania was ceded to Romania pursuant to the *Treaty of Trianon* of 1920.[329] The plaintiff retained his Hungarian nationality and moved to Hungary after the cession of territory. He brought his claim against the Hungarian Treasury. The

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administered by the Imperial railway administration and which are actually working or under construction… This substitution shall not entail any payment on the part of the French State".

325 *Alsace-Lorraine Railway v. Ducreux Es-qualité*, French Court of Cassation, Civil Chamber, 30 March 1927, in: 55 *J.D.I.*, 1928, at p. 1034; *Sirey*, 1928, Part. I, p. 300; *Annual Digest*, 1927–1928, p. 85. The Court held that France was not bound to respect and to provide compensation for a private contract entered into by the plaintiff with the former German railway administration in the territories of Alsace-Lorraine when it was still part of the territory of Germany.

326 *Kern v. Chemin de fer d'Alsace-Lorraine*, Cour de Colmar (Première Ch, civile), 16 May 1927, in: 56 *J.D.I.*, 1929, pp. 446 et seq. This case dealt with the non-payment for construction work undertaken by the plaintiff before the War.

327 *Levy v. German State*, Franco-German Mixed Arbitral Tribunal, Award of 10 July 1924, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, at p. 726, in: *Annual Digest*, 1923–1924, case no. 27.

328 *Kalmar v. Hungarian Treasury*, Supreme Court of Hungary, 24 March 1929, case no. P.VI.5473/1928, in: *Maganjog Tara*, X, no. 75, in: *Annual Digest*, 1929–1930, at p. 61.

329 *Treaty of Peace between the Allied and Associated Powers, and Hungary, Protocol and Declaration*, (*Treaty of Trianon*), of 4 June 1920, in: *L.N.T.S.* vol. 6, p. 187; *U.K.T.S.* 1920, No. 10 (Cmd. 896). In fact, the *Treaty of Versailles*, Paris, signed on 28 June 1919, entered into force on 10 January 1920, in: *The Treaties of Peace 1919–1923*, New York, Carnegie Endowment for International Peace, 1924; in: *U.K.T.S.* 1919, No. 8 (Cmd. 223), had already recognised in 1919 the sovereignty of Romania over Transylvania.

Court held that Hungary should continue the previous responsibility undertaken at the time of Austria-Hungary notwithstanding the transformation affecting the territory of Hungary:

> There is no rule according to which the Successor State [Romania] is liable to pay life-annuities in favour of Hungarian citizens living in the present territory of Hungary in the case where the damage originated in the territory detached by the Peace Treaty… The objection raised by the defendant [Hungary] that the administrative liabilities of the ceded territories *ipso facto* fall on the Successor State is unfounded.[330]

d) *The 1947* Paris Peace Treaty *in the Context of the Cession of the Dodecanesian Islands to Greece (1947)*

Pursuant to Article 14 of the 1947 *Paris Peace Treaty* signed by, *inter alia*, Greece and Italy, the Dodecanesian Islands were ceded by Italy to Greece.[331] During the period of Italian occupation and sovereignty over the Islands, several properties belonging to local Greek nationals were expropriated with no compensation given.[332] In accordance with Article 38 of the Peace Treaty, Italy (the continuing State) was under the obligation to financially compensate the victims of expropriations committed during the period of occupation and sovereignty over the Dodecanesian Islands.[333]

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330 *Annual Digest*, 1929–1930, at p. 61. In defence, the Hungarian Treasury maintained that, *inter alia*, the injury had been done by the authorities of the ceded territory and that it occurred in a territory now part of Romania. Consequently, the liability should rest with the successor State to that territory (Romania). It should be noted that the Supreme Court of Hungary was of the view that Hungary was a *new State* in 1918 as a result of the break-up of the Austria-Hungary Dual Monarchy (and was not the continuing State of Austria-Hungary). The Court therefore held that as a new State Hungary took over the obligations arising from internationally wrongful acts which took place before 1918. It should be noted that the Court must have been strongly influenced by the fact that the plaintiff was a "Hungarian citizens living in the present territory of Hungary". Another feature, which must have also had an impact on the verdict reached by the Court, was the nature of the claim and the fact that it was an "administrative debt".

331 *Paris Peace Treaty*, signed on 10 February 1947 at Paris, entered into force on 15 September 1947, in: 49 *U.N.T.S.*, p. 126; *U.K.T.S.* 1948, no. 50 (Cmd. 7481). The Dodecanesian Islands were under Ottoman Empire sovereignty until 1912, when they became under Italian military occupation (from 1912 to 1924). In 1924, the Islands were ceded to Italy. In 1947, the Islands were ceded to Greece.

332 This question is examined in great detail in doctrine by Philippe DRAKIDIS, "Succession d'Etats et enrichissements sans cause des biens publics du Dodécanèse", 24 *R.H.D.I.*, 1971, pp. 72–123, see in particular at pp. 109–110.

333 The issue was the object of at least one case before Greek courts (after the cession of 1947) dealing with the fate of a concession granted to locals ethnic Greeks in 1908 by the Ottoman Empire to exploit a sulphur mine on the Island of Nissyros which had been in effect expropriated by an Italian Decree of 1933. The Greek State Council decided in the *Nissyros Mines* case (case no. 1848, 1952, in: *Justice nouvelle*, 1952,

e) *Claims nos. 11 and 12–a Decided by the Arbitral Tribunal in the* Lighthouse Arbitration *Case (1956) in the Context of the Cession of Crete to Greece (1913)*

The *Lighthouse Arbitration* case was decided in 1956 by the French-Greek Arbitral Tribunal, which had been set up under the rules of the Permanent Court of Arbitration in The Hague.[334] It should be noted at this juncture that two connected aspects of this French claim against Greece had previously been decided by the Permanent Court of International Justice in two different cases: the *Lighthouse* case of 1934[335] and the *Lighthouse in Crete and Samos* case of 1937.[336]

The present case before the French-Greek Arbitral Tribunal, the *Lighthouse Arbitration* case, involved concession rights obtained in 1860 by a French company from the Ottoman Empire for maintaining lighthouses in Crete, a Greek territory then under Ottoman sovereignty.[337] Several claims (contractual and delictual) against

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p. 706; in: *Archives de jurisprudence*, 1953, pp. 39–43; in: *I.L.R.*, 1952, p. 135; in: *R.H.D.I.*, 1954, p. 274) that the Decree was invalid, as it did not respect the acquitted rights of the Greek nationals. The case is discussed in: D.P. O'CONNELL, *State Succession*, vol. I, p. 325.

334 *Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d'arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce*, *U.N.R.I.A.A.*, vol. 12, p. 155. The Award (in French) can also be found in: 9 *R.H.D.I.*, 1956, p. 176. This case is better known as the *Lighthouse Arbitration* case. An unofficial English version of the Award is reported in: 23 *I.L.R.*, 1956, p. 81. The most complete review of the case can be found in: Charles ROUSSEAU, "L'Affaire franco-hellénique des Phares et la sentence arbitrale du 24 juillet 1956", 63 *R.G.D.I.P.*, 1959, pp. 248–292.

335 *Lighthouse Case between France and Greece*, Judgment of 17 March 1934, P.C.I.J., *Series A/B*, no. 62. An analysis of the case can be found *in*: J.H.W. VERZIJL, *The Jurisprudence of the World Court: A Case by Case Commentary*, vol. I, Leiden, A.W. Sijthoff, 1965, pp. 370–382.

336 *Lighthouses in Crete and Samos*, Judgment of 8 October 1937, P.C.I.J., *Series A/B*, no. 71. An analysis of the case can be found *in*: J.H.W. VERZIJL, *Ibid.*, pp. 483–495.

337 Mention must be made at this juncture of the particular history of the Greek-speaking region of Crete which was under Ottoman occupation since the 17th Century. A series of revolts against the Turks in the 19th Century reached its climax in the insurrection of 1896–1897 that led to war (in 1897) between Greece and the Ottoman Empire. The European Powers intervened in the war, forcing the Ottoman Empire to evacuate Crete in 1898. An autonomous Cretan State was formed under nominal Ottoman rule but in fact governed by a high commission of the occupying powers (England, France, Russia and Italy). Crete was in favour of union with Greece but the occupying powers rejected its demand. The Young Turks revolution of 1908, however, enabled the Cretans to proclaim their union with Greece and in 1909 foreign occupation troops were withdrawn. In 1913, as a result of the Balkan Wars, Crete was officially incorporated into Greece by Article 4 of the *Treaty of London*, 17–30 May 1913, in: G. FR. De MARTENS, *Nouveau recueil général de traités*, Gr. VII, t. 8, at p. 16. On the question of the legal status of Crete under international law, see: STREIT, "La question crétoise au point du vue du droit international", *R.G.D.I.P.*, 1897, pp. 61–104, 446–483; *R.G.D.I.P.*, 1900, pp.

Greece were brought by the French owner of the concession (*la Société Collas et Michel*) after Greece gained sovereignty over the territory (in 1913) and decided to expropriate the concession during the First World War. France had no less than 27 claims and Greece 10 counter-claims. Only three of these claims are analysed in this study. There is an important distinction to be made among these three claims. One claim was submitted by France for acts allegedly entirely committed by the Ottoman Empire (Claim no. 12–a). The other two claims were for acts for which the Cretan autonomous authorities were allegedly partially responsible (Claim no. 11) and entirely responsible (Claim no. 4).[338]

Claim no. 12–a. In this claim, France was seeking damages against Greece (as successor State) for acts committed by the *authorities of the Ottoman Empire* (as predecessor State).[339] The alleged internationally wrongful act was the unauthorised removal by the Ottoman Empire of a buoy belonging to the French company. The Arbitral Tribunal ruled that the Ottoman authorities had not committed any internationally wrongful act and that the acts were legitimate for reasons of security.

In an *obiter dictum*, the Arbitral Tribunal nevertheless indicated that even if the Ottoman Empire had indeed committed an internationally wrongful act, Greece could not be held liable for it. It is Turkey (the continuing State of the Ottoman Empire) which would be liable for its "own" acts committed before the loss of a substantial portion of its territory. This was in accordance with Article 9 of Protocol XII of the *Lausanne Peace Treaty* of 24 July 1923.[340] For the Arbitral Tribunal, the "critical date" to determine which State should be responsible for which internationally wrongful acts was the date at which the Peace Treaty established that the territory lost by the Ottoman Empire would be transferred to the

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5–52, pp. 301–369; *R.G.D.I.P.*, 1903, pp. 222–282, 345–418; COUTURIER, *La situation de la Crète au point du vue international*, thesis, Paris, 1900; J. DUTKOWSKI, *Une expérience d'administration internationale d'un territoire, l'occupation de la Crète (1897–1909)*, Paris, thesis, 1950.

338 Claim no. 4 is examined at *infra*, p. 136.

339 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 106.

340 *Treaty of Peace of Lausanne*, signed on 24 July 1923, in: *U.K.T.S.* 1923, No. 16 (Cmd. 1929); *L.N.T.S.*, vol. 28, p. 11; 18 *A.J.I.L.*, 1924, Supp., p. 4. Article 9 reads as follows: "In territories detached from Turkey under the Treaty of Peace signed this day, the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other Contracting Powers, and companies in which the capital of the nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority. The same provision will apply in regards concessionary contracts entered into with the Ottoman Government or any Ottoman local authority before the coming into force of the Treaty providing for the transfer of the territory. This subrogation will have effect as from the coming into force of the treaty by which the transfer of territory was effected except as regards territories detached by the Treaty of Peace signed this day, in respect of which the subrogation will have effect as from the 30th October, 1918".

different successor States.[341] The Arbitral Tribunal added that this solution was not only dictated by the terms of the *Lausanne Peace Treaty* but also that it was in conformity with rules of State succession:

> One can only admit that within the scope of this conventional sharing of responsibilities according to time, some other autonomous and complementary principle, borrowed from the general doctrines of State succession, may be invoked to upset the juridical effects of the said sharing of responsibilities according to the Protocol.[342]

The reasoning of the Tribunal has been interpreted in doctrine as an expression of a principle according to which the successor State should not take over the obligations arising from internationally wrongful acts committed by the predecessor State.[343] In fact, the Arbitral Tribunal's *obiter dictum* supports *another* rule: in cases of cession of territory, the continuing State should remain responsible for *its own* internationally wrongful acts committed before the date of succession.[344]

Claim no. 11. This claim concerned compensation sought by France against Greece (as the successor State) relating to expenditures incurred by the French owner of the concession in the course of the construction of two new lighthouses from 1903 to 1908.[345] The Arbitral Tribunal found that the responsibility for the damage suffered by the French concessionaire was divided between the French company itself and both the Cretan authorities and the Ottoman Empire. It decided that Greece should not be held accountable for the commission of these internationally wrongful acts. The reasoning of the Arbitral Tribunal is as follows:

> [T]he Tribunal sees no real reason to saddle, after the event, Greece, who had absolutely nothing to do with the dealings between those parties, with this responsibility, in whole or in part. Not even the part of the general responsibility for the events of 1903 to 1908 to be imputed to the autonomous State of Crete can be regarded as having devolved upon Greece. Such a transmission of responsibility is net justified in the present case either from the particular point of view of the final succession of Greece to the rights and obligations of the concession in 1923/1924—if only for the reason that the said events took place outside the scope of the concession—or from the more general point of view of its succession in 1913 to the territorial sovereignty over Crete.[346]

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341 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 108: "The critical date evidently serves as the termination of Turkish responsibility and the commencement of Greek responsibility in the sense that everything which happened before the critical date and which can have given rise to charges against the concessionary firm continues to involve the responsibility of the Turkish State".

342 *Id.*

343 Charles ROUSSEAU, "L'Affaire franco-hellénique des Phares et la sentence arbitrale du 24 juillet 1956", 63 *R.G.D.I.P.*, 1959, p. 274.

344 Hazem M. ATLAM, p. 242.

345 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81.

346 *Ibid.*, at p. 89.

The Arbitral Tribunal decided that Greece (as the successor State) should not be held accountable for the portion of responsibility related to acts committed *directly by the Ottoman Empire*. It also came to the same conclusion with respect to the portion of these acts for which the *autonomous Government of Crete* was responsible. The reasoning was apparently based on the specific facts of the case. Thus, the Tribunal indicated that the territorial succession of Greece to the Island in 1913 and the acts committed by the local Cretan authorities from 1903 to 1908 were "too remote to justify a decision which would fix Greece and Greece alone with the general responsibility for the acts and omissions of others who were complete strangers to her".[347] The Arbitral Tribunal's finding was also grounded on principles of succession of States.[348]

It has been suggested in doctrine that the Arbitral Tribunal's handling of Claim no. 11 was based on the application of the principle of non-succession to obligations arising from internationally wrongful acts committed by the predecessor State.[349] This claim, in fact, illustrates the other rule that the continuing State (Turkey) should continue its previous responsibility for internationally wrongful acts committed before the transformation affecting its territory. To this principle, the Arbitral Tribunal's reasoning in dealing with Claim no. 11 seems to suggest that there is no exception. In fact, the Arbitral Tribunal's decision with respect to another claim (Claim no. 4), which is analysed below,[350] shows that there are some cases where an exception should exist.

f) *A German Court Case in the Context of the Transfer of Upper Silesia to Poland (1951)*

This author has found only one significant example of a case decided by a municipal court where the principle that the continuing State should remain responsible for the commission of *its own* internationally wrongful acts before the date of succession was *not applied*.

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347 *Id.*

348 This seems to be the reasoning of the Arbitral Tribunal, since it used the words "ni au point de vue plus générale de sa succession à la souveraineté territoriale sur Crète en 1913".

349 Charles ROUSSEAU, "L'Affaire franco-hellénique des Phares et la sentence arbitrale du 24 juillet 1956", 63 *R.G.D.I.P.*, 1959, p. 274; Hazem M. ATLAM, p. 249; Jean Philippe MONNIER, pp. 82–83.

350 See, at *infra*, p. 136.

The *Personal Injuries (Upper Silesia)* case was decided by the Court of Appeal of Cologne in 1951.[351] The Court held that the Federal Republic of Germany was not liable to pay compensation to the plaintiff for the reason that "the alleged liability of the Reich Postal Administration vis-à-vis the plaintiff arose wholly outside that territory and has no connection whatsoever with the latter, [and that] any liability of the Federal Postal Administration is out of the question".[352] The Court also stated that the identity of the Reich with the Federal Republic was limited to the territory of what was now the Federal Republic. The Court concluded by stating that "the practical result of holding the Federal Republic liable for all debts of the German Reich—regardless of when and where such debts arose—would indeed be untenable".[353]

It was thus held that the Federal Republic of Germany (the continuing State) could not be held liable to compensate the plaintiff for internationally wrongful acts committed before the territory of Upper Silesia became part of Poland. Since Poland was not a party to the proceedings, the Court did not, however, indicate that it should be for the successor State (Poland) to take over the obligations arising from the commission of the internationally wrongful act.

g) *Other Less Significant Examples*

A very old example is usually mentioned in the literature: the cession of territory in a 1343 treaty between King Philippe of France and Humbert, whereby upon the death of the latter, his territory (the *Dauphiné*) was to pass to the second son of the King of France. According to Article 8 of the Treaty, the successor to Humbert was to pay all debts and would be responsible for all liabilities arising out of "torts" committed by Humbert as "a son is bound by the obligations of his

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351 *Personal Injuries (Upper Silesia) Case*, Court of Appeal of Cologne, Federal Republic of Germany, 10 December 1951, in: *NJW*, 5 (1952), p. 1300, in: *I.L.R.*, 1951, pp. 67 et seq. In this case, the plaintiff had sustained personal injuries in 1943 as a result of a collision with a motor vehicle owned by the Postal Administration of the German Reich in the territory of Upper Silesia which at that time was part of the territory of the Reich. The territory of Upper Silesia became part of Poland after the Second World War. After the War, the plaintiff brought an action for damages against the Federal Republic of Germany and alleged that his injuries were caused by the Postal Administration of the Reich. The plaintiff was most probably an "ethnic German" and had left the territory of Upper Silesia after the transfer of territory in 1945; he was now living in Germany. He argued that the Federal Republic of Germany was liable for all acts of negligence committed by servants of the Reich in any part of the latter's territory, notwithstanding the fact that the territory was subsequently severed from the Reich. The Federal Republic of Germany contended that in the absence of special legislation to that effect, it was not liable for internationally wrongful acts committed in parts of the former Reich which were no longer part of its territory.

352 *I.L.R.*, 1951, at p. 68.

353 *Id.*

father".[354] Some in doctrine view this example as relevant to the issue of succession to obligations arising from the commission of internationally wrongful acts.[355] A better interpretation is probably that this old treaty ultimately reflects an era when the territory of a State was seen as the private patrimony of the monarch and when a territory could be exchanged between sovereigns in contracts or as part of a succession.[356] This example seems irrelevant in contemporary international law.

It should finally be mentioned that Hurst makes reference to several cases which were decided by Italian courts in the context of the cession of Lombardy by Austria to the Kingdom of Sardinia (Italy) in 1859.[357] Article 8 of the *Treaty of Zurich* (10 November 1859) stated that the Italian government (the successor State) undertook to consider compensation for the losses caused by requisitions made by the Austrians in Lombardy as a charge on the Italian State.[358] The Italian Minister of Interior issued a circular to that effect on 16 August 1860.[359] Based on this treaty provision, Italian municipal courts have held that the successor State should take over the obligations arising from the commission of internationally wrongful acts committed by the predecessor State.[360]

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354 This provision, reproduced in: Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, p. 20, provides in its original (old) French version that the succcessor "soit tenu d'amander les torts faicts de nous & de nos Predecesseurs, ainsy que le filz est tenu pour le pere".

355 Ernest H. FEILCHENFELD, *Id.*, described this case as an illustration that there is "no general custom exempting tort obligations from the rules of succession". For Michael John VOLKOVITSCH, p. 2176, this example "expressly provides for the transfer of liabilities for international delicts from the predecessor to the successor".

356 Wladyslaw CZAPLINSKI, p. 341. See also Michael John VOLKOVITSCH, p. 2176, for whom this example needs to be view as an expression of the diplomatic practice of that time. On this period see: J.H.W. VERZIJL, pp. 298 et seq.

357 The defeats of Austria at the battles of Solférino and Magenta against the combined forces of France and Sardinia led to the loss of the territories of Lombardy and Tuscany to the Kingdom of Sardinia. These cases are discussed in: Sir Cecil HURST, pp. 174 et seq. Other cases are discussed in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at pp. 113 et seq.

358 The provision reads as follows: "The Government of His Majesty, the King of Italy, succeeds to the rights and obligations resulting from contracts regularly stipulated by the Austrian administration of objects of public interest concerning specially the ceded country".

359 The circular is found in: A.B. KEITH, *The Theory of State Succession with Specific Reference to English and Colonial Law*, London, 1907, pp. 74–75: "The King's Government assumes the responsibility for and has decided in the Council of Ministers to consider at the cost of the state the compensation for the losses arising out of the requisitions regularly made by the Austrians in Lombardy". The original Italian text of the circular is found in: C.F. GABBA, *Quistioni di diritto civile studiate da C.F. Gabba*, 1882, at p. 383 (quoted in: John WESTLAKE, *International Law*, 2nd ed., vol. I, Cambridge, Cambridge Univ. Press, 1910, at pp. 79–80).

360 *Minister of Finance v. Siro Corbella*, decided in 1877 by the Civil Court of Cassation of Turin, in: *Giurisprudenza Italiana*, vol. 29, Pt. 1, Sec. 1, column 996, referred in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred

4.2 *A Special Case: Acts Committed by Autonomous Entities*

As previously examined, the principle that clearly emerges from the analysis of municipal and international case law and State practice in the context of cession and transfer of territory is that the continuing State should remain, in principle, responsible for *its own* internationally wrongful acts committed before the date of succession. This author has found one exception to this general principle: whenever the internationally wrongful act is committed by a local administration having great autonomy from the predecessor State prior to the date of succession. In such case, it should be for the successor State to be held responsible for the obligations arising from the commission of such act.[361]

This exception to the general principle is illustrated by the decision of the Arbitral Tribunal in the *Lighthouse Arbitration* case concerning Claim no. 4,[362] as well as by the decision of the Court of the Aegean Islands (Greece) in the *Samos (Liability for Torts) case*.[363]

a) *Claim no. 4 Decided by the Arbitral Tribunal in the* Lighthouse Arbitration *Case (1956) in the Context of the Cession of Crete to Greece (1913)*

As previously observed, the French-Greek Arbitral Tribunal in the *Lighthouse Arbitration* case came to the conclusion in dealing with Claims nos. 12-a and 11 that the continuing State (Turkey) should remain responsible for *its own* internationally wrongful acts committed before the cession of the territory of Crete to Greece in 1913.[364] In Claim no. 4, also known as the *Haghios Nicolaos* case, the Arbitral Tribunal came to a different conclusion.[365]

Claim no. 4 dealt with tax exemptions granted to a Greek shipping company and its ship (the Haghios Nicolaos) by a law proclaimed by the local authorities of Crete in 1908. After 1913, when the Island became officially part of Greece, the law remained in place. This tax exemption was alleged by the French company to be in violation of its existing concession rights. France therefore sought reparation from Greece.

K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at p. 117. In the case of *Finzi v. Minister of the Treasury*, Court of Cassation of Italy, referred in: Sir Cecil HURST, at pp. 174 et seq., it was held, on the contrary, that no definitive liability had ever been established against the Austrian government (the predecessor State) and that Italy (as the successor State) could therefore not be responsible for those unsettled claims.

361 This principle is further developed at *infra*, p. 259.

362 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81.

363 *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, N° 27, in: *Thémis*, vol. 35, p. 294, in: *Annual Digest*, 1923–1924, at p. 70.

364 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, at p. 81. These two claims have been examined *supra*, p. 130.

365 *Ibid.*, at p. 81.

Right from the outset, The Arbitral Tribunal indicated that the liability of Greece should not be based on the above-mentioned provision of the *Lausanne Peace Treaty* of 1923 which dealt with the rights and obligations of Turkey and not Crete. The Arbitral Tribunal held that such liability:

> [C]ould result only from a transmission of responsibility in accordance with the rules of customary law or the general principles of law regulating the succession of States in general.[366]

The Arbitral Tribunal concluded that the acts were breach of a *contractual* obligation which had been committed by Crete, which was described has an "autonomous island State the population of which had for decades passionately aspired to be united, by force of arms if necessary, with Greece, which was regarded as the mother country".[367] The Arbitral Tribunal added that this violation by the Cretan authorities was made in favour of a Greek company and that the Greek authorities maintained the situation after 1913. The Arbitral Tribunal thus concluded on this point that:

> [T]he Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract. Otherwise, the avowed violation of a contract committed by one of the two States, linked by a common past and a common destiny, with the assent of the other, would, in the event of their merger, have the thoroughly unjust consequence of cancelling a definite financial responsibility and of sacrificing the undoubted rights of a private firm holding a concession to a so-called general principle of non-transmission of debts in cases of territorial succession, which in reality does net exist as a general and absolute principle.[368]

The analysis of the Arbitral Tribunal was so far based on *contractual* obligations by Crete and Greece. However, it was quick to point out that the solution would have been the same even if the obligation had been regarded as *delictual* and not contractual.[369] The Arbitral Tribunal clearly distanced itself from the two precedents of *R.E. Brown*[370] and *Hawaiian Claims*[371] by stating that "the Tribunal does not attach a decisive importance to the rare and disparate precedents of international or municipal courts".[372] The Arbitral Tribunal finally came to the conclusion that:

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366 *Ibid.*, p. 90.

367 *Ibid.*, at p. 92.

368 *Id.*

369 *Id.* According to Brigitte STERN, Responsabilité, p. 339, the Tribunal has therefore clearly rejected the distinction, from a succession of States point of view, between contractual and delictual debts.

370 *R.E. Brown* (United States v. Great Britain), Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129. This case was examined in detail at *supra*, p. 73.

371 *Hawaiian Claims* case (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 157. This case was examined in detail at *supra*, p. 78.

372 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81, at p. 91.

> The thesis, one of theory rather than of practice, that there can never be a question of transmission . . . is not, in general, well founded.[373]

The Arbitral Tribunal awarded reparation to France in an amount of 7,830,424 French francs. The Arbitral Tribunal therefore found Greece responsible for the illegal acts committed against the French company in Crete. The important question, which will now be examined, is for which internationally wrongful acts exactly was Greece held liable.

There is no doubt that Greece was held responsible for its *own* internationally wrongful acts (delict of omission) committed *after* 1913 when Crete was officially ceded to Greece. Thus, Greece was responsible for maintaining in place the discriminatory practice *after* it had undeniable sovereignty over the Island.[374]

The question remains whether Greece was also held accountable, as the successor State, for acts committed by Crete *before* 1913. This is a difficult question, as there are arguments in favour of both positions. On the one hand, the plain language of the following quote from the decision of the Arbitral Tribunal seems to suggest that Greece was *not* found responsible for Crete's internationally wrongful acts committed *before* 1913:

> [T]he Tribunal can only come to the conclusion that Greece, *having adopted the illegal conduct of Crete in its recent past as autonomous State*, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract.[375] (emphasis added)

This interpretation also seems to be supported by the fact that in its pleadings, Rousseau (Counsel for France) observed that doctrine and case law did not admit the transfer of the obligation to repair from the predecessor State to the successor State.[376]

On the other hand, however, the Award's repeated critical assessment of the doctrine of non-succession and its conclusion that there is no such general and absolute principle[377] seems to suggest that the Arbitral Tribunal actually found Greece to be responsible for Crete's internationally wrongful acts committed *before*

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373 *Ibid.* at p. 92.

374 The question of succession to *continuing* internationally wrongful acts is further discussed at *infra*, p. 218.

375 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81, at p. 92.

376 *Différend au sujet de diverses réclamations et contre-réclamations relatives à la concession des phares de l'Empire ottoman*, pleadings of Rousseau, p. 29 (referred to in: Jean Philippe MONNIER, p. 81). However, even though France admitted to the general principle of non-succession to obligations arising from the commission of internationally wrongful acts, it nevertheless indicated that this was inoperant for cases of concessions (such as in the present case), where the new State needs to respect the acquired rights of the company.

377 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 92.

1913. This is also supported by the subsequent writings of Verzijl, who acted as President of the Arbitral Tribunal in the *Lighthouse Arbitration* case. He maintains that not only did the Arbitral Tribunal held Greece responsible for its own internationally wrongful act but that "the circumstances equally justified admitting her responsibility as a successor to the autonomous state of Crete over the preceding period".[378] For him, the special circumstances of this case "justified the admission of the transmission of liability for torts from Crete to Greece".[379]

Not surprisingly, writers also have conflicting views on this question. Some authors have taken the position that Greece was found liable for its own acts committed *after* the cession of territory of Crete as well as for those committed *before* such cession (as successor State).[380] This is also the view held by the I.L.C. Special Rapporteur Crawford.[381] Other writers believe that Greece was only found responsible for its own acts committed *after* the annexation of 1913:

> [L]e tribunal a dégagé la responsabilité de la Grèce, comme successeur de l'Etat autonome de Crète, du fait qu'elle avait connu, puis endossé, comme si elle était régulière, l'infraction au contrat de concession, réalisée au profit d'un de ses ressortissants, alors que, d'après le tribunal, l'étroitesse de ses liens avec la Crète lui faisait un devoir d'intervenir pour mettre fin à l'infraction. C'est, en d'autres termes, pour avoir 'fait sienne la conduite illégale de la Crète' que la Grèce voit sa responsabilité engagée. Il s'agit là, en quelques sorte, d'une responsabilité par omission… Il n'y a pas à proprement parler, de succession d'Etats, puisque la responsabilité de l'Etat successeur n'est pas une responsabilité 'héritée' sans conditions, la transmission de la responsabilité de l'Etat prédécesseur n'étant rendue possible que par l'existence d'une responsabilité concomitante à la charge de l'Etat successeur."[382]

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378 J.H.W. VERZIJL, p. 223. This is also the point of view of Michael John VOLKOVITSCH, pp. 2190–2191.

379 J.H.W. VERZIJL, p. 223. It should be reminded that the author is a virulent adversary of the strict application of the rule of non-succession.

380 Michael John VOLKOVITSCH, p. 2190. See also: W. WENGLER, in: 51—II *Annuaire I.D.I.*, 1965, pp. 168–169: "…dans l'affaire des phares en Crète, on a admis la responsabilité de la Grèce pour des dommages causés à une époque où la Crète ne faisait pas partie de la Grèce".

381 *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 282: "In the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, *partly on the basis that the breach had been 'endorsed by [Greece]'*." (emphasis added).

382 Jean-Philippe MONNIER, pp. 84–85. This seems to be also the position of Wladyslaw CZAPLINSKI, pp. 345–346, who indicates that the Tribunal accepted the principle of succession to responsibility in the context of Claim no. 4 but acknowledges that in this case "there was no difficulty in attributing the acts to the successor State as it had itself committed the same delict". Later he specifies (at p. 356) that the principle of acceptance of succession to responsibility for internationally wrongful acts was "in a certain sense special as the successor State was equally responsible for its own acts". Similarly, Ian BROWNLIE, *Principles of Public International Law*, 5th ed., Oxford,

A more nuanced position is adopted by Stern indicating that the Arbitral Tribunal in its evaluation of Claim no. 4 did indeed admit the legal soundness and validity of the principle of succession of States to international responsibility.[383] She nevertheless believes that this case is not a strong precedent in support of the principle of succession to the obligation to repair, because "il s'agit d'une responsabilité plus ou moins partagé, au moment où elle est née, par la Grèce en tant que mère-patrie".[384] A similar opinion was expressed by Rousseau, for whom:

> L'on ne saurait déduire, d'une solution exclusivement dictée par des considérations propres à l'espèce, un acquiescement quelconque à un prétendu principe général de succession aux actes illicites.[385]

This is undoubtedly true. The *special circumstances* of the case, referred to in the subsequent writing of Verzijl (who acted as President of the Arbitral Tribunal),[386] did indeed dictate the findings of the Tribunal. These circumstances are the fact that the acts were committed by an autonomous government with very strong links to Greece. This case, therefore, is an illustration that in the context of cession of territory there is an exception to the principle that the continuing State should always be responsible for the acts committed in the ceded territory before the date of succession. The exception is when the internationally wrongful acts were committed by a largely autonomous government. At the time of the events, Crete had indeed a largely autonomous government.[387] In such cases, it should be for the successor State (i.e. the State to which the territory is ceded) to be held

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Clarendon Press, 1998, p. 662, for whom "the decision rests on the element of adoption of the wrongful act by Greece and thus is not in principle inconsistent with the other authorities" supporting the principle of non-succession to obligations arising from the commission of internationally wrongful acts. The same reasoning is expressed in: A. VERDROSS, *Völkerrecht*, 4th ed., Vienna, Springler Verlag, 1959, p. 198; A. VERDROSS & B. SIMMA, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, Dunker & Humblot, 1984, p. 633–634. See also: Natalino RONZITTI, *La successione internazionale tra stati*, Milan, Dott. A. Giuffrè, 1970, p. 218.

383 Brigitte STERN, Responsabilité, p. 338. See also: Hazem M. ATLAM, p. 248.

384 *Ibid.*, p. 339.

385 Charles ROUSSEAU, "L'Affaire franco-hellénique des Phares et la sentence arbitrale du 24 juillet 1956", 63 *R.G.D.I.P.*, 1959, p. 275. In doctrine, Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, pp. 182–183 and Hazem M. ATLAM, p. 245, are of the same opinion.

386 J.H.W. VERZIJL, p. 223.

387 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: *U.N.R.I.A.A.*, vol. 12, at p. 181. The Arbitral Tribunal indicated about Crete that "son émancipation comme entité autonome a déja commencé en 1868…[d]epuis lors, l'île de Crète a vécu une vie politique séparée…et mené l'existence d'un Etat autonome, investi de pouvoir très larges, mais sous la suzeraineté de l'Empire Ottoman". The cession of territory in 1913 by the Ottoman Empire is described by the Arbitral Tribunal as "sa renonciation finale à un résidu de droits de suzerainté qu'il avait encore retenus après avoir érigé l'île en Etat autonome".

responsible for obligations arising from internationally wrongful acts committed before the date of succession.[388]

b) *The* Samos (Liabiliy for Torts) *Case in the Context of the Cession of the Aegean Islands to Greece (1913)*

The *Samos (Liability for Torts) case*, which was decided by the Court of the Aegean Islands (Greece), concerned an action for compensation brought against the Greek State after the cession of the Aegean Islands to Greece in 1913.[389] It concerned damage allegedly caused by customs officials of the Island of Samos at the time it was still under Ottoman rule.[390] The Court held that the Greek State was substituted to the former Principality of Samos and that it must be deemed to be responsible for the injurious acts complained about before the cession of territory. In other words, it held that as the successor State, it should be held accountable for internationally wrongful acts committed before the date of succession.

In doctrine, the solution found in this case has been explained by the autonomous status which the Island enjoyed prior to its cession to Greece in 1913 and the fact that "its absorption in Greece did not involve a total abolition of the local administration".[391] This is indeed a case supporting the principle that whenever an internationally wrongful act is committed by a largely autonomous government before the date of succession, it should be for the successor State (and not the continuing State) to be held responsible for the obligations arising from such act.[392]

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388 This point is further discussed at *infra*, p. 259.

389 *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, N° 27, in: *Thémis*, vol. 35, p. 294, in: *Annual Digest*, 1923–1924, at p. 70.

390 The Aegean Islands (Samos, Chio, etc.) were a former autonomous province of the Ottoman Empire which was ceded to Greece in May 1913 pursuant to the *Treaty of London*, 17–30 May 1913, in: G. FR. De MARTENS, *Nouveau recueil général de traités*, Gr. VII, t. 8, at p. 16. The alleged damage arose in the present case from the fact that the customs officials disregarded the relevant provisions of Samos law by declining to issue to the plaintiffs exportation permits in regard to a quantity of timber.

391 D.P. O'CONNELL, *State succession*, vol. I, p. 492. The same conclusion is reached by Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, at p. 179.

392 This point is further discussed at *infra*, p. 259. Other writers have concluded to the limited value of this case: Jacques BARDE, *Id.*: "…sa valeur est très relative et elle est dépourvue de portée quant à l'existence de la règle de non transmission de la responsabilité interne". In the *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 91 the Arbitral Tribunal indicated specifically that this precedent (as well as others) was not conclusive: "the Tribunal does not attach a decisive importance to the rare and disparate precedents of international or municipal courts".

5. *Secession*

The analysis of State practice and international and municipal case law in the context of secession shows the existence of a *general principle*: the continuing State should remain responsible for *its own* internationally wrongful acts committed before the date of succession.[393] Thus, the obligations arising from the commission of such acts should not be transferred to the successor State (the point is examined at Section 5.1). A different solution was adopted in only one significant case of State practice (examined at Section 5.2).

5.1 *The Continuing State Remains Responsible for Internationally Wrongful Acts Committed before the Date of Succession*

When the predecessor State continues to exist after the creation of the new State (such as in case of secession), it should remain, in principle, responsible for the consequence of its own internationally wrongful acts committed before the date of succession. The continuing State should therefore continue its previous responsibility for these acts notwithstanding the transformation affecting its territory.

The principle is well established by decisions of municipal courts. It was adopted by municipal courts of the *new successor State*, for instance, in the *Dzierzbicki* case decided by the Supreme Court of Poland.[394] This was also the solution reached by the Supreme Court of Poland in two decisions concluding that Austria was not a new State in 1917 and that, accordingly, it should be held accountable for the illegal acts committed by Austria-Hungary before that date.[395] The principle was also applied by one municipal court of the *continuing* State: the case of *Baron A. v. Prussian Treasury* decided by the German *Reichsgericht*.[396]

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393 The present author's conclusions on this issue is found in: Patrick DUMBERRY, "Is a New State Responsible for Obligations arising from Internationally Wrongful Acts Committed before its Independence in the Context of Secession?", 43 *Canadian Y.I.L.*, 2005, pp. 419–453. (this excerpt is reprinted with permission of the Publisher from *The Canadian Yearbook of International Law, Vol. 43* edited by Don M. McRae © University of British Columbia Press 2007. All rights reserved by the Publisher).

394 *Dzierzbicki v. District Electric Association of Czestochowa*, Supreme Court of Poland, First Division, 21 December 1933, in: *O.S.P.*, 1934, no. 288, in: *Annual Digest*, 1933–1934, at p. 89.

395 *Niemiec and Niemiec v. Bialobrodziec and Polish State Treasury*, decided by the Supreme Court of Poland, Third Division, 20 February 1923, in: 2 *Annual Digest*, case no. 33; *Olpinski v. Polish Treasury (Railway Division)*, Supreme Court of Poland, Third Division, 16 April 1921, *O.S.P.*, I, no. 15, in: *Annual Digest*, 1919–1922, at p. 63.

396 *Baron A. v. Prussian Treasury*, Germany, Reichsgericht in Civil Matters, 19 December 1923, in: *E.R.Z.*, vol. 107, p. 382, in: *Annual Digest*, 1923–1924, p. 60.

It should be noted that these municipal law cases *do not involve questions of succession to international responsibility*, as the wrongful acts were committed by the predecessor State not against another State (or a national of another State) but against *its own nationals* (which became nationals of the successor State after the date of succession).[397]

The review of State practice shows a clear tendency in support of the principle that whenever the predecessor State continues to exist after the secession of part of its territory, it should remain responsible for the commission of its own internationally wrongful acts. There are several examples of State practice supporting this principle. One such example is in the context of the break-up of the U.S.S.R. In one treaty entered into with Germany in 1992, the Federation of Russia (as the continuing State) continued its responsibility for internationally wrongful acts committed by the U.S.S.R. during and after the Second World War, namely for the pillage of works of art and cultural property in Germany. In another treaty signed with France in 1997, the Federation of Russia continued its responsibility for measures of expropriation of bonds issued in France which were taken by newly Soviet Russia after the 1917 Revolution. This principle is also supported by the official position taken by the authorities of the G.D.R., which held that it was not responsible for obligations arising from internationally wrongful acts committed before and during the Second World War. The position taken by the "Allied and Associated Powers" in the context of the break-up of the Austria-Hungary Dual Monarchy (in 1918) also supports the principle of non-succession. We will also examine a special case in the context of the secession of the Kingdom of the Netherlands from the French Empire in 1815. The author notes that at the time of writing this study the I.C.J. rendered its final judgment in February 2007 in the Genocide Case between Bosnia-Herzegovina and Serbia-Montenegro. The Court clearly recognized the independence of Montenegro in June 2006 as a case of secession. The Court also noted that the Republic of Serbia's position as the continuing State of Serbia-Montenegro was accepted by Montenegro. The Court concluded, therefore, that the Republic of Serbia was the only respondent in this case. This finding implicitly acknowledges the principle that the continuing State remains responsible for acts which took place before the date of succession.

The principle according to which whenever the predecessor State continues to exist it should remain responsible for the commission of its own internationally wrongful acts before the date of succession is the prevailing view in doctrine.[398] This is certainly the correct basic position that should be adopted.

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397 The reasons for treating these types of cases differently have been explained at *supra*, p. 30.

398 Brigitte STERN, Responsabilité, pp. 335–336 ("[e]n vertu des principes très clairs gouvernant l'imputation de l'acte illicite à un Etat… on peut affirmer que l'Etat continuateur continue bien entendu à être responsable des actes qu'il a commis, même s'il subit certaines transformations"); Wladyslaw CZAPLINSKI, p. 357; Wesley L. GOULD, *An*

The question nevertheless remains as to whether this principle should apply *uniformly in all cases* and whether there should not be some circumstances where the principle should instead call for the new successor State to be accountable for internationally wrongful acts committed before the date of succession. The position adopted in the present study is that, as a matter of principle, the continuing State should *not always* be responsible for internationally wrongful acts committed before the date of succession. There are situations where, on the contrary, it should be for the secessionist successor State to be held responsible for obligations arising from internationally wrongful acts committed before its independence.[399]

Later in the present study (at Chapter 3), are examined several circumstances which would certainly call for the secessionist State (and not the continuing State) to be held responsible for obligations arising from internationally wrongful acts committed before the date of succession.[400] One such circumstance would be

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Introduction to International Law, New York, Harpers & Brothers Publ., 1957, p. 428; Jean-Philippe MONNIER, p. 67 (for whom the continuing State "reste par conséquent titulaire des droits et des obligations engendrées par l'acte illicite"); Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, p. 11; Michael John VOLKOVITSCH, p. 2200; Miriam PETERSCHMITT, p. 54. See also Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1976, at p. 969, commenting on the *Société E. & B. Vidal* case, Conseil d'Etat, 20 June 1975, in: *Gazette du Palais*, 12–13 March 1976, p. 76, and concluding that it "confirme le principe général suivant lequel en cas de mutation territoriale ou d'accession d'un Etat nouveau à l'indépendance les obligations nées d'actes illicites commis antérieurement au changement de souveraineté incombent exclusivement à l'Etat prédécesseur". For Hazem M. ATLAM, p. 258, in cases of secession "l'Etat prédécesseur conservant intacte sa personnalité internationale, c'est lui et lui seul—qui serait tenu de répondre, le cas échéant, des faits internationalement illicites commis, à la veille de la réalisation de la succession d'Etats, par ses propres organes". Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 224, indicate that "since the parent State still exists, there is no occasion for the new State to succeed to…claim for damages against it; but there would be justification for it to be…liable on those claims, having a local character attaching to the territory of the new State and which the parent State is therefore in no position to fulfil or meet". For Hans KELSEN, "Théorie générale du droit international public. Problèmes choisis", *R.C.A.D.I.*, t. 42, 1932–IV, pp. 327, 333–334, "lorsqu'une partie seulement du territoire d'un Etat devient territoire d'un autre Etat, le prédécesseur demeure bien, en principe, le sujet des droits et des obligations qui lui appartenaient jusque-là".

399 This is, for instance, the position of Brigitte STERN, Responsabilité, pp. 335–336, who first affirms that "puisque l'Etat reste le même, il n'y a aucune raison de ne pas admettre la continuité de la responsabilité". However, she adds that the question remains open as to whether in some circumstances the new successor State should not be held responsible for the illegal acts committed at the time it was still part of the predecessor State. She gives the example of a wrongful nationalisation of a gold mine, which would now be situated in the territory of the new successor State and ask the question whether in this situation it should still be for the continuing State to provide compensation to the injured third State.

400 See, *infra*, p. 207.

whenever the secessionist State would have unjustly enriched itself as a result of such act.[401] Another circumstance would be if the internationally wrongful act had been committed by an autonomous political entity (before secession) with which the secessionist State has a structural continuity.[402] It has also been suggested in doctrine that in cases where the continuing State loses a great portion of its initial territory following the creation of a new State there should be a transfer of the obligation to repair to the new State.[403] This last argument is not entirely convincing. As a matter of principle, the size of the territory which secedes should not, *in itself*, determine which of the continuing or the secessionist State should be held responsible for obligations arising from internationally wrongful acts committed before the date of succession.

a) *The Position Taken by the Allies in the Context of the Break-Up of the Austria-Hungary Dual Monarchy (1918)*

The break-up of the Austria-Hungary Dual Monarchy after the First World War was considered by Austria to be a case of *dissolution of a State* with itself being a new State.[404] On the contrary, the Allies (the "Allied and Associated Powers" or the "Entente Powers", i.e. the British Empire, France, Italy, Japan, the United States, etc.) held that this was not a case of dissolution of State, but one of the *secession* of Poland, Czechoslovakia and Yugoslavia, with both Austria and Hungary being considered as the continuing States of the Dual Monarchy. The Allies held that post-War Austria and Hungary were both *identical* with the former Dual Monarchy.[405] Both States were considered to be responsible for the internationally wrongful acts which had been committed during the War. This is clear in the *Peace Treaty of St. Germain* (entered into by the European Powers and Austria)[406] and in

401 See, *infra*, p. 263.

402 See, *infra*, p. 259.

403 For Charles Cheney HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 2nd ed., Boston, Little, Brown & Co., 1945, p. 437, there is "little or no concern" in doctrine on the question whether a "considerable diminution of territory… might serve greatly to impair the ability of [the continuing State] to make adequate redress for wrongs chargeable to it" and that this should therefore "be regarded as a limitation upon [the continuing State] to make a valid cession". This is also the opinion of Miriam PETERSCHMITT, p. 64: "Lorsque l'Etat prédécesseur a perdu une très grande partie de son territoire, il peut, dans certains cas, paraître injuste que l'Etat continuateur porte tout seul l'obligation de réparer".

404 This point was already discussed at *supra*, p. 99.

405 Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, pp. 220 et seq.

406 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, St. Germain-en-Laye, 10 September 1919, entered into force on 16 July 1920, in: *U.K.T.S.* 1919 No. 11 (Cmd. 400), see at Article 177. The relevant quote of this provision is found at *supra*, note 196.

the separate peace treaties entered into in 1921 by the United States with Austria[407] and with Hungary.[408] A Commission set up under a 1924 treaty[409] entered into by the United States with Hungary and Austria specifically indicated that the other secessionist States (i.e. Poland, Czechoslovakia and Yugoslavia) should bear no responsibility for internationally wrongful acts committed during the War.[410]

b) *Polish and German Court Cases in the Context of the Secession of Poland (1918)*

After Poland became an independent State in 1918, a few cases decided by courts of the new State of Poland dealt with issues of State succession to international responsibility. These cases support the principle that the continuing State remains responsible for the commission of its own internationally wrongful acts on the territory that has since then seceded. Some in doctrine have also analysed these cases as an illustration that the successor State is not bound by the obligations arising from internationally wrongful acts committed by the predecessor State except when it has expressly recognised them.[411]

In the *Dzierzbicki* case, the Supreme Court of Poland dealt with a claim arising from an accident caused by the Russian railway authorities in a territory which was

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407 *Treaty between the United States and Austria, signed on August 24, 1921, to establish Securely Friendly Relations between the two Nations*, in: 16 *A.J.I.L.*, 1922, Suppl., pp. 13–16.

408 *Treaty Establishing Friendly Relations between the United States of America and Hungary*, signed in Budapest on 29 August 1921, in: *U.S.T.S.*, no. 660; in: 16 *A.J.I.L.*, 1922, Suppl., pp. 13–16.

409 The Agreement of 26 November 1924 can be found in: *L.N.T.S.*, vol. 48, p. 70; *U.N.R.I.A.A.*, vol. VI, p. 199.

410 *Administrative Decision no. 1*, 25 May 1927, Tripartite Claims Commission, *U.N.R.I.A.A.*, vol. VI, p. 203, at p. 210: "All of the Successor States other than Austria and Hungary are classed as 'Allied or Associated Powers' and under the Treaties it is entirely clear that none of them is held liable for any damage suffered by American nationals resulting from acts of the Austro-Hungarian Government or its agents during either the period of American neutrality or American belligerency".

411 This is the position of Wladyslaw CZAPLINSKI, p. 349, analysing the case of *Dzierzbicki v. District Electric Association of Czestochowa* (*infra*, note 412). The case of *Niemiec and Niemiec v. Bialobrodziec and Polish State Treasury* (*infra*, note 414) is interpreted by D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 163, as showing that after its independence "Poland did not become liable for the wrongs of its predecessor". See also: D.P. O'CONNELL, *State Succession*, vol. I, p. 493. For Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, p. 188, this last case confirms his position that there is no succession to obligations arising from the commission of internationally wrongful acts if the obligation to repair is not liquidated before the date of succession.

at the time still part of the Russian Empire.[412] The Court concluded that the new State of Poland should not bear any responsibility for the internationally wrongful acts committed by the predecessor State (Russia) against a Polish national:

> In accordance with the views of the contemporary science of international law, the new State is not the legal successor of the previous State from which it took over part of the territory, and is responsible for the charges and debts only in so far as it has expressly assumed them. There is no reason for not applying this principle to the obligations of the partitioning power arising from the responsibility for damage and losses caused in the course of running railways.[413]

In several other cases, the Supreme Court of Poland frequently held that the Polish State Treasury was not bound to pay damages on account of accidents involving State railways which, at the time of the incident, belonged to Austria-Hungary. It held that Austria was not a new State and that it was the "continuator" of the Dual Monarchy's previous responsibility. This principle was applied in the case of *Niemiec and Niemiec v. Bialobrodziec and Polish State Treasury*.[414] The same solution was also reached by the Supreme Court of Poland in the *Olpinski* case.[415]

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412 *Dzierzbicki v. District Electric Association of Czestochowa*, Supreme Court of Poland, First Division, 21 December 1933, in: *O.S.P.*, 1934, no. 288, in: *Annual Digest*, 1933–1934, at p. 89. A sum was awarded by a Russian Court in Warsaw in April 1914.

413 *Annual Digest*, 1933–1934, at p. 89. The Court also stated: "The Polish State is entirely free of obligations which were incumbent upon any of the partitioning powers with the exception of such obligations as the Polish State had itself assumed". The Court noted that under the peace treaty of Riga entered into by Russia and Poland the new Polish State did not accept responsibility for such obligations.

414 *Niemiec and Niemiec v. Bialobrodziec and Polish State Treasury*, decided by the Supreme Court of Poland, Third Division, 20 February 1923, in: 2 *Annual Digest*, 1923–1924, case no. 33, p. 64. In this case, an incident took place in 1917 in a territory then part of Austria-Hungary where the plaintiffs' building was destroyed by a fire which had allegedly been caused by sparks from the engine of a passing train belonging to Austria's State railways.

415 *Olpinski v. Polish Treasury (Railway Division)*, Supreme Court of Poland, Third Division, 16 April 1921, in: *O.S.P.*, I, no. 15, in: *Annual Digest*, 1919–1922, at p. 63. In this case, an individual had suffered damage in August 1918 caused by the conductor of a train in a territory that was still under Austria-Hungary rule. After the independence of Poland, the plaintiff sued the Polish Treasury on the ground that the Polish State took over Austria-Hungary's State railways on its territory. The Court of First Instance and the Court of Appeal gave judgments in favour of the plaintiff based, *inter alia*, on the principle of legal continuity, according to which the new State takes over obligations localised in territories which it acquired. The two lower courts also rendered their decisions based on the ground that a new State cannot take over assets without taking over liabilities. The Supreme Court of Poland rejected the claim and decided that the plaintiff would have to file suit against the Austrian railway since this State continued to exist after 1918.

Finally, the principle was also applied by a German court in the context of a delict that took place in 1913 in a territory which was then part of Germany and later became Polish.[416] The German *Reichsgericht* found that Poland was not responsible for the sum awarded by a German court for internationally wrongful acts committed by Prussia when the territory was still part of Germany.[417]

c) *German Democratic Republic (1949)*

As previously observed,[418] questions of State succession to the obligations arising from internationally wrongful acts committed before 1949 do not arise in the context of the Federal Republic of Germany, as it is considered the legal "continuator" of the German Reich. The issue only arises with respect to the German Democratic Republic (G.D.R.). The official position of the G.D.R. concerning its legal status is confused, as it was modified several times.[419] Its final position was adopted in 1956. The G.D.R. was of the view that there were two different *new* States in Germany and that both States were *successor States* to the German Reich, which had disappeared.[420] The G.D.R. therefore believed that this was a case of a disso-

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416 *Baron A. v. Prussian Treasury*, Germany, Reichsgericht in Civil Matters, 19 December 1923, in: *E.R.Z.*, vol. 107, p. 382, in: *Annual Digest*, 1923–1924, p. 60. This case involved an action introduced in 1913 by the legal predecessor of the plaintiff (the owner of some landed property) against the Prussian State for damage caused to him in consequence of some irrigation works undertaken by Prussia. The case was decided in favour of the plaintiff by the District Court of Danzig (May 1913) and by the Court of Marienwerder (Prussia, June 1920).

417 Prussia contended that, *inter alia*, as the land in question was now situated in Poland, the latter should be held responsible for the amount claimed by the plaintiff and that German courts could not assume jurisdiction in an action that was in fact against a foreign State. The German Court indicated that in accordance with Article 256 of the *Treaty of Versailles* Poland acquired all the property of Germany and of the German State in the ceded territories. However, it also indicated that Poland, in the absence of a special agreement, was not responsible for the payment of the sum claimed by the plaintiff.

418 This point is discussed at *supra*, p. 84.

419 This official position, as well as the relevant case law and doctrine, is discussed in: B. GUERIN, *L'évolution du statut juridique de l'Allemagne de 1945 au traité fondamental*, Düsseldorf, Droste, 1978, at pp. 97–105. During a first period (1949–1951), the G.D.R. considered itself as *identical* with the German Reich. At the time, the G.D.R. viewed itself as representing Germany as a whole. This position was radically changed by a decision of the District Court of Appeal ("*Oberlandesgericht*") of Schwerin of 18 June 1951 (in: *NJ*, 1951, pp. 468 et seq.) and by another one of the G.D.R.'s "*Oberlandesgericht*" of 31 October 1951 (in: *NJ*, 1952, pp. 222 et seq.), where it was held that the German Reich had disappeared as a result of the War by *debellatio*. According to this new position, the G.D.R. was a different State and, most importantly, it was *not a successor State*. This position prevailed until 1956.

420 B. GUERIN, *Id*, pp. 109 et seq., provides many examples illustrating this new position of the G.D.R.

lution of a State. The prevailing view in doctrine, however, was that in 1949 the G.D.R. was a new State which had in effect "seceded" from the German Reich.[421] This position is adopted in the present study. However, it is clear that the example of the G.D.R. is very complex and that many other interpretations are possible. It could even be argued that this is not a case of State succession at all.

The question of international responsibility which arose at the time was whether the G.D.R. (as a new successor State) should be held responsible for the obligations arising from internationally wrongful acts committed by Nazi Germany.[422] The official position taken by the authorities of the G.D.R. was that it was a new State "ideologically" totally different from the predecessor State and that, consequently, it could not be held responsible for obligations arising from internationally wrongful acts committed by the German Reich. One illustration of that is the position adopted by the G.D.R. with respect to the claim of Libya for damages arising from the presence of remnants of the Second World War on its territory. The G.D.R. refused to cooperate with Libya on the ground that it could not be held accountable for the acts committed by the Third Reich.[423] Two examples are examined below which may be interpreted as exceptions to the official position taken by the G.D.R.[424]

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421 Stefan OETER, "German Unification and State Succession", 51(2) *Z.a.ö.R.V.*, 1991, at pp. 350–351, explains that the dominant interpretation in doctrine is that the G.D.R. had in fact seceded but that the secession was "provisional" and not "final" since no final settlement on the status of Germany had been reached. He quotes the following writers supporting this view: G. RESS, "Germany, Legal Status after World War II", in: R. BERNHARDT (ed.), *Encyclopaedia of Public International Law*, vol. 10, North Holland, Max Planck Institute, 1984, p. 199; J.A. FROWEIN, "Die Rechtslage Deutschlands und der Status Berlins", in: Ernst BENDA, Werner MAIHOFER & Hans-Jochen VOGEL (eds.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, Berlin, Walter de Gruyter, 1983, pp. 29 et seq., at p. 48; G. RESS, "Grundlagen und Entwicklung der innerdeutschen Beziehungen", in: J. ISENSEE & P. KIRCHHOF (eds.), *Handbuch des Staatsrechts*, vol. I, Heidelberg, Müller, 1987, pp. 449 et seq., at p. 492. This is also the position of K. HEILBRONNER, "Legal Aspects of the Unification of the Two German States", 2 *E.J.I.L.*, 1991, at p. 21, indicating that "the process of German division and secession of the GDR remained provisional until a final settlement on Germany as a whole could be achieved with the Four Powers".

422 The question of Germany's responsibility under international law for the commission of past internationally wrongful acts is addressed in: Bert-Wolfgang EICHHORN, *Reparation als völkerrechtliche Deliktshaftung: Rechtliche und praktische Probleme unter besonderer Berücksichtigung Deutschlands (1918–1990)*, Baden Baden, Nomos Verlagsgesellschaft mbH & Co. KG, 1992.

423 This point is discussed in: Ali DAWI, *Les problèmes juridiques internationaux posés par les restes matériels des guerres, notamment en Libye*, doctoral thesis, Université d'Orléans (France), 1994, at p. 105.

424 These two examples are discussed at *infra*, pp. 165–168.

d) *Union of Soviet Socialist Republics (1991)*

i) *Introduction*

The break-up of the U.S.S.R. was officially completed with the establishment of the Commonwealth of Independent States (C.I.S.).[425] It was agreed among the former Republics (with the exception of the three Baltic States[426] and Georgia)[427] that Russia would be considered as the "*continuator*" of the international legal personality of the U.S.S.R. in international organisations and, in particular, at the United Nations Security Council.[428] This decision was largely accepted by other States in the international community.[429] Doctrine has, however, been divided on the question whether Russia should indeed be considered as the continuing State of the U.S.S.R.[430]

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425 The C.I.S. was first formed by Russia, Belarus and Ukraine on the basis of the *Minsk Agreement* of 8 December 1991 (*The Agreement Establishing the Commonwealth of Independent States*, U.N. Doc. A/46/771 (13 December 1991), in: 31 *I.L.M.*, 1992, p. 138). As a result of the *Declaration of Alma Ata*, 21 December 1991, U.N. Doc. A/46/60 (30 December 1991), in: 31 *I.L.M.*, 1992, p. 147, the C.I.S. was expended to eleven of the former fifteen Republics.

426 The three Baltic States never became members of the C.I.S.

427 Georgia only became a member of the C.I.S. in October 1993.

428 *Declaration of Alma Ata*, 21 December 1991, U.N. Doc. A/46/60 (30 December 1991), in: 31 *I.L.M.*, 1992, p. 147. See also the *Decision by the Council of Heads of State of the Commonwealth of Independent States*, 21 December 1991, in: 31 *I.L.M.*, 1992, p. 151, and Letter of Russia's President Mr Elstin to the U.N. Secretary General, 24 December 1991, in: 31 *I.L.M.*, 1992, p. 138. On this question, see: Yehuda Z. BLUM, "Russia Takes over the Soviet Union's Seat at the United Nations", 3(2) *E.J.I.L.*, 1993, pp. 354–361.

429 See, for instance, the position of the European Union examined by Pieter Jan KUYPER, "The Community and State Succession in Respect of Treaties", in: D. CURTIN & T. HEUKELS (eds.), *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, vol. II, Dordrecht, Martinus Nijhoff Publ., 1994, pp. 633–635. On the position of the United States government, see: Edwin D. WILLIAMSON & John E. OSBORN, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Break-up of the U.S.S.R. and Yugoslavia", 33 *Va.J.Int'l L.*, 1992–93, pp. 264–271; Lucinda LOVE, "International Agreement Obligations After the Soviet Union's Break-up: Current United States Practice and Its Consistency with International Law", 26(2) *Vanderbilt J. Transnatl L.*, 1993, p. 373. State practice is analysed in: Konrad G. BÜHLER, "State Succession, Identity/Continuity and Membership in the United Nations", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 258–263.

430 These writers support the position of "continuity": Rein MULLERSON, "Law and Politics in Succession of States: International Law on Succession of States", in: Geneviève BURDEAU & Brigitte STERN (eds.), *Dissolution, continuation et succession en Europe de l'Est*, Paris, Cedin-Paris I, 1994, p. 19; Michael BOTHE & Christian SCHMIDT, "Sur quelques questions de succession posées par la dissolution de l'URSS

The question whether the break-up of the U.S.S.R. should be regarded as a case of State dissolution or rather a series of secessions is also controversial. The only non-controversial point is that the three Baltic States are regarded not as new States (and not as successor States of the U.S.S.R.) but as identical to the three Baltic States that existed before their 1940 illegal annexation by the U.S.S.R.[431] It has been suggested in doctrine that because Russia is the continuator of the U.S.S.R.,

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et celle de la Yougoslavie", 96 *R.G.D.I.P.*, 1992, p. 824; Martti KOSKENNIEMI & M. LETHO, "La succession d'États dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande", 38 *A.F.D.I.*, 1992, pp. 189–190. Other writers support the other view that Russia is not the "continuator" of the U.S.S.R. but a new State: R. RICH, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", 4(1) *E.J.I.L.*, 1993, p. 45; Yehuda Z. BLUM, "Russia Takes over the Soviet Union's Seat at the United Nations", 3(2) *E.J.I.L.*, 1993, pp. 357–359; H. TICHY, "Two Recent Cases of State Succession: An Austrian Perspective", 44 *Ö.Z.ö.R.V.*, 1992, p. 130. Other writers sharing this view are referred to in: Konrad G. BÜHLER, "State Succession, Identity/Continuity and Membership in the United Nations", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *Ibid.*, p. 256, as well as in: Tarja LANGSTÖM, "The Dissolution of the Soviet Union in the Light of the 1978 Vienna Convention on Succession of States in Respect to Treaties", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *Ibid.*, pp. 723–724.

431 Most States did not recognise the Soviet annexation. This is, for instance, the position of the United States: "Statement of Under Secretary of State, the Hon. Sumner Welles", in: *The Department of State Bulletin*, 21 July 1940, vol. III (no. 57), p. 48; *Restatement (Third), Foreign Relations Law of the United States*, Vol. I, St. Paul, American Law Institute Publ., 1987, § 202, "Reporters' Notes" no. 6. On this point, see: William J.H. HOUGH III, "The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory", 6 *N.Y.Sch.J.Int'l. & Comp.L.*, 1985, p. 391; Roman YAKEMTCHOUK, "Les Républiques Baltes en droit international: échec d'une annexion opérée en violation du droit des gens", 37 *A.F.D.I.*, 1991, p. 284. Lithuania first made a declaration of independence on 11 March 1990. It was soon followed by Estonia (on 30 March 1990, suspended until 20 August 1991) and Latvia (on 4 May 1990, suspended until 21 August 1991). The independence of the three States was recognised by the U.S.S.R. on 6 September 1991. On 17 September 1991, the three Baltic States were admitted to the United Nations (U.N. General Assembly Res. 46/4, 46/5 and 46/6, in: 31 *I.L.M.*, 1992, p. 138). On this question, see: R. KHERAD, "La reconnaissance internationale des États baltes", 96 *R.G.D.I.P.*, 1992, pp. 843–872; Jacques HUNTZINGER, "La reconnaissance des États baltes", in: *L'État souverain à l'aube du XXI^e siècle*, S.F.D.I., Colloque de Nancy, Paris, Pedone, 1994, pp. 41–60. The three Baltic States are not considered by member States of the European Union as "new" States: *Declaration of European Community Foreign Ministers*, Brussels, 27 August 1991, in: 62 *British Y.I.L.*, 1991, p. 558. This is also the position held in doctrine: Rein MULLERSON, "Law and Politics in Succession of States: International Law on Succession of States", in: Geneviève BURDEAU & Brigitte STERN (eds.), *Dissolution, continuation et succession en Europe de l'Est*, Paris, Cedin-Paris I, 1994, pp. 26–27; Michael BOTHE & Christian SCHMIDT, "Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie", 96 *R.G.D.I.P.*, 1992, pp. 822–823; Martti KOSKENNIEMI & M. LETHO, "La succession d'États dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande", 38 *A.F.D.I.*, 1992, p. 27.

all other former Republics seceded from the Union.[432] Others have even described the former Republics (except for Russia) as Newly Independent States.[433]

The affirmation that Russia is the "continuator" State of the U.S.S.R. is clearly based on a legal fiction.[434] Thus, the U.S.S.R. did in fact cease to exist as a result of both the *Declaration of Alma Ata* and the *Minsk Agreement*.[435] Logically, Russia could not continue the existence of a State which had ceased to exist: there is no "resurrection" of States in international law.[436] From a logical point of view, the break-up of the U.S.S.R. should be regarded as a case of State dissolution rather than a series of secessions by the former Republics.[437] The fact remains, however, that all States concerned viewed Russia as the *continuing State* of the U.S.S.R. Since all States concerned (including Russia itself) view Russia as the continuing State of the U.S.S.R., for *practical reasons* the following three examples of State practice will be analysed with the assumption that the break-up of the U.S.S.R. resulted from a series of secessions by the former Republics (except for the Baltic States).

The first two examples are treaties entered into by Russia with, on the one hand, Germany, and, on the other hand, France, whereby the Russian Federation (as the

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432 Rein MULLERSON, *Ibid.*, p. 19; W. CZAPLINSKI, "La continuité, l'identité et la succession d'États—évaluation de cas récents", 26 *R.B.D.I.*, 1993, p. 388; Martti KOSKENNIEMI, "Report of the Director of Studies of the English-Speaking Section of the Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 71, 119 et seq.; Photini PAZARTZIS, *La succession d'Etats aux traités multilatéraux à la lumière des mutations territoriales récentes*, Paris, Pedone, 2002, pp. 55–56.

433 Andrew BEATO, "Newly Independent and Separating States' Succession to Treaties: Consideration on the Hybrid Dependency of the Republic of the Former Soviet Union", 9(2) *Am.U.J.Int'l L.& Pol'y*, 1994, p. 536. See also the comments by: Detlev F. VAGTS, "State Succession: The Codifiers' View", 33 *Va.J.Int'l L.*, 1992/93, p. 278; Tarja LANGSTöM, "The Dissolution of the Soviet Union in the Light of the 1978 Vienna Convention on Succession of States in Respect to Treaties", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *Ibid.*, pp. 734–735.

434 Of the same view: Pierre Michel EISEMANN, "Rapport du Directeur de la section de langue française du Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *Ibid.*, at p. 40.

435 The preamble to the *Minsk Agreement* (*The Agreement Establishing the Commonwealth of Independent States*, U.N. Doc. A/46/771 (13 December 1991), in: 31 *I.L.M.*, 1992, p. 138) clearly states that the U.S.S.R. "as a subject of international law and geopolitical reality no longer exists". The *Alma Ata Declaration* (21 December 1991, U.N. Doc. A/46/60 (30 December 1991), in: 31 *I.L.M.*, 1992, p. 147) also mentions that "with the establishment of the C.I.S., the U.S.S.R. ceases to exist".

436 Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, p. 6: "There is no legal resurrection in international law. Once a State has become extinct, it cannot resume a continued existence".

437 On this point: Patrick DUMBERRY & Daniel TURP, "La succession d'États en matière de traités et le cas de la sécession: du principe de la table rase à l'émergence d'une présomption de continuité des traités", *R.B.D.I.*, 2003–2, p. 377, at p. 401.

continuing State of the U.S.S.R.) continued its responsibility for the internationally wrongful acts committed by the U.S.S.R. during and after the Second World War and by Russia after the 1917 Revolution. The third example deals with a Lithuanian law requesting compensation from the Russian Federation, as the continuing State, for damage resulting from its annexation and occupation by the U.S.S.R. (1940–1990). These three examples illustrate the principle that whenever a State does not cease to exist as a result of territorial transformations, it should remain responsible for internationally wrongful acts it committed in the past.

ii) *The Pillage of Works of Art and Cultural Property in Germany during and after the Second World War*

During the Second World War, German troops seized numerous works of art in each of the occupied territories and brought them to Germany. The pillage, as well as the destruction, was particularly important in the territory of the U.S.S.R. The victory of the Red Army in 1945 was also followed by the pillage of works of art and cultural property in Germany. It is thus estimated that more than 2.5 million works of art were transferred from Germany to the Soviet Union at the time.[438] Some of these works of art were returned to the German Democratic Republic in the 1950s and 1960s.[439] Up until recently, the content and the location of these treasures remained largely unknown.

Before the break-up of the U.S.S.R., two treaties were entered into on 9 November 1990 between the U.S.S.R. and the Federal Republic of Germany.[440] The substance of Article 16 of the *1990 German-Soviet Union Good-Neighbourliness Treaty*[441] was later reaffirmed in a *Cultural Agreement* entered into in 1992 (i.e. after the

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438 An official 1958 statement of the Central Committee of the Communist Party of the Soviet Union makes reference to some "2,614,874 objects of art and culture located in the U.S.S.R". During the 1994 negotiations between Russia and Germany, the latter listed some two hundred thousand works of art, two million books as well as three kilometres of archives to be restituted to museums, libraries, archives and collections in Germany (see para. 4 of the Bonn Protocol of 30 June 1994). These issues are further discussed in: Wilfried FIEDLER, "Legal Issues Bearing on the Restitution of German Cultural Property in Russia", in: E. SIMPSON (ed.), *The Spoils of War—World War II and its Aftermath: the Loss, Reappearance, and Recovery of Cultural Property*, New York, Harry N. Abrams, 1997, pp. 175–180.

439 This aspect is discussed at *infra*, p. 325.

440 *Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good-Neighbourliness Partnership and Cooperation*, 9 November 1990, in: 30 *I.L.M.*, 1991, p. 505; *R.G.D.I.P.*, 1991, p. 214. *Treaty on the Development of Comprehensive Cooperation in the Field of Trade, Industry, Science and Technology*, 9 November 1990, in: *BGBl.* 1991, vol. II, p. 700.

441 Article 16 of the Treaty reads as follows: "The Federal Republic of Germany and the Union of Soviet Socialist Republics will seek to ensure the preservation of cultural treasures of the other side in their territory. They agree that missing or unlawfully removed art treasures which are located in their territory will be returned to the owners or their legal successors".

break-up of the Soviet Union) between Germany and Russia, where the parties committed to the restitution of cultural property which was "lost" or "unlawfully brought into the territory" of Russia.[442] This provision thus contains the commitment by Russia (as the continuing State of the U.S.S.R.) to provide reparation to Germany (in the form of the restitution of German cultural property) as a result of internationally wrongful acts committed by the Soviet Union (i.e. the cultural property "unlawfully brought" into its territory).[443] It should be noted that negotiations between the two States to secure the restitution of cultural property have so far remained unfruitful.[444]

iii) *Measures of Expropriation of French Bonds after the 1917 Revolution*

Private and public pre-revolutionary Russian bonds issued in France were nationalised as a result of the Russian Revolution of 1917. Since then, the U.S.S.R. had always refused to compensate the hundreds of thousands of private owners of bonds on the ground that the revolutionary Soviet government was not bound by the debts contracted by the previous Tsarist government.

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442 *Abkommen Zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über kulturelle Zusammenarbeit*, 16 December 1992, in: *BGBl*., 1993, vol. II, p. 1256, see at Article 15.

443 The legal issues on the question of the restitution of cultural property between Russia and Germany are discussed in: Wilfried FIEDLER, "Legal Issues Bearing on the Restitution of German Cultural Property in Russia", in: E. SIMPSON (ed.), *The Spoils of War—World War II and its Aftermath: the Loss, Reappearance, and Recovery of Cultural Property*, New York, Harry N. Abrams, 1997, pp. 175–180; A. HILLER, "The German-Russian Negotiation over the Content of the Russian Repositories", in: E. SIMPSON (ed.), *Id*; A. GATTINI, "Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War", 7(1) *E.J.I.L*., 1996, pp. 66–88; Stephan WILSKE, "International Law and the Spoils of War: To the Victor the Right of Spoils?: The Claims for Repatriation of Art Removed from Germany by the Soviet Army During or as a Result of World War II", 3 *U.C.L.A. J.I.L.F.A.*, 1998, p. 223.

444 A dispute arose between the two States concerning the interpretation to be given to Article 15 of the 1992 Treaty. In 1997, a Russian law was passed stating that all cultural properties brought to Russia as a result of the Second World War were now properties of the Russian Federation and that, consequently, no restitution (with some exceptions) would be made to Germany: *Federal Law on Cultural Values Removed to the USSR as a Result of World War II and Located in the Territory of the Russian Federation*, 5 February 1997, in: *Spoils of War, International Newsletter*, no. 4, August 1997, pp. 10–19. The law is discussed in detail in: Pierre D'ARGENT, "La loi russe sur les biens culturels transférés: Beutekunst, agression, réparations et contre-mesures", *A.F.D.I.*, 1998, pp. 114–143; A. GATTINI, "Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War", 7(1) *E.J.I.L*., 1996, pp. 66–88. The constitutionality of the law was upheld by the Russian Constitutional Court in its Decision of 20 July 1999. This decision is discussed in: Alexander BLANKENAGEL, "Eyes Wide Shut: Displaced Cultural Objects in Russian Law and Adjudication", 8(4) *E.E.C.R.*, 1999, at pp. 75–80.

The 1917 Revolution led not only to a radical change of form of government but also to some important losses of territory. The changes have traditionally been analysed from the angle of a *succession of government*, whereby the new revolutionary government was held to be bound by the international obligations undertaken by the previous monarchist government.[445] These transformations can also be viewed as a problem of *succession of States*. Thus, the U.S.S.R. (which was officially created in 1922) did not have the same territory as the Russian Empire just before the Revolution.[446] At any rate, from 1922 on the U.S.S.R. should certainly be viewed as the *continuing State* of the Russian State which emerged from the 1917 Revolution. Consequently, it should be held responsible for the acts committed in Russia between 1917 and 1922 (including any measures of expropriation).

A final settlement of reciprocal financial and property demands was signed by the Federation of Russia and France on 27 May 1997.[447] The agreement provided

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445 The firm position of Western States on this question is well-illustrated by this 1921 official communication from the British government to Mr Krassin, the agent of the Soviet Union in London: "The first [question] is that of the acceptance by the Soviet Government of the obligations which had been entered into and were binding upon previous Government in Russia. The accepted rule among civilized States is that contracts made by and debts incurred by a Government are to be regarded as the obligations of the nation it represented and not as the personal engagements of the ruler. Although the form of Government may change, the people remain bound" (in: Lord McNAIR, *International Law Opinions*, vol. I, Cambridge, Cambridge Univ. Press, 1956, at p. 9). The same position is also clearly expressed in the British-French joint declaration of 28 March 1918: "Aucun principe n'est mieux établi que celui d'après lequel une nation est responsable des actes de son gouvernement sans qu'un changement d'autorité affecte les obligations encourues: ces engagements ne peuvent être répudiés par aucune autorité, quelle qu'elle soit, sans quoi la base même du droit international se trouverait ébranlée" (in: Paul FAUCHILLE, *Traité de droit international public*, vol. I (1st Part), 8th ed., Paris, Librairie A. Rousseau, 1922, at p. 342). The question is further discussed in: Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, at pp. 34 et seq.

446 In 1922, the Soviet Union was comprised of four Soviet Republics: Russia, Ukraine, Byelorussia and the "Transcaucasian Soviet Federated Socialist Republic" (which existed from 1922 to 1936 and was composed of Georgia, Armenia and Azerbaijan). It no longer included Bessarabia which had been transferred to Romania. Also, new States were created on what used to be the territory of the Empire (Poland, the Baltic States, Finland, etc.).

447 *Accord du 27 mai 1997 entre le Gouvernement de la République française et le Gouvernement de la Fédération de Russie sur le règlement définitif des créances réciproques financières et réelles apparues antérieurement au 9 mai 1945*. The Agreement and the Memorandum of 26 November 1996 for mutual understanding were approved by the French National Assembly on 19 December 1997 (Bill No. 97–1160, in: *J.O.R.F.*, 15 May 1998). The historical background and a comprehensive analysis of the Agreement can be found in: Sandra SZUREK, "Epilogue d'un contentieux historique. L'accord sur le règlement des créances réciproques entre la France et la Russie", 44 *A.F.D.I.*, 1998, pp. 144–166; P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, and, in particular, the article by Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", at pp. 53–78.

that Russia pay France US$ 400 million in exchange for both signatories giving up financial and property claims (which arose before May 1945) on their own behalf or on behalf of their national corporations and individuals.[448] Even if the measures of expropriation taken by the Soviet authorities against French property, rights and assets without any compensation were undoubtedly internationally wrongful acts,[449] the settlement reached between the Parties is, however, clearly *ex gratia* in the sense that Russia does not recognise any legal responsibility for the acts committed after the 1917 Revolution.[450] In this agreement, the Federation of Russia is therefore viewed as the continuing State of the Soviet Union, which was itself the "continuator" of the Russian State existing between 1917 and 1922.[451]

iv) *The Lithuanian* Law on Compensation of Damage Resulting from the Occupation by the U.S.S.R.

It was observed earlier that the three Baltic States are regarded not as new States but as identical to the three Baltic States that existed before their 1940 illegal

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448 The Agreement covers the following type of claims: all loans and bonds issued/guaranteed to the French government or French individuals (including corporations) by the Government of the Russian Empire before 7 November 1917; claims concerning interests and assets based in territories ruled by the Government of the Russian Empire and subsequent governments to which the French government or private and legal persons were deprived of property or ownership rights. A French Commission was set up to deal with the compensation procedure.

449 On this question, see: Payam SHAHRJERDI, "L'indemnisation à raison des mesures soviétiques de nationalisation ou d'expropriation à l'encontre de biens français", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, pp. 89–120. This is also the position of Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN, (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, at pp. 53–78.

450 Article 7 of the Agreement of 27 May 1997 reads as follows: "Le versement de la somme mentionnée à l'article 3 du présent Accord n'est pas réputé valoir reconnaissance par l'une ou l'autre Partie de l'existence d'une responsabilité lui incombant au titre de quelque créance que ce soit réglée par le présent Accord, ni valoir confirmation de la réalité juridique de l'une quelconque desdites créances". This is discussed in: Sandra SZUREK, "Epilogue d'un contentieux historique. L'accord sur le règlement des créances réciproques entre la France et la Russie", 44 *A.F.D.I.*, 1998, p. 157.

451 Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, at pp. 76–77, concludes to the automatic transmission to the Russian Federation of all international responsibility of the U.S.S.R. on the ground that Russia was its "*continuator*". He also notes that even if Russia was not considered to be the continuing State of the U.S.S.R., the international responsibility of the U.S.S.R. (including the consequences for the commission of internationally wrongful acts) would pass in equitable proportion to the new States (including Russia).

annexation by the U.S.S.R.[452] Lithuania passed in June 2000 a *Law on Compensation of Damage Resulting from the Occupation by the U.S.S.R.*[453] The other two Baltic States have not passed any similar laws. The scope of the Law covers (at Article 1) the U.S.S.R.'s occupation of Lithuania and damage which occurred during the period 1940–1990.[454] The Law provides (at Article 2) for the Government of Lithuania to submit an estimate of damages inflicted by the Soviet occupation and to set up a delegation for conducting negotiations with Russia for compensation. Not surprisingly, Russia refused to enter into any such negotiations and rejected the very idea that any compensation could be provided to Lithuania.[455]

Lithuania is of the view that the Russian Federation is the continuing State of the U.S.S.R. and therefore remains responsible for the internationally wrongful acts committed by the U.S.S.R. during the period 1940–1990.[456]

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452 This question is discussed at *supra*, note 431.

453 *Valstybės žinios*, (2000) No. 52–1486, Law VIII–1727, of 13 June 2000 (English text available on the search engine of the Internet site of the Parliament of Lithuania: <http://www.lrs.lt/>), also in: *Foreign Power*, *Excerpts from Lithuanian Laws on Communism, Occupation, Resistance*, paper of the Seimas (Parliament) of the Republic of Lithuania, 2000, at p. 32. For a commentary on the Law: Dainius ZALIMAS, "Commentary on the Law of the Republic of Lithuania on Compensation of Damage Resulting from the Occupation of the USSR", 3 *Baltic Y.I.L.*, 2003, pp. 97–163. This Law and, more generally, the issue of reparation in the context of the annexation of the Baltic States by the U.S.S.R. is further discussed in: Lauri MÄLKSOO, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (A Study of the Tension between Normativity and Power in International Law)*, Leiden, Martinus Nijhoff Publ., 2003, at pp. 258–263. See also: Rytis SATKAUSKAS, "A Bill for the Occupants or an Issue to negotiate?: the Claims of Reparations for Soviet Occupation", 3 *Baltic Y.I.L.*, 2003, pp. 77–96; Lauri MAELKSOO, "State Responsibility and the Challenge of the Realist Paradigm: the Demand of Baltic Victims of Soviet Mass Repressions for Compensation from Russia", 3 *Baltic Y.I.L.*, 2003, pp. 57–76; Ineta ZIEMELE, "State Continuity, Succession and Responsibility: Reparations to the Baltic States and their Peoples" 3 *Baltic Y.I.L.*, 2003, pp. 165–189.

454 The Law indicates that it includes "the damage caused to the Lithuanian people deported and forcibly detained in the U.S.S.R. territory during 1941–1945, as well as the damage inflicted by the U.S.S.R. Army and repression structures during that period". The Law also extends to "damage caused by the U.S.S.R., its repression structures and the army during 1990–1991". Finally, the Law also covers damage caused by the Army of the U.S.S.R. (and the Russian Federation) which occurred after the declaration of independence (11 March 1990).

455 A. AVDEEV, "Russian-Lithuanian Relations: An Overview", 2(6) *Lithuanian Foreign Policy Review*, 2000, pp. 27–33, at p. 29 (quoted in: Lauri MÄLKSOO, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (A Study of the Tension between Normativity and Power in International Law)*, Leiden, Martinus Nijhoff Publ., 2003, at p. 260).

456 The preamble to the Law indicates that "according to international law, the Russian Federation is the state continuing the rights and obligations of the U.S.S.R".

e) *Kingdom of the Netherlands (1815)*

The Kingdom of Holland, an independent State, was formally annexed by the French Empire in 1810 (it had already been under French domination for quite some time).[457] Holland regained its independence in 1815 with the creation of the Kingdom of the Netherlands (consisting of modern day Netherlands, Belgium and Luxembourg).

After the independence of the Kingdom of the Netherlands, the United States brought several claims against the Netherlands (as the new successor State) for damage suffered by U.S. ships as a result of their seizure in Dutch ports in 1809 and 1810.[458] It is important to note that these internationally wrongful acts were committed *before* the date of the Kingdom of Holland's formal annexation by France in July 1810 but, at any rate, at the time of strong French domination.[459]

A series of correspondence followed between representatives of the United States and the Kingdom of the Netherlands. The United States took the view that the new State was responsible for obligations arising from the internationally wrongful acts.[460] In response, the Kingdom of the Netherlands indicated that at the time

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457 Prior to this formal annexation, the region was already under strong French influence since 1795 as an aftermath of the French Revolution. After that date, Holland remained nonetheless an independent State known as the Batavian Republic. In 1806 Napoleon Bonaparte compelled the Batavian Republic to "request" Louis Napoleon Bonaparte (Napoleon Bonaparte's brother) to accept the crown of the newly-founded Kingdom of Holland. This period of direct French domination lasted for four years until Louis Napoleon Bonaparte abdicated on 1 July 1810. The Kingdom of Holland was formally annexed into France by a Royal Decree of 9 July 1810.

458 This case is referred to by the following writers: Jean-Philippe MONNIER, pp. 74–75; D.P. O'CONNELL, *State Succession*, vol. I, p. 486; Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 506; Hazem M. ATLAM, p. 205; Michael John VOLKOVITSCH, pp. 2178, 2181. The complete history of the events that led to the claim (as well as the negotiations which followed) is provided in: Letter of U.S. Secretary of State Mr Fish to Mr de Westenberg, 9 April 1873, in: Francis WHARTON, *A Digest of the International Law of the United States*, vol. II, Washington, 1888, p. 49, see at pp. 50 et seq. Another complete picture of the events is found in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. V, Washington, G.P.O., 1898, at pp. 4473–4476.

459 The fact that the events took place before July 1810 is clear from the reading of this passage from the Letter of U.S. Secretary of State Mr Fish to Mr de Westenberg, 9 April 1873, in: Francis WHARTON, *Ibid.*, at p. 51: "During these frequent changes, and *mainly during the last two years of the reign of Louis Bonaparte*, several vessels of the United States and their cargoes were seized and condemned or confiscated in the port which had before then formed the territorial domain of their High Mightiness the States-General" (emphasis added).

460 Letter of U.S. Secretary of State John Quincy Adams dated 10 August 1818, quoted in: Letter of U.S. Secretary of State Mr Fish to Mr de Westenberg, 9 April 1873, in: Francis WHARTON, *Ibid.*, at p. 53. This is the relevant quote from the letter: "The rights and obligations of a nation in regard to the other States are independent of its

of the commission of the acts, "Holland had ceased for a long time to form an independent State" and that it was in effect under a foreign State's occupation. In its view, the Kingdom of the Netherlands could not be held responsible for acts which had been, in fact, committed by the French authorities.[461] Faced with this firm denial of responsibility from the Kingdom of the Netherlands, the United States finally decided to drop the claims a few years later.[462]

Subsequently, the owners of the ships that had been seized took their case before a U.S. internal commission which had been established by the Convention of 4 July 1831 between France and the United States.[463] In 1831, the commission ruled in favour of the claimants and held France responsible for damages.[464]

This case has been interpreted by some as an example supporting the view that a new State should not be held responsible for obligations arising from internationally wrongful acts committed by the predecessor State and that the continuing State should remain responsible for such acts.[465] The particular feature of this case is, however, that the acts had not been committed (at least formally) by the predecessor State (France) but by the Kingdom of Holland (which was formally annexed by France after the events).

There is another possible interpretation of this example. It is an illustration of the principle that France (the continuing State) should remain responsible for the

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internal revolution of government… [A]nd when the King of the Netherlands came to the sovereignty of the country he assumed with it the obligation of repairing the injustices against other nations which had been committed by his predecessor, however free from all participation in them he had been himself".

461 Letter of Baron de Nazel dated 14 June 1819, quoted in: Letter of U.S. Secretary of State Fish, *Id.* (in: Francis WHARTON, *Ibid.*, at p. 51). This is the relevant quote: "The principle that the present Government of the Netherlands is responsible for all the acts of the predeceding Governments from 1795 to 1813, is one which the King cannot admit without restriction. If it might be admitted in regard to a succession of legitimate Governments, it could not be in regard to a Government established by violence, and which was not itself responsible for the acts to which it was forced by a foreign usurper; that the political nullity of this Government has long been a matter of public notoriety".

462 Thus, U.S. Secretary of State Fish explained in a letter written many years after the events (and dealing with another matter) that the United States finally accepted the view held by the Kingdom of the Netherlands that it was, indeed, a new State and that it had no continuity with the previous State: Letter of U.S. Secretary of State Mr Fish to Mr de Westenberg, 9 April 1873, in: Francis WHARTON, *Ibid.*, see at pp. 50 et seq. at p. 51; *For. Rel.*, V, p. 629.

463 The history and the functioning of this commission can be found in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. V, Washington, G.P.O., 1898, pp. 4447 et seq., see at p. 4460.

464 This case is discussed in: John Bassett MOORE, *Ibid.*, at pp. 4473–4476.

465 This is the position held by Jean Philippe MONNIER, pp. 74–75; A.B. KEITH, *The Theory of State Succession with Specific Reference to English and Colonial Law*, London, 1907, pp. 74–75. *Contra*: Michael John VOLKOVITSCH, p. 2181.

internationally wrongful acts committed *before* its formal annexation of the Kingdom of Holland to the extent that France directed and controlled that State at the time the acts were committed. Under Article 17 of the final I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts*, a State which "directs and controls another State in the commission of an internationally wrongful act" is held internationally responsible for such act.[466] This solution is widely accepted in international case law[467] and by doctrine.[468] Interestingly enough, the Kingdom of the Netherlands emphasised this point in so far as it stated that it could not be held responsible for the acts of the Kingdom of Holland "to which it was forced by a foreign usurper".[469] The decision of the commission in 1831 was also based on the fact that at the time of the commission of the internationally wrongful acts, it was France that was in command in the territory of the Kingdom of Holland. Thus, after having clearly established that during the relevant period of 1809–1810 Holland was "tributary to all the project of France", the commission concluded:

> The brief account which has been given of the political condition of Holland for the year 1809 till it was formally merged in the French empire, sufficiently explains the reason for allowing [the claims]. Holland was already a dependent Kingdom, and Louis [Bonaparte] a merely nominal sovereign. The Treaty [of 16 March 1810 between France and the Kingdom of Holland] was a form; in substance it was an imperial decree.[470]

One likely explanation of the outcome of this case may be found in the application of *principles of State responsibility* rather than of any other "rule" of State succession to international responsibility. This example is therefore only of limited relevance.

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466 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

467 *Affaire des biens britanniques au Maroc Espagnol* (Great-Britain v. Spain), Award of Umpire Huber of 23 October 1924, in: *U.N.R.I.A.A.*, vol. II, p. 639, at pp. 648–649.

468 Paul GUGGENHEIM, *Traité de Droit international public*, t. II, Geneva, Librairie de l'Université, 1954, p. 27 ("[l]'Etat protecteur est responsable indirectement pour l'Etat protégé, s'il conduit lui-même la politique étrangère de ce dernier"); Paul REUTER, *Droit international public*, Paris, P.U.F., 1958, p. 154 ("est internationalement responsable celui qui assure la représentation internationale d'un Etat ou d'un territoire"). See also: D. BARDONNET, *La succession d'Etats à Madagascar: succession au droit conventionnel et aux droits patrimoniaux*, Paris, L.G.D.J., 1970, pp. 304, 306–307.

469 Letter of Baron de Nazel, 14 June 1819, quoted in: Letter of U.S. Secretary of State Mr Fish to Mr de Westenberg, 9 April 1873, in: Francis WHARTON, *A Digest of the International Law of the United States*, vol. II, Washington, 1888, p. 49, at p. 53.

470 The relevant passage from the decision of the commission can be found in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. V, Washington, G.P.O., 1898, at pp. 4473–4474.

5.2 *Examples Where the Principle of Succession was Applied*

This author has found only one *significant* example of State practice where the principle that the continuing State should remain responsible for its own internationally wrongful acts committed before the date of succession was *not* applied. This example arises in the context of the secession of Belgium (1830) (examined at Section a).

Three other less significant examples of State practice where the solution of succession was adopted will also be briefly discussed in this section: the 1926 Treaty between the United States and Panama; the war reparation paid by the G.D.R. to the U.S.S.R. for acts committed by the German Reich during the Second World War; and the offer made by the G.D.R. to Jewish groups to provide compensation for crimes committed by the Third Reich.

a) *Belgium (1830)*

Problems of State succession arose in the context of the struggle for independence of the Belgian provinces which finally ended with their secession from the Kingdom of the Netherlands in November 1830. During the armed revolt, the city of Antwerp (situated in the Belgian provinces) was bombarded in October 1830 by the Dutch forces. During the bombardment, a public warehouse was destroyed in which were stored the goods of several foreigners. Some years later, Austria, Brazil, France, Great Britain, Prussia and the United States submitted claims for compensation for the damage suffered by their nationals.[471]

Great Britain took the view that the Kingdom of the Netherlands (the predecessor and continuing State) "was not liable for the disasters occasioned by the bombardment" of October 1830.[472] Apparently, Austria, Brazil, France and Prussia also adopted the same position.[473] There is also some indication in the diplomatic correspondence of the time that France, Great Britain, Prussia and the United States made a joint application to Belgium (the successor State) requesting compensation for the damage "solely [based] upon the ground that the obligation to indemnify for such losses rested upon the country within which the injury was inflicted".[474]

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471 John Bassett MOORE, *Digest of International Law*, vol. VI, Washington, G.P.O., 1906, at p. 942.

472 This is apparently what the Attorney General of England concluded following a request made by the British Minister of Foreign Affairs. This information is found in: Letter of U.S. Secretary of State Mr Marcy to French Minister Count Sartiges concerning the claims of French subjects as a result of the U.S. bombardment of Greytown in 1854, 26 February 1857, in: MS. Notes to French Leg. VI. 301; S. Ex. Doc. 9, 35 Cong. 1 sess. 3, in: John Bassett MOORE, *Ibid.*, at p. 929.

473 This is the conclusion reached by U.S. Secretary of State, Mr Marcy in a correspondence dated 26 February 1857, *Id.*

474 *Id.*

More information is available with respect to the claims filed by the United States against *both* Belgium and the Kingdom of the Netherlands in the hope that they would come up with a satisfactory and voluntary arrangement as to the proportion of responsibility that each one would bear for the damage suffered by U.S. nationals as a result of the bombardment of October 1830.[475] Accordingly, the United States submitted its claim against the Kingdom of the Netherlands as the actual perpetrator of the act. Apparently, the Dutch government excused its bombardment of the city on the ground of a breach by the Belgian insurgents of a suspension of hostilities which had been agreed upon for the protection of the city.[476] It is not clear from the information available whether or not the Kingdom of the Netherlands ended up paying any compensation to the United States.

The position adopted by the United States towards Belgium is, however, clear: it requested a prompt and speedy settlement of the dispute:

> Policy as well as justice prescribes to Belgium the course she ought to pursue, and the forbearance of the United States in pressing these claims, notwithstanding their urgency and the sufferings of our citizens interested, furnishes a powerful reason for their speedy settlement by the Belgian Government, and imposes additional obligation upon the President [of the United States] who greatly regrets the circumstances which have heretofore occasioned such unexpected delay, to adopt the most prompt and efficient measures for their satisfactory adjustment. It is the [United States] President's wish therefore that you should ascertain whether any measures have been taken by Belgium towards the accomplishment of an object deemed by him of the greatest consequence in the preservation and promotion of those feelings of amity which subsist between the two nations, and to urge upon that government such speedy action on the subject as the equity of the claims, and the length of time which has elapsed since the injuries were sustained clearly demand.[477]

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475 Message of U.S. President Jackson of 5 December 1836, in: *Messages and Papers of the Presidents*, vol. 3, at p. 237, in: John Bassett MOORE, *Digest of International Law*, vol. VI, Washington, G.P.O., 1906, at pp. 947 et seq. The issue is also mentioned in this internal U.S. diplomatic communication: Letter of U.S. Secretary of State Mr Forsyth to Mr Davezac, U.S. Chargé d'Affaires to the Netherlands, 10 September 1836, in: *MS. Inst. Netherlands*, XIV. 24, in: John Bassett MOORE, *Ibid.*, at p. 943. This is the relevant quote taken from the letter: "Had the contest, in the course of which this bombardment took place, terminated favourably to the Netherlands, no doubt is entertained that United States would have had a just claim upon the Government of that country to the indemnification of [United States] citizens for the loss which they had sustained. The fact that the conflict had a different termination can not impair the right of this [United States] Government or its citizens to indemnification; but from which of the countries, or in what proportion from both, the satisfaction is to come it would have been most gratifying to the President [of the United States] to have had determined by themselves. He has accordingly for a long time forborne, notwithstanding the importunity of the sufferers, to urge their claims which appeared to him so just, in the hope that some mutual and voluntary arrangement for their liquidation would have been made ere this between the Governments of Belgium and the Netherlands".

476 John Bassett MOORE, *Ibid.*, at p. 947.

477 Letter of U.S. Secretary of State Mr Forsyth to Mr Maxcy, U.S. Chargé d'affaires to Belgium, 12 June 1837, in: *MS. Inst. Belgium*, I. 24, in: John Bassett MOORE, *Ibid.*, at p. 945.

For the United States, there was no doubt as to the responsibility of the new State of Belgium for the internationally wrongful act committed by the Netherlands against the Belgian city. One of the legal grounds invoked by the United States for Belgium to be held responsible for the action concerned the territorial link between the internationally wrongful act and the tortfeaser, as illustrated by this other internal diplomatic correspondence:

> The governments of the respective merchants whose property was destroyed by the bombardment claimed indemnity for these losses from the Kingdom of Belgium. The ground of the claims was, that the injury was inflicted on a territory which, at the time the reclamation was made, had become a part of Belgium; but Belgium attempted to evade it by alleging that the Dutch government received the property, had it in possession, and destroyed it; and from Holland, and not Belgium, indemnity must be sought.[478]

Another legal argument invoked by the United States was that Belgium should be held responsible based on the well-recognised principle of international law according to which a new government is responsible for the acts committed by the previous government.[479] The position adopted by the United States seems to be based on a fundamental mischaracterisation of the events of November 1830. These events should not be analysed as mere *change of government* but, rather, as the emergence of a *new State*.

In any event, Belgium initially denied its responsibility on the obvious ground that the acts were committed by the Dutch forces and that, therefore, only the Dutch

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478 This assessment of the position taken by the United States concerning the Antwerp bombardment is made in: Letter of U.S. Secretary of State Mr Marcy to French Minister Count Sartiges concerning the claims of French subjects as a result of the U.S. bombardment of Greytown in 1854, 26 February 1857, in: MS. Notes to French Leg. VI. 301; S. Ex. Doc. 9, 35 Cong. 1 sess. 3, in: John Bassett MOORE, *Ibid.*, at pp. 929–930.

479 Letter of U.S. Secretary of State Mr Webster to Mr Maxcy, U.S. Chargé d'Affaires to Belgium, 26 February 1842, in: *MS. Inst. Belgium*, I. 34, in: John Bassett MOORE, *Ibid.*, at pp. 945–947: "There is no doubt that the duty or obligation of indemnity, whatever it is, for the losses at Antwerp, falls upon Belgium. The Belgians, as a civilized people, must be considered at all times under some form of civil government, and however often they may see fit to change this form, these changes cannot affect their just responsibility to any foreign state, its citizens or subjects. Succeeding governments necessarily take upon themselves, so far at least as foreign nations are concerned, the obligations of the governments which preceded them, whether those obligations were created by treaty or by the general principles of national law. It is on this ground that the restored governments of Europe have made indemnities to foreign states for excesses committed on the property of citizens or subjects of these states by the revolutionary governments…The Belgians saw fit to change their government which, so far as foreign nations are concerned, they had a right to do. But in doing this they shook off no national responsibility. The moment the authority of the King of the Netherlands ceased over the Belgians, that moment every one of his obligations towards foreign nations, so far as that part of his Kingdom was concerned, devolved on the new government that succeeded him".

government should be responsible for them.[480] Belgium apparently subsequently changed its initial position and finally agreed to pay compensation to the owners of merchandise which had been destroyed during the incident.[481]

Verzijl described this example as a "clear case of asserted responsibility of a territorial successor to injuries inflicted by its predecessor".[482] This example is indeed one where the successor State took over the obligations arising from internationally wrongful acts committed by the predecessor State. This is the only clear example of State practice in the context of secession where the continuing State did not remain responsible for internationally wrongful acts *it committed* before the date of succession.

The outcome of this case is very surprising. It is also contrary to one principle applicable in the context of State succession (which is further examined below):[483] in cases where the insurgents are successful at establishing a new State, the latter should not be held accountable for internationally wrongful acts committed *by the predecessor State* against third States in its efforts to block the rebels' struggle for independence. The surprising fact that the new successor State was forced to pay compensation for acts for which it had simply nothing to do, and of which it was in fact the victim, may be based on *political* reasons. Thus, at the time of its independence, Belgium was probably not in a position to refuse to provide reparation to the much more powerful claimant States. In other words, the solution adopted in this case can hardly be considered as the foundation of any *general* principle in favour of succession in the context where the predecessor State continues its existence.

b) *Panama (1903)*

In 1903, Panama seceded from Colombia. Many years before (in 1855), a fire broke out in the city of Colon, situated in the Department of Panama, which was then part of the territory of Colombia.[484] The fire caused damage to U.S. nationals. After Panama's secession, the United States submitted a claim against the new State for the acts committed on its territory while it was still part of Colombia. Panama refused to be held responsible. On 28 July 1926, the United States and Panama

480 John Bassett MOORE, *Ibid.*, at p. 947. Belgium also argued that the injuries suffered were due to an unavoidable incident of war.

481 This is, for instance, the conclusion reached by J.H.W. VERZIJL, pp. 226–227.

482 *Id.*

483 See, at *infra*, p. 224.

484 The facts are explained in: Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, pp. 351–352 (at footnote no. 119); J.H.W. VERZIJL, at p. 222. This example is also briefly mentioned in: Miriam PETERSCHMITT, p. 58.

signed a treaty concerning reciprocal claims which arose *after* 1903.[485] The treaty also envisaged *future* arbitration proceedings with respect to the consequences of the 1855 fire in the city of Colon.[486] The two questions that Panama and the United States agreed should be put to a future arbitral tribunal, upon a new convention being entered into, were as follows:

> First, whether the Republic of Colombia incurred any liability for losses sustained by American citizens on account of the fire that took place in the city of Colon on 31 March 1885; and, second, in case there should be determined in the arbitration that there is an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903.

No subsequent convention was entered into by Panama and the United States on this issue and no arbitration ever took place. This example of State practice is therefore less significant, as it remains theoretical. It is nevertheless interesting to note that both the injured State (the United States) and the new successor State (Panama), had, at least theoretically, recognised that the successor State could be held liable for the internationally wrongful act committed by the predecessor State (Colombia) before the date of succession.[487]

c) *War Reparation Paid by the G.D.R. to the U.S.S.R.*

The official position of non-succession adopted by the G.D.R., as described above,[488] did not prevent the U.S.S.R. and Poland from requesting war reparation to the G.D.R. for damage resulting from internationally wrongful acts committed during the Second World War by the predecessor State (the German Reich). In accordance with the *Potsdam Agreement*, Germany was to pay war reparation to

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485 *Claims Convention between the United States and Panama*, signed on 28 July 1926 and ratified on 3 October 1931, in: *L.N.T.S.*, vol. 138, pp. 120–126; in: *U.N.R.I.A.A.*, vol. VI, p. 301. Extracts of the text are reproduced in: Ernest H. FEILCHENFELD, *Id.* (at footnote no. 119). Under the Treaty, both Parties agreed to submit to an arbitral tribunal all claims of their nationals against the other State arising out of events which took place *after* Panama became an independent State in 1903. However, claims for compensation for damage caused in connexion with the construction of the Panama Canal were excluded as they were to be dealt with by the Joint Land Commission under the Panama Canal Convention of 18 November 1903.

486 Article I (para. 2) of the Treaty reads as follows: "Panama agrees in principle to the arbitration of such claims under a Convention to which the Republic of Colombia shall be invited to become a party and which shall provide for the creation or selection of an arbitral tribunal".

487 Thus Panama "agreed in principle to the arbitration of such claims" and for the establishment of an arbitral tribunal to decide "to what extent, if any" it had succeeded to the original liability of the predecessor State.

488 See *supra*, p. 148.

the U.S.S.R. in the form of direct taking and seizure of industrial equipments situated in the German territories occupied by the Soviet Red Army (and in other parts of Eastern Europe).[489] The *Potsdam Agreement* also indicated that "the U.S.S.R. undertakes to settle the reparation claims of Poland from its own share of reparations".[490] A treaty between Poland and the U.S.S.R. subsequently dealt with the allocation between the two States of compensation resulting from war reparation paid by Germany.[491] This reparation regime was essentially enforced during the period of Soviet occupation (1945–1949). It continued for a few years after the official creation of the G.D.R. in 1949. Therefore, after 1949, the reparation regime established under the *Potsdam Agreement* was imposed upon the G.D.R. In a declaration made on 22 August 1953, the U.S.S.R. declared that it no longer requested the payment of any war reparation by the G.D.R.[492] On 23 August 1953, Poland also renounced reparation payments from the G.D.R.[493]

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489 Section IV of the Potsdam Agreements (*Tripartite Agreement by the United States, the United Kingdom and Soviet Russia* as a result of the Berlin-Potsdam Conference held from 17 July to 2 August 1945, in: 68 *U.N.T.S.*, p. 190) dated 2 August 1945, indicates that: "1. Reparation claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R., and from appropriate German external assets". The Treaty also provides (at point 4) that "in addition to the reparations to be taken by the U.S.S.R. from its own zone of occupation, the U.S.S.R. shall receive additionally from the Western Zones" a certain percentage of the industrial capital equipments specified in the Treaty. Finally, in the Treaty (at point 8) the U.S.S.R. "renounces all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foreign assets in all countries" (with the exception of those assets situated in Bulgaria, Finland, Hungary, Romania and Eastern Austria). Similarly (at point 9), the United Kingdom and the United States "renounce all claims in respect of reparations to shares of German enterprises which are located in the Eastern Zone of occupation in Germany, as well as to German foreign assets in Bulgaria, Finland, Hungary, Romania and Eastern Austria".

490 Section IV of the Potsdam Conference, at point 2.

491 *Agreement between the USSR and the Provisional Government of National Unity of Poland Concerning the Reparation of Damage caused by the German Occupation*, Moscow, 16 August 1945, in: *British and Foreign State Papers*, vol. 145, 1943–1945, at pp. 1168–1170. The regime of reparation is further described in: Pierre D'ARGENT, *Les réparations de guerre en droit international public*, Brussels, Bruylant, 2002, pp. 208 et seq.

492 *Protocol Concerning the Discontinuance of German Reparations Payments and Other Measures to Alleviate the Financial and Economic Obligations of the German Democratic Republic Arising in Consequence of the War*, 22 August 1953, in: 221 *U.N.T.S.* p. 129; in: 8 *Europa-Archiv*, 1953, p. 597. In May 1950, the U.S.S.R. had already decided to reduce the total amount in reparation due by the G.D.R., having seized property in an amount of US$ 3.6 billion.

493 Declaration of the Polish People's Republic, in: 9 *Zbior Documentow*, 1953, no. 9, at p. 1830, quoted in: 49 *BVerfG* 169. The relevant quote from the binding declaration reads as follows: "In consideration of the fact that Germany has already complied to a significant extent with its obligation to pay reparations and the fact that the improvements of the economic situation of Germany lies in the interests of its peaceful development, the government of the People's Republic of Poland has resolved, effective January 1, 1954, to waive the reparation payments to Poland, in order to thereby make a further

This example is not entirely significant. Thus, its outcome was dictated by an agreement between the victorious powers after the Second World War and the defeat of Germany, which was not a party to the *Potsdam Agreement*. After the G.D.R. became an independent State (1949), it was part of the Socialist bloc and was not in a position to refute any Soviet claims for compensation. This is therefore ultimately an example driven by Cold War *realpolitik* rather than by the application of any legal principles.

d) *Offer of Compensation Made by the G.D.R. to Jewish Groups*

Notwithstanding its official position of non-succession, the G.D.R. recognised in February 1990 the responsibility of "all Germans" for past crimes committed by the Third Reich against the Jewish people before and during the Second World War.[494] This change of policy was made after the fall of Mr Honecker as General-Secretary of the Socialist Unity Party and as head of the government (October 1989) and after the fall of the Berlin Wall (November 1989). A few months later (in April 1990), the G.D.R. reiterated its acceptance of responsibility for these crimes and pledged to pay DM 6.2 million in compensation in the following years.[495] This marked a radical change from the previous attitude adopted by the G.D.R., which had always rejected any international responsibility for the atrocities committed by the Third Reich against the Jewish people.[496]

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contribution to the resolution of the German question in the spirit of democracy and peace in accordance with the interests of the Polish and all peace-loving people" (quoted in: Rudolf DOLZER, "The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945", 20 *Berkeley J. Int'l L.*, 2002, p. 296, at p. 322). This is discussed in: Wladyslaw CZAPLINSKI, "Property questions in relations between Poland and the Federal Republic of Germany", 29(1–2) *La Pologne et les affaires occidentales*, 1988, at pp. 122–123.

494 The Declaration was attached to a letter dated 1 February 1990 signed by the G.D.R.'s Prime Minister, Mr Modrow, and addressed to the President of the World Jewish Congress, Mr Edgard Bronfman. At that time the question of the amount of reparation was still not settled. The history of the negotiations and the content of the Declaration are discussed in: Gareth WINROW, "East Germany, Israel and the Reparations Issue", 20(1) *Soviet Jewish Affairs*, 1990, at pp. 37 et seq. These facts are also explained in: J. CHARPENTIER, "Pratique française du droit international", 35 *A.F.D.I.*, 1990, p. 986; Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1990, pp. 764–765; G. SCHUSTER, "Volkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1990", 52 *Z.a.ö.R.V.*, 1992, at p. 1026; Pierre D'ARGENT, *Les réparations de guerre en droit international public*, Brussels, Bruylant, 2002, p. 217.

495 This declaration was made before the G.D.R.'s parliament (*Volkskammer*) by its newly elected Prime Minister, Mr Lothar de Maizière.

496 The G.D.R. never responded to a demand made by the Government of Israel in March 1951 requesting compensation in the amount of US$ 500 million (the request of the Government of Israel to the Federal Republic of Germany and its response are discussed at *infra*, p. 383). A little known fact is that in November 1976, the G.D.R. offered to a Jewish organisation (the Claims Conference) the amount of US$ 1 million in reparation to former German nationals of Jewish origin now living in the United States. The

However, due to the integration of the G.D.R. into the Federal Republic of Germany, no compensation was actually paid by the G.D.R. This is therefore not a significant example of a successor State taking over the obligations arising from the commission of internationally wrongful acts of the predecessor State, as it remains theoretical because no reparation was in fact ever made.

6. *Creation of Newly Independent States*

The analysis of State practice and international and municipal case law in the context of the creation of Newly Independent States *does not* clearly establish the existence of a *general principle*. Thus, State practice is not consistent. In fact, it is almost evenly divided between examples supporting succession and others in favour of non-succession:

- Examples of State practice and municipal courts cases were found where the continuing State remains responsible for internationally wrongful acts committed before the creation of the new State (Section 6.1);
- Examples of State practice and municipal courts cases were also found where the new successor State took over the obligations arising from internationally wrongful acts committed before the date of succession (Section 6.2).

6.1 *Examples where the Continuing State Remains Responsible for Internationally Wrongful Acts Committed before the Date of Succession*

There are examples of decisions of *municipal courts* supporting the principle that the continuing State remains responsible for internationally wrongful acts committed before the creation of the new State. This principle has been applied by decisions of municipal courts of Belgium in the context of the independence of Congo,[497] by the French *Conseil d'Etat* in the context of the independence of Vanuatu,[498]

Claims Conference rejected the proposal; it requested instead in 1979 the payment of some US$ 100 million in compensation. The G.D.R. refused to pay compensation. See, in: Gareth WINROW, "East Germany, Israel and the Reparations Issue", 20(1) *Soviet Jewish Affairs*, 1990, at pp. 32–33.

497 Belgian courts made statements in support of this principle in two cases: *Crépet v. Etat belge et Société des forces hydro-électriques de la colonie*, Civil Tribunal of Brussels, 30 January 1962, in: *Journal des tribunaux*, 1962, at p. 242; *Pittacos v. Etat Belge*, Brussels Court of Appeal (2nd Chamber), 1 December 1964, in: *Journal des tribunaux*, 1965, p. 7, at p. 9; *Pasicrisie Belge*, 1965, II, 263, in: 45 *I.L.R.*, p. 24. In this last case, however, the Court decided not to apply the principle on equity grounds but did not rule that it should be for the new State of Congo to take over the obligations arising from the commission of the internationally wrongful act.

498 *Russet*, Conseil d'Etat, 5 October 1984, case no. 51543, in: *Recueil Lebon*, reported in: *R.G.D.I.P.*, 1986, p. 249; 89 *I.L.R.*, p. 15.

and by Indian courts in the context of the partition of India. In the context of the independence of Algeria, State practice (and in particular an interpretation given by the French Ministry of Foreign Affairs) as well as several decisions of French municipal courts admitted one exception to the general principle of succession established at Article 18 of the *Déclaration de principes relative à la coopération économique et financière* entered into between France and Algeria: the continuing State (France) should remain responsible for the internationally wrongful acts it committed against *French nationals* in fighting the rebels of the *Front de libération nationale* (F.L.N.).[499] However, it is important to note that all these municipal law cases only dealt with wrongful acts committed by the colonial predecessor State against its *own nationals* and not against another State (or a national of another State).[500]

We have also found two other much less significant examples of *State practice* where the principle of non-succession was applied: the 1958 peace treaty between Indonesia and Japan and another one in the context of the independence of Ghana.

Writers in doctrine largely support the principle of non-succession in the context of the creation of Newly Independent States whereby it should be for the colonial power, which continues its existence, to provide reparation for the consequences of its own internationally wrongful acts committed before the date of succession.[501]

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499 *Union régionale d'Algérie de la C.F.T.C.*, Conseil d'Etat, 5 March 1965, in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1965, at pp. 846–847, in: 44 *I.L.R.*, at p. 43; *Etat français v. Consorts Caldumbide*, Cass. Civ. 3e, 7 November 1969, in: *Jurisclasseur périodique (la Semaine juridique)*, 1970, no. 16248, in: Jean-François LACHAUME, "Jurisprudence française relative au droit international public (1969)", *A.F.D.I.*, 1970, p. 904, in: D.R. "Chronique de Jurisprudence française", *J.D.I.*, 1970, at p. 718; *Bounouala*, Conseil d'Etat, 25 May 1970, in: *Recueil des décisions du Conseil d'Etat*, 1970, p. 350, in: 72 *I.L.R.*, at p. 56; *Kaddour*, Conseil d'Etat, case no. 04642, 10 May 1968, in: *Recueil Lebon*; *Veuve Haffiade Messaoud*, Conseil d'Etat, case no. 51458, 10 May 1968, in: *Recueil Lebon*; *Saiah*, Cour de Cassation, Ch. Civile 1, case no. 76–14704, 12 December 1977, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 1 N. 470, p. 373; *Consorts Deguy-Charon-Gerst*, Cour de Cassation, Ch. Civile 1, case no. 69–11738, 29 May 1973, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 1 N. 183, p. 163; *Consorts Richard*, Cour de Cassation, Chambre civile 3, case no. 69–70143, 19 March 1970, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 3 N. 222, p. 163; *Veuve Chaurand v. Agent judiciaire du trésor public*, Tribunal de grande instance of Riom, 2 October 1963, *Gazette du palais*, 1964, 1, 155, in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1964, at p. 750, in: *A.F.D.I.*, 1964, at p. 871, in: 44 *I.L.R.*, at p. 39.

500 The reasons for treating these types of cases differently have been explained at *supra*, p. 30. Another limitation is the fact that some of these municipal cases can be interpreted as involving issues of *war damage* between the predecessor State and the successor State (see *supra*, p. 28).

501 Michael John VOLKOVITSCH, p. 2201; D.P. O'CONNELL, "Independence and Problems of State Succession", in: W. O'BRIEN (ed.), *The New Nations in International Law and Diplomacy*, London, Stevens & Sons, 1965, p. 31; Brigitte STERN, "La

According to Bedjaoui, "en droit…il ne saurait y avoir de succession à l'ordre colonial, en dehors de l'oeuvre volontaire du nouveau successeur".[502] Similarly, for Makonnen, "any attempt to carry over the predecessor State's rights and duties to the successor State without the consent of the latter would put the successor in an inferior position and thus might violate the principle of sovereign equality of States".[503] Volkovitsch is in favour of a principle of non-succession based on opportunity and public policy, as it would "manifestly be unfair to hold the State emerging from the yoke of tyranny responsible for the acts of its master".[504] The same writer concludes that:

> A clear line of practice and precedent demonstrates that primary responsibility in such cases remains with the predecessor State and that former colonies and victims of occupation will only be held responsible for their predecessor's delictual liability if they have expressly agreed to assume it.[505]

The principle of non-succession would indeed seem to be the most appropriate solution in the context of the creation of Newly Independent States. However, the assessment made by Volkovitsch indicating that this principle reflects a "clear line of practice and precedent" is unsupported by the present analysis. This survey of relevant State practice and municipal case law in the context of Newly Independent States leads us to conclude that the principle of non-succession (whereby the continuing State remains responsible for the commission of its own wrong) has

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succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 246 ("il serait paradoxal d'obliger un Etat illégalement occupé à assumer les obligations de l'Etat qui l'a agressé"); M. SHAW, "State Succession Revisited", 5 *Finnish Y.I.L.*, 1994, p. 58; Hazem M. ATLAM, p. 258; F. OKOYE, *International Law and the New African States*, London, Sweet & Maxwell, 1973, pp. 178 et seq. (quoted in: Wladyslaw CZAPLINSKI, p. 356); Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, pp. 233–234. This is also the view of Zyade MOTALA, "Under International Law, Does the New Order in South Africa Assume the Obligations and Responsibilities of Apartheid Order? An Argument for Realism over Formalism", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, at p. 291, for whom "international law recognizes that [Newly Independent States] start with a clean slate with regard to wrong committed and treaties concluded on their behalf by the former colonial power". He believes (see at p. 303) that South Africa after its first free election of 1994 was a "new" State which could rely on this doctrine of non-succession.

502 Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, p. 520.

503 Y. MAKONNEN, *International Law and the New States of Africa*, Addis Abeba, UNESCO, 1983, p. 202. See also in: Yilma MAKONNEN, "State Succession in Africa: Selected Problems", *R.C.A.D.I.*, t. 200, 1986–V, p. 126. The author adopted this approach in the context of State succession to treaties, but he is of the view that it should also apply to other questions of succession of States (see at p. 134).

504 Michael John VOLKOVITSCH, p. 2201. For him, in cases of colonisation and occupation, there should exist an exception to his proposition of a rebutable presumption of succession to obligations arising from the commission of internationally wrongful acts.

505 *Id.* The same conclusion is reached by: Natalino RONZITTI, *La successione internazionale tra stati*, Milan, Dott. A. Giuffrè, 1970, pp. 216–217.

surprisingly only been applied in some instances. We will examine at Section 6.2 below several examples of State practice and municipal courts' decisions where the principle of succession was applied.

This is a surprising result, as many States expressed the view that a special regime should prevail for Newly Independent States. It has often been argued that they should never be held responsible for international responsibility committed by the predecessor State before the date of succession.[506] The special status of Newly Independent States does not seem to have any impact on the way the question of succession to international responsibility is been dealt with in State practice and before municipal courts.[507] What is even more striking is the fact that such principle of succession was even applied in cases where internationally wrongful acts were committed by the predecessor State in its effort to defeat the insurgent movements.[508]

Even though, as a matter of principle, we support the application of a principle of non-succession in the context of the creation of Newly Independent States, the question remains as to whether this principle should apply *uniformly in all cases*. As in cases of secession and of cession and transfer of territory analysed in previous sections,[509] the continuing State should *not always* be responsible for internationally wrongful acts committed before the date of succession. There are situations where, on the contrary, the Newly Independent States should be held responsible for the obligations arising from internationally wrongful acts committed before their independence. Such would, for instance, be the case whenever the internationally wrongful act was actually committed not by the colonial State but, rather, by the local authorities of a non-independent colonial entity while still part

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506 See the discussion held during the Sixth Committee of the General Assembly in 1975 on the I.L.C.'s Report: "Documents officiels de l'Assemblée générale des Nations unies, 30e session, sixième Commission, Questions juridiques". See in particular the comments made by Czechoslovakia ("1546th meeting, 22 October 1975", Doc.A/C. 6/SR. 1546, p. 103, para. 3) and Liberia ("1539th meeting, 17 October 1975", Doc. A/C. 6/SR. 1542, p. 86, para. 22).

507 Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, pp. 233–234, are of the view that, in general, cases of secession and Newly Independent States should be treated in the same way and that no special regime should prevail for the latter. It should be noted that their assessment, however, does not deal specifically with the question of succession to obligations arising from the commission of internationally wrongful acts.

508 For instance, in the case of *Van der Have v. State of the Netherlands*, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80. See also the case of *Minister of Defence, Namibia v. Mwandinghi*, Supreme Court, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), at p. 365, in: 91 *I.L.R.*, p. 358. However, it should be noted that a rule of non-succession was consistently applied by French courts in the similar context of internationally wrongful acts committed by the colonial authorities against French nationals in fighting the F.L.N. in Algeria (see *infra*, p. 253).

509 See *supra*, p. 123 and p. 142.

of the predecessor State. There is some support in doctrine for this proposition.[510] The same solution should also certainly apply whenever insurgents committed internationally wrongful acts in their successful attempt to create a new State.[511] This solution was adopted by French courts in the context of the independence of Algeria.[512] It has also been suggested in doctrine that Newly Independent States should be held accountable for past internationally wrongful acts whenever they have "unjustly" enriched themselves as a result of acts committed by the colonial power.[513] This is certainly a sound principle which should be applied in the context of Newly Independent States.[514] Later in this study (at Chapter 3, below) several circumstances are examined which would certainly call for the Newly Independent State, and not the continuing State, to be held responsible for obligations arising from internationally wrongful acts.[515]

The following paragraphs examine different examples of State practice and municipal case law where the continuing State remained responsible for its own internationally wrongful acts committed before the date of succession.

a) *The Partition of India (1947)*

India and Pakistan both became independent States on 15 August 1947 pursuant to the *Indian Independence Act (1947)* voted by Great Britain's House of Commons.[516] India has generally been considered as the *continuing State* of the

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510 For Wladyslaw CZAPLINSKI, pp. 356–357, the principle of non-succession should not apply in instances where the colony possessed a distinct personality under the municipal law of the former metropolitan power. In such case, the internationally wrongful act could be attributed directly to the local authorities and not to the colonial power. J.H.W. VERZIJL, pp. 219–220, gives the following example where "a colony which enjoy a very developed autonomy commits acts coming within those autonomous powers, but which are illegal and obnoxious to a third State; before the colony itself or the State internationally responsible for its conduct has given satisfaction to the injured State, the colony attains independence". Verzijl believes that in such cases "it would really be absurd to assume that the successor State can nevertheless take shelter behind the argument put forward by the dominant doctrine, according to which the offences of its predecessor(s) do not regard it". This seems also to be the position of Miriam PETERSCHMITT, pp. 62–63.

511 This principle is examined in detail at *infra*, p. 224. It should be noted, however, that this situation does not deal *per se* with issues of State succession.

512 These cases are examined at *infra*, p. 235.

513 Miriam PETERSCHMITT, p. 61. On the contrary, Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, pp. 554 et seq., is of the opinion that the principle of unjust enrichment is foreign to international law and that it is especially not adapted to the special situation of decolonisation.

514 This principle is examined in detail at *infra*, p. 263.

515 See at *infra*, p. 207.

516 *Indian Independence Act (1947)*, 10 and 11 Geo. VI, c. 30; *L.R. Statues* 1947.

British Dominion of India,[517] while Pakistan has been viewed as having seceded from India in 1947.[518] The relevant legislation dealing with issues of succession of States is the *1947 Indian Independence (Rights, Property and Liabilities) Order* of 14 August 1947.[519] Section 10 of the Order provides for the "transfer of liabilities for actionable wrong other than breach of contract" from the British Dominion of India to the new independent State of India. The term "actionable wrong" has been interpreted so as to include both contractual and tortious claims.[520] Many decisions of Indian courts have interpreted Section 10 of the Order.[521] These cases came to the conclusion that as the continuing State of the British Dominion, India remains responsible for internationally wrongful acts committed before the date of succession.

b) *Belgian Court Cases in the Context of the Independence of Congo (1960)*

The Republic of Congo became an independent State on 30 June 1960.[522] Belgium's *Conseil d'Etat* and other municipal courts have rendered many decisions

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517 This is stated in: *Indian Independence (International Arrangements) Order*, Gazette of India Extraordinary, 14 August 1947. The same opinion was also expressed by the Legal Department of the United Nations: U.N. Press Release, U.N. Doc PM/473, 12 August 1947. This question is examined in: T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, pp. 77 et seq.

518 The qualification is rather superficial as both India and Pakistan have actually become independent States at the same time as a result of the adoption of the *Indian Independence Act (1947)*, 10 & 11 Geo. VI, c. 30, by the British parliament. On this point see: D.P. O'CONNELL, *State Succession*. vol. I, p. 8.

519 *1947 Indian Independence (Rights, Property and Liabilities) Order*, Gazette of India (Extraordinary), 14 August 1947, in: M.M. WHITEMAN, *Digest of International Law*, vol. II, Washington, Dept. of State, 1973, p. 873. In doctrine, see: SEN, "The Partition of India and Succession in International Law", *Indian Law Review*, 1947, p. 190; Hari Om AGARWAL, *State Succession: A Study of Indian Cases*, Allahabad, Allahbad Law Agency, 1980; Hari Om AGARWAL, "State Succession: A Study of Indian Cases", 5(9) *International Law Report*, pp. 156–177; T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004.

520 S.K. AGRAWALA, "Law of Nations as Interpreted and Applied by Indian Courts and Legislature", 2 *Indian J.I.L.*, 1962, p. 431, at p. 442.

521 See, for instance, the many decisions quoted in: D.P. O'CONNELL, *State Succession*, vol. I, p. 493; S.K. AGRAWALA, *Id.* It should be noted that a great number of these decisions actually deal with cases of merger of different Indian entities (called "States") before and after the independence of India. For instance, see the case of *Kishangarh Electric Supply Co. Ltd v. United States of Rajasthan*, High Court of Rajasthan, 5 May 1959, *All Indian Report* 1960 Rajasthan 49, in: 40 *I.L.R.*, p. 365; 54 *A.J.I.L.*, 1960, pp. 900–901. In this case, the Court held that the successor "State" (Rajasthan) was not liable for the tortious acts (i.e. the taken of property without any compensation in return) of the former "State" (Kishangarh) committed against the plaintiff.

522 In 1876, King Léopold II of Belgium founded the African International Association which was transformed in 1882 into the International Association of the Congo. At the 1884–85 Berlin Conference, the different European Powers separately recognised King Léopold II's International Association of the Congo which shortly afterward became (in

dealing with several different problems of State succession.[523] There are some cases where the *Conseil d'Etat* decided that Belgium should be responsible for the internationally wrongful acts committed by the Belgian military in Congo even *after* its independence.[524] Some other cases concerned administrative actions and "delicts" committed by the colonial power before the independence of Congo.[525] In two cases, Belgian municipal courts made some interesting comments on the issue of State succession to international responsibility.

1885) the Congo Free State. The Conference recognised King Léopold II as sovereign of the new State. The Congo Free State had a "personal union" with Belgium. It is only in 1908 that the Congo Free State became formally a colony of Belgium: *Traité de Cession de l'Etat indépendant du Congo à la Belgique*, approved by *Loi sur le gouvernement du Congo belge* of 18 October 1908, in: *Pasicrisie belge*, 1908, no. 265, in: 3 *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1909, p. 370. See in doctrine: Roger BRUNET, *L'annexion du Congo à la Belgique et le droit international*, thesis, Bordeaux, 1911. These historical aspects of the question with a special emphasis on issues of State succession are fully described in: Paul De VISSCHER, "Le problème de la succession d'Etats envisagé dans l'histoire diplomatique du Congo", XI *Comunicazioni e studi*, 1960–1962, pp. 53–83; Suzanne BASTID, "La succession du Congo belge aux obligations de l'Etat indépendant du Congo", *R.J.P.U.F.*, 1957, pp. 356 et seq.

523 These court cases are discussed in: Paul De VISSCHER, *Ibid.*, at pp. 75–85; Jean-Victor LOUIS, "L'accession du Congo belge à l'indépendance, problèmes de succession d'Etats dans la jurisprudence belge", *A.F.D.I.*, 1966, pp. 731–756; Jean-Pierre De BRANDT, "De quelques problèmes de succession d'Etats à la suite de l'accession à l'indépendance de la République du Congo (Léopoldville)", *R.B.D.I.*, 1965, pp. 497–523; M. WAELBROECK, "Arrêt no. 8160 du Conseil d'Etat Belge, note d'observations", *R.J.D.A.*, 1961, no. 1, pp. 34 et seq.; L.F. GANSHOF, "Les dettes de l'ex-colonie du Congo belge", *Revue juridique du Congo*, 1964, no. 1, p. 9; L.F. GANSHOF, in: 1 *Revue juridique du Congo*, 1965, p. 13; F. RIGAUX, in: *Journal des tribunaux*, 1966, p. 689; M. ROUGEVIN-BAVILLE, "Le sort des droits et obligations de l'ancienne 'Colonie du Congo belge' d'après la jurisprudence des juridictions de Belgique", 2 (1) *Revue judiciaire congolaise*, 1963, at p. 1; A DURIEUX, "Le problème juridique des dettes du Congo et de l'Etat du Congo", *Académie Royale des Sciences d'Outre-Mer*, Mémoire in-8, t. 28, fasc. 3, Brussels, 1961.

524 These cases are mentioned in: Jean-Victor LOUIS, *Ibid.*, at p. 742.

525 See, for instance, the case of *Meert*, Opinion ("Avis") no. 8166 by the Conseil d'Etat, 21 October 1960, in: *Journal des tribunaux*, 1960, at p. 738; also in: *R.J.D.A.*, 1961, p. 28. See also the case of *Brasseries indigènes du Congo*, Opinion ("Avis") no. 9921 by the *Conseil d'Etat*, 8 March 1963, in: *R.A.A.C.E.*, 1963, p. 217. Several other cases are discussed in: Jean-Pierre De BRANDT, "De quelques problèmes de succession d'Etats à la suite de l'accession à l'indépendance de la République du Congo (Léopoldville)", *R.B.D.I.*, 1965–2, at pp. 505–509. The question of the jurisdiction of Belgian courts over problems dealing with internationally wrongful acts which took place in the territory of the new State of Congo is explored in: Jean-Victor LOUIS, "L'accession du Congo belge à l'indépendance, problèmes de succession d'Etats dans la jurisprudence belge", *A.F.D.I.*, 1966, pp. 734–744. This jurisdiction ended with the enactment of the Constitutional Law of Congo of 18 July 1963. This aspect of the question is also discussed in: Jean-Pierre De BRANDT, "Jurisprudence belge relative au droit international public", *R.B.D.I.*, 1966, at pp. 546–547.

The first case is *Crépet v. Etat belge et Société des forces hydro-électriques de la colonie*.[526] Deciding without the appearance of the Republic of Congo, the Civil Tribunal of Brussels refused to hold the Congo responsible for obligations arising from the internationally wrongful acts on the ground that, as a matter of principle, these acts do not pass automatically to the new State without any specific agreement to that effect between the predecessor State and the successor State.[527] Some in doctrine have concluded that the Tribunal applied the principle of non-succession to obligations arising from the commission of internationally wrongful acts.[528] This case is also an illustration of the principle that the continuing State (Belgium) remains responsible for internationally wrongful acts it has committed in the colony before the independence of the new State.[529]

The second case is *Pittacos v. Etat Belge*, which was decided by the Appeal Court of Brussels.[530] The Court first confirmed the reasoning of the lower court on the

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526 *Crépet v. Etat belge et Société des forces hydro-électriques de la colonie*, Civil Tribunal of Brussels, 30 January 1962, in: *Journal des tribunaux*, 1962, at p. 242. Extracts of the case can be found in: Jean-Pierre De BRANDT, *Ibid.*, at pp. 514–516. The relevant facts of the case are the following. In 1958 (i.e. before the independence of Congo), the plaintiff filed a suit against the colonial Belgian Congo and a company for non-payment of public work he had performed. After the independence of the Republic of Congo, the action was subsequently filed against the new State of Congo before a Belgian Court.

527 *Journal des tribunaux*, 1962, at p. 244. This is relevant quote from the decision of the Tribunal: "Attendu, au contraire, que le second chef de demande se fonde sur un quasi-délit, qu'aurait commis l'Etat prédécesseur et a trait à des dettes qui, en l'absence de convention internationale, ne se transmettent pas, en principe, à l'Etat successeur; Attendu qu'aucun traité relatif au passif de l'ancienne colonie du Congo belge n'a été conclu jusqu'ores entre la Belgique et le République du Congo et qu'aucune loi belge n'a été promulguée en la matière". It should be noted that the Civil Tribunal of Brussels also declared the action valid with respect to the *contractual debt* because it involved a "local debt" which was transmissible to the successor State (the Republic of Congo). A similar statement was also made by the Civil Tribunal of Brussels in the case of *Société Forces de l'Est v. Etat belge*, 22 May 1962, in: *Journal des tribunaux*, 1962, at pp. 440–441.

528 This is the position adopted by D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, pp. 164–165, for whom "the logical correlative of this [case] was that delictual claims arising against the Belgian Congo did not pass to the Republic of the Congo". The same view is expressed in: D.P. O'CONNELL, *State Succession*, vol. I, at p. 483, as well as by Michael John VOLKOVITSCH, p. 2201.

529 This is also the position of Jean-Pierre De BRANDT, "De quelques problèmes de succession d'Etats à la suite de l'accession à l'indépendance de la République du Congo (Leopoldville)", *R.B.D.I.*, 1965–2, at p. 517, for whom "une dette basée sur un quasi-délit ne se transmet pas automatiquement à l'Etat successeur *mais reste à charge de l'Etat démembré*" (emphasis added). In support of the position adopted by the court: Michel WAELBROECK, "Arrêt no. 8160 du Conseil d'Etat Belge, note d'observations", 1 *R.J.D.A.*, 1961, p. 34, at p. 40.

530 *Pittacos v. Etat Belge*, Brussels Court of Appeal (2nd Chamber), 1 December 1964, in: *Journal des tribunaux*, 1965, p. 7, at p. 9; *Pasicrisie Belge*, 1965, II, 263, in: 45 *I.L.R.*, p. 24. Extracts of the case can be found in: Jean-Pierre De BRANDT, *Ibid.*, at

distinct legal personality of the colonial Belgian Congo and the legal consequences which follow.[531] The repeal of the "Colonial Charter" after the independence of Congo did not change the situation, as it was still not for Belgium to take over any of the assets and liabilities of the former colony.[532] The Appeal Court of Brussels nevertheless affirmed, based on equity grounds, the "principles of international law" whereby quasi-delictual debts arising before the independence of Congo remain those of the continuing State (Belgium):

> Attendu, certes que l'origine donnée par le sieur Pittacos à l'obligation qu'il impute à l'intimé de lui verser des indemnités complémentaires est quasi-délictuelle; que, par ailleurs, c'est sur l'équité que se fonde le principe de droit international public selon lequel *les dettes quasi-délictuelles nées avant le démembrement d'un Etat restent à la charge de l'Etat démembré (lequel serait, en l'occurrence, la Belgique*).[533] (emphasis added)

However, the Court concluded that the measures taken by the local colonial authorities may have been illegal but they were certainly not inappropriate in the special circumstances of the case, as such measures greatly benefited the colony as a whole. The Court therefore decided, also *based on the principle of equity*,

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pp. 517–520. The case is also discussed by J.H.W. VERZIJL, at pp. 227–228. This case dealt with damage arising out of the destruction in 1952 of the coffee plantation of the plaintiff by the authorities of the colonial Belgian Congo which had ordered its destruction in order to combat the progression of a disease in the region. The plaintiff had first brought his claim before the Court of First Instance of Stanleyville (in the colonial Belgian Congo) requesting some 40 million of Belgian Francs in compensation. In a Judgment of 26 March 1960, the Court granted him compensation in the amount of some 15 million Belgian Francs. After the independence of the Republic of Congo, the plaintiff filed a claim *against Belgium* before the 2nd Chamber of the Court of First Instance of Brussels for compensation in an amount of some 5 million Belgian Francs.

531 In a judgment of 14 January 1963 (*Pittacos v. Etat Belge*, Brussels Tribunal (2nd Chamber), 14 January 1963, in: *Journal des tribunaux*, 1963, pp. 64 et seq.), the Court of First Instance of Brussels decided that an action for internationally wrongful acts committed during the colonial period was not receivable against Belgium itself but that, in accordance with the "Colonial Charter", it had to be filed against another entity, the colonial Belgian Congo. It should be noted that under the Colonial Charter ("*Charte coloniale*") of 18 October 1908, the "*Congo belge*" had a distinct legal personality from Belgium: *Loi sur le gouvernement du Congo belge*, 18 October 1908, in: *Pasicrisie belge*, 1908, no. 265. This question is examined in detail in: Paul De VISSCHER, "Le problème de la succession d'Etats envisagé dans l'histoire diplomatique du Congo", XI *Comunicazioni e studi*, 1960–1962, pp. 67–74.

532 The Court of First Instance of Brussels (in: *Pittacos v. Etat Belge, Id.*) had decided that with respect to events which arose before the independence of the Congo, the existence of colonial Belgian Congo as a distinct legal entity was unaffected by the creation of the new State in 1960. A similar statement was also made by the Court of Appeal of Brussels in its decision of 9 January 1968 in the case of *Met Den Ancxt v. Belgium (Minister of Finance)*, in: 69 *I.L.R.*, at p. 28. This argument is criticised by Paul De VISSCHER, *Ibid.*, at p. 82.

533 *Pittacos v. Etat Belge*, Brussels Court of Appeal (2nd Chamber), 1 December 1964, in: *Journal des tribunaux*, 1965, p. 7, at p. 9; *Pasicrisie Belge*, 1965, II, 263, in: 45 *I.L.R.*, p. 24.

that under these specific circumstances, the delictual debts should not be borne by the continuing State (Belgium).[534] The decision of the Brussels Court of Appeal was confirmed by the Court of Cassation.[535] It should be noted that the new State of Congo was not a party to the proceedings and that the Court did not state that Congo should be held responsible for obligations arising from the internationally wrongful acts.[536]

c) *State Practice of France and French Court Cases Supporting the Principle of Non-succession in the Context of the Independence of Algeria (1960)*

The former French colony of Algeria became an independent State in July 1962 after a national liberation war which lasted for eight years. Many issues of succession of States have arisen in the years that followed independence.[537] Article 18 of the *Déclaration de principes relative à la coopération économique et financière* (dated 19 March 1962), which is part of the *Evian Accords* that ended the war, indicates that Algeria (the successor State) took over the obligations arising from internationally wrongful acts committed before the date of succession.[538] This point is discussed in detail below.[539] The new State of Algeria did not fully implement its obligations under Article 18 of the *Déclaration*.[540] Faced with such refusal by the Algerian authorities, France decided to compensate *French nationals* which had

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534 *Id.*: "Attendu, qu'il se déduit de ces considérations que l'équité ne commanderait point que la dette d'indemnité pouvant résulter de la destruction dont litige soit à la charge de l'Etat démembrée".

535 *Pittacos v. Etat Belge*, Court of Cassation, 26 May 1966, in: *Pasicrisie Belge*, 1966, Part I, p. 1221, in: 48 *I.L.R.*, pp. 20 et seq. The Court once again confirmed that under the Colonial Charter, the Belgian Congo constituted an entity distinct from Metropolitan Belgium and that the assets and liabilities of Belgium and the colony were to be separated. Thus, the intention of the legislators was to prevent Belgium from being bound by the colony's obligations. The Court also indicated that the independence of Congo had repealed the Charter but that this in no way implied a merger of the assets and liabilities of the colony with those of Metropolitan Belgium ("a merger that would be irreconcilable with the sovereignty of the new independent State": in: 48 *I.L.R.*, at p. 22).

536 On the contrary, Hazem M. ATLAM, at p. 218, interprets the *Pittacos* case as one example where the Court decided that the successor State (Congo) should take over the liabilities of the predecessor State.

537 These issues are discussed in: Maurice FLORY, Bruno ETIENNE, Gérard FOUILlOUX & Jean-Pierre SANTUCCI, *La succession d'Etats en Afrique du Nord*, Paris, Coll. Etudes de l'Annuaire de l'Afrique du Nord, CNRS, 1968, 104 p.; Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1963, pp. 118–131.

538 The text of the Agreement is found in: *J.O.R.F.*, 20 March 1962, pp. 3019–3032. Article 18 reads as follows: "Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities".

539 See, at *infra*, p. 188.

540 This is the conclusion reached by M. CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1963, at pp. 1015–1016, 1021–1023.

suffered damage during the national liberation war.[541] The new position taken by France is clearly explained by the French Minister of Foreign Affairs in response to a question posed at the National Assembly:

> La réparation des dommages matériels consécutifs aux événements survenus en Algérie depuis le 1er novembre 1954 est une obligation de l'Etat algérien découlant…de l'Article [sic] 19 de la Déclaration de principes relative à la coopération économique et financière des accords d'Evian (19 mars 1962). Les autorités algériennes qui avaient rempli cette obligation jusqu'au 31 décembre 1962, en ont interrompu l'exécution dès le début de l'année 1963. A la suite de cette interruption, le Gouvernement français, conscient de la situation dans laquelle se trouvaient certains de nos compatriotes victimes de dommages matériels, a décidé de leur accorder, au lieu et place de l'Algérie défaillante, un dédommagement dont le caractère social à été tout particulièrement marqué par l'exclusion des sociétés commerciales et la limitation à 100 000 francs de l'indemnité total susceptible d'être allouée à chacun d'eux pour l'ensemble de leurs sinistrés.[542]

However, such compensation was limited to those debts which were liquidated: "…la créance dont le règlement est demandé doit être certaine, liquide et exigible."[543] One important limitation to the new French policy was that *it excluded foreigners* (as well as companies) from receiving any compensation for damage suffered during the war.[544] This is an important point that somewhat limits the relevance of this example. Thus, it is not at all surprising that France provided compensation to individuals which were its nationals at the time the events took place and which had remained its nationals after the independence of Algeria.[545]

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541 Article 13 of the *Loi de finances rectificative* of 31 July 1963, Decree no. 64–505 of 5 June 1964. See also the Decision of 20 April 1966. These developments are discussed in: Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1970, at pp. 942–943. The cases were handled by a special Commission ("*Commission interministérielle des dommages matériels*"). The procedure of the Commission is explained in: Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1969, at p. 882.

542 This extract is taken from: *J.O.R.F., Assemblée nationale*, no. 9458, 7 March 1970, at p. 540, quoted in: Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*; 1970, at pp. 942–943.

543 This is the position adopted by the French government as illustrated by the response given by the State Secretary for Algerian Affairs to a question posed at the National Assembly: *J.O.R.F., Assemblée nationale*, no. 3814, 28 September 1963, at p. 4919, quoted in: Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1963, at p. 1021. See also: Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, p. 186.

544 Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1968, at p. 880; Maurice FLORY, Bruno ETIENNE, Gérard FOUILlOUX & Jean-Pierre SANTUCCI, *La succession d'Etats en Afrique du Nord*, Paris, Coll. Etudes de l'Annuaire de l'Afrique du Nord, CNRS, 1968, at p. 97.

545 Thus, the above-mentioned statement of the French Minister of Foreign Affairs (*supra* note 542), which was made in 1970 (i.e. 10 years after the independence of Algeria), makes reference to "nos compatriotes victimes de dommages matériels". This is a

Further, it seems that all plaintiffs had left Algeria since independence and were now living in France. In other words, this example does not deal with any issue of *international* responsibility.

The new position taken by France was subsequently further explained in an official statement by the State Secretary for Algerian Affairs indicating that compensation for acts of expropriation committed by France should be dealt with by Algeria only to the extent that these acts were done "in the name" of Algeria.[546] Faced with such an official statement, French Courts requested from the Ministry of Foreign Affairs of France an official interpretation of Article 18 of the *Déclaration*.[547] The official position of the Ministry, which was delivered to the *Conseil d'Etat* in letters dated 13 February 1963 and 30 July 1963, starts with a general assessment of the practice of State succession, which is described as a "collection de pratiques disparates plutôt qu'un corps de règles coherent", and the indication that such practice is of no great help to solve the issue in the context of the independence of Algeria.[548] The Ministry took the view that Algeria should not be responsible for the acts and measures taken by France that were *specifically directed against*

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clear reference to the fact the victims were French nationals at the time compensation was provided.

546 Statement of the French State Secretary for Algerian Affairs, in: *J.O.R.F., Assemblée nationale*, no. 3814, 28 September 1963, at p. 4919, quoted in: Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1963, at p. 1021. This is the full paragraph of the statement: "Les créances résultant de décisions des autorités françaises sont donc désormais à la charge de l'Algérie si ces décisions peuvent être considérées comme ayant été prises au nom de cette dernière ou d'un établissement public algérien…Ces dispositions sont notamment applicables aux indemnités d'expropriation pour cause d'utilité publique".

547 This request was made in the *Union régionale d'Algérie de la C.F.T.C.* case decided by the *Conseil d'État*, 5 March 1965, in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1965, pp. 846–847; in: 44 *I.L.R.*, p. 43; *J.D.I.*, 1967 (no. 2), p. 387. In other cases, the *Conseil d'Etat* indicated that judgments had to be deferred pending the delivery of the opinion of the Ministry of Foreign Affairs of France: *In re Sadji* case, Administrative tribunal of Marseilles, 20 May 1966, *Recueil des arrêts du Conseil d'Etat*, 1966, p. 756; also in: 47 *I.L.R.*, at p. 104; *Agent judiciaire du Trésoir public v. Mallea*, Court of Appeal of Paris, 21 May 1965, in: *R.G.D.I.P.*, 1966, at p. 204; *A.F.D.I.*, 1966, at p. 854; 47 *I.L.R.*, at p. 79.

548 "Conclusions de M. le Commissaire du Gouvernement Fournier", extracts of which can be found in an analysis by R. PINTO, in: *J.D.I.*, 1967 (no. 2), p. 387: "Il est de fait qu'en ce domaine les certitudes sont rares et que les exemples que l'on peut tirer de certains précédents internationaux, souvent fort anciens, sont difficilement applicables aux problèmes, à bien des égards nouveaux, que pose au XX^{ème} siècle l'accession à l'indépendance d'un grand nombre de pays jusqu'alors colonisés. Ni la succession des Etats-Unis d'Amérique à la fin du XVIII^{ème} siècle, ni l'émancipation des colonies espagnoles d'Amérique latine au début du XIX^{ème} siècle, ni l'apparition plus récente d'Etats européens nouveaux issus du démantèlement de l'Autriche-Hongrie ne peuvent ici être d'un grand secours, quant à la détermination des règles applicables, tant sont différentes les circonstances de temps et de lieu".

the rebellion of the F.L.N. France should remain responsible for the consequences of such measures. This is the reasoning of the Ministry:

> Tout d'abord, l'accession à l'indépendance de ce pays [l'Algérie] a été précédée d'un conflit prolongé au cours duquel un certain nombre de mesures ont été prises par le Gouvernement français en vue, précisément, d'empêcher cette accession à l'indépendance. On ne pouvait guère envisager, quelle que fussent les perspectives de relations futures entre les deux pays, de voir les autorités algériennes accepter de prendre en charge les obligations contractées à ce titre par l'Etat français. Il est donc normal de considérer que le contentieux de ces mesures, prises en vue de faire échec aux mouvements insurrectionnels, n'intéresse pas l'Etat algérien au sens du protocole. On ne fait ici que rejoindre une distinction faite depuis longtemps par les théoriciens du droit international qui, s'ils admettent que l'Etat successeur doit prendre une part du passif de son prédécesseur, en excluent toujours les dettes dites de guerre ou de régime, c'est-à-dire celles qui ont été contractées en vue d'empêcher l'annexion ou de s'opposer à l'émancipation.[549]

This principle has been consistently applied by French municipal courts.[550] These examples of French municipal court decisions are examined in detail below.[551]

The position of the Ministry seems to be in accordance with the principle, which is examined below,[552] that whenever damage is inflicted by the *actions of the predecessor State* (i.e. the French colonial authorities) in fighting secessionist "rebels" (which later become an independent State), the consequences of these internationally wrongful acts should not be supported by the new State upon its independence. In such instances, the continuing State should remain responsible for the internationally wrongful acts *it committed* before the date of succession. As is

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549 *Ibid.*, at p. 389.

550 *Union régionale d'Algérie de la C.F.T.C.*, Conseil d'Etat, 5 March 1965, in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1965, at pp. 846–847, in: 44 *I.L.R.*, at p. 43; *Etat français v. Consorts Caldumbide*, Cass. Civ. 3e, 7 November 1969, in: *Jurisclasseur périodique (la Semaine juridique)*, 1970, no. 16248, in: Jean-François LACHAUME, "Jurisprudence française relative au droit international public (1969)", *A.F.D.I.*, 1970, p. 904, in: D.R. "Chronique de Jurisprudence française", *J.D.I.*, 1970, at p. 718; *Bounouala*, Conseil d'Etat, 25 May 1970, in: *Recueil des décisions du Conseil d'Etat*, 1970, p. 350, in: 72 *I.L.R.*, at p. 56; *Kaddour*, Conseil d'Etat, case no. 04642, 10 May 1968, in: *Recueil Lebon; Veuve Haffiade Messaoud*, Conseil d'Etat, case no. 51458, 10 May 1968, in: *Recueil Lebon; Saiah*, Cour de Cassation, Ch. Civile 1, case no. 76–14704, 12 December 1977, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 1 N. 470, p. 373; *Consorts Deguy-Charon-Gerst*, Cour de Cassation, Ch. Civile 1, case no. 69–11738, 29 May 1973, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 1 N. 183, p. 163; *Consorts Richard*, Cour de Cassation, Chambre civile 3, case no. 69–70143, 19 March 1970, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 3 N. 222, p. 163; *Veuve Chaurand v. Agent judiciaire du trésor public*, Tribunal de grande instance of Riom, 2 October 1963, *Gazette du palais*, 1964, 1, 155, in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1964, at p. 750, in: *A.F.D.I.*, 1964, at p. 871, in: 44 *I.L.R.*, at p. 39.

551 See, at *infra*, p. 253.

552 This principle is discussed in detail at *infra*, p. 250.

examined below,[553] French courts applied a different solution when internationally wrongful acts were committed *by the F.L.N.*

This exception to the principle of succession established at Article 18 of the *Déclaration* was thus limited to measures taken by France that were *specifically directed against the rebellion of the F.L.N.* and provided compensation only for *French nationals*. Therefore, Algeria was responsible for all other types of obligations arising from internationally wrongful acts committed before the date of succession as well as for those committed against *foreign nationals* and other States. There is one case of State practice involving the commission of an internationally wrongful act against a *foreign national* where France nevertheless decided to provide reparation as a result of the acts.

This case involves damage to property suffered in May 1961 by a Swiss national, Mr Gehrig, a trader who was also the Consular Agent of Switzerland in Oran.[554] The internationally wrongful acts were not committed by the French colonial authorities but by the O.A.S. (*Organisation armée secrète*), a para-military organisation of French nationals in Algeria opposed to its independence. Switzerland negotiated directly with the French government to settle these claims.[555] France (as the continuing State) recognised its responsibility for the internationally wrongful act probably based on the ground that the perpetrators were French nationals opposed to the independence of Algeria and that it would have been contrary to equity for the new State of Algeria to be held accountable for such act.

d) *A French Court Case in the Context of the Independence of Vanuatu (1980)*

In the *Russet* case, the French *Conseil d'Etat* ordered France to pay to Mr Russet an amount equivalent to the compensation originally awarded by the judgment of the Court of Appeal of Nouméa before the independence of the Republic of Vanuatu.[556] It held that the continuing State (France) should pay compensation for

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553 See at *infra*, p. 190.

554 This case is briefly mentioned in: *Rapport du Conseil fédéral*, 1965, at p. 28, quoted in: Paul GUGGENHEIM, "La pratique suisse 1965", 23 *A.S.D.I.*, 1966, p. 87. It is also referred to in: Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1966, at pp. 995–996, and also in: Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1961, pp. 602–603. It is also briefly discussed in: Natalino RONZITTI, *La successione internazionale tra stati*, Milan, Dott. A. Giuffrè, 1970, p. 217.

555 In its *Rapport du Conseil federal*, 1965, at p. 28, the Swiss government makes reference to the unresolved issue of compensation for 50 Swiss nationals which suffered damage before the independence of Algeria (with the exception of the claim of Mr Gehrig discussed here).

556 *Russet*, Conseil d'Etat, 5 October 1984, case no. 51543, in: *Recueil Lebon*, reported in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1986, p. 249; 89 *I.L.R.*, p. 15. This case arose from the necessity to improve security at the airport of Port-Vila and a 1971 joint decision issued by the "Resident Commissioner" for France and the United Kingdom on the New Hebrides Island formally requiring Mr Russet, a French national who owned land adjoining the

wrongful acts *it committed* against a French national before the independence of Vanuatu.[557] The *Conseil d'Etat* also indicated that France should in turn assume its rights against the United Kingdom and the Republic of Vanuatu for payment of this sum of compensation.

It has been suggested in doctrine that the decision is an illustration that the new State should not take over the consequences of internationally wrongful acts committed before its independence.[558] In fact, the reasoning of the *Conseil d'Etat* shows that the continuing State continues its responsibility for pre-succession damage and that this applies *a fortiori* when dealing with the obligation to honour the administrative debts which were its own before the date of succession.[559] It should be noted, however, that another case in the context of the independence of Vanuatu came up with a different solution.[560]

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airport, to cut down a certain number of coconut palms and remove certain buildings. Mr Russet refused and the question was finally decided before the (French) Court of Appeal of Nouméa in 1974 awarding him substantial damages. Mr Russet tried unsuccessfully to obtain the execution of the judgment. Following the accession of the territory to independence as the Republic of Vanuatu on 30 July 1980, Mr Russet instituted proceedings against France (the continuing State) before French administrative courts requesting an order for the payment of the compensation which had been awarded by the courts before the independence of Vanuatu. By a judgment of the *Tribunal administrative* of Paris of 24 November 1982, the application was rejected. Mr Russet filed an appeal to the *Conseil d'Etat*.

557 This is the relevant quote from the decision: "In order to refuse to execute the judicial award, the State based itself on the ground that the accession of the New Hebrides to internal autonomy pursuant to a diplomatic exchange of letters of 15 September 1977, and subsequently independence on 30 July 1980, had deprived Mr Russet of all means of action against the debtor in order to obtain payment of the compensation award. In these circumstances, the French State, by refusing to ensure the execution of the order made against it in 1974 [by the Court of Appeal of Nouméa], committed a fault such as to engage its responsibility".

558 This is, for instance, how this case seems to be interpreted by Jean-François LACHAUME, "Jurisprudence française relative au droit international (année 1985)", *A.F.D.I.*, 1986, at p. 931: "A s'en tenir aux principles les plus classiques du droit international public, il s'avérait difficile de mettre en cause la responsabilité de Vanuatu; l'acte reproché à la France, dans la mesure où il aurait été constitutif d'une faute, ne saurait engager la responsabilité de l'Etat successeur; ce dernier pouvait faire valoir que l'occupation du domaine, étant liée au processus de succession d'Etats, il y aurait là une dette odieuse qu'il n'était pas tenu d'honorer".

559 Charles ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1986, at p. 252.

560 *S.A. Ballande Vanuatu* case, *Conseil d'Etat*, decision of 27 September 1985, in: *Recueil Lebon*, 1985, p. 680; *R.F.D.A.*, 1986, p. 273, discussed in Jean-François LACHAUME, "Jurisprudence française relative au droit international (année 1985)", *A.F.D.I.*, 1986, p. 930. This case dealt with damage caused to property of a company whose premises were illegally occupied in 1978 and 1979. The Resident Commissioner for France had failed to take action to remove the occupiers by force. The *Conseil d'Etat* concluded that although the company had obtained a judicial order in May 1980, there had been insufficient time for the French authorities to decide what action to take prior to the

e) *The 1958 Peace Treaty between Indonesia and Japan*

Indonesia became an independent State after the Second World War.[561] On 20 January 1958, Indonesia entered into a peace treaty with Japan terminating the state of war between the two countries.[562] The treaty provided for Japan to pay reparation arising out of the internationally wrongful acts it committed during the Second World War at the time Indonesia was still a Dutch colony.[563] Under Article 5 of the treaty, Japan waived its claims against the Republic of Indonesia for any internationally wrongful acts which may have been committed by the predecessor State (the former Netherlands East Indies) before the creation of Indonesia as an independent State.[564]

This provision may be interpreted as the acknowledgement by Japan that the new State of Indonesia could not be held responsible for the acts committed by a State (the Netherlands) whose continuity was not affected by the birth of the new State. Another interpretation is more simply that Japan only waived its claims against Indonesia in reciprocity for a similar waiver made by Indonesia in the treaty.[565]

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accession of the territory to independence in July 1980 and that from that date the French authorities were no longer responsible for the enforcement of the order.

561 During the Second World War, the Dutch colony of Indonesia was occupied by Japan. The Republic of Indonesia was officially created on 17 August 1945 when its independence was proclaimed just days after Japan surrendered to the Allies during the Second World War. This declaration of independence was not recognised by the Netherlands, the former colonial power, which made several military offensives between 1945 and 1949 to reoccupy Indonesia. Finally, in November 1949, the Netherlands recognised the sovereignty of the Republic of Indonesia. On 27 December 1949 the Dutch East Indies ceased to exist. On 28 September 1950, Indonesia became a member of the United Nations. Between 1949 and 1956, the Republic of Indonesia entered into a real union with the Netherlands.

562 *Treaty of Peace between Japan and the Republic of Indonesia*, in: 324 *U.N.T.S.*, p. 227, also in: 3 *Jap.Ann.Int'l L.*, 1959, p. 158; *British Foreign State Papers*, vol. 163, 1957–1958, at p. 926; Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, p. 158. The Treaty was entered into force on 15 April 1958.

563 Aspects of the treaty dealing with Indonesia's right to reparation are analysed in another Chapter of the present study. See at *infra*, p. 327.

564 Article 5 reads as follows: "(1). Japan waives all claims of Japan and its nationals against the Republic of Indonesia and its nationals arising out of the War or out of actions taken because of the existence of a state of war. (2). The foregoing waiver includes any claims arising out of actions taken by the former Netherlands East Indies or the Republic of Indonesia with respect to Japanese ships between September 1, 1939, and September 2, 1945, as well as any claims and debts arising in respect to Japanese prisoners of war and civilians internees in the hands of the former Netherlands East Indies or the Republic of Indonesia, but does not include Japanese claims specifically recognized in the laws of the Republic of Indonesia enacted since September 2, 1945".

565 Article 4(2) states that: "Indonesia waives all reparations claims of the Republic of Indonesia and all other claims of the Republic of Indonesia and its nationals arising

f) *Ghana (1957)*

Ghana became an independent State on 6 March 1957. Almost ten years before, riots had erupted in the then British colony of Gold Coast; it involved natives demonstrating against British rule in Gold Coast. During the trouble, a Swiss company (the *Union Handelsgesellshaft* of the city of Basel) suffered damage to its property.[566] After the events, Switzerland and the United Kingdom entered into diplomatic discussions which eventually led to the recognition by the latter of its responsibility under international law for the acts committed by rioters against foreign properties. It is important to note that this engagement was taken in 1957 by the United Kingdom but *before* the independence of Ghana. The effective payment by the United Kingdom to the Swiss government for the damage suffered to *Union Handelsgesellshaft* was, however, made in August 1957, i.e. *after* Ghana had become an independent State.

One possible interpretation of this example is that it supports the view that the continuing State (the United Kingdom) should remain responsible for internationally wrongful acts committed before the creation of the new State. Another more likely interpretation is that the United Kingdom made payment *after* the independence of Ghana simply based on good faith and the fact that it had already agreed to it before the date of succession.

6.2 *Examples where the Successor State Took Over the Obligations Arising from the Commission of Internationally Wrongful Acts*

We have just examined several cases of State practice and municipal court cases where the continuing State remained responsible for internationally wrongful acts committed before the creation of the new State. There are other examples of State practice and municipal court cases where, on the contrary, the new successor State took over the obligations arising from internationally wrongful acts committed before the date of succession. This is, for instance, the case of Dutch courts' decisions which held that the new State of Indonesia took over the obligations arising from internationally wrongful acts committed by the Netherlands during the Second World War.[567] It should be noted that these municipal law cases *do not involve questions of succession to international responsibility*, as the wrongful acts were committed

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out of any actions taken by Japan and its nationals in the course of the prosecution of the War".

566 These events are referred to in: *Rapport du Conseil fédéral*, 1957, at p. 152, in: Paul GUGGENHEIM, "La pratique suisse, 1957", 15 *A.S.D.I.*, 1958, at p. 257.

567 *Poldermans v. State of the Netherlands*, Netherlands, Court of Appeal of The Hague (First Chamber), 8 December 1955, in: *N.J.*, 1959, no. 7 (with an analysis by Boltjes), reported in: *I.L.R.*, 1957, p. 69; *Poldermans v. State of the Netherlands*, Netherlands, Supreme

by the predecessor State not against another State (or a national of another State) but against *its own nationals*.[568]

This principle of succession is also well-illustrated by the Constitution of Namibia, which indicates that (in principle) the new State is responsible for the obligations arising from internationally wrongful acts committed by South Africa (but also that Namibia may repudiate such acts). The principle of the transfer of the obligation to repair to the successor State has been applied by the Supreme Court of Namibia in the case of *Minister of Defence, Namibia v. Mwandinghi*.[569] The regime prevailing under the Constitution and the outcome of this case was no doubt influenced by the political context in which Namibia became an independent State and the fact that the damage had been suffered by a Namibian national (and not a foreign national).

Finally, the principle of succession is also supported by Article 18 of the *Déclaration de principes relative à la coopération économique et financière* entered into between France and Algeria and by official statements made by the French government which clearly indicate that Algeria should be liable for *all* internationally wrongful acts committed before the date of succession.[570] French municipal courts have consistently held that the new State of Algeria should be responsible (in principle) to provide compensation to the victims of internationally wrongful acts committed by the F.L.N. in its struggle to achieve independence.[571]

It is important to note that although several examples have been found where the successor State was held responsible for pre-succession damage, these cases are not entirely convincing and can hardly support any legal principle in favour of succession in the context of Newly Independent States. Thus, it seems that the outcome of these cases was ultimately *politically motivated* and driven by special circumstances. This aspect is further discussed below.

Court, 15 June 1956, in: *Id. Van der Have v. State of the Netherlands*, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80.

568 The reasons for treating these types of cases differently have been explained at *supra*, p. 30.

569 *Minister of Defence, Namibia v. Mwandinghi*, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), in: 91 *I.L.R.*, p. 358. See also the previous decision of the High Court: *Mwandinghi v. Minister of Defence, Namibia*, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), in: 91 *I.L.R.*, p. 343.

570 An exception to this rule of succession has already been examined (at *supra*, pp. 179–180): the continuing State (France) should remain responsible for the internationally wrongful acts it committed against *French nationals* in fighting the rebels of the F.L.N.

571 *Perriquet*, Conseil d'Etat, case no. 119737, 15 March 1995, in: *Recueil Lebon; Hespel*, Conseil d'Etat, 2/6 SSR, case no. 11092, 5 December 1980, in: *Tables du Recueil Lebon*; Conseil d'Etat, 2/4 SSR, case no. 5059, 25 May 1970, in: *Tables du Recueil Lebon; Etablissements Henri Maschat*, Conseil d'Etat, case no. 04878, 10 May 1968, in: *Recueil Lebon; Consorts Hovelacque*, Conseil d'Etat, 2/6 SSR, case no. 35028, 13 January 1984, in: *Tables du Recueil Lebon*.

a) *Dutch Court Cases in the Context of the Independence of Indonesia (1949)*

There are at least two decisions of Dutch courts which held that it was for the new State of Indonesia to take over the consequences of an internationally wrongful act committed by the Netherlands during the Second World War.

The first case was decided by the District Court of The Hague in the *Van der Have* case.[572] The Netherlands argued that according to Article 4 of the 1949 *Draft Agreement on Transitional Measures* entered into between the Kingdom of the Netherlands and the Republic of Indonesia, liabilities of the "Asian part" of the Kingdom of the Netherlands were transferred to the new Republic of Indonesia.[573] The Court held that it was, in principle, the Republic of Indonesia (the successor State) which should be responsible for the unlawful acts committed by the Dutch Army during its military campaign combating secessionist rebel groups. The Court further indicated that this did not, however, exclude the possible responsibility of the Netherlands for the internationally wrongful acts. The outcome of the case is, in fact, not clear and writers disagree on the actual findings of the Court.[574]

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572 *Van der Have v. State of the Netherlands*, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80. This case concerned the death of an Indonesian native who was killed unlawfully by a soldier of the Royal Netherlands Indies Army in the context of the repression by the Dutch Army of the rebellions of native Indonesian secessionist groups in Java (these events are known as the "second military action" of 18 December 1948). After the Second World War, the widow sought to recover compensation before Dutch Courts for the loss she had suffered from the death of her husband.

573 *Draft Agreement on Transitional Measures* (which is part of the *Round-Table Conference Agreement between the Kingdom of the Netherlands and the Government of the Republic of Indonesia* of 2 November 1949), in: 69 *U.N.T.S.*, p. 200, at p. 267. Article 4 reads as follows: "The Kingdom of the Netherlands and the Republic of the United States of Indonesia recognize and accept that all rights and obligations of Indonesia, under private and public law, are *ipso jure* transferred to the Republic of the United States of Indonesia, unless otherwise provided for in the special agreements included in the Union Statute". The Netherlands stated that it was only the "European part" of the Kingdom of the Netherlands and that the military forces which operated during the second military action on Java were in fact doing so in the service of the other "Asian part" of the Kingdom. The State of the Netherlands therefore contended that liability for internationally wrongful acts committed by soldiers rested on the "Asian part" of the Kingdom.

574 Some in doctrine have indicated that the Court finally decided that the Netherlands should *also* compensate the plaintiff based on internal constitutional grounds. See the analysis by H. LAUTERPACHT, in: *I.L.R.*, 1953, p. 80. This is also the position of Michael John VOLKOVITSCH, pp. 2182, 2201, who concludes that both Indonesia and the Netherlands were held responsible by the Court. For him, the Court "strongly urged the recognition of a principle of joint liability by which the former power would not escape responsibility". Others in doctrine have concluded that only Indonesia was found liable by the Court. For instance, J.H.W. VERZIJL,

The second case decided by a Dutch court is that of *Poldermans v. State of the Netherlands*, which arose from the internment by the Japanese occupation authorities of a Dutch civil servant (from 1942 to 1945).[575] The Supreme Court rejected the claim based on the application of Article 4 of the *Draft Agreement on Transitional Measures* between the Netherlands and Indonesia. For the Court, this provision reflected:

> [T]he accepted rules of international law, that the Republic [of Indonesia]—which succeeded to all the rights of the former Netherlands Indies—should also have to bear all its obligations. Since no specification of those obligations was given at the time, the provision must be construed as covering all debts which at the time of the transfer of sovereignty existed according to the Indonesian law then in force.[576]

The findings of these two Dutch courts that the new State of Indonesia should be held accountable for the internationally wrongful acts committed by the predecessor State was criticised in doctrine.[577] The findings of the courts seem to be contrary to the principle (which is examined below)[578] that a new State should not be responsible for obligations arising from internationally wrongful acts committed by the predecessor State during the armed struggle led by "insurrectional movements" to establish that new State. The findings of both courts may, however, be explained by the existence of an express provision contained in a treaty between

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p. 226, who simply concludes that in this case the Court decided, entirely wrongly in his view, that it was solely for the Republic of Indonesia, as the successor State, to be held responsible for the unlawful acts committed by the Dutch Army.

575 *Poldermans v. State of the Netherlands*, Netherlands, Court of Appeal of The Hague (First Chamber), 8 December 1955, in: *N.J.*, 1959, no. 7 (with an analysis by Boltjes), reported in: *I.L.R.*, 1957, p. 69; *Poldermans v. State of the Netherlands*, Netherlands, Supreme Court, 15 June 1956, in: *Id.* During this period of internment, the plaintiff received no salary while at the same time his contract of service had not been terminated or cancelled. After the War, he sued the Netherlands for payment of that salary.

576 *I.L.R.*, 1957, at p. 72. The Court also dismissed the plaintiff's argument that the debt under consideration could not be regarded as coming within the definition of Article 4 because it was a "debt arising from tort—the kind of debt which, owing to its so-called 'odious' character, cannot be held to come under that provision". The Court refused to discuss the value of this theory and instead simply added that it was not warranted in the present action. The Court concluded that "the debt, if it exists at all, has therefore, as the Court of Appeal decided, passed to the Indonesian Republic".

577 For instance, J.H.W. VERZIJL, p. 226, concludes that the Court in the *Van der Have v. State of the Netherlands* case, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80, was entirely wrong to held the Republic of Indonesia responsible for the unlawful acts committed by the Dutch Army. Similarly, H. LAUTERPACH, in: *I.L.R.*, 1953, p. 80, commenting on the case of *Van der Have v. State of the Netherlands, Id.*, states that "from the perspective of international law the judgment seems to depart drastically from the accepted practice in respect of the liability of the successor State for torts".

578 This principle is further discussed at *infra*, p. 250.

Indonesia and the Netherlands, whereby the new State was held responsible for the acts committed by the Netherlands before the date of succession.[579]

b) *State Practice of France and French Court Cases Supporting the Principle of Succession in the Context of the Independence of Algeria (1960)*

When Algeria was still a French colony, the Algerian Assembly had established a compensation regime for victims of "terrorist" acts committed during the national liberation war (i.e. those committed by the *Front de Libération Nationale* (F.L.N.), the insurgent group fighting for independence).[580] The question of compensation was also on the agenda during the negotiations between France and the F.L.N. which led to the independence of Algeria. It was specifically addressed at Article 18 of the *Déclaration de principes relative à la coopération économique et financière* (dated 19 March 1962), which is part of the *Evian Accords* that ended the national liberation war.[581] This clause provided that:

> Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities.[582]

This provision has been interpreted as meaning that it was for the new State of Algeria (and not for France, the continuing State) to compensate victims of internationally wrongful acts committed between 1 November 1954 and 9 July 1962 (the period of the national liberation war). Such obligation of the new State to provide compensation applied for French nationals and foreigners alike. This was

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579 This is the view of Wladyslaw CZAPLINSKI, p. 348, for whom the findings of the Court in the case of *Van der Have v. State of the Netherlands*, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80, was solely based upon the application of Article 4 of the Treaty between Indonesia and the Netherlands and did not express any rule of international law.

580 Decision no. 55–032 of 10 June 1955.

581 The text of the Agreement is found in: *J.O.R.F.*, 20 March 1962, pp. 3019–3032. Negotiations between France and the F.L.N. led to a cease-fire signed on 18 March 1962, at Evian, France. The *Evian accords* also provided for continuing economic, financial, technical and cultural relations between the two States. It also installed an interim administrative arrangement until a referendum on self-determination could be held. The referendum was finally held in Algeria on 1 July 1962. France declared Algeria an independent State on 3 July 1962. Previously, the *Evian Accords* had also been approved by referendum in France on 8 April 1962.

582 The original French version reads as follows: "L'Algérie assume les obligations et bénéficie des droits contractés en son nom ou en celui des établissements publics algériens par les autorités françaises compétentes".

clearly the position taken by the French Minister of Foreign Affairs[583] as well as by the French State Secretary for Algerian Affairs.[584]

The French Minister of Foreign Affairs expressed the view that Article 18 of the *Déclaration*, under which Algeria was held responsible for obligations arising from internationally wrongful acts committed before the date of succession, was "l'application des règles du droit international relative à la succession d'Etats".[585] The same assessment was made by French courts.[586] It has been argued in doctrine

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583 This is the response given by the Minister of Foreign Affairs to a question posed at the French National Assembly: "La réparation des dommages matériels subis en Algérie *par des nationaux ou par des résidents étrangers* au cours de troubles de l'ordre public pose un problème de droit interne algérien" (emphasis added). This extract is taken from: *J.O.R.F., Assemblée nationale*, no. 7496, 17 January 1970, at p. 104, quoted in: Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1970, at pp. 942–943.

584 This is an extract of the debate at the French National Assembly and the statement made by the State Secretary for Algerian Affairs (in: *J.O.R.F., Assemblée nationale*, no. 82, 16 March 1970, at p. 2408, quoted in: Jean CHARPENTIER, "Pratique française du droit international public", *A.F.D.I.*, 1963, at p. 1022): "La décision no. 55–032 de l'Assemblée algérienne a posé le principe de la responsabilité de l'Algérie en ce qui concerne la réparation des dommages causées aux personnes et aux biens à l'occasion des événements qui se sont déroulés sur ce territoire depuis le 1er novembre 1954. Les difficultés qu'a connues l'Algérie en 1962 ont profondément perturbé les procédures normales d'attributions des indemnités et les retards dans l'étude des droits des intéressés sont très importants. Il n'en demeure pas moins que, aux termes des accords d'Evian et spécialement de l'article 18 de la déclaration de principes relative à la coopération économique et financière, l'Algérie reste tenue d'assumer les obligations de l'espèce contractées en son nom par les autorités françaises compétentes". Another statement by the State Secretary for Algerian Affairs is worth quoting (in: *J.O.R.F., Assemblée nationale*, no. 3298, 28 September 1963, at p. 4919, quoted in: Jean CHARPENTIER, *Ibid.*, at pp. 1022–1023): "Il appartient donc en droit aux autorités algériennes de liquider et de régler les indemnités afférentes aux dommages corporels et matériels subis du fait d'événements d'Algérie, que ces évènements aient eu lieu avant ou après l'indépendance algérienne et de quelques manière que ce soit".

585 This was the assessment made by the Minister in response to a question posed at the National Assemby, in: *J.O.R.F., Assemblée nationale*, no. 4275, 20 January 1968, at p. 145.

586 In particular, the decision of the Court of Appeal of Paris of 17 May 1969 in the case of *Agent judiciciare du trésor public v. Labeunie*, where the Court indicated that "l'article 18 de la déclaration de principes relative à la coopération économique et financière des accords d'Evian du 19 mars 1962 doit s'interpréter selon la règle du Droit des Gens dite de succession des Etats, comme posant le principe fondamental selon lequel l'Algérie assume toutes les obligations et bénéficie de l'ensemble des droits contractés par les autorités françaises dans l'exercice des compétences transférées lors de l'indépendance au nouvel Etat algérien" (quoted in the decision of the Cour de Cassation, Chambre civile 1, case no. 69–13387, 15 June 1971, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 1 N. 195, p. 164; in: *J.D.I.*, 1972, p. 812; 72 *I.L.C.*, at p. 53). However, in this case, the Court decided that France (and not Algeria) should pay compensation to the plaintiff.

that the solution adopted by Article 18 was, on the contrary, not in accordance with principles of State succession.[587]

As previously observed above,[588] to this principle of succession existed an exception. French municipal courts consistently held that France should remain responsible for the internationally wrongful acts committed by France which were *specifically directed against the rebellion of the F.L.N.* and had for victims *French nationals*. French courts have, however, applied a different solution when the acts were committed *by the F.L.N.* They have applied the principle, which is examined in detail below,[589] that whenever internationally wrongful acts are *committed by rebels* in their struggle to achieve independence, the responsibility for such acts should be transferred to the new State upon its independence.

This principle has been consistently applied by French courts.[590] These cases are examined in detail in a subsequent Chapter.[591] They have been viewed favourably in doctrine.[592]

The outcome of these decisions by French courts can hardly be considered as firm precedents in the establishment of any principle of succession to international responsibility in the context of Newly Independent States. Thus, it seems that the courts simply applied a *special rule* which prevails in the *specific context* of internationally wrongful acts committed by an insurrectional movement in its struggle for independence.[593] What is more is the fact that Algeria was not a party in any of the proceedings before these French courts. Consequently, these court decisions did not formally hold Algeria responsible for the commission of the internationally wrongful acts of the F.L.N. These decisions simply held that France could not be responsible for such acts which only "concerned" ("*intéressent*") Algeria. These decisions therefore had only limited concrete implication.

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587 See, for instance, the comments by these two writers: M. CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1968, at p. 881; Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, p. 186.

588 See, *supra*, pp. 179–180.

589 This principle is discussed at *infra*, p. 224.

590 *Perriquet*, Conseil d'Etat, case no. 119737, 15 March 1995, in: *Recueil Lebon*; *Hespel*, Conseil d'Etat, 2/6 SSR, case no. 11092, 5 December 1980, in: *Tables du Recueil Lebon*; Conseil d'Etat, 2/4 SSR, case no. 5059, 25 May 1970, in: *Tables du Recueil Lebon; Etablissements Henri Maschat*, Conseil d'Etat, case no. 04878, 10 May 1968, in: *Recueil Lebon*; *Consorts Hovelacque*, Conseil d'Etat, 2/6 SSR, case no. 35028, 13 January 1984, in: *Tables du Recueil Lebon*.

591 See, at *infra*, p. 236.

592 Jean-François LACHAUME, "Jurisprudence française relative au droit international public (1970)", *A.F.D.I.*, 1971, at p. 1004, for whom this solution, however correct it may be from a legal stand point, is nevertheless difficult to implement in practice as the Algerian authorities would probably not provide any such compensation to the victims.

593 This principle is discussed at *infra*, p. 224.

c) *Namibia (1991)*

In March 1990, Namibia became an independent State after a period of German colonisation (1884–1915), British occupation (1915–1920) and South African Mandate (1920–1966), which was followed by a period of continuous illegal presence by South Africa.[594]

i) *The United Nations Council of Namibia as the Predecessor State of Namibia*

Prior to its independence, Namibia was represented in its international relations by the United Nations Council of Namibia.[595] The Council represented Namibia in several international conferences, including the 1978 United Nations Conference on "succession of States in respect to treaties" and the 1983 United Nations Conference on "succession of States in respect to State property, archives and debts".[596] In the context of these two Conferences, two resolutions were passed and annexed to the Final Act. The resolutions (both entitled "Resolution Concerning Namibia") indicated that in the case of Namibia, the articles of the Convention should be "interpreted…in conformity with United Nations resolutions on the question of Namibia". One such resolution specifically states that "South Africa is not the predecessor State of the future independent State of Namibia".[597] Accordingly, it was decided that the United Nations Council of Namibia should be regarded as the "predecessor State".[598] According to one representative of the Council, Namibia

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594 See more generally on Namibia: Raymond GOY, "L'indépendance de la Namibie" 37 *A.F.D.I.*, 1991, p. 387; M. KAMTO, "L'accession de la Namibie à l'indépendance" 94 *R.G.D.I.P.*, 1990, p. 577; Georges ABI-SAAB, "Namibia and International Law: An Overview", 1 *African Y.I.L.*, 1993, pp. 3–11; Yilma MAKONNEN, "Namibia: Its International Status and the Issues of Succession of States", 3 *Lesotho L.J.*, 1987, pp. 183–221. The United Nations Institute for Namibia also published in 1984 a booklet entitled "Independent Namibia: Succession to Treaty Rights and Obligations Incorporating Namibian Treaty Calendar" (154 p.).

595 The legislative history of the Council is discussed below.

596 The United Nations invited the Council to participate in the 1978 Conference (UN Doc. A/AC.131/61, 4 April 1967).

597 *United Nations Conference on Succession of States in Respect to Treaties*, A/CONF.80/16/add.1, vol. III, p. 177. This point is further discussed in: Yilma MAKONNEN, "Namibia: Its International Status and the Issues of Succession of States", 3 *Lesotho L.J.*, 1987, pp. 201–203. The 1983 *Convention on Succession of States in Respect to State Property, Archives and Debts*, in: 22 *I.L.M.* p. 306, indicated that "in consequence, all rights of the future independent State of Namibia should be reserved": *Final Act of the United Nations Conference on Succession of States in Respect to State Property, Archives and Debts*, A/CONF.117/15, 7 April 1983, pp. 9–10.

598 This was also the wish of the representatives of SWAPO (the insurgent movement fighting for independence): *United Nations Conference on Succession of States in Respect to Treaties*, A/CONF.80/16/add.1, vol. I, p. 96, para. 66.

would be a *sui generis* case of succession, with the United Nations itself (in fact the United Nations Council of Namibia) as the predecessor State.[599]

This position has received some support in doctrine.[600] It should be noted that *in practice* South Africa was nevertheless deemed to be the "predecessor State" of Namibia. Thus, in the case of *Mwandinghi v. Minister of Defence, Namibia* before the High Court, which will be examined below, specific reference is made to South Africa as being the "predecessor State."[601]

ii) *Article 140(3) of the Namibian Constitution*

Prior to the independence of Namibia, questions of State succession had been the object of some comments in doctrine. It was largely agreed that the rule of *tabula rasa* should apply to the new State of Namibia, including with respect to any internationally wrongful acts committed by South Africa.[602] The position finally adopted by Namibia upon its independence sharply contrasts with these previous assessments. Article 140(3) of the Namibian Constitution provides that the acts of the South African government should be deemed as those of the new Namibian

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599 *Ibid.*, p. 44, para. 55.

600 See, for instance, Yilma MAKONNEN, "State Succession in Africa: Selected Problems", *R.C.A.D.I.*, t. 200, 1986–V, p. 173. See also: Yilma MAKONNEN, "Namibia: Its International Status and the Issues of Succession of States", 3 *Lesotho L.J.*, 1987, at p. 202.

601 *Mwandinghi v. Minister of Defence, Namibia*, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), in: 91 *I.L.R.*, p. 343, at pp. 352–353.

602 This was the position taken (in 1987) by Yilma MAKONNEN, "Namibia: Its International Status and the Issues of Succession of States", 3 *Lesotho Law Journal*, 1987, pp. 210 et seq., indicating that all dealings of South Africa with Namibia were illegal. His analysis dealt more generally with "economic and financial rights and obligations" but can easily be applied as well to the issue of succession to obligations arising from the commission of internationally wrongful acts. The *tabula rasa* rule adopted by the author (at p. 210) is based on the ground that "the essence of colonization [in Namibia] was economic domination and exploitation of the colonized peoples and territories" and that "Namibia's entire wealth, their resources as well as their economic activities [were] in the hands of South Africans and other aliens" (at p. 213). He concludes (at p. 213) that "the effect of succession of States on [these] alien economic interests will in fact be the most important single factor which will determine the degree of independence of the future state of Namibia" and that future Namibia would be "guided by the principle of self-determination and decolonization with the objective of eradicating alien exploitation and domination of all forms and manifestations" (p. 217). The view that the special situation of Namibia should have required the application of the clean slate rule is supported by Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, p. 207. Another writer in favour of the application of the clean slate rule (in the field of succession to treaties) is Paul C. SZASZ, "Succession to Treaties under the Namibian Constitution", 15 *South African Y.I.L.*, 1989–1990, pp. 65–80.

State.[603] Importantly, this provision also reserves the right for the new State to repudiate (by an act of legislation) the internationally wrongful acts committed by South Africa.[604] This is the text of the provision entitled "The Law in Force at the Date of Independence":

> (1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.
> (2) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.
> (3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.

There is no doubt that the adoption of this provision of the Namibian Constitution was largely influenced by the *political context* in which the independence of Namibia occurred. When Namibia became an independent State and the Constitution was drafted (March 1990), South Africa's President F.W. de Klerk had announced (in February 1990) the lifting of a 30-year ban on the A.N.C. (African National Congress) and other anti-apartheid organisations as well as the release of some political prisoners, including Mr Nelson Mandela, the historical leader of the A.N.C. This period was therefore marked by the end of the apartheid regime in South Africa.

Article 140(3) of the Namibian Constitution has been the object of many comments in doctrine.[605] It has been rightly suggested that this provision illustrates the principle that a successor State is always free to agree to accept the obligations

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603 *Constitution of Namibia*, adopted by the Constituent Assembly of Namibia on 9 February 1990, entered into force on 21 March 1991, U.N. Doc. S/20967/Add.2.

604 This aspect of the Constitution is discussed in: *Government of the Republic of Namibia and Another v. Cultura 2000 and Another*, Supreme Court, 15 October 1993, in: 1993, 3 *LRC* 175, in: 103 *I.L.R.*, p. 104, at pp. 111–112.

605 See, for instance: H.A. STRYDOM, "Namibian Independence and the Question of the Contractual and Delictual Liability of the Predecessor and Successor Governments", 15 *South African Y.I.L.*, 1989–1990, pp. 111–121.

arising from internationally wrongful acts committed by the predecessor State.[606] It has also been seen as contrary to the view, generally held in doctrine, whereby the successor State is not bound by internationally wrongful acts committed by the predecessor State.[607]

The scope and content of this provision was analysed in two decisions rendered by Namibian courts.

iii) *The Case of* Minister of Defence, Namibia v. Mwandinghi

The case of *Mwandinghi v. Minister of Defence, Namibia*[608] before the High Court of Namibia and that of *Minister of Defence, Namibia v. Mwandinghi*[609] before the Supreme Court of Namibia involved damages arising out of the shooting of Mr Mwandinghi, a Namibian national, by forces operating for the South African Defence Forces in 1987.[610] Before independence, the plaintiff submitted a claim for damages against the Minister of Defence of South Africa. Upon independence, he sought to substitute the Minister of Defence of Namibia as defendant based on Article 140(3) of the new Namibian Constitution. He applied to the High Court by notice of motion for an order to allow the substitution.

The Minister of Defence of Namibia opposed the motion on the ground that the Namibian Constitution did not make the new State responsible for obligations arising from internationally wrongful acts committed by the predecessor State. The argument was based on the fact that, on the one hand, Article 140(3) would not cover "delicts" (i.e. internationally wrongful acts) and, on the other hand, that Article 145 of the Constitution contains a disclaimer according to which an obligation may be accepted by Namibia only to the extent that it is recognised as binding under international law. Article 145 of the Namibian Constitution reads as follows:

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606 John DUGARD, *International Law; a South African Perspective*, 2nd ed., Kenwyn, Juta, 2000, pp. 232–233. This principle is further explained at *infra*, p. 215.

607 Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, p. 207–208. He is favour of the application of a rule of non-succession to obligations arising from the commission of internationally wrongful acts based on principles of private law (see at pp. 209–210).

608 *Mwandinghi v. Minister of Defence, Namibia*, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), in: 91 *I.L.R.*, p. 343.

609 *Minister of Defence, Namibia v. Mwandinghi*, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), in: 91 *I.L.R.*, p. 358.

610 These two decisions have been the object of comments in doctrine: Neville BOTHA, "To Pay or Not to Pay?: Namibian Liability for South African Delicts", 16 *South African Y.I.L.*, 1990–1991, pp. 156–162; Neville BOTHA, "Succession to Delictual Liability: Confirmation", 17 *South African Y.I.L.*, 1991–1992, pp. 177–179; Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, pp. 204–214.

> (1) Nothing contained in this Constitution shall be construed as imposing upon the Government of Namibia:
> (a) any obligations to any other State which would not otherwise have existed under international law;
> (b) any obligations to any person arising out of the acts or contracts of prior Administrations which would not otherwise have been recognised by international law as binding upon the Republic of Namibia.
> (2) Nothing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia.

In its judgment, the High Court (comprised of one sitting Judge) indicated that Article 140 of the Constitution was an "acceptance by the new government of all that was previously done under those laws in the exercising of the powers conferred thereby" but added that this provision contains "no express reference to delicts or wrongs committed by the previous government".[611] The sitting Judge went on to state that the words "anything done under such laws" of Article 140(3) should be given their wide and ordinary meanings and should not be limited to lawful acts performed by the previous government. The sitting Judge concluded that it was wide enough to cover the claim of the plaintiff for "delicts" committed by the South African Defence Forces.

Similarly, the words "any obligations to any persons arising out of the acts or contracts of prior Administrations" of Article 145(1)b should also not be construed so as to include only lawful obligations and acts. This provision was described by the Judge as "a disclaimer clause by the new State of the Republic of Namibia in respect of obligations incurred by its predecessor, the Republic of South Africa", under which the question is whether the obligation to the plaintiff for acts of the predecessor State "is recognised by international law as one which is binding on the successor State".[612] The Minister of Defence of Namibia submitted that under international law "a new State does not succeed to delicts committed by its predecessor and consequently, applying art. 145(1)(b), the Minister of Defence of Namibia is not liable and cannot be substituted for the wrong committed by the Minister of Defence of the Republic of South Africa".[613] The sitting Judge seems to have accepted this argument, as a matter of principle, and stated:

> [F]or the purpose of this case, I shall accept that in international law a new State is not liable for the delicts committed by its predecessor.[614]

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611 *Mwandinghi v. Minister of Defence, Namibia*, High Court, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), at p. 856, in: 91 *I.L.R.*, p. 343, at p. 346.

612 *Ibid.*, at pp. 352–353.

613 *Ibid.*, at p. 353. In support of its position, the defendant referred to the case of *R.E. Brown* (United States v. Great Britain, Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129), and the case of *Hawaiian Claims* (Great Britain v. United States, award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 157).

614 *Id.*

However, in the concrete situation of the present case, he had already concluded that Article 140(3) expressed the acceptance by the new State of the internationally wrongful acts committed by the predecessor. Therefore, he stated:

> The question whether in international law delicts committed by a predecessor State become the delicts of a successor Sate or not is no longer relevant. By its acceptance of such debts, in this case in terms of the Constitution, the debt became that of the new State in terms of the municipal law of the State and is according to municipal law principles justiciable in the courts of the land.
>
> When art 145(1)(b) refers to 'acts or contracts…which would not otherwise have been recognised by international law as binding upon the Republic of Namibia', it can therefore not mean to refer to the recognition in international law of non-liability of a new State for delicts committed by its predecessor. This mater is now dealt with, according to our Constitution, in terms of the municipal law, and if the new State of Namibia wishes to repudiate such liability, provision is specifically made therefore at art 140(3).[615]

In other words, the sitting Judge concluded that it made little difference whether or not the rules of State succession *in international law* called for Namibia to take over responsibility for internationally wrongful acts committed by South Africa since the Namibian Constitution specifically provided for such acceptance of liability *under its own municipal law*. The Judge thus stated that "in the present case the new State chose to accept liability, subject to its right to repudiate, and is therefore liable".[616] He further maintained that "I know of no principle whereby international law can step in and undo such an acceptance by a State".[617] The Judge therefore decided that the Minister of Defence of Namibia was substituted as the defendant in the present case to the Minister of Defence of the Republic of South Africa. The Minister of Defence of Namibia appealed this decision before the Supreme Court.

The Supreme Court dismissed the appeal and confirmed the decision of the lower court. The Court started its analysis by making this (rather controversial) remark:

> There can be no doubt that when delict was committed, the respondent acquired a private right to compensation for damages against the administration then in control of the country. Such private rights do not cease on a change of sovereignty.[618]

It seems that the Court here confuses the right to start procedure (which is not contested) and the "acquired right" to "compensation for damages", which is undoubtedly quite another thing. For the Court, Article 140(3) of the Constitution "cannot be said to have amended the position of international law pertaining to private rights".[619] It also seems that the Court analysed Article 140(3) of the

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615 *Ibid.*, at p. 354.
616 *Ibid.*, at p. 355.
617 *Ibid.*, at pp. 354–355.
618 *Minister of Defence, Namibia v. Mwandinghi*, Supreme Court, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), at p. 358, in: 91 *I.L.R.*, p. 358, see at pp. 359–360.
619 *Ibid.*, see at p. 361.

Constitution as a question of attribution to the new *government* of internationally wrongful acts committed by the previous *government*, rather than a question of succession of *States*. This is clear from this extract from the decision:

> [W]hat art 140 succeeds in doing is to confirm in no uncertain terms that the successor Government would inherit liability for anything done by the predecessor Government under laws existing prior to independence unless such laws were repealed by the successor government by means of an Act of Parliament.[620]

The Court's confusion between the two distinct concepts of succession of "governments" and succession of "States" is also evident from the fact that in support of its finding it relied on Article 15(1) (which later became Article 10(1) in the final version) of the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts*, which indeed only deals with succession of *governments*.[621] The Court interpreted this provision as:

> …attribut[ing] to the State which has a new government after the insurrection, not only the acts of the organs of the insurrectional movement, but also those committed by the State before the insurrection has ceased.[622]

This is another very controversial statement by the Court that is arguably misleading. Firstly, the Court should have referred to Article 10(2) of the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts* dealing with succession of States and not to Article 10(1), which concerns changes of governments.[623] Secondly, the Court's affirmation of the principle of succession to obligations arising from the commission of internationally wrongful acts is correct in so far as it deals

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620 *Ibid.*, at pp. 360–361. The Court also quoted the work of Hazem M. ATLAM, "National Liberation Movements and International Responsibility", in: M. SPINEDI & B. SIMMA (eds.), *United Nations Codification of State Responsibility*, New York, Oceana, 1987, at pp. 51–52, to support its proposition. However, this reference is misleading. Thus, for Atlam the solution adopted by the I.L.C., whereby the new government is responsible for the acts committed by the previous government, is an "unacceptable solution" in the context of racist regimes overthrown. The case of Namibia would certainly fit the criteria of a racist regime overthrown. It has been rightly pointed out in doctrine that by subscribing to the work of Atlam, the Court was in effect endorsing an "unacceptable solution": Neville BOTHA, "Succession to Delictual Liability: Confirmation", 17 *South African Y.I.L.*, 1991–1992, p. 178.

621 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

622 *Minister of Defence, Namibia v. Mwandinghi*, Supreme Court, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), at p. 359, in: 91 *I.L.R.*, p. 358, see at p. 360. Here again, in support of this proposition, the Court quoted the above-mentioned work of Hazem M. ATLAM, "National Liberation Movements and International Responsibility", in: M. SPINEDI & B. SIMMA (eds.), *United Nations Codification of State Responsibility*, New York, Oceana, 1987.

623 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

with acts committed *by the insurrectional movement* during its armed struggle for independence.[624] However, the regime is different for those acts committed *by the predecessor State* in combating the secessionist rebellion.[625] Thus, under Article 10(2) of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts*, as a matter of principle, the new State (Namibia) which emerged as a result of the struggle of a national liberation movement (S.W.A.P.O., South West Africa People's Organisation) *should not* be held responsible for the acts committed by the predecessor State (South Africa) during that period of trouble.[626] The Court is therefore wrong in stating that the work of the I.L.C. means that "when a national liberation movement becomes the new government of a State, as was the case in Namibia, the new State will be attributed with the conduct which would have been previously considered as an act of the pre-existing state, that is, the new government inherits responsibility for the acts committed by the previous organs of the State".[627] This misinterpretation of the work of the I.L.C. by the Court has not passed unnoticed by the I.L.C.'s Special Rapporteur Crawford:

> Namibia, as a new State created as the result, *inter alia*, of the actions of the South West Africa People's Organization, a recognized national liberation movement, was not responsible for the conduct of South Africa in respect of its territory. That it assumed such a responsibility attests to its concern for individual rights, but it was not required by the principles of article 15 [now Article 10].[628]

This being said, nothing prevents a new State to decide, such as in the present case, based on policy grounds, to take over the liability for acts committed by the predecessor State.[629] The flaw in the reasoning of the Court is to say that there is a legal requirement for the new State to do so under Article 10 of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts*. In other words, the Court should have based its conclusion in favour of the transfer of obligations on the clear provision of the Namibian Constitution. The Court was wrong in trying to validate its conclusion based on the work of the I.L.C.

The Court, as the sitting Judge before it, interpreted the words "anything done under such laws" of Article 140(3) as to include unlawful acts performed by the previous State. The Court then indicated that Namibia did not repudiate any such acts with the use of Article 140(3). It concluded:

> The necessary consequence which therefore follows is that [Namibia] is saddled in law with the liability to compensate the plaintiff for the damage which he alleges he has suffered from the delictual acts of the official of the predecessor Government. International law does not preclude any such liability and, even if it did, the Namibian

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624 This principle is further examined at *infra*, p. 224.
625 This principle is further examined at *infra*, p. 250.
626 *Id.*
627 *Minister of Defence, Namibia v. Mwandinghi*, Supreme Court, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), at p. 359, in: 91 *I.L.R.*, p. 358, see at p. 361.
628 *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 277.
629 This principle is further explained at *infra*, p. 215.

> State was free to elect, as it did, on a proper construction of art 140(3) to accept such liability."[630]

The Court then examined the relevance of Article 145 of the Constitution and whether there was a rule of international law, as submitted by the Minister of Defence of Namibia, according to which the successor State would not take over the liabilities of the predecessor State. The Court did not really answer the point. It seems to have agreed with the argument submitted by the Respondent according to which the disclaimer clause of Article 145 would only refer to apartheid law, and that the delict in question here would not fall within the categories described at Article 145. At any rate, the Court relied instead on the fact that international law must recognise the liabilities accepted by Namibia under its own municipal law.

The Court therefore dismissed the appeal. The Minister of Defence of Namibia was therefore substituted as the defendant in the present case to the Minister of Defence of the Republic of South Africa.

The logical construction of the two judgments is therefore different. The High Court accepted, as a matter of principle, the proposition submitted by the Ministry of Defence of Namibia according to which "in international law a new State is not liable for the delicts committed by its predecessor".[631] The Supreme Court seems to have been much more open to the possibility of the transfer of the obligation to repair from one State to another, as it indicated that "international law does not preclude" such transfer.[632] In both cases, however, this mattered little since the courts concluded that Namibia chose to accept liability in its Constitution.

This aspect of the decisions has been received with great scepticism by some commentators, for whom it was contrary to both the Namibian Constitution and principles of international law whereby "a new State does not succeed to the delicts of its predecessor".[633] Thus, it has been argued that the Court interpreted too widely Article 140(3) and that it should have instead excluded internationally wrongful acts of South Africa from the scope of this provision.[634] The same writer also points out that if this provision is read together with Article 145, "it is extremely doubtful

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630 *Minister of Defence, Namibia v. Mwandinghi*, Supreme Court, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), at p. 365, in: 91 *I.L.R.*, p. 358, see at pp. 365–366.

631 *Mwandinghi v. Minister of Defence, Namibia*, High Court, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), at p. 862, in: 91 *I.L.R.*, p. 343, at p. 353.

632 *Minister of Defence, Namibia v. Mwandinghi*, Supreme Court, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), at p. 365, in: 91 *I.L.R.*, p. 358, see at pp. 365–366. John DUGARD, *International Law; a South African Perspective*, 2nd ed., Kenwyn, Juta, 2000, p. 233, is of the view that the Supreme Court "expressed doubt as to whether there [was] a general rule of international law extinguishing delictual responsibility when the wrongdoer State ceases to exist".

633 Neville BOTHA, "To Pay or Not to Pay?: Namibian Liability for South African Delicts", 16 *South African Y.I.L.*, 1990–1991, p. 162. See also: Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, pp. 210–211.

634 Hercules BOOYSEN, *Ibid.*, p. 210.

whether there is any clear intention on the part of the new State to deviate from the international law rule that there is no succession to delictual liability".[635]

The Supreme Court was right in deciding that in accordance with Article 140 of the Constitution, Namibia took over the obligations arising from internationally wrongful acts committed by the "predecessor State" before the date of succession. This is all the more so since Namibia had the opportunity to repudiate the internationally wrongful acts by an Act of parliament and it failed to do so. The finding of the courts is nevertheless contrary to the principle (which is examined below)[636] according to which a new State should not be held accountable for the obligations arising from internationally wrongful acts committed by the predecessor State in fighting the insurrection which eventually led to its independence. This is particularly so considering that in the present context Namibia greatly suffered under many years of illegal South African occupation and that its struggle for independence was long and laborious. The fact that Namibia should pay for internationally wrongful acts that were in fact committed by the racist regime of South Africa in its deliberate efforts to suppress the legitimate struggle of the Namibian people for freedom and independence is (to say the least) surprising.

The outcome of the case may be partially explained by the fact that at the time Namibia became an independent State, South Africa was undergoing major political changes marked by the end of the apartheid regime. A certain brotherhood now existed between Namibia and post-apartheid South Africa.

The fact that this case involved the undeniable suffering of a Namibian national as a result of violent acts attributed to South Africa may also have had some impact on its outcome. The courts indeed rendered their judgments barely one year after the end of the liberation struggle of the Namibian people. Thus, the reasoning of the courts may have been influenced by the fact that fairness would certainly call for proper compensation to be provided to Mr Mwandinghi for the damage he suffered.[637] In the present case, both courts, however, only decided

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635 *Ibid.*, pp. 210–211. He argues (see at pp. 212–213) that South Africa can no longer be sued before Namibian courts for *its* internationally wrongful acts committed against Namibian nationals before independence.

636 This principle is further examined at *infra*, p. 250.

637 In fact, the Judge in the High Court decision (*Mwandinghi v. Minister of Defence, Namibia*, High Court, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), in: 91 *I.L.R.*, p. 343, at p. 350) does mention that Article 140 of the Constitution should be interpreted in a "liberal manner" to protect human rights. This is the relevant paragraph of the decision: "Although [article] 140 is not part of [chapter] 3 of the Constitution, [i.e.] that part which sets out the Fundamental Human Rights and Freedoms, the article concerns in particular the continuance, *inter alia*, of vested rights of individuals and should therefore be interpreted in the same purposive and liberal manner for the preservation of such rights, as would be the case with [chapter] 3". The same liberal approach to the Namibian Constitution was also adopted by the Supreme Court in another case: *Government of the Republic of Namibia and Another v. Cultura 2000 and Another*, Supreme Court, 15 October 1993, in: 1993, 3 *LRC* 175; in: 103 *I.L.R.*, p. 104, at p. 116: "A constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must be interpreted broadly, liberally and purposively so

to grant the application by Mr Mwandinghi to have the Minister of Defence of Namibia substituted to the Minister of Defence of the Republic of South Africa. The courts did not award any damages as a result of the internationally wrongful act committed against Mr Mwandinghi.

It is not clear whether the High Court and the Supreme Court would have adopted the same reasoning had the internationally wrongful act been committed by South Africa not against a Namibian national taking part in the armed struggle for freedom but against a third State (or a national of a third State). It can only be supposed that the courts would have probably been more inclined to make use of Article 145(1) of the Namibian Constitution and to develop the argument that any succession to obligations arising from the commission of internationally wrongful acts would impose upon Namibia an obligation "not otherwise . . . recognised by international law as binding upon the Republic of Namibia". It can also safely be said that the courts would have probably argued that if Namibia were to take over the obligations arising from internationally wrongful acts committed by South Africa during the time of the illegal occupation, this would in effect recognise "the validity of the Administration of Namibia by the Government of the Republic of South Africa", in clear violation of Article 145(2) of the Namibian Constitution. In other words, Namibian courts would have been less keen to apply the principle of succession if faced with a claim submitted by a State (or a national of another State). Ultimately, the outcome of the *Mwandinghi* cases was driven by internal considerations.

7. *Conclusion to Chapter 2*

The analysis of State practice and international and municipal case law clearly indicates that there is no uniform and standard solution dealing with the question whether the successor State(s) should take over the consequences of an internationally wrongful act committed by the predecessor State(s). The fundamental assumption made at the outset of the present study is thus confirmed: *the solution adopted in State practice and international and municipal case law essentially depends on the different types of mechanism of succession of States involved.*

The first noticeable point which emerges from this investigation of State practice and case law is that many examples were found where the successor State freely accepted to take over the responsibility for internationally wrongful acts committed before the date of succession. It can therefore no longer be said that such possibility

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as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation in the articulation of the values bonding its people and in disciplining its government".

is exceptional. This point is further discussed below.[638] The following paragraphs summarise the findings for each different type of succession of States.

The examination of State practice in the context of incorporation of State shows that older cases (which are considered as annexation of States) support the principle that the successor State is not responsible for the obligations arising from internationally wrongful acts committed by the predecessor State. This principle of non-succession has been applied in State practice,[639] by one decision of a municipal court[640] and by two awards of an international Arbitral Tribunal.[641] The analysis of three examples in the context of the incorporation of the German Democratic Republic into the Federal Republic of Germany (1990) shows that *modern* practice supports the principle that the successor State is responsible for the obligations arising from internationally wrongful acts committed by the predecessor State.

Only one example of State practice was found in the context of unification of States.[642] In this case, the successor State decided to take over the responsibility for obligations arising from internationally wrongful acts committed before the date of succession. Doctrine also favours this solution of the transferability of the obligation to repair to the successor State.

The conclusion to be reached in view of the relevant international and municipal case law and State practice in the context of dissolution of State seems less straightforward. Thus, on the one hand, at least two rather old examples of State practice were found where States have adopted the doctrine of non-succession to international responsibility.[643] This position was also adopted by municipal courts of one State.[644] State practice also shows that *injured States* have submitted claims to the successor States notwithstanding the existence of the so-called "rule" of non-succession supported by many in doctrine.[645] There are also examples where the *successor States* agreed (as a matter of principle) to take over obligations arising from internationally wrongful acts committed by the predecessor State before its

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638 See *infra*, p. 216.

639 In the context of the unity Italy (1860–1861), the annexation of Burma by Great Britain (in 1886), the annexation of Madagascar by France (in 1896) and the annexation of the Boer Republic of South Africa by Great Britain (in 1902).

640 *West Rand Central Gold Mining Company Ltd. v. The King*, decision of 1 June 1905, in: L.R., 1905, 2 K.B., p. 391; *British International Law Cases*, vol. II, London, Stevens, 1965, p. 283.

641 The U.S.-Great Britain Arbitral Commission in the *R.E. Brown* case (United States v. Great Britain, Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129) and in the *Hawaiian Claims* case (Great Britain v. United States, Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 157).

642 The unification of the United Arab Republic (1958).

643 These examples are in the context of the dissolution of the Kingdom of Westphalia (1813) and the dissolution of the Austria-Hungary Dual Monarchy (1918).

644 Decisions of Austrian courts in the context of the dissolution of Austria-Hungary (1918).

645 This is, for instance, the position of Australia in the *Tokic* case in the context of the dissolution of the former Yugoslavia (1991–1992). See also the position of the United States in the context of the dissolution of the Union of Colombia (1829–1831).

break-up. In several of these cases, the agreement was reached between the injured State and the successor State(s).[646] In other cases, an accord was concluded among the successor States themselves.[647] State practice is therefore not uniform in the context of dissolution of State. There is nevertheless a clear tendency in *modern* State practice towards the recognition that successor States should take over the obligations arising from the commission of internationally wrongful acts.

It can therefore be concluded that in the context where the predecessor State *ceases to exist* as a result of the events affecting its territorial integrity (integration, unification and dissolution of State), the *tendency is clearly towards succession to the obligation to repair*.

One rule that seems to be clearly established is that in cases of cession and transfer of territory (when the predecessor State continues to exist) the continuing State (and not the successor State) should remain, in principle, responsible for the commission of *its own* internationally wrongful acts before the date of succession. This principle has been applied in State practice on at least one occasion.[648] The rule was also adopted and applied by municipal courts of the successor State,[649] by

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646 In the context of the dissolution of the Union of Colombia (1829–1831), the three successor States entered into separate agreements with the injured third State (United States). In the context of the dissolution of the United Arab Republic in 1961, one of the two successor States (Egypt) entered into several agreements with other States (Italy, Switzerland, Lebanon, Denmark, Greece, the Netherlands, Great Britain, Sweden and the United States) under which compensation was provided to foreign nationals whose property had been nationalised during, *inter alia*, the period of the existence of the United Arab Republic (the predecessor State, 1958–1961). A *Compromis* to refer a dispute to the I.C.J. (*Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3) was signed between Hungary and Slovakia, whereby both States agreed that Slovakia was the successor State to Czechoslovakia for its internationally wrongful acts committed in the context of the construction of a barrage. However, as mentioned above, both Hungary and Slovakia rejected in their pleadings the existence of any rule of State succession, whereby the new State would have to take over the obligations arising from internationally wrongful acts committed by the predecessor State.

647 The 2001 *Agreement on Succession Issues* among the successor States to the former Yugoslavia.

648 *Paris Peace Treaty*, entered into on 10 February 1947, entered into force on 15 September 1947, in: 49 *U.N.T.S.*, p. 126; *U.K.T.S.* 1948, no. 50 (Cmd. 7481).

649 For instance, the following three cases decided by the Court of Cassation of Romania: *Mordcovici v. P.T.T.*, Romania, Court of Cassation, 29 October, 1929, in: *Buletinul deciziunilor Inaltei Curti de Casatie*, LXVI (1929), Part 2, p.150, in: *Annual Digest*, 1929–1930, at p. 62; *Sechter v. Ministry of the Interior*, Romania, Court of Cassation, 1929, in: *Jurisprudenta Românâ a Inaltei Curti de Casatie si Justitie*, vol. XVII, N° 4 (1930), p. 58, in: *Annual Digest*, 1929–1930, case no. 37; *Vozneac v. Autonomous Administration of Posts and Telegraphs*, Romania, Court of Cassation, 22 June 1931, in: *Jurisprudenta Românâ a Inaltei Curti de Casatie si Justitie*, 1932, pp. 36–38, in: *Annual Digest*, 1931–1932, case no. 30. See also these two cases decided by French courts: *Alsace-Lorraine Railway v. Ducreux Es-qualité*, French Court of Cassation, Civil Chamber, 30 March 1927, in: 55 *J.D.I.*, 1928, at p. 1034; *Sirey*, 1928, Part. I, p. 300;

one municipal court of the continuing State,[650] by an international mixed arbitral tribunal,[651] and by another international arbitral tribunal.[652] Only one municipal court decision was found where it was decided, on the contrary, that the continuing State could not be held responsible for the internationally wrongful acts which were committed before the date of succession.[653] Two other decisions, one by a municipal court[654] and the other by an international Arbitral Tribunal,[655] show that there is one exception to this well-established principle that the continuing State continues to be responsible (after the date of succession) for its pre-succession internationally wrongful acts. Thus, whenever the internationally wrongful act was committed by a local administration having great autonomy before the date of succession, the successor State should be held responsible for such act. This is no doubt a very *specific circumstance* (which is discussed in detail below)[656] which does not undermine the principle of non-succession in the context of cession and transfer of territory.

In cases of secession, it is also established that the continuing State should remain responsible for the commission of *its own* internationally wrongful acts before the date of succession. This principle has been applied by municipal courts of the new successor State which seceded[657] as well as by municipal courts of the

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Annual Digest, 1927–1928, p. 85; *Kern v. Chemin de fer d'Alsace-Lorraine*, Cour de Colmar (Première Ch, civile), 16 May 1927, in: 56 *J.D.I.*, 1929, at pp. 446 et seq.

650 *Kalmar v. Hungarian Treasury*, Supreme Court of Hungary, 24 March 1929, case no. P.VI.5473/1928, in: *Maganjog Tara*, X, no. 75, in: *Annual Digest*, 1929–1930, at p. 61.

651 *Levy v. German State*, Franco-German Mixed Arbitral Tribunal, Award of 10 July 1924, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, at p. 726, in: *Annual Digest*, 1923–1924, case no. 27.

652 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81, dealing with Claim no. 11 and in an *obiter dictum* dealing with Claim no. 12-a.

653 *Personal Injuries (Upper Silesia) Case*, Court of Appeal of Cologne, Federal Republic of Germany, 10 December 1951, in: *NJW*, 5 (1952), p. 1300, in: *I.L.R.*, 1951, pp. 67 et seq. It should be noted that since Poland was not a party to the proceedings, the Court did not indicate that it should be for the successor State (Poland) to take over the obligations arising from the commission of the internationally wrongful act.

654 *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, N° 27, in: *Thémis*, vol. 35, p. 294, in: *Annual Digest*, 1923–1924, at p. 70.

655 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81, dealing with Claim no. 4.

656 This is discussed at *infra*, p. 259.

657 *Dzierzbicki v. District Electric Association of Czestochowa*, Supreme Court of Poland, First Division, 21 December 1933, in: *O.S.P.*, 1934, no. 288, in: *Annual Digest*, 1933–1934, at p. 89; *Niemiec and Niemiec v. Bialobrodziec and Polish State Treasury*, decided by the Supreme Court of Poland, Third Division, 20 February 1923, in: 2 *Annual Digest*, 1923–1924, case no. 33, p. 64; *Olpinski v. Polish Treasury (Railway Division)*, Supreme Court of Poland, Third Division, 16 April 1921, in: *O.S.P.*, I, no. 15, in: *Annual Digest*, 1919–1922, at p. 63.

continuing State.[658] The review of State practice shows a clear tendency in support of this principle.[659] There is, however, one significant instance where the new seceding State was held responsible for obligations arising from internationally wrongful acts committed by the predecessor State before its independence.[660] As previously mentioned, the solution adopted in this last case was no doubt *politically motivated* and can hardly support any legal principle in favour of succession in the context of secession.

It is also difficult to draw any definitive conclusion from the analysis of State practice and decisions of municipal courts in the context of Newly Independent States. There seems to be almost equal support for both the principles of succession and of non-succession. Thus, there are examples of municipal court decisions in accordance with the principle that the continuing colonial State should remain responsible for the internationally wrongful acts committed before the creation of the new State.[661] On the contrary, the principle that the new State should take over the obligations arising from the commission of internationally wrongful acts (before independence) has been applied by municipal court decisions.[662] This principle of

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658 *Baron A. v. Prussian Treasury*, Germany, Reichsgericht in Civil Matters, 19 December 1923, in: *E.R.Z.*, vol. 107, p. 382, in: *Annual Digest*, 1923–1924, p. 60.

659 In the context of the break-up of the U.S.S.R., Russia entered into agreements with both Germany and France, whereby it remained responsible for the internationally wrongful acts committed by the U.S.S.R. during and after the Second World War (the pillage of works of art and cultural property in Germany) and for measures of expropriation committed by Soviet Russia after the 1917 Revolution. The official position taken by the authorities of the G.D.R. was that it could not be responsible for internationally wrongful acts committed by the German Reich before and during the Second World War. Finally, the Allies also took the view in the context of the break-up of the Austria-Hungary Dual Monarchy that Austria and Hungary were the "continuator" States of Austria-Hungary and should, consequently, remain responsible for internationally wrongful acts it committed during the First World War.

660 Claims in the context of the secession of Belgium (1830).

661 This principle was applied by Belgian municipal courts in the context of the independence of Congo*: Crépet v. Etat belge et Société des forces hydro-électriques de la colonie*, Civil Tribunal of Brussels, 30 January 1962, in: *Journal des tribunaux*, 1962, at p. 242. In the case of *Pittacos v. Etat Belge*, Brussels Court of Appeal (2nd Chamber), 1 December 1964, in: *Journal des tribunaux*, 1965, p. 7, at p. 9; *Pasicrisie Belge*, 1965, II, 263, in: 45 *I.L.R.*, p. 24, the principle was stated by the Court, but not applied to the case on equity grounds. The principle was also applied by Indian municipal courts in the context of the partition of India (1947) and by a decision of a French municipal court in the context of the independence of Vanuatu (1980).

662 This principle was applied by Dutch courts in the context of the independence of Indonesia: *Poldermans v. State of the Netherlands*, Netherlands, Court of Appeal of The Hague (First Chamber), 8 December 1955, in: *N.J.*, 1959, no. 7 (with an analysis by Boltjes), reported in: *I.L.R.*, 1957, p. 69; *Poldermans v. State of the Netherlands*, Netherlands, Supreme Court, 15 June 1956, in: *Id.*; *Van der Have v. State of the Netherlands*, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80.

succession was also stated in the Namibian Constitution[663] (with a possibility, it should be noted, for the new State to repudiate the internationally wrongful acts committed before its independence) and applied by both the High Court and the Supreme Court of Namibia.[664] Finally, State practice and decisions of French municipal courts rendered in the context of the independence of Algeria support both solutions of succession and non-succession to international responsibility.[665] However, as previously noted, these cases where the successor State was held responsible for pre-succession damage are not entirely convincing and their outcome was ultimately politically motivated and driven by special circumstances.

It can therefore be concluded that in the context where the predecessor State *continues to exist* as a result of the events affecting its territorial integrity (cession and transfer of territory, secession and Newly Independent States), the *overwhelming tendency is clearly toward non-succession to the obligation to repair*, whereby the continuing State remains responsible for the commission of *its own* internationally wrongful acts before the date of succession.

Finally, the review of State practice and international case law has not only shown that the solution to the issue of State succession to international responsibility *depends on the different types of mechanism of succession of States involved* but also that it depends on some *other factors, criteria and circumstances*. The next Chapter (Chapter 3) determines the different factors and circumstances under which *specific problems* of State succession to international responsibility require *specific solutions*.

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663 *Constitution of Namibia*, adopted by the Constituent Assembly of Namibia on 9 February 1990, entered into force on 21 March 1991, U.N. Doc. S/20967/Add.2.

664 *Minister of Defence, Namibia v. Mwandinghi*, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), in: 91 *I.L.R.*, p. 358. See also the previous decision of the High Court: *Mwandinghi v. Minister of Defence, Namibia*, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), in: 91 *I.L.R.*, p. 343.

665 Thus, Article 18 of the *Déclaration de principes relative à la coopération économique et financière* entered into by France and Algeria as well as official statements made by the French government clearly indicate that Algeria should be liable for all internationally wrongful acts committed before the date of succession. However, French courts consistently held that the continuing State (France) should remain responsible for the tortious acts committed by the colonial authorities against *French nationals* in fighting the rebels of the F.L.N. during the national liberation war (see the cases discussed in detail at *infra*, p. 253). French Courts have also held, on the contrary, that whenever the internationally wrongful acts were committed by the F.L.N. against French nationals in its struggle to achieve independence, the new State of Algeria should be responsible to provide compensation to victims of such acts (see the many cases discussed at *infra*, p. 236).

3

ANALYSIS OF SPECIFIC ISSUES

Introduction

The previous Chapter examined State practice and decisions of both municipal and international judicial bodies. The results of those findings show that some conclusions can be reached as to which of the principles of succession or non-succession should apply depending on the *different types of mechanisms of succession of States*. For instance, in the context of cession and transfer of territory, the rule of non-succession should be applied. However, the analysis of case law in the same context of cession of territory also shows that whenever the internationally wrongful act was in fact committed by a local administration having great autonomy from the predecessor State, it is the successor State that should be held responsible for the act committed before the date of succession.[1] This is one *specific circumstance* which calls for a *specific treatment*. The aim of the present Chapter is to determine the different *factors and circumstances* under which *specific problems* of State succession to obligations arising from the commission of internationally wrongful acts require *specific solutions*.

For instance, this Chapter tries to answer the question whether there may be circumstances under which it should be for the secessionist State or for the "Newly Independent State" (and not for the continuing State) to be held responsible for obligations arising from internationally wrongful acts committed before its independence. This Chapter also examines what are the different factors and circumstances which may be taken into account in determining whether there should be any succession

1 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81 (dealing with Claim no. 4); *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, N° 27, in: *Thémis*, vol. 35, p. 294, in: *Annual Digest*, 1923–1924, at p. 70.

Patrick Dumberry, State Succession to International Responsibility, *pp. 207–298.*

to international responsibility in the context of dissolution of State (and if so, which of the successor States should bear which portion of such obligations).

The method of analysis used here is by no means novel. It, in fact, corresponds to the methodology adopted by the Arbitral Tribunal in the *Lighthouse Arbitration* case, which not only recognised that the solution to problems of State succession to international responsibility may vary depending on the different *types of mechanism of State succession involved* but also that *other factors and circumstances* need to be taken into account.[2] This is also the position of O'Connell:

> It is exasperating not to be able to propose a synthetic structure of State succession doctrine which can accommodate the problem of torts, but the truth is that the matter cannot be brought to any finer focus than in Verzijl's conclusion in the *Lighthouse case* that *many concrete factors*, including the continuing nature of the wrong, and its liquidated or unliquidated character, *are to be taken into account, and the factors may require different evaluation in different types of successions of States.*[3] (emphases added)

There are at least *five different groups* of types of factors and circumstances under which State practice and international case law call for specific solutions to problems of State succession to international responsibility.

A first group of relevant factors and circumstances is the *position taken by the predecessor State* with respect to the internationally wrongful act it committed before the date of succession. Thus, whenever the predecessor State has recognised its own responsibility (before the date of succession) for the commission of an internationally wrongful act, the successor State would be under the obligation to provide reparation to the injured third State (Section 1). The same solution should also prevail whenever the liability of the successor State has been determined (before the date of succession) by a judicial body (Section 2).

A second group of relevant factors and circumstances is the *position taken by the successor State(s)* and its *actual behaviour* in dealing with internationally wrongful acts committed before the date of succession. Thus, whenever the new successor State has *accepted* to take over the consequences of an internationally wrongful act committed prior to the date of succession, State practice and international case law clearly shows that such acceptance must be respected and that the rule of succession must apply (Section 3). Another relevant circumstance is whenever the successor State *continues* an internationally wrongful act which was initially

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2 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 91, where the Arbitral Tribunal asked the question: "Is it a matter of contractual or delictual obligations? Of private or of public law?—recognized or disputed?—liquidated or unliquidated?" In its evaluation of Claim no. 4 the Arbitral Tribunal further developed its reasoning. It explained that the nature of the obligations is different whether it is a violation of international law directly made against a State, or whether it is made against one of its nationals.

3 D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 164.

committed by the predecessor State (Section 4). In this case, the successor State is responsible for its own internationally wrongful act committed *after* the date of succession. The successor State is also responsible for obligations arising from the internationally wrongful act committed by the predecessor State *before* the date of succession. This is certainly the case in the context where the predecessor State ceases to exist but not necessarily in the other situation where the predecessor State does continue its existence (such as in cases of secession).

A third group of relevant factors and circumstances is the *identification of the entity which has actually committed the internationally wrongful act.* It is well recognised in State practice, international case law and doctrine that the new successor State should take over the obligations arising from internationally wrongful acts committed by an *insurrectional movement* during an struggle which eventually led to the creation of the new State (Section 5). This is, however, not a case of succession of States *per se*. On the contrary, the successor State should not be responsible for obligations arising from internationally wrongful acts committed by the *predecessor State* during the armed struggle led by an insurrectional movement to establish that new State (Section 6). There is also some support in State practice for the more general principle that the successor State should be responsible for obligations arising from internationally wrongful acts committed by an *autonomous government* (while still part of the predecessor State) with which it has an "organic and structural continuity" (Section 7).

A fourth group of relevant factors and circumstances is the practical *consequences* that the application of the solution of succession or non-succession would have on the States involved. In the present study, it is submitted that general principles of law, such as the principle of *unjust enrichment* and the principles of *equity* and *justice*, are indeed relevant to determine which of the continuing State or the successor State (and in case of dissolution, which of the successor States) should be responsible for obligations arising from the commission of internationally wrongful acts. The following two principles will be discussed. The first principle is that the State (the "continuator" or the successor State) that has unjustly enriched itself as a result of an internationally wrongful act committed before the date of succession should provide reparation to the injured third State (Section 8). The second principle is that the outcome of the allocation of liability between the continuing State and the successor State (and in case of a dissolution of State, among the successor States themselves) should be fair and equitable (Section 9).

A fifth group of relevant factors and circumstances is the *nature, the origin and the character of the obligation* breached by the predecessor State. This review of relevant State practice and international case law shows that there is no support for a general rule whereby the successor State is *automatically* responsible for obligations arising from internationally wrongful acts committed by the predecessor State *solely based* on the fact that such acts took place prior to its independence on what is now its territory. However, there is support for the principle that the successor State does take over the consequences of violations of *territorial regimes* obligations committed by the predecessor State (Section 10). The review of State

practice and international case law will also show that there is no support for the general proposition that the responsibility resulting from the violation of a treaty by the predecessor State before the date of succession is automatically transferred to the successor State when it becomes party to that treaty by way of succession (Section 11). Finally, it is submitted that there is no special rule for violations of *jus cogens* norms or other "odious" acts committed by the predecessor State and that such breaches should not be treated any differently than other "ordinary" violations of international law (Section 12).

1. *The Predecessor State Recognises its Liability for an Internationally Wrongful Act*

When an internationally wrongful act is committed by the predecessor State and when, before the date of succession, it recognises its responsibility for the commission of the act, the question arises as to whether the successor State is bound by such recognition. The question is only relevant in so far as such recognition did not lead to any (or only partial) compensation to the injured third State before the date of succession. The issue also only concerns cases where the predecessor State *ceases to exist* as a result of the events affecting its territorial integrity (such as, for instance, cases of dissolution of State).[4]

It should be noted that the solution to the issue of succession to the obligation to repair for the successor State exists quite *independently* of the other question whether or not the predecessor State has recognised any liability. In other words, the question whether or not a successor State takes over the consequences of obligations arising from the commission of internationally wrongful acts *does not depend only* on the recognition of liability for such acts by the predecessor State. There will be cases where succession to the obligation to repair will prevail even if the predecessor State did not recognise any liability. The point is that succession to the obligation to repair should prevail *a fortiori* when the predecessor State did indeed recognise such responsibility.

Whenever the predecessor State recognises its responsibility for the commission of the internationally wrongful act, the injured third State has some sort of an "acquired right" to reparation in the sense that such right is "liquidated" and certain; it is not a mere expectation.[5] There is support in doctrine for the proposition that in such case the successor State is bound to respect the "acquired right" of the injured third State and, accordingly, to provide reparation.[6] Ultimately, the

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4 The issue simply does not arise in the context where the predecessor State *continues* to exist. Thus, in cases of secession the continuing State is, of course, bound by *its own* recognition of responsibility before the date of succession.

5 This is the position of Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, at p. 184.

6 Jacques BARDE, *Ibid.*, at p. 177: "Le nouvel Etat n'est pas responsable des délits (actes illicites) de son prédécesseur à moins que celui-ci ait reconnu sa dette avant de

principle that the successor State is responsible for obligations arising from the commission of internationally wrongful acts for which the predecessor State has recognised its liability is based on *good faith*. This principle may also be applied, in some circumstances, based on the other principle of *estoppel*.[7] The only support found in State practice in favour of this proposition is a few cases decided by Italian municipal courts in the context of the unity of Italy.[8]

2. *A Judicial Body Finds the Predecessor State Responsible for an Internationally Wrongful Act*

The question whether or not a successor State takes over the consequences of obligations arising from the commission of internationally wrongful acts does not depend *per se* on any determination of liability by a judicial body. In other words, a solution of succession to international responsibility may very well prevail *without* any such finding by a judicial body. Nevertheless, whenever a judicial body has determined (before the date of succession) that the predecessor State was responsible for the commission of an internationally wrongful act, the successor State should take over the obligations arising from the commission of such act.[9] Thus, in such cases where a judicial body made a determination on the veracity of

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disparaître". See also: Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 218 (in the context of merger of States): "… where, however, [the extinct State] had acknowledged its liability and compensation had been agreed, a debt has arisen which, it is suggested, ought to survive the extinction of personality and be discharged by the absorbing State". This is also the position of Ivan A. SHEARER, *Starke's International Law*, 11th ed., Sydney, Butterworths, 1994, p. 303: "The successor State is not bound to respect an unliquidated claim for damage in tort. If, however, the amount of the claim has become liquidated by agreement of the parties or through a judgment or award of a tribunal, then in the absence of any suggestion of injustice or unreasonableness, the successor State may be bound to settle the amount of this liquidated claim". The same position is also adopted by: Georg DAHM, *Völkerrecht*, vol. 1, Stuttgart, W. Kohlhammer Verlag, 1958, at p. 121; Hazem M. ATLAM, pp. 216–217; Jean Philippe MONNIER, p. 67; Cecil J.B. HURST, at p. 177.

7 In the case of *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras), *Application to Intervene*, Judgment of 13 September 1990, *I.C.J. Reports 1990*, p. 92, paras. 118–119, the I.C.J. defined the concept of estoppel as "a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it".

8 *Orcesi v. The Ministry of War*, Court of Cassation of Florence, 21 December 1881, in: Cecil J.B. HURST, at p. 177; *Verlengo v. Finance Department*, decided in 1878 by the Court of Cassation at Florence, in: *Giurisprudenza Italiana*, 3rd Series, vol. 30, Pt. 1, Sec. 1, column 1206, in: *Brief filed by Fred K. Nielsen, American Agent*, *Hawaiian Claims Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration, Report*, Washington, G.P.O., 1926, pp. 95 et seq., at pp. 119–120.

9 This is also the position of these writers: Ivan A. SHEARER, *Starke's International Law*, 11th ed., Sydney, Butterworths, 1994, p. 303; Michael John VOLKOVITSCH, footnote

the facts surrounding an alleged internationally wrongful act and the quantum of the damage suffered, such claim should be deemed to be "liquidated". The question is then one of succession to "administrative debts" of the predecessor State. There is support in doctrine for the proposition that the successor State is responsible for such "administrative debts".[10] The issue only concerns cases where the predecessor State *ceases to exist* as a result of the events affecting its territorial integrity (such as, for instance, cases of dissolution of State).[11]

However, such determination by a judicial body does not result in any more "rights" for the injured State. In other words, the right of the injured State to reparation is the same *notwithstanding* any determination of liability by a judicial body. The only likely consequence of such determination may in fact be "practical": it may help the injured State in its negotiation with the successor State to be given proper reparation.

From the mere fact that a claim is *not* "liquidated" at the time of the date of succession, *it should not be automatically concluded* that obligations arising from an internationally wrongful act committed by the predecessor State cannot be transferred to the successor State(s).

It should be noted that there is some support in international case law for the opposite automatic principle of *non-succession* for "unliquidated" claims. In the *R.E. Brown* case, one of the reasons why the U.S.-Great Britain Arbitral Commission rejected the claim of Mr Brown was because it "was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State".[12] Similarly, in the *Lighthouse Arbitration* case, the Arbitral Tribunal rejected Claim no. 11 but added in the form of an *obiter dictum* that "[i]n any event, the claim was not admitted by either of those States, nor was it liquidated or easily ascertainable".[13] The same Arbitral Tribunal accepted Claim no. 4 and added that this was so, moreover, based on the fact that the claim was susceptible of being easily liquidated.[14]

235; T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, at p. 209.

10 D.P. O'CONNELL, *State Succession*, vol. I, p. 448: "There has never been any doubt that a successor State is under an obligation to respect those debts incurred in the ordinary routine of governmental administration in the territory acquired by it". Similarly, for Michael John VOLKOVITSCH, p. 2191, "there is a genuine question as to whether a completely liquidated claim should be treated as a delictual obligation at all, or whether it is better viewed as an administrative debt of the predecessor State for a fixed sum of damage".

11 The issue simply does not arise in the context where the predecessor State *continues* to exist. Thus, in cases of secession the continuing State is, of course, bound by a finding made by a judicial body before the date of succession.

12 *R.E. Brown* (United States v. Great Britain), Award of 23 November 1923, *U.N.R.I.A.A.*, vol. 6, p. 129. See the assessment of D.P. O'CONNELL, *State Succession*, vol. I, p. 488.

13 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 83.

14 *Ibid.*, at p. 89.

It has been argued in doctrine that "unliquidated" claims cannot be protected by international law in the context of State succession and therefore become extinct at the date of succession.[15] Other writers believe, on the contrary, that this distinction between "liquidated" and "unliquidated" debts is "inapplicable to inter-State relations and lack[s] sufficient justification in that field".[16]

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15 For Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 218, there is "good authority" for the rule of non-succession to unliquidated damages. The following writers make similar findings: Louis HENKIN, Richard CRAWFORD PUGH, Oscar SCHACHTER & Hans SMIT, *International Law, Cases and Materials*, 3rd ed., St. Paul, West Publ. Co., 1993, p. 293 ("if the claim has not been reduced to a money judgment, which may be considered a debt, or an interest on the part of the claimant in assets of fixed value, there is no acquired right in the claimant, and no obligation to which the successor State has succeeded"); S.K. AGRAWALA, "Law of Nations as Interpreted and Applied by Indian Courts and Legislature", 2 *Indian J.I.L.*, 1962, p. 431, at p. 442 ("a claim for unliquidated damages is not protected by international law"); Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, pp. 183–184 ("il est frappant de constater qu'une condition est toujours exigée pour que le transfert soit possible aussi bien, en matière de responsabilité internationale que de responsabilité interne: pour être imputable à l'Etat successeur et constituer un droit acquis, le droit à réparation doit être liquide c'est-à-dire bien arrêté, certain et donc définitivement entré dans le patrimoine de la victime avant le changement de souveraineté. L'unanimité de la doctrine, la pratique gouvernementale, la jurisprudence internationale et la jurisprudence interne concordent sur ce point: le droit à réparation n'est pas un droit acquis tant qu'il n'est pas liquide", and at p. 185 "le caractère liquide de la dette est une condition toujours nécessaire mais pas suffisante dans tous les cas d'illicéité pour que le droit à réparation soit un droit acquis"); Malcolm SHAW, *International Law*, 4th ed., Cambridge, Cambridge Univ. Press, 1997, p. 713 ("claims to unliquidated damages will not continue beyond the succession"); Ernest H. FEILCHENFELD, *Public Debts and State Succession*, New York, Macmillan, 1931, pp. 728–729 ("[t]here is, moreover, another reason which speaks against the classification of most unawarded or unrecognised diplomatic tort claims as debts…As long as it is not certain that the State against which the claim is directed will have to pay money, the doubt concerns not merely the point that the amount of the debt is undefined, but the more fundamental question whether or not a debt will be created at all. Unless it is clear that money is owed, it is not established that a debt exists which may subsequently be protected in case of State succession"). See also the same conclusion reached by these other authors: Nkambo MUGERWA, "Subject of International Law", in: Max SORENSEN, *Manual of Public International Law*, London, Macmillan, 1968, p. 292; John O'BRIEN, *International Law*, London, Cavendish Publ. Ltd, 2001, p. 604; Charles ROUSSEAU, *Les transformations territoriales des Etats et leurs conséquences juridiques*, Paris, Les cours de droit, 1964–1965, p. 142; Hazem M. ATLAM, pp. 216–217; T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, at p. 210.

16 J.H.W. VERZIJL, p. 220, for whom this theory is "too rigid and too unduly influenced by Anglo-Saxon doctrine concerning the non-transferability of non-liquidated debts in the field of private law". D.P. O'CONNELL, *State Succession*, vol. I, p. 485, adopts a more prudent position in so far as he believes, on the one hand, that any attempt to maintain the difference between "liquidated" and "unliquidated" debts is "apt to torture

As rightly observed by Stern, it would be illogical to determine the sake of the transmission of the obligation to repair to the successor State solely based on the moment in time when such right is invoked or determined by a judicial body.[17] This distinction would be particularly inequitable in cases where the internationally wrongful act itself would arise from the State's denial of justice and refusal to give the opportunity to the individual to liquidate its claim.[18]

At any rate, the "unliquidated" nature of a claim should not prevent the injured third State from exercising its right to *bring an action* before a judicial body *after the date of succession* for the damage it has suffered from an internationally wrongful act committed by the predecessor State before the date of succession.[19] This right of the injured third State is, of course, not tantamount to any automatic "acquired right" to compensation from the successor State.[20] As suggested by O'Connell, it is only a right to bring an action which may eventually lead to a judgment awarding reparation.[21]

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the problem rather than resolve it", but also, on the other hand, that such criterion is not "altogether irrelevant, either singly or in association with other factors, in distinguishing claims which devolve upon a successor State from those which do not". See also his comments in: D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, 164. T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, at pp. 210, 212, indicates that Indian municipal courts in the context of the partition of India have not treated "liquidated" and "unliquidated" damage differently (he makes reference to the *State of Tripura v. The Province of East Bengal* case, in: *All Indian Report* 1951, 1 SC 23).

17 Brigitte STERN, Responsabilité, p. 337. See also: Miriam PETERSCHMITT, p. 22.

18 Brigitte STERN, *Id.* This is also the position of Michael John VOLKOVITSCH, pp. 2190–2191.

19 Brigitte STERN, *Id.* See also: S.K. AGRAWALA, "Law of Nations as Interpreted and Applied by Indian Courts and Legislature", 2 *Indian J.I.L.*, 1962, p. 431, at p. 442: "In case of unliquidated claims, the claimant has no more than the capacity to appear before a court which thereupon may or may not create a debt against the offending State".

20 Thus, for Michael John VOLKOVITSCH, p. 2205, the "acquired right" of the injured third State is *not* the right to "automatic compensation but rather the right to bring an action that will be adjudicated". For him, the doctrine of acquired rights "guarantees the existence of a claim and a defendant, but not a valid claim and a defendant able to pay".

21 D.P. O'CONNELL, *State Succession*, vol. I, p. 485: "It has been argued that a tort committed by the agents of a State merely gives rise to a right of action for unliquidated damages of a penal or compensatory character. It does not create an interest in assets of a fixed or determinable value. The claimant has no more than the capacity to appear before a court, which thereupon may or may not create in his favour a debt against the offending State. Until such a debt is created, however, the claimant's interest is not an acquired right".

3. *The Successor State Accepts to Take Over the Responsibility for an Internationally Wrongful Act*

It has long been recognised that nothing in international law prevents a successor State from deciding to succeed to an internationally wrongful act committed by the predecessor State.[22] There is unanimity in doctrine on that point.[23] This basic principle has been confirmed by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case.[24] In this case, the *Compromis* between the parties had recognised that the Slovak Republic, as one of the two successor States to Czechoslovakia, was the "sole successor state in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project". The Court did not question whether the Slovak Republic could freely decide to be held solely liable for the internationally wrongful act committed by the predecessor State; it simply accepted this position as a fact.[25] Similarly, in interpreting Article 140(3) of the Namibian Constitution, the sitting Judge of the Namibian High Court in the case of *Mwandinghi v. Minister of Defence, Namibia* stated that "in the present case the new State chose to accept liability, subject to its right to repudiate, and is therefore liable".[26] He added: "I know of no principle whereby international law can step in and undo such an acceptance by a State."[27]

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22 Brigitte STERN, Responsabilité, p. 350.

23 Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 768; Brigitte STERN, Responsabilité, p. 350; H. LAUTERPACHT, *Oppenheim's International Law*, vol. I, London, Longmans Green & Co., 1955, p. 162; Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 218; John O'BRIEN, *International Law*, London, Cavendish Publ. Ltd, 2001, p. 605; Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 54; Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, Clarendon Press, 2003, p. 632 (arguing that the successor State's acceptance of succession to obligations arising from the commission of internationally wrongful acts creates "an estoppel in various particular respects"); W. SCHÖNBORN, *Staatensuccession*, *Handbuch des Völkerrechts*, vol. 2, Part. 5, Stuttgard, 1913, p. 49; Jean Philippe MONNIER, pp. 67, 90; Michael John VOLKOVITSCH, pp. 2199–2200; Natalino RONZITTI, *La successione internazionale tra stati*, Milan, Dott. A. Giuffrè, 1970, p. 221; John DUGARD, *International Law; a South African Perspective*, 2nd ed., Kenwyn, Juta, 2000, pp. 232–233; Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, p. 207; T.S.N. SASTRY, *State Succession in Indian Context*, New Delhi, Dominant Publ. & Dist., 2004, at p. 209.

24 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3.

25 *Ibid.*, para. 151.

26 *Mwandinghi v. Minister of Defence, Namibia*, High Court, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), at p. 864, in: 91 *I.L.R.*, p. 343, at p. 355.

27 *Ibid.*, at pp. 354–355. It has been suggested in doctrine by Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, pp. 213–214, that third States may object to the decision by Namibia to take over

The review of State practice and international case law in the previous Chapter has shown that successor States have accepted to take over the consequences of international responsibility of the predecessor State in many instances. Such acceptances have been found in international treaties entered into by the successor State and the injured third State,[28] among the successor States themselves[29] and between the predecessor State and the successor State.[30] State acceptance was also found in agreements with private foreign companies[31] as well as in a *compromis* between

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internationally wrongful acts committed by South Africa during its racist and oppressive rule over the colony.

28 Two treaties were entered into by the successor State with injured third States in the context of the unification of the United Arab Republic (1958): *Accord général entre le gouvernement de la République française et le gouvernement de la République arabe unie*, in: *La documentation française*, 18 October 1958, no. 2473; *R.G.D.I.P.*, 1958, pp. 738 et seq.; *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt*, in: *U.K.T.S.* 1959, no. 35 (Cmd. 723); 343 *U.N.T.S.*, p. 159; 14 *Rev. égyptienne d.i.*, 1958, p. 364; 54 *A.J.I.L.*, 1960, pp. 511–519. One international agreement was entered into by the successor State in the context of the integration of the G.D.R. into West Germany (1990): *Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Settlement of certain Property Claims*, 13 May 1992, in: *T.I.A.S.* no. 11959; also in: Jan KLAPPERS (ed.), *State Practice Regarding State Succession and Issues of Recognition*, The Hague, Kluwer Law International, 1999, at p. 240. In the context of the dissolution of the Union of Colombia (1829–1831), the three different successor States entered into separate agreements with the injured third State: *Protocol between the United States of America and Venezuela* (1 May 1852, Caracas), in: William M. MALLOY, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776–1909*, vol. II, Washington, G.P.O., 1910–1938, vol. II, p. 1842. Both treaties signed by the United States with Ecuator and New Grenada can be found in: William M. MALLOY, *Ibid.*, vol. I, at p. 319 & p. 432. Another (rather theoretical and less significant) example is in the context of the secession of Panama (1903): *Claims Convention between the United States and Panama*, signed on 28 July 1926 and ratified on 3 October 1931, in: *L.N.T.S.*, vol. 138, pp. 120–126; in: *U.N.R.I.A.A.*, vol. VI, p. 301.

29 The 2001 *Agreement on Succession Issues* of 29 June 2001 among the successor States to the former Yugoslavia, in: 41 *I.L.M.*, 2002, p. 3.

30 Article 38 of the Paris peace treaty of 1947 dealing with the cession of the Dodecanesian Islands (*Paris Peace Treaty*, signed on 10 February 1947 at Paris, entered into force on 15 September 1947, in: 49 *U.N.T.S.*, p. 126; *U.K.T.S.* 1948, no. 50 (Cmd. 7481)). See also Article 18 of the *Déclaration de principes relative à la coopération économique et financière* (dated 19 March 1962) which is part of the *Evian Accords* (in: *J.O.R.F.*, 20 March 1962, pp. 3019–3032) entered into by France and Algeria to end the national liberation war in Algeria.

31 One such agreement was entered into by the successor State in the context of the unification of the United Arab Republic (1958): Agreement of 13 July 1958 between the United Arab Republic and the *Société Financière de Suez*. This Agreement is discussed in: L. FOCSANEANU, "L'accord ayant pour objet l'indemnisation de la compagnie de Suez nationalisée par l'Egypte", *A.F.D.I.*, 1959, pp. 161–204.

two States to refer a dispute to the International Court of Justice.[32] The principle of acceptance of international responsibility was also found in national constitutions[33] and national laws[34] as well as in unilateral declarations.[35]

Interestingly enough, examples of State practice whereby the new State accepted to be bound by the consequences arising from internationally wrongful acts of the predecessor State were found in the context of different types of mechanism of State succession. Thus, such acceptance of the transfer of the obligation to repair has been observed in the context of unification and integration of State,[36] of dissolution of State,[37] of secession[38] and of the creation of Newly Independent States.[39] No such acceptance was found, however, in the context of cession and transfer of territory.

These cases of clear and positive acceptance of responsibility must be distinguished from the other situation whereby a State agrees to pay compensation to

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32 *Compromis* between Hungary and Slovakia in the context of the *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3.

33 *Constitution of Namibia*, adopted by the Constituent Assembly of Namibia on 9 February 1990, entered into force on 21 March 1991, U.N. Doc. S/20967/Add.2. See also: *Treaty on the Establishment of German Unity*, 31 August 1990, in: 30 *I.L.M.*, 1991, p. 457.

34 For instance, in the context of the integration of the G.D.R. into West Germany (1990).

35 Despite its official position that it was a new State and that it could not be responsible for the internationally wrongful acts committed by the German Reich before and during the Second World War, the G.D.R., nevertheless, made an offer in 1990 to Jewish groups to provide compensation for crimes committed by the predecessor State. This precedent (which is discussed in detail *supra*, p. 167) is, however, of limited legal significance since the offer never materialised and no reparation was in fact ever made. Another form of unilateral declaration is that of Slovenia which specifically informed the U.N. Human Rights Committee that victims of human rights violations committed by the former Yugoslavia remained entitled to remedy from the successor State: U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Slovenia*, 21 September 1994, U.N. Doc. CCPR/C/79/Add.40; A/49/40, paras. 334–353 (1994), at para. 6. Similar remarks were also made by other States: U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ukraine*, 26 July 1995, U.N. Doc. CCPR/C/79/Add.52 (1995), para. 3; U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Slovakia*, 4 August 1997, U.N. Doc. CCPR/C/79/Add.79 (1997), at para. 7; U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Azerbaijan*, 3 August 1994, U.N. Doc. CCPR/C/79/Add.38; A/49/40, paras. 291–311 (1994), at para. 3.

36 Several examples were found in the context of the unification of the United Arab Republic (1958) and the integration of the G.D.R. into West Germany (1990).

37 In the context of the dissolution of the Union of Colombia (1829–1831) and the dissolutions of Yugoslavia and Czechoslovakia.

38 In the context of the secession of Belgium from the Kingdom of the Netherlands (1830).

39 In the context of the independence of Namibia.

another injured State on an *ex gratia* basis without any acceptance of the principle of responsibility for the acts.[40] Many (old) examples of *ex gratia* compensation were found in the context of cession and transfer of territory.[41]

4. *The Successor State Continues an Internationally Wrongful Act Committed by the Predecessor State*

This section deals with the continuation by the successor State of *the same* internationally wrongful act initially committed by the predecessor State before the date of succession. In reality, however, there exist *two different* internationally wrongful acts: the first is committed by the predecessor State and ends at the time of the creation of the new State; while the second commences at this very moment and is imputable to the successor State. These two aspects are dealt with separately in this section.

4.1 *Acts Committed by the Successor State after the Date of Succession*

The fact that the new successor State is responsible for the acts it has *itself committed after its independence* is uncontroversial and is widely recognised in doctrine.[42] This is in fact not a problem of succession of States, since there is no "transfer" of an obligation from one State to another, but is rather the creation of a *new obligation* for the successor State. This principle is clearly expressed by Monnier as follows:

> La responsabilité qui incombe dans des cas de ce genre à l'Etat successeur n'est pas une responsabilité 'héritée' de l'Etat prédécesseur, mais une responsabilité nouvelle. L'Etat successeur ne reprend pas, ce faisant, des obligations délictuelles de l'Etat antérieur. Il n'y a donc pas *stricto sensu*, succession d'Etats.[43]

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40 Brigitte STERN, Responsabilité, p. 350.

41 For instance, in the context of the annexation of Burma by Great Britain (1886), the annexation of the Boer Republic by Great Britain in 1902 and the annexation of Madagascar by France in 1896.

42 Michael John VOLKOVITSCH, p. 2199; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 768; Erik CASTREN, "Aspects récents de la succession d'Etats", *R.C.A.D.I.*, t. 78, 1951–I, p. 391; Volinka REINA, "Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide for Better Resolution of Successor State Responsibility?", 22 *Berkeley J. Int'l L.*, 2004, p. 583, at p. 590; A. VERDROSS & B. SIMMA, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, Dunker & Humblot, 1984, pp. 633–634; Max HUBER, *Die Staatensuccession: völkerrechtliche und staatsrechtliche Praxis im XIX. Jahrhundert*, Leipzig, Duncker & Humblot, 1898, pp. 65–66.

43 Jean Philippe MONNIER, p. 89. The same assessment is made by Brigitte STERN, Responsabilité, p. 349: "Il existe un cas de figure dans lequel il peut sembler qu'il y a une transmission de responsabilité de l'Etat prédécesseur à l'Etat successeur, mais…en

Another question is which of the predecessor State or the successor State should bear the responsibility for the damage which was caused by acts that occurred *before the date of succession*. This point is examined in the next section.

4.2 *Acts Committed by the Predecessor State before the Date of Succession*

It has been argued in doctrine that if the new State continues the original internationally wrongful act committed by the predecessor State, that new State should be held accountable not only for *its own* act committed after the date of succession *but also* for the damage which was caused by the predecessor State *before the date of succession*.[44] In other words, the new State should take over obligations arising from internationally wrongful acts committed by the predecessor State *before* its independence *because of its continuation of the original internationally wrongful act.*

Some comments made by the I.L.C.'s Special Rapporteur Crawford suggest that he is of the opinion that the successor State should be responsible for the acts committed before its independence whenever it continues such acts after the date of succession. In his *First Report on State Responsibility* (*addendum* no. 5), he indicated that the general issue of the subsequent adoption of an illegal conduct by a State (dealt with at Article 11 of the I.L.C.'s Final Articles)[45] was also applicable in the more specific context of succession of States:

> All the bases for attribution covered in chapter II (with the exception of the conduct of insurrectional movements under article 15) assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the allegedly wrongful conduct. But that is not a necessary prerequisite to responsibility. *A State might subsequently adopt or ratify conduct not otherwise attributable to it; if so, there is no reason why it should not be treated as responsible for the conduct*.[46] (emphasis added)

In the 2001 Commentaries to the Final Articles, the Special Rapporteur also made specific reference to questions of State succession and to the *Lighthouse Arbitration* case, where Greece had endorsed and continued a breach committed

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réalité la responsabilité de l'Etat successeur naît de sa propre violation d'une obligation continue qui avait antérieurement été violée par l'Etat prédécesseur".

44 Malcolm SHAW, *International Law*, 4th ed., Cambridge, Cambridge Univ. Press, 1997, p. 713.

45 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1. The provision reads as follows: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".

46 *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 281.

by Crete before the date of succession.[47] The Special Rapporteur expressed the view that:

> In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has *assumed responsibility for it*.[48] (emphasis added)

In reference to the "retroactive effects" of State responsibility as applied in the *Lighthouse Arbitration* case, the Special Rapporteur concluded in the I.L.C.'s *First Report on State Responsibility* (*addendum* no. 5) that:

> This has the desirable consequence of allowing the injured State to obtain reparation in respect *of the whole transaction or event*. It is also consistent with the position established by Article 15 for insurrectional movements.[49] (emphasis added)

The solution to this issue depends on whether the predecessor State continues its existence or not as a result of the events affecting its territorial integrity.

a) *The Predecessor State Ceases to Exist*

The principle that the new State takes over the obligations arising from internationally wrongful acts committed by the predecessor State *before* its independence whenever (after its independence) it maintains and continues such acts should be applied in situations where the predecessor State becomes extinct (such as in cases of dissolution and unification of States).[50] This is a sound and equitable principle which prevents an internationally wrongful act from simply disappearing along with the perpetrator. Thus, the different solution of non-succession would result in an internationally wrongful act remaining unpunished.

The position that the new State should be responsible for internationally wrongful acts committed by the predecessor State whenever it continues such acts after the date of succession was endorsed by Hungary in its pleading in the *Gabčíkovo-*

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47 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81.

48 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 119, para. 3. A similar assessment is also made in: *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 282.

49 *First Report on State Responsibility* (*addendum* no. 5), *Ibid.*, at para. 283. Similar remarks were made in: *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, *Ibid.*, at p. 120, para. 4, where it is further indicated that the retroactive effect of responsibility "avoids gaps in the extent of responsibility for what is, in effect, the same continuing act".

50 This is also the position of Miriam PETERSCHMITT, p. 64.

Nagymaros Project case.[51] Thus, to the "well-established principle that there is in general no succession to international responsibility",[52] Hungary maintained that there remains one "key exception": when "a successor State, by its *own* conduct, has acted in such a way as to assume the breaches of the law committed by its predecessor".[53] The argument developed by Hungary in its Memorial clearly indicates that by endorsing and continuing the internationally wrongful act (i.e. the unilateral derivation of the Variant C project), Slovakia was not only responsible for the damage resulting from its own illicit act committed upon its creation in January 1993 but also for the internationally wrongful act committed by the predecessor State. Thus, mention is made of the fact that Slovakia must "assume the obligations, as operator of variant C, to repair damage caused by *present and prior breaches of international law*".[54] This position is also clear from this passage:

> Slovakia is therefore responsible for damage and loss caused *by Czechoslovakia* in relation to the implementation of Variant C *until the disappearance of Czechoslovakia* on 31 December 1992. This responsibility extends to damage caused by any part of the material of the Original Project that was wrongfully converted or taken over for use in Variant C. From 1 January 1993 onwards, Slovakia is of course responsible, as a successor, for damage created by its own conduct.[55] (emphases added)

Dupuy, Counsel for Hungary, also indicated that "lorsqu'un Etat revendique et poursuit les faits illicites de son prédécesseur" this new State (Slovakia) "est responsable des manquements au droit accomplis par la Tchécoslovaquie".[56] He further explains his view as follows:

> En réalité, *la raison pour laquelle la Slovaquie est responsable des agissements tchécoslovaques constitue bien un fait de succession*. Mais c'est de la succession à un comportement illicite qu'il s'agit, non de la succession à l'acte juridique que constitue le traité. En réalité, la dérivation unilatérale du Danube dans le cadre du projet qu'elle appelle 'Variante C' constitue un ensemble de faits illicites dont tous sont 'continus' selon la terminologie que le professeur Ago fit adopter à la Commission du droit international. Cette continuité, loin d'avoir été interrompue, comme il aurait convenu qu'elle le fût a été poursuivie et consolidée par le nouvel Etat.
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> Dés l'instant de sa naissance, la Slovaquie, prolongeant sans aucune interruption une action dont elle avait d'ailleurs été l'inspiratrice en tant qu'Etat fédéré, perpétua cet ensemble de faits, *les reprenant ainsi intégralement à son compte*…
>
> Par une action persistant dans l'illicite, elle a au contraire endossé la responsabilité de la Tchécoslovaquie évanouie parce qu'elle a fait survivre, puis croître et aggraver un

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51 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3.

52 *Reply of the Republic of Hungary*, vol. I, 20 June 1995, at para. 3.163.

53 *Id.* (emphasis in the original text). The argument is also described in: Oral Pleadings, 7 March 1997, see at para. 6 of Pierre-Marie Dupuy's transcript of his pleadings.

54 *Memorial of the Republic of Hungary*, vol. I, 2 May 1994, at para. 8.05 (emphasis added).

55 *Ibid.*, at para. 8.06. This aspect is also dealt with in the *Reply of the Republic of Hungary*, vol. I, 20 June 1995, at para. 3.164.

56 Oral Pleadings, 7 March 1997, see at para. 6 of Pierre-Marie Dupuy's transcript of his pleadings.

comportement de fait attentatoire aux droits de la Hongrie, dont elle a immédiatement et intégralement revendiqué la paternité.

Par le fait même, elle devenait responsable de la série des agissements tchécoslovaques antérieurs. Ceux qui, s'échelonnant du 13 mai 1989 à la disparition de la Tchécoslovaquie, avaient constitué les phases successives devant inexorablement mener à la dérivation unilatérale de ce fleuve international.[57] (emphases in the original)

b) *The Predecessor State Continues its Existence*

The question arises as to whether the solution of succession should also apply in situations where the predecessor State does continue its existence (such as in cases of secession).

As previously observed above,[58] in cases where the predecessor State does continue its existence, the analysis of State practice and international case law has clearly shown that, in principle, the continuing State remains liable for internationally wrongful acts it has *itself committed* before the date of succession.[59] There is no reason why the continuing State should not continue to be held accountable for *its own* internationally wrongful acts (committed before the date of succession) in cases where the successor State continues and endorses such act (after the date of succession).[60] In other words, the fact that the successor State subsequently endorses such internationally wrongful act should not, logically, have for consequence that the continuing State no longer has any responsibility for the initial act it committed.

In such case, there would in fact be two different internationally wrongful acts committed by two different States. Each State should bear its own responsibility for the commission of its own internationally wrongful act. This is a case of plurality of responsible States. The injured third State would have the right to invoke the responsibility of *any* of the States responsible for the internationally wrongful acts.[61] There is no general rule of joint and several responsibility in international

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57 *Ibid.*, at paras. 6–7.

58 See the analysis in the context of secession, at *supra*, p. 142.

59 However, this is not so clear in the context of Newly Independent States where State practice is not uniform. This issue is dealt with at *supra*, p. 168.

60 *Contra*: Miriam PETERSCHMITT, p. 64, for whom the new successor State should be responsible for internationally wrongful acts committed by the predecessor State before the date of succession. For the author, this "equitable" rule is necessary to counterbalance the many difficult problems facing an injured third State victim of a continuous internationally wrongful act. In particular, she makes reference to the problem of the quantification of damages and the question of the evaluation of which of the predecessor State or the successor State is responsible for which portion of the damage.

61 The *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 314, para. 3, indicates that "the general

law.[62] The State having provided full reparation could then turn against the other responsible State(s) for a proper division of responsibility.[63]

Surprisingly enough, two examples of court decisions have been found where, on the contrary, it was held that the successor State should be responsible for obligations arising from internationally wrongful acts committed before the date of succession. Special circumstances may, however, explain the reasoning of the courts. Thus, in both cases, the internationally wrongful acts were in fact *not committed by the predecessor State* and there was no reason for the continuing State to "remain" responsible for such acts after the date of succession.

The first case was decided by the U.S. Foreign Claims Settlement Commission in the context of the U.S. 1976 "Claim Program" which was set up to deal with outstanding property claims in the G.D.R.[64] The Commission held that the G.D.R. should be responsible for the illegal taking of property committed *by the Soviet Union* during its military occupation of East Germany (1945–1949) since the Soviet expropriations "were subsequently ratified by [the] G.D.R. after its establishment in 1949".[65] It should be noted that the illegal acts were not committed by the

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principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it". Therefore, "where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State" (*Ibid.*, at para. 7).

62 In the case of *Certain Phosphate Lands in Nauru, Preliminary Objections* (Nauru v. Australia), Judgment of 26 June 1992, *I.C.J. Reports 1992*, p. 240, Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States member of the Administrative Authority. The Court indicated that it "does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States". There is support in doctrine for the proposition that there is no joint and several responsibility of the successor States for *the debts* of the predecessor State: Wladyslaw CZAPLINSKI, "Equity and Equitable Principles in the Law of State Succession", in: Mojmir MRAK (ed.), *Succession of States*, The Hague, Martinus Nijhoff Publ., 1999, at p. 70. See also: Article 10(1) of the resolution of the *Institut de Droit international* on *State Succession in Matters of Property and Debts*, Session of Vancouver, 2001, in: 69 *Annuaire I.D.I.*, 2000–2001, at pp. 713 et seq.

63 Article 47 (2) of the I.L.C.'s *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

64 The Claim Program is further explained at *supra*, p. 91.

65 The *Earl N. Reinsel* case, Claim no. G–0433, Decision no. G–2674, published in: Foreign Claims Settlement Commission of the United States, *Index-Digest of Decisions*, vol. III (1976–1986), at p. 22. See also the *Anna Low Bollinger* case (Decision no. G–2055, in: *Id.*), where the *Index-Digest of Decisions* summarises the decision of the Commission as follows: "The fact that the G.D.R. was not officially established until October 1949 *did not preclude* a finding that actions by prior governmental authorities before October of 1949 in the territory administered by the Soviet military authorities after World War II constituted a taking for which the Government of the G.D.R. was responsible" (emphasis added).

predecessor State (the German Reich) but by the *Soviet Union*. The decision of the U.S. Foreign Claims Settlement Commission must have been ultimately guided by the fact that it would have been undoubtedly unjust to decide that the continuing State (the Federal Republic of Germany) was responsible for the internationally wrongful acts committed by the Soviet Union.

The second case is that of the *Lighthouse Arbitration* case (in the context of a cession of territory), where the Arbitral Tribunal concluded that Greece should be held responsible for its own internationally wrongful acts (delicts of omission) committed *after* 1913 (the date of the cession of territory of Crete) and for the financial consequences of the illegal acts committed by the autonomous Government of Crete *before* the date of succession. The Tribunal held that: "[T]he Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract".[66] It should be noted that in this case the actual perpetrator of the internationally wrongful act was not the predecessor State (the Ottoman Empire) but an autonomous entity (Crete).

5. *An Insurrectional Movement Commits an Internationally Wrongful Act during its Struggle to Establish a New State*

5.1 *Introduction*

In time of political turmoil, insurrectional movements fighting for independence have rights and obligations under international law.[67] This is so independently of the other question whether the insurrectional movement has been recognised an international legal personality under international law.[68] In principle, the violation of an obligation *by* the insurrectional movement (or the National Liberation Move-

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66 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 92.

67 See Hazem M. ATLAM, at pp. 313–335, 352–392.

68 *Fourth Report on State Responsibility of the Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, ch. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at p. 150, para. 210; *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5, at para. 274 ("it should be irrelevant to the application of the rules stated in articles 14 and 15 [now Article 10] whether and to what extent the insurrectional movement has international legal personality"). On the contrary, for Hazem M. ATLAM, pp. 303–312, and Hazem M. ATLAM, "National Liberation Movements and International Responsibility", in: M. SPINEDI & B. SIMMA (eds.), *United Nations Codification of State Responsibility*, New York, Oceana, 1987, p. 47, 54–55, these rights and obligations under international law are the *consequence* of the fact that an insurrectional movement was recognised as having an international personality.

ment) against a third State entails its responsibility under international law.[69] Inversely, the commission of an internationally wrongful act *against* an insurrectional movement by a third State would result in the right to reparation. This responsibility (whether passive or active) is usually exercised only after the end of the hostilities.[70]

When the insurrection ends, there are two possibilities that can be schematically envisaged and which are commented on in the next paragraphs. The applicable legal regime depends on whether or not the insurrectional movement succeeds in its struggle to establish a new State.

The insurrectional movement in unsuccessful in establishing a new State. It is well-recognised in doctrine as well as in State practice that, as a matter of principle, a State should not be held responsible for internationally wrongful acts which were committed by an *unsuccessful* insurrectional movement in its struggle against it.[71] The only exception is when the State is negligent in preventing damage caused by the rebels or in suppressing the insurrection.[72]

A good example of the rule that a State is not responsible for internationally wrongful acts committed by the *unsuccessful* insurrectional movement in its failed

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69 Hazem M. ATLAM, "National Liberation Movements and International Responsibility", *Ibid.*, pp. 46–49.

70 This is discussed in: *Fourth Report on State Responsibility of the Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, ch. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at pp. 129–130, paras. 154–155.

71 Hazem M. ATLAM, pp. 296–300, 394–395; Charles ROUSSEAU, *Droit international public*, vol. V, Paris, Sirey, 1977, pp. 84–86; Paul REUTER, "La Responsabilité internationale, problèmes choisis" (Cours 1955–1956), in: Paul REUTER, *Le développement de l'ordre juridique international, écrits de droit international*, Paris, Economica, 1995, pp. 464–465; Ian BROWNLIE, *Principles of Public International Law*, 5th ed., Oxford, Clarendon Press, 1998, pp. 455–456; NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 755. This rule was the object of a separate provision (Article 14(1)) in the *Draft Articles on State Responsibility Adopted by the Commission on First Reading*, 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May–26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, ch. III, in: *Yearbook I.L.C.*, 1996, vol. II (Part Two), pp. 58–65, which reads as follows: "The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law". There is, however, some disagreement amongst writers as to whether this principle should be uniformly adopted and whether there should not be exceptions for some types of activities conducted by the rebels during the conflict. On this last point see: D.P. O'CONNELL, *International Law*, vol. II, London, Stevens & Sons, 1970, pp. 969 et seq.

72 This situation is covered by Article 10(3) of the final Draft Articles: *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1. Ses also on this point: Haig SILVANIE, *Responsibility of States for Acts of Unsuccessful Insurgent Governments*, New York, Columbia Univ. Press, 1939, pp. 135 et seq.

attempt to establish a new State is the *Socony Vaccum Oil Company* case.[73] Another example is the *Iloilo Claims* case arising from the internationally wrongful acts committed by Filipino insurgents against British nationals in the context of the 1898 cession by Spain to the United States of sovereignty over the Philippines.[74] Another case involves internationally wrongful acts committed by Cuban insurgents in 1870 against the property of U.S. nationals.[75]

The question was also dealt with by several Italian municipal court cases after the Second World War. This includes, for instance, the *Rainoldi* case, where during the Second World War the plaintiff was run down by a motor-car which was at that time in the hands of the Italian "Social Republic" (the Republic of Salò), a fascist puppet State in German-occupied northern Italy established at the end of the Second World War.[76] The plaintiff's contention was that Italy, as the successor to the "new State" of the Italian "Social Republic", should assume the liabilities caused by that short-lived "State". The Court concluded that the Italian "Social Republic" had never been able to establish itself as a new State (or even as any sort of government), and that Italy, which never ceased to exist, should not be responsible for the acts of the unsuccessful insurgents.[77] This decision contrasts with other different findings by Italian courts.[78]

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73 *Socony Vaccum Oil Company*, decided by the U.S. International Claims Commission, in: *Settlements of Claims*, 1949–1955, p. 77, in: *I.L.R.*, 1954, p. 55, see in particular at p. 61: "…no case has been cited in argument, and we think none can be found, in which the acts of a portion of a State unsuccessfully attempting to establish a separate revolutionary government have been sustained as a matter of legal right". This case is further analysed at *infra*, p. 237.

74 *Several British Subjects (Great Britain) v. United States [the Iloilo Claims]*, U.S.-Great Britain Claims Commission, Award of 19 November 1925, in: 20 *A.J.I.L.*, 1926, pp. 382–384; in: *U.N.R.I.A.A.*, vol. VI, p. 158.

75 *Emma McGrady & Augustus Wilson v. Spain*, in: no. 59, *Span Com*. (1871), 25 April 1874, also discussed in: J.B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 2981–2982.

76 *Rainoldi v. Ministero della Guerra*, Court of First Instance of Brescia (Italy), 20 February 1946, in: *Foro Italiano*, 1947, I, 151, in: *Annual Digest*, 1946, p. 6.

77 *Annual Digest*, 1946, p. 6. However, in an *obiter dictum*, the Court indicated that had a new State been shortly established and had it later vanished, Italy would have been considered the successor State to that short-lived Republic and, consequently, that it would have had to assume liabilities for internationally wrongful acts committed by that Republic: "We may admit, although this is not universally accepted, that international law imposed upon the successor State the duty to assume the liabilities of the predecessor State, both towards other States and private persons of foreign nationality. We may admit, further, that the successor State owes a corresponding duty towards its own citizens to recognise the succession in domestic law". D.P. C'CONNELL, State Succession, vol. I, p. 492, describes this case as of "doubtful merit".

78 In the case of *Costa v. Ministero della Guerra*, in: 70 *Foro Italiano*, 1947, I, 256, mentioned in: *Annual Digest*, 1946, p. 9, the Court of First Instance of Genoa decided in its judgment of 26 March 1946 that the Italian "Social Republic" constituted a *de facto government* during the War. It held, consequently, that the legitimate Italian gov-

Echoes of the principle that a State should not be held responsible for internationally wrongful acts committed by an *unsuccessful* insurrectional movement can be found in U.S. practice at the end of the failed attempt of the Confederate forces to secede during the American Civil War (1861–1865). This is stated at Section 4 of the Fourteenth Amendment to the U.S. Constitution, enacted on 28 July 1868.[79]

The United States-Great Britain Mixed Claims Commission acting under Articles XII–XVII of the Treaty of Washington of 8 May 1871 between the United States and Great Britain rejected any responsibility on behalf of the United States for the acts of the Confederate armed forces and, in particular, "injuries inflicted by the Confederate authorities or by private citizens of the Confederacy".[80] This rule was, for instance, applied in the *John H. Hanna, No. 2* case, where the Commission had to decide a claim by Mr Hanna, an English national, against the United States for the destruction of 819 bales of cotton which had been "destroyed by orders of the authorities of the Confederate States and of the rebel State of Louisiana, for the purpose of preventing the same from falling into the hands of the Federal forces".[81] Great Britain, acting on behalf of the claimant, argued that the

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ernment after the War was responsible for the damage caused by a motor car of the fire brigade of the Italian army which was controlled at the time by the Italian "Social Republic". D.P. C'CONNELL, *State Succession*, vol. I, p. 492, rightly observed that the result of this case was based "on the ground that the succession of Italy was more a succession of government than of States". Other cases decided by Italian courts are mentioned in: *Annual Digest*, 1946, p. 9. In a decision of the Court of First Instance of Cremona dated 15 November 1945 (in: *Foro Padano*, 1946, I, 150) and in another decision of that same court dated 3 April 1946 (in: *Giurisprudenza Italiana*, 1946, I, 2 273) it was decided that the Italian "Social Republic" had established itself as a *new State* during the War (and not merely as a new government). D.P. O'CONNELL, *State Succession*, vol. I, also refers to the case of *Durchi v. The Commune of Genoa*, in: 70 *Foro Italiano*, 1947, I, p. 334, where Italy was found liable for the acts committed by the Italian "Social Republic".

79 U.S. Const. amend. XIV, sect. 4: "[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claims for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void".

80 J.B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at p. 684. These cases are also referred to in: J.B. MOORE, *Digest of International Law*, vol. 1, Washington, G.P.O., 1906, at p. 60, and are discussed in: Mark THOMPSON, "Finders Weepers Losers Keepers: United States of America v. Steinmetz: the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama", 28 *Conn.L.Rev.*, 1996, at pp. 495–500. However, this last author seems to be reading these U.S. Civil War cases (see at p. 543) as relevant in the larger context of State succession and (wrongly) analyses the revolutionary movement of the Confederate forces as a "predecessor State".

81 *John H. Hanna v. United States*, U.S.-Great Britain Mixed Claims Commission, case no. 2, discussed in: J.B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at p. 2982.

"so-called secession of the State of Louisiana and the other States forming the so-called Confederate States did not extinguish or suspend the liability of the United States for internationally wrongful acts committed by said States".[82] The United States refuted this argument and maintained, on the contrary, that "no responsibility can attach to the United States for the destruction of the claimant's property under colour of the authority of the State of Louisiana, because its destruction was not authorised by any officials representing or authorised to represent or act for the State of Louisiana under the Constitution and laws of the United States".[83] The Commission concluded that "the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control, and over which acts they had no power to prevent".[84] Similar findings were made

82 *Ibid.*, at p. 2983. Great Britain also submitted (*Ibid.*, at p. 2984) the following argument: "…the Government of United States was rightfully supreme in Louisiana and the other States in rebellion, and having finally maintained its authority over those States, its liability to Great Britain for violation of these treaties by those respective States remained precisely as if there had been no insurrection or civil war… [A]s a principle of international law, if the rightful government of a country be displaced and the usurping government becomes liable for wrong done, such liability remains, and devolves on the rightful government when restored; that this principle equally applied when the usurpation was only partial; that the restored and loyal government of Louisiana was liable for wrongs done by the insurrectionary government of the same State; and that it was only by the provisions of the Constitution of the United States that the State of Louisiana was prevented from being compelled to discharge that liability toward foreign governments, and that on this ground the Government of the United States must be held responsible for the acts of the State of Louisiana".

83 *Ibid.*, at pp. 2984–2985. The United States further argued: "It is a absurd to hold the United States responsible in the case of Hanna as it would be to hold France responsible for the destruction of the property of a British subject in the part of France held by the German armies in the late war, on the ground that a French official at the head of some *arrondissement*, or *commune*, might have joined in the order of the German forces for its being done, he having being put in office or retained there by the German forces for the very purpose, and having first renounced his allegiance to France and taken an oath of allegiance to Germany".

84 *Ibid.*, at p. 2985. In his separate opinion, U.S. Commissioner Fraser further stated (*Ibid.*, at pp. 2986–2987): "It should be further observed that the particular 'State of Louisiana', which concurred and participated in the destruction of the claimant's property was a rebel organization, existing and acting as much in hostility to the Government of the United States as was the Confederate States, so called. It was in form and fact a creature unknown to the Constitution of the United States, and acting in hostility to it. It was an instrumentality of the rebellion. Its agency, in the spoliation of this cotton can not be likened to the act of a State of the American Union claiming to exist under the Constitution; and any argument tending to show that under the international law the national government is liable to answer for wrongs committed by such a State upon the subjects of a foreign power, can have no application to the matter now under consideration. The question presented is simply whether the Government of the United States is liable to answer to a neutral for the acts of those in rebellion against it under the circumstances stated, who never succeeded in establishing a government…It is not the case of a government established *de facto*, displacing the government *de jure*. But

by the same Commission in the *Stewart* case[85] and in the *A.E. Campbell & Co.* case.[86]

Another Mixed Commission established under a treaty enacted between the United States and Mexico on 4 July 1868 also reached the same conclusion of non-responsibility.[87] This is, for instance, the conclusion reached by Commissioner Wadsworth in his Opinion in the *Prats* case dealing with the claim of a Mexican national who had stocked 213 bales of cotton on board a British vessel in the port of New Orleans which were soon after destroyed when the vessel was burned by men acting under the authority of the Confederate Army.[88] Similar findings dealing with "tortious" acts committed by the Confederate Army were made by the

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it is the case merely of an unsuccessful effort in that direction…Its acts were lawless and criminal, and could result in no liability on the party of the Government of the United States".

85 *Stewart v. United States*, U.S.-Great Britain Mixed Claims Commission, case no. 339, discussed in: J.B. MOORE, *Ibid.*, at p. 2989.

86 *A.E. Campbell & Co. v. United States*, U.S.-Great Britain Mixed Claims Commission, case no. 290, discussed in: J.B. MOORE, *Ibid.*, at p. 2990.

87 The work of the commission is discussed in: J.B. MOORE, *Ibid.*, at pp. 2144–2167.

88 *Salvador Prats v. United States*, United States-Mexico Mixed Commission, case no. 748, in: J.B. MOORE, *Ibid.*, at p. 2886. This is the relevant quote from Commissioner Wadsworth's opinion: "Is the United States responsible for injuries committed during the late civil war within the arena of the struggle by the armed forces of the so-called Confederate States to the property of aliens, 'transient or dwelling'? We have no difficulty in answering that question in the negative. The Confederate armed forces were in no sense 'authorities of the United States' within the meaning of the convention under which we are assembled…The international duty of the United States or its engagements by treaty to extend protection to aliens, transient or dwelling, in its territories, ceased inside the territory held by the insurgents from the time such territory was withdrawn by war from the control of that government, and until her authority and jurisdiction were again established over it. The principle of non-responsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own subjects, between whom, in this respect, no inequality of rights can justly be asserted…The nonresponsibility of the United States for the acts of its late rebel enemies, while forcibly withdrawn from the jurisdiction of that government, must have been generally conceded by other nations; for, although many citizens of American and European states were resident in the hostile territory during the struggle, and suffered losses common to all inhabitants of the arena of war, no nation has made a demand upon the United States for indemnity (unless the present case forms the exception), while it is certain that that government would promptly repel all such demands. To admit the principle would place just governments, driven to the employment of arms for the suppression of wicked attempts at their overthrow, under serious disadvantages, and very much strengthen and embolden the cause of insurrection. It is not likely, therefore, soon to find a place in the code of nations".

U.S.-Mexico Mixed Commission in the *Nieves Olirares* case[89] and in the *Baltimore Insurance Co*. case.[90]

Finally, the principle of non-responsibility for internationally wrongful acts committed by unsuccessful rebels in their struggle to create a new State was also applied by the Peruvian-U.S. Claims Commission.[91] This is the *Alleghanian* case, where a ship registered in Peru was attacked in 1862 during the American Civil War by men belonging to the Confederate Navy. The United States rejected the claim submitted by Peru for damage for the reason that it was caused by the unsuccessful rebels. This position is clearly expressed in a diplomatic note dated 9 January 1863 by Mr Seward, U.S. Secretary of State, addressed to Mr Barreda, the Peruvian Minister to the United States.[92] The Mixed Commission, however, rejected the claim on jurisdictional grounds unrelated to any argument dealing with liability for acts of rebels.[93]

The insurrectional movement is successful in establishing a new State. The second situation is when the insurrectional movement does succeed in creating *a*

89 *Nieves Olirares v. United States*, United States-Mexico Mixed Commission, case no. 749, in: MS. Op. VI. p. 160, briefly mentioned in: J.B. MOORE, *Ibid.*, at p. 2900.

90 *Baltimore Insurance Co. v. United States*, U.S.-Mexico Mixed Commission, case no. 756, in: MS. Op. V. p. 446, briefly mentioned in: J.B. MOORE, *Id.*

91 The work of the commission is discussed in: J.B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II, Washington, G.P.O., 1898, at pp. 1615 et seq.

92 Note of U.S. Secretary of State Mr Seward to Mr Barreda, the Peruvian Minister to the United States, 9 January 1863, in: J.B. MOORE, *Ibid.*, at pp. 1622 et seq.: "The act which [the insurgents] committed is deemed by the laws of the United States as an act of treasons and piracy… [T]he boarding, seizure, and destruction of the *Alleghanian* with her cargo was an act of civil war committed by the revolutionary insurgents, and under the pretended authority of their unlawful and treasonable leaders, not more in violation of the rights of Peru than in violation of their allegiance to the United States, and in defiance of their constitutional and legal authority…[the United States] government was in no wise informed or cognizant of the crime before its commission, although it was extraordinarily vigilant and active in military and naval operations on the waters and shores of the Chesapeake;…its agents hastened to arrest and defeat the criminal enterprise as soon as it came to their knowledge, and…those agents adopted the most energetic and effective measures to prevent the destruction of the ship and cargo, and to bring the offenders to punishment, and to compel them to make restitution to the parties aggrieved…This government regrets as sincerely as the Peruvian Government can that its efforts to accomplish these objects have been thus far unsuccessful. What has happened, however, in the case of the *Alleghanian* has occurred without any fault whatever on the part of this government, has been committed by disloyal citizens over whom, through the operations of civil war, it has temporarily lost its control. The government, moreover, has spared no reasonable effort to redress the injuries which have been committed and to repair the losses which have been incurred".

93 Subsequently to this correspondence, the guano aboard the ship was recovered in a damage condition and was sold in Baltimore in 1863. The Peruvian government in fact received half of the proceeds (i.e. US$ 12,981.20): J.B. MOORE, *Ibid.*, at p. 1624.

new State, and not merely to become a *new government* of an existing State.[94] In such case, the question arises as to whether the new State should be held responsible for obligations arising from internationally wrongful acts *committed by the insurrectional movement* against third States during the struggle for independence. This question is dealt with in the present section.[95] The other question, whether the new State should be held responsible for obligations arising from internationally wrongful acts *committed by the predecessor State* in fighting the rebels (which succeeded in creating that new State) is discussed in a subsequent section.[96]

It should be noted that this section only focuses on situations where the struggle of the insurrectional movement led to the creation of a new State *on part* of the territory of the predecessor State.[97] Thus, it does not deal with the very exceptional (and rather hypothetical) cases where the insurrectional movement succeeds in creating a new State not only *in part* of the territory of the predecessor State but on the *totality* of its territory. There is some limited support in doctrine for such distinction,[98] which seems to have been envisaged at some point by

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94 The situation of change of *government* is dealt with at Article 10(1) of the I.L.C. Articles on State Responsibility (*Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.), which stipulates as follows: "The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law". It is generally recognised that a new government is not only responsible for internationally wrongful acts committed by the rebels but also for acts committed by the previous government: *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 100, at para. 5.

95 A summary of the author's findings are found in: Patrick DUMBERRY, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", 17(3) *E.J.I.L.*, 2006, pp. 605–621.

96 See at *infra*, p. 250.

97 Article 10(2) of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1., is thus concerned with cases where an insurrectional movement succeeds in establishing a new state "in part of the territory of a pre-existing state" (such as in the case of a secession) or in a territory under the "administration" of the pre-existing state (for cases of Newly Independent States).

98 The distinction is supported by: Hazem M. ATLAM, pp. 79–103, 258–267, 275–281, 289–293; R. QUADRI, *Diritto internazionale pubblico*, 4th ed., Milan, Priulla, 1963, pp. 500–501; B. CONFORTI, *Lezioni di diritto internazionale*, 2nd ed., Naples, Editoriale Scientifica, 1982, pp. 97–99; Gaetano ARANGIO-RUIZ, *L'Etat dans le sens du droit des gens et la notion du droit international*, Bologna, Cooperativa libraria universitaria, 1975, p. 305. This question is discussed in: *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 101, at para. 7.

Special Rapporteur Ago in the work of the I.L.C. on State responsibility.[99] There is simply no example in actual State practice in support of this hypothesis.[100]

5.2 *The Principle of Transfer Adopted by the I.L.C.'s Articles on State Responsibility*

The conduct of an "insurrectional movement" which succeeds in establishing a new State is dealt with at Article 10(2) of the final 2001 *Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the I.L.C., which stipulates that:

> The conduct of a movement, insurrectional or other, which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration shall be considered an act of the new state under international law.[101]

This provision indicates that it is the *new State* which should be held responsible for obligations arising from internationally wrongful acts committed by the "move-

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99 *Fourth Report on State Responsibility* of the *Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, ch. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at p. 131, para. 157 (see also at paras. 195, 199, 210): "[T]he revolutionary change in the State structure might be so far-reaching as to affect the very continuity and identity of the State. Then it is not only the previous government which disappears: it is the pre-existing State itself which cease to exist while another State, endowed with a different international personality from that of the former, succeeds it in the same territory". Special Rapporteur Ago even included this exceptional case in the *Fourth Report on State Responsibility of the Special Rapporteur* (*Ibid.*, at p. 151, para. 214) he submitted to the Commission (see at Article 13(1)).

100 It has been submitted by Hazem M. ATLAM, back in 1986 (see at pp. 81, 92, 96–103, 266, 289–293), that a victory of the African National Congress (A.N.C.) rebels fighting South Africa's apartheid regime should be best analysed in the light of the creation of *a new State* rather then simply a change of government. The reality which prevailed at the end of the apartheid regime in 1991 was somewhat different, as it did not lead to the creation of a new State but simply to the arrival of a radically new government within the confine of the existing State. *Contra*: Zyade MOTALA, "Under International Law, Does the New Order in South Africa Assume the Obligations and Responsibilities of Apartheid Order? An Argument for Realism over Formalism", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, pp. 287–303.

101 The *Text of the Draft Articles on State Responsibility Adopted by the Commission on First Reading*, 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May–26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, ch. III, in: *Yearbook I.L.C.*, 1996, vol. II (Part Two), pp. 58–65, was slightly different: "The act of an insurrectional movement whose action results in the formation of a new state in part of the territory of a pre-existing state or in a territory under its administration shall be considered as an act of the new state".

ment" (whether "insurrectional" or "other")[102] during the period which led to its creation, provided that:

– the conduct performed by the movement constitutes a breach of an international obligation; and
– the conduct is attributable to this movement.

In the context of the present study, we are more interested in those internationally wrongful acts committed by the insurrectional movement *against third States* than those committed against the predecessor State.[103]

The 1961 *Harvard Draft Convention on International Responsibility* also adopted the principle at its Article 18(1) that:

> In the event of a revolution or insurrection which brings about a change in the government of a State *or the establishment of a new State*, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government.[104] (emphasis added).

Writers generally agree with the principle of the devolution (or transfer) of responsibility in the context of *governmental* changes. They however rarely address the other question whether the same principle should apply in cases where the actions of the rebels result not in a change of government but in the *creation of a new State*.[105] The limited number of writers who have indeed made this distinction and have tackled this specific question reached the conclusion that there should be

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102 The previous 1996 version of the Articles (*Text of the Draft Articles on State Responsibility Adopted by the Commission on First Reading, Id.*) only made reference to "insurrectional movements".

103 This is so because when the rebels are successful in their efforts to create a new State the issue of responsibility for wrongful acts committed by them (before the date of succession) becomes one of *war damage* between the predecessor State and the successor State. It was mentioned at the outset of the present study (see *supra*, p. 28) that claims *between the predecessor State and its successor* would not be analysed *per se*.

104 *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 15 April 1961, by reporters Louis B. SOHN and Richard BAXTER, Harvard School of Law, in: 55 *A.J.I.L.*, 1961, p. 576. See also the Harvard Draft of 1929, at Article XIII (b), in: 23 *A.J.I.L.*, Spec. Supp., 1929, pp. 131–239.

105 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 104, para. 18: "[Writers] generally make no distinction between the situation where the insurgents have asserted their authority as a new government or new régime over the whole of the territory of the pre-existing State and the situation where they have, on the contrary, caused the formation of a new State in part of the territory of the pre-existing State, which is therefore detached from the latter". See also in: *Fourth Report on State Responsibility of the Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, chp. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at p. 150, para. 210.

devolution of responsibility to the successor State for the acts committed by the rebels before independence.[106] The principle has also been recognised by scholars dealing with the specific question of State succession to obligations arising from the commission of internationally wrongful acts.[107] These writers are indeed consistently referring to this principle as a well-established one.[108]

5.3 *Analysis of State Practice*

An analysis of State practice leads to the conclusion that this principle embodied in Article 10(2) of the I.L.C. Articles does not rest on grounds as solid as is often expressed in doctrine. One therefore cannot fully agree with the statement made by the I.L.C. Special Rapporteur Crawford that "the earlier jurisprudence and doctrine, at least, *firmly support* the two rules set out in article 15 [now Article 10]".[109]

In fact, the principle seems to be more a doctrinal construction than one based on actual State practice. As a matter of fact, the I.L.C. Commentary to the Draft Articles adopted on First Reading by the Commission (1996) only mentions a

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106 Brigitte STERN, Responsabilité, p. 344; Liesbeth ZEGVELD, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge Univ. Press, 2002, at pp. 155–156; NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 755; G. BALLADORE PALLIERI, *Diritto internazionale pubblico*, 8th ed., Milan, Giuffrè, 1962, p. 173; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 768–769; Gaetano ARANGIO-RUIZ, *L'Etat dans le sens du droit des gens et la notion du droit international*, Bologna, Cooperativa libraria universitaria, 1975, p. 45; Gordon A. CHRISTENSON, "The Doctrine of Attribution in State Responsibility", in: R.B. LILLICH, *International Law of State Responsibility of Injuries to Aliens*, Charlottesville, Univ. Press Virginia, 1983, at p. 334; John Bassett MOORE, *Digest of International Law*, vol. I, Washington, G.P.O., 1906, at p. 44; John QUIGLEY, "State Responsibility for Ethnic Cleansing", 32 *U.C. Davis L. Rev.*, 1999, p. 341, at p. 357. See also: Patrick DUMBERRY, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", 17(3) *E.J.I.L.*, 2006, pp. 605–621.

107 Brigitte STERN, Responsabilité, p. 344; Wladyslaw CZAPLINSKI, p. 353; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 768–769; Michael John VOLKOVITSCH, p. 2199.

108 Brigitte STERN, Responsabilité, p. 344 (describing this rule as a customary norm of international law); Hazem M. ATLAM, p. 422 (speaking of "une règle bien établie en droit international"; see also his comments at pp. 399, 410, 419 and 422); Wladyslaw CZAPLINSKI, p. 353 (speaking of a "consistent" practice in this field). See also: Michael John VOLKOVITSCH, p. 2199.

109 *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 267 (emphasis added).

single case of State practice and no judicial decisions.[110] The *First Report on State Responsibility* (*addendum* no. 5) by Crawford refers to one judicial decision, which is however not relevant in this context.[111] The rarity of State practice is also apparent in the comprehensive work of Atlam, who considers this principle to be well established[112] but does not quote a single case of judicial decisions or State practice where the principle was referred to, let alone applied.[113]

The present investigation has led to the discovery of only three examples of case law dealing with the issue.[114] These examples support the principle expressed at Article 10(2) of the I.L.C. Articles.

French municipal court decisions in the context of the independence of Algeria. The principle of succession to obligations arising from the commission of internationally wrongful acts was applied in the context of the independence of Algeria in 1962, where there was a structural continuity between the rebel group (the F.L.N.) and the new government which took office upon independence. This is, however, an example where the acts were committed by the insurrectional movement against the predecessor State (and not against third States). French municipal courts have consistently held that the new State of Algeria should (in principle) provide compensation to French nationals victims of internationally wrongful acts

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110 This is the case of the (unsuccessful) struggle of the Confederate Army to secede from the United States during the American Civil War (1861–1865). This example is examined at *infra*, p. 239.

111 The *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 277, refers to a case decided by the High Court of Namibia: *Minister of Defence, Namibia v. Mwandinghi*, in: 1992 (2) *SA* 355 at pp. 359–360, in: 91 *I.L.R.*, p. 341 at p. 361. However, this case (examined in detail at *supra*, p. 194) deals with the *different question* of the devolution of acts committed not by the rebels, but *by the predecessor State*. This totally different issue is dealt with in a subsequent section (*infra*, p. 250).

112 Hazem M. ATLAM, p. 422.

113 The author acknowledges (see at pp. 410 et seq.) the rarity of State practice in support of the principle. In fact, the one international judicial decision he mentions in support of the principle (*Case Concerning Certain German Interests in Upper-Silesia (Merits)*, Judgment of 25 May 1926, P.C.I.J., *Serie A*, no. 7) is not relevant. Thus, this case does not deal specifically with the question of succession to responsibility for acts committed by rebels but with the issue of State succession to treaties. Atlam also makes reference (at pp. 410, 448–450) to the fact that there is apparently evidence that insurrectional movements (such as the *Front de Libération Nationale* (F.L.N.) of Algeria) have themselves taken the view that the new State, which they want to see emerge, should be responsible for their acts committed during their struggle for independence. However, the many references he takes from the work of Mohammed BEDJAOUI, *La révolution algérienne et le droit*, Brussels, Éditions de l'Association internationale des juristes démocrates, 1961, do not deal with the acceptance by Algeria of any responsibility for internationally wrongful acts committed by the F.L.N. during the national liberation war prior to independence.

114 These examples are discussed in: Patrick DUMBERRY, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", 17(3) *E.J.I.L.*, 2006, pp. 605–621.

committed by the insurgents of the F.L.N. in their war efforts to achieve independence. However, since Algeria was not a party in any of the proceedings before these French municipal courts, these court decisions did not formally hold Algeria responsible for the obligations arising from internationally wrongful acts committed by the F.L.N. These decisions simply held that France could not be responsible for such acts, which only "concerned" ("*intéressent*") Algeria.

This principle was, for instance, applied in the *Perriquet* case, where the *Conseil d'Etat* had to decide the legality of one decision taken in 1990 by a French war damage commission (*Commission d'arrondissement des dommages de guerre de Paris*) rejecting the plaintiff's request for compensation for an internationally wrongful act committed by the rebels. The *Conseil d'Etat* upheld this decision and reached the conclusion that Algeria should be responsible for obligations arising from internationally wrongful acts caused by the F.L.N.[115] A similar finding was made by the *Conseil d'Etat* in the *Hespel* case, dealing with material damage to property suffered during the war.[116] In this case, the *Conseil d'Etat* nullified part of a 1977 Award made by the same French war damage commission in favour of the plaintiff in so far as this portion of the Award accepted France's responsibility for damage caused by the F.L.N. The *Conseil d'Etat* decided that the Commission was wrong in stating that France should provide any compensation for any such internationally wrongful acts caused by the insurgents; Algeria remained responsible for such internationally wrongful acts.[117] In several cases, the *Conseil d'Etat* con-

115 *Perriquet*, Conseil d'Etat, case no. 119737, 15 March 1995, in: *Recueil Lebon*. This is the relevant quote taken from the decision: "Considérant qu'il résulte tant de la déclaration de principe du 19 mars 1962 publiée au Journal Officiel du 20 mars 1962 relative à la coopération économique et financière, que du protocole judiciaire conclu le 28 août 1962 entre le gouvernement de la République française et l'Exécutif provisoire algérien et publié par décret du 29 août 1962 que l'ensemble des droits et obligations contractés par la France au titre de l'Algérie ont été transférés à l'Etat algérien à la date de son indépendance; que si l'application de cette règle générale n'a pas pour effet de mettre à la charge de l'Etat algérien la réparation des dommages causés par les mesures prises spécialement et directement par les autorités françaises en vue de faire échec aux mouvements insurrectionnels, l'indemnisation des dommages imputables à des éléments insurrectionnels intéresse l'Etat algérien; Considérant que M. Perriquet a demandé réparation des dommages causés à l'exploitation agricole dont il était propriétaire en Algérie; que ces dommages ont été causés par des éléments insurrectionnels avant l'accession de l'Algérie à l'indépendance; que leur réparation ne peut, en vertu de ce qui a été dit ci-dessus, incomber à l'Etat français".

116 *Hespel*, Conseil d'Etat, 2/6 SSR, case no. 11092, 5 December 1980, in: *Tables du Recueil Lebon*.

117 The *Conseil d'Etat* concluded: "Les conclusions des consorts d'Hespel tendant à l'indemnisation de dommages qui seraient imputables à des éléments insurrectionnels intéressent l'Etat algérien". It also noted that France remains responsible for its own acts in combating the rebels: "Considérant en revanche que les conclusions des consorts d'Hespel tendant à l'indemnisation des dommages estimés par eux imputables à des actions de l'armée française menées spécialement et directement en vue de faire échec aux mouvements insurrectionnels intéressent l'Etat français; que les dommages dont il s'agit sont susceptibles d'être indemnisés par l'Etat français."

cluded that it had no jurisdiction to hear cases involving internationally wrongful acts caused by the F.L.N.: the case no. 5059,[118] the *Etablissements Henri Maschat* case[119] and the *Consorts Hovelacque* case.[120]

The *Conseil d'Etat* also decided similarly in the *Grillo* case.[121] In this case, the *Conseil d'Etat* rejected a request by the plaintiff to nullify a 1995 decision by the administrative court of Lyon which had rejected his request to nullify a 1992 decision by the administrative tribunal of Nice deciding not to provide him with any compensation for damage suffered by his company as a result of acts of the insurgents. The *Conseil d'Etat* concluded that both courts were right in rejecting the plaintiff's claim in so far as the damage had been caused by *a foreign State*.[122] It therefore seems that the *Conseil d'Etat* interpreted the internationally wrongful acts committed in January 1962 by the F.L.N. (i.e. *before* the independence of Algeria) as those of the future State of Algeria.

The *Socony Vaccum Oil Company* case before the U.S. International Claims Commission. Another example involving internationally wrongful acts committed by rebels is the *Socony Vaccum Oil Company* case before the United States International Claims Commission.[123] The case arose out of the taking of property

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118 Conseil d'Etat, 2/4 SSR, case no. 5059, 25 May 1970, in: *Tables du Recueil Lebon.* This case dealt with a submission to nullify an award made by a war damage commission in Algeria (before independence) which had rejected a claim for damage because it was resulting from internationally wrongful acts committed by both the rebels and the French army. The *Conseil d'Etat* concluded that it had no jurisdiction with respect to the part of the plaintiff's submission dealing with the damage caused by the rebels. The summary of the case indicates: "Les conclusions de la requête dirigées contre ladite sentence en tant qu'elle a refusé d'indemniser des dommages estimés par l'intéressé imputables à la rébellion intéressent l'Etat algérien. Incompétence du Conseil d'Etat… Compétence, en revanche, du Conseil d'Etat pour connaître des conclusions tendant à l'annulation de la même sentence en tant qu'elle a refusé d'indemniser les dommages imputés par le requérant à l'armée française".

119 *Etablissements Henri Maschat*, Conseil d'Etat, case no. 04878, 10 May 1968, in: *Recueil Lebon*. In this case, the *Conseil d'Etat* had to decide on a request submitted by the plaintiff to nullify an award made by a war damage commission in Algeria (before independence) which had refused to provide any compensation to the plaintiff. The *Conseil d'Etat* declined jurisdiction.

120 *Consorts Hovelacque*, Conseil d'Etat, 2/6 SSR, case no. 35028, 13 January 1984, in: *Tables du Recueil Lebon.* In this case, the *Conseil d'Etat* was requested to nullify a decision by the administrative tribunal of Paris which had found France liable for damage caused by the rebels. The *Conseil d'Etat* declined jurisdiction.

121 *Grillo*, Conseil d'Etat, case no. 178498, 28 July 1999, in: *Tables du Recueil Lebon*.

122 The judgment reads as follows: "Le préjudice subi par les requérants, qui trouve son origine direct dans le fait d'un Etat étranger, ne saurait engager la responsabilité de l'Etat français sur le fondement du principe de l'égalité devant les charges publiques".

123 *Socony Vaccum Oil Company*, decided by the U.S. International Claims Commission, in: *Settlements of Claims*, 1949–1955, p. 77, in: *I.L.R.*, 1954, p. 55. On 19 July 1948, the United States and Yugoslavia entered into an agreement for the settlement of claims of nationals of the United States against Yugoslavia for taking of property and other measures of confiscation which occurred during and after the Second World War (i.e. from 1 September 1939 to the date of the agreement). Yugoslavia paid the amount of

of the claimant company by the Nazi puppet "independent" State of Croatia during the Second World War. The claimant requested payment in the amount of US$ 11.325 million by Yugoslavia on the ground that the latter should be held responsible for the internationally wrongful acts committed by the "independent" State of Croatia.

The Claims Commission concluded that this so-called "independent" State of Croatia was actually a "puppet" State created by Italy and Germany which at no time had complete control over its territory and population and which disappeared upon the retreat of these foreign troops. In other words, the Claims Commission viewed the "independent" State of Croatia as an unsuccessful attempt by an insurrectional group (backed by foreign troops) to secede from Yugoslavia, which as a State had never ceased to exist (even if its legitimate government was in exile).[124] This case in fact supports the above-mentioned principle according to which a State should not be held responsible for internationally wrongful acts committed by an *unsuccessful* insurrectional movement in its struggle for secession.

In one *obiter dictum*, the Claims Commission nevertheless made reference to the (successful) secession of the United States from the British Crown in 1776 and indicated that in such case the new State was responsible for the acts of the rebels committed during the revolution:

> Such was the case of the State government under the old [United States] confederation on their separation from the British Crown. *Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemy property made by them were sustained as if made by an independent nation*. But if they had failed in securing their independence and the authority of the [British] King had been reestablished in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.[125] (emphasis added)

The Claims Commission ultimately rejected the claim on the ground that the taking of property which occurred under the authority of the "puppet" State of Croatia was not covered by the 1948 Bilateral Agreement entered into by the United States and Yugoslavia and that it never was the intention of the negotiators of the Treaty

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US$ 17 million to the United States which established the International Claims Commission to adjudicate the claims of U.S. nationals.

124 Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 510, analyses this case as one of succession of governments rather than a succession of States.

125 The Claims Commission quoted in favour of this proposition the work of John Bassett MOORE, *Digest of International Law*, vol. I, Washington, G.P.O., 1906, at p. 44, which states: "The other kind of *de facto* government…is such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeeds, and become recognised, its acts from the commencement of its existence are upheld as those of an independent nation".

to include such claims. The Claims Commission arrived at the exact same result in two other cases dealing with damage caused by the "puppet" State of Croatia: the *Popp Claim*,[126] dealing with the taking of a motor car, and the *Versic Claim*,[127] which was for personal injuries suffered in a camp.

A Legal Opinion of Great Britain in the Context of the American Civil War. In the context of the (unsuccessful) struggle of the Confederate Army for secession of the Southern States from the United States during the American Civil War (1861–1865), the Law Officers of the British Crown gave a legal opinion during the War (on 16 February 1863). The Opinion stated that if the rebels were to succeed in their secession efforts, the new State should be held responsible for its acts committed before independence. This is the relevant quote from the Opinion:

> In the event of the war having ceased, and the authority of the Confederate State being de *jure* as well as de facto established, it will be competent to Her Majesty's Government to urge the payment of a compensation for the losses inflicted on Her Majesty's subjects by the Confederate Authorities during the War.[128]

Conclusion on State practice. State practice in support of the principle expressed at Article 10(2) of the I.L.C. Articles is, therefore, quite limited. Thus, State practice ultimately consists of one *obiter dictum* by an internal United States compensation commission and one sentence taken from a legal opinion discussing the likely consequences arising from uncertain future events. Even the several French municipal court decisions, which held that the new State of Algeria was (in principle) responsible for the internationally wrongful acts committed by the FLN before 1960, had limited concrete implication, since Algeria was in fact not a party in any of these proceedings.

5.4 *Reasons for the Adoption of the Principle of Transfer*

This section examines the different reasons which have been submitted in doctrine to support the principle that responsibility for internationally wrongful acts committed by an insurrectional movement should be taken over by the new State.[129]

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126 *Popp Claim*, decided by the U.S. International Claims Commission, in: *Settlements of Claims*, 1949–1955, p. 76. The decision is briefly referred to in: *I.L.R.*, 1954, p. 63.

127 *Versic Claim*, decided by the U.S. International Claims Commission, in: *Settlements of Claims*, 1949–1955, p. 58. The decision is briefly referred to in: *I.L.R.*, 1954, p. 63.

128 Legal Opinion of the Law Officers of the British Crown, 16 February 1863, in: Lord McNAIR, *International Law Opinions*, vol. II, Cambridge, Cambridge Univ. Press, 1956, p. 257. This example is reported in: *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 103, para. 12.

129 Hazem M. ATLAM, pp. 423 et seq., provides a comprehensive analysis of these different theories.

Two doctrinal approaches. Two broad approaches can be distinguished. One approach focuses on the discontinuity between the movement and the new State (the "succession theory"), while the other (the "continuity theory"), on the contrary, explains the transfer of responsibility based on the close continuity which exists between them.

According to the first approach (the "succession theory"), the victory of the rebels results in the creation of an original new subject of international law (the new State), which *is conceptually distinct* from the other subject (the insurrectional movement) which led to its creation.[130] Thus, the creation of the new State results in the extinction of the insurrectional movement and in a break in the chain of the continuity of legal personality between the movement and the new State.[131] According to this approach, the devolution of responsibility to the new State is simply based on the "ordinary" existing rules of State succession between *two distinct subjects* of international law.[132] This theory is only supported by a minority of writers in doctrine.[133]

The second approach (the "continuity theory") rejects the very foundation upon which the "succession theory" is based.[134] The work of the I.L.C. has clearly opted for the "continuity theory":

> The structure of the organisation of the insurrectional movement then becomes those of the organisation of the new State. In such a case, the affirmation of the responsibility of the newly-formed State for any wrongful acts committed by the organs of the insurrectional movement which preceded it would be justified by virtue of the continuity which would exist between the personality of the insurectional movement and that of the State to which it has given birth…[A]n existing subject of international law would merely change category: from a mere embryo State it would become a State proper, without any interruption in its international personality resulting from the change.[135]

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130 *Ibid.*, pp. 424, 427–433.

131 *Ibid.*, pp. 427–428.

132 *Ibid.*, p. 428.

133 See, for instance: G. CANSACCHI, "Identité et continuité des sujets de droit international", *R.C.A.D.I.*, t. 130, 1970–I, pp. 42–43, for whom "lorsque le gouvernement insurgé devient le seul gouvernement de l'Etat, on doit admettre que le sujet international particulier qu'il représentait s'est éteint, et qu'une succession internationale s'est ouverte entre lui et l'Etat dont il est devenu l'organe suprême".

134 Hazem M. ATLAM, p. 434: "Il existe entre le mouvement révolutionnaire et l'Etat issu de sa lutte des 'liens juridiques intrinsèques et substantiels' qui feraient nécessairement obstacle à toute affirmation de rupture entre le sujet mouvement révolutionnaire et le sujet nouvel Etat né de son action…les 'liens juridiques intrinsèques et substantiels' établis entre le mouvement et l'Etat nouveau issu de sa lutte justifient que l'on reconnaisse ici l'existence d'un seul et même sujet de droit international qui n'a fait que s'affermir en se transformant d'un simple 'organe provisoire' pour regagner 'la pleine stature étatique'".

135 *Fourth Report on State Responsibility of the Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, chp. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at p. 131, at para. 159, see also at para. 194.

There is therefore some sort of *continuity* between the two subjects of international law that are the insurrectional movement and the new State; they have the same legal identity.[136] Consequently, the new State takes over the obligations arising from internationally wrongful acts *it has* committed while still being an insurrectional movement not yet structured as an independent State.

An important point is that this devolution of responsibility is solely based on the mechanisms of State responsibility and *not on any rules of State succession*.[137] This is generally agreed in doctrine.[138] This is also clear from the Commentary of the I.L.C.:

> [These wrongful] acts committed by agents of the insurrectional movement before the movement takes power are attributed to the state because there is continuity between the apparatus of the insurrectional movement and the new governmental apparatus of the state, *not a succession of the state as one subject of international law to the insurrectional movement as another*.[139] (emphasis added)

At least four different theories have been elaborated in doctrine to explain the relationship of *continuity* between the insurrectional movement and the new State. These theories are examined in the following paragraphs.

Theory of the continuity of government. According to this theory, the continuity between the new State and the rebels arises from the fact that the latter were organised in a *de facto* government and were acting in such capacity throughout the hostilities.[140] From this *continuity of government*, it would result that the new State should be held responsible for the acts committed by the *de facto* rebel government prior to independence.

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136 Hazem M. ATLAM, p. 425; Hazem M. ATLAM, "National Liberation Movements and International Responsibility", in: M. SPINEDI & B. SIMMA (eds.), *United Nations Codification of State Responsibility*, New York, Oceana, 1987, p. 54.

137 Hazem M. ATLAM, p. 435.

138 Brigitte STERN, Responsabilité, p. 344; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 768–769. *Contra*: Wladyslaw CZAPLINSKI, p. 353, who seems to view this issue as one dealing with State succession. Thus, for him, this rule is "the exception to the general rule of non-responsibility of the successor State for the acts of its predecessor".

139 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 101, para. 8. A similar assessment is made in the *Fourth Report on State Responsibility*, *Yearbook I.L.C.*, 1972, vol. II, p. 131, at para. 159: "The attribution to the new State of the acts of organs of the insurrectional movement would therefore be only a normal application of the general rule providing for the attribution to any subject of international law of the conduct of its organs".

140 Hazem M. ATLAM, pp. 455–461.

The theory of the continuity of government is generally supported by international case law,[141] as well as in doctrine,[142] in the *different context* of the establishment of a *new government* by the rebellion. However, this theory does not seem to be supported in doctrine or in international case law when the actions of the rebels result in the creation of a *new State*. This theory has also been rejected by the work of the I.L.C.[143] In fact, the attribution to the new State of the acts of insurgents is indeed *quite independent* from the other question whether these rebels were exercising *de facto* power in part of the territory of the predecessor State, which territory later became a new State.[144] A further weakness of this theory is that it is of no general application. Thus, it is limited only to those cases where

141 *Dix* case, U.S.-Venezuela Commission, Award of 1903, in: *U.N.R.I.A.A.*, vol. IX, p. 119, at p. 120. The case is about a U.S. national (Mr Dix) who was involved in the cattle business in Venezuela at the time of important political turmoil between the Venezuelan government and some revolutionaries. The revolutionaries were at the end successful in their attempt to take power. The Commission decided that the revolutionaries (now forming the new government) should in principle be held responsible for the acts they had committed before their seizure of power and should compensate Mr Dix for his stolen cattle. This is the relevant passage of the Award of the Commission: "The revolution of 1899… proved successful and its acts, under a well-established rule of international law, are to be regarded as the acts of a *de facto* government. Its administrative and military officers were engaged in carrying out the policy of that government under the control of its executive. The same liability attaches for encroachments upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other *de facto* government". It should be noted that the Commission nevertheless rejected the claim. Thus, it concluded that in the circumstances of the case, the losses complained were too remote to entitle Mr Dix to compensation and, in any event, that the rebels had no deliberate intention to injure him.

142 D.P. O'CONNELL, *International Law*, vol. II, p. 968; Charles De VISSCHER, *Les effectivités du droit international public*, Paris, Pedone, 1967, p. 120; Paul REUTER, "La Responsabilité internationale, problèmes choisis" (Cours 1955–1956), in: Paul REUTER, *Le développement de l'ordre juridique international, écrits de droit international*, Paris, Economica, 1995, p. 465.

143 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 100, para. 2: "It is held in some instances that the attribution to the State, as a possible source of responsibility, of acts committed by subsequently victorious insurgents is justified by the fact that during the conflict the insurgents were already exercising authority as a '*de facto* government' in at least part of the territory of the State. But in practice, for the purpose of attributing acts to the State, no distinction is made between the acts of organs of the insurrectional movement according to whether they preceded or followed the acquisition by the movement of effective power over a given region". See also in: *Fourth Report on State Responsibility of the Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, ch. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at p. 145, para. 198.

144 *Fourth Report on State Responsibility of the Special Rapporteur*, *Id.*

the rebels have indeed established a regular "government" during the hostilities, which is far from always the case.[145]

Theory of the Legitimacy of the Struggle. Another theory submitted in doctrine to explain the continuity between the insurrectional movement and the new State is the reference to the "internal legitimacy" of the struggle of the former against the predecessor State.[146] Since the rebels' struggle would truly represent the "desire" of the people for whom they are fighting, the new State should be held accountable for the commission of internationally wrongful acts during that liberation struggle.

Here again, this theory is generally supported by international case law,[147] as well as in doctrine,[148] in the *different context* of the establishment of a *new government* by the rebellion. This approach does not seem to be supported when the actions of the rebels result in the creation of a *new State*. The major criticism that can be raised against this theory is the fact that it is not, of course, in all cases that the rebels can be said to be truly representing the interests and the will of the people.[149] This point was highlighted in the work of the I.L.C.[150] The situation is, of course,

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145 Hazem M. ATLAM, p. 459.

146 *Ibid.*, p. 461, describes this theory (without endorsing it) as follows: "Le mouvement victorieux… serait considéré comme ayant incarné, dès le début de sa lutte, la volonté nationale de son peuple accédant ultérieurement à l'indépendance. A partir de cette analyse, la victoire du mouvement devrait être considérée comme l'achèvement de sa représentativité et de son investiture populaire".

147 In the *Bolivar Railway Company* case, United-Kingdom-Venezuela Mixed Claims Commission, Award of 1903, in: *U.N.R.I.A.A.*, vol. IX, p. 445, at p. 453, Umpire Plumley expressed the principle as follows: "The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result".

148 See, for instance: E.M. BORCHARD, *The Diplomatic Protection of Citizens Abroad (or the Law of International Claims)*, New York, Banks Law Publ., 1915, p. 241; Charles ROUSSEAU, *Droit international public*, vol. V, Paris, Sirey, 1977, pp. 85–86; Jean SALMON, *La responsabilité internationale*, Brussels, Cours de droit international public, 1968, p. 60; Georges BERLIA, "La guerre civile et la responsabilité internationale", 11 *R.G.D.I.P.*, 1937, at p. 59; Jackson H. RALSTON, *Law and Procedure of International Tribunals*, Stanford, Stanford Univ. Press, 1926, pp. 343–344; Abdel-Azzeem AL-GANZORY, "International Claims and Insurgence", 33 *Rev. égyptienne d.i.*, 1977, p. 93. See also the documents quoted in: Green Haywood HACKWORTH, *Digest of International Law*, vol. V, 1943, Washington, G.P.O., pp. 681–682.

149 Hazem M. ATLAM, p. 465. Georg SCHWARZENBERGER, *International Law*, vol. I, 3rd ed., London, Stevens & Sons, 1957, p. 628, states (in reference to rebels establishing a new government) that this theory of the national will "is no more than an empty fiction in the verbiage of political philosophy".

150 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 100, para. 2: "The idea has also been put forward that, where the action of the insurgents was successful, they would be regarded as having represented the true national will ever since their uprising against the constituted power. But the very concept of 'national will' is to be treated with caution, quite apart from the fact that, in general, international law is not greatly

different in the other context where the legitimacy of one insurrectional movement in representing a people struggling for independence has been recognised by the United Nations. In such case, the theory of the legitimacy of the struggle may explain why the new State should be held accountable for internationally wrongful acts committed by this recognised movement during the liberation struggle.

"Ressurrection" of State theory. In some cases, the "new" State may actually be an "ancient" State which only ceased to exist as an independent entity for a certain period of time.[151] The new State would thus be "resurrected" through the struggle of the liberation movement. According to this theory,[152] there would be a continuity of identity between the "ancient" State, the insurrectional movement and the "new" State. Consequently, the newly "resuscitated" State would be responsible for obligations arising from internationally wrongful acts committed by the rebel movement prior to independence.

The very notion of State "resurrection" has been widely contested in doctrine and treated by authors as nothing more than a legal fiction without any foundation in international law.[153] Anyway, States claiming to be identical to ancient States have nevertheless been regarded as new States.[154] What is more is that this thesis can only be applied in *specific circumstances* and could by no means be resorted to

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concerned with whether a given government is or is not the representative of the 'true' national will. Even leaving that aside, it is difficult to maintain that the outcome of fighting should, like a judgment of God, establish retrospectively that the victors, from the outset of the civil war, were more representative of the true national will than the defeated". See also in: *Fourth Report on State Responsibility of the Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, ch. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at p. 145, para. 198.

151 The general issue (unrelated to the specific question of insurrectional movements) is analysed in: Vladimir D. DEGAN, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *R.C.A.D.I.*, t. 279, 1999, pp. 293 et seq.

152 A summary of this thesis, as well as a list of writers supporting it, can be found in: Hazem M. ATLAM, pp. 437–455.

153 Krystyna MAREK, *Identity and Continuity of States in Public International Law*, Geneva, Librairie Droz, 1968, p. 6: "It could, however, be asked whether… there might not be identity of a State without its continuity. Unless the possibility of legal miracle is admitted, the question must be answered emphatically in the negative: there is no legal resurrection in international law. Once a State has become extinct, it cannot resume a continued existence". See also G. CANSACCHI, "Identité et continuité des sujets de droit international", *R.C.A.D.I.*, t. 130, 1970–I, pp. 47–48. *Contra*: Vladimir D. DEGAN, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)", *R.C.A.D.I.*, t. 279, 1999, pp. 293 et seq., who indicates that the relevant factor is the lapse of time during which the State lost sovereignty. He is of the view that in situations where the lapse of time is short the issue should be best understood as one of continuity of State rather than one of succession.

154 Several African and Asian States claimed this status after their independence and refused to be qualified as "new" States. This is, for instance, the position of Algeria explained in: Mohammed BEDJAOUI, *La révolution algérienne et le droit*, Brussels, Éditions de l'Association internationale des juristes démocrates, 1961, pp. 18–39.

as a general explanation indicating why new States should *always* be responsible for obligations arising from internationally wrongful acts committed by rebels in their struggle to establish this new entity.

Organic or structural continuity theory. Finally, it has been submitted that it is the "organic" or "structural" continuity between the insurrectional movement and the new State which better explains why the consequences of responsibility should be accepted by the latter for internationally wrongful acts committed by the former.[155] This is so for the reason that the rebels and the new State are essentially the *same* legal entity.[156]

This is the solution that was adopted by the I.L.C. It is the *continuity of the structure* between the organisation of the insurrectional movement and the organisation of the new State which is relevant in determining whether the latter should be liable for the acts committed by the former. The I.L.C. Commentary indicates that:

> The attribution to the new state of the acts of the organs of the insurrectional movement which preceded it, and of such acts only, is then justified by virtue of the continuity between the organisation of the insurrectional movement and the organisation of the state to which it has given rise. From being only an embryo State, the insurrectional movement has become a State proper, without any break in the continuity between the two. It is in fact the same entity which previously had the characteristics of an insurrectional movement and which now has those of a State proper.[157]

This analysis is supported by many in doctrine as the appropriate way to explain the theory of continuity.[158] The position adopted in the present study is that the

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155 See Hazem M. ATLAM, pp. 468–476, for an analysis of this theory.

156 *Ibid.*, p. 469: "Un telle identité trouve ici son fondement dans la permanence de la substance même de l'organe qui a simplement changé de catégorie en quittant définitivement sa qualité de mouvement pour rejoindre la stature originaire d'un gouvernement étatique".

157 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 101, para. 6. Very similar wording is used in: *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq, at 114, para. 6. See also in: *Fourth Report on State Responsibility of the Special Rapporteur*, Mr Roberto Ago, 24th session of the I.L.C., 1972, U.N. Doc. A/CN.4/264 and Add.1, I.L.C. Report, A/8710/Rev.1 (A/27/10), 1972, ch. IV(B), paras. 72–73, in: *Yearbook of I.L.C.*, 1972, vol. II, p. 71, at p. 131, paras. 159, 194.

158 Gaetano ARANGIO-RUIZ, *L'Etat dans le sens du droit des gens et la notion du droit international*, Bologna, Cooperativa libraria universitaria, 1975, p. 304; Liesbeth ZEGVELD, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge Univ. Press, 2002, at p. 156. Hazem M. ATLAM, pp. 476, 479, is also in favour of the theory of "organic continuity" because of the "liens juridiques intrinsèques et substantiels existants entre le mouvement révolutionnaire et l'Etat issu de sa lutte". If he finds (at p. 479) this theory "pertinente, adaptée et logique" for insurrectional

"organic" or "structural" theory is indeed the most appropriate to explain the continuity between the insurgents and the new State and why the latter is responsible for the acts of the former before independence. The application of this theory is, however, not self-evident in the case where it is the efforts of not one, but many rebel groups which led to the creation of a new State. It has been suggested in doctrine that in such case, the new State should be held responsible for obligations arising from the internationally wrongful acts of *all* revolutionary groups and not only for those of the movement which eventually became the new government of the new State.[159]

5.5 *Application of the Principle of Transfer for Different Types of Succession of States*

The principle established at Article 10(2) of the *Articles on Responsibility of States for Internationally Wrongful Acts* seems to be perfectly applicable to cases of *secession*, whereby the new State should be held responsible for obligations arising from internationally wrongful acts committed by the secessionist rebels against third States. The continuing State should not be accountable for the internationally wrongful acts committed by successful secessionist rebels.[160] There are similarly no reasons to object to the application of I.L.C. Article 10(2) in the context of *dissolution* of State as well as for *unification* of States.

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movements, he nevertheless adopts it with a slight variation for National Liberation Movements (see at pp. 480 et seq.). A variation of this interpretation is provided by Georg SCHWARZENBERGER, *International Law*, vol. I, 3rd ed., London, Stevens & Sons, 1957, p. 628 (in the context of rebels establishing a new *government*), for whom the concept of estoppel explains the retroactivity of the tortious liability for the acts of the rebels. See also: Patrick DUMBERRY, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", 17(3) *E.J.I.L.*, 2006, pp. 605–621.

159 Hazem M. ATLAM, p. 475, for whom the *raison d'être* of the continuity of the international legal personality between the new State and the movements (other than the one forming the new government) is based on the common goal of their struggle. For Atlam (at pp. 484–485), these questions simply do not arise in the case where the struggle involves a National Liberation Movement. Thus, since the international legal personality is vested in the people and not in the movement, it does not make any difference which of the competing groups actually succeeds in forming a new State. In all cases, the new State would be held responsible for the internationally wrongful acts committed by the people (through any of the groups which fought for independence). One example of such a scenario is the independence of Angola (1975) which was the result of the fighting efforts of different groups: *União Nacional para a Independência Total de Angola* (U.N.I.T.A.), *Movimento Popular de Libertação de Angola* (M.P.L.A.) and *Frente Nacional de Libertação de Angola* (F.N.L.A.).

160 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 114, para. 6.

There is some controversy as to whether the devolution of responsibility principle should be applied in the other contexts of Newly Independent States and of cession and transfer of territory. This question will now be examined.

The principle established at Article 10(2) of the *Articles on Responsibility of States for Internationally Wrongful Acts* is clearly applicable to cases of *Newly Independent States.* Thus, the expression "or in a territory under its administration" contained in this provision refers specifically to the situation of a dependant colony not yet recognised as an independent State.[161] This is also clear from the use of the words "movement, insurrectional or other", which include National Liberation Movements struggling in the particular context of colonialism. The I.L.C. thus rejected the distinction between National Liberation Movements and other movements in the context of this provision.[162] The assimilation of the two concepts has been criticised in doctrine,[163] as well as by several members of the Commission.[164] It was also contested by some States on the ground that this assimilation would not take into account the legitimacy of the struggle for independence of National Liberation Movements.[165] It was suggested by some States that a new

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161 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at pp. 105–106, para. 22.

162 *Ibid.*, p. 105, at para. 20: "The Commission considered that no distinction should be made, for the purposes of this article, between different categories of insurrectional movements on the basis of any international 'legitimacy' or any illegality in respect of their establishment as the government, despite the possible importance of such distinctions in other contexts". The same comments were made in: *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 116, para. 11: "From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin".

163 Hazem M. ATLAM, pp. 258, 419–421. See also: Hazem M. ATLAM, "National Liberation Movements and International Responsibility", in: M. SPINEDI & B. SIMMA (eds.), *United Nations Codification of State Responsibility*, New York, Oceana, 1987, p. 55.

164 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, *Discussion in Plenary*: 1303rd to 1317th meetings (6 to 27 May 1975), and 1345th meeting (7 July 1975), I.L.C. Report, A/10010/Rev.1 (A/30/10), 1975, ch. II, paras. 9–52, in: *Yearbook I.L.C.*, 1975, vol. I, pp. 3–72, 213–220. See the comments by: Mohamed BEDJAOUI (*Ibid.*, pp. 48–49), Taslim Olawale ELIAS (*Ibid.*, p. 50, at para. 30), Paul REUTER (*Ibid.*, pp. 45–46, 58), Nikolai A. USHAKOV (*Ibid.*, p. 47, para. 7; p. 64, para. 20; p. 70, para. 26), and Abdul Hakim TABIBI (*Ibid.*, p. 59, para. 34).

165 See the discussion held during the Sixth Committee of the General Assembly in 1975 on the I.L.C.'s Report: "Documents officiels de l'Assemblée générale des Nations unies, 30e session, sixième Commission. Questions juridiques". See in particular the comments made by the following countries: German Democratic Republic ("1539th Meeting,

State resulting from the struggle of a National Liberation Movement *should not* be held accountable for the internationally wrongful acts committed by the Movement against third States.[166]

The principle established at Article 10(2) of the *Articles on Responsibility of States for Internationally Wrongful Acts* should apply to Newly Independent States in the same way that it applies in cases of secession: the colonial continuing State should not be responsible for internationally wrongful acts committed by successful rebels in their efforts to establish a new State in the context of decolonisation. The legitimacy of the struggle for independence of National Liberation Movements *does not* result in any impunity for internationally wrongful acts committed during that struggle.

The question whether Article 10(2) of the I.L.C. Articles is applicable to *cession and transfer of territory* is also controversial. The I.L.C. Commentaries to the 2001 Articles indicates that this provision does not cover a "situation where an insurrectional movement within a territory succeeds in its agitation for union with another State".[167] This interpretation apparently derives from the wording of Article

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15 October 1975", Doc.A/C. 6/SR. 1539, at p. 68, para. 3), Ghana ("1549th Meeting, 27 October 1975", Doc.A/C. 6/SR. 1549, p. 133, para. 42), Liberia ("1539th Meeting, 17 October 1975", Doc.A/C. 6/SR. 1542, p. 86, para. 22), Madagascar ("1546th Meeting, 22 October 1975", Doc.A/C. 6/SR. 1546, p. 109, para. 54), Oman ("1546th Meeting, 22 October 1975", Doc.A/C. 6/SR. 1546, p. 108, para. 42), Swaziland ("1549th Meeting, 27 October 1975", Doc.A/C. 6/SR. 1549, p. 131. para. 28), Syria ("1548th Meeting, 24 October 1975", Doc.A/C. 6/SR. 1548, p. 127, para. 54), Zambia ("1550th Meeting, 28 October 1975", Doc.A/C. 6/SR. 1550, p. 137, para. 3), Czechoslovakia ("1546th Meeting, 22 October 1975", Doc.A/C. 6/SR. 1546, p. 103, para. 3), U.S.S.R. ("1544th Meeting, 21 October 1975", Doc.A/C. 6/SR. 1544, pp. 93–94, para. 11), Tanzania ("1542nd Meeting, 17 October 1975", Doc.A/C. 6/SR. 1542, p. 84, para. 12), Lesotho ("1545th Meeting, 21 October 1975", Doc.A/C. 6/SR. 1545, p. 99, para. 16) and Indonesia ("1548th Meeting, 24 October 1975", Doc.A/C. 6/SR. 1548, p. 123, para. 19). A different position is taken by Italy ("1543rd Meeting, 20 October 1975", Doc.A/C. 6/SR. 1543, p. 89, para. 19).

166 See the discussion held during the Sixth Committee of the General Assembly in 1975 on the I.L.C.'s Report, *Id.* See, in particular, the comments made by the following countries: Lesotho ("1545th Meeting, 21 October 1975", Doc.A/C. 6/SR. 1545, p. 99, para. 16), Madagascar ("1546th Meeting, 22 October 1975", Doc.A/C. 6/SR. 1546, p. 109, para. 54); Liberia ("1539th Meeting, 17 October 1975", Doc.A/C. 6/SR. 1542, p. 86, para. 22), Syria ("1548th Meeting, 24 October 1975", Doc.A/C. 6/SR. 1548, p. 127, para. 54), Indonesia ("1548th Meeting, 24 October 1975", Doc.A/C. 6/SR. 1548, p. 123, para. 19) and Tanzania ("1542nd Meeting, 17 October 1975", Doc.A/C. 6/SR. 1542, p. 84, para. 12). A balanced position is taken by Hazem M. ATLAM, "National Liberation Movements and International Responsibility", in: M. SPINEDI & B. SIMMA (eds.), *United Nations Codification of State Responsibility*, New York, Oceana, 1987, p. 49.

167 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., p. 115, para. 10.

10(2), which specifically refers to the creation of a "new State". Consequently, the work of the I.L.C. suggests that Article 10(2) of the I.L.C. Articles does not apply in cases of cession and transfer of territory where no new State is created as a result of the mechanism of succession of States.

It is submitted that the non-application of Article 10(2) of the I.L.C. Articles in the context of cession and transfer of territory could lead to unfair results. Firstly, it would certainly be unfair for the continuing State to be held liable for internationally wrongful acts committed by rebels which succeed in removing part of its territory and having it attached to another State. Secondly, internationally wrongful acts committed before the date of succession should not simply go unpunished based on the (rather technical) reason that the actions of the rebels did not establish a *new State*, but led to the attachment of the territory to an *already existing State.* For the injured third State which has suffered a damage as a result of the internationally wrongful act committed by the rebels, it matters little whether the actions of the rebels led to the creation of a new State or a cession of territory. The already existing State which now has its territory enlarged as a result of the successful actions of the rebels (i.e. the successor State) should compensate the injured third State for internationally wrongful acts committed by the rebels before the date of succession. This solution is based on fairness and should apply notwithstanding the fact that there is no "organic continuity" between the rebels and the successor State.[168] Therefore, the principle established at Article 10(2) of the *Articles on Responsibility of States for Internationally Wrongful* should apply in the context of cession and transfer of territory.

For similar reasons, Article 10(2) of the I.L.C. Articles should apply to cases of *total* incorporation of a State into another already existing State (such as in the case of the incorporation of the G.D.R. into West Germany), even if that does not result in the creation of a new State.

5.6 *The Principle is Fair, Equitable and Necessary*

Notwithstanding the fact that the principle expressed in Article 10(2) of the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts* is based on limited precedent, it should be applied in the context of *all cases* of succession of States (including Newly Independent States and cession and transfer of territory).

This principle is *fair and equitable* in the context where the predecessor State *ceases to exist* as a result of the events affecting its territorial integrity (such as cases of unification, dissolution and incorporation of State). Thus, the application

168 There could be an "organic continuity" between the rebels and the successor State if the rebels were not only successful at having the territory removed from the predecessor State and having it attached to the successor State, but also successful at gaining power and becoming the government of the already existing successor State.

of I.L.C. Article 10(2) ensures that an internationally wrongful act does not remain unpunished and that the injured State victim of such an act is not left without any debtor against whom it can file a claim for reparation. In the other context where the predecessor States *continues* to exist as a result of the events affecting its territorial integrity (such as cases of secession, Newly Independent States and cession and transfer of territory), the opposite solution of *non-devolution* of responsibility would certainly result in unfair consequences. Thus, it would no doubt be unjust for the continuing State to be held liable for internationally wrongful acts committed by rebels with which it has simply nothing to do. This is all the more so considering that the consequence of such wrongful acts by the rebels ultimately led to the dismembering of its territorial integrity and the loss of part of its territory.

It is further submitted that the principle expressed at Article 10(2) of the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts* is also *necessary* because it addresses the important concern of the international community for predictability, order and stability of international legal relations among States.[169]

6. *The Predecessor State Commits an Internationally Wrongful Act during the Struggle of an Insurrectional Movement to Establish a New State*

The previous section examined the situation where an insurrectional movement succeeds in establishing a new State and the question whether that new State should be held responsible for obligations arising from internationally wrongful acts committed *by the insurrectional movement* against third States during its armed struggle for independence. The present section examines whether the new State should be responsible for obligations arising from internationally wrongful acts committed not by the insurrectional movement but *by the predecessor State* during that period of trouble. In the context of the present study, we are more interested in those internationally wrongful acts committed by the predecessor State *against third States* than those committed against the insurrectional movement. However, most cases of State practice examined below involve instances where the acts of the predecessor State were committed against the insurrectional movement.[170]

One must distinguish cases where the predecessor State continues its existence following the events affecting its territorial integrity from other examples where it ceases to exist.

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169 R. MULLERSON, "Law and Politics in Succession of States: International Law on Succession of States", in: Geneviève BURDEAU & Brigitte STERN (eds.), *Dissolution, continuation et succession en Europe de l'Est*, Paris, Cedin-Paris I, 1994, p. 44.

170 One exception is in the context of the secession of Belgium from the Kingdom of the Netherlands, where the internationally wrongful act was committed by the predecessor State *against third States.* Another exception is the acts committed against a Swiss national in the context of the independence of Algeria.

6.1 *The Predecessor State Continues to Exist*

To the extent that the predecessor State continues to exist as a result of the emergence of a new State on what used to be part of its territory, there is no reason for it not to be held responsible for *its own* internationally wrongful acts committed during the period of uprising. In such cases, the new State *should not* be held responsible for obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession. This is recognised in doctrine.[171] It is also implicitly recognised by Article 10(2) of the I.L.C. 2001 *Articles on Responsibility of States for Internationally Wrongful Acts*, indicating that only the conduct of the "movement, insurrectional or other" (and not that of the predecessor State) is considered that of the new State. The principle of non-transfer of obligations is explicitly affirmed elsewhere in the work of the I.L.C.:

> [T]he acts of the organs of the pre-existing State are in no way attributable to the new State, which has separated from the pre-existing State by secession or decolonization. These are and remain exclusively the acts of the pre-existing State, which as a general rule, moreover, will continue to exist after the constitution of the new State by the insurrectional movement.[172]

In doctrine, the problem has been assimilated to one of three types of "odious debts" of the predecessor State towards the successor State (and not *vis-à-vis* third States). Reference is made to the so-called "subjugation" debts, which have been defined as those debts "contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory".[173] This is also the official position taken by the Ministry of Foreign Affairs of France

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171 This is, for instance, the position of D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 164: "There is common sense in the view that successor States should not be required to foot the bill for such acts of their predecessors as wrongful arrest or damage in war or revolution". See also: Hazem M. ATLAM, pp. 255, 258, 420; Hazem M. ATLAM, "National Liberation Movements and International Responsibility", in: M. SPINEDI & B. SIMMA (eds.), *United Nations Codification of State Responsibility*, New York, Oceana, 1987, p. 53.

172 *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May to 25 July 1975, Draft Articles on State Responsibility, U.N. Doc. A/10010/Rev.1, in: *Yearbook I.L.C.*, 1975, vol. II, p. 47, at p. 101, at para. 6. In the Report another similar statement is made (in: *Ibid.*, p. 105, at para. 22): "It goes without saying that, since the pre-existing State will continue to exist, although with a reduced territory, it will still be responsible for its own acts carried out before the creation of the new State".

173 P.K. MENON, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts*, Lewiston, N.Y., E. Mellen Press, 1991, at pp. 162–163 (quoting: *Ninth Report on Succession of States in Respect of Matters Other than Treaties*, by Mr M. Bedjaoui, Special Rapporteur, 28th session of the I.L.C., 1977, U.N. Doc. A/CN.4/301 and Add.1, I.L.C. Report, A/32/10, 1977, ch. III(A)(1), par. 49, in: *Yearbook I.L.C.*, 1977, vol. II, p. 45, at p. 72, para. 157).

in the context of the independence of Algeria.[174] Such "odious debts" contracted by the predecessor State are deemed non-transmissible to the successor State.[175]

However clear the position of doctrine and the I.L.C. seems to be on the question, a closer look at the relevant State practice and case law shows that the principle of non-succession embodied at Article 10(2) of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts* is not as firmly established as one would have expected. Examples of State practice and municipal court decisions were found where the new State was, in fact, found liable for internationally wrongful acts committed by the predecessor State during the armed struggle.

The official position taken by France and French municipal court decisions in the context of the independence of Algeria. The principle of non-succession was applied in the context of the independence of Algeria in 1962.[176] Article 18 of the *Déclaration de principes relative à la coopération économique et financière* entered into between France and Algeria as part of the *Evian Accord*s provided for the new State of Algeria to make reparation for *all* internationally wrongful acts committed before the date of succession.[177] This principle was never applied in practice. The official position taken by France was that the new State of Algeria *should not* be held accountable for those acts committed by the French colonial authorities "not in the name" of Algeria.[178] In reply to a request by the *Conseil d'Etat* for an interpretation of Article 18 of the *Déclaration*, the Ministry of Foreign Affairs of France took the view that the new State of Algeria should not be responsible for the acts and measures taken by France (the predecessor State)

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174 "Conclusions de M. le Commissaire du Gouvernement Fournier", letters of 13 February and 30 July 1963, extracts of which can be found in an analysis by R. PINTO, in: *J.D.I.*, 1967 (no. 2), p. 387, at p. 389. In making reference to acts committed by France in fighting the rebels of the F.L.N., the letters indicate: "Il est donc normal de considérer que le contentieux de ces mesures, prises en vue de faire échec aux mouvements insurrectionnels, n'intéresse pas l'Etat algérien au sens du protocole. On ne fait ici que rejoindre une distinction faite depuis longtemps par les théoriciens du droit international qui, s'ils admettent que l'Etat successeur doit prendre une part du passif de son prédécesseur, en excluent toujours les dettes dites de guerre ou de régime, c'est-à-dire celles qui ont été contractées en vue d'empêcher l'annexion ou de s'opposer à l'émancipation".

175 Brigitte STERN, Responsabilité, p. 341; P.K. MENON, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts*, Lewiston, N.Y., E. Mellen Press, 1991, at pp. 162–163. The issue is also discussed in: Mark THOMPSON, "Finders Weepers Losers Keepers: United States of America v. Steinmetz: the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama", 28 *Conn.L.Rev.*, 1996, at pp. 500–502, 549–550.

176 This example is discussed in detail at *supra*, p. 177.

177 The text of the Agreement is found in: *J.O.R.F.*, 20 March 1962, pp. 3019–3032: "Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities".

178 Statement of the French State Secretary for Algerian Affairs, in: *J.O.R.F., Assemblée nationale*, no. 3814, 28 September 1963, at p. 4919, quoted in: Jean CHARPENTIER, "Pratique française du droit international", *A.F.D.I.*, 1963, at p. 1021.

against French nationals that were *specifically directed against the rebellion of the F.L.N.*[179] This principle has received support in doctrine.[180]

This principle of non-succession was consistently applied by French municipal courts. In the case of *Etat français v. Consorts Caldumbide*, the French colonial authorities in Algeria expropriated in 1958 the property of a French company in order to combat the Algerian insurrection.[181] The case was first filed before local courts in Algeria.[182] The case was subsequently transferred to French courts, where France was assigned as defendant.[183] In its decision, the *Cour de Cassation* recalled Article 18 of the *Déclaration* and stated that "en règle générale, un Etat accédant à l'indépendance [doit] assumer les obligations contractées par les autorités antérieures". The Court then refered to the above-mentioned official position taken by the Ministry of Foreign Affairs of France. The Court noted (in approval) the findings of the lower Court that the measures of expropriation taken by the colonial French authorities had indeed not been taken in the interests of the new State of Algeria

179 The official position of the Ministry is expressed in: "Conclusions de M. le Commissaire du Gouvernement Fournier", extract of which can be found in an analysis by R. PINTO, in: *J.D.I.*, 1967 (no. 2), p. 387. This position was delivered to the *Conseil d'Etat* in letters dated 13 February 1963 and 30 July 1963 in the *Union régionale d'Algérie de la C.F.T.C.* case, decided by the *Conseil d'Etat*, 5 March 1965 (in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1965, at pp. 846–847; 44 *I.L.R.*, at p. 43). The *Conseil d'Etat* speaks of "mesures prises spécialement et directement en vue de faire échec aux mouvements insurrectionnels".

180 In reference to the *Kaddour* case, Conseil d'Etat, case no. 04642, 10 May 1968, in: *Recueil Lebon*, Jean-François LACHAUME, "Jurisprudence française relative au droit international (1984)", *A.F.D.I.*, 1985, at p 930, indicates that this position is in conformity with traditional rules of international law.

181 This led the plaintiff to file two cases: one for the expropriation of land belonging to the company for the construction of national roads and the other for the construction of military baracks. Only the second one is of some interests for the present discussion: *Etat français v. Consorts Caldumbide*, Cass. Civ. 3e, 7 November 1969. The two cases can be found in: *Jurisclasseur périodique (la Semaine juridique)*, 1970, no. 16248, followed by an analysis by David RUZIE. The case is commented in: Jean-François LACHAUME, "Jurisprudence française relative au droit international public (1969)", *A.F.D.I.*, 1970, p. 904; D.R. "Chronique de Jurisprudence française", *J.D.I.*, 1970, at p. 718.

182 A commission of evaluation first determined that compensation should be awarded. On appeal the *Tribunal de grande instance* of Algiers requested an expertise, which was not completed before independence.

183 The transfer of the case before a French court was made in accordance with the bilateral judicial cooperation agreement between Algeria and France. The case was first heard before the *Tribunal de grande instance* of Carcassonne and then by the Appeal Court of Montpellier which decided (in a judgment of 16 February 1968) that the action fell within the scope of its jurisdiction and that it could award damages. These cases are discussed in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1967, p. 506. The decision was challenged by France before the *Cour de Cassation*.

but for those of France in its campaign against the rebels.[184] The Court rejected the appeal and confirmed the judgment of the lower court.

In the *Kaddour* case, the *Conseil d'Etat* had to decide on a request by the plaintiff to nullify a 1960 decision by a war damage commission of Oran which had rejected his claim for compensation for damage suffered during the war.[185] The *Conseil d'Etat* decided to nullify the award made by the war damage commission and sent the case back to a French war damage commission (*Commission d'arrondissement des dommages de guerre de Paris*). In so deciding, the *Conseil d'Etat* made the following observation with respect to the above-mentioned interpretation given by the Ministry of Foreign Affairs:

> L'ensemble des droits et des obligations contractées par la France au titre de l'Algérie ont été transférés à l'Etat algérien à la date de son accession à l'indépendance et qu'ainsi les actes qui, quels qu'en soient les auteurs, avaient été pris par des autorités françaises dans l'exercice des compétences aujourd'hui dévolues aux autorités algériennes, doivent être regardés comme s'étant, à la date de l'indépendance, insérés dans l'ordre juridique du nouvel Etat…toutefois…l'application de ces règles générales d'interprétation ne saurait avoir pour effet d'entraîner la transmission aux autorités algériennes de recours concernant soit les mesures prises spécialement et directement en vue de faire échec aux mouvements insurrectionnels, soit les actes qui par leur nature et notamment en raison du fait qu'ils concernent des services publics demeurés français, produisent en définitive leurs effets dans l'ordre juridique français.[186]

The fact that the continuing State (France) should remain responsible for its own acts committed during its fight with the rebellion was also applied by French courts in many other cases. This is, for instance, true in the *Bounouala* case, where the plaintiff was wounded by a French soldier in 1955 in the course of measures taken by the French authorities against the insurgents in Algeria.[187] It was decided similarly in the *Veuve Haffiade Messaoud* case, concerning acts of

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184 The original French text of the judgment reads as follows: "…non dans l'intérêt de l'Etat algérien actuel, mais dans celui de la France, en vue de renforcer les moyens mis en oeuvre dans la lutte contre l'insurrection".

185 *Kaddour*, Conseil d'Etat, case no. 04642, 10 May 1968, in: *Recueil Lebon*. This case is referred to in: Jean-François LACHAUME, "Jurisprudence française relative au droit international public (1968)", *A.F.D.I.*, 1969, at p 847; Jean-François LACHAUME, "Jurisprudence française relative au droit international (1984)", *A.F.D.I.*, 1985, at p. 930.

186 The same wording is found in: *Union régionale d'Algérie de la C.F.T.C.*, decided by the *Conseil d'Etat*, 5 March 1965. The case can be found in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1965, at pp. 846–847; 44 *I.L.R.*, at p. 43; *J.D.I.*, 1967 (no. 2), p. 387 (with an analysis by R. PINTO).

187 *Bounouala*, decided by the *Conseil d'Etat*, 25 May 1970, in: *Recueil des décisions du Conseil d'Etat*, 1970, p. 350; also in: 72 *I.L.R.*, at p. 56. The claim for compensation was first rejected by the Regional Commission for War Damage of Constantine in 1961. The plaintiff applied to the *Conseil d'Etat* for an annulment of the decision. The *Conseil d'Etat* held that this case concerned France and that French courts continued to have jurisdiction over it notwithstanding Article 17 of the judicial protocol of 1962 between France and Algeria. However, it concluded on the merits of the case that all

pillage committed by the French army.[188] Mention should also be made of the *Saiah* case dealing with the occupation of agricultural lands by the French Army,[189] the *Consorts Deguy-Charon-Gerst* case concerning measures of expropriation of property taken by the French authorities,[190] the *Consorts Richard* case also dealing with measures of expropriation which benefited the French Army,[191] and the case of *Veuve Chaurand v. Agent judiciaire du trésor public* on measures of sequestration taken by the colonial authorities in the implementation of a 1956 Decree aimed at reestablishing law and order in the colony.[192] There are also instances where the *Conseil d'Etat* made reference to the principle without, however, applying it to the

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the relevant documents were in the possession of the State of Algeria and since it was impossible to obtain them, no decision could be taken on the application.

188 *Veuve Haffiade Messaoud*, Conseil d'Etat, case no. 51458, 10 May 1968, in: *Recueil Lebon*.

189 *Saiah*, Cour de Cassation, Ch. Civile 1, case no. 76–14704. 12 December 1977, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 1 N. 470, p. 373. The Court upheld the decision of the Court of Appeal on the following grounds: "Attendu qu'ayant relevé que les dommages dont Saiah demande réparation résultent de l'occupation à partir de l'année 1957 des domaines agricoles dont il était propriétaire ou locataire, que ces dommages se rattachent à des mesures prises pour les besoins de la lutte contre les mouvements insurrectionnels et qu'ils sont indépendants de la dépossession survenue ultérieurement par le fait de l'Etat algérien ayant accédé à l'indépendance, la cour d'appel a décidé à bon droit et sans contradiction que lesdits dommages donnaient à Saiah une créance contre l'Etat français".

190 *Consorts Deguy-Charon-Gerst*, Cour de Cassation, Ch. Civile 1, case no. 69–11738, 29 May 1973, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 1 N. 183, p. 163. In this case, the land had been bought and paid for by a French public corporation before independence. The plaintiff claimed before French courts that the contract had since then not been fulfilled by the buyer. The Court of Appeal decided that the matter dealt with a question of acquired rights which could only be invoked against Algeria. The *Cour de Cassation* rejected that argument and nullified the decision of the Court of Appeal on the ground that: "…qu'en statuant ainsi, alors que la vente litigieuse qui tendait à l'implantation d'un village destiné au regroupement de populations évacuées avait été motivée par les besoins de la lutte contre les mouvements insurrectionnels, la Cour d'appel, en qualifiant inexactement cette opération, a violé, par fausse application, les textes [i.e. Article 18 of the *Déclaration*]".

191 *Consorts Richard*, Cour de Cassation, Chambre civile 3, case no. 69–70143, 19 March 1970, in: *Bulletin des arrêts de la Cour de Cassation Chambre civile*, 3 N. 222, p. 163. The Court approved the reasoning of the Court of Appeal of Aix-en-Provence stating, *inter alia*, that: "La Cour d'appel a déclaré que les consorts Richard étaient fondés à réclamer à l'Etat français le paiement des indemnités d'expropriation, au motif que l'expropriation effectuée par le commissariat général à la reconstruction avait profité à l'armée française qui s'était servie du terrain litigieux comme champ de tir, et que, dès lors, cette expropriation avait eu pour objet de permettre la répression des mouvements insurrectionnels, ce qui rendait compétents les tribunaux français".

192 *Veuve Chaurand v. Agent judiciaire du trésor public*, decided by the *Tribunal de grande instance* of Riom, 2 October 1963, *Gazette du palais*, 1964, 1, 155. This case is discussed in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1964, at p. 750; *A.F.D.I.*, 1964, at p. 871. See also the English translation of the case in: 44 *I.L.R.*, at p. 39.

circumstances of the case.[193] There is, however, one recent case where the *Conseil d'Etat* rejected France's responsibility based on extinctive prescription for a claim dealing with events which took place more than 40 years earlier.[194]

There is also one case of State practice where France decided to take over the consequences of an internationally wrongful act committed against a Swiss national before the independence of Algeria.[195] In fact, in this case, the internationally wrongful act was not committed by the French colonial authorities but by the O.A.S. (*Organisation armée secrète*), a para-military organisation of French nationals in Algeria opposed to its independence.

The *Shimshon Palestine Portland Cement Factory Ltd.* case decided by the Supreme Court of Israel. Some rather limited support for the principle of non-succession can also be found in an *obiter dictum* of the Supreme Court of Israel in one case which, however, did not deal with acts committed by the predecessor State in the context of a rebellion which led to the creation of a new State. This case dealt with the other question whether the new State of Israel was liable to pay the judgment debt which had been awarded by a Haifa Court at the time of the United Kingdom Mandate for Palestine in the context of a custom reimbursement.[196] The Court came to the conclusion that there was no rule of international law obliging the new State to discharge the debts due by the predecessor State. The Court also asked in a rhetorical way the following question: "Is the State of Israel responsible for the payment of all the debts of the former Mandatory Government, even those which have been incurred during its struggle against the aspirations of the Jewish people, aspirations which were to bring about the establishment of the State of Israel?"[197] The Court did not provide any answer to this question, but

193 *Institut des vins de consommation courante v. A. & M. Chabane*, *Conseil d'Etat*, 29 June 1966, in: *Rec. des arrêts du Conseil d'Etat*, 1966, p. 420, in: 47 *I.L.R.*, at p. 94. The *Société E. & B. Vidal* case, Conseil d'Etat, 20 June 1975, in: *Gazette du Palais*, 12–13 March 1976, p. 76, and commented in: Ch. ROUSSEAU, "Jurisprudence française en matière de droit international public", *R.G.D.I.P.*, 1976, at pp. 968–969, deals with the decision of the French colonial authorities to prohibit the access of non civil servant to an administrative city in Algeria. The plaintiff alleged that these measures caused him damage as he could not pursue the work he had undertaken in the city before its closure. The *Conseil d'Etat* determined that in principle France remained responsible for the damage resulting from such an action because it was aimed at fighting the rebellions. However, since the decision was aimed at protecting people and goods against the acts of the F.L.N., it was decided that, without any regulation to that effect, such measures were not as such as to create a right to compensation for the plaintiff. This case is analysed by some in doctrine as confirming the principle that internationally wrongful acts committed before the creation of a new State rest exclusively with the predecessor State: Ch. ROUSSEAU, *Ibid.*, at p. 969.

194 *Ahmed X.*, Conseil d'Etat, case no. 243558, 12 January 2004.

195 This case was discussed in detail at *supra*, p. 181.

196 *Shimshon Palestine Portland Cement Factory Ltd. v. the Attorney-General*, Supreme Court of Israel, 12 April 1950, in: *Pesakim Elyonim*, vol. 9 (1951), p. 16, in: *I.L.R.*, 1950, pp. 72 et seq.

197 *I.L.R.*, 1950, at pp. 76–77.

the reading of its judgment strongly suggests that it would have given a negative answer to this question.

The case of *Minister of Defence, Namibia v. Mwandinghi* decided by the Supreme Court of Namibia. In the case of *Minister of Defence, Namibia v. Mwandinghi*, the Supreme Court of Namibia stated that under Article 10 of the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts* "the new government inherits responsibility for the acts committed by the previous organs of the State".[198] For the Court, this provision:

> [A]ttributes to the State which has a new government after the insurrection, not only the acts of the organs of the insurrectional movement, but also those committed by the State before the insurrection has ceased.[199]

This is an obvious misinterpretation of Article 10 of the I.L.C. Articles. The Supreme Court seems to have confused the situation of a *new government* with that of a *new State* emerging from the struggle of the insurrectional movement.[200] Namibia has no obligations *under Article 10(2) of the I.L.C.* to take over the liability for the internationally wrongful acts committed by South Africa (the predecessor State) before its independence. This is indeed the view taken by the I.L.C. Special Rapporteur Crawford in the *First Report on State Responsibility* (*addendum* no. 5) of 1998.[201]

The secession of Belgium from the Kingdom of the Netherlands (1830). This is an example of State practice contrary to the principle according to which when the insurgents are successful at establishing a new State, the latter should not be held accountable for internationally wrongful acts committed by the predecessor State during the struggle which led to independence.[202] During the armed revolt, the city of Antwerp (situated in the Belgian provinces) was bombarded in October 1830 by the Dutch forces. This bombardment resulted in the destruction of a public warehouse in which were stored the goods of several foreigners. Great Britain, Austria, Brazil, France and Prussia took the view that the Kingdom of the Netherlands (the predecessor State) was not responsible for these acts and made a joint application to Belgium for indemnity. The United States also adopted the

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198 *Minister of Defence, Namibia v. Mwandinghi*, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), in: 91 *I.L.R.*, p. 358, at p. 361. This case is further examined at *supra*, p. 194.

199 *Ibid.*, in: 91 *I.L.R.*, at p. 360.

200 Criticisms of the reasoning of the Court have already been examined at *supra*, p. 197.

201 *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, U.N. Doc. A/CN.4/490/Add.5., at para. 277: "Namibia, as a new State created as the result, *inter alia*, of the actions of the South West Africa People's Organisation, a recognized national liberation movement, was not responsible for the conduct of South Africa in respect of its territory. That it assumed such a responsibility attests to its concern for individual rights, but it was not required by the principles of article 15 [now Article 10]".

202 This case was discussed at *supra*, p. 161.

view that Belgium (the new State) should compensate U.S. nationals for the damage resulting from the bombardment.[203] If Belgium initially denied its responsibility on the ground that the acts were committed by the Dutch forces,[204] it apparently subsequently changed its view on the matter and agreed to pay compensation to the owners of merchandise which had been destroyed during the incident.[205] Little is known about the reason why Belgium accepted such responsibility.

The *Van der Have* case decided by the District Court of The Hague. The principle of succession was also applied in this case dealing with the death of an Indonesian native who was killed unlawfully by a soldier of the Royal Netherlands Indies Army in the context of the repression by the Dutch Army of the rebellions of native Indonesian secessionist groups in Java.[206] The District Court of The Hague rendered its judgment in 1953 and held that it was, in principle, the Republic of Indonesia (as the successor State) which should be responsible for the unlawful acts committed by the Dutch Army during its military campaign combating secessionist rebel groups. The Court further indicated that this did not, however, exclude the possible responsibility of the Netherlands for the internationally wrongful act. It seems that the Court found both the new State and the continuing State responsible for the internationally wrongful act.[207]

A case arising in the context of the American Revolution. Finally, mention should be made of a little known, and rather marginal, case of State practice where it was decided that a new State may be held responsible for obligations arising from the internationally wrongful acts committed by the predecessor State during the armed struggle leading to the establishment of a new State. During the American Revolution, British troops apparently caused damage to one church in the State of Pennsylvania (a fence burned).[208] Some 183 years later, a Philadelphia clergyman presented a claim to Great Britain for compensation for the damage. In response, the Office of the Chancellor of the Exchequer wrote:

> The convention is that claims by a citizen of colonial territories against the Government, which have not been settled by the date of independence, lie against the successor Government unless a special arrangement is made to the contrary.[209]

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203 Letter of U.S. Secretary of State Mr Webster to Mr Maxcy, U.S. Chargé d'Affaires to Belgium, 26 February 1842, in: *MS. Inst. Belgium*, I. 34, in: John Bassett MOORE, *Digest of International Law*, vol. VI, Washington, G.P.O., 1906, at pp. 945–947.

204 John Bassett MOORE, *Ibid.*, at p. 947.

205 J.H.W. VERZIJL, pp. 226–227.

206 *Van der Have v. State of the Netherlands*, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80. This case is analysed in more detail at *supra*, p. 186.

207 This is the assessment made by H. LAUTERPACHT in an analysis commenting this case (in: *I.L.R.*, 1953, p. 80). *Contra*: J.H.W. VERZIJL, p. 226, for whom only the Republic of Indonesia, as the successor State, was held responsible for the unlawful acts committed by the Dutch Army.

208 The case is referred to in: M.M. WHITEMAN, *Digest of International Law*, vol. II, Washington, Dept. of State, 1973, at pp. 875–876.

209 *Id.*

6.2 *The Predecessor State Ceases to Exist*

The application of the principle that the new State *should not* be held responsible for obligations arising from the internationally wrongful acts committed by the predecessor State during the period of uprising is problematic in the context when the predecessor State *ceases to exist* (such as, for instance, in cases of dissolution of State).

On the one hand, it would certainly be unfair for the new State to be held financially responsible for damage to third States resulting from the actions of the predecessor State in fighting the rebels struggling for independence. On the other hand, since the predecessor State no longer exists, the application of the principle of non-succession would result in the internationally wrongful act remaining unpunished.

No State practice or judicial decisions were found dealing with this situation. Article 10(2) of the I.L.C. 2001 *Articles on Responsibility of States for Internationally Wrongful Acts* suggests that the solution of non-succession should prevail.

7. *An Autonomous Government Commits an Internationally Wrongful Act*

The principle under international law is that the acts of a federated entity or any other political subdivisions are regarded as those of the State. This is clear from the reading of Article 4 of the I.L.C. *Articles on Responsibility of States for Internationally Wrongful Acts*: "The conduct of any State organ acting in that capacity shall be considered an act of that State under international law… whatever its character as an organ of the central government or of a territorial unit of the State."[210] Accordingly, a State would have to compensate another State for the acts committed by any of its political subdivisions.[211] This is at least the situation prevailing *before* this political entity becomes itself an independent State. The situation is different whenever a political entity, which had previously committed

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210 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

211 According to the *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 90, para. 10, there would be one exception to that rule. There are cases where provinces (or other entities) of a federation are able to enter into international agreements on their own account and where other States may agree to limit themselves to recourse against such entities in the event of a breach. In such cases, the matter will solely involve the responsibility of such entities and not the federal State. It should be noted that this is a limited exception to the general rule of State responsibility in so far as it is applicable only between the parties to a treaty for matters covered by the treaty.

an internationally wrongful act when still part of the predecessor State, becomes an independent State. The question then arises as to whether the consequences of the commission of the act should still be borne by the predecessor State (provided, of course, that it continues to exist) or whether the new State should instead be held accountable for the act.

The principle established at Article 10(2) of the I.L.C. 2001 Articles in the specific context of acts committed by insurrectional movements in their armed struggle for independence may be used, by analogy, in the different context where independence is achieved as a result of a democratic process where no rebel groups are involved. It is true that this provision *does not* deal with questions of succession of States. The logic behind this provision may nevertheless be applied in the context of succession of States to international responsibility. Thus, the basic proposition that the new State should take over responsibility for acts committed by the insurrectional movement because there is a *structural continuity* between the new State and the actual wrongdoer is certainly fit to apply to other cases where there is also a structural continuity between a new State and *an autonomous political entity* which committed an internationally wrongful act before independence.

The new successor State should be held responsible for obligations arising from internationally wrongful acts committed before its independence in so far as the acts were in fact committed by an autonomous government (or by any other political entity clearly identifiable) with which the new State has an *organic and structural continuity*. There is some support in doctrine for such proposition.[212] Therefore, there should be a transfer of the obligation to repair to the successor State whenever the following three requirements are met:

(1) a legal or *de facto* autonomous government was in place in the predecessor State at the time of the commission of the internationally wrongful act;[213]
(2) the organs of this autonomous government committed the internationally wrongful act; and

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212 Miriam PETERSCHMITT, pp. 62–63. See also: Michel WAELBROECK, "Arrêt no. 8160 du Conseil d'Etat Belge, note d'observations", *R.J.D.A.*, 1961, no. 1, at p. 36 ("lorsqu'il existe une relation d'affinité étroite entre l'ancien souverain et l'Etat successeur, on pourra parfois considérer qu'il y a transmission de responsabilité"). This seems also to be the view of Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 769.

213 This would certainly be the case of political entities forming a federation. It could also be the case for some centralised States which, nevertheless, have some sort of asymmetrical decentralisation, for instance, the autonomous regions of Catalonia, Galicia and the Basque Country in Spain, or the relative autonomy of Scotland and Wales in the United Kingdom. It should also apply to Colonies which had a large autonomy in their international relations.

(3) there is an organic and structural continuity between the organs of this autonomous government (which committed the internationally wrongful act) and the organs of the new State.[214]

This principle was applied by one international tribunal as well as by a municipal court. It was decided in the context of cession of territory that the successor State should be responsible for obligations arising from internationally wrongful acts committed by a local administration having great autonomy from the predecessor State. In the *Samos (Liability for Torts) case*, a Greek Court decided that it was for the successor State (Greece) to be held responsible for the damage caused by local customs officials of the Island of Samos at the time it was still under Ottoman rule.[215] In doctrine, the findings of the Court has been explained on the ground that the Island of Samos had an autonomous status when part of the Ottoman Empire prior to its cession to Greece in 1913.[216] Similarly, the French-Greek Arbitral Tribunal in the 1956 *Lighthouse Arbitration* case reached the same solution.[217] In its evaluation of Claim no. 4, the Arbitral Tribunal decided that Greece should be responsible for its own acts of omission committed after the date of succession (1913) as well as for those committed by the *de facto* autonomous Government of Crete before that date.[218]

There are no valid reasons not to apply a similar rule in the context of secession. In such circumstances, where there would be an organic and structural continuity between the organs of the autonomous government (which committed the internationally wrongful act while still part of the predecessor State) and the organs of the new State, the latter should be held responsible for the acts committed by the former against third States. The same solution should prevail in the other context of

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214 Miriam PETERSCHMITT, p. 63, speaks of a "continuité organisationnelle" between this autonomous entity and the successor State. This third criterion is of all three admittedly the most important. It will thus prevent a new State to be held responsible for internationally wrongful acts committed by an autonomous entity (while still part of the predecessor State) *which acted against the will and the interest of the majority of the population of that new State*. For instance, if Kosovo becomes an independent State, it should not be responsible for the internationally wrongful acts committed by the "autonomous" region of Kosovo at the time of the S.F.R.Y. because this entity was clearly not representing the interests of the majority of the population of the region. In such case, there would be no "structural continuity" between that autonomous entity and the new State and therefore no transfer to the new State of the obligations arising from the commission of internationally wrongful acts.

215 *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, N° 27, in: *Thémis*, vol. 35, p. 294, in: *Annual Digest*, 1923–1924, at p. 70. This case is discussed in further detail at *supra*, p. 141.

216 D.P. O'CONNELL, *State Succession*, vol. I, p. 492; Jacques BARDE, *La notion de droit acquis en droit international public*, Paris, Publ. univ. de Paris, 1981, at p. 179.

217 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81. This case was discussed in detail at *supra*, p. 136.

218 *Ibid.*, pp. 196–200.

autonomous colonies which later become Newly Independent States. This approach is supported in doctrine.[219]

The solution is also perfectly conceivable in the context of dissolution of State. Any transfer of obligations to one of the successor States would be justified whenever an autonomous government with which it has an organic and structural continuity can be identified as responsible for the commission of a wrongful act. The obvious advantage of such solution is, of course, that those new successor States whose previous autonomous entities had nothing to do with the commission of an internationally wrongful act should bear no responsibility for it. Some limited echoes of that can be found in the *Case Concerning the Gabčíkovo-Nagymaros Project*, where the I.C.J. did make reference to the important role played by the then federative State of Slovakia in the commission of the breach of international law by Czechoslovakia (the implementation of the Variant C). The Court decided not to infer any legal consequences from the crucial role played by Slovakia (while still part of the predecessor State) since it had already determined that the 1977 Treaty was of a territorial character and that as such it was binding upon Slovakia on 1 January 1993.[220] It has been suggested in doctrine that the Court was in fact inclined to find Slovakia (the successor State) responsible for obligations arising from the internationally wrongful act committed by the predecessor State on the ground of the important role played by the federal entity of Slovakia before it became an independent State.[221]

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219 For Wladyslaw CZAPLINSKI, pp. 356–357, there should be a succession to responsibility whenever a colony possessed a distinct personality under the municipal law of the former metropolitan power, so that the internationally wrongful acts could be attributed directly to the local authorities which later become an independent State. J.H.W. VERZIJL, pp. 219–220, gives the following example where "a colony which enjoy a very developed autonomy commits acts coming within those autonomous powers, but which are illegal and obnoxious to a third State; before the colony itself or the State internationally responsible for its conduct has given satisfaction to the injured State, the colony attains independence". Verzijl believes that in such cases "it would really be absurd to assume that the successor State can nevertheless take shelter behind the argument put forward by the dominant doctrine, according to which the offences of its predecessor(s) do not regard it".

220 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at 124.

221 This is the position of Philippe WECKEL, "Convergence du droit des traités et du droit de la responsabilité internationale: à la lumière de l'Arrêt du 25 septembre 1997 de la Cour Internationale de Justice relatif au projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)", 102 *R.G.D.I.P.*, 1998, at pp. 672–673. A similar conclusion is reached by Miriam PETERSCHMITT, p. 70: "Même si la Cour n'a pas tiré de conclusion par rapport à ce rôle, nous relevons encore une fois l'analogie qui peut être tirée du lien organisationnel entre l'entité inférieure d'un Etat et l'Etat successeur pour admettre une succession pour les conséquences de la responsabilité internationale découlant des faits illicites attribuables à cette entité".

8. *The Use of the Principle of Unjust Enrichment to Resolve Issues of Succession to Responsibility*

This section discusses the use of the principle of unjust enrichment (*enrichissement sans cause*) to resolve problems of State succession to obligations arising from the commission of internationally wrongful acts. It is argued that this general principle of law is indeed a very useful tool to determine which of the predecessor State or the successor State(s) should be held accountable for internationally wrongful acts committed before the date of succession.

8.1 *The Principle of Unjust Enrichment*

The concept of unjust enrichment is intrinsically ambiguous and imprecise. This is, however, no reason, in itself, to refrain from making use of it. Thus, as explained by O'Connell, "the concept of unjust enrichment may not be notably articulate in practice, but once one perceives that practice corresponds roughly to its fundamental requirements, that, with a consideration of the relevant social and ethical factors, suffices".[222] Because of its very ambiguous nature, one needs to "take into account all the circumstances of each specific situation" to determine whether any unjust enrichment occurred.[223]

The obligation for compensation based on unjust enrichment does not arise directly from the commission of an act but derives from a *state of fact*, which may be caused by *a legal or an illegal act*.[224] The concept has thus often been used in instances involving the infringement of property rights of foreigners in cases where the acts did not amount to an internationally wrongful act.[225] As

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222 D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 274.

223 This is specifically mentioned in: *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at pp. 168–169; *Schlegel Corp. v. National Iranian Copper Industries Co.*, Award No. 295–834–2, 27 March 1987, in: 14 *Iran-U.S. C.T.R.*, p. 176, at pp. 181–183. See also in: E. JIMÉNEZ DE ARÉCHAGA, "International Law in the Past Third of a Century", *R.C.A.D.I.*, t. 159, 1978–I, at pp. 299–300.

224 G.C. RODRIGUEZ IGLESIAS, "El enriquecimiento sin causa como fundamento de responsabilidad internacional", 34 *R.E.D.I.*, 1982, at p. 389.

225 Christoph H. SCHREUER, "Unjustified Enrichment", in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 9, Amsterdam, North Holland, 1986, p. 382. This was explained as follows by the Iran-U.S. Claims Tribunal in the case of *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at p. 169: "[The concept of unjust enrichment] involves a duty to compensate, which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question. Thus the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party was enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages".

one writer puts it, "the basis of liability for unjust enrichment is not necessarily linked with any delictual responsibility as such but… on an injustice which must be remediated".[226]

In order for a State's action to qualify as an unjust enrichment, not only does the consequence of such act need (i) to result in its enrichment, but also such enrichment needs (ii) to be "unjust" and, finally, (iii) to be detrimental to another State. These different requirements were expressed as follows by the Iran-U.S. Claims Tribunal in the case of *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*:

> There are several instances of recourse to the principle of unjust enrichment before international tribunals. There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.[227]

The first fundamental requirement is that enrichment has indeed occurred.[228] The Iran-U.S. Claims Tribunal determined that "where there is no 'beneficial gain' to the party allegedly enriched, the remedy of unjust enrichment is not available".[229] The notion of "beneficial gain" has been the object of controversy in the context of the Iran-U.S. Claims Tribunal. Some decisions came to the conclusion that the State needs to make *actual use* of the property for an unjust enrichment to arise.[230] On the contrary, it has been argued by one Judge in his dissenting opinion that such benefit "occurs when goods are available for use by a State, regardless of whether the claimant can show particular instance of such use".[231] In the context of a taking of property, it is required that the expropriating State *makes actual use* of the expropriated property.[232] However, the expropriated property does not

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226 Charles M. FOMBAD, "The Principle of Unjustified Enrichment in International Law", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, p. 124.

227 *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, *Ibid.*, at pp. 168–169.

228 Charles M. FOMBAD, "The Principle of Unjustified Enrichment in International Law", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, at p. 123: "The fact that the enrichment was either negligent, delictual or innocent does not appear to be a critical factor either to the duty to restitute or to the amount. The fundamental requirement is the determination that such enrichment has occurred and that it is without legal justification under international law".

229 *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award no. 259–36–1, 13 October 1986, in: 12 *Iran-U.S. C.T.R.*, p. 335, at p. 353.

230 *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at pp. 171–172; *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award no. 259–36–1, 13 October 1986, in: 12 *Iran-U.S. C.T.R.*, p. 335, at pp. 353–355.

231 Dissenting opinion of Judge Holtzmann in: *Flexi-Van Leasing*, *Inc., Ibid.*, at p. 363. See also the separate opinion of Judge Holtzmann in: *Sea-Land Service, Inc., Ibid.*, at pp. 213–216.

232 In the *Thomas C. Baker Arbitration*, in: J.B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. IV, Washington,

necessarily need to result in any *financial* benefits for that State; an *advantage* or a *benefit* is sufficient.[233]

The second requirement is that the enrichment be "unjust". As one writer indicates, the concept is "used in its broadest sense to cover all instances of illegitimate, unconscionable, inequitable and unfair acquisition of wealth".[234] The Iran-U.S. Claims Tribunal also vaguely defined the notion by stating that "there must be no justification for the enrichment".[235] What has been considered "unjust" in international practice is, for instance, the fact that one company had not paid the balance due to another company for the work performed under a contract,[236] the use of materials belonging to a foreign national by the army of a State,[237] and the use of property by the host State for which no compensation had been given to the foreign national.[238]

The third requirement is that the enrichment be not only "unjust" but also at "the detriment of the other".[239] In other words, the enrichment needs to be "directly linked with and result in an impoverishment on the other side".[240] One international arbitral decision speaks of the condition of simultaneity of the enrichment and the

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G.P.O., 1898, vol. IV, at p. 3668, compensation was awarded as a result of the use by the Mexican army of materials belonging to a U.S. national. In the case of *Sucrerie de Roustchouk v. Etat Hongrois*, Belgian-Hungarian Mixed Arbitral Tribunal, Award of 29 October 1925, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. V, p. 772 at p. 776, the refloating by the Hungarian military authorities of one barge belonging to a Belgian company that the army had previously sunk led to compensation.

233 *Contra*: Charles M. FOMBAD, "The Principle of Unjustified Enrichment in International Law", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, p. 123, for whom the increase of wealth seems to be a requirement.

234 *Id.*

235 *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at pp. 168–169.

236 *Schlegel Corp. v. National Iranian Copper Industries Co.*, Iran-U.S. Claims Tribunal, Award No. 295–834–2, 27 March 1987, in: 14 *Iran-U.S. C.T.R.*, p. 176, at pp. 181–183; *Burroughs Wellcome & Co. v. Chemische Fabrik auf Actien*, Great-Britain-Germany Mixed Arbitral Tribunal, Award of 19 January 1926, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. VI, p. 13.

237 *Thomas C. Baker Arbitration*, in: J.B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. IV, Washington, G.P.O., 1898, vol. IV, at p. 3668; *Sucrerie de Roustchouk v. Etat Hongrois*, Belgian-Hungarian Mixed Arbitral Tribunal, Award of 29 October 1925, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. V, p. 772.

238 *William A. Parker (United States) v. United Mexican States*, U.S.-Mexico General Claims Commission, Award of 31 March 1926, in: *U.N.R.I.A.A.*, vol. IV, p. 35; *Zilberszpic v. (Polish) Treasury*, Poland, Supreme Court, First Division, 14 December 1928, in: *Zb. O.S.N.*, 1928, no. 190, reported in: 4 *Annual Digest*, 1927–1928, p. 82.

239 *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award no. 259–36–1, 13 October 1986, in: 12 *Iran-U.S. C.T.R.*, p. 335, at p. 353. See also: Charles M. FOMBAD, "The Principle of Unjustified Enrichment in International Law", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, p. 123.

240 Charles M. FOMBAD, *Id.*

detriment.[241] Another decision by the Iran-U.S. Claims Tribunal mentions that both the enrichment of one party and the detriment of another party must "arise as a consequence of the same act or event".[242]

Finally, the Iran-U.S. Claims Tribunal stated that "the damage for unjust enrichment should be measured in terms of the extent to which that State has been enriched".[243] Thus, what is sought as a remedy to unjust enrichment is the "achievement of an acceptable economic equilibrium" between the two parties.[244] Such a goal is reached with the reestablishment of the previous economic position of the enriched party.[245] Thus, the "acceptable economic equilibrium" is sought not simply by compensating the victim of the internationally wrongful acts but by first "depriving the enriched party of its unjustly gained benefits, which are then awarded to the other party".[246] The amount of compensation "will not exceed the amount by which the defendant's wealth has been increased or that by which the claimant has been impoverished".[247]

8.2 *Unjust Enrichment is a General Principle of Law*

The principle of unjust enrichment is frequently used in domestic law.[248] It is recognised as a "principle of law" under both civil law[249] and common law.

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241 *Dickson Car Wheel Co. (United States) v. United Mexican States*, U.S.-Mexico General Claims Commission, Award of July 1931, in: *U.N.R.I.A.A.*, vol. IV, p. 669, at p. 676.

242 *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at pp. 168–169.

243 *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Award no. 259–36–1, 13 October 1986, in: 12 *Iran-U.S. C.T.R.*, p. 335, at pp. 353–355.

244 Christoph H. SCHREUER, "Unjustified Enrichment", in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 9, Amsterdam, North Holland, 1986, p. 381.

245 Christoph H. SCHREUER, "Unjustified Enrichment in International Law" 22 *Am.J.Comp. L.*, 1974, p. 300.

246 Christoph H. SCHREUER, "Unjustified Enrichment", in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 9, Amsterdam, North Holland, 1986, p. 381.

247 Charles M. FOMBAD, "The Principle of Unjustified Enrichment in International Law", 30 *Comp. & Int'l L.J. S. Afr.*, 1997, p. 125.

248 For a comparative analysis of the concept, see: Paolo GALLO, "Unjust Enrichment: A Comparative Analysis", 40 *Am. J. Comp. L.* 1992, at pp. 431 et seq.; John A. DAWSON, *Unjust Enrichment: A Comparative Analysis*, Boston, Little, Brown & Company, 1951; Wolfgang FRIEDMANN, "The Principle of Unjust Enrichment", *Can. Bar Rev.*, 1938, p. 377; David JOHNSTON & Reinhard ZIMMERMANN (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge Univ. Press, 2002.

249 The definition of unjust enrichment is currently under consideration by the Study Group on an European Civil Code: E. CLIVE, "Unjustified Enrichment", in: A. HARTKAMP, M. HESSLINK, E. HODIUS, C. JOUSTRA, E. DU PERRON & M. VELDMANN

According to the Iran-U.S. Claims Tribunal, the concept "is codified or judicially recognized in the great majority of the municipal legal systems of the world".[250]

The U.S.-Mexico General Claims Commission in the 1931 *Dickson Car Wheel Co.* case stated that the concept had "encountered serious difficulties in its practical application in municipal law" and that it had "not yet been transplanted to the field of international law".[251] This statement is, however, not representative of contemporary international law, where international tribunals have often used the principle of unjust enrichment in many different areas of international law.[252] One area where the principle has been applied is that of State expropriation of foreign assets and property.[253] The concept was also used to settle outstanding business transactions in the context of the First World War arising out of contracts between business partners who had subsequently become enemy nationals and had seen their contracts invalidated pursuant to the *Versailles Treaty*.[254] The concept has been frequently used in the context of the Iran-U.S. Claims Tribunal and described as a

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(eds.), *Towards a European Civil Code*, 3rd ed., Nijmegen, Aspen Publi., 2004, at p. 585. See also: Reinhard ZIMMERMANN, "Unjust Enrichment: The Modern Civilian Approach", 15 *Oxford J.Legal Stud.*, 1995, at pp. 403 et seq. The principle, for instance, is codified at Articles 1493 to 1496 of the Québec Civil Code 1994, enacted by S.Q. 1991, c. 64 and in force on 1st January 1994.

250 *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at pp. 168–169.

251 *Dickson Car Wheel Co. (United States) v. United Mexican States*, U.S.-Mexico General Claims Commission, Award of July 1931, in: *U.N.R.I.A.A.*, vol. IV, p. 669, at p. 676.

252 A review of international judicial decisions is found in: Christoph H. SCHREUER, "Unjustified Enrichment in International Law" 22 *Am.J.Comp.L.*, 1974, pp. 281–301; G.C. RODRIGUEZ IGLESIAS, "El enriquecimiento sin causa como fundamento de responsabilidad internacional", 34 *R.E.D.I.*, 1982, pp. 379–397; Charles M. FOMBAD, "The Principle of Unjustified Enrichment in International Law", 30 (2) *Comp. & Int'l L.J. S. Afr.*, 1997, pp. 120–130.

253 *Lena Goldfields ltd. v. U.S.S.R.*, Award of 1930, in: *The Times*, 3 September 1930, at p. 7. See also in: A. NUSSBAUM, "The Arbitration the Lena Goldfields Ltd. and the Soviet Government", 36 *Cornell L.Q.*, 1950, p. 31. For a detailed analysis of the use of this principle in the context of nationalisation, see: G.C. RODRIGUEZ IGLESIAS, *Ibid.*, pp. 391–396.

254 See Articles 296, 299 and 304 of the *Versailles Treaty*, Paris, signed on 28 June 1919, entered into force on 10 January 1920, in: *The Treaties of Peace 1919–1923*, New York, Carnegie Endowment for International Peace, 1924; in: *U.K.T.S.* 1919, No. 8 (Cmd. 223). See: *Arnold & Foster Ltd. v. J.W. Erkens*, U.K.-Germany Mixed Arbitral Tribunal, 13 & 20 October 1926, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. VI, p. 606. The concept was also used in situations where transfer of assets took place under putative agreement which later turned out to be invalidly concluded due to lack of authority of State-agents: *William A. Parker (United States) v. United Mexican States*, U.S.-Mexico General Claims Commission, Award of 31 March 1926, in: *U.N.R.I.A.A.*, vol. IV, p. 35.

"general principle of law"[255] and "an important element of State responsibility".[256] The I.C.J. has not sanctioned the principle even though a party relied on it in at least one case.[257]

Authors in doctrine recognize that the principle of unjust enrichment is applicable in international law. In fact, the vast majority of scholars recognize it as a "general principle of law" (in the sense of Article 38 of the Statute of the I.C.J.).[258] This

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255 In the *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at pp. 168–169, the Tribunal recognised that the concept is "widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international Tribunals". See also in: *Schlegel Corp. v. National Iranian Copper Industries Co.*, Iran-U.S. Claims Tribunal, Award No. 295–834–2, 27 March 1987, in: 14 *Iran-U.S. C.T.R.*, p. 176, at pp. 181–183.

256 *Benjamin R. Isaiah v. Bank Mellat*, Iran-U.S. Claims Tribunal, Award No. 35–219–2, 30 March 1983, in: 2 *Iran-U.S. C.T.R.*, p. 232, at pp. 236–237. For an analysis of the use of this concept by the Iran-U.S. Claims Tribunal, see: G.H. ALDRICH, *The Jurisprudence of the Iran-United States Claims Tribunal*, Oxford, Clarendon Press, 1996, pp. 396–411.

257 In the case of *Ambatielos, Merits* (Greece v. United Kingdom), Judgment of 19 May 1953, *I.C.J. Reports 1953*, p. 10, Greece based its claim that the United Kingdom was responsible based on the notion of unjustified enrichment. The Court did not use the concept to render its judgment. The case was finally decided by an arbitral tribunal which determined that there was no unjust enrichment at stake: *Ambatielos Claim* (Greece v. United Kingdom), Commission of Arbitration, Award of 6 March 1956, in: *U.N.R.I.A.A.*, vol. XII, p. 83, at p. 91; 23 *I.L.R.*, p. 306.

258 Elio FANARA, *Gestione di affari e arricchimento senza causa nel diritto internazionale*, Milan, Giuffrè, 1966, at p. 241; Wolfgang FRIEDMANN, *The Changing Structure of International Law*, New York, Columbia Univ. Press, 1964, p. 206; Detlev Chr. DICKE, "Unjustified Enrichment and Compensation", in: Detlev Chr. DICKE (ed.), *Foreign Investment in the Present and a New International Economic Order*, Fribourg, Univ. Press, 1987, at p. 273; Wilfred JENKS, *The Prospects of International Adjudication*, London, Dobbs Ferry, N.Y., Stevens – Oceana Publications, 1964, at p. 417; André GONCALVES PEREIRA, *La succession d'États en matière de traités*, Paris, Pedone, 1969, p. 190; D.P. O'CONNELL, *State Succession*, vol. I, p. 34; A. NUSSBAUM, "The Arbitration the Lena Goldfields Ltd. and the Soviet Government", 36 *Cornell L.Q.*, 1950, p. 31, at p. 41; Georges RIPERT, "Les règles du droit civil applicables aux rapports internationaux", *R.C.A.D.I.*, 1933–II, t. 44, at pp. 631–632; D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 273; Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 769–770; Georg SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, vol. I, 3rd ed., London, Steven & Sons, 1957, at p. 579; E. JIMÉNEZ DE ARÉCHAGA, "International Law in the Past Third of a Century", *R.C.A.D.I.*, t. 159, 1978–I, at pp. 299–300; Paul GUGGENHEIM, *Traité de Droit international public*, t. I, Geneva, Librairie de l'Université, 1953, p. 155; Michael John VOLKOVITSCH, pp. 2210–2211; Charles M. FOMBAD, "The Principle of Unjustified Enrichment in International Law", 30 (2) *Comp. & Int'l L.J. S. Afr.*, 1997, pp. 123, 129. See also the dissenting opinion of Judge J. Spiropoulos in the *Ambatielos Claim* (Greece v. United Kingdom), Award of 6 March 1956, in: *U.N.R.I.A.A.*, vol. XII, p. 83, at p. 129, for the concept "forms part of the general principles of law applicable in international relations".

is a sound position. Yet, some writers have expressed doubts as to whether the concept was at all a general principle of law.[259] This is, for instance, the position of Schreuer, for whom the sporadic use of this principle in practice does not permit one to conclude that it is "firmly embedded in international law". He does however add that "the concept might be usefully applied in certain areas of international law if appropriately developed".[260] Other authors have clearly rejected the concept as being part of international law.[261]

8.3 *Reference has been made to the Principle by Courts dealing with Issues of State Succession*

Recently, the *Institut de Droit international* adopted a resolution on the question of "State Succession in Matters of Property and Debts" which does refer to the principle of unjust enrichment.[262] Thus, Article 8 of the Resolution indicates that the result of the apportionment of property and debts should be equitable and that "unjust enrichment shall be avoided".[263]

The principle of unjust enrichment was referred to by at least two international tribunals deciding issues involving questions of State succession, although not dealing with international responsibility. Further two national court decisions dealing with questions of State succession have also made reference to the concept.[264] These four cases are briefly examined in the following paragraphs.

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259 For instance, see Charles ROUSSEAU, *Droit international public*, vol. I, Paris, Sirey, 1977, pp. 380–381, and also the balanced position of Paul REUTER, *Droit International Public*, Paris, P.U.F., coll. Thémis, 1958, p. 90.

260 Christoph H. SCHREUER, "Unjustified Enrichment", in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 9, Amsterdam, North Holland, 1986, p. 382. In previous writing, ("Unjustified Enrichment in International Law" 22 *Am.J.Comp.L.*, 1974, p. 301), the author concluded that "with international law in the present stage of development, restitution for unjustified enrichment can be considered hardly more than a decision-technique to be applied once that basic policy decisions have been made, and not a normative principle or general rule from which specific 'correct' decisions can be logically derived". G.C. RODRIGUEZ IGLESIAS, "El enriquecimiento sin causa como fundamento de responsabilidad internacional", 34 *R.E.D.I.*, 1982, at p. 387, 396–397, believes that the concept is a general principle of international law that can be used in settling international legal disputes. He also states that there is no norm in international law *prohibiting* unjust enrichment *as such*.

261 This is the position of Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, pp. 554 et seq., for whom this principle is foreign to international law and especially not adapted to the context of decolonisation.

262 Institut de Droit international, *State Succession in Matters of Property and Debts*, Session of Vancouver, 2001, in: 69 *Annuaire I.D.I.*, 2000–2001, at pp. 713 et seq.

263 See also Articles 11 and 13.

264 Mention should also be made of the case of *Kunstsammlungen zu Weimar and Others v. Elicofon*, United States District Court, Eastern District, New York, 15 June 1981, 536 F Supp 829 (1981), in: 94 *I.L.R.*, p. 133, where the concept was (in this author's

The *Emeric Koranyi* case, decided by the Hungary-Romania Mixed Arbitral Tribunal. The principle of unjust enrichment was applied to succession to debts in the case of *Emeric Koranyi & Mme. Ernest Dengyel (née Koranyi) v. Romanian State* before the Romanian-Hungarian Mixed Arbitral Tribunal.[265] The Tribunal first determined that the outstanding debt was of an administrative character. To determine the eventual responsibility of the successor State, the Tribunal used the concept of unjust enrichment. Thus, the Tribunal indicated that for the successor State (Romania) to be held liable for the outstanding debt, the debt would need to have been contracted in the "interest" of the territory subsequently transferred and that the money served, or would continue serving, "to obtain some improvement or

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view) misunderstood and misused. This case arose from a dispute over the property of German paintings which had become public property before the Second World War but had later "disappeared" during the period of U.S. military occupation of Germany and which had finally been acquired by a U.S. national in 1946. An Agency of the German Democratic Republic claimed ownership before a New York Court in 1981. The district Judge decided that the G.D.R. was entitled to possession of the works of art. In so concluding, the Judge (rightly) stated that the G.D.R. was a successor State to the German Reich. He (more controversially) identified the doctrine of acquired rights as the source of a rule, according to which property designated for local use which were located in the territory of the successor State would be acquired by it after the date of succession. In his demonstration that with rights also pass obligations to the successor State, the Judge made reference to the doctrine of unjustified enrichment as the "corollary to the doctrine of acquired rights" and indicated (in: *Ibid.*, 94 *I.L.R.*, p. 181) that in the context of this case "the doctrine [of unjustified enrichment] dictates that when a State is divided up among two or more States, each successor State assumes responsibilities for its portion of the financial obligations of the predecessor".

265 *Emeric Koranyi & Mme. Ernest Dengcjel (née Koranyi) v. Romanian State* case, Hungary-Romania Mixed Arbitral Tribunal, Award of 27 February 1929, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. 8, p. 980; in: *Annual Digest*, 1929–1930, p. 64. In this case, the plaintiffs (apparently Hungarian nationals) had deposited in 1918–1919 a sum of money (8,000 Hungarian crowns) in a tax-collector office ("*Bureau de contribution*") in the city of Maromarossziget which was then part of Austria-Hungary. By a decision of the Hungarian District Court of Maromarossziget the tax-collector office was ordered to return the money (with the interests) to the plaintiffs. In the meantime, and before the office could effect the payment, the territory of Transylvania (where the city of Maromarossziget was situated) was ceded after the break-up of the Dual Monarchy to the State of Romania pursuant to the *Trianon Treaty* of 4 June 1920 (*Treaty of Peace between the Allied and Associated Powers, and Hungary, Protocol and Declaration*, in: *L.N.T.S.* vol. 6, p. 187; *U.K.T.S.* 1920, No. 10 (Cmd. 896)). The Romanian office which took over the assets of the plaintiff refused to return the money on the ground that the deposit had been made before the territory was ceded to Romania. Another argument advanced by the Romanian authorities was that "en vertu des dispositions du traité de Trianon, le gouvernement roumain a pris possession de tous les biens de l'Etat hongrois et de tous les dépôts confiés à l'administration de l'Etat hongrois qui se trouvaient sur les territoires détachés de la Hongrie au profit de la Roumanie et que c'est donc contre tout droit que le bureau de contribution roumain a refusé de payer le dépôt en question…" (in: *Ibid.*, at p. 982).

benefit" to that territory.[266] However, the Tribunal came to the conclusion that the present deposit of this sum of money was for the private purpose of the plaintiffs only and that the State of Romania had not "profited" from it. Accordingly, the Tribunal decided that Romania (in its capacity as successor State) should not be held responsible for the reimbursement of the sum of money deposited. In other words, the Tribunal did not actually make use of the principle of unjust enrichment in its Award since it concluded that no such enrichment had occurred in the first place.

The *Lighthouse Arbitration* case, decided by the French-Greek Arbitral Tribunal. In the 1956 *Lighthouse Arbitration* case, the French-Greek Arbitral Tribunal dealt with several French claims and Greek counter-claims, two of them concerning the concept of unjust enrichment.[267] French Claim no. 13 requested reimbursement for some work conducted by the French company, which occured prior to the cession of the territory of Crete to Greece. France based its claim on the grounds that Greece (as the successor State) had enriched itself by the improvement of the property value resulting from the repair of a light by the French company. The Tribunal found that the repair work undertaken by the French company was within the normal scope of contractual obligations of the concessionaire. It therefore rejected the claim without pronouncing itself on the validity of the concept of unjust enrichment. In its analysis of Greece's Counter-claim no. 9, the Arbitral Tribunal had to decide on the costs claimed for a port beacon which had been erected by the French concessionaire during the military occupation and which had been subsequently maintained by Greece. The Tribunal decided that there had been no enrichment. The Tribunal, however, used the words "supposed principle" in reference to the notion of unjust enrichment, which suggest that it had some doubt that this concept constituted a general principle of law.

The case of *Zilberszpic v. (Polish) Treasury* decided by the Supreme Court of Poland. In *Zilberszpic v. (Polish) Treasury* before the Supreme Court of Poland, a private contractor (whose nationality is not mentioned in the Award but who may be Polish) concluded an agreement with the Russian Orthodox Charitable Society

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266 The reasoning of the Arbitral Tribunal is as follows (in: *Annual Digest*, 1929–1930, p. 64): "With regard to the liability of a successor State for debts of an administrative character outstanding at the time of a transfer of a territory, which are not guaranteed by a mortgage upon an immovable situated in the said territory, it is above all necessary to establish the purpose for which the loans were originally raised, and the purpose for which the money has been applied. Where the debts had been contracted in the interests of the territory subsequently transferred, and the money has served in the past or will continue to be used in future to obtain some improvement or benefit ('enrichissements') to the said territory, it would be only just and equitable to make the successor State liable for such a debt on this ground. Where this is not the case, there is no reason whatever for making it responsible for the debts".

267 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 81. This Award was discussed at *supra*, p. 130 and p. 136.

of Kielce, which was at the time situated in Polish territory under Russian rule.[268] On appeal from a decision of the Court of Appeal of Lublin, which had denied the action, the Supreme Court of Poland used the notion of unjust enrichment. However, it did so solely on the ground that this notion existed under Polish municipal law, without any discussion as to whether the concept was embodied in international law.[269]

The case of *Niedzielskie v. (Polish) Treasury* decided by the Supreme Court of Poland. In the *Niedzielskie v. (Polish) Treasury* case,[270] a contract was entered into by the authorities of the former Austria-Hungary for work to be done on certain government buildings before the First World War.[271] In dealing with the property at stake, the Court made reference to the concept of unjust enrichment but concluded that in the present case, no such enrichment had occurred.[272]

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268 *Zilberszpic v. (Polish) Treasury*, Supreme Court of Poland, First Division, 14 December 1928, in: *Zb. O.S.N.*, 1928, no. 190, reported in: 4 *Annual Digest*, 1927–1928, at p. 82. The agreement for the construction of an apartment house for the Society was partially performed by the contractor. But as a result of the First World War, the money due to him remained unpaid. In November 1918, the contractor assigned his unpaid claim to the plaintiff which had been a partner in this business. The plaintiff in turn filed a claim against the Society before the Court of Kielce. The territory where the apartment house was built passed under Polish administration after the outbreak of the War. Under Article XII of the peace treaty of Riga of 18 March 1921, Poland was recognised as the owner of all former Russian State property in its territory. This included property rights that had been given up by the former Russian Tsars, such as the property of the Society. Since the property on which the construction was built had now become that of the Polish Treasury, the plaintiff cited it as defendant in the present action before Polish courts.

269 The Supreme Court decided that the land property *alone* had been the object of a grant in 1868 to the Society (by the Russian Tsars) and that the construction built later on it had therefore never constituted Russian State property in the sense of Article XII of the peace treaty of Riga. The Court emphasised also on the absence of any contractual relationship between the plaintiff and Poland for the building of the apartment house. It concluded that the plaintiff could claim part of his expenditures for the increase value of the land resulting from its investment in building the apartment house (with the deduction of the sum already paid for this construction).

270 *Niedzielskie v. (Polish) Treasury*, Supreme Court of Poland, 13 October 1926, in: *Rw*. III, 1485/26/I, reported in: 3 *Annual Digest*, 1925–26, p. 74, and discussed in: 4 *Annual Digest*, 1927–1928, at p. 83 (see under "notes").

271 After the end of the War, the territory where the buildings were situated was ceded to Poland and the buildings taken over by the latter. The Supreme Court of Poland came to the conclusion that "the successor State takes over the debts of its predecessor only in so far as it has expressly accepted them".

272 *Niedzielskie v. (Polish) Treasury*, 3 *Annual Digest*, 1925–26, at p. 75: "It is true that Poland took over all the immovable property of the Austrian State, but no question of unjustified enrichment arises seeing that, apart from school buildings, hospitals, and state forests, Poland had to pay for the properties taken over by a contribution to the cost of war to be paid to the Allied Powers".

The analysis of these four cases shows that even though these different courts made reference to the principle of unjust enrichment, in none of them, however, the principle was actually used to decide the case on the merits.

8.4 *Analysis of Doctrine and the Position Adopted in this Study*

One of the most vocal advocates of the use of the principle of unjust enrichment to deal with questions of State succession is O'Connell, for whom "the juridical justification for the obligation to pay compensation is to be found in the concept of unjustified enrichment".[273]

Doctrine is generally favourable to the use of the principle of unjust enrichment to solve problems of State succession to international responsibility. Not surprisingly, those authors willing to apply the principle of State succession to obligations have also been favourable to the use of the concept in determining whether there should be a transfer of the obligation to repair from the predecessor State to the successor State.[274] Other writers, who generally reject the possibility of succession to international responsibility, however, make an exception for the special circumstance when such acts result in the unjust enrichment of the successor State. In such case, these writers believe that the successor State should be held responsible for the acts.[275] This is, for instance, the position of

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273 D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 103. At p. 273, he also mentions that this principle "is the norm behind the doctrine of respect for acquired rights in the law of State succession". André GONCALVES PEREIRA, *La succession d'États en matière de traités*, Paris, Pedone, 1969, p. 190, is of the opinion that the concept can be used especially for questions of State succession to public debts and to treaties.

274 Michael John VOLKOVITSCH, pp. 2210–2211; Miriam PETERSCHMITT, pp. 55–61; Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, at p. 62.

275 Oscar SCHACHTER, "State Succession: the Once and Future Law", 33(2) *Va.J.Int'l L.*, 1993, p. 256; Ivan A. SHEARER, *Starke's International Law*, 11th ed., Sydney, Butterworths, 1994, p. 303; A. VERDROSS, *Völkerrecht*, 4th ed., Vienna, Springler Verlag, 1959, p. 198; A. VERDROSS & B. SIMMA, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, Dunker & Humblot, 1984, pp. 633–634; Michel WAELBROECK, "Arrêt no. 8160 du Conseil d'Etat Belge, note d'observations", *R.J.D.A.*, 1961, no. 1, at p. 35; Lynn BERAT, "Genocide: The Namibian Case Against Germany", *Pace Int'l L.Rev.*, 1993, p. 165, at p. 193. This is also the position of Natalino RONZITTI, *La successione internazionale tra stati*, Milan, Dott. A. Giuffrè, 1970, pp. 220–221, who, however, is of the view that an obligation of the new successor State is a *new obligation* which does not arises from the previous obligations of the predecessor State. See also: *Restatement (Third), Foreign Relations Law of the United States*, Vol. I, St. Paul, American Law Institute Publ., 1987, § 209 (g) (p. 105) and also Reporters' notes no. 7 (p. 107).

Udina.[276] Another example is the work of Drakidis, who applied it specifically in the context of a cession of territory (that of the Dodecanesian Islands to Greece in 1947).[277]

Other scholars have been more prudent in their appraisal of the application of this principle in the context of State succession to international responsibility.[278] On the contrary, Bedjaoui is of the opinion that the concept is not adapted to problems of State succession, especially in the context of decolonisation.[279] He illustrates his point by making reference to the situation prevailing in the context of nationalisa-

276 Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 769–770: "En effet, on doit admettre que, dans le droit international aussi, on peut avoir des droits et des obligations des Etats qui, faute de rapports juridiques préexistant à cet égard entre les intéressés, naissent de ce principe de justice qu'on ne doit pas s'enrichir aux dépens d'autrui, en vertu d'une norme du droit international général et comme conséquence d'actes unilatéraux et illicites d'un Etat envers d'autres Etats… En général, les droits et obligations découlant *quasi ex contractu* entre Etats auraient un caractère essentiellement personnel, et par là intransmissible, mais pas nécessairement, comme surtout dans le cas de l'enrichissement sans cause pourvu qu'il soit en rapport direct avec le territoire dans lequel s'opère la substitution d'un Etat à l'autre".

277 Philippe DRAKIDIS, "Succession d'Etats et enrichissements sans cause des biens publics du Dodécanèse", 24 *R.H.D.I.*, 1971, at pp. 109–110. He is of the view that, in principle, it should be for the continuing State (Italy) to compensate the victims of expropriation acts, but that whenever the successor State (Greece) has unjustly enriched itself as a result of the acts, it should be for Greece to compensate its nationals: "En revanche lorsque le fait illicite incriminé résulte de l'appropriation d'un bien étranger, en violation de traités spécifiques, à concurrence duquel l'Etat prédécesseur s'est enrichi, sans que cet enrichissement ait disparu par la suite, la situation est toute différente et le doute n'est plus permis: L'Etat successeur qui en a hérité sans paiement, ne peut échapper à l'obligation corrélative de réparer l'appauvrissement de son propre national victime de cette dépossession. Le passage entre les mains de l'Etat successeur du corps même du délit international, l'entrée dans son patrimoine du bien intact de la victime, sont de nature à faciliter la mise en œuvre du redressement de la situation illicite, loin plutôt que de l'affaiblir".

278 This is, for instance, the view of Jean Philippe MONNIER, pp. 89–90, for whom the application of the principle of unjust enrichment should not be excluded as a justification for transferability but should nevertheless be accepted with prudence. See also: Louis HENKIN, Richard CRAWFORD PUGH, Oscar SCHACHTER & Hans SMIT, *International Law, Cases and Materials*, 3rd ed., St. Paul, West Publ. Co., 1993, p. 293, who are generally against the transfer of the consequences of responsibility, but leave the question open when the successor State has enriched itself as a result of an internationally wrongful act committed by the predecessor State.

279 Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, pp. 554 et seq. See also in: *First Report on Succession of States in Respect of Rights and Duties Resulting from Sources other than Treaties*, by Mr Mohammed Bedjaoui, Special Rapporteur, 20th session of the I.L.C., 1968, U.N. Doc. A/CN.4/204, I.L.C. Report, A/7209/Rev.1 (A/23/9), 1968, ch. III(C)(a), paras. 45–50, in: *Yearbook I.L.C.*, 1968, vol. II, p. 94, at p. 101, para. 43.

tion performed by Newly Independent States and of possible compensation which could be claimed by Western private companies:

> Les raisons morales de l'indemnisation en droit international général comme en matière de succession d'Etats, ont pris chaque fois le pas d'autant plus aisément que le fondement juridique de l'indemnisation restait encore à trouver. L'équité est demeurée l'argument le plus employé. Mais bien des pays nouvellement indépendants estiment pour des raisons éthiques que le problème de l'indemnité est mal posé. Les mêmes motifs d'équité qui leur sont avancés pour justifier l'indemnisation leur commandent de repousser au contraire celle-ci dans le cas de décolonisation. Ils estiment que même dans la meilleur des hypothèses, celle toute théorique semble-t-il où la conquête ne s'est pas accompagnée de spoliations de la propriété indigène, il n'y a pas lieu de consentir à une indemnisation lorsque survient l'indépendance, car la colonisation a enrichi la métropole et a rempli une fonction historique considérable dans l'industrialisation, la puissance et la prospérité de l'Etat conquérant. De ce fait, celui-ci ne possède pas de droit acquis à l'indemnisation, mais au contraire selon ce point de vue, a contracté une dette envers son ancienne possession ultra-marine.[280]
>
> On s'aperçoit donc pas comment l'équité ou le principe de l'enrichissement sans cause pourraient recevoir application dans le cas de ces biens qui font tout simplement retour, par la décolonisation, à leur propriétaire d'origine qui en avait été dépossédé.[281]

It is submitted that the principle of unjust enrichment should be used to resolve questions of State succession to obligations arising from internationally wrongful acts.[282] As previously observed, the principle of unjust enrichment is generally used as a subsidiary tool to redress the undesirable effect of a situation when it is not covered by other areas of law, such as contract law and torts law.[283] It is, in other words, a remedy used in judicial practice to "reverse accretions of wealth under circumstances in which contractual or delictual principles would have been unable to reach this result".[284] As O'Connell puts it, the function of the principle of unjust enrichment "is to mitigate the hardship which would result in certain cases from an application of strict law by applying principles of justice and equity".[285] The

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280 Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, p. 550.

281 *Ibid.*, p. 551.

282 This is discussed in: Patrick DUMBERRY, "The Use of the Concept of Unjust Enrichment to Resolve Issues of State Succession to International Responsibility", *R.B.D.I.*, 2006–2 (to be published). We examine below the application of this proposition for different types of State Succession.

283 Christoph H. SCHREUER, "Unjustified Enrichment", in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 9, Amsterdam, North Holland, 1986, p. 381. See also: G.C. RODRIGUEZ IGLESIAS, "El enriquecimiento sin causa como fundamento de responsabilidad internacional", 34 *R.E.D.I.*, 1982, at p. 389; F. FRANCIONI, "Compensation for Nationalisation of Foreign Property: the Borderland between Law and Equity", 24 *I.C.L.Q.*, 1975, p. 259, at p. 273.

284 Christoph H. SCHREUER, "Unjustified Enrichment in International Law" 22 *Am.J.Comp. L.*, 1974, p. 289. See also: *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, Iran-U.S. Claims Tribunal, Award No. 115–33–1, 22 June 1984, in: 6 *Iran-U.S. C.T.R.*, p. 149, at p. 169.

285 D.P. O'CONNELL, "Unjustified Enrichment", 5 *Am.J.Comp.L.*, 1956, at p. 16.

principle therefore plays a "mediating role between the categories of justice and of law"[286] and is "on the borderland of law and ethics".[287]

It has been rightly argued that the usefulness of this concept in the context of State succession is that it "entirely sidesteps the question of whether international law includes a specific 'legal' rule as a 'general principle' imposing a fiscal obligation upon successor states in cases of state succession".[288] In other words, in using the concept the question can deviate from whether there is a *positive legal rule* indicating that in one situation or another the successor State should take over obligations arising from the commission of internationally wrongful acts committed before the date of succession. The appropriate question becomes instead: "... whether a successor State which can be shown factually to have been unjustly enriched at the expense of a predecessor state's public creditors is under an 'equitable' obligation to take steps to correct the situation."[289]

The successor State should be held accountable to pay compensation to an injured third State based on the evaluation of a *factual situation*: whether or not it has unjustly enriched itself as a result of an unlawful act committed before the date of succession.[290] In other words, it is the State (the predecessor State or the successor State) which has unjustly enriched itself as a result of an internationally wrongful act committed before the date of succession which should provide reparation to the injured third State. It should be noted that there is no State practice in favour of or against this proposition. We will now examine the possible use of the concept of unjust enrichment for different types of succession of States.

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286 D.P. O'CONNELL, *State Succession*, vol. I, p. 34. See also in: D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 273. See also the analysis of the author of the concept under English Law: D.P. O'CONNELL, "Unjustified Enrichment", 5 *Am.J.Comp.L.*, 1956, pp. 2–17.

287 D.P. O'CONNELL, "Unjustified Enrichment", 5 *Am.J.Comp.L.*, 1956, at p. 4.

288 M.H. HOEFLICH, "Through a Glass Darkly: Reflections Upon the History of the International Law of Public Debt In Connection With State Succession", *U.Ill.L.Rev.*, 1982 (no. 1), p. 39, at p. 46.

289 *Id.*

290 Miriam PETERSCHMITT, p. 58, entirely based her analysis of this question on whether the successor State had any knowledge of the wrongful expropriation which occurred on the territory ceded before the date of succession. To the extent that the successor State was not aware of such acts and that it had the legitimate expectation (based on the principle of good faith) that the territory it acquired was free from any hidden charges, she believes that it should not be responsible for the acts committed by the predecessor State. It may be that Peterschmitt relies too heavily on the ambiguous concept of "knowledge". In fact, the question whether or not there is an unjust enrichment by one State should be determined *independently of any reference to the "knowledge" that such State may have had of the events which led to its enrichment*.

8.5 *Application of the Principle to Different Types of Succession of States*

In the context where the predecessor State *does not* cease to exist as a result of the events affecting its territorial integrity (such as cases of secession and Newly Independent States),[291] the relevant question is which of the continuing State or the new State has enriched itself as a result of an unlawful act committed before the date of succession.[292] As already explained, the State that has enriched itself should provide reparation to the injured third State. In certain situations, both the continuing State and the successor State may have enriched themselves. In such cases, they should then both be held accountable to the injured third State in proportion to their actual benefits/advantage arising from the commission of the internationally wrongful act. In cases of cession and transfer of territory, the successor State should take over the consequences of internationally wrongful acts committed before the date of succession if it has enriched itself as a result.

The application of the so-called "rule" of non-succession to cases where the predecessor State does not cease to exist would certainly result in unfair consequences. Thus, it would no doubt be unjust for the continuing State to be held liable for the commission of internationally wrongful acts for which it did not receive any benefit/advantage. In other words, the continuing State should not pay reparation to the injured third State when it is the successor State which was enriched to the detriment of the injured State. Yet, in some circumstances, the application of an automatic principle of State succession to responsibility could also lead to unfair results for the successor State. This would certainly be the case if the successor State were to be held responsible for the consequences of wrongful acts whereby only the continuing State was enriched.

The situation just described can be illustrated with the example of a foreign company being expropriated in State A before part of that State secedes and become an independent State (State B). In such a case, there is a strong presumption that it is the State where the property is situated that received a greater benefit from the expropriation, and should, consequently, pay compensation to the injured third

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291 On the contrary, Mohammed BEDJAOUI, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *R.C.A.D.I.*, t. 130, 1970–II, p. 558, is of the opinion that this principle is foreign to international law and is especially not adapted to the context of decolonisation. Natalino RONZITTI, *La successione internazionale tra stati*, Milan, Dott. A. Giuffrè, 1970, pp. 220–221, believes that in situations where the predecessor State does not cease to exist, the *continuing State* should be held responsible for the damage arising from the period before the date of succession.

292 See Brigitte STERN, Responsabilité, p. 336, who makes reference to the issue. For Miriam PETERSCHMITT, pp. 57–61, whenever a nationalisation is not illegal in itself (i.e. when the illegality results from the absence of compensation), it should be for the continuing State *alone* to pay compensation to the third State. In cases where the nationalisation is illegal *per se*, the new successor State should be responsible for the value of the property taken and the loss of profits after the date of succession. In such cases, the continuing State should remain accountable for the loss of profits arising out of the expropriation of property which occurred before the date of succession.

State.[293] If the property expropriated is situated in the new State B, why should State A (the continuing State) be held accountable for these pre-secession acts? Conversely, why should the new secessionist State be responsible for the consequences of the expropriation if the property is situated in the territory of the continuator State?

In the other context where the predecessor State *ceases* to exist as a result of the events affecting its territorial integrity (such as cases of dissolution, incorporation and unification of States), what matters is that an internationally wrongful act does not remain unpunished as a result of the disappearance of its perpetrator. We have already concluded that in cases of incorporation and unification of States, the successor State should always take over the obligations arising from the commission of internationally wrongful acts. In cases of dissolution of State, the question would be which of the successor States (if any) has benefited from the commission of the internationally wrongful act. Here again, there may be cases where several successor States will have benefited from the internationally wrongful act. The actual partition of liability among the different States involved should be determined in proportion to their actual benefits/advantage arising from the commission of the internationally wrongful act.

As already mentioned,[294] in the context of the dissolution of the United Arab Republic in 1961, one of the two successor States (Egypt) entered into several agreements with other States (Italy, Switzerland, Lebanon, Denmark, Greece, the Netherlands, Great Britain, Sweden, and the United States) under which compensation was provided to foreign nationals whose property had been nationalised during, *inter alia*, the period of the existence of the United Arab Republic (the predecessor State, 1958–1961). It is clear that in this case the successor State (Egypt) provided compensation to injured third States because the properties expropriated were situated in the territory of Egypt and not in Syria.

It is therefore submitted that the concrete application of the concept of unjust enrichment to resolve issues of State succession to international responsibility leads to *fair and equitable* results. It is further submitted that the use of this concept is also *necessary* because it addresses the important concern of the international

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293 This is also the conclusion reached by Miriam PETERSCHMITT, pp. 70–71: "S'agissant d'une nationalisation, le critère pourrait bien être celui de la proportion des biens situés dans chaque territoire. En effet, étant enrichi par ces biens illicitement nationalisés, chaque Etat devrait réparer selon la part des biens dont il profite encore aujourd'hui". See also the position of Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'Etats", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, at p. 77, for whom the succession to responsibility among the different new successor States should most likely follow the principle of equitable proportion (as defined in the 1983 *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306) taking into account the geographical location of the use of expropriated goods by the different States.

294 This case is further discussed at *supra*, p. 107.

community for predictability, order and stability in international legal relations among States.[295]

9. *The Use of the Principle of Equity to Resolve Issues of Succession to Responsibility*

The concept of equity has even been described as "the key… to the entire problem of State succession".[296] According to the *1983 Vienna Convention on Succession of States in Respect of State Properties, Archives and Debts*, in cases of dissolution of State, secession and the cession and transfer of territory, the debts of the predecessor State "pass to the successor State[s] in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State[s] in relation to that State debt".[297] The *Institut de Droit international*'s resolution on "State Succession in Matters of Property and Debts" also indicates at its Article 8 that "the result of the apportionment of property and debts must be equitable".[298] Stern speaks of a "customary international rule requiring the equitable distribution of the national debts" of the predecessor State.[299] In that context, the notion of equity is used for the establishment of "equitable criteria of repartition" of rights and obligations between the different States involved.[300]

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295 Rein MULLERSON, "Law and Politics in Succession of States: International Law on Succession of States", in: Geneviève BURDEAU & Brigitte STERN (eds.), *Dissolution, continuation et succession en Europe de l'Est*, Paris, Cedin-Paris I, 1994, p. 44.

296 D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 268.

297 See Articles 37, 40 and 41 of the 1983 *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306. According to Stefan OETER, "State Succession and Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States", 38 *German Y.I.L.*, 1995, at pp. 101–102 (see also at pp. 90–92), in the contexts of secession and dissolution of State the adoption of liability *pro rata* is the only viable solution because it "promises to bridge the gap between the legitimate expectations of creditors and the legitimate aspirations of successor States".

298 Institut de Droit international, *State Succession in Matters of Property and Debts*, Session of Vancouver, 2001, in: 69 *Annuaire I.D.I.*, 2000–2001, at pp. 713 et seq.

299 Brigitte STERN, "General Concluding Remarks", in: Brigitte STERN (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, The Hague, Martinus Nijhoff Publ., 1998, at p. 204. See also in: Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 171.

300 Vladimir D. DEGAN, "Equity in Matters of State Succession", in: Ronald St. John MACDONALD (ed.), *Essays in Honour of Wang Tieya*, Dordrecht, Martinus Nijhoff, 1993, at p. 207. See also: Sandrine MALJEAN-DUBOIS, "Le rôle de l'équité dans le droit de la succession d'Etats", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession:*

The concepts of equity and fairness can also be used for the allocation of *liability* between the predecessor State and the successor State (and in case of dissolution of State, among the different successor States).[301] This is in accordance with the findings of the Badinter Arbitration Commission in its *Opinion no. 1*: "…the outcome of succession should be equitable, the States concerned being free to settle terms and conditions by agreement."[302]

It is submitted that the principle of equity finds application in the context of State succession to international responsibility.[303] Some writers have indeed made use of the concepts of justice and equity as the cornerstone of their analysis of the issue.[304]

Codification Tested Against the Facts, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, p. 145, at p. 149.

301 This is also the opinion of Wladyslaw CZAPLINSKI, "Equity and Equitable Principles in the Law of State Succession", in: Mojmir MRAK (ed.), *Succession of States*, The Hague, Martinus Nijhoff Publ., 1999, at p. 72, for whom "the notion of 'equitable principles' within the law of State succession refers to the equitable global result of division of assets and liabilities rather than to equitable (balanced) criteria applied to the division of specific kinds of sorts of property".

302 *Opinion no. 1*, 29 November 1991, in: 92 *I.L.R.*, 1993, p. 166 (under letter 1)e). For a critical analysis of this statement, see: P.M. EISEMANN, "Rapport du Directeur de la section de langue française du Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, p. 28.

303 Vladimir D. DEGAN, "Equity in Matters of State Succession", in: Ronald St. John MACDONALD (ed.), *Essays in Honour of Wang Tieya*, Dordrecht, Martinus Nijhoff, 1993, at p. 207, believes that "one should reach an equitable solution in *any* specific problems arising from State succession" (emphasis added).

304 This is the position of Michael John VOLKOVITSCH, p. 2172, who summarises this issue as the confrontation of two inherently antagonistic equitable principles in international law: "Is it more important that every victim of an international wrong be allowed a remedy? Or should States only be held liable for those acts that they can be truly said to have caused?" He concludes (at p. 2200) that "the balance of the compelling equitable considerations of providing compensation to the victim and attributing responsibility to a somewhat distant party tips strongly in favour of the former". Thus, for the author (see at pp. 2211–2212), it is more fair to compensate the victims and to impose liability on a State even though traditional notions of State responsibility would not call for such liability to be imposed on that State. He believes that the same phenomenon also exists under municipal law where he observed "a shift from a system centered on the punishment of tortfeasors to one that focuses on the compensation of victims and the avoidance of incidents". For him, the situation prevailing under municipal law with respect to torts is relevant in deciding issues of State succession to international responsibility. Thus, "the competing equities in both cases are the same, that of compensation for the victim as opposed to the imposition of liability on a party whose 'fault' would not have been sufficient to engender liability under traditional notions of torts, and the answer reached in one case can illuminate the decision in the other". *Contra*: Georg DAHM, *Völkerrecht*, vol. 1, Stuttgart,

Reference can also be found in municipal case law where equity seems to have dictated the solution.[305]

More specifically, the outcome of the allocation of liability between the continuing State and the successor State (or among the different successor States in the context of dissolution of State) for obligations arising from the commission of internationally wrongful acts should be fair and equitable.[306] The outcome of the allocation of liability should be fair not only from the perspective of the interests of both the continuing State and the successor State(s) but *also from the point of view of the injured third State*. In other words, the outcome needs to respect the right of the injured third State to have its damage redressed. This rule set out in the context of the division of debts should also be applied when dealing with questions of succession to international responsibility.[307] Recent State practice concerning the allocation of debts in the context of the dissolution of Yugoslavia and the U.S.S.R. has in fact shown that creditor States have dictated the results of such allocation.[308] The injured third State is thus not bound by any agreement entered into between the predecessor State and the successor State(s) deciding the allocation of liability between them.[309] This is in accordance with Article 34 of the *Vienna Convention on the Law of Treaties*, whereby "a treaty does not create either obligations or rights for a third State without its consent".[310] The injured third State may thus object to an unfair allocation of liability.[311]

W. Kohlhammer Verlag, 1958, at p. 121, for whom there is no general principle of succession to international responsibility even based on the concept of equity.

305 *Pittacos v. Etat Belge*, Court of Appeal (2nd Chamber), 1 December 1964, in: *Journal des tribunaux*, 1965, p. 7, at p. 9. This case is discussed in detail at *supra*, p. 173. The Court held that: "…c'est sur l'équité que se fonde le principe de droit international public selon lequel les dettes quasi-délictuelles nées avant le démembrement d'un Etat restent à la charge de l'Etat démembré (lequel serait, en l'occurrence, la Belgique)".

306 For Georg SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, vol. I, 3rd ed., London, Steven & Sons, 1957, pp. 175–176, in the context of dissolution of State, the "share of the liability" among the successor States for the internationally wrongful act committed by the predecessor State before the date of succession "can be determined only by equitable considerations".

307 Article 36 of the *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, in: 22 *I.L.M.*, 1983, p. 306. See also at Article 24(1) of the *Institut de Droit international*'s resolution on *State Succession in Matters of Property and Debts*: "A succession of States should not affect the rights and obligations of private creditors and debtors" (Institut de Droit international, *State Succession in Matters of Property and Debts*, Session of Vancouver, 2001, in: 69 *Annuaire I.D.I.*, 2000–2001, at pp. 713 et seq.).

308 This point is discussed in: P. WILLIAMS & J. HARRIS, "State Succession to Debts and Assets: the Modern Law and Policy", 42 *Harv.Int'l L.J.*, 2001, at p. 413.

309 This point is discussed in: Miriam PETERSCHMITT, at pp. 31–32.

310 *Vienna Convention on the Law of Treaties*, in: 1155 *U.N.T.S.*, p. 331.

311 *Contra* (in the context of the division of debts): Wladyslaw CZAPLINSKI, "Equity and Equitable Principles in the Law of State Succession", in: Mojmir MRAK (ed.), *Succession of States*, The Hague, Martinus Nijhoff Publ., 1999, at p. 69.

The *strict and automatic* application of a principle of *non-succession* to international responsibility could lead, in some circumstances, to unjust and unfair results. This is recognised in doctrine.[312] This is even admitted by those writers who support the principle of non-succession but who nevertheless accept the transmission of the consequences of internationally wrongful acts to the successor State on grounds of equity.[313] Two examples will illustrate this point.

Firstly, the application of a strict and automatic principle of non-succession in the context of *unification of States* would be unfair for the injured third State which would be left with no debtor.[314] This was recognised by the Arbitral Tribunal in the *Lighthouse Arbitration* case.[315] The argument was also advanced by Great Britain in the *Hawaiian Claims* case.[316] Thus, based on the concept of equity, Counsel for Great Britain claimed in his pleading that the "unification" did not extinguish international claims existing prior to the date of succession:

> What I am contending here is that one must look at the circumstances, the political circumstances of the coalition [between the United States and the independent Republic

312 Thus, for Brigitte STERN, Responsabilité, p. 336, the application of a strict doctrine of non-transferability would go against the idea of justice: "Une absence systématique de succession en matière de responsabilité choque cependant l'esprit de justice". See also: J.H.W. VERZIJL, p. 220. Miriam PETERSCHMITT, p. 33, adopts the same approach based on the concept of good faith: "[I]l y a des situations de succession où un refus d'assumer les conséquences de la responsabilité internationale de l'Etat prédécesseur va à l'encontre d'un principe fondamental du droit international qui est celui de la bonne foi. Ce principe repose sur la confiance qu'un sujet de droit a à l'égard de l'autre et notamment dans le fait que dans leurs relations juridiques mutuelles chacun s'acquittera de ses obligations. En conséquence, un Etat lésé par un fait illicite d'un autre Etat peut avoir confiance que ce dernier respectera les obligations lui incombant de par sa responsabilité".

313 Jean Philippe MONNIER, p. 90, admits that, in some circumstances, "la transmission des obligations nées de l'acte illicite…répondrait à des considérations de justice et d'équité".

314 Miriam PETERSCHMITT, p. 33, believes that the concept of good faith should be applied whenever a succession of States is the result of an agreement between them (such as in cases of unification of States).

315 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 92: "the avowed violation of a contract committed by one of the two States, linked by a common past and a common destiny, with the assent of the other, would, in the event of their merger, have the *thoroughly unjust consequence* of cancelling a definite financial responsibility and of sacrificing the undoubted rights of a private firm holding a concession to a so-called general principle of non-transmission of debts in cases of territorial succession, which in reality does net exist as a general and absolute principle" (emphasis added).

316 *F.H. Redward and Others* (Great Britain v. United States), Award of 10 November 1925, *U.N.R.I.A.A.*, vol. 6, p. 158. In its pleadings, Great Britain described the events which took place in Hawaii at the end of the 19th Century as a "voluntary union" between the United States and the "Republic of Hawaii".

> of Hawaii], and then consider the question really from the point of view of common sense, equity, and justice.[317]
>
> It is surely unjust and inequitable to the highest degree that all obligations should simply perish. Surely it is repugnant to natural justice when a person has a perfectly just claim against the Hawaiian Government [i.e. the predecessor State] that it simply be extinguished because that Government and the United States choose to enter into a voluntary union.[318]

Secondly, the strict and automatic application of a principle of non-succession could also lead to an unfair outcome for the continuing State in the context of *secession* and the creation of *Newly Independent States* if the internationally wrongful act was in fact committed by a political entity with which the new State has an "organic" or "structural" continuity.[319]

In both examples just examined, the principle of equity would certainly call for the transfer of the obligation to repair to the successor State. This solution should be adopted in order to prevent the unfair results of the application of a *strict and automatic* principle of non-succession.

A good illustration of the usefulness of the principle of equity to resolve problems of State succession to international responsibility is in the context of *dissolution of State*. The strict and automatic application of a principle of *non-succession* would certainly result in an unfair outcome for the injured third State in so far as an internationally wrongful act would remain unpunished because the predecessor State ceased to exist. Thus, a State would have suffered damage from a breach of international law but would have no debtor against whom it could file a claim for reparation. The unfairness of such results is recognised in doctrine.[320] It was also stated (in the form of an *obiter dictum*) by the Arbitral Tribunal in the *Lighthouse Arbitration* case.[321] However, the strict and automatic application of a principle of

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317 *Synopsis of Argument in behalf of Great Britain*, *R.E. Brown Case*, in: Fred K. NIELSEN, *American and British Claims Arbitration*, Washington, G.P.O., 1926, at p. 88.

318 *Ibid.*, at p. 92.

319 This question was discussed in detail at *supra*, p. 260.

320 Brigitte STERN, Responsabilité, p. 336: "Il nous paraît… particulièrement préoccupant qu'une responsabilité délictuelle encourue par un Etat disparaisse purement et simplement dans toutes les hypothèses où ne subsiste, à l'issue d'un processus successoral, aucun Etat continuateur". For Georg SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, vol. I, 3rd ed., London, Steven & Sons, 1957, pp. 175–176, in cases of dissolution of State, international liability should be transferred to the new successor States "based on ground of estoppel and [would] rests on the rules governing the principle of good faith". For Miriam PETERSCHMITT, pp. 33, 72, the concept of good faith would call for the rights of injured third States for compensation to be respected by the successor States.

321 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 93: "What justice, or even what juridical logic, would there be, for example, in the hypothesis of an international wrong committed against another Power by a State which subsequently splits up into two new independent States, in regarding the later as being free from an international obligation to make compensation which would without any doubt have lain on the former, predecessor, State which had committed the wrong?"

succession in the same context of dissolution of State would also lead to unfair results. Thus, such principle of automatic transfer of the consequences of responsibility to *all* successor States could be unfair for those successor States that have not been involved in the commission of the internationally wrongful act and which have not benefited from it.

Ultimately, the concept of equity will play the following role:

- In the context where the predecessor State ceases to exist (integration and unification of States), equity will ensure that an internationally wrongful act does not remain unpunished and that the injured State victim of such an act is not left without any debtor against whom it can file a claim for reparation;
- In the other context, where the predecessor State continues to exist (such as cases of secession), equity will ensure that the State being held responsible for the wrongful act is the one which was involved in its commission or has enriched itself as a result;
- In the context of dissolution of State, equity will ensure, on the one hand, that an internationally wrongful act does not remain unpunished and, on the other hand, will determine which of the successor States should be held responsible for it.

An example of a fair and equitable allocation of liabilities among the different successor States in the context of dissolution of State is that of the dismemberment of the Union of Colombia (from 1829 to 1831).[322] Apparently, the method of allocation of liability among the three successor States was in proportion to Colombia's division of its national debt as agreed among them at the time of the dissolution.

Another example of a fair and equitable way to decide questions of allocation of liabilities among the different successor States is the establishment of a settlement of disputes mechanism such as the one included in the 2001 *Agreement on Succession Issues* entered into by all successor States in the context of the dissolution of Yugoslavia.[323] The preamble to the Agreement indicates that the Agreement was reached after discussions and negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". In particular, Article 2 of Annex F to the Agreement deals with the principle of the transfer of the "obligation to repair" from the predecessor State to the successor States and indicates that "all claims against the SFRY" shall be "considered" by the Standing Joint Committee, which will settle any "differences" among the successor States arising over the "interpretation and application" of the Agreement.[324]

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322 This example is discussed in detail *supra*, p. 106.

323 The Agreement can be found in: 41 *I.L.M.*, 2002, pp. 1–39. The Agreement is discussed in detail at *supra*, p. 119.

324 Under Article 5, these differences should be first settled through "discussions" amongst the States. The matter may be referred to either "an independent person of their choice"

10. *The Relevance of the Territorial Factor to Resolve Issues of Succession to Responsibility*

This section addresses the link between the territory of a State and the transfer of the obligation to repair. More specifically, the question discussed in this section (at Section 10.1) is whether there is a general rule whereby the successor State is automatically responsible for obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession solely based on the fact that such acts took place on what is now its territory. This section also addresses (at Section 10.1) whether such rule of transfer of the obligation to repair exists with respect to violations of territorial regimes obligations.

The concept of territory is of great importance in the field of State responsibility (as well as in other fields of international law). As previously observed, the modern theory of territory in international law is the *Kompetenztheorie*, whereby the territory of a State is defined as the "territorial sphere of validity of the national legal order called a State".[325] The correlative aspect of the sovereignty of the State over its territory is, logically, that, in principle, it is responsible for internationally wrongful acts committed within its territory.[326] This rule is not without any effect in the specific context of State succession.

There is no doubt that the element of territory is, generally speaking, of the greatest importance in order to determine any issue of State succession.[327] This importance is recognised in doctrine.[328] This statement certainly applies in

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or to the Standing Joint Committee which may make "appropriate recommendations to the Governments of the successor States" (Article 4(2)).

325 Hans KELSEN, *Principles of International Law*, 2nd ed., New York, Holt, Rienhart & Winston inc., 1966, p. 307. According to Benedetto CONFORTI, "The Theory of Competence in Verdross", 6(1) *E.J.I.L.*, pp. 74–75, "the territory delimits the sphere within which the State is in principle free to exercise its own coercive power in all directions, free in principle to do what it wants".

326 These questions are further explored in: Malcolm N. SHAW, "Territory in International Law", 13 *Netherlands Y.I.L.*, 1982, p. 73. A clear statement of that rule is found in the dissenting opinion of Judge Moore in the *Case of the S.S. "Lotus"*, Judgment of 7 September 1927, P.C.I.J. *Serie A*, no. 10, at p. 68: "It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied. The benefit of this principle equally enures to all independent and sovereign State, and is attended with a correspondent responsibility for what takes place within the national territory".

327 Thus, both Vienna Conventions concerning State succession include provisions specifically related to the element of territory. See, for instance, Articles 11 and 12 of the 1978 *Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488.

328 Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, p. 690, admits that, in principle: "La transmissibilité des droits et obligations internationaux résulte du fait qu'ils trouvent un point de rattachement, plutôt que dans leur titulaire, dans des choses matérielles,

particular to problems of State succession to obligations arising from the commission of internationally wrongful acts. Some writers have, indeed, emphasised the importance of where an internationally wrongful act was actually committed to determine which of the continuing State or the successor State(s) should bear the responsibility for it.[329] This is especially the case with Hyde.[330] Others have, on the contrary, rejected that any particular emphasis be put on the territorial element in deciding questions of State succession to international responsibility.[331] This is also the position of Monnier:

> La thèse opposée, qui veut rattacher l'acte illicite au territoire, 'dépersonnalise' en quelque sorte l'obligation qu'il engendre. S'il n'est pas contestable que la souveraineté territoriale forme l'assise des pouvoirs de l'Etat, cette constatation ne saurait pour autant justifier une construction liant au sol l'obligation délictuelle au même titre que les obligations de nature réelle contenues par exemple dans un traité concernant la fixation d'une frontière ou l'exploitation d'un cours d'eau. Cette théorie, qui ne trouve

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dans des lieux ou territoires déterminés… qui peuvent passer indifféremment d'un sujet à l'autre" (emphasis added). However, for Udina this reasoning applies only to cases where no *intuitu personae* rights and obligations exist. For the learned author (see at p. 767), internationally wrongful acts committed by the predecessor State against third States are so "strictly personal" to the former that they cannot be transferred to the successor State. Therefore, Udina expressly excludes the relevance of the element of territory with respect to internationally wrongful acts.

329 This is, for instance, the position held by Miriam PETERSCHMITT, p. 28, for whom: "Si le droit international préconise la succession pour les droits et les obligations présentant un lien territorial, la conséquence logique voudrait que le droit international admette aussi la succession dans les droits et les obligations découlant de la responsabilité internationale qui présentent un tel lien".

330 Charles Cheney HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 2nd ed., Boston, Little, Brown & Co., 1945, pp. 437–438. According to the author, internationally wrongful acts committed by a State cannot be separated from the territory: all international tortious acts committed by a State have a territorial basis, even the one committed outside of the territory of that State. He is particularly critical (see at p. 437) of the "prevailing theory that seemingly disassociates State responsibility from the territory that undergoes a complete change of sovereignty" which he concluded "leaves something to be desired". The learned author (see at pp. 437–438) is, instead, in favour of a principle under which there would be a "connection between the territory as such and certain forms of conducts committed thereon as to cause [the new State] to afford under some conditions a means of redress regardless of a change of sovereignty that marks the extinction of the tort feasor". As a consequence, Hyde is of the view that (at p. 438) "the particular territory concerned, despite the extinction of the former sovereign, should, at least under certain conditions, be made to bear the burden of requiting wrongs due to, and growing out of, the assertion of supremacy therein". Hyde concludes his analysis (at p. 438) by stating that his proposition, according to which "the territory should be made the means of redressing wrongs necessarily attributable to the exercise of sovereignty within it", is "worthy of the faithful consideration of the international society".

331 Manlio UDINA, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *R.C.A.D.I.*, t. 44, 1933–II, pp. 690, 767.

> d'ailleurs aucun appui dans la pratique diplomatique ou arbitrale, est trop artificielle pour être retenue.[332]

There is very limited case law on this question. One relevant example is an incident which arose in the context of the secession of Belgium from the Kingdom of the Netherlands in 1830.[333] France, Great Britain, Prussia and the United States made a joint application to Belgium (the new successor State), requesting compensation from the latter "solely upon the ground that the obligation to indemnify for such losses rested upon the country within which the injury was inflicted".[334] One of the legal grounds invoked by the United States for Belgium to be held responsible for the damage specifically referred to the territorial link between the "tort" and the tortfeaser:

> The governments of the respective merchants whose property was destroyed by the bombardment claimed indemnity for these losses from the Kingdom of Belgium. The ground of the claims was, that the injury was inflicted on a territory which, at the time the reclamation was made, had become a part of Belgium; but Belgium attempted to evade it by alleging that the Dutch government received the property, had it in possession, and destroyed it; and from Holland, and not Belgium, indemnity must be sought.[335]

There is no principle under positive international law whereby the successor State is *automatically* responsible for obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession *solely based* on the fact that such acts took place on what is now its territory. In other words, the fact that an internationally wrongful act took place on the territory of the new State before its independence should not, *in itself*, be a ground for finding this State responsible for such act. The question of where an internationally wrongful act was committed is in fact *only one relevant element* out of many which need to be taken into account in determining which State should be responsible for such act.

Any general theory to the contrary would anyway be quite limited in its scope of application, as it would not be able to deal with internationally wrongful acts committed *outside* the territory of the predecessor State. The concrete application of such general theory could also lead, in certain circumstances, to unfair results. Such would certainly be the case whenever an internationally wrongful act is committed before the date of succession in the territory of a new State but with which that new State had nothing to do and for which it received no benefit or advantage. In such circumstances, it would seem unfair to transfer to the new State

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332 Jean Philippe MONNIER, pp. 88–89.

333 This example is further discussed in detail at *supra*, p. 161.

334 This is the conclusion reached by U.S. Secretary of State, Mr Marcy, in a letter (dated 26 February 1857) to French Minister Count Sartiges concerning the claims of French subjects as a result of the U.S. bombardment of Greytown in 1854, in: MS. Notes to French Leg. VI. 301; S. Ex. Doc. 9, 35 Cong. 1 sess. 3, in: John Bassett MOORE, *Digest of International Law*, vol. VI, Washington, G.P.O., 1906, at p. 929.

335 *Id.*

the obligations arising from the commission of the act only based on the fact that it took place on what is now its territory.

10.1 *Violation of Territorial Regime Obligations*

Although, as a matter of principle, the successor State should not be automatically liable for obligations arising from internationally wrongful acts committed by the predecessor State on what is now its territory, the successor State should nevertheless be responsible for acts which are *specifically linked to its territory*, such as violations of territorial regime obligations.

It is a well-recognised principle that for considerations of stability in international relations successor States are bound to respect pre-existing international frontiers and international boundary treaties established by the predecessor State.[336] Similarly, the Successor State cannot denounce an "objective" situation created by a treaty regarding territory, such as "servitudes" or other territorial regimes.[337] This is the solution provided for at Article 12 of the *1978 Vienna Convention on Succession of States in Respect of Treaties*.[338] In the *Case Concerning the Gabčíkovo-Nagy-*

336 *Frontier Dispute Case* (Burkina Faso v. Mali), Judgment of 22 December 1986, *I.C.J. Reports 1986*, p. 554; *Case Concerning the Determination of the Maritime Boundary between Guinea and Guinea-Bissau*, Arbitral Tribunal, Award of 14 February 1985, in: *U.N.R.I.A.A.*, vol. 19, p. 149, para. 40. On this point, see: Maria del Carmen MARQUEZ CARRASCO, "Régimes de frontières et autres régimes territoriaux face à la succession d'États", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits / State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 493–577; Photini PAZARTZIS, *La succession d'Etats aux traités multilatéraux à la lumière des mutations territoriales récentes*, Paris, Pedone, 2002, pp. 164–169; Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, pp. 255–262.

337 In the 1960 *Right of Passage Case, Merits* (India v. Portugal), Judgment of 12 April 1960, *I.C.J. Reports 1960*, p. 6, at p. 40, the I.C.J. recognised the opposability to a new State (India) of an "objective" situation (the rights of passage of civilians and civil servants on a territory) created by a bilateral customary rule between Great Britain and Portugal. The Court also held that this practice had been *accepted* as law by the Parties (including India after its independence) and had given rise to a right and a correlative obligation. On the concept of international servitude, see: D.P. O'CONNELL, *State Succession*, vol. II, pp. 17 et seq. He provides a long list of examples of "active" servitudes (such as the right of way by a State over the territory of another, rights respecting the maintenance of river banks and international railways and rights to navigate in national waterways) as well as examples of "negative" servitudes (such as the neutralisation or demilitarisation of a territory).

338 *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488.

maros Project, the Court considered that "Article 12 reflects a rule of customary international law".[339]

To the extent that a successor State inherits territorial regimes obligations from the predecessor State, it should also take over *the consequences of the violation of such obligations* committed by the predecessor State prior to the date of succession. Thus, the high degree of importance that the international community accords to the respect of those rights and obligations specifically linked to the territory of a State should also be reflected in the way violations of such obligations are dealt with. The commission of an internationally wrongful act related to a territorial regime by the predecessor State should not go unpunished as a result of the mechanisms of succession of States. Logically, only the State having in fact inherited rights and obligations from servitudes and other territorial regimes as a result of the mechanisms of succession of States should bear the responsibility for any violation related to such obligations committed prior to the date of succession.[340]

There is support in doctrine for the proposition that upon its arrival on the international scene a new State should, as a matter of principle, be held responsible for obligations arising from violations of territorial regimes committed by the predecessor State before the date of succession on what is now its territory.[341]

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339 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 123. This is also the conclusion reached by Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 165.

340 In practical terms, in the context of dissolution of State not all successor States would be concerned by this principle: only those which inherited rights and obligations from the territorial regime or the servitude. In cases of secession, the creation of Newly Independent States and cession of territory, it would have to be determined which of the continuing State or the successor State is still bound by the territorial regime or the servitude after the date of succession. For instance, if it is the successor State that now has such an obligation to respect the territorial regime or the servitude it, alone, should take over obligations arising from the internationally wrongful act originally committed by the predecessor State. If both the continuing State and the successor State have the obligation to respect the territorial regime they should, consequently, both be held responsible for internationally wrongful acts committed before the date of succession.

341 Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 224 (for the authors, in cases where the predecessor State does not cease to exist, it is nevertheless the new successor State which should be held liable for "those claims, having a local character attaching to the territory of the new State"); Jean Philippe MONNIER, pp. 88–89 ("[s]'il n'est pas contestable que la souveraineté territoriale forme l'assise des pouvoirs de l'Etat, cette constatation ne saurait pour autant justifier une construction liant au sol l'obligation délictuelle au même titre que les obligations de nature réelle contenues par exemple dans un traité concernant la fixation d'une frontière ou l'exploitation d'un cours d'eau"); Ivan A. SHEARER, *Starke's International Law*, 11th ed., Sydney, Butterworths, 1994, p. 303 ("where a tort relates to territory, as where there has been a wrongful diversion of water… it may in some circumstances be reasonable to bind the successor State to respect the unliquidated claim against its predecessor"). See also: Miriam PETERSCHMITT, pp. 28–29. This is also the position of Michael John

However, no State practice or international case law was found where the issue was discussed. One possible relevant example would be the *Case Concerning the Gabčíkovo-Nagymaros Project* before the I.C.J., where a new State (Slovakia) decided to specifically take over obligations arising from the internationally wrongful act of the predecessor State (Czechoslovakia) concerning the violation of obligations stipulated in a territorial regime (a series of dams along the Danube).[342] However, it should be noted that Slovakia clearly did not base such position on the application of any general theory of succession to responsibility. In fact, Slovakia denied altogether the existence of any such theory of succession.[343]

11. *The Relevance of Treaty Succession to Resolve Issues of Succession to Responsibility*

The question examined in this section is whether the solution to the issue of State succession to the obligation to repair is different depending on the *origin* of the internationally wrongful act breached by the predecessor State (i.e. treaty violations, violations of customary international law, etc.).

It has been argued in doctrine that whenever a successor State becomes party to a treaty by way of succession, there is an automatic transmission of the international obligations arising from prior treaty violations committed by the predecessor State before the date of succession. This rule is affirmed by Stern.[344] Another writer is of the view that the successor State should be under the obligation to take over

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VOLKOVITSCH, pp. 2207–2208, for whom the principle of servitude "does provide further support for a presumption of succession to responsibility for those delicts that have a clear territorial element".

342 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 123.

343 Thus, in its written pleadings (*Counter-Memorial of the Slovak Republic*, vol. I, 5 December 1994, at paras. 3.59, 3.60), Slovakia made reference to the "widely accepted thesis of non-succession to delictual responsibility" quoting the work of Jean Philippe Monnier in order to "recall" "the practically unanimous view of the doctrine" on this question.

344 Brigitte STERN, Responsabilité, pp. 344–348, who states the existence of a "principle de transmission en même temps que le traité de la responsabilité née de la violation de ce traité". The existence of such a rule is criticised by Miriam PETERSCHMITT, pp. 14–21, in particular at p. 19: "De tous ces points, il s'ensuit, d'une part, que l'application du principe de la transmission de la responsabilité en même temps que le traité violé est probablement restreinte aux cas de la succession automatique et, d'autre part, que la succession au traité n'est pas le seul critère décisif pour affirmer ou nier une succession aux droits et aux obligations découlant de la responsabilité internationale. L'utilité du principe est, dès lors, fortement mise en cause". However, the author comes to a different conclusion with respect to human rights treaties (see at pp. 37, 72).

the consequences of *human rights* treaty violations committed by the predecessor State before the date of succession.[345]

Article 39 of the 1978 *Vienna Convention on Succession of States in Respect of Treaties* specifically indicates that the question of succession of States to responsibility is reserved.[346] The origin of the obligation breached should not (as a matter of principle) lead to a different treatment. There seems to be no reason to treat treaty violations differently than other violations of customary international law or general principles of law. Ultimately, there is simply no State practice and international case law in support of such a principle of automatic succession for treaty violations.

Reference is made in doctrine to the *Case Concerning the Gabčíkovo-Nagymaros Project* before the I.C.J., where it was argued that the Court adopted the principle of succession for responsibility arising out of a treaty violation.[347] However, it would seem that the Court found Slovakia liable to pay compensation to Hungary for the wrongful conduct of Czechoslovakia solely based on the *Compromis* entered into between Hungary and Slovakia whereby Slovakia affirmed that it was the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project.[348] The Court did not discuss the question whether any obligation to repair arising from the treaty violation committed by Czechoslovakia should be transmitted to Slovakia because it became party to the 1977 Treaty.[349] In fact, none of the Parties even invoked this argument in their pleadings. Slovakia maintained that Czechoslovakia had not breached the 1977

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345 Miriam PETERSCHMITT, p. 37: "L'aspiration de la communauté internationale à voir la personne humaine protégée et à lui accorder une protection ininterrompue en cas de succession d'Etats nous amène à constater qu'il y a une tendance de plus en plus forte à considérer un Etat successeur en obligation de réparer les actes contraires aux droits de l'homme commis par l'Etat prédécesseur sur son territoire". See also her conclusion (at p. 72): "La protection des droits de l'homme est un autre fondement pour admettre la succession dans cette responsabilité particulière pour assurer la protection ininterrompue de la personne humaine et pour ne pas lui enlever les moyens d'obtenir la réparation de la violation de ses droits".

346 *1978 Vienna Convention on Succession of States in Respect of Treaties*, U.N. Doc. ST/LEG/SER.E/10, in: 17 *I.L.M.*, 1978, p. 1488. Article 39 reads as follows: "The provisions of the present Convention shall not prejudge any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States".

347 Brigitte STERN, Responsabilité, p. 344, stating that "le principe de la succession pour la responsabilité résultant de la violation d'un traité a été appliqué [by the Court], pour ainsi dire sans le moindre débat".

348 This view is also expressed by Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 54. See also the analysis of Miriam PETERSCHMITT, pp. 20–21.

349 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 123. The Court determined that the 1977 treaty entered into by Hungary and Czechoslovakia was of a "territorial character" and that, consequently, it became binding upon Slovakia (as successor State) on 1 January 1993.

Treaty.[350] Hungary only went so far as to state that secondary obligations resulting from the violation of the Treaty committed by Czechoslovakia would simply not vanish with the break-up of the country.[351] Ultimately, Hungary's position was that the 1977 Treaty had ceased to be in force as of 31 December 1992 (the date of the dissolution of Czechoslovakia) and that, consequently, Slovakia had never been party to the Treaty.[352] What is more is that both Parties, in fact, denied altogether the existence of any "rule" of succession to obligations arising from the commission of an internationally wrongful act.[353]

In fact, only one case has been found (about which very little information is available) that could possibly be interpreted as supporting (to some extent) the principle of automatic succession to treaty violations. This is the *Mechanic* case, where in May 1824, a U.S. schooner, the Mechanic, was captured by another ship licensed by the Republic of Colombia, which was at the time engaged in a war of independence with Spain.[354] The seizure by Colombia was contrary to Article 15 of the 1795 *Treaty of Friendship, Boundaries, Commerce and Navigation* between

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350 *Counter-memorial submitted by the Slovak Republic*, 5 December 1994, at para. 3.69. Therefore, the question whether in becoming Party to the 1977 treaty it also became responsible for any eventual treaty violations committed by the predecessor States simply did not arise.

351 *Memorial of the Republic of Hungary*, vol. I, 2 May 1994, at para. 8.03: "The first legal consequence is that Slovakia cannot be deemed responsible for breaches of treaty obligations attributable only to Czechoslovakia, which no longer exists. Nevertheless, Czechoslovakia's breaches of the 1977 Treaty, other bilateral treaties, various multilateral conventions and customary international law created a series of secondary obligations; namely, the obligation to repair the damage caused by the internationally wrongful acts. These secondary obligations were neither extinguished by the termination of the 1977 Treaty nor by the disappearance of Czechoslovakia".

352 *Memorial of the Republic of Hungary*, vol. 1, 2 May 1994, at para. 6.05: "Although the Slovak Republic sought Hungarian agreement to its succession to the 1977 Treaty, the Republic of Hungary declined to agree to this". See also at para. 6.06 of the same document, where Hungary states that the 1977 treaty "has *never* been in force between the parties to the present case" (emphasis in the original).

353 *Reply of the Republic of Hungary*, vol. I, 20 June 1995, at para. 3.163; *Counter-memorial submitted by the Slovak Republic*, vol. I, 5 December 1994, at para. 3.59. The argument developed by Hungary was that Slovakia should be responsible for internationally wrongful acts committed by the predecessor State because when becoming a State (on 1 January 1994) Slovakia continued, maintained and aggraved the acts initially committed by Czechoslovakia (see at para. 8.03 of its *Memorial* dated 2 May 1994).

354 This example is briefly examined in: John Bassett MOORE, *A Digest of International Law*, vol. V, Washington, G.P.O., 1906, at pp. 342–343. Large extracts of the case can be found in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 3221–3227; A. de LAPRADELLE, & A. POLITIS, *Recueil des arbitrages internationaux*, vol. II, 1856–1872, Paris, Pedone, 1923, at p. 433. This case is also briefly discussed in: Lord McNAIR, *The Law of Treaties*, Oxford, Clarendon Press, 1961, at p. 611.

the United States and Spain.[355] Ecuador was still part of Colombia at the time of the incident; it latter became an independent State (in 1830) upon the dissolution of the Union of Colombia.[356] Based on an 1862 arbitration agreement between the United States and Ecuador for the settlement of outstanding claims,[357] the United States brought a claim against Ecuador (now an independent State) on behalf of the insurers for the seizure of the ship. The argument developed by the United States was that Colombia was bound by the 1795 Treaty between the United States and Spain, whether as part of Spain at the time of the events or by way of succession to treaties upon its independence.[358] At any rate, it was argued that upon its independence from Colombia, Ecuador was equally bound by the 1795 Treaty through the mechanisms of State succession to treaties.

A commission decided in 1865 that Ecuador should be condemned for the internationally wrongful act committed in 1824 by the authorities of the predecessor State (Colombia).[359] The commission held that Colombia was bound by Spain's treaties and also that Ecuador, in turn, had succeeded to Colombia's treaties. It has been suggested in doctrine that the commissioners "may have intended to say that Ecuador has succeeded to the responsibility of [the predecessor State] rather than to the continuing obligations of the treaty under which responsibility arose".[360] Thus, one possible way to analyse the decision of the Commission is that Ecuador (as the successor State) was bound by the 1795 Treaty and, consequently, it was

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355 The Treaty can be found in: William M. MALLOY, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776–1909*, vol. II, Washington, G.P.O., 1910–1938, p. 1795.

356 The dissolution of the Union of Colombia is discussed in detail at *supra*, p. 106.

357 The Agreement can be found in: William M. MALLOY, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776–1909*, vol. I, Washington, G.P.O., 1910–1938, p. 432.

358 The position of the United States is expressed in: Letter of U.S. Secretary of State Mr Adams to Mr Anderson, U.S. Minister appointed to Colombia, 27 May 1823, in: *British & Foreign State Papers*, vol. 13, p. 459, at pp. 480–481; John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at p. 3224. The same affirmation of continuity of the Treaty is also made in: Letter of U.S. Secretary of State Mr Forsyth to Mr Semple, the Chargé d'affaires to New Grenada, 12 February 1839, in: John Bassett MOORE, *A Digest of International Law*, vol. V, Washington, G.P.O., 1906, at p. 342.

359 Opinion delivered by Commissioner Hassaurek in the name of the Commission in the case of *Atlantic & Hope Insurance Co. v. Ecuador*, in: John Bassett MOORE, *A Digest of International Law*, vol. V, Washington, G.P.O., 1906, at pp. 342–343. In fact, Ecuador paid only 21.5% of the original amount claimed. This was the proportion of the old Colombian debts for which the new State of Ecuador was held liable after the dissolution of Colombia.

360 D.P. O'CONNELL, *State Succession*, vol. II, p. 94.

found responsible for obligations arising from the initial violation of that Treaty by Colombia (the predecessor State).[361]

12. *Internationally Wrongful Acts having a Special Character*

The question addressed in this section is whether the *character* of the internationally wrongful act committed by the predecessor State before the date of succession does in any way influence the issue of State succession to the obligation to repair. In other words, is the solution to this issue dictated by the fact that the predecessor State breached an international obligation considered by the international community to be more important? The commission of so-called "odious" acts and violations of *jus cogens* norms will be examined.

12.1 *Commission of "Odious" Acts*

There is support in doctrine for the principle that "odious debts" are non-transmissible from the predecessor State to the successor State(s) as a matter of customary international law.[362] The so-called "odious debts" include war debts contracted by the predecessor State in its war efforts against the successor State and the "enslavement" or "subjugation" debts, which are debts contracted with the aim of the colonisation of a territory.[363] The I.L.C. work defined such odious debts as those contracted by the predecessor State "with a view to attaining objectives contrary to the major interests" of the successor State and those debts contracted by the predecessor State "with an aim and for a purpose not in conformity with international law".[364] A similar language has been used by the Iran-U.S. Claims Tribunal.[365]

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361 However, it has been observed in doctrine by D.P. O'CONNELL, *Ibid.*, p. 93, that the decision is obscurely reasoned and that the role which the Treaty of 1795 played in the decision of the Commission is not clear at all.

362 Brigitte STERN, Responsabilité, p. 341.

363 *Id.*, see the numerous examples she provides.

364 *Ninth Report on Succession of States in Respect of Matters Other than Treaties*, by Mr M. Bedjaoui, Special Rapporteur, 28th session of the I.L.C., 1977, U.N. Doc. A/CN.4/301 and Add.1, I.L.C. Report, A/32/10, 1977, chp. III(A)(1), par. 49, in: *Yearbook I.L.C.*, 1977, vol. II, p. 45, at p. 70.

365 *United States of America v. The Islamic Republic of Iran (Case B-36)*, Award No. 574–B36–2, 3 December 1996, in: 32 *Iran-U.S. C.T.R.*, p. 162. Iran argued that a 1948 contract between the United States and pre-revolution Iran was actually imposed by the former on the latter. The Tribunal rejected this argument and indicated (at para. 51) that "[t]he Tribunal is of the opinion that the debt under the 1948 Contract cannot be classified under the notion of 'odious debts' as understood in international law. They were not contracted with a view to attaining objectives contrary to the legitimate interests of Iran nor were they contracted with an aim and for a purpose not in conformity with international law". It should be noted that the Tribunal also indicated (at para. 49) that

In case of "odious debts", it is argued in doctrine that it would be illogical if these debts were to pass to the successor State(s) since these debts were in fact incurred with the very aim of defeating the successor State's struggle for independence.[366] There would indeed be "ethical, moral and political reasons" for such debts not to bind the successor State(s), since such transmission would "constitute a serious impairment of (a successor's) interests".[367] The I.L.C. took the position that "if the debt was contracted by a State for the purpose of committing a wrongful act against another State, the position is clear: the other State, if it becomes a successor State, will not acknowledge the debts".[368] This solution of non-succession to odious war debts was applied in the case of *S. Th. v. German Treasury* decided by a German Court: "…in no case would there be any liability on the successor State in regard to the debts arising out of the conduct of war or otherwise connected with the war."[369] This was, however, not a case of succession of States *per se*.[370]

This is no doubt a sound approach, as it *involves claims between the predecessor State and its successor* for acts committed *against each other*. However, it has been already observed at the outset of the present study that "odious debts" would not be analysed precisely because they deal with claims *between* the predecessor State and its successor.[371] The main objective of the present study is to examine

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there was no evidence that these were "subjugation debts", since the debts had not been "incurred by Iran for the purpose of suppressing any such war or revolution".

366 Paul FAUCHILLE, *Traité de droit international public*, vol. I (1st part), 8th ed., Paris, Librairie A. Rousseau, 1922, p. 352: "…il paraît en effet difficile d'obliger l'Etat acquéreur à supporter les dettes que l'Etat cédant avait contractée pour le combattre et amener sa défaite".

367 P.K. MENON, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts*, Lewiston, N.Y., E. Mellen Press, 1991, at pp. 161–162.

368 *Ninth Report on Succession of States in Respect of Matters Other than Treaties,* by Mr M. Bedjaoui, Special Rapporteur, 28th session of the I.L.C., 1977, U.N. Doc. A/CN.4/301 and Add.1, I.L.C. Report, A/32/10, 1977, ch. III(A)(1), par. 49, in: *Yearbook I.L.C.*, 1977, vol. II, p. 45, at pp. 68–69, para. 130.

369 *S. Th. v. German Treasury*, decided by the German Reichsgericht in Civil Matters, 3 June 1924, in: *E.R.Z.*, vol. 108, p. 298, in: *Annual Digest*, 1923–1924, at pp. 59–60. In this case, the personal debt of a plaintiff living in the German colony of "German East Africa" was (partially) contracted as part of a war effort to assist the conduct of German military operations during the First World War against the United Kingdom and other allies.

370 This case arose in the context of the cession of all German colonial territories after the First World War pursuant to Article 119 of the *Versailles Treaty*, Paris, signed on 28 June 1919, entered into force on 10 January 1920, in: *The Treaties of Peace 1919–1923*, New York, Carnegie Endowment for International Peace, 1924; in: *U.K.T.S.* 1919, No. 8 (Cmd. 223). The territory known as Tanganyika (and later Tanzania) became a British Mandate under the League of Nations in 1920. The United Kingdom was therefore not a "successor State" to the territory of "German East Africa".

371 See *supra*, p. 28.

the regime of succession to obligations arising from internationally wrongful acts committed by the predecessor State *against a third State*.[372]

Some authors have used the notion of "odious debts" to make reference, more generally, to *"odious acts"* of States.[373] The proposition that obligations arising from "odious" acts committed by a State should, in principle, not pass to its successor(s) can only find very limited support in case law. In the *Lighthouse Arbitration* case, the Tribunal indicated that Claim no. 4 should be admitted, adding that this was so moreover because such claim "had nothing odious" for Greece.[374] This reference, in the form of an *obiter dictum*, seems to suggest that had the claim been related to an "odious" act committed by the predecessor State, the Tribunal would have been more reluctant to find the successor State responsible for it. The language used sometimes by courts seems to refer to the odious character of acts, which in fact may be broader than "debts" as it speaks of obligations and liabilities. The argument was, for instance, raised by the claimant in the case of *West Rand Central Gold Mining Company Ltd. v. The King* before the High Court of Justice of England:

> [B]y international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State, *except liabilities incurred for the purpose of or in the course of the particular war.*[375] (emphasis added)

Similarly, the question was dealt with in an opinion presented by British Crown Counsel to the British Colonial Office on 30 November 1900 concerning the possible repudiation by Great Britain of war bonds as well as other loans floated by the Boer South African Republic to finance its military operations against Great Britain during the Boer War:

> We think that obligations incurred during the war, or in contemplation of the war, stand upon a different footing, and we do not know of any principle in international law which would oblige Her Majesty's Government to recognise such obligations.[376]

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372 The other question of the regime applicable for internationally wrongful acts committed by a third State *against the predecessor State* is the object of Part III, *infra*.

373 Thus, D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 165, is using the term "odious debts" and affirms the "repugnancy of the suggestion that successor States should be responsible for *reprehensive actions* of their predecessor" (emphasis added). Similarly, Joe VERHOEVEN, *Droit international public*, Brussels, Larcier, 2000, p. 189, indicates that "les dettes directement liées à des *comportements infamants* paraissent difficilement transmissibles" (emphasis added).

374 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: *U.N.R.I.A.A.*, vol. 12, at p. 199.

375 *West Rand Central Gold Mining Company Ltd. v. The King*, decision of 1 June 1905, in: L.R., 1905, 2 K.B., p. 391; *British International Law Cases*, vol. II, London, Stevens, 1965, p. 283. This case is discussed in detail at *supra*, p. 72.

376 Referred to in: *Ninth Report on Succession of States in Respect of Matters Other than Treaties*, by Mr M. Bedjaoui, Special Rapporteur, 28th session of the I.L.C., 1977, U.N.

The first problem with the proposition that the consequences of the commission of "odious" acts by the predecessor State should not pass to the successor State is that there is no clear definition of what does indeed constitute an "odious" act. No attempt has ever been made to define such a loose concept, and it would arguably be impossible to come up with any satisfactory definition.

A second problem with the proposition is the fact that there is no theoretical reason justifying the conclusion that such "odious" acts should be treated differently than other "ordinary" violations of international law. Quite the contrary, justice and fairness would, in some circumstances, militate in favour of the application of a principle of succession. Thus, the application of an automatic principle of non-succession in the context of dissolution and unification of States would lead to the unsatisfactory result that grave breaches of international law, or "odious" acts, would simply go unpunished. Such situation would certainly be unfair for the injured third State. From the perspective of the injured third State, it does not matter much whether the obligation breached was "odious" or not; what is relevant is that it suffered a damage for which no reparation is available. It is submitted that the concepts of fairness and equity (which have been referred to above)[377] calling for the rejection of an all-inclusive and automatic "rule" of non-succession with respect to "ordinary" violations of international law should apply *a fortiori* when "odious" acts are committed.

Therefore, the doctrinal proposition that the consequences of the commission of "odious" acts by the predecessor State are non-transmissible to the successor State is not supported by State practice and international law. Strong arguments based on fairness also militate against such principle. As a matter of principle, a successor State may be held responsible for "odious" acts committed by the predecessor State in the same way that it may be accountable for other "ordinary" violations of international law. In that sense, the situation for "odious" acts is not any different from that of any other breach of international law.

12.2 *Breach of* jus cogens *Norms*

It has been suggested in doctrine that in cases when the predecessor State breaches a peremptory (*jus cogens*) norm of international law, the successor State(s) should automatically be held responsible for the consequences of such grave acts.[378] Other

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Doc. A/CN.4/301 and Add.1, I.L.C. Report, A/32/10, 1977, ch. III(A)(1), par. 49, in: *Yearbook I.L.C.*, 1977, vol. II, p. 45, at p. 70, para. 143.

377 See *supra*, p. 279.

378 This is the position of Michael John VOLKOVITSCH, p. 2200, for whom: "…each successor state is bound by such norms as an implicit condition of its entry into international society, and accepts with them the obligation to enforce them and provide remedies for their violation. The maintenance of such norms is essential to the health of the international system and cannot depend on the vagaries of history that sometimes determine the circumstances of state succession. Nor can international law allow a State

authors have doubted that such principle, however convenient it may be, does actually exist in positive international law.[379] Stern believes that State practice does not support the principle of the automatic transferability of the obligation to repair in case of violations of *jus cogens* norms.[380]

There is, indeed, no support in State practice and international case law for the proposition in support of the automatic transferability of the obligation to repair to the successor State in case of violation of *jus cogens* norms. As a matter of principle, the situation of the consequences of violations of *jus cogens* norms should not be treated differently from other "ordinary" norms of international law.

to avoid such liability by splitting itself into two purportedly 'new' entities otherwise committing 'State suicide'".

379 Brigitte STERN, Responsabilité, p. 349; Miriam PETERSCHMITT, p. 38.

380 *Id.* She gives the example of the *Socony Vaccum Oil Company* case, *I.L.R.*, 1954, p. 55, where Yugoslavia apparently refused to succeed to the international responsibility arising out of genocide acts committed by the Nazi puppet "independent" State of Croatia during the Second World War. However, this case (which was analysed at *supra*, p. 238) does not seem to support this proposition in so far that it does not deal with acts of genocide but only with unlawful nationalisations. On this point, see the analysis of Miriam PETERSCHMITT, p. 39.

4

GENERAL CONCLUSION TO PART II

The question addressed in this Part was as follows: who from the continuing State or the successor State(s) should be held responsible for obligations arising from internationally wrongful acts committed by the predecessor State against a third State before the date of succession? In other words, and more generally, when an internationally wrongful act is committed by the predecessor State(s) against a third State, can the obligation to repair, for which the predecessor State(s) is the debtor before the date of succession, be "transferred" to the successor State(s)?

The response of the doctrine of non-succession to this question is that the successor State is not bound by internationally wrongful acts committed by the predecessor State before the date of succession. It has been shown in this Part that such *strict and automatic* principle of non-succession to obligations arising from the commission of internationally wrongful acts suffers from many flaws. The arguments referred to by writers supporting the doctrine of non-succession are generally unconvincing. As a matter of illustration, the argument that a State is not responsible for acts committed by *other* States is undoubtedly valid in itself. Thus, no objection can be raised to the proposition that the *responsibility* for an internationally wrongful act committed before the date of succession remains with the perpetrator (the predecessor State, which sometimes becomes the "continuing" State). This argument, nevertheless, does not address at all the relevant point discussed in the present study. The relevant question is not whether there can be a transfer of *responsibility* from the predecessor State to the new State but, rather, whether the successor State may be held responsible for the *legal consequences arising from such responsibility* (i.e. international obligations). Criticisms can also be raised with respect to the theory of the personal character of internationally wrongful acts (*actio personalis moritur cum persona*), which is referred to by some in doctrine to support the principle of non-succession. This theory is based on an erroneous analogy with individual succession principles under private law and is founded on the outdated concept of *culpa* in State responsibility.

Patrick Dumberry, State Succession to International Responsibility, pp. 299–303.

Apart from the weaknesses of the arguments put forward by writers supporting a strict and automatic "rule" of non-succession to international responsibility, this doctrine suffers from two important shortcomings concerning its analysis of State practice and international and municipal case law. The first shortcoming of this doctrine is its failure to conduct its investigation of State practice and case law in the light of the fundamental distinction between different *types of succession of States*. This doctrine thus completely fails to acknowledge the (obvious and logical) fact that the solution to the problem of succession to international responsibility will essentially depend on what *type of mechanism of succession of States is involved*. The second shortcoming of this doctrine is its failure to take into account the (also logical) fact that the solution to the question just referred to depends also on a variety of other *factors and circumstances*.

Modern writers have increasingly recognised the inherent flaws and the incoherent arguments on which is based the theory supporting the strict and automatic "rule" of non-succession. A number of scholars accept, as a matter of principle, the solution of succession to the obligation to repair depending on the circumstances involved in each case. It is submitted that this is indeed the correct approach to the issue. It is clearly supported by the present analysis of State practice and international and municipal case law.

This review of the relevant State practice and case law (many of these examples having simply never been examined before in doctrine) shows a great degree of diversity of solutions to the issue of State succession to the obligation to repair. What is clear is that the strict and automatic "rule" of non-succession supported by many in doctrine is simply not representative of contemporary international law. As just explained, this practice confirms the basic assumption adopted in the present study that different solutions prevail depending on the types of mechanism of succession of States involved.

State practice shows that in the context of unification and integration of States, the principle of *succession* to international responsibility finds application. The rule of *non-succession* is firmly settled in the context of cession and transfer of territory: the continuing State remains responsible for internationally wrongful acts it committed before the date of succession.[381] In cases of secession, decisions of municipal courts clearly support the same principle of *non-succession*, whereby the continuing State remains responsible for its own internationally wrongful acts. The review of State practice (in the context of secession) also shows a certain tendency in support of this principle, but there is one significant example where the new seceding State was held responsible for obligations arising from internationally wrongful acts committed by the predecessor State before its independence. State practice is not uniform in the context of dissolution of State, but a certain

381 In the context of cession of territory, there is at least one exception to this rule of non-succession: the successor State should take over the obligations arising from internationally wrongful acts committed by an entity which had an autonomous status before the date of succession.

tendency emerges in modern State practice whereby the successor State(s) takes over the obligations arising from the commission of internationally wrongful acts. The examination of State practice and case law in the context of the creation of Newly Independent States shows a great variety of solutions. It cannot be concluded from this analysis whether the relevant State practice and case law clearly supports the principle of succession or the principle of non-succession.

The present analysis of State practice and international and municipal case law has also demonstrated that the answer to the question whether the successor State should take over obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession depends not only on the type of mechanism of succession of States involved but also on a variety of other *factors and circumstances*. Thus, it clearly emerges from our analysis that different problems of State succession to the obligation to repair deserve specific solutions.

Several *specific circumstances* have been identified under which State practice and international and municipal case law (as well as doctrine) clearly support the application of the *principle of succession* to international responsibility. These are the specific circumstances under which the successor State takes over the obligation to repair arising from internationally wrongful acts committed before the date of succession:

- The successor State has accepted to take over the obligations arising from an internationally wrongful act committed prior to the date of succession;
- The successor State became an independent State as a result of a struggle led by an insurrectional movement. In such case, the successor State is responsible for the obligations arising from internationally wrongful acts committed by the insurrectional movement during the struggle which eventually led to the creation of the new State;
- The successor State became an independent State in a context *other than* an armed struggle led by rebels. In such case, the successor State is responsible for obligations arising from internationally wrongful acts committed by an autonomous government (while still part of the predecessor State) with which it has an "organic and structural continuity".

Several other *specific circumstances* have also been identified where the *principle of succession* to international responsibility should prevail even if there is only limited (or no) State practice dealing with the issue. These are the other specific circumstances under which the successor State *should* take over the obligation to repair:

- The predecessor State has recognised its own responsibility (before the date of succession) for the commission of an internationally wrongful act;
- A judicial body has found the predecessor State responsible for the commission of an internationally wrongful act;
- The successor State maintained and continued after its independence the internationally wrongful act which was initially committed by the predecessor State before the date of succession. In such case, the successor State is

responsible not only for its own acts committed after the date of succession but also for the obligations arising from the acts committed by the predecessor State before the date of succession.[382]

One *specific circumstance* has also been found under which the work of the I.L.C., doctrine and (to some extent) State practice support the principle of non-succession: the successor State is not responsible for obligations arising from internationally wrongful acts committed by the predecessor State against third States during the armed struggle led by an insurrectional movement to establish that new State.

The review of relevant State practice has also shown that there is *limited support* for several propositions made by writers in doctrine, whereby the successor State would be *automatically* held responsible for obligations arising from internationally wrongful acts committed before the date of succession. From this analysis, we conclude as follows on the following doctrinal propositions:

- The successor State is not automatically responsible for obligations arising from internationally wrongful acts committed by the predecessor State *solely based* on the fact that such acts took place prior to its independence on what is now its territory. To that general principle would exist one exception: the successor State should be responsible for obligations arising from internationally wrongful acts committed by the predecessor State which are *specifically linked to its territory*, such as violations of territorial regime obligations;
- The successor State that becomes party to a treaty by way of succession is not automatically responsible for obligations arising from the breach of that treaty by the predecessor State before the date of succession;
- The consequences of the commission of "odious" acts and breaches of *jus cogens* norms should not be treated differently than other violations of "ordinary" norms of international law.

Finally, several *factors* have been identified that need to be taken into account to determine which of the continuing State or the successor State (and in the context of dissolution of State, which of the successor States) should be held responsible for obligations arising from internationally wrongful acts committed before the date of succession. Therefore, it is submitted that in every situation where the question of succession to the obligation to repair arises, the following two factors need to be taken into account:

- The principle of *unjust enrichment*. Whenever a State has unjustly enriched itself as a result of an internationally wrongful act committed before the date

382 This solution of succession to international responsibility is clearly established in the context where the predecessor State ceases to exist (such as in cases of dissolution of State, unification and integration of States). However, this solution should not apply in the other context where the predecessor State does not cease to exist (such as in cases of secession and the creation of Newly Independent States). In this last case, it would seem logical that the continuing State remains responsible for *its own* internationally wrongful acts committed before the date of succession.

of succession, that State should provide reparation to the injured third State. In the context where the predecessor State does not cease to exist (such as secession), it should be determined which of the continuing State or the successor State has enriched itself as a result of the commission of the unlawful act before the date of succession. In the other context of dissolution of State, the question will be which of the different successor States benefited from the commission of the internationally wrongful act;

– The principles of *equity and justice*. The questions whether there is succession or not to international responsibility should be answered taking into account the principles of equity and justice. Thus, any outcome of allocation of liability between the continuing State and the successor State (and in case of a dissolution of State among the different successor States) should be fair and equitable. Such determination should be fair and equitable not only from the perspective of the continuing State and the successor State(s) but also from the point of view of the injured third State.

PART III

SUCCESSION OF STATES TO THE RIGHT TO REPARATION

General Introduction

This Part explores the issue of State succession to the *right to reparation*. The issue analysed in the present Part arises from the commission of an internationally wrongful act *by a third State against the predecessor State*. Before the date of succession, the predecessor State is thus the *creditor* of the *right to reparation* against the third State that committed the internationally wrongful act. The question addressed in this Part is what happens to the international rights arising from the commission of such acts in the context of a succession of States. In other words, after the date of succession, who from the continuing State or the successor State(s) should have the right to claim reparation as a consequence of the internationally wrongful act committed by a third State against the predecessor State. Can the right to reparation, for which the predecessor State is the creditor before the date of succession, be transferred to the successor State(s)?

The present Part is divided into two distinct Chapters. The first Chapter (Chapter 1) examines the situation where the internationally wrongful act committed by a third State *directly* affected the predecessor State. The second Chapter (Chapter 2) focuses on the other situations where the internationally wrongful act committed by a third State affected a *national* of the predecessor State. This distinction, which is not often observed in doctrine, is nevertheless necessary.[1] This is so because situations where the victim of the wrongful act is a national of the predecessor State (and not the State itself) involve distinct and complex issues of diplomatic protection which need to be examined separately.

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1 This distinction is made by D.P. O'CONNELL, *State Succession*, vol. I, p. 538: "A distinction might be urged between cases where action is brought by the State in its own right, as a signatory, and cases where it is brought to recover damages on behalf of the injured individual". See also: Brigitte STERN, Responsabilité, p. 354; Miriam PETERSCHMITT, p. 39; Hazem M. ATLAM, pp. 24–25. The distinction is also made by the Arbitral Tribunal in the *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, at p. 91.

1

THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT DIRECTLY AFFECTING THE PREDECESSOR STATE

Introduction

This Chapter deals with the question as to who from the continuing State or the successor State can submit a claim for reparation for internationally wrongful acts committed by a third State (before the date of succession) *directly affecting the predecessor State*.

The first section (Section 1) explores the theoretical dimension of the question whether the transfer of the right to reparation from the predecessor State(s) to the successor State(s) is accepted in international law. It examines in detail (at Section 1.1) the legal arguments advanced by the doctrine of non-succession, which deny any such transfer of rights to the successor State. This section also examines some criticisms of these arguments (Section 1.2). Finally, Section 2 examines the relevant State practice and international case law where questions of State succession to the right to reparation arose.

1. *Analysis of Doctrine*

1.1 *The Doctrine of Non-Succession*

The analysis of the question of the transfer of the right to claim reparation is divided into two different situations which must be clearly distinguished. The first case is when the predecessor State continues to exist as a result of territorial modifications affecting it. The second case is when the predecessor State ceases to exist.

Patrick Dumberry, State Succession to International Responsibility, pp. 309–337.

The *first* situation is when the predecessor State *continues to exist* as a result of territorial modifications affecting it (such as in cases of secession, cession and transfer of territory, and the creation of Newly Independent States). In this context, the continuing State, the victim of an internationally wrongful act, should remain, in principle, entitled to submit a claim for reparation against the third State responsible for the internationally wrongful act. As a matter of fact, since the existence of both the State responsible for the act and the State that has suffered from it is not jeopardised by the mechanisms of succession of States, *the problem does not involve any question of State succession to international responsibility*. The continuing State may therefore submit a claim for reparation to the responsible third State based on the application of principles of State responsibility. This principle is largely accepted in doctrine.[1] The other question, which is in general not dealt with extensively, is whether this rule should apply *in all circumstances* and whether there should not be cases where the successor State should instead be allowed to claim reparation from the third State responsible for the internationally wrongful act. This issue is examined in this study.

The *second* situation is when the predecessor State, which has been the victim of an internationally wrongful act committed by a third State before the date of succession, *ceases to exist* as a result of territorial modifications affecting it (such as in cases of unification and dissolution of State). Very few writers have tackled this issue. It has been suggested by those scholars who did explore this question that there are simply no cases of State practice and international case law on this subject.[2] This is not accurate. In fact, there are several cases of State practice and international case law where the question did arise. They are examined in Section 2 below.

The conclusion reached by most writers is that in cases where the predecessor State *ceases to exist* there can be no transfer of the right to claim reparation to the successor State(s). Consequently, the successor State(s) cannot submit a claim for reparation to the State responsible for internationally wrongful acts committed before the date of succession.[3] It is argued that the right to claim reparation "belongs"

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1 Brigitte STERN, Responsabilité, p. 354; Jean Philippe MONNIER, p. 67; Miriam PETERSCHMITT, p. 40; Hazem M. ATLAM, at p. 31.

2 This is, for instance, the assessment made by these writers: Jean Philippe MONNIER, at pp. 71–72, 86; Hazem M. ATLAM, at pp. 30, 104; Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, at pp. 368–369 ("in the law of succession [of States] there is no authority on the question whether a successor State is entitled to recover damages for a wrong committed against the predecessor State").

3 Jean Philippe MONNIER, at p. 86 ("l'Etat nouveau ne reprend pas les droits appartenant à l'Etat antérieur du fait d'un acte illicite dont il a été la victime"); Peter MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th ed., London, Routledge, 1997, p. 169 ("no succession occurs to the rights of the claimant State or to the obligations of the defendant State"); Louis DELBEZ, *Principes généraux du droit international public*, 3rd ed., Paris, L.G.D.J., 1964, p. 275 ("il n'existe pas de succession au droit à réparation de l'Etat prédécesseur"); Suzanne BASTID, *Droit international public, Principes*

only to the predecessor State.[4] For these authors, such right to reparation would be a "personal" right of the predecessor State: "…les droits de réclamations sont de par leur nature même tellement attachés à la personne de leur sujet actif que toute tentative visant à envisager une succession juridique à leur égard ne serait qu'hasardeuse."[5] This is also the position of Cavaglieri:

> Qu'il s'agisse de l'observance des principes de droit international commun, qui lie les Etats dès le moment de leur reconnaissance mutuelle comme sujet de droit… le rapport est toujours si personnel, si étroitement lié avec son sujet que leur sort ne peut être que le même. Il est absurde de penser qu'un Etat… puisse hériter les droits fondamentaux que l'Etat disparu tenait de sa qualité de membre de la communauté internationale.[6]

These scholars believe that in principle, only the "injured State" is entitled to invoke the international responsibility of another State.[7] The work of the I.L.C. on State responsibility defines the "injured State" as the State "whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act".[8] Under Article 42(a) of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts*, a State is considered "injured" if the obligation breached was owed to it *individu-*

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généraux, Fasc. II, Univ. de Paris, les Cours de droit, 1966–1967, at p. 730 ("si l'acte illicite a atteint l'Etat [prédécesseur] directement… l'Etat successeur n'est pas en droit d'agir"). See also: A. VERDROSS, *Völkerrecht*, 4th ed., Vienna, Springler Verlag, 1959, p. 198; A. VERDROSS & B. SIMMA, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, Dunker & Humblot, 1984, pp. 633–634.

4 This is the position of Charles ROUSSEAU, *Droit international public*, vol. III (*Les compétences*), Paris, Sirey, 1977, p. 142, for whom the right to claim reparation is "propres à l'Etat au profit duquel elles sont née et elles dépendent de la continuation d'une relation légale qui ne survit pas au changement de souveraineté".

5 Hazem M. ATLAM, p. 118. He, however, supports the rule of succession to the right to claim reparation in the context of unification of States because he (wrongly) maintains that in such cases the legal personality of the predecessor States remains unaltered. See earlier comments on his theory at *infra*, note 24.

6 Arrigo CAVAGLIERI, "Effets juridiques des changements de souveraineté territoriale", in: *Annuaire I.D.I.*, 1931–I, p. 190.

7 Hazem M. ATLAM, p. 119.

8 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2), pp. 59 et seq., at p. 293, para. 2. The *Text of the Draft Articles on State Responsibility Adopted by the Commission on First Reading,* 1996, Report of the I.L.C. on the Work of its Forty-eighth Session, 6 May–26 July 1996, General Assembly Official Records, Fifty-first Session Supplement No. 10, U.N. Doc. A/51/10, chp. III, in: *Yearbook I.L.C.*, 1996, vol. II (Part Two), pp. 58–65, contained a distinct provision (Article 40) defining the concept: "For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State".

ally.[9] The argument is therefore that a new State, which did not exist at the time the internationally wrongful act was committed, cannot be considered to have been injured and, consequently, should not be entitled to seek redress against the responsible State since the obligation breached was not owned by it "individually" (or even "collectively"). In other words, the new State is considered a "third State" and does not have the right to claim reparation.[10]

1.2 *Challenges and Criticisms of the Doctrine of Non-Succession*

The great difference between the question of succession to the *right to reparation* and the other question of succession to the *obligation to repair* (examined in Part II) is that in the former case the State responsible for the internationally wrongful act remains the same and is not affected in any way by territorial modifications. Thus, the difficult question of the imputation of an internationally wrongful act to a State does not arise.[11] In other words, before and after the date of succession, no doubt exists as to the liability of the State responsible for the act. The fact that the injured predecessor State may have ceased to exist after the date of succession does not alter in any way the other fact that the responsibility of the wrongdoer remains intact.[12] The only question that arises is whether such right to reparation, for which the predecessor State was the creditor before the date of succession, should simply vanish at the same time that the predecessor State ceases to exist.

One way to prevent that the commission of an internationally wrongful act remains unpunished simply due to the mechanisms of State succession is to allow the transfer of the right to claim reparation to the successor State. There is some support in doctrine for allowing such transfer.[13] This solution is indeed sound and

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9 Under Article 42(b), a State may be considered "injured" if the obligation breached is not owed to it individually, but instead *collectively* to a group of States (which includes it) and even to the international community as a whole. In order for that State to be entitled to seek reparation, it needs to demonstrate that it was "specially affected" by the violation of that international obligation owed to the group of States or to the international community as a whole. According to the *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 300, para. 12, "for a State to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed".

10 Hazem M. ATLAM, p. 119, for whom any other solution would be against the principle of the equality of States under international law.

11 Brigitte STERN, Responsabilité, p. 353.

12 *Id.* See also: Miriam PETERSCHMITT, p. 43.

13 Thus, according to Brigitte STERN, Responsabilité, p. 354, the non-continuity of the existence of the predecessor State "[n]e devrait avoir aucune conséquence sur l'imputabilité continue de l'acte illicite à l'Etat tiers et la transmission du droit à réparation corre-

logical. Thus, as a matter of principle, the possibility of a transfer of the right to reparation to the successor State should be accepted as valid under international law. This should certainly be the case *a fortiori* whenever the State responsible for an internationally wrongful recognises *before the date of succession* its own responsibility for such act.[14] The same solution of transfer should also apply when the State responsible for such act explicitly or implicitly accepts *after the date of succession* such transfer.[15] There are several examples of this situation in State practice and international case law.[16]

It would be simply illogical to accept (in some circumstances examined in Part II, Chapter 3) that the *obligations* arising from the commission of internationally wrongful acts can be transferred to the successor State but not the *right* to seek redress for the consequences arising from the commission of internationally wrongful acts.

The possibility of a transfer of the right to reparation should be accepted even if (at least formally) the new successor State cannot be deemed to have been "directly" and "individually" injured *at the time the internationally wrongful act was committed* by the responsible State. In fact, in most instances, *the successor State should be considered to be an injured State nonetheless.* It would thus be plainly wrong to deny the possibility of such transfer of the right to seek reparation solely on the ground that the new successor State is a "third" State with respect to the internationally wrongful act which was committed before the date of succession. There is, indeed, an undeniable connection between the new successor State and the commission of such act. For instance, there will be cases where the internationally wrongful act will affect the *territory* which became part of the new

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spondant; L'Etat prédécesseur a en effet une réclamation directe, une créance à l'égard de l'Etat tiers, qui peut être transmise à l'Etat successeur". See also Miriam PETERSCHMITT, p. 43. The author also affirms (at p. 37) the principle of transferability of the right to reparation in the special context of violations of *jus cogens* norms: "L'Etat successeur, bien que n'ayant pas encore existé au moment du fait illicite, doit avoir le droit de demander réparation pour la simple raison qu'il fait désormais partie de cette communauté internationale à qui l'obligation violée était due".

14 It has also been suggested in doctrine that the successor State should have the right to continue the claim already submitted by the predecessor State against the responsible third State. Miriam PETERSCHMITT, p. 33, argues that in such cases the principle of transferability of the right to reparation would be based on the concept of *good faith*. For the author (see at p. 34): "Si les prétentions de l'Etat prédécesseur sont connues et que l'affaire n'a pas pu être réglée avant sa disparition, l'Etat tiers ne pourra pas contester la qualité des Etats successeurs pour obtenir réparation du fait illicite commis contre leur prédécesseur".

15 This seems also to be the position of Philippe MONNIER, p. 86, for whom "*en l'absence de convention contraire*, l'Etat nouveau ne reprend pas les droits appartenant à l'Etat antérieur du fait d'un acte illicite dont il a été la victime" (emphasis added).

16 This is, for instance, the case of the restitution of cultural properties by the U.S.S.R. to the G.D.R. (see at *infra*, p. 325). This is also the case of the peace treaties entered into by Japan with Indonesia, Malaysia and Singapore after the Second World War (see at *infra*, p. 327).

State after the date of succession. In other instances, it will be the *population* of that successor State which will be the victim of the internationally wrongful act. Thus, even if the injured predecessor State ceases to exist, the *consequences of the internationally wrongful act will continue even after the date of succession*. The only difference being that after the date of succession the State suffering damage from the commission of such internationally wrongful act will no longer be the predecessor State but the new successor State.

Whenever the circumstances show that the *new successor State is the "injured" State after the date of succession*, it should be allowed to submit a claim for reparation to the State responsible for the internationally wrongful act.[17]

This principle should certainly apply in cases where the predecessor State *ceases to exist* (such as in cases of dissolution of State). In such cases, the question of which of the different successor States is the holder of the right to reparation should be determined by examining which of these States is now (i.e. after the date of succession) specifically injured by the internationally wrongful act committed before the date of succession.[18] The injured State(s) should be allowed to claim reparation. The next section examines some examples of State practice supporting this principle.[19]

The same principle should also be accepted in the context where the predecessor State *continues to exist* (such as secession).[20] The examination of State practice and international case law in the next section (Section 2) shows several examples where such transfer of the right to reparation from the predecessor State to the successor State did indeed occur based on the ground that the latter was considered the injured State.[21] State practice also shows examples where *both the continuing*

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17 This solution should apply to *continuous* internationally wrongful acts as well.

18 Miriam PETERSCHMITT, p. 44: "Comme dans le cas de l'Etat unifié, la dissolution de l'Etat en droit de demander réparation ne saurait effacer ce droit qui passe aux Etats successeurs. Il dépend cependant de l'obligation violée et du genre de dommage si le droit d'invoquer la responsabilité internationale appartient seulement à un des successeurs ou à chacun des successeurs individuellement ou aux Etats successeurs conjointement… S'il y a dommage matériel, seul l'Etat successeur qui est frappé par le dommage demandera sa réparation. S'il y a dommage moral, tous les successeurs peuvent demander réparation".

19 In the context of the unification of the United Arab Republic (see at *infra*, p. 316), the dissolution of Czechoslovakia (see at *infra*, p. 319) and the dissolution of Yugoslavia (see at *infra*, p. 322).

20 Miriam PETERSCHMITT, p. 41 (see also at p. 45), is of the same view. However, she argues that the continuing State should *also* simultaneously have the right to claim reparation, since it was initially its right which was infringed: "…selon le droit de la responsabilité internationale, puisque l'intérêt juridiquement protégé était celui de l'Etat prédécesseur, ce dernier n'est pas privé de son droit de demander réparation, même si le dommage matériel n'est plus à sa charge".

21 In the context of the "secession" of the G.D.R. (see at *infra*, p. 325), the creation of the Newly Independent State of Vanuatu (see at *infra*, p. 329) and several treaties entered

State and the successor State should be considered to be the injured States.[22] In such conditions, nothing should prevent both States to make reparation claims for the portion of damage for which each can be deemed the injured State.

2. *Analysis of State Practice and Case Law*

The present section analyses the relevant State practice and international case law, taking into account the *different types of mechanism of State succession involved*.[23] For each type of succession of States, the reader is provided with a summary of findings at the beginning of the section. The position of doctrine is also examined and our own position on which of the principles of succession or non-succession should apply for each type of succession of States is presented.

2.1 *Unification of States*

It seems difficult to draw any conclusion in the context of unification of States as only one relevant example of State practice (the United Arab Republic, 1958) has been found. This difficulty is all the more apparent since this case is not the most persuasive one because the two States responsible for the damage (the United Kingdom and France) ultimately denied the claim for reparation submitted by the new State.

There is support in doctrine for the proposition that in cases of unification of States (as well as in cases of incorporation of State) the transfer of the right to reparation to the successor State should be allowed.[24] This is indeed a sound and

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into by Japan with the Newly Independent States of Indonesia, Malaysia and Singapore (see at *infra*, p. 327).

22 An illustration of that is Pakistan's succession to the *Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold* (see at *infra*, p. 324).

23 This essential distinction is supported in doctrine. This is, for instance, the position of Hazem M. ATLAM, pp. 32, 37, 104, and in particular at p. 39: "Il est tout à fait impossible de chercher à formuler dans l'abstrait une solution a priori quant au sort des droits de réclamations de l'Etat prédécesseur lors d'une succession d'Etats. Et c'est précisément cette impossibilité-là qui a échappé à l'esprit de la doctrine classique lors de son examen de cette question".

24 Brigitte STERN, Responsabilité, p. 354; Miriam PETERSCHMITT, p. 43. The same position is also taken by Hazem M. ATLAM, at pp. 78, 119–123. However, this last author does so (see at pp. 67–79) based on the (questionable) assumption that in cases of unification of States, the predecessor States keep their own international legal personalities intact and that there is in fact no creation of a new State. The defect of the author's assumption has already been examined (*supra*, p. 94). The position of Atlam (see at pp. 120–122) on the question of the transfer of the right to reparation in the

logical approach. Part II came to the conclusion that in cases of unification and incorporation of State, the successor State should be held responsible for obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession.[25] Since international rights and obligations are two sides of the same token, it seems only logical that the new State should be entitled to exercise the rights which were those of the predecessor State before the date of succession, including the right to claim reparation against other States responsible for internationally wrongful acts.

a) *Agreements between the United Arab Republic and other States in the Context of the Suez Crisis (1956)*

The creation of the United Arab Republic was the result of the merger of Egypt and Syria in 1958.[26] The new State submitted claims requesting "adequate compensation" from the United Kingdom and France for damage committed during the 1956 Suez Canal crisis by these two States against Egypt (one of the two predecessor States).[27] The damages claimed by the United Arab Republic from the two States were in the amount of UK£ 78 million.[28] The United Arab Republic apparently also claimed reparation from Israel.

Both the United Kingdom and Israel refused to admit any responsibility and to pay any compensation to the United Arab Republic.[29] The question of claims submitted by the United Arab Republic to the United Kingdom was dealt with in an exchange of notes leading to the conclusion of an Agreement between the two States on 28 February 1959.[30] The exchange of notes provided for both parties to waive their respective claims "arising out of the events of October–November

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context of unification of States is therefore based on the application of rules of State responsibility and *not rules of State succession* (since he believes that there is simply no new State when two States merge together).

25 See at *supra*, p. 93.

26 The relevant circumstances of this case have already been examined at *supra*, p. 95.

27 This case is referred to and discussed in: Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, at pp. 368–369; Ian BROWNLIE, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, at p. 145; Pierre D'ARGENT, *Les réparations de guerre en droit international public*, Brussels, Bruylant, 2002, pp. 299–301.

28 Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1958, p. 681.

29 On this aspect, see the documents referred to in: Ian BROWNLIE, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, at p. 145.

30 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt*, in: *U.K.T.S.* 1959, no. 35 (Cmd. 723); 343 *U.N.T.S.*, p. 159; 14 *Rev. égyptienne d.i.*, 1958, p. 364; 54 *A.J.I.L.*, 1960, pp. 511–519; Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, pp. 57 et seq. This Agreement is further discussed at *supra*, p. 97.

1956" (i.e. the Suez Canal crisis).[31] The United Arab Republic waived all its claims for war damage against the United Kingdom in return for the United Kingdom's waiver of its claims for compensation arising out of Egypt's seizure of the Suez Canal.[32] The exchange of notes mentions that both parties "do not admit liability in respect of any of these claims".

Similarly, the Agreement of 22 August 1958 between the United Arab Republic and France does not refer to any payment for war damage having been paid by France.[33] It has been suggested in doctrine that France did pay some compensation to the new State.[34] However, France always denied having paid any such compensation.[35]

It has been suggested in doctrine that the United Arab Republic implicitly renounced in these agreements to claims for reparation against the two countries.[36] What is relevant for the purpose of the present discussion is not so much that no compensation was paid (although this remains rather unclear in the case of France). What matters is the fact that there is no indication from the available documentation that either France or the United Kingdom ever objected, as a matter of principle, to the right of the new State (the United Arab Republic) to seek reparation for internationally wrongful acts committed by them against one of the predecessor States (Egypt) before the date of succession.[37] As a matter of fact,

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31 The text of the exchange of notes is found in: 54 *A.J.I.L.*, 1960, pp. 511–519; M.M. WHITEMAN, *Digest of International Law*, vol. II, Washington, Dept. of State, 1973, at p. 875.

32 Thus, the United Kingdom waived its claims "in respect of United Kingdom Government property situated in the Suez Canal Base… and in respect of the costs incurred by the Government of the United Kingdom for clearance of the Suez Canal".

33 *Accord général entre le gouvernement de la République française et le gouvernement de la République arabe unie*, in: *La documentation française*, 18 October 1958, no. 2473; *R.G.D.I.P.*, 1958, pp. 738 et seq. Thus, Article 7 indicates: "Les deux gouvernements considèrent que le présent Accord et ses annexes ainsi que les autres accords et leurs annexes signés ce jour constituent un règlement final de leurs réclamations nées des événements d'octobre et de novembre 1956".

34 This is, for instance, the assessment made by Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, at p. 369, who refers to an article published on 14 July 1958 in *The Times* (of London) apparently indicating that France had paid the sum of UK£ 20 million to the United Arab Republic for damage done in Egypt in 1956. This is also the position of Miriam PETERSCHMITT, p. 43.

35 Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1958, p. 681, makes reference to such rumours of compensation having been paid by France to the United Arab Republic prior to the signature of the 1958 Agreement between the two States. He indicates that France denied having provided any compensation.

36 Ch. ROUSSEAU, *Id.*; Ian BROWNLIE, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, at pp. 145–146.

37 This is also the assessment of Miriam PETERSCHMITT, p. 43. Eugene COTRAN, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 *I.C.L.Q.*, 1959, at pp. 368–369, raises the question whether the United

the United Kingdom explicitly accepted that such claim for reparation by the new State be part of the negotiations leading to the 1959 Agreement.[38]

2.2 *Dissolution of States*

One example of State practice has been found where the different successor States clearly accepted the validity of the principle of the transfer of the right to claim reparation from the predecessor State to the successor States. This is the *Agreement on Succession Issues* reached in the context of the dissolution of Yugoslavia.[39] Two other examples of decisions by international judicial bodies in the context of the dissolution of Czechoslovakia are not entirely conclusive as to the existence of a right for the successor State to claim compensation for internationally wrongful acts committed before the date of succession. It seems that in both cases the I.C.J.[40] and the Panel of Commissioners of the United Nations Compensation Commission (U.N.C.C.)[41] simply endorsed prior agreements reached between the parties. At the most, it can be argued that the two judicial bodies did not reject the validity of the possibility of the transfer of such right to reparation to the new State.

Doctrine is divided on the question whether the successor States in the context of dissolution of State should be allowed to claim reparation for internationally wrongful acts committed before the date of succession. Some have argued that because there is a break in the chain of the continuous international legal personality between the predecessor State and the new successor States the rule of *tabula rasa* should

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Kingdom and France may be liable to pay compensation to the new State despite the fact that the internationally wrongful acts were in fact committed against one of the predecessor State. He is of the opinion that there is no authority in international law on this point. However, Cotran interprets the creation of the United Arab Republic not as a case of succession of States but as one of "amalgamation", whereby the legal personality of the two predecessor States are not extinguished but have "fused" into the new State. In light of this (controversial) interpretation, he concludes that: "[T]here is no reason why the United Arab Republic should be deprived of the right to recover damages for torts committed against Egypt or Syria before the Union. If the United Arab Republic has taken over the obligations of Egypt and Syria, then it is only reasonable and natural that it should take over the corresponding rights, whether they are rights in property, contract or delict".

38 Thus, in the Agreement the United Arab Republic waived its claims against the United Kingdom for "damage to Government and private property, and damage to public utilities including loss of revenue, damage to the Suez Canal including loss of revenue to the Suez Canal Authority and other damage to the Egyptian economy".

39 *Agreement on Succession Issues*, in: 41 *I.L.M.*, 2002, pp. 1–39.

40 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3.

41 *Report and Recommendations made by the Panel of Commissioners Concerning the Second Instalment of "F1" Claims*, U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1998/12, 2 October 1998.

apply to the right to claim reparation which belonged to the predecessor State before the date of succession.[42] It is submitted that the fact that the new successor States have a different legal personality than the predecessor State should not, in itself, prevent the former to claim reparation for internationally wrongful acts committed against the latter before the date of succession. Thus, the right to reparation for which the predecessor State was the creditor should not simply vanish as a result of the dissolution.[43] The right to reparation should be transferred to the successor State(s), which can still be considered to be injured (after the date of succession) as a result of an internationally wrongful act committed before the dissolution.[44] In that sense, the *Agreement on Succession Issues* reached in the context of the dissolution of Yugoslavia seems the most appropriate solution.[45]

a) *The* Gabčíkovo-Nagymaros Project *Case (1997) in the Context of the Dissolution of Czechoslovakia (1992)*

In the *Case Concerning the Gabčíkovo-Nagymaros Project*, the I.C.J. determined that before the date of succession Hungary had committed an internationally wrongful act and that it was under the obligation to pay compensation to Czechoslovakia (the predecessor State).[46] The Court however *did not* address the question whether this right to reparation, for which Czechoslovakia was the creditor before the date of succession, had vanished as a result of the dissolution of the federal State or

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42 Hazem M. ATLAM, pp. 107–109, and at pp. 117–118: "[L]a rupture dans la personnalité internationale entre l'Etat prédécesseur démembré et les Etats successeurs issue de son démembrement constitue ici le prélude à l'application de la règle de la table rase à l'égard des droits de réclamations du premier… Les Etats successeurs y exercent dans ce cas leur propre souveraineté naissante et originale et non pas une souveraineté qui leur aura été transmise de l'Etat prédécesseur à la suite de la mutation territoriale. Dans une telle situation, il serait sans doute inacceptable d'opter pour une dévolution des droits de réclamations de l'Etat prédécesseur démembré à l'un ou l'autre des Etats successeurs nés de la dislocation". Atlam also indicates (at p. 118) that when all new States voluntarily and freely decide to dissolute a State they should not be in a position to take over the right to reparation of the predecessor State with which they have decided to break-up definitively.

43 Similarly, Miriam PETERSCHMITT, p. 44: "Comme dans le cas de l'Etat unifié, la dissolution de l'Etat en droit de demander réparation ne saurait effacer ce droit qui passe aux Etats successeurs. Il dépend cependant de l'obligation violée et du genre de dommage si le droit d'invoquer la responsabilité internationale appartient seulement à un des successeurs ou à chacun des successeurs individuellement ou aux Etats successeurs conjointement".

44 This is also the conclusion reached by Miriam PETERSCHMITT, p. 44: "S'il y a dommage matériel, seul l'Etat successeur qui est frappé par le dommage demandera sa réparation. S'il y a dommage moral, tous les successeurs peuvent demander réparation".

45 *Agreement on Succession Issues*, in: 41 *I.L.M.*, 2002, pp. 1–39.

46 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at paras. 108–110, 152.

whether such right could be transferred to the new State of Slovakia. The Court simply made reference to the second paragraph of the Preamble to the Special Agreement (*Compromis*) of 2 July 1993 entered into by Slovakia and Hungary, which indicates that:

> *Bearing in mind* that the Slovak Republic is one of the two successor states of the Czech and Slovak Federal Republic and the sole successor state in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project.

The Court interpreted the Preamble to the Special Agreement to mean that Slovakia was "entitled to be compensated for the damage sustained *by Czechoslovakia* as well as by itself as a result of the wrongful conduct of Hungary" with respect to the Gabčíkovo-Nagymaros Project.[47] The Court thus acknowledged that the new State of Slovakia was entitled to seek redress from Hungary for the internationally wrongful act committed by the latter against the predecessor State (Czechoslovakia) before the date of succession.

However, it must be emphasised that the Court seems to have accepted the transfer of the right to reparation solely based on the wording of the Special Agreement entered into by Slovakia and Hungary to submit the dispute to the Court.[48] In fact, Slovakia in its pleadings explicitly rejected the existence of any such principle of succession to the right to reparation.[49] This position adopted by Slovakia was certainly coherent with its rejection of the principle of succession to *obligations*.[50] The ground invoked by Slovakia for finding Hungary responsible was that the latter had committed an internationally wrongful act "of a continuing character which extended beyond the date of the dissolution of Czechoslovakia".[51] Slovakia argued that it was "entitled to all remedies available to the injured State

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47 *Ibid.*, at para. 151 (emphasis added).

48 This is clear from the reading of paragraph 151 of the reasoning of the Court: "*According to the Preamble to the Special Agreement, the Parties agreed* that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia *thus* may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary" (emphasis added).

49 In its *Counter-Memorial of the Slovak Republic*, vol. I, 5 December 1994, at para. 3.60, Slovakia mentioned (quoting the work of Monnier) that as a new State it does not take over the rights belonging to the predecessor State as a result of any internationally wrongful act committed before the date of succession. Thus, Slovakia argued that its right to obtain compensation from Hungary in the context of the Gabčíkovo-Nagymaros Project was "not based on succession to Czechoslovakia *per se*" but that it was instead "based on the [1977] Treaty" (*Id.*, at para. 3.61).

50 Thus, Slovakia's ultimate aim was to avoid any responsibility for the internationally wrongful acts committed by Czechoslovakia before its dissolution. Having rejected the existence of any principle of succession to the obligation to repair, Slovakia, quite logically, also rejected the existence of any rule in favour of succession to the right to reparation.

51 *Counter-Memorial of the Slovak Republic*, vol. I, 5 December 1994, at para. 3.63.

by the rules of international law governing *State responsibility*".[52] In fact, Slovakia claimed reparation only for the portion of the internationally wrongful act committed by Hungary *after* the date of succession. Slovakia thus considered that it could not claim reparation from Hungary for damage which occurred *before* the break-up of Czechoslovakia.[53]

This example is therefore not entirely conclusive. At the most, it can be argued that the Court did not reject the possibility for the successor State to claim compensation for internationally wrongful acts committed before the date of succession. The Court's decision also confirms the (logical) principle that nothing should prevent the successor State from submitting claims for reparation whenever the State responsible for the internationally wrongful act committed before the date of succession consented to such transfer of the right to reparation. In the present case, the reading of the *Compromis* between the Parties shows that Hungary did indeed accept (in principle) that Slovakia could take over the right to reparation for which the predecessor State was the creditor before the date of succession.

b) *Claim Submitted by the Czech Republic before the U.N.C.C. for Damage to the Czechoslovak Embassy Caused by Iraq*

This case arose in the context of the U.N.C.C., which was set up to deal with claims arising from the invasion and occupation of Kuwait by Iraq in 1990–1991.[54] After the dissolution of the Federation of Czechoslovakia (1 January 1993), the Czech Republic Ministry of Foreign Affairs filed a claim in the amount of US$ 11,208 for damage caused by Iraq to the *Czechoslovak* Embassy in Baghdad during the Gulf War (i.e. before the dissolution of the Federation).

In its Report and Recommendations, the Panel of Commissioners recommended an award in the amount of US$ 4,733.[55] The Panel acknowledged that the Czech

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52 *Id.* (emphasis added).

53 *Ibid.*, at para. 3.60.

54 One category of claims (the "F4" claims) dealt with claims by governments "for losses related to departure and evacuation costs of their nationals or damage to physical property". The nature of the U.N.C.C. is further examined in detail at *infra*, p. 379.

55 *Report and Recommendations made by the Panel of Commissioners Concerning the Second Instalment of "F1" Claims*, U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1998/12, 2 October 1998, see at footnote no. 3 of the Report. This is the relevant quote from the Report: "The Czech Republic's claim includes a statement explaining that the Czech and Slovak Federal Republic ceased to exist on 31 December 1992 and was succeeded by the Czech Republic and the Slovak Republics on 1 January 1993. On the basis of agreements concluded at the time of the separation, the Czechoslovak Embassy and Embassy residence in Baghdad became the property of the Czech Republic. Accordingly, although it had been the Federal Republic [of Czechoslovakia] that had suffered the losses in respect of which compensation is claimed, the Czech Republic is the proper and sole claimant in respect of these losses". This recommendation was adopted by the Governing Council Decision no. 56: *Decision Concerning the Second Instalment of "F1" Claims taken by the Governing Council of the United Nations Compensation Commission at its 81st meeting, held on 30 September 1998 at Geneva* [Governing Council Decision

Republic (the successor State) was not the injured State at the time of the commission of the internationally wrongful act to the Embassy. The Panel concluded that the Czech Republic should nevertheless be deemed to be the "proper and sole claimant in respect of these losses" based on the agreement which had been entered into between the two successor States to the Czechoslovak Federation "at the time of the separation" and whereby the "Czechoslovak Embassy and Embassy residence in Baghdad became the property of the Czech Republic".

It thus appears that the decision of the Panel was ultimately largely influenced by the existence of an agreement entered into between the two successor States (which, however, did not deal with the issue of internationally wrongful acts committed before the dissolution). The Panel's Report therefore cannot be considered as a general endorsement of the principle of the transfer of the right to reparation from the predecessor State to the successor State. At the most, it can be argued that the Panel did not reject the validity of the possibility of the transfer of such right to reparation.

c) *The* Agreement on Succession Issues *in the Context of the Dissolution of Yugoslavia (1991–1992)*

As previously mentioned, on 29 June 2001 was entered into among the successor States to the former Yugoslavia (including the Federal Republic of Yugoslavia) an *Agreement on Succession Issues*.[56] Article 1 of Annex F to the Agreement deals with the outcome of internationally wrongful acts committed by third States against the S.F.R.Y. before its dissolution.[57] Under this provision, claims of the S.F.R.Y. for reparation against other States before its dissolution are considered as "rights and interests which belonged to the SFRY" and, as such, they should be "shared" amongst the successor States. The provision also indicates that the "division of such rights and interests" should be done under the direction of the Standing Joint Committee.[58] It should be noted that the provision makes a direct reference to the division of the financial assets of the S.F.R.Y. as a yardstick of the proportion of the "rights" to be shared among the successor States.[59]

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no. 56], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/Dec.56 (1998), 2 October 1998.

56 41 *I.L.M.*, 2002, pp. 1–39. The Agreement is discussed in detail at *supra*, p. 119.

57 The provision reads as follows: "All rights and interests which belonged to the SFRY and which are not otherwise covered by this Agreement (including, but not limited to, patents, trade marks, copyrights, royalties, and *claims of* and debts due to *the SFRY*) shall be shared among the successor States, taking into account the proportion for division of SFRY financial assets in Annex C of this Agreement. The division of such rights and interests shall proceed under the direction of the Standing Joint Committee established under Article 4 of this Agreement" (emphasis added).

58 The role of the Standing Joint Committee was examined at *supra*, p. 119.

59 The division of the S.F.R.Y.'s financial assets is indicated at Article 5(2) of Annex C of the Agreement: Bosnia and Herzegovina: 15.5 %; Croatia: 23.0 %; Macedonia: 7.5 %; Slovenia: 16.0 %; Federal Republic of Yugoslavia: 38.0 %.

This provision is a clear illustration of the acceptance *by the different successor States* of the validity of the principle that the successor States should be entitled to submit reparation claims for internationally wrongful acts committed against the predecessor State before the date of succession. This interpretation is, however, the object of some controversy.[60]

2.3 *Secession*

State practice in the context of secession shows the existence of examples in favour of both principles of succession and non-succession.

As a matter of principle, the continuing State (whose status as an independent State is not affected by the change in its territory) remains entitled to claim reparation against the third State responsible for the commission of internationally wrongful acts which occurred before the date of succession. Thus, the emergence of the secessionist State does not *per se* jeopardise the continuing State's entitlement to compensation. This principle is recognised in doctrine.[61] It is also illustrated in State practice by the 1997 Agreement entered into by Russia and France.

a) *The 1997 Agreement Entered into by Russia and France on Reparation for Expropriation of Bonds after the 1917 Russian Revolution*

In the context of the break-up of the U.S.S.R.,[62] a final settlement of reciprocal financial and property demands was entered into in 1997 between Russia and

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60 In a letter dated 13 November 2002 sent to the present author, Sir Arthur Watts (see *supra*, p. 121), who was the "Special Negotiator for Succession Issues" and under whose supervision the Agreement was signed, mentions that "it was understood by all concerned… that Articles 1 and 2 of Annex F included within their scope such items of international responsibility as might exist, whether involving outstanding claims by the SFRY against other States (Article 1) or outstanding claims by other States against the SFRY (Article 2)". A completely different view is held by Professor Vladimir-Djuro Degan, who participated in the negotiations leading to this Agreement as a representative of Croatia. In a letter dated 21 October 2002 sent to the present author (on file with the author), Degan explained that Annex F to the Agreement does not deal with any issue of succession of States to international responsibility and that during the negotiations no party had raised possible reparation claims of the former S.F.R.Y. against third States. The present author was given permission from both scholars to make reference to the content of these letters in the context of the present study.

61 Brigitte STERN, Responsabilité, p. 354; Jean Philippe MONNIER, p. 67; Hazem M. ATLAM, at p. 31; Miriam PETERSCHMITT, p. 40.

62 As already explained at *supra*, p. 150, the break-up of the U.S.S.R., which is a case of *dissolution of State*, should, nevertheless, be analysed for practical reasons from the perspective of a series of secessions by the former Republics of the U.S.S.R. (except for Russia and the Baltic States), Thus, for practical reasons the international community decided that Russia should be considered as the continuing State of the U.S.S.R.

France.[63] As explained above,[64] the Agreement provided for Russia to compensate France in the amount of US$ 400 million in exchange for guarantees that France would not exercise diplomatic protection for claims of French nationals and corporations against Russia arising out of the non-payment of bonds expropriated after the 1917 Revolution. The Agreement is construed as a set-off, whereby Russia agreed not to pursue claims for reparation which the U.S.S.R. had for many years against France. Article 2 (al. a) of the Agreement thus makes reference to the claims linked to the "Western intervention" of 1918–1922 and other military or hostile operations undertaken by Western States (including France) against the new Soviet government during that period.[65]

From the information available, it does not appear that France objected to the fact that such claims for reparation were part of the negotiations leading to the Agreement. This is certainly because France considered Russia to be the legal "continuator" of the U.S.S.R. and believed that it remained entitled to submit a claim for reparation arising from damage which occurred before the break-up of the U.S.S.R.[66]

Two examples of State practice have been found where the successor States were allowed to claim reparation for internationally wrongful acts committed before the date of succession. In these two cases, the different parties accepted that the right to claim reparation be transferred to a new State since it was considered to be the injured State.

b) *The 1946* Agreement on Reparation from Germany *in the Context of the Secession of Pakistan (1947)*

After the Second World War, an agreement was reached in 1946 for the establishment of an Inter-Allied Reparation Agency for the equitable distribution among

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63 *Accord du 27 mai 1997 entre le Gouvernement de la République française et le Gouvernement de la Fédération de Russie sur le règlement définitif des créances réciproques financières et réelles apparues antérieurement au 9 mai 1945*. Bill No. 97–1160 (in: *J.O.R.F.*, no. 295, December 1997, p. 18453) passed by the French National Assembly on 19 December 1997 approving the Agreement and the Memorandum (in: *J.O.R.F.*, 15 May 1998).

64 This Agreement was already discussed in detail at *supra*, p. 154.

65 These claims are analysed in doctrine by Michel COSNARD, "Les créances au titre de l'intervention occidentale de 1919–1922", in: P. JUILLARD & B. STERN (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Cedin Cahiers internationaux n°16, 2002, pp. 121–149. Article 2 (al. c) also deals with the renunciations by Russia of a certain number of "claims" (*créances*) including gold deposited in France. This aspect is discussed in: Geneviève BURDEAU, "L'or russe dans le règlement du contentieux financier franco-russe", in: P. JUILLARD & B. STERN, *Ibid.*, pp. 151–169.

66 It should be noted that the U.S.S.R. (which was officially created in 1922) was itself the continuing State of the Russian State which emerged after the 1917 Revolution. In that sense, the Russian Federation is the *continuing State* of the *continuing State* of the Russian State which existed between 1917 and 1922.

several States of the total assets declared to be available as reparation from Germany.[67] The Dominion of India was a party to the Treaty, i.e. before it formally became an independent State (in August 1947) pursuant to the *Indian Independence Act (1947)*.[68] As mentioned above,[69] Pakistan has been viewed as having seceded from India in 1947.[70] The Governments of India and Pakistan reached an agreement on 22 January 1948 under which they agreed on the division of the share of reparation allocated to India under the 1946 Agreement. This agreement between India and Pakistan led to the conclusion of an *Additional Protocol* to the 1946 Agreement which was entered into on 15 March 1948. The *Additional Protocol* indicates that Pakistan "shall be deemed to have been a Government signatory of the [1946] Paris Agreement, as from the date of the entry into force of the said Agreement, with corresponding rights and obligations".[71]

This example shows that all Parties to the international treaty accepted that a new State (Pakistan) could claim reparation arising out of internationally wrongful acts committed by Germany during the Second World War at a time when that new State did not exist as an independent State. This example is, in fact, also an illustration that *both the continuing State and the successor State* can in some circumstances be considered to be the injured States.

c) *The 1958 Protocol Entered into by the U.S.S.R. and the G.D.R. for the Restitution of Cultural Properties*

As already mentioned,[72] the victory of the Soviet Red Army in 1945 was followed by the pillage of some 2.5 million works of art and cultural property which were transferred from Germany to the Soviet Union. The question of the restitution of these cultural properties is still not settled between Russia and "unified" Germany (the Federal Republic of Germany). Another solution prevailed with respect to the G.D.R., which was considered to have "seceded" from the rest of Germany in 1949.[73] A Protocol was entered into by the U.S.S.R. and the G.D.R. in 1958 for the restitution of some of the art treasures, books and archives which had been

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67 *Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold*, signed in Paris on 14 January 1946, entered into force on 24 January 1946, in: 555 *U.N.T.S.*, p. 69. The Agreement determined the percentage that each State would receive in terms of war reparation.

68 *Indian Independence Act (1947)*, 10 and 11 Geo. VI, c. 30; *L.R. Statues* 1947.

69 This example is discussed in detail at *supra*, p. 172.

70 India has generally been considered to be the *continuing State* of the British Dominion of India. See the *Indian Independence (International Arrangements) Order*, Gazette of India Extraordinary, 14 August 1947.

71 *Additional Protocol to the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency, and on the Restitution of Monetary Gold of 14 January 1946*, signed in Brussels on 15 March 1948, entered into force on 15 March 1948, in: 555 *U.N.T.S.*, p. 104.

72 This example is discussed in detail at *supra*, p. 153.

73 This point is discussed in detail at *supra*, p. 148.

taken away by the Red Army from the territory of Germany.[74] It is estimated that some 1.9 million cultural objects belonging to German owners were returned by the U.S.S.R. to the G.D.R.[75]

This is a clear example of State practice whereby the State responsible for the commission of an internationally wrongful act (the U.S.S.R.) provided reparation (in the form of restitution) to a new State (the G.D.R.) even if that State was not in existence at the time of the commission of the act. It should be noted that the decision by the U.S.S.R. to provide reparation was undoubtedly politically motivated in the context of the Cold War.

2.4 *Creation of Newly Independent States*

Similarly to cases of secession, in principle, the emergence of a Newly Independent State does not jeopardise *per se* the colonial continuing State's entitlement to compensation as a result of internationally wrongful acts committed by a third State before the date of succession. As a matter of principle, the colonial continuing State should therefore remain entitled to claim reparation for internationally wrongful acts committed before the date of succession. State practice in the context of Newly Independent States in fact shows several examples where the new State was allowed to claim reparation for internationally wrongful acts committed before the date of succession. In these cases, the new successor States were deemed to be the injured State.

It should be noted, however, that three of these examples of State practice[76] concern claims *between* the predecessor State and the successor State.[77]

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74 The Protocol was signed on 8 September 1958 and the Final Protocol on 29 July 1960. This example is discussed in: M. BOGUSLAVSKY, "Legal Aspects of the Russian Position in Regard to the Return of Cultural Property", in: Elizabeth SIMPSON (ed.): *The Spoils of War. World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property,* New York, Harry N. Abrams, 1997, at p. 189; Petra KUHN, "Comment on the Soviet Returns of Cultural Treasures Moved because of the War to the GDR", *Spoils of War, Newsletter*, no. 2, 1996 (available at: <http://www.dhh-3.de/biblio/bremen/sow2/soviet.html>).

75 This figure is provided in: Petra KUHN, *Id.*

76 One example is in the context of the independence of Nauru and another in the context of the independence of Vanuatu. A third example concerns the right of Namibia to claim reparation from South Africa for the illegal occupation and other human rights violations.

77 The reasons why such examples are of limited value in the context of the present study have already been explained. See at *supra*, p. 30.

a) *The Peace Treaties Entered into by Japan with Indonesia, Malaysia and Singapore After the Second World War*

After the Second World War, Japan entered into several peace treaties with its Asian neighbours. Three of these treaties are relevant in the context of the present discussion as they were entered into with States which did not exist when the internationally wrongful acts were committed by Japan during the Second World War. This did not prevent Japan from making reparation to these new States and to accept that successor States may be entitled to receive compensation. Thus, it was clear that these new States were the States injured since the wrongful acts had been committed by Japan on what was now their territories and their own populations were the primary victims of these acts.

One such peace treaty was entered into on 20 January 1958 with Indonesia, a former Dutch colony, which became an independent State after the Second World War. At Article 4 of the treaty, Japan indicated that it was "prepared to pay reparation to the Republic of Indonesia in order to compensate the damage and suffering caused by Japan during the [Second World] war".[78] Japan agreed to supply products and services for the next 12 years worth an amount of some Yen 80.3 billion (i.e. some US$ 223 million).[79] In return, Indonesia waived all its claims against Japan.[80] Another similar peace treaty was signed on 11 September 1967 with Malaysia, a former British colony, which became an independent State in 1957.[81] This agreement dealt with what is oddly referred to as the "unhappy events" which took place in Malaysia during the Second World War and provided for Japan to pay

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78 *Treaty of Peace between Japan and the Republic of Indonesia*, entered into force on 15 April 1958, in: 324 *U.N.T.S.*, p. 227; 3 *Jap.Ann.Int'l L.,* 1959, p. 158; *British Foreign State Papers*, vol. 163, 1957–1958, at p. 926; Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, p. 158.

79 An interesting feature of this agreement is the acknowledgment at Article 4 of the fact that "the resources of Japan are not sufficient, if it is to maintain a viable economy, to make complete reparation for all the damage and suffering for the Republic of Indonesia and other counties caused by Japan during the war and at the same time meet its other obligations". This is a consistent feature in Japan's post-Second World War treaties. On this aspect, see: A. LEVY, "The Persian Gulf War Cease-Fire Agreement Compared with the Japanese Peace Treaty in Terms of Reparations and Reconstruction, 10 *Dick. J.Int'l L.*, 1992, pp. 541–566. The implementation of Article 4 of this agreement was the object of a separate agreement: *Reparations Agreement between Japan and the Republic of Indonesia*, in: 323 *U.N.T.S.*, p. 248.

80 Article 4(2). Japan also waived (at Article 5) its claims against the Republic of Indonesia. This provision has already been discussed (see at *supra*, p. 183).

81 *Treaty of Peace between Japan and Malaysia*, signed on 11 September 1967, entered into force on 7 May 1968, in: 13 *Jap.Ann.Int'l L.*, 1969, p. 209; Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, p. 349.

reparation in the amount of Yen 2.94 billion.[82] Finally, another peace treaty was signed on 21 September 1967 with Singapore after its secession from Malaysia in 1965.[83] An interesting feature of this last agreement is the fact that in this case the damage which took place during the Second World War was not caused to the predecessor State (Malaysia) but to the predecessor of the predecessor State (i.e. the United Kingdom, the former colonial power).

b) *The* Certain Phosphate Lands in Nauru *Case (1992) in the Context of the Independence of Nauru (1968)*

In the I.C.J. *Certain Phosphate Lands in Nauru* case, Nauru filed an *Application* in 1989 instituting proceedings against Australia in respect of a "dispute… over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence".[84] From 1947 until its independence in 1968, Nauru was a United Nations Trust Territory jointly administered by Australia, Great Britain and New Zealand, with Australia having effective administration. Nauru alleged Australia's failure to make any (or adequate) provision for the rehabilitation of the phosphate lands worked out in Nauru while under Australian administration.[85] Nauru also maintained that Australia had failed to "comply with applicable international stan-

82 The content of the agreement is similar to the one entered into with Indonesia in so far as it provided for Japan to "supply in grants to Malaysia the products of Japan and the services of the Japanese people, the total value of which shall be Yen 2.94 billion". Under the Agreement, all questions arising out of these events are "fully and finally settled" between the two States.

83 *Treaty of Peace between Japan and Singapore*, signed on 21 September 1967, entered into force on 7 May 1968, in: 13 *Jap.Ann.Int'l L.*, 1969, p. 244; Burns H. WESTON & Richard B. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, Univ. Press of Virginia, 1975, p. 121. The Treaty indicated that "an early and complete settlement of questions regarding the unhappy events in Singapore during the last war would contribute constructively to the furtherance of the friendly relations" between the two countries and that, consequently, "Japan shall supply in grants to the Republic of Singapore the products of Japan and the services of the Japanese people, the total value of which shall be Yen 2.94 billion". The Agreement "completely and finally" settled all questions arising out of the Second World War.

84 *Certain Phosphate Lands in Nauru, Preliminary Objections* (Nauru v. Australia), Judgment of 26 June 1992, *I.C.J. Reports 1992*, p. 240.

85 It was more specifically alleged by Nauru that Australia had breached many of its obligations under international law, including an "obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources" (in: *Memorial of the Republic of Nauru*, vol. I, April 1990, third Submission). Another ground invoked was the "principle of general international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory" (in: *Ibid.,* Sixth Submission, see also at para. 458).

dards in respect of the preparation for transfer of control by a predecessor in title or a predecessor responsible for the control and administration of territory".[86]

Australia submitted several objections to the jurisdiction of the Court over the dispute. However, Australia did not object, as a matter of principle, to the right of Nauru as a new State to submit a claim for damage which occurred before its independence.[87] The Court also implicitly recognised this right for a new State, since it decided that it had jurisdiction over the dispute (except for one portion of Nauru's claim). The Court could have refused to hear this case on the ground that any such claim for reparation could not be submitted by a new State not in existence at the time the damage occurred.[88] It did not do so.

c) *The 1984 Exchange of Notes between Vanuatu and the United Kingdom*

The Island of Vanuatu became an independent State in July 1980.[89] On 13 March 1984, it entered into an Exchange of Notes with the United Kingdom concerning "civil disturbances on the islands of Santo, Tanna and Malekula between May

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86 *Application Instituting Proceedings*, Nauru, 10 May 1989, at para. 48. The reasoning is further explained in the *Memorial of the Republic of Nauru*, vol. I, April 1990, at para. 464, as follows: "The 'transfer' of the Island of Nauru to the Applicant State on independence is not to be regarded as a case of State succession operating against an assumption of a clean slate. The independence of a trust territory is not a case of transfer of territory, since, first, the Administering Authority has no sovereignty over the territory, and, secondly, the people of a trust territory are an already existing international entity to whom duties are owed by the Administering Authority, both under the Trusteeship Agreement or otherwise under general international law. The emergence of a new State from the status of a trust territory in accordance with the principle of self-determination embodied in the trusteeship arrangements is not the emergence *ab initio* of an entirely new legal entity, but the emergence from a state of dependence of a people whose rights and status are already distinctly recognized, and to which the predecessor State is in principle accountable". Nauru maintained (in: *Memorial of the Republic of Nauru*, vol. I, April 1990, at para. 467) that the general duty owned by Australia to it was "confirmed by the settled international practice" of Decree N° 1 of the United Nations Council for Namibia (which is examined at *infra*, p. 332).

87 In fact, in its *Preliminary Objection* (December 1990) and its *Counter-Memorial* (29 March 1993) Australia does not mention this issue at all.

88 It is a well known principle of international law that the Court has the power and the "duty" to examine its own jurisdiction *proprio motu* over a dispute even when the issue is not raised by the parties in their respective submissions. This faculty is consistently used by the I.C.J. and other arbitral tribunals applying international law. Thus, in the *South West Africa Case, Preliminary Objections* (Ethiopia v. South Africa; Liberia v. South Africa), Judgment of 21 December 1962, *I.C.J. Reports 1962*, p. 319, at p. 328, the Court raised *proprio motu* an objection as to whether a dispute existed at all between the Parties. On this faculty, see: Hersch LAUTERPACHT, *The Development of International Law by the International Court*, New York, F.A. Praeger, 1958, at p. 102; Manley O. HUDSON, *International Tribunals, Past and Future*, Washington, Carnegie Endowment for International Peace & Brookings Inst., 1944, at p. 72.

89 Before its independence Vanuatu was known as the New Hebrides (an Anglo-French "*Condominium*" since 1906).

and August 1980" which provided for the United Kingdom to make an "*ex gratia* contribution" of some VT 142,068,023 "to assist the Government of Vanuatu to meet the cost of admissible claims".[90] The Notes thus cover damage for events which took place before as well as after the independence of the Islands.[91] No objection was raised against the right of Vanuatu as a new State to submit a claim for damage which occurred *before* its independence.

d) *Namibia (1990)*

Before the independence of Namibia in 1990, the United Nations explicitly recognised its right, upon its independence, to claim reparation for damage against South Africa as a result of its illegal occupation. The United Nations also recognised such right for Namibia against other States, individuals and corporations. These two different aspects of this recognised right to reparation are examined in the following two sections. Other (hypothetical) claims for reparation are not examined here.[92]

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90 *Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Vanuatu Concerning the United Kingdom Contribution Towards Compensation Claims Arising out of Civil Disturbance in Vanuatu in 1980,* 13 March 1984, in: *U.K.T.S.*, 1984, no. 55 (Cmnd. 9293); Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley, N.Y., Transnational Publ., 1999, p. 289.

91 The Notes also mentions that the contribution is "without prejudice to the position of the United Kingdom and does not amount to the admission of past, present or future liability" on its part and that it is a "full and final settlement" of claims arising of these events.

92 Thus, it has been argued in doctrine that Namibia would have a right to claim reparation for the crime of genocide committed by Germany against the Herero people at the start of the 20th Century. Thus for Lynn BERAT, "Genocide: The Namibian Case Against Germany", *Pace Int'l L.Rev.*, 1993, p. 165, at p. 201, "[i]t is apparent that because the present German state may be seen as a direct legal continuation of the old Germany instead of the creation of a new sovereign entity, it, rather than South Africa and Namibia, should be accountable for acts which took place in Namibia earlier in this century". See also: S.L. HARRING, "German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development?", 104 *W.Va. L.Rev*., 2002, p. 393. A private lawsuit was filed in the United States in September 2001 by the Herero People's Reparations Corporation, the Herero Tribe of Namibia and others claiming a total of US$ 2 billion in compensation from several German companies for their (alleged) involvement (in cooperation with Germany) in crimes perpetuated against the Herero people. On 31 July 2003, Judge Kollar-Kotelly of the Federal District Court for the District of Columbia held that plaintiffs had failed to state a cause of action and dismissed the claim (*The Herero People's Reparation Corporation v. Deutsche Bank AG, et al.*, Civ. No. 01–01868). The decision was confirmed on 11 June 2004 by the U.S. Court of Appeals for the District of Columbia (*The Herero People's Reparation Corporation v. Deutsche Bank AG, et al.*, No. 03–7110). These decisions do not discuss any issue of State succession to international responsibility. In August 2004, Germany's

The Right to Claim Reparation against South Africa for the Illegal Occupation and other Human Rights Violations. The U.N. General Assembly and the U.N. Security Council repeatedly reiterated the illegality of South Africa's continuous occupation of Namibia.[93] The I.C.J., in its advisory opinion of 1971, also stated that South Africa incurred international responsibility arising from this continuing violation of an international obligation.[94] Subsequently, the U.N. Security Council declared that "South Africa remains accountable to the international community for any violations of its international obligations or the rights of the people of the territory of Namibia".[95] More specifically, two U.N. General Assembly Resolutions state that upon its independence the new State of Namibia would have the right to claim reparation for human rights abuses committed by South Africa during the period of illegal occupation.[96] These Resolutions clearly accepted, as a matter of principle, that the successor State (Namibia) would be entitled to claim reparation for internationally wrongful acts which were committed at the time it did not even exist.[97]

Development Aid Minister accepted Germany's "historical and moral responsibility" in the massacre of some 65,000 members of the Herero tribe by German troops in Namibia, but refused to provide any compensation.

93 On 27 October 1966, the U.N. General Assembly adopted Res. 2145 (XXI), whereby it decided that the Mandate was terminated and that South Africa had no right to administer the territory of Namibia. Subsequently, U.N. Security Council Res. 264 (1969), 20 March 1969, approved the decision of the General Assembly to terminate the Mandate. U.N. Security Council Res. 276 (1970), 30 January 1970, declared illegal the continued presence of South Africa in Namibia.

94 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16. The Court stated (at para. 118) that South Africa was accountable for any violations of "the rights of the people of Namibia". It also held that South Africa had the obligation to end the occupation and to withdraw its administration from Namibia.

95 U.N. Security Council Res. 301 (1971), 20 October 1971, at para. 4.

96 U.N. General Assembly Res. 36/121 of 10 December 1981, at para. 25, demanding "that South Africa account for all 'disappeared' Namibians and release any who are still alive and declares that South Africa shall be liable for damages to compensate the victims, their families *and the future lawful Government of an independent Namibia for the losses sustained*" (emphasis added). The same content is also found in U.N. General Assembly Res. 38/36 of 2 December 1983, at para. 42.

97 This seems to be the position adopted by the United Nations Group of Experts in its Report of 18 December 1990 (U.N. Doc. E/CN.4/1990/7, at p. 67) which requested a study on the damage caused during the period of occupation and the establishment of a mechanism by which equitable reparation could be provided. This report is referred to (and its conclusions approved) by Raymond GOY, "L'indépendance de la Namibie" 37 *A.F.D.I.*, 1991, at p. 404.

The Right to Claim Reparation for Internationally Wrongful Acts Committed by other States, Individuals and Corporations under Decree No. 1 on the Natural Resources of Namibia Enacted by the United Nations Council for Namibia. In its 1971 advisory opinion, the I.C.J. stated as follows the binding obligations of States (other than South Africa) in the context of the illegal occupation:

> States members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and to refrain from any act and in particular any dealing with the Government of South Africa implying recognition of the legality of or lending support or assistance to such presence and administration.[98]

It is in this context that *Decree No. 1 on the Natural Resources of Namibia* was enacted on 27 September 1974 by the United Nations Council for Namibia.[99] The United Nations Council for Namibia, which was established in 1967, was expressly authorised to "promulgate laws, decrees and administrative regulations as are necessary for the administration of [Namibia]".[100] There is some controversy in doctrine

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98 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16, at p. 58.

99 *Decree on the Natural Resources of Namibia*, Addendum to the Report of the United Nations Council for Namibia, 29 U.N. GAOR Supp. 24A, at pp. 27–28, U.N. Doc. A/9624/add 1(1975). The Decree was endorsed by U.N. General Assembly Res. 3295 (XXIX) of 13 December 1974, in: 29 U.N. GAOR Supp. 31, at p. 106, U.N. Doc.A/9631 (1975). The Decree is analysed in doctrine by the following authors: N.J. SCHRIJVER, "The Status of Namibia and of Its Natural Resources in International Law. A Report to the United Nations Council for Namibia", in: UN Doc. A/AC.131/GSY/CRP. 13 July 1984, (also published in: *Proceedings of the Regional Symposium on International Efforts to Implement Decree No. 1 for the Protection of the Natural Resources of Namibia*, United Nations, Geneva, 1984, UN Doc. DPI–839–40047, pp. 17–54); H. BOOYSEN & G.E.J. STEPHAN, "Decree no. 1 of the United Nations Council for South West Africa", 1 *South African Y.I.L.*, 1975, pp. 63–86; Caleb M. PILGRIM, "Some Legal Aspects of Trade in the Natural Resources of Namibia", 61 *British Y.I.L.*, 1990, pp. 249–278; George R, SHOCKEY Jr., "Enforcement in United States Courts of the United Nations Council for Namibia's Decree on Natural Resources", 2 *Yale Stud.World P.O.*, 1976, pp. 285–339; François RIGAUX, *Droit public et droit privé dans les relations internationales*, Paris, Ed. Pédone, 1977, pp. 279–293; Nicolaas Jan SCHRIJVER, "Namibian Decree in National Courts", 26 *I.C.L.Q.*, 1977, pp. 81–96; Itse SAGAY, "The Right of the United Nations to Bring Actions in Municipal Courts in Order to Claim Title to Namibian (South West African) Products Exported Abroad", 66 *A.J.I.L.*, 1972, pp. 600–605; François RIGAUX, "Le décret sur les ressources naturelles de la Namibie adopté le 27 septembre 1974 par le Conseil des Nations Unies pour la Namibie", 9 *R.D.H.*, 1976, pp. 467–483.

100 U.N. General Assembly Res. 2248 (s–v), 19 May 1967. The Council was dissolved after the independence of Namibia by U.N. General Assembly Res. 44/243 of 11 September 1990. The legal status and the role of the Council is discussed in doctrine by these writers: Karin ARTS, "The Legal Status and Functioning of the UN Council for Namibia", 2 *Leiden J.I.L.*, 1989, pp. 194–220; Lawrence L. HERMAN, "The Legal Status of Namibia and of the United Nations Council for Namibia", 13 *Canadian Y.I.L.*, 1975, pp. 306–322; Ralph ZACKLIN, "The Problems of Namibia in International Law",

as to the binding force of laws, decrees and regulations passed by the Council.[101] *Decree No. 1 on the Natural Resources of Namibia* forbade the prospecting, mining, processing, selling, exporting, etc., of natural resources within the territorial limits of Namibia without permission of the Council.[102] Most importantly for the present discussion, Paragraph 6 of the Decree stated that the *future government* of an independent Namibia could hold liable for damages individuals and corporations contravening the Decree.

The Council took legal action in courts against corporations breaching Decree No. 1 in one case: *U.N. Council for Namibia v. Urenco UCN and the Netherlands* before the District Court in The Hague, Netherlands.[103] The Council asked for a court order prohibiting Urenco from carrying out further enrichment of uranium originating from Namibia; it also sought a declaratory judgment.[104] The Council did not actively further pursue the court case in The Hague. As a result of the

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R.C.A.D.I., t. 171, 1981–II, at pp. 308–339; Andreas JULIUS, *Der United Nations Council for Namibia*, Frankfurt, Peter Lang, 1989.

101 Nicolaas Jan SCHRIJVER, *Sovereignty over Natural Resources: Balancing Rights and Duties in an Interdependent World*, Groningen, University Library Groningen, 1995, at p. 140, defines the binding nature of these instruments under international law as "less than that of a binding decision of, say, the Security Council, but greater than that of an 'ordinary' General Assembly resolution or a law of a foreign State". See also: François RIGAUX, "Le décret sur les ressources naturelles de la Namibie adopté le 27 septembre 1974 par le Conseil des Nations Unies pour la Namibie", 9 *R.D.H.*, 1976, p. 473. It has been argued by others in doctrine that, on the contrary, the Decree has no binding force on United Nations member States: Ralph ZACKLIN, *Ibid.*, at pp. 320–321; H. BOOYSEN & G.E.J. STEPHAN, "Decree no. 1 of the United Nations Council for South West Africa", 1 *South African Y.I.L.*, 1975, p. 68.

102 It also gave the U.N. Council the power to seize such materials as well as any vehicle, ship or container which transported these illegally-obtained resources.

103 Writ of summons, *Nauta van Haersolte*, no. VM/1 w 3720817, in: United Nations, "The URENCO Case", *Namibia Bulletin*, Special Issue, vol. II, no. 7 (July 1988). In this case, the Council summoned on 14 July 1987 the Dutch corporations of Urenco Nederland v.o.f. and Ultra-Centrifuge Nederland N.V. (as well as the Netherlands) to appear in the District Court in The Hague. It was alleged that during the 1970s the companies based in the Netherlands were involved in the processing of uranium originating from Namibia in violation of the Decree prohibiting the processing and refining of natural resources of Namibia without the permission of the Council. This case is analysed in: Nicolaas Jan SCHRIJVER, "The UN Council for Namibia *vs.* Urenco, UCN and the State of the Netherlands", 1 *Leiden J.I.L.*, 1988, pp. 25–48; Nicolaas Jan SCHRIJVER, *Sovereignty over Natural Resources: Balancing Rights and Duties in an Interdependent World*, Groningen, University Library Groningen, 1995, at pp. 140–143; Caleb M. PILGRIM, "Some Legal Aspects of Trade in the Natural Resources of Namibia", 61 *British Y.I.L.*, 1990, pp. 263 et seq.; Andrew LYALL, "Violations of the Decree no. 1 for the Protection of the Natural Resources of Namibia", in: *Proceedings of the Regional Symposium on International Efforts to Implement Decree No. 1 for the Protection of the Natural Resources of Namibia*, United Nations, Geneva, 1984, U.N. Doc. DPI–839–40047.

104 It should be noted that the Council did not ask the Court for any compensation because paragraph 6 of the Decree stipulates that only the "future Government of an independent Namibia" (and not the Council) could hold liable for damages corporations contravening

independence of Namibia on 21 March 1990, the case was withdrawn on 4 December 1990. Namibia did not pursue this case upon its independence.[105]

What is relevant for the present discussion is not so much the fact that the new State of Namibia did not continue the proceedings started before Dutch courts or that it did not submit any other claims against States as it could have had under the Decree. What matters is the fact that the Decree explicitly recognised the right of the "future government of an independent Namibia" to make such claim for reparation against States as well as against any "person, entity or corporation".[106] In fact, at the time of the enactment of Decree No. 1 by the U.N. Council for Namibia, no State contested the legitimacy of Paragraph 6 of the Decree and the fact that the future State of Namibia could take over the right to reparation arising from internationally wrongful acts committed before its independence.[107]

What is more is the fact that the right of the (future) State of Namibia to claim reparation from individuals or companies for their economic activities in Namibia during the illegal occupation was explicitly recognised in U.N. General Assembly Resolution 38/36 of 2 December 1983 as well as in Resolution 40/52 of 2 December 1985, which both stipulated that the Assembly:

> Declares that all activities of foreign economic interests in Namibia are illegal under international law and that consequently South Africa and all the foreign economic interests operating in Namibia are liable to pay damages to the future lawful Government of an independent Namibia.[108]

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to the Decree. This aspect is further discussed in: Caleb M. PILGRIM, *Ibid.*, at pp. 261–262.

105 Caleb M. PILGRIM, *Ibid.*, at p. 278 (at footnote 94).

106 Some in doctrine are of the same view: Raymond GOY, "L'indépendance de la Namibie" 37 *A.F.D.I.*, 1991, at p. 404; François RIGAUX, *Droit public et droit privé dans les relations internationales*, Paris, Ed. Pédone, 1977, at p. 286; Caleb M. PILGRIM, *Ibid.*, pp. 252, 262.

107 Some objections were raised by several States but not with respect to this eventual right of claiming reparation. Thus, the United States, France and the United Kingdom were not in favour of the wide range of powers given to the Council and did not specifically endorse the Degree. The one State that did support the Council and the Decree was the Netherlands. This explains why a complaint was filed before Dutch courts. The position of the United States is further explained in: George R, SHOCKEY Jr., "Enforcement in United States Courts of the United Nations Council for Namibia's Decree on Natural Resources", 2 *Yale Stud.World P.O.*, 1976, pp. 303–304. The position of other countries is dealt with in: Ralph ZACKLIN, "The Problems of Namibia in International Law", *R.C.A.D.I.*, t. 171, 1981–II, at pp. 323–324. See also: H. BOOYSEN & G.E.J. STEPHAN, "Decree no. 1 of the United Nations Council for South West Africa", 1 *South African Y.I.L.*, 1975, pp. 72 et seq.

108 U.N. General Assembly Res. 40/52 of 2 December 1985, para. 14; U.N. General Assembly Res. 38/36 of 2 December 1983, para 42.

This right of the future independent State of Namibia to claim reparation was also recognised implicitly by two resolutions of the U.N. Security Council[109] as well as by one other U.N. General Assembly resolution.[110]

Decree No. 1 on the Natural Resources of Namibia of the United Nations Council for Namibia, as well as those above-mentioned U.N. Security Council and General Assembly resolutions, are clear examples where the international community explicitly endorsed the right of the successor State to reparation for internationally wrongful acts committed by other States (as well as corporations and individuals) before the date of succession.

3. *Conclusion to Chapter 1*

The question whether a successor State may claim reparation for internationally wrongful acts committed *directly* against the predecessor State by another State before the date of succession is generally answered in the negative in doctrine. The view held is that whenever the predecessor State *continues to exist* (such as in cases of secession) the continuing State should remain entitled to submit a claim for reparation against the third State responsible for the commission of the internationally wrongful act. Therefore, the right to reparation should remain with the continuing State and should not be transferred to the successor State. Similarly, whenever the predecessor State *ceases to exist* (such as in cases of dissolution of State) the conclusion reached by most writers is that there can be no transfer of the right to reparation to the successor States because such right is considered to be personal to the predecessor State.

In the preceding analysis, the reasons given in doctrine for this theory of non-succession have been criticised. The successor State should not be considered as a simple "third" State with respect to the internationally wrongful act which was committed before the date of succession. In many instances, the *consequences of an internationally wrongful act* committed before the date of succession continue to exist *even after the date of succession*. Whenever the circumstances show that

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109 For instance, U.N. Security Council Res. 283 (1970), para. 7, whereby the Security Council "*[c]alls* upon all States to discourage their nationals or companies of their nationality not under direct governmental control from investing or obtaining concessions in Namibia, and to this end to withhold protection of such investment against claims of a future lawful Government of Namibia". See also U.N. Security Council Res. 301 (1971), 20 October 1971, at para. 12, whereby the Security Council "*[d]eclares* that franchises, rights, titles or contracts relating to Namibia granted to individuals or companies by South Africa after the adoption of General Assembly Res. 2145 (XXI) are not subject to protection or espousal by their States against claims of a future lawful Government of Namibia".

110 U.N. General Assembly Res. 36/121 of 10 December 1981, para. 11: "*Calls* upon all States to prohibit companies of their nationality not under direct governmental control from investing or obtaining concessions in Namibia and to announce that they will not protect such investments against claims of a future lawful Government of Namibia".

the *new successor State is the "injured" State after the date of succession* as a result of an internationally wrongful act committed before the date of succession, it should be allowed to submit a claim for reparation to the State responsible for the act. This solution should prevail in cases where the predecessor State ceases to exist. It should also be accepted when the predecessor State continues to exist.

The examination of State practice and international case law also supports this conclusion. Several cases were found (involving many different types of succession of States) where the successor State claimed compensation for internationally wrongful acts which occurred before the date of succession, when it did not exist as an independent State. In some cases, the State responsible for the internationally wrongful act provided reparation to the new successor State.[111] The principle of succession to the right to reparation was explicitly endorsed by organs of the United Nations in the context of the independence of Namibia.

In fact, not a single case of State practice or international case law was found where a State actually objected to the claim submitted by a successor State based on the ground that it did not exist at the time the internationally wrongful act was committed. Also, no judicial body rejected a claim by a successor State based on this ground. It is true that from the information available it does not seem that any of the new successor States involved in these cases actually made use of the argument of succession to the right to reparation. It is therefore not surprising that the issue was simply not discussed by the parties nor decided by the judicial bodies. In fact, in one case, the successor State (Slovakia) could have easily based its claim to reparation on this doctrine of succession because of the language used in the *Compromis* entered into with Hungary to submit a dispute to the I.C.J.[112] However, Slovakia did not invoke such argument (principally for tactical reasons).[113]

It therefore seems that the principles of succession or non-succession to the right to reparation are simply (almost) never invoked by States in their actual practice and never dealt with by judicial bodies. It should therefore be concluded that the fact that an internationally wrongful act was committed before the date of succession is *not* treated in State practice and international case law *as an obstacle* preventing the new successor State from receiving reparation.

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111 This is the case of the 1958 Protocol entered into by the U.S.S.R. and the G.D.R. for the restitution of cultural properties. Other examples are the peace treaties entered into by Japan with Indonesia, Malaysia and Singapore after the Second World War. One last case is the 1984 Exchange of Notes between Vanuatu and the United Kingdom.

112 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3.

113 Slovakia explicitly rejected in its written submissions the existence of any such principle of succession to the right to reparation: *Counter-Memorial of the Slovak Republic*, vol. I, 5 December 1994, at paras. 3.60 et seq. It did so, however, in order to avoid any *responsibility* for internationally wrongful acts committed by Czechoslovakia before the date of succession.

2

THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT AFFECTING A NATIONAL OF THE PREDECESSOR STATE

Introduction

This Chapter deals with the question whether the continuing State or the successor State can submit a claim for reparation for internationally wrongful acts committed by a third State (before the date of succession) which affected *a national of the predecessor State* who later became a national of the successor State. Because the internationally wrongful acts affected a national of that State, the issue involves the concept of diplomatic protection. The analysis of doctrine (as well as the present author's position) on this point are explored at Section 1. The next section (Section 2) examines the relevant State practice and case law.

1. *Analysis of Doctrine*

1.1 *The Rule of Continuous Nationality in Diplomatic Protection*

It is a well-known principle of international law that by the mechanisms of diplomatic protection a State offers to take up on the international level the claim of one of its nationals who has suffered injuries as a consequence of the commission of an act by another State. By doing so, it is generally admitted that the State "is in reality asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law".[1] Since a State is, in fact, "asserting its

1 *Mavrommatis Palestine Concessions* case *(Jurisdiction)*, Judgment of 30 August 1924,

Patrick Dumberry, State Succession to International Responsibility, pp. 337–411.

own right" when protecting one of its nationals by exercising diplomatic protection, it needs to ensure that such person is indeed one of its nationals. This requirement is recognised at Article 44(a) of the I.L.C.'s *Articles on Responsibility of States for Internationally Wrongful Acts*, which states that the responsibility of a State may not be invoked if "the claim is not brought in accordance with any applicable rule relating to the nationality of claims".[2]

The traditional rule of diplomatic protection concerning the nationality of claims is the principle of "continuous nationality". A first essential condition for a State to exercise diplomatic protection on behalf of a person is that such person must have possessed its nationality *at the time of the commission of the internationally wrongful act* by the third State.[3] The second essential condition is that such person remain a national of that State at least *until that State takes up his/her claim*.[4] There is also support in doctrine[5] as well as in case law[6] for the rule that the person for which a State wants to exercise diplomatic protection should also have its nationality at *the date of the award.*

Support for the rule of continuous nationality is, however, far from being unanimous. It has been suggested in doctrine that it is not a rule of international law.[7] This is, for instance, the position of Umpire Parker in the *Administrative Decision No. V* case[8] and the position of some members of the *Institut de Droit*

P.C.I.J., *Series A*, no. 2. The same explanation is found in: *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76.

2 *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, 26 July 2001, U.N. Doc. A/CN.4/L.602/Rev.1.

3 Jean Philippe MONNIER, at p. 68.

4 *Id.*

5 Sir Robert JENNING & Sir Arthur WATTS, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, pp. 512–513; Ian BROWNLIE, *Principles of Public International Law*, 5th ed. 1998, at p. 484 ("the majority of governments and of writers take the date of the award or judgment as the critical date").

6 *Affaire des biens britanniques au Maroc Espagnol* (Great-Britain v. Spain), case no. 36 "Benchiton", Award of Umpire Huber of 29 December 1924, in: U.N.R.I.A.A., vol. II, p. 615, at p. 706. See also: *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID case No. ARB (AF)/98/3, Award of 26 June 2003, at para. 225, in: 42 *I.L.M.*, 2003, p. 811.

7 Ian SINCLAIR, "Nationality of Claims: British Practice", 27 *British Y.I.L.*, 1950, at p. 130; J.H.W. VERZIJL, *International Law in Historical Perspective, Part VI (Juridical Facts as Sources of International Rights and Obligations)*, Leiden, A.W. Sijthoff, 1973, p. 723.

8 *Administrative Decision No. V*, Decision of Umpire Edwin B. Parker, United States-Germany Mixed Claims Commission, 31 October 1924, in: *U.N.R.I.A.A.*, vol. VII, p. 119, p. 140, at p. 143 (also in: *A.J.I.L.*, 1925, p. 614): "Those decisions which have adopted [the rule of continuous nationality] as a whole have recognized it as a mere rule of practice. Usually they have been rendered by divided commissions, with one member vigourously dissenting. When the majority decisions in these cases come to be analyzed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them".

international,[9] as well as the one defended by Judge van Eysinga in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case.[10] It should also be noted that the rule of "continuous nationality" was not adopted in the 1960 Harvard *Draft Convention on the International Responsibility of States*[11] or by the International Law Association Rapporteur Orrego Vicuña in his *Interim Report* on diplomatic protection.[12] Some authors have suggested that the traditional rule should be dropped altogether.[13] These criticisms are also echoed in the work of the I.L.C.'s Special Rapporteur Dugard on diplomatic protection, for whom "[t]he traditional 'rule' of continuous nationality has outlived its usefulness" and "has no place in a world in which individual rights are recognized by international law and in which nationality is not easily changed".[14]

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9 See, the position of N. POLITIS, in: *Annuaire I.D.I.*, 1933, pp. 487–488, challenging the proposal of the *Institut*'s Rapporteur Borchard endorsing the rule of continuous nationality. The debate held at the *Institut* is examined in detail at *infra*, p. 350.

10 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at pp. 34–35. His opinion is examined in detail at *infra*, p. 399.

11 *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 15 April 1961, by reporters Louis B. SOHN and Richard BAXTER, Harvard School of Law, in: 55 *A.J.I.L.*, 1961, p. 579. Article 23(6) of the Draft Convention reads as follows: "A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury".

12 Francisco ORREGO VICUÑA, *The Changing Law of Nationality of Claims, Interim Report*, in: International Law Association, London Conference (2000), Committee on Diplomatic Protection of Persons and Property, p. 28, see at Rules 8–10. He is of the view (see at p. 37) that "the retention of the rule of continuance of nationality does not seem to find any longer justification in the light of the changing role of nationality as a requirement of diplomatic protection".

13 Eric WYLER, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, P.U.F., 1990, pp. 133–134; M. BENNOUNA, "La protection diplomatique, un droit de l'État?" in: *Boutros Boutros-Ghali Amicorum Discipulorumque Liber. Paix, Développement, Démocratie*, vol. I, Brussels, Bruylant, 1998, p. 245; Matthew S. DUCHESNE, "The Continuous Nationality of Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes", 36 *Geo. Wash. Int'l L. Rev.*, 2004, p. 783, at pp. 801–802.

14 *Addendum to First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 20 April 2000, U.N. Doc. A/CN.4/506/Add.1, at para. 24. He makes reference to the "dubious status of the requirement of continuity of nationality as a customary rule" (in: *Ibid.*, at para. 12) which is "emphasized by the uncertainties surrounding the content of the alleged rule" and in particular the question of the "date until which continuous nationality of the claim is required" (*Ibid.*, at para. 16). Accordingly, draft Article 9 proposed by the Special Rapporteur sought to "free the institution of diplomatic protection from the chains of the continuity rule and to establish a flexible regime" (*Ibid.*, at para. 24). Thus, draft Article 9 does not adopt the traditional rule of diplomatic protection in so far as it allows a State to bring a claim on behalf of a person who has acquired its nationality *bona fide* after having suffered from an injury attributable to a third State (other than the person's previous State of nationality).

1.2 *The Application of the Rule of Continuous Nationality in the Context of State Succession*

The application of the rule of continuous nationality in the particular context of State succession has important implications with respect to the possibility for both the continuing State and the successor State to submit claims on behalf of persons injured as a result of internationally wrongful acts committed before the date of succession. Two situations must be distinguished (and will now be examined): when the predecessor State ceases to exist; and when its existence is, on the contrary, not affected by territorial changes.

In cases of State succession where the predecessor State *ceases to exist* (such as incorporation and unification of States, as well as dissolution of State), nationals of the predecessor State(s) will become nationals of the successor State(s) at the date of succession. Since at the time of the commission of the internationally wrongful act by the third State the individuals injured possessed the nationality of the predecessor State(s) and not that of the successor State(s), the rule of continuous nationality would prevent the successor State(s) from exercising its diplomatic protection on behalf of its "new" nationals. They are sometimes referred to as "late" nationals. This principle is largely supported in doctrine.[15]

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15 Brigitte STERN, Responsabilité, p. 354; Jean Philippe MONNIER, at pp. 68–69 ("comme en cas de succession d'Etats les sujets de l'Etat prédécesseur deviennent les nationaux de l'Etat successeur, ce dernier ne pourra pas faire valoir le prétention qu'avait l'un d'eux contre un Etat tiers, du fait de la rupture du lien de nationalité"); Pierre-Marie DUPUY, *Droit international public*, 4th ed., Paris, Dalloz, 1998, p. 54 ("[l]e principe est que l'Etat successeur ne peut faire valoir les prétentions d'un ancien ressortissant de l'Etat prédécesseur à l'encontre d'un Etat tiers"); Paul GUGGENHEIM, *Traité de Droit international public*, t. I, Geneva, Librairie de l'Université, 1953, p. 474 ("le droit à la protection diplomatique à l'égard d'un Etat tiers, droit qui naît au moment où a lieu l'acte illicite, ne passe pas à l'Etat successeur"); NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 550 ("[l]'Etat successeur n'est pas habilité à exercer la protection diplomatique, en vue d'engager la responsabilité d'un Etat tiers, à raison d'un fait antérieur à la succession et qui a causé un préjudice à un ressortissant du territoire muté"); Louis DELBEZ, *Principes généraux du droit international public*, 3rd ed., Paris, L.G.D.J., 1964, pp. 275–276 ("[i]l n'existe pas…de succession au droit à réparation de l'Etat prédécesseur. Cela est vrai même s'il s'agit d'un préjudice subi par une personne privée. L'Etat successeur n'est pas fondé à exercer la protection diplomatique à l'égard de cette personne, passée au nombre de ses nationaux, car le délit est antérieur à la mutation territoriale et que ses droits n'ont pas été violés en la personne d'un de ses ressortissants"); David RUZIE, *Droit international public*, 14th ed., Paris, Dalloz, 1999, at p. 90 ("[e]n principe, un Etat C (Etat successeur) ne peut faire valoir les prétentions d'un ancien ressortissant de l'Etat A (Etat cédant) contre un Etat B"). See also the same assessment made by these other writers: Hercules BOOYSEN, "Succession to Delictual Liability: a Namibian Precedent", 24 *Comp. & Int'l L.J. S. Afr.*, 1991, p. 213; I. SEIDL-HOHENVELDERN, *Völkerrecht*, Cologne, Carl Heymanns Verlang KG, 1987, at p. 288; A. VERDROSS, *Völkerrecht*, 4th ed., Vienna, Springler Verlag, 1959, p. 198 (who makes, however, an

In the other situation, where the predecessor State *does not cease to exist* (such as in cases of secession, Newly Independent States and cession and transfer of territory), the successor State would also not be able to exercise diplomatic protection for its "new" nationals since, at the time of the commission of the internationally wrongful act by the third State, the individuals injured did not possess its nationality but only the nationality of the predecessor State. Support for this position is found in doctrine.[16]

It has been suggested in doctrine that in cases where the predecessor State does not cease to exist, it would remain, at least in theory, for the continuing State to exercise such diplomatic protection.[17] This is indeed true in the case of the existence of a right of option of nationality when the person injured before the date of succession decides to keep the nationality of the continuing State. In such a case, the continuing State may espouse the claim of such person, as there is no break in the chain of nationality. However, such a right of option is not always available, and even in cases where it does exist, an individual might decide not to exercise it. In this last scenario, the individual injured before the date of succession would become a national of the successor State at the date of succession. The continuing State could not exercise diplomatic protection for such person for the simple reason that he/she would no longer be its national at the time the claim is submitted. Thus, the rule of continuous nationality would prevent the continuing State from exercising diplomatic protection for individuals which used to be its nationals but have since the date of succession become nationals of the successor State.[18] A good illustration of that principle is the *Henriette Levy* case, which was decided by a U.S.-France Commission in 1881.[19] The only possible exception to that rule is when the continuing State's "own national interest" has been affected by the original injury to one of its nationals (who no longer has such nationality).[20]

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exception for "continuous" internationally wrongful acts which continue after the date of succession); A. VERDROSS & B. SIMMA, *Universelles Völkerrecht, Theorie und Praxis*, Berlin, Dunker & Humblot, 1984, pp. 633–634; Marcel SINKONDO, *Droit international public*, Paris, Ellipses, 1999, p. 327.

16 Suzanne BASTID, *Droit international public*, Univ. de Paris, les Cours de droit, 1976–1977, at p. 582: "Les règles relatives aux dates auxquelles doit exister la nationalité subsistent même lorsqu'il y a eu cession de territoires et changement de nationalité à raison de la cession intervenue. Pratiquement, la protection diplomatique devient impossible".

17 Eric WYLER, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, P.U.F., 1990, at p. 117: "L'Etat dont le lésé possédait la nationalité à l'époque de l'acte illicite devrait conserver son droit d'intervention".

18 NGUYEN Quoc Dinh, Patrick DAILLIER & Alain PELLET, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, p. 550. See also: I. SEIDL-HOHENVELDERN, *Völkerrecht*, Cologne, Carl Heymanns Verlang KG, 1987, at p. 288.

19 This case is discussed in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 2514 et seq. This case is examined in detail at *infra*, p. 404.

20 This principle is recognised at draft Article 9 (al. 3) of the *Addendum to First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 20 April 2000,

Therefore, the conclusion remains the same quite independently of the question whether or not the predecessor State ceases to exist. The application of the rule of continuous nationality in the context of State succession:

- would prevent the *successor State* from exercising diplomatic protection on behalf of its *new nationals* because they were not its nationals at the time the internationally wrongful act was committed; and
- would prevent the *continuing State* from exercising diplomatic protection on behalf of its *former nationals* for the reason that they are no longer its nationals at the time a claim is presented to the State responsible for the commission of the internationally wrongful act.

In other words, the application of the rule of continuous nationality in the context of State succession would result in neither the continuing State nor the successor State being able to exercise diplomatic protection on behalf of an individual injured as a result of an internationally wrongful act committed before the date of succession. As no State would be entitled to seek redress against the State responsible, the internationally wrongful act would remain unpunished.[21]

1.3 *The Parties are Free to Exclude the Application of the Rule of Continuous Nationality*

Since the rule of continuous nationality is *not a peremptory* rule of international law, the parties are always free not to apply it in the context of State succession (as in any other context). This is accepted in doctrine, even by the strongest supporters of the rule.[22] This was also recognised by Arbitrator Barge in the *Orinoco*

U.N. Doc. A/CN.4/506/Add.1, which reads as follows: "The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State". In the same *Addendum* to the Report (at para. 29), Dugard explains that this provision was added to "ensures the right of the State of original nationality to bring a claim where its own national interest has been affected by the injury to its nationals". Support for this position can also be found in comments made by H. ROLIN, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at pp. 519–520.

21 Jean Philippe MONNIER, at pp. 70–71: "En cas de succession d'Etats, la règle de la permanence de la nationalité, imperméable à toute exception, laisse sans remède la violation de la norme internationale".

22 E.M. BORCHARD, "La protection des nationaux à l'étranger et le changement de nationalité d'origine", 14 *R.D.I.L.C.*, 1933(no. 3), p. 421, at p. 446, see also at p. 463: "Il n'y a toutefois pas de raison pour que deux Etats ne puissent, s'ils le désirent, au cas où l'un d'entre eux succède à l'autre, convenir que l'Etat successeur, plutôt que l'ancien Etat, continuera à appuyer les réclamations internationales de ceux qu'il acquiert comme nationaux, sans le consentement de ceux-ci. Pareil traité modifierait le droit coutumier existant mais il peut y avoir quelque motif de procéder à ces modifications.

Steamship Company case.[23] The same assessment was made by Umpire Parker in *Administrative Decision No. V*, where he indicated that the rule of continuous nationality was an "established rule of international law" which may, however, be changed "by mutual agreement between the two governments parties to a particular protocol creating a tribunal for the adjudication of claims and defining its jurisdiction".[24] Similarly, in the 1928 Arbitral Award in the *Pablo Nájera* case decided by the France-Mexico Claims Commission, President Verzijl observed that the rule of continuous nationality does not apply when the circumstances of the case show that it is the intention of the parties to exclude it.[25]

In the *Panevezys-Saldutiskis Railway* case before the P.C.I.J.,[26] both the claimant (Estonia)[27] and the respondent (Lithuania)[28] agreed to this principle. The Court also acknowledged that the rule applies "in the absence of a special agreement"

Il n'est pourtant pas possible de forcer les Etats défendeurs à respecter semblable traité et à accepter les réclamations du ressortissant d'un Etat qui, par suite de cession de territoire, est devenu national d'un second Etat. Tout ce qu'on peut faire est d'exprimer l'espoir ou de formuler le vœu que pareils traités soient respectés et il se peut qu'avec le temps le droit résultant des traités deviendra droit coutumier". The same opinion is expressed by these authors: A. de LAPRADELLE & N. POLITIS, *Recueil des arbitrages internationaux*, vol. III, 1872–1875, Paris, Pedone, 1954, at pp. 100–101 (footnote no. 1); Sir Cecil HURST, "Nationality of Claims", 7 *British Y.I.L.*, 1926, p. 163, at p. 182; Hazem M. ALTAM, p. 178; E.M. BORCHARD, *La protection diplomatique des nationaux à l'étranger, Rapport supplémentaire*, in: *Annuaire I.D.I.*, 1933, Session of Oslo, pp. 235 et seq., at p. 244.

23 *Orinoco Steamship Company* case, U.S.-Venezuela Mixed Claims Commission, in: *U.N.R.I.A.A.*, vol. IX, p. 180, at p. 192.

24 *Administrative Decision No. V*, Decision of Umpire Edwin B. Parker, United States-Germany Mixed Claims Commission, 31 October 1924, in: *U.N.R.I.A.A.*, vol. VII, p. 119, p. 140, at p. 141. See also the same view expressed by U.S. Commissioner, Mr Anderson, in his separate opinion.

25 *Pablo Nájera (France) v. United Mexican States*, Decision no. 30–A, 19 October 1928, in: *U.N.R.I.A.A.*, vol. V, p. 466, at p. 488. This case is examined in detail at *infra*, p. 367.

26 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76. This case is examined in detail at *infra*, p. 390.

27 *Observations et conclusions du gouvernement estonien*, 20 April 1938, in: PCIJ, *Serie C, Pleadings, Oral Statements and Documents*, Judicial Year 1938–1939, no. 86, the Panevezys-Saldutiskis Railway Case, Leiden, A.W. Sijthoff, p. 176, at pp. 191–192.

28 *Pleadings ("Exposé") of Prof. Mandelstam, Agent for Lithuania*, 13 June 1938, in: *Ibid.*, p. 430, at p. 434: "[D]'après le droit international…un gouvernement ne peut régulièrement porter un procès devant la juridiction internationale que si la demande est nationale au moment du préjudice subi. Il est vrai que tout gouvernement peut, par un traité, écarter cette règle. Mais, dans chaque cas particulier, il faut alors démontrer qu'un accord pareil est intervenu. Le Gouvernement lithuanien n'a conclu aucun traité avec le Gouvernement estonien et n'a pris aucun engagement envers ce Gouvernement, par lesquels il aurait renoncé à cette règle générale du droit international".

between the parties and that there "are cases where the government concerned had agreed to waive the strict application of the rule" and to establish tribunals with jurisdiction to adjudicate claims "even if this condition as to nationality were not fulfilled".[29]

1.4 *The Rule of Continuous Nationality is not Appropriate in the Context of State Succession*

Many authors in doctrine and the work of the I.L.C. on diplomatic protection, as well as the work of the *Institut de Droit international*, support the proposition that the strict rule of continuous nationality is not appropriate in the context of State succession. There is also support for this proposition in at least two decisions of international tribunals and in some individual and dissenting opinions of judges in two cases before the P.C.I.J. and the I.C.J. States have also issued statements in favour of this proposition.

a) *Case Law*

The traditional rule of continuous nationality was firmly criticised by Judge van Eysinga in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case before the P.C.I.J.[30] He was of the view that such a rule of law which would prevent the successor State from "espous[ing] any claim of any of its new nationals in regard to injury suffered before the change of nationality" would lead to "inequitable results". This is the full paragraph of his reasoning:

> And in this connection the question also arises whether it is reasonable to describe as an unwritten rule of international law a rule which would entail that, when a change of sovereignty takes place, the new State, or the State which has increased its territory would not be able to espouse any claim of any of its new nationals in regard to injury suffered before the change of nationality. It may also be questioned whether indeed it is part of the Court's task to contribute towards the crystallisation of unwritten rules of law which would lead to such inequitable results. It follows from the foregoing that the Lithuanian Agent has not succeeded in establishing the existence, in the absolute form alleged by him, of the rule of international law to the effect that a claim must be a national claim not only at the time of its presentation but also at the time when the injury was suffered, and that this rule cannot resist the normal operation of the law of state succession.[31]

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29 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at p. 16.

30 *Ibid*., His opinion is examined in detail at *infra*, p. 399.

31 *Ibid.*, at p. 35.

Judge Fitzmaurice, in his individual opinion in the *Barcelona Traction* case before the I.C.J., also criticised the rule of continuous nationality and its application in the context of State succession. He indicated that when the change in nationality is involuntary (such as in case of State succession) the rule "would work injustice", as it deprives new nationals of the successor State of all possibility of redress for past internationally wrongful acts.[32] In his view:

> …too rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act.[33]

In his individual opinion in the same case, Judge Jessup agreed with the comments made by Judge Fitzmaurice and suggested that the rule of continuous nationality does not apply in the context of State succession.[34]

The proposition that the rule of continuous nationality should not apply in a strict manner in the context of changes of nationality occurring following a succession of States is also held in an *obiter dictum* by President Verzijl in the *Pablo Nájera* case before the France-Mexico Claims Commission:

> Le cas présent diffère essentiellement des hypothèses dans lesquelles un individu, ressortissant de l'Etat A à l'époque des dommages, devient après cette époque et avant la date de la réclamation, ressortissant de l'Etat B de son propre fait. *Dans le cas de changements collectifs de nationalité en vertu d'un titre de succession d'Etats, la situation juridique doit être appréciée d'une manière beaucoup moins rigide* que ne

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32 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3, individual opinion of Judge Fitzmaurice, p. 65, at pp. 100–101. This is the full paragraph of his reasoning: "Thus a rigid application [of the rule of continuous nationality], though justified where necessary to prevent abuses, should be eschewed where it would work injustice…A clear case of this would be where the change in nationality was involuntary, e.g., because of a re-alignment of State boundaries…Or again, why should the fact that a former dependent territory attains independence and become a separate State deprive whole categories of claimants in that State of all possibility of redress? Such would however be the effect of the continuity rule, for there would technically have been a change in the claimant's nationality, and the former sovereign or protecting State could no longer sustain the claim, while the new one also could not or, according to the doctrines involved, should not be able to do so, because the private claimant was not, at the time of the injury, its national,—or alternatively because, since the later State did not then exist as a separate State, it could not itself, *qua* what it now is, have suffered any wrong in the person of its national".

33 *Id.*

34 *Ibid.*, individual opinion of Judge Jessup, p. 162, at p. 203: "Sir Gerald Fitzmaurice makes a forceful argument against any 'too rigid and sweeping' application of the continuity rule, but I believe his illustrative situation in paragraph 62 of his separate opinion may be covered by another rule deriving from the law of State succession, and on that basis would escape the application of the continuity rule for international claims which I consider to be generally binding—*specialia generalibus derogant*".

> le fait généralement la pratique arbitrale dans les hypothèses normales de changement individuel de nationalité par le fait volontaire de l'intéressé.[35] (emphasis added)

Echoes of the unjust consequences which might result from the application of a strict rule of continuous nationality can also be found in *Administrative Decision No. V* decided by Umpire Parker of the United States-Germany Mixed Claims Commission.[36]

b) *Doctrine*

There is some support in doctrine for the proposition that the application of the rule of continuous nationality should depend on whether the change of nationality was voluntary or involuntary.[37] Many scholars believe that the application of the traditional rule of continuous nationality may lead to unjust results when changes of nationality are *involuntary*, such as in cases of State succession.[38] It would thus

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35 *Pablo Nájera (France) v. United Mexican States*, France-Mexico Claims Commission, Decision no. 30–A, 19 October 1928, in: *U.N.R.I.A.A.*, vol. V, p. 466, at p. 488; *Annual Digest*, 1927–1928, p. 52. This case is examined in detail at *infra*, p. 367.

36 *Administrative Decision No. V*, Decision of Umpire Edwin B. Parker, United States-Germany Mixed Claims Commission, 31 October 1924, in: *U.N.R.I.A.A.*, vol. VII, p. 119, p. 140, at pp. 141–143: "The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed. And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it. Others while following it, have challenged its soundness. *The application in all of its parts of the rule invoked by the German Agent to a privately-owned claim in which the nationality has changed by voluntary or involuntary transfer since the right accrued would deprive the claimant of all remedy for its enforcement through diplomatic intervention. The practical effect would frequently be to deprive the owner of his property. As the rule in its application necessarily works injustice, it may well be doubted whether it has or should have a placed among the established rules of international law.* Those decisions which have adopted it as a whole have recognized it as a mere rule of practice" (emphasis added).

37 This is, for instance, the position of: Ian BROWNLIE, *Principles of Public International Law*, 5th ed., Oxford, Clarendon Press, 1998, pp. 483, 661; Hazem M. ATLAM, pp. 157, 180–182. *Contra*: D.P. O'CONNELL, *International Law*, vol. II, London, Stevens & Sons, 1970, p. 1036, for whom "a sharp distinction between voluntary and involuntary changes of nationality, with a limitation of the doctrine of continuous nationality to the former, seem of little value". *Contra*: H.F. VAN PANHUYS, *The Role of Nationality in International Law: An Outline*, Leiden, A.W. Sythoff, 1959, at p. 93 ("the tendency to make a distinction between a voluntary and an involuntary change of nationality must raise a host of problems").

38 Charles ROUSSEAU, *Droit international public*, vol. V, Paris, Sirey, 1983, at p. 119 ("il est parfaitement inique de refuser toute réparation aux particuliers en raison de changements accidentels (décès) ou imposés (mutations territoriales) affectant leur statut

result in nationals of the successor State being left without any possible redress for internationally wrongful acts suffered at the time they were nationals of another State.[39] The fact that the application of the rule in the context of State succession would ultimately deprive "large numbers and extensive categories of persons" has been described as "offensive to the modern conception of the role of international law in protecting the individual".[40] Others in doctrine have maintained that the application of the rule of continuous nationality in the context of State succession in fact rewards the wrongdoer State, as its "wrong" (i.e. the internationally wrongful act) goes unpunished.[41] For all these reasons, a growing number of authors in

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juridique"); Hazem M. ATLAM, pp. 154, 182, see at p. 184 ("[l]a distinction entre les changements volontaires et les changements collectifs de la nationalité conduit ainsi à neutraliser la règle de la continuité de la nationalité lorsqu'un tel changement se réalise du fait d'une succession d'Etats"). A. de LAPRADELLE & N. POLITIS, *Recueil des arbitrages internationaux*, vol. III, 1872–1875, Paris, Pedone, 1954, at pp. 99–100 (footnote no. 1), discuss the case law supporting the rule of continuous nationality and mention that it mostly relates to voluntary acts of individuals to acquire a new nationality. The authors conclude that "il serait imprudent d'étendre cette jurisprudence au cas où le changement de la nationalité est le résultat de circonstances indépendantes de la volonté des intéressés et où l'application automatique de la règle conduirait à priver les individus et les Etats de la possibilité de faire valoir leurs droits actuels devant les juridictions internationales". The authors further indicate (at p. 101, footnote no. 1): "… il suffit de constater l'abandon de la règle étroite de la persistance de la nationalité de la réclamation en présence de circonstances de droit et de fait qui auraient rendu la règle appliquée dans sa lettre souverainement injuste". This is also the position of J.H.W. VERZIJL, *International Law in Historical Perspective*, t. V, Leiden, A.W. Sijthoff, 1972, at p. 449, for whom the application of the rule in cases of "massive change of nationality" is unreasonable. See also: Ulrich FASTENRATH, "Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", 44 *Ö.Z.ö.R.V.*, 1992, at p. 39; Ruth DONNER, *The Regulation of Nationality in International Law*, 2nd ed., Irvington-on-Hudson, Transnational Publ. inc., 1994, at p. 252, footnote 17. *Contra*: Georg SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, vol. I, 3rd ed., London, Steven & Sons, 1957, pp. 600–601.

39 This is, for instance, the position of D.P. O'CONNELL, *International Law*, vol. II, London, Stevens & Sons, 1970, pp. 1035–1036, expressing doubts that the rule of continuous nationality "has or should have a place among the established rules of international law" partially based on the ground that "the wholesale change of nationality forced upon peoples in this century" would "leaves a substantial body of alien rights without a practical remedy if the rule of continuous nationality [was] rigorously applied". This is also the position of Charles De VISSCHER, "Cours général de droit international public", *R.C.A.D.I.*, t. 136, 1972–II, at p. 166: "La grande vague de décolonisation des années 60 a mis clairement en lumière le caractère inéquitable de cette règle dont l'effet a été de priver des millions d'individus de toute protection du chef des dommages illicites subis avant la date de l'accession de leur peuple à l'indépendance". The writer is of the view that the rule should be abandoned for all cases of State succession (and not only for Newly Independent States).

40 D.P. O'CONNELL, *State Succession*, vol. I, pp. 538–539. This is also the conclusion reached by Hazem M. ATLAM, p. 18.

41 Gabriele SALVIOLI, **"**Les règles générales de la paix", *R.C.A.D.I.*, t. 46, 1933–IV, at pp. 125–127 ("je n'aperçois pas pourquoi le changement de nationalité du lésé devrait

doctrine are of the view that the rule of continuous nationality should not apply in the context of changes of nationality resulting from State succession.[42]

c) *The Work of the I.L.C.*

The work of the I.L.C.'s Special Rapporteur on diplomatic protection has clearly adopted the position that the traditional rule of continuous nationality should not be applied in the context of changes to nationality resulting from State succession. For Special Rapporteur Dugard, the rule of continuous nationality "may cause great injustice where the injured individual has undergone a *bona fide* change of nationality, unrelated to the bringing of an international claim, after the occurrence of the injury, as a result, *inter alia*, of…cession of territory or succession of States".[43] He even took the more radical view that it would be "preferable to reject the doctrine of continuous nationality as a substantive rule of customary international law".[44] This is reflected in Special Rapporteur Dugard's draft Article 9 (al. 1).[45]

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profiter à l'Etat coupable; je ne comprends pas pourquoi cette circonstance devrait aboutir à laisser sans réparation un acte internationalement illicite"); D.C. OHLY, "A Functional Analysis of Claimant Eligibility", in: R. LILLICH (ed.), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, Univ. Press of Virginia, 1983, at p. 286 ("by leaving such claims uncompensated, strict application of the continuous nationality doctrine allows wrongful international conduct to remain unretributed, rewarding the State whose actions gave right to the claim with additional incentive to conduct itself in a similarly wrongful manner in the future").

42 Erik J.S. CASTREN, "Aspects récents de la succession d'Etats", *R.C.A.D.I.*, t. 78, 1951–I, pp. 487–488; D.P. O'CONNELL, *State Succession*, vol. I, pp. 538–539; Wilhelm WENGLER, *Völkerrecht*, vol. I, Berlin, Springler, 1964, at p. 602; Ian BROWNLIE, *Principles of Public International Law*, 5th ed., Oxford, Clarendon Press, 1998, p. 483 (for whom the principle of continuous nationality "may be modified in cases of State succession"). See also: Patrick DUMBERRY, "Obsolete and Unjust: The Rule of Continuous Nationality in the Context of State Succession", 76(2) *Nordic J.I.L.*, 2007 (to be published); This position also seems to be defended by J.H.W. VERZIJL, *The Jurisprudence of the World Court: A Case by Case Commentary*, vol. I, Leiden, A.W. Sijthoff, 1965, at pp. 567–568 (analysing the *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76). *Contra*: H.F. VAN PANHUYS, *The Role of Nationality in International Law: An Outline*, Leiden, A.W. Sythoff, 1959, at p. 91, indicating that "international judicial bodies show little inclination to adopt [the] view" that any exception should be made to the rule of continuous nationality in the context of State succession.

43 *Addendum to First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 20 April 2000, U.N. Doc. A/CN.4/506/Add.1, at para. 1. At para. 21 of the same *Addendum*, the Special Rapporteur also mentions that "the doctrine of continuous nationality creates particular hardships in the case of involuntary change of nationality, as in the case of State succession".

44 *Ibid.*, at para. 21.

45 *Id.* The provision reads as follows: "1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs".

In the Report of the I.L.C. on the work of its Fifty-third Session, mention is made of the fact that "most members" of the I.L.C. did not approve the Special Rapporteur's proposal to abandon altogether the traditional rule of continuous nationality. They preferred instead maintaining the traditional rule "albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State".[46] Members of the I.L.C. therefore agreed with the Special Rapporteur that to the traditional rule of continuous nationality should exist a "basic exception" dealing with cases of "involuntary changes of nationality of the protected person, arising from succession of States", as well as another exception for "situations where it would be impossible to apply the rule of continuity owing to, for example, the disappearance of the State of original nationality through dissolution or dismemberment".[47] At its Fifty-fourth Session, the I.L.C. adopted Articles 1 to 7 based on the recommendation of the Drafting Committee.[48] The I.L.C. adopted Article 4, which became Article 5 in 2004, providing for an exception to the traditional rule of continuous nationality in the context of changes of nationality resulting from State succession.[49] Recently, the Special Rapporteur issued its Seventh Report where he proposed some important

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46 *Report of the International Law Commission on the Work of its Fifty-Third Session*, 23 April to 1 June and 2 July to 10 August 2001, I.L.C. Report, A/56/10, 2001, ch. VII, pp. 507 et seq., at para. 177.

47 *Id.*

48 *Report of the International Law Commission on the Work of its Fifty-Fourth Session*, 29 April–7 June and 22 July–16 August 2002, I.L.C. Report, A/57/10, 2002, ch. V, pp. 120 et seq.

49 *Report of the International Law Commission on the Work of its Fifty-Sixth Session*, 3 May to 4 June and 5 July to 6 August 2004, I.L.C. Report, U.N. Doc. A/59/10, 2004, chp. IV. Article 5 reads as follows: "1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim; 2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law; 3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality". The *Report of the International Law Commission on the Work of its Fifty-Fourth Session*, 29 April–7 June and 22 July–16 August 2002, I.L.C. Report, A/57/10, 2002, ch. V, pp. 120 et seq., at p. 180, paras. 7, 8, states that the aim of para. 2 of final Article 5 is to "limit exceptions to the continuous nationality rule to cases involving compulsory imposition of nationality, such as those in which, the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States". In the context of continuous nationality of *corporations*, Article 10 contains an identical al. 1 but al. 2 reads as follows: "Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State".

changes to the relevant provision, which, however, do not affect the rule in the context of State succession.[50]

d) *The Work of the* Institut de Droit international

The *Institut de Droit international* discussed on two different occasions (in 1931–1932 and in 1965) issues related to the rule of continuous nationality and the question whether it should apply in the context of State succession.

The Session of Oslo (1932). The debate at the *Institut de Droit international* on the rule of continuous nationality and its application in the specific context of State succession first arose at the session of Cambridge (1931). Several members of the *Institut* objected to the strict rule of continuity of nationality presented by Rapporteur Borchard. They argued that its application would be unfair in the context of State succession as it would leave the injured person without any possibility of legal redress since neither the continuing State nor the successor State could take over his/her claim.[51] Some members argued, consequently, that the successor State should be given the possibility to take over the claim of its new nationals.[52]

The question was fiercely debated at the *Institut*'s subsequent session of Oslo (1932), when Rapporteur Borchard presented a supplementary report to the one he had submitted at the previous session of Cambridge (1931).[53] The Rapporteur rejected the proposal made by some members at the previous session of Cambridge to amend the rule of continuous nationality in the context of State succession.[54]

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50 *Seventh Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 7 March 2006, U.N. Doc. A/CN.4/567. At para. 35, he notes the position of the United States on Article 5 whereby the "right of diplomatic protection passes in State succession, and the right to diplomatically protect in this situation should not be viewed as an exception to the general requirement" of continuous nationality. Consequently, Dugard suggested, *inter alia*, the following changes to al. 1 of the provision: "(1) A State is entitled to exercise diplomatic protection only in respect of a person who was a national of that State, *or any predecessor State*, continuously from the date of injury to the date of the official presentation of the claim". (emphasis added).

51 *La protection diplomatique des nationaux à l'étranger*, in: *Annuaire I.D.I.*, 1931–II, Session of Cambridge, pp. 201 et seq. See the remarks by N. POLITIS, at pp. 206–207.

52 See the comments by M.F.L. DE LA BARRA, in: *Ibid.*, at p. 210; J. BROWN SCOTT, in: *Ibid.*, at p. 212. See also the letter sent by M.F.L. DE LA BARRA to Rapporteur Borchard, reproduced in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 263, at p. 264.

53 *La protection diplomatique des nationaux à l'étranger, Rapport supplémentaire*, in: *Annuaire I.D.I.*, 1933, Session of Oslo, pp. 235 et seq.

54 *Ibid.*, at pp. 243–244: "En ce qui concerne la suggestion suivant laquelle les changements de nationalité survenus par suite d'une circonstance légale internationale pourraient justifier l'intervention diplomatique du nouvel Etat en faveur de son nouveau citoyen, il est admis que cette suggestion est aussi contraire au droit et qu'elle ne devrait pas être défendue par l'Institut". Rapporteur Borchard also stated (in: *Ibid.*, at p. 246): "Au lieu de demander extension de la protection diplomatique en s'écartant de ses bases fondamentales, la solution devrait consister, je pense, à autoriser les particuliers à présenter

Several members of the *Institut* still opposed the draft resolution. This is, for instance, the case with Politis, for whom the draft resolution "prive l'individu qui a changé de nationalité de toute protection diplomatique, pour le dommage qu'il aurait subi dans le passé".[55] He believed that the successor State should be given the right to claim reparation from the State responsible for the commission of internationally wrongful acts on behalf of its new nationals. However, he made an exception for three different cases.[56] Other members of the *Institut* also expressed similar views.[57]

Ultimately, some members (led by de Lapradelle) submitted an alternative draft resolution to the *Institut* which included a provision (Article 6) setting aside the traditional rule of continuous nationality: "le lien de droit entre la personne et l'Etat, qui conditionne l'exercice de la protection diplomatique, doit exister au moment de la présentation de la demande."[58] This new draft provision was condemned in the strongest terms by Rapporteur Borchard:

> L'article 6 contient une idée dangereuse: en établissant comme règle que l'Etat dont l'intéressé serait devenu le ressortissant, reprenne la protection exercée auparavant par l'Etat dont l'intéressé aura perdu la nationalité. Cet article consacre une vraie anarchie internationale.[59]

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leurs demandes directement devant une juridiction internationales sous certaines conditions et restrictions à définir dans un traité".

55 N. POLITIS, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at p. 487.

56 *Ibid.*, at p. 488: "A la vérité, la protection doit pouvoir s'exercer en faveur de l'individu, malgré son changement de nationalité, sauf lorsque celui-ci agit contre son gouvernement d'origine, ou ne se décide pour une nationalité nouvelle que dans un but frauduleux, en recherchant la protection d'un gouvernement fort, capable de donner plus de prise à sa réclamation. L'objection faite par le Rapporteur de la difficulté de prouver cette fraude n'est pas déterminante. La pratique diplomatique offre de très nombreux cas où semblable preuve a pu être faite". To these two exceptions, Politis adds (at p. 522) a third one: when the internationally wrongful act concerns a particular treaty violation to which the successor State is not a party.

57 See, for instance, the position of B. DE NOLDE, in: *Ibid.*, at p. 495: "[L]a nationalité devrait persister au moment de la présentation de la réclamation, sauf cependant dans le cas d'acquisition d'une nationalité nouvelle à la suite d'un changement territorial". See also the position of A. de LAPRADELLE, in: *Ibid.*, at p. 516: "[I]l n'est pas nécessaire que l'individu lésé possède la nationalité de l'Etat requérant au moment où le dommage est né. La conséquence du contraire serait que, si l'on se trouve sans nationalité, on ne pourrait dans aucune circonstance, faire respecter ses droits". See also the view held by H. ROLIN, in: *Ibid.*, at pp. 519–520, and the comments by A.N. MANDELSTRAM, in: *Ibid.*, p. 521.

58 *Ibid.*, at pp. 501–503.

59 E.M. BORCHARD, in: *Ibid.*, at p. 506. He also indicates (in: *Ibid.*, at p. 512) that in State practice no State would accept the proposal made by some members that a State may espouse the claim of a new national after a change of nationality. A *post facto* criticism of the arguments advanced by some members of the *Institut* against his draft resolution can be found in: E.M. BORCHARD, "La protection des nationaux à

Rapporteur Borchard nevertheless finally accepted the following amendment to his original draft text: "…si le changement de nationalité se fait par acte politique, indépendamment de la volonté de l'individu, il est à désirer, que les deux Etats s'entendent au sujet de la protection à lui accorder."[60] The draft resolution initially submitted by Rapporteur Borchard was rejected by members of the *Institut* by a slim majority of 2 votes.[61] The *Institut* ended up not adopting any resolution on this question.

The Session of Warsaw (1965). The question whether or not the rule of continuous nationality should apply in the context of State succession was dealt with by the *Institut de Droit international* at its Session of Warsaw (1965).[62] The first draft resolution proposed by Rapporteur Briggs contained a classic endorsement of the traditional rule of continuous nationality.[63] Many members of the *Institut* made some statements to the effect that the rule of continuous nationality should be modified in the context of State succession.[64] It was thus submitted that this rule should be more flexible for Newly Independent States in order to allow them to espouse claims of their nationals who did not have such nationality at the time the internationally wrongful act was committed.[65]

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l'étranger et le changement de nationalité d'origine", 14 *R.D.I.L.C.*, 1933, p. 421, at pp. 441–442.

60 *Ibid.*, at p. 515.

61 *Ibid.*, at pp. 524–525.

62 *La protection diplomatique des individus en droit international. La nationalité des réclamations*, Session of Warsaw, September 1965, in: 51–II *Annuaire I.D.I.*, 1965, pp. 157 et seq.

63 *Ibid.*, at p. 159. Article 1 reads as follows: "Toute réclamation internationale présentée par un Etat en raison d'un dommage causé à un individu est irrecevable si elle ne possédait pas le caractère national de l'état requérant, tant à la date du dommage qu'à la date de la présentation de la réclamation". Article 2(a) reads as follows: "Une réclamation présentée en faveur d'un individu possède le caractère national d'un Etat lorsque cet individu est un national de cet Etat ou une personne que cet Etat a qualité, en vertu du droit international, d'assimiler à ses propres nationaux aux fins de la protection diplomatique".

64 For instance, see the position taken by Sir Kenneth BAILEY, in: *Ibid.*, at pp. 180–181: "Le projet dans la rédaction actuelle, n'assure pas une protection complète des individus, notamment lorsqu'il y a un changement dans la structure de l'Etat susceptible d'affecter la nationalité des nationaux entre la date du dommage et la date de présentation de la réclamation diplomatique". He proposed the following amendment: "Si l'Etat, dont l'individu victime d'un dommage est le ressortissant au moment de la réclamation, faisait partie de l'Etat dont il était ressortissant lors du dommage, la réclamation est recevable". W. WENGLER, in: *Ibid.*, at pp. 168–169 (see also at p. 214) indicates that since in the *Lighthouse Arbitration* case the principle of succession to the obligation to repair was endorsed by the Arbitral Tribunal, the same solution should also be adopted for succession to the right to reparation.

65 This is the position of W. WENGLER, in: *Id.* ("[d]ans [les cas de fusion et de démembrement d'Etats] les règles relatives à l'admissibilité de la réclamation devraient donc être assouplies; cela est très important dans le cas des nouveaux Etats"). Q. WRIGHT

Members of the *Institut* proposed an amendment to the above-mentioned Article 1 with the addition of two paragraphs.[66] This amendment proposition was backed by many members of the *Institut*.[67] Several members, as well as the Rapporteur, were, on the contrary, of the opinion that this issue should not be dealt with in the present resolution and should be deferred for further analysis.[68] A compromise was finally reached; it was agreed that a new paragraph should be added to Article 1 to deal specifically with "new States".

The resolution adopted by the *Institut* clearly states that there is an exception to the principle of continuous nationality for Newly Independent States, whereby they can submit claims on behalf of their new nationals even if those persons were not their nationals at the time the internationally wrongful act was committed by

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in: *Ibid.*, at p. 196, indicates that "Si l'on applique avec rigueur la règle de la nationalité continue depuis la date du dommage jusqu'à celle de la présentation de la réclamation, les Etats nouveaux se verront interdire le droit de présenter des réclamations pour des dommages causés dans un passé très récent". He therefore proposed that "l'on insère une disposition de *lege ferenda* prévoyant l'exercice de la protection diplomatique par l'Etat national quelle que fût la nationalité de la réclamation à l'origine". J. SPIROPOULOS, in: *Ibid.*, at p. 199, agrees with the proposition made by Q. WRIGHT, which he describes as establishing "la règle générale qu'un Etat peut présenter une réclamation diplomatique en faveur d'un de ses ressortissants quelle que soit la nationalité de la réclamation à l'origine". He refers to such a proposition as "quelque chose de tout à fait nouveau, voire de révolutionnaire" but mentions that "le fait que cela soit nouveau ne saurait d'ailleurs suffire à repousser la proposition. Il est nécessaire d'adapter les normes juridiques aux exigences du temps". See also the view held by I. FORSTER, in: *Ibid.*, at p. 181, who makes reference to "le cas des millions d'Africains qui ont possédé la nationalité française avant l'indépendance de leurs pays respectifs et qui ont pu subir des dommages à l'époque de la période coloniale". The author also mentions (at pp. 218 & 236) that the *Institut* should avoid causing a denial of justice to these millions of Africans "qui ont faim et soif de justice".

66 The amendment was proposed by W. WENGER and J. ANDRASSY (in: *Ibid.*, at p. 213) and reads as follows: "Les conditions de l'article premier sont considérées comme remplies dans les cas: (1). Où l'individu victime du dommage ressortissait à la date du dommage d'un pays qui était alors lié de telle manière à l'Etat réclamant que ce dernier est responsable des violations de droit international causées par les organes de ce pays; (2). Où l'individu victime du dommage a changé de nationalité par suite des changements territoriaux ou des changements du statut international du pays auquel il appartient".

67 Sir Kenneth BAILEY, in: *Ibid.*, at p. 215; A. DE LUNA GARCIA, *Ibid.*, p. 216; I. FORSTER, *Ibid.*, p. 218.

68 See the position of the following members: E. JIMÉNEZ DE ARÉCHAGA, *Ibid.*, at pp. 193, 214–215; R.L. BINDSCHEDLER, *Ibid.*, p. 215; E. CASTREN, *Ibid.*, pp. 215–216; M.F. BARTOS, *Ibid.*, p. 216; S. ROSENNE, *Ibid.*, p. 216; J. SPIROPOULOS, *Ibid.*, p. 217; F.-A.F. von der HEYDTE, *Ibid.*, p. 217; R. DE NOVA, *Ibid.*, p. 219.

a third State.[69] Although it was observed that it was not always easy to clearly distinguish "new States" from other types of State succession,[70] and that ultimately the principle embodied at Article 1 (para b) could also be applicable to other cases of succession of States,[71] the resolution of the *Institut* applies only to Newly Independent States.[72] It was also decided that the other question of the applicability of the rule of continuous nationality to other types of succession of States should be reserved for a later time (and was, in fact, never followed up on).[73]

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69 Article 1 of the final resolution adopted by the *Institut* entitled "Le caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu" (*Ibid.*, at p. 260) reads as follows: "(a) Une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu peut être rejetée par l'Etat auquel elle est présentée si elle ne possède pas le caractère national de l'Etat requérant à la date de sa présentation comme à la date du dommage. Devant la juridiction saisie d'une telle réclamation, le défaut de caractère national est une cause d'irrecevabilité; (b) Une réclamation internationale présentée par un *Etat nouveau* en raison d'un dommage subi par un de ses nationaux avant l'accession à l'indépendance de cet Etat, *ne peut être rejetée ou déclarée irrecevable en application de l'alinéa précédent pour la seule raison que ce national était auparavant ressortissant de l'ancien Etat*" (emphasis added).

70 See the comments by Sir Louis MBANEFO, in: *Ibid.*, at p. 235.

71 See the comments by Sir Kenneth BAILEY, in: *Ibid.*, at p. 236; W. WENGLER, in: *Ibid.*, at p. 213.

72 For instance, see this comment by J. ZOUREK, in: *Ibid.*, at p. 237: "Le grand nombre des nouveaux Etats qui ont accédé à l'indépendance dans les anciens territoires coloniaux constitue un argument suffisant pour motiver cette façon de procéder. Il semble pleinement justifié à l'orateur de reconnaître, par exception à la règle posée dans le paragraphe a) de l'article premier, que la réclamation internationale présentée par un des Etats constitués dans les anciens territoires non autonomes ne peut pas être déclarée irrecevable pour la seule raison que le national qui avait subi le dommage n'avait pas la nationalité de l'Etat réclamant au moment du dommage subi. Cette exception visant le cas des nouveaux Etats accédant à l'indépendance ne saurait évidement pas s'étendre, en l'absence d'une règle de droit international contraire, aux autres cas de la succession des Etats". This question is referred to in: Jean SALMON, "La cinquante-deuxième session de l'Institut de Droit international", *R.B.D.I.*, 1966–2, p. 579, at p. 582; Hazem M. ATLAM, pp. 190–191; Charles De VISSCHER, "Cours général de droit international public", *R.C.A.D.I.*, t. 136, 1972–II, p. 1, at p. 166.

73 See the proposition by P.C. JESSUP, in: *Ibid.*, at p. 218, and the vote at p. 220. See also the explanation given by the Rapporteur, in: *Ibid.*, p. 234: "Le rapporteur répond que le paragraphe b) de l'article premier traite du cas particulier des Etats nouveaux. La commission a considéré qu'il fallait reconnaître une exception immédiate en ce qui les concerne. Pour les autres questions de succession d'Etats cependant, la Commission a considéré qu'il fallait les réserver en vue d'un examen ultérieur par la Commission". The preamble to the Resolution (in: *Ibid.*, at p. 260) indicates: "…réservant plus spécialement pour un examen ultérieur les cas où l'individu qui a subi le dommage a changé de nationalité…par la suite de modifications territoriales de l'Etat auquel il ressortissait".

e) ***Statements by States***

As previously examined, the work of the I.L.C.'s Special Rapporteur on diplomatic protection clearly adopted the position that the traditional rule of continuous nationality should find no application in the context of changes of nationality resulting from State succession.[74] In this context, some States submitted their comments supporting the position adopted in the context of State succession.[75] For instance, the United States noted that "the right of diplomatic protection passes in [cases of] State succession".[76] The United States also indicates: "there is no interruption of continuous nationality created by State succession, as the successor State retains the right to assert protection with respect to the claims of its citizens that were citizens of the predecessor State, provided all other requirements are met".[77] Also, the United Kingdom noted (not specifically in the context of State succession) that its "Rules Applying to International Claims" allow it to take up the claim of a national who ceases to be or becomes a national after the date of the injury.[78]

1.5 *The Successor State has a Right to Claim Reparation on Behalf of its New Nationals for Internationally Wrongful Acts Committed before the Date of Succession*

It is submitted, in agreement with the long list of authorities referred to in the previous section, that the consequences of the application of the strict rule of continuous nationality in the context of State succession would create a blatant injustice for the new national of the successor State in so far as he/she could not obtain redresse for damage suffered before the date of succession. This result would be unfair since, in most cases, the *consequences* of the commission of the internationally wrongful act affecting an individual before the date of succession will continue to affect this individual *even after the date of succession*. This person remains injured quite independently of his/her change of nationality.

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74 *Report of the International Law Commission on the Work of its Fifty-Sixth Session*, 3 May to 4 June and 5 July to 6 August 2004, I.L.C. Report, U.N. Doc. A/59/10, 2004, ch. IV, *see* Article 5 (al. 2).

75 This is the case of Austria and the Netherlands: *Diplomatic Protection, Comments and Observations Received from Governments*, 27 January 2006, U.N. A/CN.4/561, at p. 15 ff.

76 *Ibid.*, at p. 20.

77 *Id.*

78 Rule II of the United Kingdom 'Rules Applying to International Claims' (in: 37 *I.C.L.Q.* (1988) at p. 1006) reads as follows: "Where the claimant has become or ceases to be a UK national after the date of the injury, HMG [Her Majesty's Government] may in an appropriate case take up the claim in concert with the government of the country of his former subsequent nationality". This is discussed in: *Diplomatic protection, Comments and Observations Received from Governments*, *Addendum*, 3 April 2006, U.N. A/CN.4/561/Add.1, at p. 6.

It has been suggested in doctrine that the unjust consequences which might result from the application of the rule of continuous nationality in the context of State succession are in practice limited by the existence of a "right of option" of nationality. The "right of option" gives individuals the option (at the date of succession) to choose between the nationality of the continuing State and that of the successor State. According to these writers, if the injured individual opts to keep the nationality of the continuing State, the right to reparation would not be affected, as this State could exercise diplomatic protection on his/her behalf after the date of succession.[79] It is submitted that this theoretical "limitation" to the hardship caused by the application of the rule of continuous nationality is in reality of little help and is also morally reprehensible. Thus, it ultimately forces individuals to choose their nationality solely based on their willingness to keep alive their rightful claims against other States. This "limitation" is also very limited in scope as, on the one hand, it is not widespread and is not available in all cases of State succession and, on the other hand, it does not find any application in the context of dissolution, integration and unification of States (where the predecessor State ceases to exist).

Since the rule of continuous nationality should not be applied in the context of State succession, the successor State should, consequently, be allowed to claim reparation on behalf of its new nationals.

The right for the successor State to claim reparation on behalf of its new nationals for pre-succession damage is supported in doctrine.[80] This position was also

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79 This is the position of Georg SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, vol. I, 3th ed., London, Steven & Sons, 1957, pp. 600–601, who interprets the right of option as one solution, whereby the rule of continuous nationality cannot be deemed to be unjust. He, however, admits that such a right of option may "cause hardship" to an individual "for in order to keep his claim alive an individual may have to accept other, and disagreeable, consequences of such a choice". However, he states that "any such criticism of the nationality test misses the point". This is also the position of Giulio DIENA, "La protection diplomatique en cas de décès de la personne lésée", *R.D.I.L.C.*, 1934, at p. 181: "On a cependant remarqué qu'il peut se faire que la personne lésée, après avoir subi le dommage, vienne à changer de nationalité, indépendamment de sa volonté. Mais il s'agit d'une hypothèse qui se réalisera bien rarement. En effet, même en cas de cession territoriale, la personne intéressé aura le plus souvent le moyen de manifester sa volonté en exerçant ou en n'exerçant pas le droit d'option". This argument is also referred to by H.F. VAN PANHUYS, *The Role of Nationality in International Law: An Outline*, Leiden, A.W. Sythoff, 1959, at p. 93.

80 Ian BROWNLIE, *Principles of Public International Law*, 5th ed., Oxford, Clarendon Press, 1998, p. 661 ("the correct solution in principle is a rule of substitution or subrogation, putting the successor [State] in charge of claims belonging to the predecessor [State]"); Eric WYLER, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, P.U.F., 1990, at p. 117 ("[e]n dépit des réactions doctrinales, force est de constater qu'à défaut des dispositions spéciales, la règle de la continuité de la nationalité trouve application dans les cas de changement de souveraineté affectant la nationalité des habitants. Cet état de chose nous incite, ici encore, à recommander l'abandon de la règle: l'Etat dont le lésé possédait la nationalité à l'époque de l'acte illicite devrait conserver son droit d'intervention. Mais l'Etat prédécesseur ne survit pas

defended by several members of the *Institut de Droit international* at its 1931 and 1932 sessions[81] and, most recently, by the International Law Association's Rapporteur on questions of diplomatic protection.[82] This is the solution defended by Judge van Eysinga in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case.[83] This

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toujours au changement de souveraineté; s'il disparaît, c'est à L'Etat successeur qu'il faudrait alors attribuer cette faculté"); Gabriele SALVIOLI, "Les règles générales de la paix", *R.C.A.D.I.*, t. 46, 1933–IV, pp. 1–164, at pp. 125–127 ("[j]e n'aperçois pas pourquoi le changement de nationalité du lésé devrait profiter à l'Etat coupable; je ne comprends pas pourquoi cette circonstance devrait aboutir à laisser sans réparation un acte internationalement illicite. Si l'on a des raisons de croire que le changement de nationalité a pu avoir un but frauduleux, cette circonstance pourra entrer en ligne de compte, mais non le simple fait du changement de nationalité par lui-même… Je dirai donc que, en principe, le changement de nationalité du lésé n'éteint pas le devoir à la réparation… En conclusion, je m'oppose à la thèse négative, selon laquelle le devoir de réparer le dommage causé à un particulier s'éteint lorsque ce dernier a changé de nationalité, et je crois que, des deux Etats, celui dont le particulier lésé est actuellement ressortissant, a seul qualité pour agir en vue d'obtenir une indemnité pour son ressortissant"). See also Hazem M. ATLAM, p. 184. See also: Patrick DUMBERRY, "Obsolete and Unjust: The Rule of Continuous Nationality in the Context of State Succession", 76(2) *Nordic J.I.L.,* 2007 (to be published).

81 See the remarks of the following members of the *Institut* at its Session of Cambridge of 1931: N. POLITIS, in: *Annuaire I.D.I.*, 1931–II, Session of Cambridge, p. 201, at pp. 206–207; M.F.L. DE LA BARRA, in: *Ibid.*, at p. 210; J. BROWN SCOTT, in: *Ibid.*, at p. 212. See also the letter sent by M.F.L. DE LA BARRA to Rapporteur Borchard, reproduced in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 263, at p. 264. At the subsequent Session of Oslo (1932), members of the *Institut* also made similar statements: N. POLITIS, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at p. 487 (he, however, makes reference to three cases where this proposition should not apply); B. DE NOLDE, in: *Ibid.*, at p. 495; A. de LAPRADELLE, in: *Ibid.*, at p. 516; H. ROLIN, in: *Ibid.*, at pp. 519–520 ("[p]eu importe que depuis le moment où le déni de justice a été commis l'individu lésé ait changé de nationalité, il n'en a pas moins droit à réparation, et la protection diplomatique doit pouvoir s'exercer par l'Etat dont il a acquis la nationalité"); A.N. MANDELSTRAM, in: *Ibid.*, p. 521.

82 Francisco ORREGO VICUÑA, *The Changing Law of Nationality of Claims, Interim Report*, in: International Law Association, London Conference (2000), Committee on Diplomatic Protection of Persons and Property, p. 28, at pp. 35–36, for whom (at p. 43) "only the State of the latest nationality should be able to bring a claim" against the State responsible for the internationally wrongful act.

83 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at p. 32: "[I]t is difficult to see why a 'claim' against a third State arising out of an unlawful act should not also pass from the old to the new State. Regarded from this aspect of the law of State succession—there is nothing surprising in the fact that Estonia [i.e. the new successor State] should have had the right to take up a case which previously only Russia [i.e. the predecessor State] could have espoused. Such a 'succession' is an absolutely characteristic and even essential feature of the law of State succession. The successor State is continually exercising rights which previously belonged exclusively to the old State, and the same holds good as regards obligations. Accordingly it would be quite normal that in this case the successor State [i.e. Estonia] should have protected both diplomatically and before the Court a company the diplomatic protection of which formerly fell to Russia alone". His opinion is examined in detail at *infra*, p. 399.

proposition was also endorsed by Article 5 adopted by the work of the I.L.C. on diplomatic protection.[84] The same solution was adopted by the *Institut de Droit international* at its 1965 session, however only for Newly Independent States.[85] The principle that a new successor State should be entitled to submit claims on behalf of its new nationals should apply for *all different types* of State succession.[86]

The same solution should also prevail in the context of *continuous* internationally wrongful acts. In such cases, the successor State is entitled to seek reparation from the responsible State for any damage suffered by one of its new nationals *after the date of succession* as well as for the *pre-succession* portion of the damage. This solution is supported in doctrine[87] as well as by the I.L.C.'s Special Rapporteur Dugard in an *Addendum* to his *First Report on Diplomatic Protection*.[88] This argument was submitted by Estonia in the *Panevezys-Saldutiskis Railway* case before the P.C.I.J.[89] Lithuania rejected the argument and noted that if it were to be accepted it would result in the traditional rule of continuous nationality never finding application in the context of State succession.[90] The Court did not rule on this point nor did it made any observations.

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84 *Report of the International Law Commission on the Work of its Fifty-Fourth Session*, 29 April–7 June and 22 July–16 August 2002, I.L.C. Report, A/57/10, 2002, ch. V, pp. 120 et seq.

85 *La protection diplomatique des individus en droit international. La nationalité des réclamations*, Institut de Droit international, Session of Warsaw, 1965, in: 51–II *Annuaire I.D.I.*, 1965, pp. 157 et seq., at p. 260. See Article 1 of the Resolution entitled "Le caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu".

86 *Contra*: David RUZIE, *Droit international public*, 14th ed., Paris, Dalloz, 1999, at p. 90, who admits only an exception to the general rule of non-succession for Newly Independent States.

87 Miriam PETERSCHMITT, p. 51, reaches the same conclusion but based on a different reasoning.: "Lorsqu'il y a un fait illicite continu, la logique pure voudrait que l'Etat prédécesseur et l'Etat successeur puissent tous les deux exercer la protection diplomatique pour le dommage subi pendant la période où le particulier était leur national. Cependant, lorsque le dommage subi est celui dans la personne d'un ressortissant, il n'est pas toujours aisé de répartir le dommage entre les deux victimes successives d'un même fait illicite. Nous pensons que, dans ces cas-là, il devrait y avoir succession de l'Etat successeur pour toute la période du fait illicite comme nous l'avons déjà préconisé dans les autres cas de succession". The issue is also addressed in: H.F. VAN PANHUYS, *The Role of Nationality in International Law: An Outline*, Leiden, A.W. Sythoff, 1959, at p. 95.

88 *Addendum to First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 20 April 2000, U.N. Doc. A/CN.4/506/Add.1, at para. 17.

89 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76. Estonia argued that the act of nationalisation of the First Company by Lithuania, which took place in 1919, was a continuous internationally wrongful act. See: *Observations et conclusions du gouvernement estonien*, 20 April 1938, in: P.C.I.J., *Serie C, Pleadings, Oral Statements and Documents*, Judicial Year 1938–1939, no. 86, the Panevezys-Saldutiskis Railway Case, Leiden, A.W. Sijthoff, p. 176, at pp. 184–185.

90 *Pleadings ("Exposé") of Prof. Mandelstam, Agent for Lithuania*, 13 June 1938, in: *Ibid.*, p. 430, at p. 450. The argument is also advanced in the *Pleadings ("Réplique") of Prof. Mandelstam, Agent for Lithuania*, 17 June 1938, in: *Ibid.*, p. 497, at pp. 504–505. Estonia

The same solution of succession should certainly prevail *a fortiori* whenever the State responsible for an internationally wrongful act has accepted *after* the date of succession that such right be transferred to the successor State. Section 2 examines several examples illustrating that point. There is support in doctrine for the proposition that the right to reparation should also be transferred to the new State in cases where the predecessor State had already submitted a claim (before the date of succession) on behalf of its injured national.[91]

Some writers have argued that the successor State should not be allowed to submit a claim on behalf of its new national (which did not possess its nationality at the time of the commission of the internationally wrongful act) if it involves a breach of a *treaty obligation* to which the successor State *is not a party*.[92] This position was also supported by several members of the *Institut de Droit international* at its session of Oslo (1932).[93] It is argued by these writers that the successor State

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rejected this interpretation of events: *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at pp. 476–477; *Pleadings ("Duplique") of Baron Nolde, Agent for Estonia*, 18 June 1938, in: *Ibid.*, p. 518, at pp. 522–523.

91 Paul GUGGENHEIM, *Traité de Droit international public*, t. I, Geneva, Librairie de l'Université, 1953, p. 474, supports the general rule of non-succession: "Le droit à la protection diplomatique à l'égard d'un Etat tiers, droit qui naît au moment où a lieu l'acte illicite, ne passe pas à l'Etat successeur". However, he makes an exception (at p. 478, footnote 2) for cases where the claim was already espoused by the predecessor State before the date of succession: "L'Etat successeur a le droit de faire sienne la cause épousée pas l'Etat prédécesseur, même si au moment du préjudice seul ce dernier avait le droit de présenter la cause". The same reasoning is adopted by David RUZIE, *Droit international public*, 14th ed., Paris, Dalloz, 1999, at p. 90. Similarly, for Miriam PETERSCHMITT, pp. 53–54, "[l]orsque l'Etat prédécesseur a déjà fait des démarches diplomatiques pour obtenir réparation, l'Etat tiers est tenu par le principe de la bonne foi de continuer les négociations avec l'Etat successeur. Il ne saurait se retrancher derrière la disparition de l'Etat lésé dans la personne de son ressortissant". Others in doctrine have, on the contrary, rejected this proposition. This is the case with Jean Philippe MONNIER, at p. 71: "Que l'Etat prédécesseur eût ou non épousé déjà la cause de son ressortissant, l'Etat successeur, en la faisant valoir, soutiendrait une demande qui, n'étant pas nationale dès l'origine, devrait nécessairement être rejetée".

92 For instance, D.P. O'CONNELL, *State Succession*, vol. I, p. 538, indicates that "the successor State is incompetent to complaint of the breach of a treaty [by a third State] to which it was not a party". Charles De VISSCHER, "Cours général de droit international public", *R.C.A.D.I.*, t. 136, 1972–II, at p. 166, is of the view that "on concevrait difficilement que l'Etat nouveau puisse obtenir réparation de dommages causés en violation de traités auxquels il déclarerait, par ailleurs, ne pas vouloir succéder". This is also the position of Hazem M. ATLAM, pp. 196–197. *Contra*: E.M. BORCHARD, "La protection des nationaux à l'étranger et le changement de nationalité d'origine", 14 *R.D.I.L.C.*, 1933 (no. 3), p. 421, at p. 459.

93 This is, for instance, the position taken by E. KAUFMANN, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at pp. 517–518 ("le changement de nationalité devrait être sans conséquence juridique au cas où le droit violé serait de caractère universel. Si, d'autre part, ce droit était de caractère spécial (p. ex. un traité conclu entre deux Etats), il n'y aurait aucune raison pour que le nouvel Etat fasse siennes les réclamations formulées jusqu'alors par l'ancien Etat protecteur"). This is also the view of A. RAESTAD, in: *Ibid.*, at pp. 518–519 ("il y a des cas, dans lesquels le changement de nationalité ne

should not be allowed to claim reparation for a breach of a treaty obligation that is not binding on it, the reason given being that it would be illogical that a State not party to a treaty could nevertheless claim reparation for any breach of such treaty.[94]

It is submitted that the successor State has a right to claim reparation on behalf of its new nationals provided only that *one condition* is met: the individual for which the new successor State espouses the claim is still "injured" *after the date of succession*. An individual should be deemed "injured" if the consequences of the commission of an internationally wrongful act which first affected him/her before the date of succession continue to affect him/her after the date of succession. Although under principles of State responsibility a material "damage" is not a requirement for the establishment of an internationally wrongful act,[95] in the present context some sort of "damage" would have to exist in order for an individual to be deemed "injured" after the date of succession. In the case of dissolution of State, only the successor State which has the injured person as one of its nationals may submit a claim on his/her behalf.[96]

In doctrine, reference is often made to the existence of *another requirement*: the individual for whom the new successor State espouses the claim needs to have changed his/her nationality for *bona fide* reasons unrelated to the bringing of an international claim. It is thus argued by some writers that a successor State should not take over the claims of a new national who has "fraudulently" changed his/her nationality in order to have his/her pre-succession claim be espoused by the successor State at the level of diplomatic protection.[97] This requirement finds its roots in traditional diplomatic protection. Thus, the rule of continuous nationality has been traditionally justified in order to prevent certain abuses by individuals who might be otherwise tempted to engage in State protection "shopping" and to

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peut, en raison de la nature du rapport juridique en cause, engendrer la transmission de la protection de l'ancien au nouvel Etat. Un premier de ces cas est constitué par le préjudice causé à un individu par la violation d'un traité entre deux Etats, par exemple, un traité de commerce"). See also the comments by N. POLITIS, in: *Ibid.*, at p. 522.

94 It is argued by some in doctrine that the question is different if the successor State does ratify the treaty. In such a case, nothing should prevent the successor State from being entitled to claim on behalf of its new nationals for breach of this treaty obligation. This is the position of Hazem M. ATLAM, pp. 197–198, who, however, seems to accept the right of the successor State to make reparation claim only in the context of Newly Independent States.

95 *First Report on State Responsibility* (*addendum* no. 4), by Mr James Crawford, Special Rapporteur, 26 May 1998, U.N. Doc. A/CN.4/490/Add.4, at para. 116.

96 Miriam PETERSCHMITT, p. 54.

97 Hazem M. ATLAM, p. 180; N. POLITIS, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at p. 488 ("[à] la vérité, la protection doit pouvoir s'exercer en faveur de l'individu, malgré son changement de nationalité, sauf lorsque celui-ci…ne se décide pour une nationalité nouvelle que dans un but frauduleux, en recherchant la protection d'un gouvernement fort, capable de donner plus de prise à sa réclamation"). See also the position of Gabriele SALVIOLI, "Les règles générales de la paix", *R.C.A.D.I.*, t. 46, 1933–IV, pp. 1–164, at pp. 125–127.

acquire, for political reasons and solely for the sake of opportunity, the nationality of one powerful State in order to pursue their claims against another State.[98] This is the view of Umpire Parker of the United States-Germany Mixed Claims Commission in *Administrative Decision No. V*.[99] Article 4 of the I.L.C. work on diplomatic protection requires that the new national acquired the nationality of the successor State "for a reason unrelated to the bringing of the claim" and "in a manner not inconsistent with international law".[100] Some authors have indicated that there should be a presumption that changes of nationality in the context of State succession are made in good faith and are not fraudulent.[101]

The I.L.C.'s Special Rapporteur Dugard has rightly criticised the appropriateness of the argument of diplomatic protection shopping in contemporary international law.[102] Thus, this argument seems to be of little relevance in the context of State succession, where changes of nationality are, by their very nature, *involuntary*.[103] It is indeed not entirely obvious how an *involuntary* change of nationality by a person might be considered as a fraudulent attempt to pursue any pre-succession claim for

98 John B. MOORE, *Digest of International Law*, vol. VI, Washington, G.P.O., 1906, at p. 637, for whom the absence of the continuous nationality requirement "would allow [a person] to call upon a dozen Governments in succession, to each of which he might transfer his allegiance, to urge his claim". See also: Charles ROUSSEAU, *Droit international public*, vol. V, Paris, Sirey, 1983, at pp. 118–119; E.M. BORCHARD, "La protection des nationaux à l'étranger et le changement de nationalité d'origine", 14 *R.D.I.L.C.*, 1933 (no. 3), p. 421, at p. 449.

99 *Administrative Decision No. V*, Decision of Umpire Edwin B. Parker, United States-Germany Mixed Claims Commission, 31 October 1924, in: *U.N.R.I.A.A.*, vol. VII, p. 119, p. 140, at p. 141: "Any other rule [then the rule of continuous nationality] would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization law for the purpose of procuring its espousal of their claims".

100 *Report of the International Law Commission on the Work of its Fifty-Fourth Session*, 29 April–7 June and 22 July–16 August 2002, I.L.C. Report, A/57/10, 2002, ch. V, pp. 120 et seq.

101 This is, for instance, the position held by Hazem M. ATLAM, p. 180. *Contra*: H.F. VAN PANHUYS, *The Role of Nationality in International Law: An Outline*, Leiden, A.W. Sythoff, 1959, at p. 92, who speaks of an "irrebuttable presumption of bad faith" that is "assumed" in the context of voluntary changes of nationality, while there would be "rebuttable presumption" in other cases of involuntary changes of nationality.

102 In *Addendum to First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 20 April 2000, U.N. Doc. A/CN.4/506/Add.1, at para. 23, he refers to this argument as being "fanciful" and even "ridiculous" in contemporary international law.

103 This is the position of D.P. O'CONNELL, *State Succession*, vol. I, p. 537: "The explanation of the rule [of continuous nationality] is that, if it did not exist, persons would seek naturalization in States which were parties to arbitration agreements merely to get a hearing for their claims. If this is it only rationalization, then the rule obviously lacks cogency when the change of nationality is affected by transfer of territory and not by act of the claimant, and the conclusion should be drawn that States succession constitutes an exception to it".

damage.[104] Therefore, it is submitted that the requirement of *bona fide* changes of nationality is simply not applicable in the context of State succession.

1.6 *An Alternative Theoretical Justification for Allowing the Successor State to Claim Reparation on Behalf of its New Nationals*

As just explained, the rule of continuous nationality should not be applied in the context of State succession because of the injustice it would create. There are, therefore, no valid reasons not to allow the successor State to claim reparation on behalf of its new nationals.

The present section briefly examines (without, however, specifically endorsing it) another theoretical justification which has been offered in doctrine to support the succession of the new State to the claims of its new nationals.

The backbone of this alternative theory is the proposition that the rule of continuous nationality is based on the *false assumption* that an injury caused directly to a national of the predecessor State is deemed to be an injury to *that State* and not to the *individual him/herself*. This assumption, which goes back to de Vattel,[105] and has since then been endorsed by many in doctrine,[106] was specifically stated by the P.C.I.J. in the *Mavrommatis Palestine Concessions* case.[107] Under this assumption, since *only the predecessor State* is considered to be "injured" as a result of the commission of an internationally wrongful act, no other State may be given the right to claim reparation for damage. The successor State is therefore considered to be a *simple third State* with respect to the damage caused to an individual which has since then become one of its nationals.[108] As a third State, the successor State

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104 *Contra*: H.F. VAN PANHUYS, *The Role of Nationality in International Law: An Outline*, Leiden, A.W. Sythoff, 1959, at p. 93, who is of the view that it is not "beyond doubt that in cases of State succession false motives may not influence the subsequent change of nationality".

105 Emerich de VATTEL, *The Law of Nations* (1758), ch. VI, at p. 136: "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen".

106 See, for instance: D. ANZILOTTI, *Cours de droit international public*, Sirey, Paris, 1929, p. 518; E.M. BORCHARD, *The Diplomatic Protection of Citizens Abroad (or the Law of International Claims)*, New York, Banks Law Publ., 1915, at p. 178.

107 *Mavrommatis Palestine Concessions* case *(Jurisdiction)*, Judgment of 30 August 1924, P.C.I.J., *Series A*, no. 2, at p. 12: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant". This *dictum* was repeated by the P.C.I.J. in the *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at p. 16.

108 The rule is explained as follows by Umpire Parker of the United States-Germany Mixed Claims Commission in the *Administrative Decision No. V*, 31 October 1924,

is not allowed to espouse the claim of its new nationals for damage which occurred before the date of succession.[109]

Several writers[110] and Judges of the I.C.J.[111] have criticised this assumption as being a *legal fiction* in the context of changes of nationality.[112] As observed by O'Connell: "If the State were really injured the only relevant point in time would

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in: *U.N.R.I.A.A.*, vol. VII, p. 119, p. 140, at pp. 140–141 (also in: *A.J.I.L.*, 1925, pp. 613–614): "As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing State obligations. Only the injured nations will be heard to assert a claim against another nation".

109 The P.C.I.J. indicated in the *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at pp. 16–17, that "where the injury was done to the national of *some other State*, no claim to which such injury may give rise falls within the scope of diplomatic protection" (emphasis added).

110 Brigitte BOLLECKER-STERN, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pédone, 1973, at p. 99. See also, Philippe CAHIER, "Changements et continuité du droit international, Cours général de droit international public", *R.C.A.D.I.*, t. 195, 1985–VI, at p. 315, for whom "[s]i en effet c'est l'Etat qui est atteint en la personne de son ressortissant, alors seule la nationalité au moment du fait illicite doit entrer en ligne de compte". See also the position of Sir Robert JENNING, "General Course on Principles of International Law", *R.C.A.D.I.*, t. 121, 1967–II, pp. 475–476: "The rule of nationality of claims, indeed, is illogical on any view. Thus, as generally stated, it provides that the individual in question must have possessed that link of nationality continuously from the time of injury up to the time *of the presentation* of the claim and even, according to *some* authorities, up to the time of an award; though it is true that there may be some mitigation of this rule… But both the requirement and the mitigation are surprising because, if the theory is that the injury to the individual national is what creates the injury to the State, it should follow that the existence of a nationality link at the moment of the injury would suffice" (emphasis in the original). See also a similar assessment made by these authors: Louis DUBOUIS, "La distinction entre le droit de l'Etat réclamant et le droit du ressortissant dans la protection diplomatique", LXVII *Revue critique d.i. privé*, 1978, p. 615, at p. 623; Charles De VISSCHER, *Théories et réalités en droit international public*, 2nd ed., Paris, Pedone, 1955, p. 342; Charles De VISSCHER, "Cours général de droit international public", *R.C.A.D.I.*, t. 136, 1972–II, p. 1 at p. 165; Charles De VISSCHER in: *Annuaire I.D.I.*, 1933, Session of Oslo, pp. 479 et seq., at pp. 481–482; Clyde EAGLETON, "Une théorie au sujet du commencement de la responsabilité de l'Etat", 11 *R.D.I.L.C.*, 1930, at p. 651.

111 In the words of Judge Fitzmaurice in his individual opinion in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3, at p. 100, if "the wrong done to the State in the person of its national arises… *at the moment of injury*, the claims then becomes indelibly impressed *ab initio* with the national character concerned" and therefore the "injury to the claimant State is not, so to speak, '*de*-inflicted' by the fact that the individual claimant or company ceases to have its nationality" (emphasis in the original).

112 This is also the position taken in: *First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 7 March 2000, U.N. Doc. A/CN.4/506, at para. 67.

be the moment of the injury; thereafter the State would be able, logically, to seek redress even if the injured individual died or changed his nationality."[113]

Writers have further argued that this assumption does not take into account recent developments in international law, where the position of individuals is not merely that of an "object" of law but also, increasingly, that of a "subject" of law.[114] In the words of the I.L.C.'s Special Rapporteur Dugard, "the Vattelian notion that gives the State of nationality at the time of injury the sole right to claim" does not "acknowledge the place of the individual in the contemporary international legal order";[115] it is "out of line" with the "growing tendency to see the individual as a subject of international law".[116] This legal fiction also does not take into account, in the words of the International Law Association's Rapporteur Orrego Vicuña, the "new approach to diplomatic protection, where it is increasingly the right of the individual and not that of the State acting on its behalf the one that is upheld and enforced".[117] For him, "[t]he retention of the rule of continuance of nationality does not seem to find any longer justification in the light of the changing role of nationality as a requirement of diplomatic protection".[118] The growing number of international instruments (for instance, in the fields of human rights protection and international investments) under which the individual is given a direct access to international tribunals ultimately undermines the fiction that damage caused directly to an individual should nevertheless be deemed to be an injury to the State.[119] This is clearly the assessment made by I.L.C. Special Rapporteur Dugard in his *First Report on Diplomatic Protection*.[120]

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113 D.P. O'CONNELL, *International Law*, vol. II, London, Stevens & Sons, 1970, p. 1034.

114 This is also the assessment made by F.V. GARCÍA AMADOR, "State Responsibility. Some New Problems", *R.C.A.D.I.*, t. 94, 1958 II, at p. 421. See also the position of Hazem M. ATLAM, p. 148.

115 *Addendum to First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 20 April 2000, U.N. Doc. A/CN.4/506/Add.1, at para. 21.

116 *Ibid.*, at para. 18.

117 Francisco ORREGO VICUÑA, *The Changing Law of Nationality of Claims, Interim Report*, in: International Law Association, London Conference (2000), Committee on Diplomatic Protection of Persons and Property, p. 28, at pp. 35–36 (See also in: Francisco ORREGO VICUÑA, "Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement", 15(2) *ICSID Rev.*, 2000, p. 340, at p. 350).

118 *Ibid.*, at p. 37.

119 This issue (in the context of international investment treaties) is briefly discussed in: Patrick DUMBERRY, "L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements", 108 *R.G.D.I.P.*, 2004, pp. 103–122.

120 *First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 7 March 2000, U.N. Doc. A/CN.4/506, at para. 66: "Developments in international human rights law, which elevate the position of the individual in international law, have further undermined the traditional doctrine [of the continuous nationality]. If an individual has the right under human rights instruments to assert his basic human rights before an international body, against his own State of nationality or a foreign State, it

According to this theory, the right to claim reparation from the State responsible for the internationally wrongful act which caused damage *belongs to the individual injured by the act*.[121] This position was, for instance, maintained by Politis during the debate at the session of Cambridge (1931) of the *Institut de Droit international*.[122] The right to claim reparation is thus "attached" to the injured individual and cannot be affected by the fact that he/she later changes nationality and becomes a national of the successor State.[123] In other words, the right to claim reparation "follows" the

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is difficult to maintain that when a State exercises diplomatic protection on behalf of an individual it asserts its *own* right. Investment treaties which grant legal remedies to natural and legal persons before international bodies raise similar difficulties for the traditional doctrine". However, Dugard is of the view (at para. 29) that "[u]ntil the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection".

121 D.P. O'CONNELL, *State Succession*, vol. I, p. 540, proposes two alternative theoretical foundations upon which may be based his proposition that the rule of continuous nationality should not apply when changes of nationality results from succession of States: "Assuming the rule of continuous nationality to exist as one of substantive law, there are two ways of avoiding its operation in cases of State succession. The first way, dependent on the view that the claim is primarily that of the individual and only secondarily that of the State, is to argue that the rationalization of the rule excludes its operation when the change of nationality occurs through change of sovereignty, and that the successor State is competent to claim on his behalf. The second way, dependent on the alternative view that a claim is always that of the State, is that the successor State inherits the claim, so that it is asserting its predecessor's rights by transmission, and not protecting an individual previous susceptible of protection by another State".

122 N. POLITIS, in: *Annuaire I.D.I.*, 1931–II, Session of Cambridge, p. 201, at pp. 208–209: "…il faudrait accorder aux individus le droit de présenter eux-mêmes leur réclamation à une juridiction internationale, et séparer nettement leur démarche de l'intervention de l'Etat auquel ils appartiennent. Le droit international n'a pas encore franchi cette étape. On peut, cependant, trouver, à l'état sporadique, quelques exemples de cette tendance, notamment dans l'existence des commissions mixtes ou des tribunaux arbitraux mixtes…Le droit individuel tend donc à apparaître. Dès lors, exclure la protection diplomatique sous prétexte d'un changement de nationalité, serait maintenir dans les résolutions prises par l'Institut une règle qui n'est que la conséquence d'une conception périmée. S'écarter de cette règle, c'est se mettre d'accord avec le droit actuel, ou, en tout cas, si c'est innover, comme le soutient M. Borchard, c'est en même temps améliorer". Politis also explained his position at the session of Oslo (1932), in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at pp. 487–490. Other members of the *Institut* also made similar remarks: A. de LAPRADELLE, in: *Id.*, pp. 490–492; S. SEFERIADES, in: *Ibid.*, p. 492–494. The arguments developed by Politis and other members of the *Institut* were strongly rejected by Rapporteur Borchard, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 235, at pp. 240 et seq.

123 Francisco ORREGO VICUÑA, *The Changing Law of Nationality of Claims, Interim Report*, in: International Law Association, London Conference (2000), Committee on Diplomatic Protection of Persons and Property, p. 28, at p. 36: "…if the right of the individual is affected the relevant critical date is that of the wrong, and the situation should not change simply because there has been a change of nationality intervening thereafter; the wrong follows in this perspective the affected individual".

injured individual through his/her changes of nationality.[124] The injured individual now being a national of the new State (after the date of succession), nothing should prevent the successor State from submitting a claim on his/her behalf against the State responsible for the commission of the internationally wrongful act which caused the damage.

2. *Analysis of State Practice and Case Law*

Because of the limited number of relevant State practice and international case law dealing with the question whether the successor State takes over the right to claim reparation on behalf of its new nationals which were injured before the date of succession, the present analysis is not based on the different types of succession of States.

The analysis of State practice and international case law shows that different solutions have prevailed. The following tendencies can be highlighted:

- There are several examples of *international judicial decisions* where the traditional rule of continuous nationality was not applied and where the successor State submitted a claim for reparation on behalf of a new national even if this individual did not have the nationality of that State at the time the damage occurred (examined at Section 2.1);
- There are several examples of *State practice* where reparation was provided to the successor State for its new nationals which did not have its nationality at the time the damage occurred (examined at Section 2.2);
- There is only one significant case decided by an international court where the application of the rule of continuous nationality prevented a *new successor State* from claiming reparation for its new nationals concerning events which took place before the date of succession (examined at Section 2.3);
- There is also one example where the application of the rule of continuous nationality by an international judicial body prevented *the continuing State* from exercising diplomatic protection on behalf of a person who was its national when the damage occurred but no longer had such nationality at the time the claim was submitted to the State responsible (also examined at Section 2.3);
- There is some support in case law (and in doctrine) for the proposition that the successor State does not have the right to claim reparation on behalf of its new nationals from the former State of nationality of such nationals (examined at Section 2.4).

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124 *Ibid.*, at p. 43, for whom the "wrong follows the individual in spite of changes of nationality and so does his entitlement to claim". This is also, for instance, the position held by H. ROLIN, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at pp. 519–520.

2.1 *Cases where the Successor State Submitted a Claim on Behalf of its New Nationals*

There are four examples of international judicial decisions where the traditional rule of continuous nationality was not applied in the specific context of State succession.

The first example is the *Pablo Nájera* case of 1928 decided by the France-Mexico Claims Commission, where the Arbitral Tribunal held that the successor State (France) was allowed to submit a claim on behalf of a new national even if this individual did not have the nationality of that State at the time the damage occurred (he was an Ottoman subject).[125] Another similar situation arose in the 1934 Arbitral Award in the case of the *Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War*.[126] In this case, the respondent (the United Kingdom) did not invoke the traditional rule of continuous nationality to deny the jurisdiction of the Sole Arbitrator over the case. The third and fourth examples are the consistent approaches adopted by the Mixed Arbitral Tribunals established after the First World War and the United Nations Compensation Commission (U.N.C.C.) set up after the Gulf War (1990–1991). In both cases, it was deliberately decided to exclude the application of the rule of continuous nationality to prevent the unjust consequences that nationals of new States created after the conflicts could not seek redress for the damage they suffered during the conflicts. The new States were thus allowed to claim reparation on behalf of their new nationals which did not have such nationality at the time the damage occurred.

a) *The* Pablo Nájera *Case (1928)*

The *Pablo Nájera* case before the France-Mexico Claims Commission arises from incidents which took place in 1916 in Mexico, when an Ottoman national (Mr Nájera, born in Lebanon in 1860) was injured as a result of the action of Mexican revolutionaries (during the Mexican Revolution which started in 1910).[127] At the time, Mr Nájera was still formally a national of the Ottoman Empire even though

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125 *Pablo Nájera (France) v. United Mexican States*, Decision no. 30–A, 19 October 1928, in: *U.N.R.I.A.A.*, vol. V, p. 466, at p. 488; in: *Annual Digest*, 1927–1928, p. 256.

126 *Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War* (Finland v. United Kingdom), Award of Dr. Bagge, 9 May 1934, in: *U.N.R.I.A.A.*, vol. III, p. 1481.

127 *Pablo Nájera (France) v. United Mexican States*, Decision no. 30–A, 19 October 1928, in: *U.N.R.I.A.A.*, vol. V, p. 466, at p. 488; in: *Annual Digest*, 1927–1928, p. 256. This case is mentioned in: J.H.W. VERZIJL, *The Jurisprudence of the World Court: A Case by Case Commentary*, vol. I, Leiden, A.W. Sijthoff, 1965, p. 555, see at p. 568, at footnote no. 10 (analysing the *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76). The case is also discussed in: A.H. FELLER, *The Mexican Claims Commissions, 1923–1934; A Study in the Law and Procedure of International Tribunals*, New York, Macmillan Co., 1935, at p. 102.

France had traditionally exercised diplomatic protection for Lebanese and Syrians abroad before the end of the First World War (and the break-up of the Ottoman Empire).[128] France filed a complaint on 15 June 1926 on behalf of Mr Nájera, whom it considered to be a French national, before the Claims Commission which was set up in 1923–1924 to examine claims for losses by French nationals against the Government of Mexico. In defence, Mexico objected, *inter alia*, that Mr Nájera was presently not a French national ("French protégés") under Article III of the *Compromis* under which the Commission was established. Mexico also objected that, at any rate, in 1916 (at the time the damage occurred) Mr Nájera was not a French national and that France could therefore not espouse his claim.

President Verzijl of the Tribunal held that Mr Nájera was included in the term "French protégés" under Article III of the *Compromis* at the time France espoused his claim and submitted its Memorial. The other important point remaining was that when the damage occurred, Mr Nájera was an Ottoman national and not a French national. President Verzijl first noted that the rule of continuous nationality (authorising a State to exercise diplomatic protection only for persons who were its nationals at the time the damage occurred) did not apply when the circumstances of the case show that the parties had the contrary intention.[129] He concluded from his

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128 As a result of the defeat of the Ottoman Empire, the territory of Lebanon was placed under a French military administration and soon after became a French Mandate. In 1923, the League of Nations formally gave the Mandate for Lebanon and Syria to France. Article 3 of the French Mandate provided that "les ressortissants de la Syrie et du Liban se trouvant hors des limites de ces territoires relèveront de la protection diplomatique et consulaire du Mandataire" (quoted in the Award, in: *U.N.R.I.A.A.*, vol. V, p. 466, at p. 474.). In other words, France could exercise diplomatic protection for Lebanese abroad.

129 *Pablo Nájera (France) v. United Mexican States*, Decision no. 30–A, 19 October 1928, in: *U.N.R.I.A.A.*, vol. V, p. 466, at pp. 487–488. This is the relevant passage from the Award: "Mais dans l'espèce ce dernier point se présente sous un jour particulier. Lorsque les deux Gouvernements correspondaient au sujet des Syrio-Libanais ou des protégés… ils savaient que tous les dommages auxquels se référaient les négociations avaient été causés pendant une période dans laquelle la qualité de 'protégé français' ne pouvait encore être appréciée à la lumière de la nouvelle situation juridique du Liban et de la Syrie… Ils savaient qu'un changement fondamental de la situation politique et juridique de ces régions était en train de se produire et que ce changement comporterait des conséquences juridiques pour les Syriens et les Libanais émigrés au Mexique. Ils pouvaient prévoir que la situation juridique de ces individus paraîtrait avoir changé entre l'époque des dommages et celle de l'introduction de la réclamation. Si, dans ces conditions, ils ont étendu quand même les bénéfices de la convention aux étrangers en question, sous la condition tacite que la Commission mixte à créer reconnaîtrait qu'ils peuvent être compris dans le terme 'protégé', il ne me semble pas loisible d'appliquer après coup aux réclamations de ces étrangers des règles techniques strictes, comme celles auxquelles je viens de faire allusion, ni d'exciper du fait qu'à l'époque des dommages ils étaient des sujets ottomans. L'intention évidente des Parties a été de faire bénéficier des avantages de la Convention des personnes originaires de Syrie et du Liban, qui auraient subi des dommages pendant les révolutions, pour autant que la France serait autorisée à les faire bénéficier de sa protection".

examination of the exchange of correspondence between the representatives of the two States that it was indeed the intention of the Parties when they were negotiating the setting up of the Mixed Claims Commission to consider Lebanese living abroad as "French protégés" under Article III of the *Compromis*.[130] The President also held that it was the intention of the Parties that Lebanese living abroad should benefit from this protection *retroactively* for damage suffered during the Mexican Revolution. Faced with such clear intention of the Parties, President Verzijl decided that he could not apply the strict technical rule of continuous nationality and its requirement that the claim of Mr Nájera be "French" in nationality at the time the internationally wrongful act was committed.[131]

The reasoning was approved by the French Commissioner. In his dissenting opinion, the Mexican Commissioner refuted the position taken by President Verzijl. He maintained that the rule of continuous nationality should have found application in the present case and should have prevented France from espousing the claim of Mr Nájera:

> La doctrine juridique parfaitement claire qui s'impose de la date d'acquisition de la nationalité, est celle selon laquelle cette époque ne doit pas être postérieure à celle du préjudice subi pour que la réclamation soit recevable…[I]l est manifestement impossible que le demandeur Nájera et tous ceux qui se trouvent dans la même situation aient le droit de présenter une réclamation puisqu'ils ont acquis la qualité d'administrés français en 1924, après la signature du Traité de Lausanne, c'est-à-dire après avoir subi les dommages.[132]

This Award may probably not be viewed as the strongest case in support of the non-application of the rule of continuous nationality in the context of State succession. Thus, the outcome of this case was undoubtedly driven by the fact that President Verzijl considered that it was the intention of the Parties that the rule of continuous nationality should not apply. This "intention" was, however, not self-evident. As a matter of fact, Mexico strongly objected that it never was its intention to have the Commission competent to hear claims submitted by persons who were not French nationals when the damage occurred. In his dissenting opinion, the Mexican Commissioner also refuted (in strong terms) the position held by President Verzijl. Some quotes from the Award in fact show that President Verzijl was of the view that, as a matter of principle, the strict rule of continuous nationality should only apply in cases of voluntary changes of nationality and not when changes of nationality are involuntary.[133]

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130 This was so because at the time of the negotiations, the Mandate over Syria and Lebanon had already been conferred to France.

131 *Id.*

132 *Ibid.*, at p. 503.

133 *Ibid.*, at p. 488: "Le cas présent diffère essentiellement des hypothèses dans lesquelles un individu, ressortissant de l'Etat A à l'époque des dommages, devient après cette époque et avant la date de la réclamation, ressortissant de l'Etat B de son propre fait. Dans le cas de changements collectifs de nationalité en vertu d'un titre de succession d'Etats,

b) *The Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War (1934)*

This is a case where a claim was submitted by Finland against Great Britain for damage suffered by Finnish nationals before the First World War.[134] At the time of the commission of the internationally wrongful act, Finland was not yet an independent State (it became one after the Russian Revolution of 1917) and the victims had Russian nationality. In application of the traditional rule of continuous nationality, Great Britain (the respondent) could have easily argued that the claim be rejected by the Sole Arbitrator because Finland could not, as a matter of principle, submit a claim on behalf of Finnish nationals who did not have such nationality at the time the damage occurred. Great Britain did not submit such defence. By not rejecting its own jurisdiction over the dispute, the Sole Arbitrator implicitly endorsed the validity of the proposition that a new State may be entitled to reparation for damage which occurred at a time the national (in this case a corporation) for which it is claiming did not have its nationality.[135]

It has been suggested in doctrine that the silence of both the respondent State and the Sole Arbitrator on this point illustrate the fact that States do not make use of the argument of the traditional rule of continuous nationality in the context of State succession and that judicial bodies do not apply it.[136] This is indeed a sound interpretation.

c) *The Practice of Mixed Arbitral Tribunals Established after the First World War*

Introduction. At the end of the First World War, several peace treaties were concluded between the victorious States and the defeated States. The most important treaty was no doubt the *Versailles Peace Treaty* (28 June 1919) signed between Germany, on the one hand, and the Allies (the "Allied and Associated Powers" or "entente Powers",

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la situation juridique doit être appréciée *d'une manière beaucoup moins rigide* que ne le fait généralement la pratique arbitrale dans les hypothèses normales de changement individuel de nationalité par le fait volontaire de l'intéressé" (emphasis added).

134 *Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War* (Finland v. United Kingdom), Award of Dr. Bagge, 9 May 1934, in: *U.N.R.I.A.A.*, vol. III, p. 1481.

135 The Sole Arbitrator had the power to examine its own jurisdiction *proprio motu* in this case even if the issue was not raised by the Parties in their respective submissions.

136 See, for instance, the comments by Hazem M. ATLAM, p. 151; M. PETERSCHMITT, p. 50; W. WENGLER, in: *Annuaire I.D.I.*, 1965–II, at pp. 168, 213. Others in doctrine have rejected this example as simply irrelevant: E. CASTREN, in: *Ibid.*, at p. 215, and M.F. BARTOS, *Ibid.*, p. 215.

i.e. the British Empire, France, Italy, Japan, the United States, etc.), on the other hand.[137] Other separate peace treaties were also signed between the Allies and the "Central Powers" (Austria, Bulgaria, Hungary and Turkey).[138] These five treaties are known collectively as the "Paris Peace Treaties". They all provided for the establishment of Mixed Arbitral Tribunals (M.A.T.s) between each of the Allies, on the one side, and each of the "Central Powers" and Germany, on the other.[139] It should be noted that other M.A.T.s were also established separately: the U.S.-Germany Mixed Claims Commission;[140] the Tripartite Claims Commission (United States, Austria and Hungary);[141] and the Germany-Mexico Mixed Claims Commission.[142]

The tribunals (established under the so-called "Paris Peace Treaties") were all similar in content with respect to the provisions on reparation.[143] They had

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137 *Versailles Treaty*, Paris, signed on 28 June 1919, entered into force on 10 January 1920, in: *The Treaties of Peace 1919–1923*, New York, Carnegie Endowment for International Peace, 1924; in: *U.K.T.S.* 1919, No. 8 (Cmd. 223).

138 The *Saint-Germain Peace Treaty* (1919) with Austria; the *Neuilly Peace Treaty* (1919) with Bulgaria; the *Trianon Peace Treaty* (1920) with Hungary; and the *Lausanne Peace Treaty* (1923) with Turkey.

139 In doctrine, see in general: Ellinor Von PUTTKAMER, "Versailles Peace Treaty", in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 1, North Holland, Max Planck Institute, 1981, p. 276. The description and the functioning of the different tribunals is found in: Norbert WÜHLER, "Mixed Arbitral Tribunals", in: R. BERNHARDT (ed.), *Ibid.*, p. 143. The decisions of the tribunals are compiled in several volumes: *Recueil des décisions des tribunaux arbitraux mixtes*, Paris, Sirey, 1922–1930.

140 The United States never ratified the *Versailles Treaty* and entered into a separate peace treaty with Germany (the Treaty of Berlin of 25 August 1921) which established a Mixed Claims Commission. The awards of this Commission are found in: *U.N.R.I.A.A.*, vol. 7, pp. 13 et seq.

141 The awards of the Tripartite Claims Commission are found in: *U.N.R.I.A.A.*, vol. VI, p. 203, at p. 210; 21 *A.J.I.L.*, 1927, p. 599.

142 The Commission was set up by a bilateral treaty of 16 March 1925.

143 The establishment of the tribunals is provided for at Article 304 a) of the *Versailles Treaty*, *supra*, note 137. The jurisdiction of the tribunals is discussed in doctrine by these writers: Rudolf BLÜHDORN, "Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes par les traités de Paris", *R.C.A.D.I.*, t. 41, 1932–III, p. 220; Karl STRUPP, "The Competence of the Mixed Arbitral Courts of the Treaty of Versailles", 17 *A.J.I.L.*, 1923, pp. 661–690; Karl STRUPP, *Die zuständigkeit der gemischten schiedsgerichte des Versailles friedensvertrages*, Mannheim, J., Bensheimer, 1923; J.-C. WITENBERG, *Etude sur la compétence des tribunaux arbitraux mixtes institués en vertu de l'article 304 b alinéa 1 du traité de Versailles, concernant les dommages causés par les enlèvements des biens des particuliers au cours de l'occupation allemande durant la grande guerre (1914–1918)*, Paris, Recueil Sirey, 1925, 60 p.; J. TEYSSAIRE & P. de SOLERE, *Les tribunaux arbitraux mixtes*, Paris, Ed. internationales, 1931; Charles CARABIBER, *Les juridictions internationales en droit privé. Histoire et société d'aujourd'hui*, Neuchatel, Ed. de la Baconnière, 1947, at pp. 216–228.

jurisdiction over three different types of claims for "material damage" suffered by individuals:[144]

- claims between individuals originating from their pre-war relations, including debts and contract-related debts;[145]
- claims by nationals of the Allies against the German Empire and the other "Central Powers" for damage inflicted in German territories (as existing at the time of the beginning of the War in 1914) resulting from "exceptional war measures and measures of transfer taken by Germany [and other "Central Powers"] during the War with respect to the property, rights and interests" of individuals;[146] and
- claims by nationals of the "Central Powers" for measures (including confiscation/expropriation) taken by "new States".[147]

Thousands of claims were submitted by individuals and corporations before the different Mixed Arbitral Tribunals established after the First World War.[148] One important feature of these M.A.T.s is that individuals had *direct access* to these tribunals (even if agents of the State of the claimants were always present at the

144 Under Article 297 of the *Versailles Treaty, supra*, note 137, only "material" damage was compensable under the tribunals. Non-material damage, such as personal injuries, was excluded from the jurisdiction of the tribunals; they were dealt with by the State-to-State mechanism for settlement of disputes created by the Reparation Commission. See at Article 232 and Annex I of the Treaty. This is discussed in: Rudolf BLÜHDORN, *Ibid.*, p. 220. Also excluded from the jurisdiction of the tribunals were claims for damage caused by the German Empire and the other Central Powers to the Allied and Associated Powers which were dealt with by the Reparation Commission.

145 Article 296 of the *Versailles Treaty supra*, note 137. These claims were between nationals of "Allied and Associated Powers" and nationals of Germany as well as between nationals of "Allied and Associated Powers" and nationals of the "Central Powers".

146 Article 297e of the *Versailles Treaty, supra*, note 137. It should be noted that claims by nationals of the German Empire and the other "Central Powers" for measures taken by "Allied and Associated Powers" were excluded from the jurisdiction of the tribunals. A very detailed analysis of this provision is found in: Karl STRUPP, "The Competence of the Mixed Arbitral Courts of the Treaty of Versailles", 17 *A.J.I.L.*, 1923, p. 661, at pp. 669 et seq.

147 Article 297h of the *Versailles Treaty, supra*, note 137.

148 Norbert WÜHLER, "Mixed Arbitral Tribunals" in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. 1, North Holland, Max Planck Institute, 1981, p. 145, provides the following figures: more than 20,000 cases were dealt with by the Franco-German M.A.T., about 10,000 cases by the Anglo-German M.A.T. and over 10,000 cases by the German-Italian M.A.T. David J. BEDERMAN, "The United Nations Compensation Commission and the Tradition of International Claims Settlement", 27 *N.Y.U. J. Int'l L. & Pol.*, 1994, p. 1, at pp. 17, 19–20, also indicates that over 10,000 cases were decided by the tribunal set up between Poland and Germany and that the U.S.-Germany Mixed Claims Commission (1922–1939) disposed of 20,433 claims and rendered awards in 7,000 cases.

hearings).[149] In that sense, the mechanisms set up departed from the traditional system of State-to-State dispute settlement where individual claims need to be endorsed by their State of origin under the umbrella of diplomatic protection. However, the nationality of claims remained the basis for the jurisdiction of these tribunals. For instance, the French-German M.A.T. only had jurisdiction over disputes involving German and French nationals. This question is dealt with in the next section.

Case Law. As a result of the First World War and the break-up of the Russian Empire, the Ottoman Empire and the Austria-Hungary Dual Monarchy, several *new States* were created: Finland, Lithuania, Latvia, Estonia, Armenia, Georgia, Azerbaijan, Czechoslovakia, Poland and the Kingdom of the Serbs, Croats and Slovenes.[150] As mentioned already, the application of the traditional rule of continuous nationality in the context of State succession would require that individuals submitting claims to the M.A.T.s be nationals of a State Party to the *Versailles Treaty* at the moment the damage occurred. The strict application of this rule would lead to great injustice, since it would prevent nationals of these new States from submitting a claim for reparation against Germany and the "Central Powers" because at the time the damage occurred, they were citizens of other States (the predecessor States: Germany, the Russian Empire, the Ottoman Empire, Austria-Hungary).

In order to prevent such injustice, the M.A.T.s gave an interpretation of Article 304 (b, al. 2) of the *Versailles Treaty*[151] which is not in accordance with the traditional rule of continuous nationality. They indeed allowed nationals of the Allies to submit claims even if they were not nationals of those States at the time the

149 Article 231 of the *Versailles Treaty, supra*, note 137, reads as follows: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies". The *Versailles Treaty* distinguished between the reparation claims, which were to be determined by the Reparation Commission (Article 233), and the settlement of claims of private individuals placed under the responsibility of the Mixed Arbitral Tribunals (Articles 297–303 of the Treaty).

150 There were also some cessions of territory. Thus, former German Empire territories were ceded to France (Alsace-Lorraine), to the new State Poland (the Province of Posen, the east part of Upper Silesia, Eastern Pomerania, etc.), to Denmark (the northern part of Schleswig-Holstein), to the new State of Czechoslovakia (the Hulczyn area of Upper Silesia) and to Belgium (the cities of Eupen and Malmedy). Romania also gained some territories which formally belonged to the Russian Empire (Bessarabia) and the Austria-Hungary Dual Monarchy (Transylvania). The territories of South Tyrol and Trieste were granted to Italy.

151 This provision indicates that the Mixed Arbitral Tribunals have jurisdiction over "all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and German nationals".

damage occurred. The U.S.-Germany M.A.T. also adopted a practical solution similar to this.[152] The consistent case law adopted by the different M.A.T.s established under the *Versailles Treaty* was that a person should be considered a "national of the Allied and Associated Powers" if at the time of the *entry into force of the Versailles Treaty* (January 1920) he/she had acquired such nationality.[153] One exception was made for cases where a person had changed his/her nationality from one Allies to another *after* the date of the entry into force of the *Versailles Treaty* but prior to the presentation of his/her claim.[154] The rule adopted by the M.A.T. therefore allowed the submission of claims by nationals of new States which did not formally exist as independent States before the entry into force of the *Versailles*

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152 The U.S.-Germany M.A.T., which was not established pursuant to one of the five treaties known as the "Paris Peace Treaties", adopted, *as a matter of principle*, the traditional rule of continuous nationality. It thus decided that it only had jurisdiction over claims submitted by U.S. nationals who had this nationality both at the time the damage occurred and when the Treaty of Berlin entered into force. See U.S.-Germany *Administrative Decision No. V*, Decision of Umpire Parker, U.S.-Germany Mixed Claims Commission, 31 October 1924, in: *U.N.R.I.A.A.*, vol. VII, p. 119, p. 140, at pp. 148 & 154. However, a different *practical solution* was in effect adopted in the context of changes of nationality resulting from State succession. Thus, the application of the traditional rule of continuous nationality would have prevented claimants from the Virgin Islands to submit claims since they were not U.S. nationals at the time the damage occurred. The territory of the Virgin Islands, a Danish colony, was ceded to the United States on 17 January 1917. In the case of *United Stated on behalf of Boyer v. Germany* (docket no. 276), it was, nevertheless, agreed by both agents of the United States and Germany that the claimant should get some compensation for the damage resulting from the sinking of a U.S. submarine in April 1916. No decision was rendered in this case. This claim is discussed in: John HANNA, "Nationality and War Claims", *Colum. L.Rev.*, 1945, p. 301, at p. 317. The case law of this M.A.T. is found in: J.C. WITENBERG, *Commission mixte de réclamations germano-américaine*, Paris, P.U.F., 1927. It is also discussed in: A. BURCHARD, "The Mixed Claims Commissions and German Property in the United States of America", 21 *A.J.I.L.*, 1927, p. 472.

153 *Leontitos & Nicolas Arakas v. Bulgaria*, Greece-Bulgaria M.A.T., 3 April 1925, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. V, p. 245; *National Bank of Egypt v. German Government and Bank fur Handel und Industrie*, United Kingdom-Germany M.A.T., 14 December 1923 and 31 May 1924, in: *Ibid.*, vol. IV, p. 233; *Meyer-Wildermann v. Hoirie Hugo Stinnes and others*, German-Romanian M.A.T., 6 November 1924, in: *Id.*, vol. IV, p. 842, at pp. 846 et seq.; *M. Kirschen Sr. v. Sobotka, ZEG & Empire Allemand*, German-Romanian M.A.T., 3 January 1925, in: *Ibid.*, vol. IV, p. 858, at pp. 862–863; *D'Esquevilley v. Aktiengesellschaft Weser*, French-German M.A.T., 27 October 1923, in: *Ibid.*, vol. III, p. 689, at p. 692; *Mercier & cie. v. Etat Allemand*, French-German M.A.T., 26 October 1923, in: *Ibid.*, vol. III, p. 686*; Dame De Laire v. Etat Hongrois*, French-Hungarian M.A.T., 27 July 1927, in: *Ibid.*, vol. VII, p. 825, at pp. 827–828; *O.V.C. v. R.A.A. (Dony)*, German-Belgian M.A.T., 18 July 1927, in: *Ibid.*, vol. VII, p. 548.

154 *Radziwill v. Etat Allemand*, French-German M.A.T., 26 January 1926, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IX, p. 81; also in: *Annual Digest*, 1925–1926, p. 238.

Treaty. These new States did not exist at the time the internationally wrongful acts were committed. Only two decisions deviated from this consistent case law.[155]

A good illustration of the principle adopted by the M.A.T.s is the case of *Poznanski v. Lentz & Hirchfeld* before the Polish-German Mixed Arbitral Tribunal arising from a contract entered into in 1914 by a German firm (Lentz & Hirchfeld) and a Polish firm (Poznanski).[156] The argument of the defendant (the German company) was that the Tribunal had no jurisdiction over the dispute pursuant to Article 304 (b, al. 2) of the *Versailles Treaty* since the Polish claimant company was not a national of the Allies *when the dispute arose between the two companies* but had Russian nationality at that time.[157] The Tribunal came to the conclusion that the question whether or not the company was a national of the Allies should be considered at the time the *Versailles Treaty* entered into force and not at the time when the contract between the parties was signed.[158] The Tribunal clearly adopted this solution because any other alternative would have left nationals of the new State of Poland with no right to redress for internationally wrongful acts committed before the date of succession.[159] The Tribunal therefore decided that it had jurisdiction over the dispute since the company Poznanski was a Polish company at the time of the entry into force of the *Versailles Treaty* (and that Poland was an independent State at that time and was considered to be one of the Allied Powers).[160]

One delicate problem facing the M.A.T.s was that of individual nationals of States which became independent at the time of the entry into force of the *Versailles Treaty* but who only *formally* became nationals of these new States *after* the entry into force of *subsequent* peace treaties. In the context of claims submitted by Yugoslav nationals, the German-Yugoslav M.A.T. consistently rejected its jurisdiction over claims involving this issue based on the ground that the claimants were not Yugoslav nationals at the time of the entry into force of the *Versailles*

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155 These two awards were rendered by the Austrian-Italian M.A.T. In one such case, it was decided that the jurisdiction of the Tribunal was "determined by the nationality of the parties at the time of the contract" and that it should not take into account "any modification which might have successively happened in the nationality of the parties to said Contract": *Torrest Antonio v. Sami Spiegel & Etat fédéral Autrichien*, Italian-Austrian M.A.T., 27 June 1924, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. V, at p. 506.

156 *Poznanski v. Lentz & Hirchfeld*, Polish-German M.A.T., 22 March 1924, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, at p. 353.

157 *Ibid.*, at pp. 356–357.

158 *Ibid.*, at p. 358: "Le texte de l'art. 304, s'accommode également des diverses interprétations, et il n'y a aucune raison de rechercher depuis quelle époque les parties possèdent la nationalité exigée, du moment qu'elles la possèdent lors de la mise en vigueur du Traité".

159 *Id.*: "A quoi l'on peut ajouter qu'en se plaçant au moment du contrat on diminuerait les prérogatives des ressortissants des Etats nouveaux sans pouvoir alléguer aucun motif à l'appui de cette restriction de leurs droits. Passe encore si la lettre du Traité n'admettait point d'autre interprétation, mais tel n'est point le cas".

160 *Id.* The Tribunal added, in an *obiter dictum*, that Poland existed anyway *before* the entry into force of the *Versailles Treaty, supra*, note 137.

Treaty (in January 1920) since they only formally acquired such nationality later with the entry into force of the *Trianon Treaty* (26 July 1921).[161]

The exact same problem arose in the other context of claims submitted by Czechoslovak nationals who were former nationals of Austria living in territories now forming parts of the new State of Czechoslovakia (which was created by the *Versailles Treaty* of January 1920). These individuals formally became nationals of this new State only upon the entry into force of the *St. Germain Treaty* (16 July 1920).[162] The German-Czechoslovak M.A.T. came to a different conclusion than the German-Yugoslav M.A.T. It decided that it had jurisdiction over these claims since a *de facto* Czechoslovak nationality had been created as a result of the *Versailles Treaty* and had, therefore, existed *before* the entry into force of the *St. Germain Treaty*.[163]

Another particularly sensitive problem concerned claims by individuals from the territories of Alsace-Lorraine against Germany for damage suffered during the War.[164] In accordance with Article 51 of the *Treaty of Versailles*, the territories of Alsace-Lorraine which were "ceded" by France to Germany in accordance with the Preliminaries of Peace and the *Treaty of Frankfurt* (1871) were "restored to French sovereignty as from the date of the Armistice of November 11, 1918". The population living in the territories of Alsace-Lorraine therefore "re-became" French nationals on that date (provided that they had acquired no other nationality than German nationality before that date[165]).[166]

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161 *Gabriel Radic v. Maschinenfabrik u. Mühlenbauanstalt G. Luther A.G.*, German-Yugoslav M.A.T., 1 October 1922, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. II, p. 655, at pp. 660–662. See also: *Franz Peinitsch v. Etat Allemand; Etat Prusse Banque Bleichroeder*, German-Yugoslav M.A.T., 18 September 1922, in: *Ibid.*, vol. II, p. 610, at pp. 619 et seq.

162 Article 70 of the *Treaty of Peace between the Allied and Associated Powers, and Austria; Protocol; Declaration; and Special Declaration*, signed on 10 September 1919, entered into force on 16 July 1920, in: *U.K.T.S.* 1919, No. 11 (Cmd. 400).

163 *Loy & Markus v. Empire Allemand & Deutsch Ostrafrikanische Bank A.G.*, German-Czechoslovak M.A.T., 27 April 1923, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. III, p. 998, at pp. 1007–1009. See also: *Gellert v. Kolker*, German-Czechoslovak M.A.T., 24 October 1923, in: *Ibid.*, vol. IV, p. 515, at pp. 524–525; *Goldschmiedt v. Heesch Hinrichsem & Cie*, German-Czechoslovak M.A.T., 30 November 1923, in: *Ibid.*, vol. IV, p. 530, at p. 533. The solution adopted by the M.A.T. was criticised in: Rudolf BLÜHDORN, "Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes creés par les traités de Paris", *R.C.A.D.I.*, t. 41, 1932–III, pp. 207–208.

164 These claims are discussed in: Rudolf BLÜHDORN, *Ibid.*, p. 209. See also in: Louis CAVARE, *Le droit international positif*, vol. I, 2nd ed., Paris, Pedone, 1961, p. 284; Hazem M. ATLAM, p. 150.

165 Article 1(1) to the Annex to Section V of the Treaty. The question is dealt with in the case of *De Luck v. Etat allemand*, French-German M.A.T., 31 March 1928, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. VIII, p. 142, where the Tribunal declined its jurisdiction on the ground that the claimant had acquired Prussian nationality after the cession of territory in 1871.

166 One noteworthy provision of the Treaty is Article 63 which reads as follows: "For the purposes of the obligation assumed by Germany in Part VIII (Reparation) of the

The question of the admissibility of such claims was first decided by the French-German M.A.T. in the *August Chamant* case, where the claimant submitted a claim pursuant to Article 302(2) of the *Treaty of Versailles* against a judgment by default rendered by a German court during the War.[167] Germany argued that the French-German M.A.T. did not have jurisdiction over this claim as the claimant could not be considered a national of an Allied Power since he was *not a French national* but a German national at the time the damage occurred before the end of the War. The Tribunal rejected the argument submitted by Germany and decided that the words "a national of an Allied or Associated State" contained at Article 302(2) of the Treaty included persons from Alsace-Lorraine.[168] According to the Tribunal, it was the (rational and equitable) intention of the Parties that the fact that individuals from Alsace-Lorraine were not French nationals at the time the damage occurred during the War should not be prejudicial to their claims.[169] The Tribunal concluded that it had jurisdiction.

The same French-German M.A.T. had to deal with a similar claim in the *Veuve Heim* case, where the claimant requested, pursuant to Article 297e) of the Treaty, an indemnity for the confiscation of goods by the German authorities during the

present Treaty to give compensation for damage caused to the civil populations of the Allied and Associated countries in the form of fines, the inhabitants of the territories referred to in Article 51 [i.e. Alsace-Lorraine] shall be assimilated to the above-mentioned populations".

167 *August Chamant v. Etat Allemand*, French-German M.A.T., 23 June 1921 & 25 August 1921, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. I, p. 361. Article 302(2) reads as follows: "If a judgment in respect to any dispute which may have arisen has been given during the war by a German Court against a national of an Allied or Associated State in a case in which he was not able to make his defence, the Allied and Associated national who has suffered prejudice thereby shall be entitled to recover compensation, to be fixed by the Mixed Arbitral Tribunal provided for in Section VI".

168 *Ibid.*, at p. 368. The Tribunal noted that: "…aucune disposition spéciale à Alsace-Lorraine (partie III, section V et annexe) ne vient, sur ce point, déroger aux dispositions générales du Traités, ni leur apporter aucun tempérament, ni aucune modalité d'adaptation; qu'il faut, dès lors, appliquer celles-ci à l'espèce, conformément à l'esprit du Traité et à l'article 79, al. 2, en particulier; que la *sedes materiae* est l'article 302, al. 2; que cette disposition reconnaît indistinctement à tout ressortissant des Puissances alliées et associées le droit de réclamer la réparation du préjudice causé par un jugement rendu contre lui, en quelque nature que ce soit, par un Tribunal allemand, pendant la guerre, dans une instance où il n'a pas pu se défendre".

169 *Ibid.*, at pp. 368–369: "Que, dans l'espèce, la conclusion tirée des considérants qui précèdent ne blesse en aucune façon ni le bon sens ni l'équité; qu'il est au contraire rationnel d'admettre que l'intention des auteurs du Traité a été de placer au bénéfice de ses disposition tous les citoyens d'un même pays, sauf les cas où, pour des motifs spéciaux, il en décide autrement par une clause expresse; qu'il ne paraîtrait pas conforme aux principes de justice et d'équité que, de deux citoyens français considérés après la guerre, l'un, parce qu'il serait de Paris ou Marseille, aurait vis-à-vis de l'Allemagne un droit à la réparation d'un certain préjudice, droit qui serait refusé à l'autre, parce qu'il serait de Strasbourg ou de Metz".

War.[170] The Tribunal also concluded that it had jurisdiction over this case.[171] The Tribunal further added that individuals from the territories of Alsace-Lorraine had somehow never ceased to be "French nationals" in 1871 and that they were "virtual" French nationals from the date of the *Treaty of Frankfurt* (1871) until the end of the First World War (11 November 1918).[172] This last statement, which is in clear contradiction to Article 51 of the *Treaty of Versailles*,[173] was not endorsed in subsequent cases decided by the French-German M.A.T.[174] and was strongly criticised in doctrine.[175]

Germany requested a revision of those two awards, but the M.A.T. confirmed them.[176] The case law of the French-German M.A.T. consistently held that individuals from Alsace-Lorraine could submit claims for reparation against Germany,

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170 *Veuve Heim v. Etat Allemand*, French-German M.A.T., 30 June 1921 & 19 August 1921, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. I, p. 381. Article 297 e) of Treaty allows the submission of claims to be determined by the Mixed Arbitral Tribunal for "compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer".

171 *Ibid.*, at p. 387: "[Attendu] qu'il résulte de ce qui précède qu'un Alsacien-Lorrain a, comme tout ressortissant des Puissances alliées et associeés, droit à une indemnité pour les dommages ou préjudices causés à ses biens, droits ou intérêts, sur le territoire allemand tel qu'il existait au 1er août 1914, par l'application tant des mesures exceptionnelles de guerre que des mesures de dispositions qui font l'objet des paragraphes 1 et 3 de l'annexe à la section IV de la partie X du Traité de Versailles et prises par l'Allemagne pendant la guerre; et que la requérante a droit à une indemnité pour le préjudice causé à ses biens par la confiscation ou l'expropriation de son linge, ainsi que par la réquisition de ses ustensiles de cuivre et de laiton".

172 *Id.*: "[Attendu] que le Traité de Versailles considère les Alsaciens-Lorrains comme ayant une sorte d'indigénat distinct soit de la nationalité allemande, soit de la nationalité française jusqu'au jour de leur réintégration dans cette dernière; qu'il n'a pas voulu les assimiler aux ressortissants allemands pendant la guerre, mais qu'il les considère, comme des citoyens français virtuel et qu'il a voulu les placer, vis-à-vis de l'Allemagne, au bénéfice des mêmes droits que tous les ressortissants des Puissances alliées et associées, sous la seule réserve de certaines dérogations ou modalités d'application dictées par une situation spéciale et explicitement indiquées".

173 This provision indicates that persons from the territories of Alsace-Lorraine became French nationals only on the date of the Armistice of 11 November 1918.

174 In the case of *Berger v. Etat Allemand*, 20 July 1924, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, p. 730, at p. 732, the M.A.T. spoke of the population of Alsace-Lorraine as being "réintégrées dans la souveraineté française".

175 Rudolf BLÜHDORN, "Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes creés par les traités de Paris", *R.C.A.D.I.*, t. 41, 1932–III, pp. 209–210. See also the comment by Karl STRUPP, "The Competence of the Mixed Arbitral Courts of the Treaty of Versailles", 17 *A.J.I.L.*, 1923, at p. 670, stating that "this conception is a monstrosity from the juridical point of view".

176 *Heim & Chamant v. Etat Allemand*, French-German M.A.T., 7 August 1922 & 25 September 1925, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. III, p. 50, at p. 57.

even if at the time the damage occurred they were not nationals of the successor State (France).[177]

d) *The Practice of the U.N.C.C.*

Introduction. The U.N.C.C. was set up after the 1990–1991 Gulf War to deal with claims arising from the invasion and occupation of Kuwait by Iraq.[178] Decision no. 10 of the U.N.C.C. Governing Council provides at its Article 5(1) that governments can make submission on behalf of their nationals and corporations which suffered damage as a result of the conflict.[179]

Decision no. 10 also indicates that "[i]n the case of Governments existing in the territory of a former federal State, one such Government may submit claims on behalf of nationals, corporations or other entities of another such Government, if both Governments agree".[180] This provision was expressly added to deal with the difficulty arising from the dissolutions of Yugoslavia and the U.S.S.R.[181] Governing

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177 *Dietz v. Etat Allemand*, French-German M.A.T., 11 April 1923, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. III, p. 351; *Briegel v. Etat Allemand*, 19 May 1923, in: *Ibid.*, vol. III, p. 358; *Ruolt v. Etat Allemand*, 23 May 1923, in: *Ibid.*, vol. III, p. 361; *Berger v. Etat Allemand*, 20 July 1924, in: *Ibid.*, vol. IV, p. 730; *Rothbetz v. Etat Allemand*, 8 October 1924, in: *Ibid.*, vol. IV, p. 747; *Grande Carrières des Vosges v. Etat Allemand*, 11 December 1922, in: *Ibid.*, vol. III, p. 118.

178 On 2 August 1990 Iraq invaded Kuwait and occupied it until 27 February 1991. On 3 April 1991 the Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 687 which, *inter alia*, "reafirm[ed]" that Iraq was "liable under international law for any direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait". U.N. Security Council Res. 687 also decided (at para. 18) to "create a fund to pay compensation for claims… and to establish a commission that will administer the fund". The U.N.C.C. was created as a subsidiary organ of the Security Council by Resolution 692 of 20 May 1991.

179 *Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, sixth Session, held on 26 June 1992* [Governing Council Decision no. 10, the "Provisional Rules for Claims Procedure"], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1992/10, 26 June 1992. Under the U.N.C.C., compensation was made available for individuals, corporations, governments and international organisations. More than 2.6 million claims were filed to the U.N.C.C. by nearly 100 States for a total amount of some US$ 350 billion claimed (Internet site of the U.N.C.C. under "Status of Claim Processing": <http://www2.unog.ch/uncc/status.htm>).

180 *Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, sixth Session, held on 26 June 1992, Id.*

181 This is mentioned in doctrine by these writers: David J. BEDERMAN, "The United Nations Compensation Commission and the Tradition of International Claims Settlement", 27 *N.Y.U. J. Int'l L. & Pol.*, 1994, p. 1, at p. 31; J. CROOK, "The United Nations Compensation Commission: A New Structure to Enforce State Responsibility", 87 *A.J.I.L.*, 1993, p. 144 at pp. 151–152; Norbert WÜHLER, "The United Nations

Council Decision no. 10 was thus enacted in June 1992, i.e. *after* the break-up of the Soviet Union, *before* the dissolution of Czechoslovakia and in the midst of the break-up of Yugoslavia.[182] The provision was apparently adopted at the suggestion of the Russian delegation in order to "protect the interests of claimants in the former Soviet Union".[183]

This provision recognises the right of new successor States to submit claims for reparation against Iraq before the U.N.C.C. on behalf of their new nationals, even though these new nationals did not have its nationality at the time of the commission of the internationally wrongful acts (i.e. at the time of the invasion and occupation of Kuwait by Iraq, which lasted from 2 August 1990 until 27 February 1991). This is clearly one example of international case law where the traditional rule of continuous nationality was not applied in the context of State succession. The U.N.C.C. contains other features which clearly deviate from the traditional rule of continuous nationality.[184] This position adopted in the context of the U.N.C.C. was based on policy reasons, namely that a different rule would have been unfair and unjust as it would have left nationals of the new States

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Compensation Commission; A New Contribution to the Process of International Claims Resolution", *J.Int'l Econ.L.*, 1999, p. 247, at pp. 253–254.

182 According to the Badinter Commission, the break-up of Yugoslavia had already commenced in November 1991 (*Opinion no. 1* of 29 November 1991, in: 92 *I.L.R.*, 1993, at p. 166) and was concluded in July 1992 (*Opinion no. 8* of 4 July 1991, in: 92 *I.L.R.*, 1993, at p. 202).

183 David J. BERDERMAN, "The United Nations Compensation Commission and the Tradition of International Claims Settlement", 27 *N.Y.U. J. Int'l L. & Pol.*, 1994, p. 1, at p. 31. See also: J. CROOK, "The United Nations Compensation Commission: A New Structure to Enforce State Responsibility", 87 *A.J.I.L.*, 1993, p. 144, at p. 151.

184 Thus, the U.N.C.C. allows States to exercise diplomatic protection for persons who became nationals *after* the events which result in a damage. Iraqi nationals having a "bona fide nationality of any other State" do not need to show that they had acquired that nationality of the claimant State at the time the damage occurred but only that they were nationals of that State on 2 August 1991 (i.e. one year after the invasion of Kuwait) or even later in some circumstances. The rule is established in: *Criteria for Expedited Processing of Urgent Claims* [Governing Council Decision no. 1], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1991/1, 2 August 1991, at para. 17. This rule is discussed in the following Panel Reports: *Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment of Claims for Departure from Iraq of Kuwait (Category "A" Claims)*, U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1996/3, 16 October 1996, at para. 30; *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Second Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)*, U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1998/11, 2 October 1998, at p. 10. This aspect is critically assessed in: Pierre D'ARGENT, *Les réparations de guerre en droit international public*, Brussels, Bruylant, 2002, p. 356. Another such feature is Governing Council Decision 7 which does not require that corporations have the nationality of the claiming State at the time of the submission of the claim or at the time of the rendering of the award but only at the "date on which the claim arose". The rule is established in: *Criteria for Additional Categories of Claims* [Governing Council Decision no. 7], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1991/7/Rev.1, 17 March 1992, at 5, para. 26.

with no right of redress for damage suffered. From the documentation available, it seems that Iraq, which strongly objected to the legality of the establishment of the U.N.C.C. and to many of its features, did not formally contest this particular aspect of the system.

Case Law. Before its dissolution (on 31 December 1992), Czechoslovakia filed several claims on behalf of its nationals. However, by the time (at the end of 1994) the U.N.C.C. Governing Council was to approve the recommendations made in the Reports of the Panel of Commissioners, Czechoslovakia had ceased to exist. One Governing Council Decision took the view that "[t]he claims were initially submitted by the Czech and Slovak Federal Republic" but that for reasons not indicated in its Decision, "[t]he award of compensation is to be paid to the Government of the Slovak Republic".[185] In another Decision, the Governing Council simply mentioned that:

> These claims were submitted before the Czech and Slovak Federal Republic ceased to exist. Awards of compensation are to be paid to the Governments of the Czech Republic and Slovak Republic, respectively.[186]

An agreement was reached between the two successor States determining which of them should be compensated for the damage caused during the invasion and occupation of Kuwait.[187] After the dissolution, the two successor States directly

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185 *Decision Concerning the First Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 43rd meeting, held on 26 May 1994 in Geneva* [Governing Council Decision no. 20], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/Dec.20 (1994), 26 May 1994.

186 *Decision Concerning the First Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 46th meeting, held on 20 October 1994 in Geneva* [Governing Council Decision no. 22], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/Dec.22 (1994), 21 October 1994.

187 The Agreement is mentioned in: *Decision Concerning the Second Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 51st meeting, held on 22 March 1995 at Geneva* [Governing Council Decision no. 28], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/Dec.28 (1995), 22 March 1995. The same explanation can also be found in subsequent Governing Council Decisions on Category "A" Claims, See: *Decision Concerning the Fourth Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 55th meeting held on 11 October 1995 at Geneva* [Governing Council Decision no. 31], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/Dec.31 (1995), 12 October 1995; *Decision Concerning the Fifth Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 57th meeting, held on 13 December 1995 at Geneva* [Governing Council Decision no. 33], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/Dec.33 (1995), 13 December 1995; *Decision Concerning the Sixth Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 64th meeting, held on 15 October 1996 at Geneva* [Governing

filed claims on behalf of their own new nationals. Annex 1 shows the total amount of compensation received by the two successor States.

The case of the integration of the G.D.R. into the G.F.R. is slightly different, since the date of succession (3 October 1990) occurred during the period of invasion and occupation of Kuwait by Iraq (2 August 1990 to 27 February 1991). However, in the different Panel Reports, no indication is given as to whether the damage was suffered before or after the date of succession. In other words, it is not clear from the documentation available whether any nationals of the G.D.R. suffered from damage before the date of succession.[188] Annex 1 also indicates the amount of compensation received by Germany.

Annexes 2 and 3 show the total amount of compensation received by the different successor States in the context of the break-up of the U.S.S.R. and Yugoslavia.

2.2 *State Practice where Reparation was Provided to the Successor State for its New Nationals*

There are several examples of State practice where reparation was provided in an agreement to the successor State for its nationals, which did not have its nationality at the time the damage occurred. These cases of State practice are the 1952 Agreement on reparation between the Federal Republic of Germany and Israel,[189] the 1982 Agreement between the United Kingdom and Mauritius,[190] the bilateral agreements entered into by Austria with Central and Eastern European States in the context of the 2000 *Austrian Reconciliation Fund Law*,[191] and the 2000 German *Law on the Creation of a Foundation "Remembrance, Responsibility and Future"*.[192]

Council Decision no. 38], U.N.C.C. Governing Council, U.N. Doc. S/AC.26/Dec.38 (1996), 16 October 1996.

188 The present author was told by a member of the Permanent Mission of Germany to the United Nations in Geneva (whose name should remain confidential upon his request) that Germany had no means to know the origin of the claims and whether the claimants were in fact from East Germany or West Germany. The position of the successor State was that this did not make any difference because all claims had been considered "Germans".

189 *Agreement between the State of Israel and the Federal Republic of Germany on Compensation*, in: 162 *U.N.T.S.*, p. 205; also in: *BGBl*, 1953, vol. II, no. 5, at p. 37.

190 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius*, of 7 July 1982 and in force on 28 October 1982, in: *U.K.T.S.*, 1983, no. 6 (Cmnd. 8785).

191 *Federal Law Concerning the Fund for Voluntary Payments by the Republic of Austria to Former Slave Laborers and Forced Laborers of the National Socialist Regime* (the "Reconciliation Fund Law"), in: *ÖBGBl*., I No. 74/2000 of 8 August 2000, entered into force on 27 November 2000.

192 *Gesetz Zur Errichtung Einer Stiftung "Erinnerung; Verantwortung Und Zukunft"*, in: *BGBl.*, 2000, vol. I, p. 1263.

In these cases, the fact that a new State claimed compensation for damage on behalf of its new nationals was not considered by the State responsible for the internationally wrongful act as an *obstacle to reparation.*

a) *The 1952 Agreement on Reparation between the Federal Republic of Germany and Israel*

On 10 September 1952, a reparation agreement (the *Luxembourg Agreement*) was signed by Federal Republic of Germany and Israel calling for the former to provide annual fixed instalments of goods and services to the Jewish State over the next 11 to 13 years in compensation for the internationally wrongful acts committed by the Third Reich before and during the Second World War.[193] The Agreement provided for the amount of DM 3 billion (US$ 715 million) to be paid in reparation by Germany to the State of Israel. The vast majority of the reparation consisted not in payments in cash but in the shipment of goods of all kinds to Israel. In two separate but parallel instruments (the *Hague Protocols*), Germany also committed to the amount of DM 450 million to be given to Israel for the Conference on Jewish Material Claims against Germany (or "Claims Conference", an umbrella Jewish organisation) to compensate Nazi victims.[194] It also called for Germany to enact laws to compensate Jewish victims of Nazi persecution.[195]

At the time of the commission of the internationally wrongful acts by the Third Reich, the victims were nationals of European States (Poland, Germany, etc.) and not nationals of Israel, which did not yet exist as an independent State. This did not prevent the new successor State of Israel from seeking reparation against Germany on behalf of its nationals as well as on behalf of non-Israeli Jews. In a Note dated 12 March 1951 addressed to the Four Allied Powers, Israel requested compensation in the amount of US$ 1 billion from the F.R.G. and US$ 500 million from the

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193 *Agreement between the State of Israel and the Federal Republic of Germany on Compensation*, entered into on 27 March 1953, in: 162 *U.N.T.S.*, p. 205; also in: *BGBl*, 1953, vol. II, no. 5, at p. 37. In doctrine, see: E. NATHAN, "Le traité israélo-allemand du 10 septembre 1952", *R.G.D.I.P.*, 1954, pp. 375–398; Frederick HONIG, "The Reparations Agreement between Israel and the Federal Republic of Germany", 48(4) *A.J.I.L.* 1954, pp. 564–578; Nicholas BALABKINS, *West German Reparations to Israel*, New Brunswick, N.J., Rutgers Univ. Press, 1971; Nana SAGI, *German Reparations: A History of the Negotiations*, Dafna Alon Trans., Magnes Press, 1980; Ronald ZWEIG, *German Reparations and the Jewish World: A History of the Claims Conference*, 2nd ed., Boulder and London, Westview Press, 2001.

194 *Protocol II between the Federal Republic of Germany and the Conference on Jewish Material Claims against Germany*, in: 162 *U.N.T.S.*, p. 205; in: *BGBl.*, 1953, vol. II, p. 85.

195 *Protocol I between the Federal Republic of Germany and the Conference on Jewish Material Claims against Germany*, in: 162 *U.N.T.S.*, p. 205; in: *BGBl.*, 1953, vol. II, p. 85. The different laws enacted by West Germany to compensate Nazi victims are examined at *infra*, pp. 387 et seq.

G.D.R.[196] It should be noted that in the Note Israel *did not* claim compensation for damage caused by the atrocious acts committed by the Third Reich *per se*; it claimed compensation for the consequences that such acts had on its economy, mainly the costs related to the reinstallation in Israel of an estimated 500,000 refugees who fled regions of Europe which had been under the domination of Germany during the War.[197] In other words, the Agreement covered compensation for *survivors* of the Holocaust rather than for the victims who perished in the Holocaust.

This is one example of State practice where the traditional rule of continuous nationality was not applied in the context of State succession. Thus, Germany did not require that the individuals on behalf of which Israel was now claiming reparation had Israeli nationality at the time of the commission of the internationally wrongful act. Germany also did not object to the fact that Israel submitted claims on behalf of former German nationals.[198] The special character of this Agreement has been highlighted in doctrine.[199] It has been argued that this example was an

196 Note of 12 March 1951, in: P. GINIEWSKI, "Il trattato tedesco-israelo per le riparazioni", *Rivista du studi politici internazionale*, 1954, at p. 590; also in: *Documents Relating to the Agreement between the Government of Israel and the Government of the Federal Republic of Germany*, published by the Ministry of Foreign Affairs of Israel (see documents nos. 5 & 22). The position of the G.D.R. with respect to this claim for compensation was examined in detail at *supra*, p. 167.

197 This point is discussed in: E. NATHAN, "Le traité israélo-allemand du 10 septembre 1952", *R.G.D.I.P.*, 1954, pp. 379–380, for whom "le montant des dommages réclamés fut calculé en fonction des dépenses engagées et prévues pour la réinstallation des immigrants juifs en provenance des pays autrefois sous la domination allemande. Ces dépenses furent estimées à US$ 3,000 par tête".

198 Rudolf DOLZER, "The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945", 20 *Berkeley J. Int'l L.*, 2002, p. 296, at p. 324, is of the view that in this Agreement "the Federal Republic of Germany declared that compensation for the victims of persecution should not be dependent on their nationality, and that the Jews of German nationality were thereby included". For the author, "[t]his is one example of the government of the Federal Republic going beyond its legal obligations under public international law". This point is also discussed in: Bert-Wolfgang EICHHORN, *Reparation als völkerrechtliche Deliktshaftung: Rechtliche und praktische Probleme unter besonderer Berücksichtigung Deutschlands (1918–1990)*, Baden Baden, Nomos Verlagsgesellschaft mbH & Co. KG, 1992, at p. 158. This aspect is discussed at *infra*, pp. 405–408.

199 E. NATHAN, "Le traité israélo-allemand du 10 septembre 1952, *R.G.D.I.P.*, 1954, p. 384. See also, Karen HEILIG, "From the Luxembourg Agreement to Today: Representing a People", 20 *Berkeley J. Int'l L.*, 2002, p. 176, at p. 180: "The adoption [of the 1952 Agreement] was a revolutionary idea. In no previous case in history had a State paid indemnification directly to individuals, most of them not even its own citizens. Countries paid indemnification when they were defeated in war; the fact is as old as human history itself. But that a government should pay for crimes committed, not only to its own citizens, which was unusual enough, but to hundreds of thousands of non-citizens, or to another state, the State of Israel, which was not even in existence at the time the crimes were committed…was truly a revolutionary idea".

exception to the "fundamental principle of international responsibility"[200] which could, however, be explained by its political nature,[201] by the *ex gratia* nature of the payments[202] and, finally, by the fact it was an agreement dealing with reparation for war crimes, for which would apply rules different from ordinary internationally wrongful acts.[203]

b) *The 1982 Agreement on Reparation between the United Kingdom and Mauritius for the Ilois*

In 1966, before Mauritius became an independent State (in 1968), the United Kingdom, the colonial power, separated the Chagos Islands from Mauritius and ceded (for a first period of 50 years, with an extension option) one of these Islands (the Island of Diego Garcia) to the United States, which eventually built a military base there. The local population which lived on the Island of Diego Garcia (some 2,000 Ilois) were moved to Mauritius. A treaty was entered into between the United Kingdom and Mauritius in 1982 with the desire to "settle certain problems which have arisen concerning the Ilois who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965".[204] Article 1 of the Agreement provides that:

> The Government of the United Kingdom shall *ex gratia* with no admission of liability pay to the Government of Mauritius for and on behalf of the Ilois and the Ilois community in Mauritius in accordance with Article 7 of this Agreement the sum of £4 million which, taken together with the payment of £650,000 already made to the Government of Mauritius, shall be in full and final settlement of all claims whatsoever of the kind referred to in Article 2 of this Agreement against the Government of the United Kingdom by or on behalf of the Ilois.[205]

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200 Charles ROUSSEAU, *Droit international public*, vol. V, Paris, Sirey, 1983, at p. 118; Ch. ROUSSEAU, "Chronique des faits internationaux", *R.G.D.I.P.*, 1990, pp. 764–765.

201 *Id.*

202 This is the position of Wladyslaw CZAPLINSKI, pp. 355–356.

203 Charles ROUSSEAU, *Droit international public*, vol. V, Paris, Sirey, 1983, at p. 118. For David RUZIE, *Droit international public*, 14th ed., Paris, Dalloz, 1999, at p. 90, reparation for crimes against humanity, such as this 1952 Agreement between Germany and Israel, is an exception to the rule of non-succession to the right to reparation.

204 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius*, of 7 July 1982 (in force on 28 October 1982), in: *U.K.T.S.*, 1983, no. 6 (Cmnd. 8785); also in: Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley, N.Y., Transnational Publ., 1999, p. 283.

205 Article 2 of the Agreement indicates that it only deals with claims for "the closure of the plantations in the Chagos Archipelago, the departure or removal of those living or working there, the termination of their contracts, their transfer to and resettlement in Mauritius and their preclusion from returning to the Chagos Archipelago". The Agreement deals with any incidents, facts or situation, whether past, present or future, occurring in the course of these events or arising out of the consequences of these events. In

This is a case of State practice where the strict rule of continuous nationality was not applied. The United Kingdom did not object to the fact that the new State of Mauritius could submit claims on behalf of a group of people which did not have its nationality at the time the damage occurred.[206] However, it should be noted that this example is one concerning claims *between* the predecessor State and the successor State.[207]

c) *Bilateral Agreements Entered into by Austria with Other States in the Context of the Austrian "Reconciliation Fund Law" (2000)*

The Austrian Reconciliation Fund was created with money from both the government and the private sector to provide compensation for persons who were deported from their home countries by the Nazi regime for forced or slave labour in the territory of the Republic of Austria during the Second World War.[208] In the context

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return for compensation, the Government of Mauritius will "use its best endeavours to procure from each member of the Ilois community in Mauritius a signed renunciation of its claims" (Article 4). Finally, under the Agreement a trust fund will be established by Mauritius (Article 6).

206 It should be noted that the Ilois people have recently undertook legal action in Great Britain's High Court demanding their return to the Chagos Islands. In its Order of 3 November 2000 (*The Queen (ex parte Bancoult) v. Foreign and Commonwealth Office*, [2001] *Q.B.* 1067, 2000), the High Court decided that the United Kingdom acted unlawfully in sending the Ilois people in exile and that they could go back to the Chagos Islands. The United Kingdom government did not appeal the Court's Order and accepted the return of the Ilois people to the Chagos Islands, but not to the Island of Diego Garcia (in: Ewen MacASKILL, "Evicted Islanders to go Home", *The Guardian*, London, 4 November 2000, p. 1). Law suits were also filed in U.S. courts for compensation: *Bancoult, et al v. McNamara, et al*, U.S. District Court, District of Columbia (Washington), Civil docket for case #: 01–CV-2629. All relevant documents on these questions are found at this website: <http://homepage.ntlworld.com/jksonc/5_DiegoGarcia.html>.

207 The reasons why such examples are of limited value in the context of the present study have already been explained. See at *supra*, p. 28.

208 *Bundesgesetz über den Fonds für freiwillige Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes (Versöhnungsfonds-Gesetz)* (*Federal Law Concerning the Fund for Voluntary Payments by the Republic of Austria to Former Slave Laborers and Forced Laborers of the National Socialist Regime* (the "Reconciliation Fund Law")), in: *ÖBGBl*., I No. 74/2000 of 8 August 2000, entered into force on 27 November 2000. All relevant documents can be found on this website: <http://www.reconciliationfund.at/>. In doctrine, see: Roland BANK, "The New Programs for Payments to Victims of National Socialist Injustice", 44 *German Y.I.L.*, 2001, pp. 307–352. About one million foreigners were forced by the Nazi regime to work on the territory of present-day Austria. The number of victims still alive is estimated at 150,000. The total amount of the Fund is more than Euro 400,000.

of setting up this Fund, several bilateral agreements were signed on 24 October 2000 between Austria and six Central and Eastern European countries (Belarus, the Czech Republic, Hungary, Poland, the Russian Federation and Ukraine).[209] An Executive Agreement was also signed with the United States. Along with these treaties was signed a Joint Statement stating Austria's "moral responsibility" for the internationally wrongful acts committed during the War.[210]

What is interesting in the context of the present study is the fact that some of these bilateral treaties were entered into with new States: Belarus, the Czech Republic and Ukraine. When the damage occurred the individuals injured were not nationals of these new successor States. This did not prevent the State responsible (i.e. Austria in the context of the Fund) to provide compensation to the new successor States on behalf of these victims. This is therefore one example where the rule of continuous nationality was not applied in the context of State succession.

d) *The Joint Statement by Germany and other States in the Context of the German Foundation "Remembrance, Responsibility and Future" (2000)*

Following the end of the Second World War, the Federal Republic of Germany decided to compensate victims of Nazi persecutions. Apart from the 1952 reparation agreement entered into with Israel,[211] many laws and funds were created over the years: The *Holocaust Indemnification* statute in 1953 (which was revised in 1956 and 1963),[212]

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209 The Agreement with the Russian Federation was entered into on 27 November 2000.

210 *Joint Statement on the Occasion of the Signing Ceremony of the Bilateral Agreements Relating to the Austrian Reconciliation Fund*, 24 October 2000. The Joint Statement indicates that "Austria and Austrian companies acknowledge moral responsibility for and recognize the suffering of all victims of slave or forced labor who worked on the territory of the present-day Republic of Austria and who were exploited to contribute to the economy of that time". The Statement also notes that "Austria and Austrian companies wish to respond to and acknowledge moral responsibility and bring a measure of justice to the victims of slave or forced labor during the National Socialist era or World War II". In the Statement, mention is also made of the "common objective" of Austria and Austrian companies (including parents and subsidiaries as defined in Annex A of the Statement) to "receive all-embracing and enduring legal peace for all claims involving or related to the use of slave or forced labor during the National Socialist era or World War II". The Statement is also "recognizing that the establishment of the Reconciliation Fund does not create a basis for claims against Austria, Austrian companies, or Austrian nationals".

211 This Agreement was discussed in detail at *supra*, p. 383.

212 The statutes were collectively referred to as the "BEG" (*Bundesgesetzes zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* or more simply *Bundesentschaedigungsgesetz*, e.g. the *Federal Law for the Compensation of the Victims of National Socialist Persecution*). The law of 1 October 1953 was revised on 29 June 1956 (in: *BGBl.*, 1956, vol. I, p. 559) and on 14 September 1965 (*Zweiten Gesetzes zur Änderung des Bundesentschädigungsgesetzes—BEG-Schlußgesetz—*(Final Federal Compensation Law), in: BGBl., 1965, vol. I, p. 1315). According to the U.S. Foreign Claims Settlement Commission ("German Compensation for National Socialist Crimes", available at this

the "Hardship Fund" in 1980,[213] the "Article 2 Fund" in 1992,[214] and, finally, the "Central and Eastern European Fund" of 1998.[215]

At the end of the 1990s, German companies were faced with numerous class action lawsuits brought before U.S. courts by former slave and forced labourers of the Nazi era. It is in this context of possibly years of litigation and large amounts of compensation to pay (as well as adverse publicity) that several German companies took the initiative to set up a fund which would compensate victims. In August 2000, the Federal Republic of Germany passed the *Law on the Creation of a Foundation "Remembrance, Responsibility and Future"*.[216] The preamble to

website: <http://www.ushmm.org/assets/frg.htm#1>), more than four million claims were submitted to Germany under these different laws and Germany provided more than DM 72 billion in compensation.

213 Under *Section 1 of Guidelines to Hardship Fund*, published in Germany's Federal Register (14 October 1980), the Fund was created to compensate Nazi victims who "suffered several health damage" and were "therefore in a special hardship situation" and had not obtained any prior compensation because they had not met time deadlines or residency requirements of the BEG. The Fund, which was administered by the "Claims Conference" (the Conference on Jewish Material Claims Against Germany), was mainly set up to compensate Nazi victims living in the former U.S.S.R. and Central and Eastern Europe. According to the Claims Conference, in 2007 it had approved 312,358 claims for payment from this fund and has paid a total of approximately US$ 835 million (the figures are from the Claims Conference website: <http://www.claimscon.org/>, under "Compensation and Restitution/Claims Conference Programs/ Hardship Fund").

214 Under Article 2 of the *Agreement on the Enactment and Interpretation of the Unification Treaty* of 18 September 1990, "[t]he Federal Government is prepared, in continuation of the policy of the German Federal Republic, to enter into agreements with the Claims Conference for additional Fund arrangements in order to provide hardship payments to persecutees who thus far received no or only minimal compensation according to the legislative provisions of the German Federal Republic". The "Article 2 Fund" was thus established in 1992 after the integration of the G.D.R. into the G.F.R. The Fund was administered by the Claims Conference to provide pensions to needy Nazi persecutees who had received minimal or no compensation. According to the Claims Conference, in 2007 it had approved 72,358 claims for payment from this fund and has paid a total of approximately US$ 2 billion (the figures are from the Claims Conference website: <http://www.claimscon.org/>, under "Compensation and Restitution/Claims Conference Programs/Article 2 Fund").

215 In January 1998, the Claims Conference and the German government entered into an agreement requiring Germany to contribute DM 200 million over a four-year period (beginning 1 January 1999) to compensate directly Holocaust victims in the former Soviet Union and Central and Eastern Europe. The "Central and Eastern European Fund" was established in May 1998 and is administered by the Claims Conference in 2007. According to the Claims Conference, in 2007 it had approved 23,078 claims for payment from this fund and has paid a total of approximately US$ 253 million (the figures are from the Claims Conference website: <http://www.claimscon.org>, under "Compensation and Restitution/Claims Conference Programs/Central and Eastern European Fund").

216 *Gesetz Zur Errichtung Einer Stiftung "Erinnerung; Verantwortung Und Zukunft"*, in: *BGBl.*, 2000, vol. I, p. 1263. The Law was amended by the Law of 4 August 2001 (entered into force on 11 August 2001, in: *BGBl.*, 2001–I, 2036) as well as by the

the Law indicated that the "German Bundestag acknowledges political and moral responsibility for the victims of National Socialism"[217] while remaining silent as to Germany's legal responsibility. The legislation established a fund of approximately US$ 5.2 billion to compensate those persons who performed forced labour in concentration camps or in another place of confinement (outside Austria) or a ghetto "under comparable conditions".[218] Under the Law, the German government and German companies each provided half the funds for the Foundation.[219] The fund was meant to be the exclusive forum for resolving such claims.

In the context of the Final Plenary Meeting concluding the preparation of the Foundation, a Joint Statement was signed by Germany, the United States, Belarus, the Czech Republic, Ukraine, Israel, Poland, Russia, the Foundation Initiative of German Enterprises and the Claims Conference (a Jewish organisation).[220] It is noteworthy that this Statement was entered into by Germany and several States which did not yet exist at the time the internationally wrongful acts were committed. Germany did not invoke the rule of continuous nationality; it accepted that these States could negotiate a reparation agreement on behalf of individuals which did not have their nationality at the time the damage occurred. This is clearly another example of State practice where the rule of continuous nationality was not applied.

Law of 21 August 2002 (entered into force on 28 August 2002, in: *BGBl.*, 2002–I, 3347). All the relevant documents can be found at the official Internet site: <http://www.stiftung-evz.de>. In doctrine see: Roland BANK, "The New Programs for Payments to Victims of National Socialist Injustice", 14 *German Y.I.L.*, 2001, pp. 307–352; Sean D. MURPHY, *United States Practice in International Law, vol. 1: 1999–2001*, Cambridge, Cambridge Univ. Press, 2002, at pp. 136–144; Sean D. MURPHY, "Implementation of German Holocaust Claims Agreement", 97 *A.J.I.L.*, 2003, pp. 692–695.

217 The preamble indicates that: "The National Socialist State inflicted severe injustice on slave laborers and forced laborers, through deportation, internment, exploitation which in some cases extended to destruction through labor, and through a large number of other human rights violations". It also stated that "German enterprises which participated in the National Socialist injustice bear a historic responsibility and must accept it".

218 Article 11 (1) al. 1 of the *Law on the Creation of a Foundation "Remembrance, Responsibility and Future*". The Law also provides compensation for other types of personal injuries (such as medical experiments and death or serious injuries to the health of a child, Article 11 (1) para. 5) as well as some type of property damage where German companies were involved (Article 11 (1) para. 1, item 3).

219 According to the Claims Conference, it had approved in 2007 154,168 claims for payment from this fund and has paid a total of approximately US$ 1.2 billion (the figures are from the Claims Conference website: <http://www.claimscon.org/>, under "Compensation and Restitution/Claims Conference Programs/Former Slave and Forced Laborers").

220 The Joint Statement was issued on 17 July 2000, in: *BGBl.*, 2000, vol. II, pp. 1383 et seq.

2.3 *Cases where the Rule of Continuous Nationality was Applied*

The examination of State practice and international case law shows, in fact, that in only one significant case did the traditional rule of continuous nationality prevent a *new Successor State* from claiming reparation on behalf of its new nationals for damage arising out of events which took place before the date of succession. This is the 1939 *Panevezys-Saldutiskis Railway* case decided by the P.C.I.J.[221] There are two other judicial decisions which are sometime referred to in doctrine but which, in fact, do not deal *per se* with the question whether a successor State has the right to claim reparation on behalf of its new nationals.[222] These are the 1849 *Sandoval and Others* case and the 1850 *Champion* case, both decided by the U.S. Board of Commissioners in the context of the annexation of New Mexico and Texas by the United States. There is also one example where the rule of continuous nationality was applied to prevent the *continuing State* from claiming reparation on behalf of its *former national* (section c) below).

a) *The* Panevezys-Saldutiskis Railway *Case (1939)*

The question whether the traditional rule of continuous nationality should apply in the context of State succession was dealt with in the *Panevezys-Saldutiskis Railway* case before the P.C.I.J.[223] In this case, Estonia (which declared its independence in February 1918 but was recognised by Russia only in 1920) exercised diplomatic protection on behalf of a company which had been expropriated by the Lithuanian authorities (which also declared its independence in February 1918 but was recognised by Russia only in 1920). Estonia claimed reparation for the expropriation.

The case is important even if the Court did not thoroughly address the application of the rule of continuous nationality in the context of State succession. Thus, the

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221 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76.

222 Eric WYLER, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, P.U.F., 1990, at p. 115, also makes reference to the case of *Foucher* (*Arthur Denis v. United States*, France-U.S. Mixed Claims Commission, case no. 603, decision of June 1883) which arose in the context of the cession of Louisiana by France to the United States in 1803. The case is fully discussed in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at p. 2510, see also in: *Ibid.*, vol. II, at p. 1152. However, a closer look at the facts of the case shows that the damage complained about by the heirs of Mr Foucher took place *after* the cession of territory in 1803. This case is therefore not relevant in the context of the present study.

223 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76. This case is analysed in: J.H.W. VERZIJL, *The Jurisprudence of the World Court: A Case by Case Commentary*, vol. I, Leiden, A.W. Sijthoff, 1965, pp. 551–571. See also: Eibe H. RIEDEL, "Panevezys Saldutiskis Railway Case", in: R. BERNHARDT (ed.), *Encyclopedia of Public International Law*, vol. II, North Holland, Max Planck Institute, 1981, p. 224.

Court decided instead to join the Lithuanian objection on this point to the merits of the dispute. The question was nevertheless thoroughly debated by the Parties in their written and oral pleadings.[224] The issue was also raised and discussed in the individual opinions of some judges and, in particular, by Judge van Eysinga in his dissenting opinion.

The Facts of the Case. In 1892, a railway company named "First Company of Secondary Railways in Russia" (hereinafter referred to as the "First Company") was founded in St. Petersburg, Russia, and incorporated under the laws of the Russian Empire.[225] The company possessed railway lines and other assets in several Russian provinces. One such railway line was the Panevezys-Saldutiskis line, which passed through the Baltic provinces. The railway company was impacted by several dramatic sets of events after the Russian Revolution of 1917 and the end of the First World War. The company was first affected by a Soviet Russian decree of nationalisation in December 1917.[226] Soon after, both Estonia and Lithuania made declarations of independence in February 1918. As a result, different parts of the railway line were now under the sovereignty of the new States of Lithuania, Ukraine and Estonia. In September 1919, the new State of Lithuania confiscated (with no compensation in return) the assets of the First Company situated in Lithuania, which included the Panevezys-Saldutiskis line.[227]

In February 1920, was entered into between Soviet Russia and the new State of Estonia the *Treaty of Tartu*.[228] Under this Treaty, Russia transferred to Estonia all rights and all company shares of former private possessions (which had been nationalised by decree after the Revolution, such as those of the First Company) which were now situated in Estonia and "agreed" that the seats of those companies would be regarded as being transferred to Estonia.[229] Some days later, Estonia promulgated

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224 The present section contains large extracts of the arguments submitted by the Parties in their written and oral pleadings. It is pertinent to do since nowhere in doctrine are these documents ever quoted or referred to.

225 An overview of the factual situation of the case is provided in: J.H.W. VERZIJL, *The Jurisprudence of the World Court: A Case by Case Commentary*, vol. I, Leiden, A.W. Sijthoff, 1965, pp. 555 et seq.

226 This was followed by a series of other Soviet decrees of nationalisation of all railway companies (from June 1918 to March 1919).

227 However, it should be noted that in October 1920, the railway line ceased to be under Lithuanian sovereignty and passed to the new State of Poland.

228 *Treaty of Tartu*, 2 February 1920, in: *L.N.T.S.*, vol. XI, pp. 29–71.

229 Under Article XI of the Treaty, Russia renounces to "all [its] rights to movable and immovable property of individuals, which previously did not belong to her, in so far as such property may be situated in Estonian territory". They became "the sole property of Estonia". In another supplementary article to this provision, it was stipulated that "the Russian government will hand over to the Estonian government *inter alia* the shares of those joint-stock companies which had undertakings in Estonian territory…" The provision expressly referred to the First Company as one such company. Finally, the supplementary article to this provision also included the stipulation that the "Russian government agrees that the registered offices of [those companies] shall be regarded as transferred to [Tallinn, the capital of Estonia] and that the Estonian authorities shall

a series of provisional regulations regarding these joint-stock companies (which had undertakings in Estonia), stating that they would have to conduct shareholders' meetings within two months to be registered under Estonian law. In the event of their failure to do so, the regulations indicated that they would be nationalised. In 1923, Estonia nationalised that part of the railway line of the First Company which was situated within its territory. In November 1923, the First Company held a shareholders' meeting in Tallinn: it proceeded to revise and amend its statutes in accordance with Estonian Law. It was also decided at that meeting that the company would be renamed "Esimene", with registered offices in Tallinn, Estonia. In 1923, the company "Esimene" was therefore formally Estonian by law.

The company "Esimene" subsequently requested compensation from Lithuania for the nationalisation which took place in 1919. These efforts were unsuccessful. In November 1937, Estonia submitted a claim before the P.C.I.J. against Lithuania, on behalf of the company "Esimene", for reparation for the nationalisation of the Panevezys-Saldutiskis line.

The Arguments of the Parties. On the merits of the case, Lithuania maintained that it did not commit any internationally wrongful act. For Lithuania, the Russian company had ceased to exist as a consequence of the Soviet nationalisation decrees; it no longer existed in 1919 when the Lithuanian government took control of that part of the railway line situated on its territory.

In defence, Lithuania submitted two preliminary objections. One such objection was that the company had not exhausted all local remedies under Lithuanian Law. The other objection submitted by Lithuania was that the Court had no jurisdiction over the present dispute since Estonia could not invoke any breach of obligation on behalf of the company because at the time the nationalisation took place, no legal relationship existed between Estonia and the company (which no longer existed).[230] Lithuania further argued that even if it was established that the company still existed (and that it had later become Estonian), Estonia should anyway be prevented from submitting this claim on behalf of the company in application of the rule of continuous nationality. Lithuania described this "well-established" principle in the following terms:

> Le Gouvernement lithuanien … reconnaît à chaque gouvernement le droit de prendre fait et cause pour ses ressortissants qu'il considère comme lésés par un acte émanant d'un autre gouvernement et contraire au droit international. Mais en même temps le Gouvernement lithuanien croit devoir rappeler le principe bien établi du droit international

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be entitled to amend the statues of such companies in accordance with the rules to be laid down by those authorities".

230 *Contre-Mémoire du gouvernement lithuanien*, 30 August 1938, in: P.C.I.J., *Serie C, Pleadings, Oral Statements and Documents*, Judicial Year 1938–1939, no. 86, the Panevezys-Saldutiskis Railway Case, Leiden, A.W. Sijthoff, p. 215, at pp. 265, 267.

> qui veut que le particulier en faveur duquel intervient un État ait été son ressortissant à la date du préjudice subi.[231]
>
> [D]'après le droit international… un gouvernement ne peut régulièrement porter un procès devant la juridiction internationale que si la demande est nationale au moment du préjudice subi. Il est vrai que tout gouvernement peut, par un traité, écarter cette règle. Mais, dans chaque cas particulier, il faut alors démontrer qu'un accord pareil est intervenu. Le Gouvernement lithuanien n'a conclu aucun traité avec le Gouvernement estonien et n'a pris aucun engagement envers ce Gouvernement, par lesquels il aurait renoncé à cette règle générale du droit international.[232]

Thus, according to Lithuania, the company had already changed its nationality in 1919 and was not an Estonian national company at the time the damage occurred (when its assets were confiscated by Lithuania).[233]

On the merits of the case, Estonia submitted that the acts of nationalisation by Lithuania were illegal.[234] Estonia also maintained that the Russian company had

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231 *Exceptions préliminaires du gouvernement lithuanien*, 12 March 1938, in: *Ibid.*, p. 127, at p. 138. See also the *Pleadings ("Exposé") of Prof. Mandelstam, Agent for Lithuania*, 13 June 1938, in: *Ibid.*, p. 430, at pp. 436 et seq.

232 *Pleadings ("Exposé") of Prof. Mandelstam, Agent for Lithuania*, 13 June 1938, in: *Ibid.*, p. 430, at p. 434.

233 *Exceptions préliminaires du gouvernement lithuanien*, 12 March 1938, in: *Ibid.*, p. 127, at p. 142. This is the argument developed by Lithuania: "L'application de la règle du droit international [i.e. the rule of continuous nationality] ci-dessus rappelée au cas actuel conduit logiquement à l'irrecevabilité de la demande du Gouvernement estonien. En effet, l'acte incriminé au Gouvernement lithuanien par la société estonienne est celui de la prise de possession du chemin de fer Panevezys-Saldutiskis. La règle plus haute démontrée exige, pour que le Gouvernement estonien soit qualifié à présenter au Gouvernement lithuanien des réclamations à ce sujet, qu'au moment où le Gouvernement lithuanien a pris possession du chemin de fer la personne qui se prétend lésée par cette mesure ait été un citoyen estonien. Or, le ministère des Communication lithuanien a commencé à exploiter ledit chemin de fer encore en septembre 1919. A cette époque, la Première Société était déjà nationalisée. Mais, admettant même *ex hypothesi* qu'en septembre 1919 la Première Société n'avait pas encore cessé d'exister, elle ne possédait pas, en tous cas, à cette époque la nationalité estonienne; en effet, l'assemblée générale des actionnaires de cette société, qui a pris la décision de transférer le siège social de la société de Pétersbourg à Tallinn, n'a eu lieu qu'en 1923. Il est donc parfaitement clair que le Gouvernement estonien n'a aucune qualité pour porter ses réclamations contre le Gouvernement lithuanien au sujet de la prise de possession du chemin de fer Panevezys-Saldutiskis devant la Cour Permanente de Justice Internationale, car si la société, pour laquelle le Gouvernement estonien a pris fait et cause, est à l'heure actuelle estonienne, elle ne l'était pas encore en 1919".

234 *Réplique du gouvernement estonien*, 8 October 1938, in: *Ibid.*, p. 288, at pp. 316 et seq., and at p. 319: "Le gouvernement lithuanien ayant à maintes reprises refusé la restitution du chemin de fer à la Première Société, la demande du Gouvernement estonien est basée sur le simple principe qu'une indemnité correspondant au dommage que la Première Société a subi par suite d'un acte contraire au droit internationale doit lui être payée. Ce dommage est double: d'une part la mainmise lithuanienne a dépossédé la Première Société d'un bien qui lui appartenait, et, d'autre part, depuis 1919 elle a été privée de la jouissance de sa concession".

not ceased to exist as a consequence of the Soviet nationalisation decrees.[235] Such nationalisation would have been anyway impossible, since in 1918 all railway lines were situated *outside* the Russian territory as a result of the *Peace Treaty of Brest Litovsk* (3 March 1918) and the newly achieved independence of Lithuania, Ukraine and Estonia.[236] The position of Estonia was that even though the company had undergone some organisational transformation (it changed seats and its nationality), it was essentially the same company as the First Company, which was founded under (pre-Soviet) Russian Law.[237]

In response to the preliminary objection on nationality submitted by Lithuania, Estonia took two lines of argumentation, which will now be examined. The first group of arguments advanced by Estonia were essentially factual, while the second group attacked the soundness of the strict rule of continuous nationality referred to by Lithuania.

Estonia first submitted some *factual arguments* which were aimed at making unnecessary the use of the rule of continuous nationality. Estonia maintained that, as a matter of fact, the company was already of Estonian nationality at the time the damage occurred. In order to prove this allegation, Estonia submitted three different (alternative, and to some extent conflicting) interpretations of events on the question of the proper date at which the damage occurred and on the question of the moment at which the company became Estonian. These are the three different interpretations:

- Because all legal issues concerning Estonia's relationship with Russia were only finally settled in February 1920 (*Treaty of Tartu*), Estonia argued that the company "Esimene" was *de facto* Estonian by nationality since the declaration of independence of Estonia (February 1918), i.e. *before* the damage occurred (in September 1919).[238]
- The company "Esimene" may have become Estonian only after 1919, but that does not matter since the initial internationally wrongful act of expropriation and the subsequent denial by the Lithuanian authorities that the company continue the exploitation of the railway line was of a *continuous character*. The illegal act which first occurred in 1919 continued to exist at the time the company formally became Estonian (in 1923).[239]
- The company "Esimene" in fact suffered damage only after September 1919, at a time when the company had clearly become Estonian (in 1923).[240]

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235 *Ibid.*, at pp. 302 et seq., at p. 316.
236 *Pleadings ("Exposé") on the Merits of the Case of Baron Nolde, Agent for Estonia*, 19–20 January 1939, in: *Ibid.*, p. 532, at p. 539.
237 *Ibid.*, at p. 558.
238 *Observations et conclusions du gouvernement estonien*, 20 April 1938, in: *Ibid.*, p. 176, at pp. 185–186.
239 *Ibid.*, at pp. 184–185.
240 *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at p. 478.

Estonia presented two different *legal arguments* against the application of the rule of continuous nationality in the present case. The first main legal argument advanced by Estonia was that this rule (in its absolute form) did not exist as such in modern international law:

> [L]a règle rigide et absolue dont le Gouvernement lithuanien veut doter le droit des gens n'existe pas, et que tant la doctrine que la jurisprudence ont pu dégager de la diversité des circonstances dans lesquelles se posait le problème de la réclamation internationale de nombreuses exceptions à la règle en question.[241]

Estonia argued that the rule was not of strict application[242] and that doctrine (quoted by Lithuania in favour of the rule) had certainly not envisaged its application in the context of changes of nationality due to border changes.[243] In other words, it was submitted that the rule of continuous nationality should not apply in the context of State succession. In fact, Estonia sought to distinguish the present case from others where the doctrine of continuous nationality had been applied by arguing that in the case of the company "Esimene", the change of nationality had occurred *involuntarily* as a result of State succession. This is clear from these different extracts of its pleadings:

> Rien à objecter contre l'esprit de la règle: l'acquisition volontaire d'une réclamation étrangère par un ressortissant ou l'obtention par un réclamant étranger de la nationalité de l'État par voie de naturalisation dans le but d'acquérir la protection pour ses réclamations ne justifie pas l'intervention de l'État: celui-ci serait alors un 'agent de recouvrement'. Mais les cas où la réclamation devient la propriété d'un ressortissant par la volonté de la loi et où l'acquisition d'une nouvelle nationalité est l'effet d'un changement territorial ne tombent évidemment pas sous l'empire de la règle prise dans son esprit.[244]
>
> On voit ainsi que l'ancienne jurisprudence arbitrale visait essentiellement les cas où le changement dans la nationalité de la réclamation provenait d'actes volontaires ou de manœuvres tendant à placer la réclamation sous les auspices d'un nouvel État, généralement plus puissant… Il serait imprudent d'étendre cette jurisprudence au cas où le changement de la nationalité de la réclamation de la réclamation est le résultat de

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241 *Observations et conclusions du gouvernement estonien*, 20 April 1938, in: *Ibid.*, p. 176, at p. 194. See also at p. 186: "Le Gouvernement estonien estime enfin que la règle en question telle qu'elle est formulée dans l'exception n'existe pas en réalité dans le droit des gens moderne". More specifically, Estonia made reference (*Ibid.*, at p. 187) to the above-mentioned debate at the *Institut de Droit international* at its 1932 session of Oslo (see at *supra*, p. 350).

242 *Ibid.*, at p. 189: "Ainsi, de tous côtés la tradition doctrinale que désire voir maintenir dans toute son intégralité le Gouvernement lithuanien s'effrite et cède la place à des règles plus nuancées et plus souples, qui tiennent compte des diversités de circonstances dans lesquelles se pose le problème de la responsabilité internationale". See also in: *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at p. 475.

243 *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at p. 475.

244 *Observations et conclusions du gouvernement estonien*, 20 April 1938, in: *Ibid.*, p. 176, at p. 188.

> circonstances indépendantes de la volonté des intéressés et où l'application automatique de la règle conduirait à priver les individus et les Etats de la possibilité de faire valoir leurs droits actuels devant des juridictions internationales.[245]
>
> Je ne crois pas qu'on puisse trouver dans le droit international positif de règle qui dise que, dans le cas où le changement de nationalité n'est pas volontaire—il ne s'agit pas ici de chercher une protection pour défendre un droit—que dans les cas où, sans sa volonté, l'individu est devenu sujet d'un autre pays, c'est fini: vous avez eu le malheur de changer de nationalité, vous n'avez plus de protection internationale, puisque la chaîne de la persistance de la nationalité a été brisée.[246]

The second legal argument of Estonia was to say that at any rate the rule of continuous nationality should not be applied *in the present case* because it would lead to inequitable results. It argued in favour of the abandonment of the rule "en présence de circonstance de droit et de fait qui auraient rendu règle appliquée dans sa lettre souverainement injuste".[247] One such unjust consequence of the application of the rule was that the company, which had suffered damage, could not seek any redress solely because it (involuntarily) changed its nationality:

> Il s'agit d'une société qui devient estonienne, et on se demande si le droit de protéger cette société aurait disparu du fait de ce changement de nationalité. Je prends l'analogie très simple d'un Estonien, d'un individu privé. Le traité de paix l'a fait changer de nationalité. Il a subi à l'étranger un préjudice au moment où il était encore russe, puisque la nationalité estonienne n'existait pas au point de vue international avant 1920, avant la reconnaissance de son indépendance par les Soviets. Ce préjudice porté à l'étranger ne donnerait lieu à aucune intervention diplomatique dans l'espèce: on dirait au ressortissant estonien: Vous avez changé de nationalité, personne ne peut plus protéger? Le résultat serait certainement injuste.[248]

According to Estonia, another unjust consequence of the application of the rule of continuous nationality in the present case would be that neither the continuing State (Russia) nor the successor State (Estonia) could provide diplomatic protection to the company:

> En succédant à la Russie dans l'exercice exclusif de la souveraineté à l'égard des sociétés reconnues estoniennes, l'Estonie a de ce fait même succédé dans son droit de protéger les droits et les intérêts de ces sociétés. Affirmer le contraire équivaut à reconnaître qu'aucun État n'a plus le droit de protéger ces sociétés en tout ce qui concerne la période où elles étaient encore russes. Car, d'une part, selon le Gouvernement lithuanien, l'Estonie n'a pas ce droit, les sociétés n'étant devenues estoniennes qu'en 1920, et, d'autre part, le Traité de paix de 1920 a manifestement privé la Russie du droit d'intervenir en faveur des sociétés. Un vide en résulterait qui ne saurait être

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245 *Ibid.*, at p. 190.

246 *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at p. 474.

247 *Observations et conclusions du gouvernement estonien*, 20 April 1938, in: *Ibid.*, p. 176, at p. 193.

248 *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at pp. 473–474.

> justifié en droit. Une règle du droit des gens sanctionnant une solution négative de cette nature paraît difficilement concevable.[249]

In its pleadings, Lithuania refuted the arguments developed by Estonia and stated that doctrine and international case law did not support any difference of treatment between cases where changes of nationality were voluntary from those other collective changes imposed upon individuals by State succession.[250] Lithuania further argued that such distinction advanced by Estonia between cases of involuntary and voluntary changes of nationality was anyway not applicable in the present case since the seat of the company had not changed as a result of any border modification. Thus, Lithuania maintained that the seat of the company had remained in Russia after Estonia became an independent State.[251] Lithuania also submitted (alternatively) that the distinction referred to by Estonia between cases of involuntary and voluntary changes of nationality was of no help in the present case since the company had changed its nationality *voluntarily*.[252] Lithuania maintained that the company became Estonian in 1923 by its own voluntary acts, deciding to change its seat and move it to Tallinn, Estonia.[253] Estonia, on the contrary, held that the change of nationality of the company was not voluntary, as it resulted from the application of the *Treaty of Tartu* of 1920.[254]

Ultimately, Counsel for Estonia indicated that "je crois que la Cour de Justice internationale pourra, au moment où elle étudiera le fond du problème, tenir compte d'une tendance certaine à ne pas considérer la règle de la persistance de la nationalité comme une règle absolue."[255] To this argument, Lithuania responded that "les tribunaux internationaux n'appliquent pas des tendances, mais les règles du droit positif".[256]

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249 *Observations et conclusions du gouvernement estonien*, 20 April 1938, in: *Ibid.*, p. 176, at p. 186.

250 *Pleadings ("Exposé") of Prof. Mandelstam, Agent for Lithuania*, 13 June 1938, in: *Ibid.*, p. 430, at pp. 442–443. See also in: *Pleadings ("Réplique") of Prof. Mandelstam, Agent for Lithuania*, 17 June 1938, in: *Ibid.*, p. 497, at pp. 500–501.

251 *Pleadings ("Réplique") of Prof. Mandelstam, Agent for Lithuania*, 17 June 1938, in: *Ibid.*, p. 497, at p. 503.

252 *Pleadings ("Exposé") of Prof. Mandelstam, Agent for Lithuania*, 13 June 1938, in: *Ibid.*, p. 430, at p. 443.

253 *Pleadings ("Duplique") of Baron Nolde, Agent for Estonia*, 18 June 1938, in: *Ibid.*, p. 518, at p. 521. See also in: *Pleadings ("Exposé") on the Merits of the Case of Prof. Mandelstam, Agent for Lithuania*, 24–25 January 1939, in: *Ibid.*, p. 591, at pp. 623–624.

254 *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at pp. 475–476. See also the answer given to a question posed by Judge Hudson in: *Pleadings ("Exposé") on the Merits of the Case of Baron Nolde*, Agent for Estonia, 19–20 January 1939, in: *Ibid.*, p. 532, at p. 591.

255 *Pleadings ("Exposé") of Baron Nolde, Agent for Estonia*, 14–15 June 1938, in: *Ibid.*, p. 469, at p. 475.

256 *Pleadings ("Réplique") of Prof. Mandelstam, Agent for Lithuania*, 17 June 1938, in: *Ibid.*, p. 497, at p. 501.

The Decision of the Court. In its Decision, the Court first affirmed the classic rule of diplomatic protection. This is the relevant quote from the Decision:

> In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.[257]

The Court noted that the rule of continuous nationality could be set aside by agreement between the parties and that there were examples of international adjudication where this had been done. However, it held that in the present case "no grounds exist for holding that the parties intended to exclude the application of the [continuous nationality] rule".[258] The Court then stated that "[t]he Lithuanian Agent is therefore right in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of Lithuania the company suffering the injury possessed Estonian nationality".[259] This is in fact the only passage from the Decision where the Court clearly seems to have endorsed the traditional rule of continuous nationality.

The Court did not further investigate the question. It decided instead that the question whether the company was indeed Estonian at the time the damage occurred could not be separated from the other question of the ownership of the *Panevezys-Saldutiskis* railway line (which was also disputed by Lithuania). In other words, the preliminary objection raised by Lithuania could not be elucidated without a full examination of the case on the merits.[260] This aspect of the Court's decision was criticised by some Judges in their individual opinions[261] as well as in doctrine.[262]

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257 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at p. 16.

258 *Id.*

259 *Ibid.*, at pp. 16–17.

260 *Ibid.*, at p. 17.

261 For instance, the position of Judge De Visscher and Count Rostworowski in their common individual opinion (*Ibid.*, pp. 24 et seq.) concluding that the Court should have decided the preliminary objections raised by Lithuania in the first stage of the proceedings before dealing with the merits of the case. The same conclusion was reached by Judge Erich in his individual opinion (*Ibid.*, at pp. 50 et seq.). *Contra*: dissenting opinion of Judge Hudson (*Ibid.*, at p. 46).

262 J.H.W. VERZIJL, *The Jurisprudence of the World Court: A Case by Case Commentary*, vol. I, Leiden, A.W. Sijthoff, 1965, p. 555, at p. 566; Hazem M. ATLAM, p. 139; H.F.

Judge De Visscher and Count Rostworowski, in their common individual opinion, were of the view that the Lithuanian argument of the absence of Estonian nationality of the claim was "well-founded".[263] They explained that the "initial act of injury" was the seizure of the railway line in 1919 and then went on to say that at that time the First Company was not yet Estonian. According to the two Judges, the claim submitted by Estonia should have been rejected on the ground of the lack of the "bond of nationality required by international law". This is the full reasoning of the Judges:

> The Estonian Government has tried to prove that the rule of law underlying the objection is subject to various qualifications, but it has not claimed that in 1919 the interests damaged by the seizure had already acquired Estonian character. On its own admission, the First Russian Company, which is said to have survived the nationalization decrees, was only transformed into an Estonian company as a result of the Treaty of Tartu of February 2nd, 1920, and, to quote the words of the Estonian Agent: 'at the time and by the fact of the treaty of peace' (oral statement of the Agent for the Estonian Government, June 14th, 1938; Oral Statements, p. 40). Accordingly, even it could be agreed that the change of nationality dates back to the Treaty of Tartu, the change could still not operate in regard to a fact which the Parties agree in dating 1919. Finally, either the interests affected by the seizure were at that time still represented by the Russian company, according to the Estonian Government's theory of survival, or they were no longer represented by any company at all, according to the argument of the Lithuanian Government to the effect that the nationalization decrees destroyed the Company's legal personality. In either case—and this fact is alone decisive—there was in 1919 no Estonian company, and therefore the bond of nationality required by international law to have existed at the time the injury was suffered, was manifestly lacking.[264]

The Court finally upheld the second preliminary objections raised by Lithuania according to which the company had not exhausted all local remedies before Lithuanian courts. The case was therefore rejected.

The Dissenting Opinion of Judge van Eysinga. In his dissenting opinion, Judge van Eysinga concluded that the Court should have first dealt with the two preliminary objections raised by Lithuania. He concluded that both objections were unfounded. His reasoning on the first objection (dealing with the nationality of the claim) will be examined here.

He first noted that it could not be denied that at the time the expropriation measures were taken by the Lithuanian authorities (in 1919) the First Company did not have Estonian nationality.[265] Lithuania was therefore right to invoke the rule of continuous nationality. However, the Judge indicated that "there appears to be ground for serious doubt" that such rule of law exists "in the absolute form

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VAN PANHUYS, *The Role of Nationality in International Law: An Outline*, Leiden, A.W. Sythoff, 1959, at p. 93.

263 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at p. 24.

264 *Ibid.*, at p. 27.

265 *Ibid.*, at p. 31.

attributed by [Lithuania]".[266] He concluded that Lithuania had "not succeeded in establishing the existence of the rule" in its strict and absolute form.[267]

The Judge went on to explain that the rule of continuous nationality had been frequently used in the special context of Mixed Arbitral Commissions and that the logic of such rule in this context was "perfectly comprehensible", as these judicial bodies are aimed at treating only claims by nationals of both sides. He further admitted that "perhaps in this sphere it is possible to speak of a rule of international law [in favour of continuous nationality] in the sense that, in the absence of a definite treaty provision, it must be observed by the Mixed Commissions".[268] The Judge also mentioned that doctrine often quoted in support of the strict application of the rule of continuous nationality was in fact related to the work of these Mixed Commissions. He also made reference to the above-mentioned debate at the *Institut de Droit international* at its 1932 Oslo session and, in particular, to the position taken by Politis during those debates.[269] He said that the rule of continuous nationality "may be binding on a certain number of cases, [but] is by no means crystallised as a general rule".[270]

The Judge was of the view that the Court should not take part in the crystallisation of the rule because of its "inequitable results". This is his full reasoning:

> And in this connection the question also arises whether it is reasonable to describe as an unwritten rule of international law a rule which would entail that, when a change of sovereignty takes place, the new State, or the State which has increased its territory would not be able to espouse any claim of any of its new nationals in regard to injury suffered before the change of nationality. It may also be questioned whether indeed it is part of the Court's task to contribute towards the crystallisation of unwritten rules of law which would lead to such inequitable results. It follows from the foregoing that the Lithuanian Agent has not succeeded in establishing the existence, in the absolute form alleged by him, of the rule of international law to the effect that a claim must be a national claim not only at the time of its presentation but also at the time when the injury was suffered, and that this rule cannot resist the normal operation of the law of state succession.[271]

The conclusion reached by the Judge was that the existence of the rule of continuous nationality, in its "absolute form", had not been proven by Lithuania. Therefore, he indicated that such rule "cannot resist the normal operation of the law of State succession".[272] It seems that Judge van Eysinga believed in some sort of universal succession: "…the legal life of the new State in all its aspects proceeds

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266 *Id.*
267 *Id.*
268 *Ibid.*, at p. 33.
269 These debates at the *Institut* were discussed in detail at *supra*, p. 350.
270 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76, at p. 35.
271 *Ibid.*, at p. 35.
272 *Id.*

in succession to the legal life of the old State. Thus, in all matters where the Government of the latter had jurisdiction, its place is now taken by the Government of the new State. This holds good as regards diplomatic protection."[273] Therefore, the Judge was clearly of the view that there should be a succession to the right to exercise diplomatic protection for new nationals from the predecessor State to the successor State:

> [I]t is difficult to see why a 'claim' against a third State arising out of an unlawful act should not also pass from the old to the new State. Regarded from this aspect of the law of State succession—there is nothing surprising in the fact that Estonia should have had the right to take up a case which previously only Russia could have espoused. Such a 'succession' is an absolutely characteristic and even essential feature of the law of State succession. The successor State is continually exercising rights which previously belonged exclusively to the old State, and the same holds good as regards obligations. Accordingly it would be quite normal that in this case the successor State should have protected both diplomatically and before the Court a company the diplomatic protection of which formerly fell to Russia alone.[274]

Conclusion. This is a case where the classic rule of continuous nationality was endorsed by the Court in the context of State succession. However, the reasoning of the Court does not constitute the most solid foundation in support of the application of the traditional rule when changes of nationality result from succession of States. The Court's reasoning is thus limited to one sentence, where it simply stated that Estonia "must prove that at the time when the injury occurred…the company suffering the injury possessed Estonian nationality".[275] The Court did not further examine the issue. The statement of the Court is also merely in the form of an *obiter dictum*. Thus, this statement was made on a point which was not involved in the determination of the case by the Court on its merits. The Court rejected the Estonian claim on another ground unrelated to the question of the nationality of claim. The claim was rejected by the Court on the ground that Estonia had not exhausted all local remedies before Lithuanian courts. As a matter of fact, in the operative part of the judgment, no mention is even made of the preliminary objection raised by Lithuania on the question of the nationality of the claim.

The only clear support for the application of the rule of continuous nationality in the context of State succession can be found in one paragraph of the common individual opinion of Judge De Visscher and Count Rostworowski.[276] The only judge who in fact did thoroughly tackle the issue came to a completely different conclusion. In his dissenting opinion Judge van Eysinga clearly rejected the application

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273 *Ibid.*, at p. 32.
274 *Id.*
275 *Ibid.*, at pp. 16–17.
276 *Ibid.*, at p. 24.

of the rule when changes of nationality result from succession of States. His reasoning has found some support in doctrine.[277]

b) *The* Sandoval and Others *Case (1849) and the* Champion *Case (1850)*

The *Sandoval and Others* case arose in the context of the annexation of the territory of New Mexico, which had been part of Mexico, by the United States in 1848.[278] The case of *Champion* arose in the context of the annexation of Texas (an independent State since 1836) by the United States in 1845.[279] In both cases, the territorial changes were dealt with in the *Treaty of Guadalupe Hidalgo* (of 2 February 1848)[280] between the United States and Mexico, under which was established a U.S. internal commission (the Board of Commissioners) to "ascertain the validity and amount" of claims of U.S. nationals against Mexico which had their origin in events which took place before 1848.[281]

The claims by Mr Sandoval, Mr Francisco Saracina and Mr Clement Saracina were for services rendered as civil officers in the territory of New Mexico and for money obtained by means of a forced loan. These were claims against the Gov-

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277 This is, for instance, the position of J.H.W. VERZIJL, *The Jurisprudence of the World Court: A Case by Case Commentary*, vol. I, Leiden, A.W. Sijthoff, 1965, p. 555, see at pp. 568–569, who believes that there should be an "exception" to the rule of continuous nationality in the context of State succession. However, he maintains that such an exception should have found no application in the present case. Thus, he believes that there should have been no transfer of any right to claim reparation from the predecessor State (Russia) to the new State (Estonia), since the former had extinguished the rights initially belonging to the First Company by nationalising it in 1918. However, he is of the view that the case did not involve any question dealing with the nationality of the claim as, in his opinion, the internationally wrongful act complained about by Estonia was not committed in 1919, but much later (i.e. when the Lithuanian government refused to pay any compensation). At which time, the company was undoubtedly Estonian by nationality. He believes that the preliminary objection raised by Lithuania on the question of the nationality of the claim should have been rejected by the Court.

278 This case is discussed in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 2323–2324. This case is also mentioned in: *Administrative Decision No. V*, Decision of Umpire Edwin B. Parker, United States-Germany Mixed Claims Commission, 31 October 1924, in: *U.N.R.I.A.A.*, vol. VII, p. 119, p. 140, at p. 145 (footnote 9).

279 The case is briefly referred to in: John Bassett MOORE, *Ibid.*, at p. 2322.

280 *Treaty of Peace, Friendship, Limits, and Settlement*, signed at Guadalupe Hidalgo on 2 February 1848, ratified by the United States (16 March 1848) and by Mexico (30 May 1848) and proclaimed on 4 July 1848, in: M. MALLOY, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776–1909*, vol. I, Washington, G.P.O., 1910–1938, pp. 1107–1121.

281 Article 14 of this Treaty indicates that the United States "discharge the Mexican Republic from all claims of citizens of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this treaty". Article 15 of the Treaty further provides that Mexico was exonerated from all demands of U.S. nationals and that these claims were considered "entirely and forever canceled, whatever their amount may be".

ernment of Mexico for damage which occurred at the time these individuals were residing in New Mexico and were therefore Mexican nationals. Mr Sandoval and the others became nationals of the United States subsequent to the annexation of New Mexico in 1848 and filed their claims before the Board of Commissioners.[282] The Board dismissed the claims based on the application of Treaty provisions. The Board stated that the claims arose prior to the date of the entry into force of the 1848 Treaty and that Article 14 of the Treaty explicitly excluded such claims. The Board also took the view that these claims should fail since the claimants were not citizens of the United States *at the time of the entry into force of the Treaty* and, therefore, not entitled to receive any compensation.[283]

In the *Champion* case, two nationals of Texas (an independent State since 1836), Mr Edward Dwyer and Mr J.H. Grammant, were passengers on the U.S. schooner Champion, which was illegally captured by a Mexican vessel of war in 1837. As Texan nationals, they claimed reparation from Mexico for injuries resulting from the capture. Mexico apparently never made any reparation before the date of succession. After the annexation of Texas, at which time the claimants became U.S. nationals, they submitted a claim to the Board for compensation. The Board of Commissioners declined its jurisdiction over their claims on the ground that they were not citizens of the United States when the injury complained of occurred.[284]

These two cases are of limited value to the present discussion. Thus, they do not deal with the question whether the successor State (the United States) can take over the claims of its new nationals against the State responsible for the damage (Mexico). In fact, the issue dealt with by the Board had nothing to do with any

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282 The claimants were arguing that their "citizenship and allegiance [had] been totally changed from that of Mexico to that of the United States, so that [they had] no recourse upon the Government of Mexico, nor means of asserting or enforcing [their] claim but through the Government of the United States" (in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 2323–2324).

283 The Board also added this comment: "It would be a forced interpretation of the language employed in the treaty to regard the memorialists and others similarly situated as embraced within the provisions of the fourteenth articles, and as entitled to the indemnification thereby secured to citizens of the United States whose claims originated anterior to that period, and which it is known had long been the subject of negotiation and discussion between the two governments. The Government of the United States could have had no knowledge of the amount of claims of Mexican citizens within the ceded territory upon that republic, nor or their origin or validity; and could have had no purpose or intention of assuming their payment out of the limited fund provided for indemnities to its own citizens for claims which are generally understood to amount to a much larger sum. The treaty does not discharge the Mexican republic from claims of this character, and the United States have done no act to invalidate them" (in: opinion of Messrs. Evans, Smith & Paine, Board of Commissioners, 30 November 1849, in: John Bassett MOORE, *Id.*).

284 Opinions of Messrs. Evans, Smith & Paine, Board of Commissioners, 9 December 1850, in: John Bassett MOORE, *Ibid.*, at p. 2322.

question of diplomatic protection, as no claim was to be submitted against Mexico. The question at stake was solely whether the claimants could be deemed to be U.S. nationals and whether the United States should *itself* provide compensation to its own new nationals. The Board simply applied the Treaty provisions without making any assessment of the traditional rule of continuous nationality in the context of State succession.

c) *The* Henriette Levy *Case (1881)*

There is one example where the application of the traditional rule of continuous nationality by an international judicial body prevented *the continuing State* from exercising diplomatic protection on behalf of a person who was its national when the damage occurred but no longer had such nationality at the time the claim was submitted to the State responsible. This is the *Henriette Levy* case decided in 1881 by a U.S.-France commission.

This case dealt with the claim by Mrs Henriette Levy, the widow of Mr Jacob Levy, for the seizure by U.S. forces in Louisiana in 1863 of cotton belonging to Mr Levy and some associates of his firm.[285] Mr Levy was a French national at the time the damage occurred. He subsequently moved with his family to the city of Strasbourg (France), where he died in 1871. That year, the territories of Alsace-Lorraine (where the city of Strasbourg was situated) were ceded by France to Germany. At that time, Mrs Levy did not make use of her right of option to keep her French nationality pursuant to Article II of the *Frankfurt Treaty* (of 10 May 1871). She therefore became a German national in 1871.

Upon the establishment of a U.S.-France Commission in 1880, Mrs Levy submitted a claim for the damage sustained by her deceased husband (and his associates). The United States argued that Mrs Levy had become a German national in 1871 and that the Commission had no jurisdiction over claims submitted by German nationals.[286] It was further maintained by the United States that the Commission should not make the distinction between voluntary and involuntary changes of nationality and that the motive, reason or the attending circumstances in the case of a change of nationality should not be considered and could properly have no

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285 This case is discussed in detail in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 2514 et seq. See also in: Eric WYLER, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, P.U.F., 1990, at p. 113; Hazem M. ATLAM, p. 133.

286 John Bassett MOORE, *Ibid.*, at p. 2515. This is the argument submitted by the United States: "That it appears that the claimant and her children, about the year 1871, became citizens or subjects of Germany, and have ever since remained and are now such citizens or subjects, and have not since that year been citizens of the republic of France, and that this claim is therefore not presented by or on behalf of the citizens of that republic".

weight.[287] Counsel for the claimant argued, on the contrary, that the Commission had jurisdiction over the dispute since at the time the damage was sustained by Mr Levy, he was a French national and continued to be a citizen of France all his life.[288]

In its decision of 25 June 1881, the Commission dismissed the claim based on the ground that it did not have jurisdiction over claims of individuals who were no longer French nationals.[289]

2.4 *The Specific Problem of Reparation Claims against the Former State of Nationality*

There is support in doctrine for the proposition that the new successor State does not have the right to submit a claim for compensation on behalf of its new nationals against the former State of nationality of such nationals.[290] This rule has been proposed by Rapporteur Borchard at the session of Oslo (1932) of the *Institut de Droit international*.[291] This proposition was supported by several members of the *Institut*, even by those who were in favour of the non-application of the rule

287 *Ibid.*, at p. 2517.

288 *Ibid.*, at p. 2516. It was further argued that any subsequent changes of nationality by Mrs Levy could not affect the rights acquired by the heirs of Jacob Levy while Alsace-Lorraine was an integral part of France. In other words, the claimant argued that the cession of Alsace to Germany in 1871 did not affect the private rights of these citizens, including the right to reparation for injuries committed prior to the cession.

289 *Ibid.*, at p. 2517: "The commission, in this case, judges well-founded and admits the demurrer interposed by the agent of the United States to the claim or memorial. In its opinion, it is beyond doubt that the claimant and her children, being natives of Alsace, and having always resided there, and not having made choice of the French nationality during the interim granted by the treaty of May the 10th, 1871 (which applied to persons of full age as well as to minors), are included in the collective naturalization, real as well as personal, which resulted to that country in consequence of its annexation to the German Empire, sanctioned by that treaty. And as German subjects, which they have become, they cannot in any manner have recourse to a commission created solely for the settlement of certain claims of French or American citizens. The French nationality of Jacob Levy, whose rights the claimant and her children have inherited, cannot be included in this inheritance. Possessed by him alone, it does not satisfy the requirements of the convention, which demands French nationality in those who actually present themselves before the commission".

290 D.P. O'CONNELL, *State Succession*, vol. I, at p. 538; E.M. BORCHARD, "La protection des nationaux à l'étranger et le changement de nationalité d'origine", 14 *R.D.I.L.C.*, 1933, p. 421, at p. 459; Sir Cecil HURST, "Nationality of Claims", 7 *British Y.I.L.*, 1926, p. 163, at p. 182.

291 *La protection diplomatique des nationaux à l'étranger, Rapport supplémentaire*, in: *Annuaire I.D.I.*, 1933, Session of Oslo, at pp. 235 et seq.

of continuous nationality in the context of State succession.[292] The rule was also stated by International Law Association Rapporteur Orrego Vicuña.[293] The same principle is also reflected in Article 5 (al. 3) adopted by the work of the I.L.C. on diplomatic protection, which reads as follows:

> Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.[294]

International case law and State practice is, however, far from being unanimously in support of this principle.

The rule was endorsed in the *Affaire des Forêts du Rhodope Central (Fond)* case.[295] This claim arose from Bulgaria's alleged deprivation of certains individuals' property and exploitation rights over forests situated in Central Rhodope. This territory had become part of Bulgaria in 1913 (by the *Treaty of Constantinople*)[296] and was under Bulgarian sovereignty at the time of the commission of the internationally wrongful acts. It later became part of Greece.

In this case, the successor State (Greece) claimed on behalf of several of its nationals who had acquired property rights in the forests. The Arbitrator rejected the claim for two of these Greek nationals on behalf of which Greece submitted a claim. The reason given was that these two individuals had Bulgarian nationality at the time the damage occurred and that, therefore, Greece (the successor State) could not submit a claim for reparation on behalf of these two nationals against Bulgaria (the predecessor State). The Arbitrator rejected the argument submitted by Greece that to prevent it from exercising diplomatic protection on behalf of

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292 See the remarks by N. POLITIS, in: *Annuaire I.D.I.*, 1931–II, Session of Cambridge, p. 201, at pp. 206–207; M.F.L. DE LA BARRA, in: *Ibid.*, at p. 211. See also the comments by N. POLITIS, in: *Annuaire I.D.I.*, 1933, Session of Oslo, p. 479, at p. 488.

293 Francisco ORREGO VICUÑA, *The Changing Law of Nationality of Claims, Interim Report*, in: International Law Association, London Conference (2000), Committee on Diplomatic Protection of Persons and Property, p. 28, at p. 43 (at points no. 8 and 10), for whom claims by the successor State "shall not be made against the former State of nationality". See also at p. 36: "It is quite evident that the new State of nationality should not be able to claim against the former State of nationality for wrongs that the individual might have suffered under the latter's jurisdiction".

294 *Report of the International Law Commission on the Work of its Fifty-Fourth Session*, 29 April–7 June and 22 July–16 August 2002, I.L.C. Report, A/57/10, 2002, ch. V, pp. 120 et seq. The issue is also dealt with in: *Addendum to First Report on Diplomatic Protection*, by Mr John R. Dugard, Special Rapporteur, 20 April 2000, U.N. Doc. A/CN.4/506/Add.1, at para. 30.

295 *Affaire des Forêts du Rhodope Central (Fond)*, Award of 29 March 1933, in: *U.N.R.I.A.A.*, vol. III, p. 1389. This case is referred to in: Hazem M. ATLAM, p. 134.

296 *Treaty of Peace Between Bulgaria and Turkey*, signed at Constantinople on 29 September 1913, between Bulgaria and Turkey.

these two nationals would "aller à l'encontre de la tendance actuelle du droit international de considérer la protection diplomatique comme un moyen nécessaire de sauvegarder les droits individuels dans les rapports internationaux".[297] This is the full reasoning of the Arbitrator:

> A l'époque où s'est produit le fait dommageable—la prétendue confiscation des forêts—ils étaient donc incontestablement ressortissants du pays qui prenait les mesures incriminées. Dans ces conditions, il ne saurait être admissible, selon le droit international commun, de reconnaître au Gouvernement hellénique le droit de présenter des réclamations à leur profit pour ces faits dommageables, étant donné que ceux-ci on été causés par leur propre Gouvernement…[L]a Grèce ne saurait baser une réclamation sur le fait qu'un ressortissant bulgare a été frappé de mesures de confiscation de la part du Gouvernement bulgare, même s'il est ultérieurement devenu sujet hellénique.[298]

The principle of non-succession was also applied by a U.S. internal commission (the Board of Commissioners) in the above-mentioned *Sandoval and Others* case arising in the context of the annexation of the territory of New Mexico by the United States in 1848.[299] In this case, the Commission did not allow claims by U.S. nationals against Mexico.

Conversely, the principle of succession was applied in the context of the Mixed Arbitral Tribunals set up after the First World War.[300] Thus, the consistent case law of the French-German M.A.T. allowed French nationals to submit claims against Germany (the predecessor State) even though they were German nationals (living in the territories of Alsace-Lorraine) at the time the internationally wrongful acts were committed by Germany.[301]

Similarly, in the 1952 Agreement between West Germany and Israel, compensation was given to Israel for internationally wrongful acts committed against Jews before and during the Second World War.[302] Germany did not object to the fact

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297 *Affaire des Forêts du Rhodope Central (Fond)*, Award of 29 March 1933, in: *U.N.R.I.A.A.*, vol. III, p. 1389, at p. 1413.

298 *Ibid.*, at p. 1421.

299 This case is discussed in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 2323–2324. This case was discussed at *supra*, p. 402.

300 This case law is examined at *supra*, p. 373.

301 *August Chamant v. Etat Allemand*, 23 June 1921, 25 August 1921, in: *Recueil des décisions des tribunaux arbitraux mixtes*, vol. I, p. 361; *Veuve Heim v. Etat Allemand*, 30 June 1921, 19 August 1921, in: *Ibid.*, vol. I, p. 381; *Heim & Chamant v. Etat Allemand*, 7 August 1922 and 25 September 1925, in: *Ibid.*, vol. III, p. 50, at p. 57; *Dietz v. Etat Allemand*, 11 April 1923, in: *Ibid.*, vol. III, p. 351; *Briegel v. Etat Allemand*, 19 May 1923, in: *Ibid.*, vol. III; p. 358; *Ruolt v. Etat Allemand*, 23 May 1923, in: *Ibid.*, vol. III, p. 361; *Berger v. Etat Allemand*, 20 July 1924, in: *Ibid.*, vol. IV, p. 730; *Rothbetz v. Etat Allemand*, 8 October 1924, in: *Ibid.*, vol. IV, p. 747; *Grande Carrières des Vosges v. Etat Allemand*, 11 December 1922, in: *Ibid.*, vol. III, p. 118.

302 *Agreement between the State of Israel and the Federal Republic of Germany on Compensation*, in: 162 *U.N.T.S.*, p. 205; also in: *BGBl*, 1953, vol. II, no. 5, at p. 37. See also: *Protocol II between the Federal Republic of Germany and the Conference on Jewish*

that the new successor State of Israel could submit claims on behalf of new Israeli nationals who were German nationals at the time the damage occurred.[303]

The same observation can also be made in the context of the 1982 Agreement between the United Kingdom and Mauritius.[304] This is a case where the successor State (Mauritius) claimed reparation on behalf of its new nationals against the former State of nationality of these individuals (the United Kingdom, the colonial power).

3. *Conclusion to Chapter 2*

The question whether the successor State may take over the right to claim reparation on behalf of its new nationals which were injured before the date of succession involves concepts of diplomatic protection. The important question is whether or not the traditional diplomatic protection rule of continuous nationality finds application in the context of succession of States. The strict application of the rule of continuous nationality in the context of State succession would result in neither the continuing State nor the successor State being able to exercise diplomatic protection on behalf of the individual which suffered damage as a result of an internationally wrongful act committed before the date of succession. Thus, the rule prevents, on the one hand, the *successor State* from exercising diplomatic protection on behalf of its *new nationals* because they were not its nationals at the time the internationally wrongful act was committed and, on the other hand, would prevent the *continuing State* from exercising diplomatic protection on behalf of its *former nationals* because they are no longer its nationals at the time a claim is presented to the State responsible for the act.

The fact that no State would be entitled to seek redress for the damage suffered by an individual and that, consequently, the internationally wrongful act would

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Material Claims against Germany, in: 162 *U.N.T.S.*, p. 205; in: *BGBl.*, 1953, vol. II, p. 85; *Protocol I between the Federal Republic of Germany and the Conference on Jewish Material Claims against Germany*, in: 162 *U.N.T.S.*, p. 205; in: *BGBl.*, 1953, vol. II, p. 85. This example is discussed at *supra*, p. 383.

303 Rudolf DOLZER, "The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945", 20 *Berkeley J. Int'l L.*, 2002, p. 296, at p. 324, is of the view that this feature of the Agreement "is one example of the government of the Federal Republic going beyond its legal obligations under public international law". This point is also discussed in: Bert-Wolfgang EICHHORN, *Reparation als völkerrechtliche Deliktshaftung: Rechtliche und praktische Probleme unter besonderer Berücksichtigung Deutschlands (1918–1990)*, Nomos Velagsgesellschaft mbH & Co. KG, 1992, at p. 158.

304 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius*, of 7 July 1982 (in force on 28 October 1982), in: *U.K.T.S.*, 1983, no. 6 (Cmnd. 8785); also in: Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley, N.Y., Transnational Publ., 1999, p. 283. This example is discussed at *supra*, p. 385.

remain unpunished is undoubtedly unfair from the point of view of the injured individual. This is so because (in most cases) the consequences of the commission of an internationally wrongful will continue to affect the injured individual even after the date of succession, when he/she becomes a national of the successor State. The conclusion that the application of the strict rule of continuous nationality is not appropriate in the context of State succession is supported by many authors in doctrine and by the work of the I.L.C. on diplomatic protection, as well as by the work of the *Institut de Droit international*. It is also supported by some decisions of international tribunals and some individual and dissenting opinions of judges in cases before the P.C.I.J. and the I.C.J.

The position adopted in the present study is that the successor State has the right to claim reparation on behalf of its new nationals against the State responsible for damage arising from an internationally wrongful act committed before the date of succession. This solution should prevail in all cases where the individual on behalf of whom the new successor State espouses the claim *is still injured* after the date of succession.

This conclusion is supported by the present analysis of international case law and State practice. There are thus several cases of State practice where the State responsible for the internationally wrongful act committed before the date of succession *did not raise any objection* to claims submitted by a new State for compensation for damage on behalf of its new nationals which did not have its nationality at the time the damage occurred.[305] In fact, no example of State practice was found where a State made any objection on this ground. Two examples of international case law have also been found where the State responsible for the internationally wrongful act committed before the date of succession did not submit any objection

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305 One such case of State practice is the position of the Federal Republic of Germany in the 1952 Agreement on reparation entered into with Israel: *Agreement between the State of Israel and the Federal Republic of Germany on Compensation*, in: 162 *U.N.T.S.*, p. 205; also in: *BGBl*, 1953, vol. II, no. 5, at p. 37. Another case of State practice is the position of the United Kingdom in the 1982 Agreement with Mauritius: *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius*, of 7 July 1982 (in force on 28 October 1982), in: *U.K.T.S.*, 1983, no. 6 (Cmnd. 8785); also in: Burns H. WESTON, Richard B. LILLICH & David J. BEDERMAN, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley, N.Y. Transnational Publ., 1999, p. 283. Another example is the position of Austria which signed different bilateral agreements with several new States in the context of the 2000 *Austrian Reconciliation Fund Law: Federal Law Concerning the Fund for Voluntary Payments by the Republic of Austria to Former Slave Laborers and Forced Laborers of the National Socialist Regime* (the "Reconciliation Fund Law"), in: *ÖBGBl.*, I No. 74/2000 of 8 August 2000, entered into force on 27 November 2000. Another example is the position of Germany in the context of its 2000 *Law on the Creation of a Foundation "Remembrance, Responsibility and Future"*, in: *BGBl.*, 2000, vol. I, p. 1263. Case law is examined in: Patrick DUMBERRY, "Obsolete and Unjust: The Rule of Continuous Nationality in the Context of State Succession" 76(2) *Nordic J.I.L.*, 2007 (to be published).

(based on the traditional rule of continuous nationality) against claims made by the successor State for its new nationals.[306] In all these cases of State practice and international case law, the rule of continuous nationality was *not* considered by the State responsible for the internationally wrongful act as an *obstacle* preventing the successor State from receiving reparation.

It is true that in a few other cases the State responsible for the internationally wrongful act committed before the date of succession *did object*, based on the traditional rule of continuous nationality, to a claim submitted by the successor State for its new nationals.[307] What is relevant, however, is the fact that such objections by the State responsible were not upheld by international judicial bodies.

In fact, there is *only one case* where the classic rule of continuous nationality was endorsed by a judicial body, therefore preventing the successor State to claim reparation on behalf of its new national.[308] This is the 1939 *Panevezys-Saldutiskis Railway* case decided by the P.C.I.J.[309] However, as previously observed, the reasoning of the Court in this case does not constitute the most solid foundation in support of the application of the traditional rule in the context of State succession. Thus, the Court's reasoning on the question is limited to one sentence (in the form of an *obiter dictum*),[310] which does not provide any explanation as to the origin, the content and the application of the rule. In fact, the only clear support for the application of the rule of continuous nationality can be found in one paragraph of the common individual opinion of Judge De Visscher and Count Rostworowski.[311] In his dissenting opinion, Judge van Eysinga, on the contrary, concluded that the new successor State of Estonia should have been given the right to exercise diplomatic protection on behalf of the company even if the company did not have its nationality when the damage occurred.[312]

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306 This is the position of the United Kingdom in the *Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War* (Finland v. United Kingdom), Award of Dr. Bagge, 9 May 1934, in: *U.N.R.I.A.A.*, vol. III, p. 1481. This is also the position of Iraq in the context of the U.N.C.C.

307 This is the position of Germany in the context of the Mixed Arbitral Tribunals set up after the First World War. This is also the position of Mexico in the case of *Pablo Nájera (France) v. United Mexican States*, Decision no. 30–A, 19 October 1928, in: *U.N.R.I.A.A.*, vol. V, p. 466.

308 In the other case of *Henriette Levy* decided in 1881 by a U.S.-France Commission (discussed in: John Bassett MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington, G.P.O., 1898, at pp. 2514 et seq.), the rule of continuous nationality prevented the *continuing State* from exercising diplomatic protection on behalf of a person who was its national when the damage occurred but no longer had such nationality at the time the claim was submitted to the State responsible.

309 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76.

310 *Ibid.*, at pp. 16–17.

311 *Ibid.*, at p. 24.

312 *Ibid.*, at p. 35.

It can therefore be concluded that there is *very limited* support in international case law and State practice for the application of the strict rule of continuous nationality in the context of State succession. The principle that a successor State is entitled to claim reparation on behalf of its new nationals for damage which occurred before the date of succession is established in both State practice and international case law. There seems to be only one special circumstance where doctrine (and to some extent) State practice and international case law show, on the contrary, that the successor State does not have the right to claim reparation on behalf of its new nationals: when the claim is directed against the former State of nationality of the new nationals of the successor State.

3

GENERAL CONCLUSION TO PART III

The question addressed in this Part was who from the continuing State or the successor State should have (after the date of succession) the right to claim reparation as a result of an internationally wrongful act committed by a third State before the date of succession. In other words, when an internationally wrongful act is committed by a third State against the predecessor State, can the right to reparation, for which the predecessor State is the creditor before the date of succession, be "transferred" to the successor State?

The present investigation distinguished two separate situations where the question arises. The first one is when the internationally wrongful act committed by a third State *directly* affected the predecessor State. The second one is when the act committed by a third State affected a *national* of the predecessor State. Such distinction is necessary, since the latter situation involves issues of diplomatic protection and the question whether or not the traditional rule of continuous nationality should apply.

For both situations, the response of the doctrine of non-succession is that there can be no transfer of the right to claim reparation from the predecessor State to the successor State and that, consequently, the successor State cannot submit a claim for reparation to the State responsible for the internationally wrongful acts committed before the date of succession.

In the context of internationally wrongful acts *directly* affecting the predecessor State, the reason invoked in doctrine for the theory of non-succession is that the right to claim reparation "belongs" only to the predecessor State as some kind of "personal" right. This argument has been strongly refuted in the present study. Thus, the *consequences* of an internationally wrongful act committed before the date of succession against the predecessor State will continue to have an impact *even after the date of succession*. If such impact is still suffered by the successor State after the date of succession, that State simply cannot be considered as a "third"

Patrick Dumberry, State Succession to International Responsibility, pp. 413–415.

State with respect to the internationally wrongful act committed before the date of succession. There is, indeed, an undeniable connection between the new successor State and the commission of such act since it will affect both its *territory and its population.* The successor State should be considered as an "injured" State. It should, consequently, be allowed to submit a claim for reparation against the State responsible for the internationally wrongful act. In such cases, the internationally wrongful act committed should not remain unpunished.

In the other context of internationally wrongful acts affecting *a national* of the predecessor State, the reason invoked in doctrine in support of the theory of non-succession is based on the application of the traditional rule of diplomatic protection requiring continuous nationality. The application of this rule in the context of State succession results in neither the continuing State nor the successor State being able to exercise diplomatic protection on behalf of an individual which suffered damage as a result of an internationally wrongful act committed before the date of succession. Consequently, the internationally wrongful act committed before the date of succession will remain unpunished. This is certainly unjust for the injured individual, who will continue to be affected (after the date of succession) by the consequences of such an act. There is strong support for the proposition that the strict rule of continuous nationality is not appropriate in the context of State succession and should therefore not apply. This is indeed the proper solution. The successor State has the right to claim reparation on behalf of its new nationals against the State responsible for damage arising from an internationally wrongful act committed before the date of succession. The only exception concerns claims directed against the former State of nationality of the new nationals of the successor State.

These criticisms of the doctrine of non-succession are supported by the examination of relevant State practice and international case law.

In the context of internationally wrongful acts *directly* affecting the predecessor State, several cases were found where the successor State claimed compensation for internationally wrongful acts which occurred before the date of succession, at the time it did not exist as an independent State. Not a single case of State practice or international case law was found where a State actually objected to the claim submitted by a successor State based on the ground that it did not exist at the time the internationally wrongful act was committed. Also, no case was found where a judicial body rejected a claim by the successor State based on this ground. This may, however, be explained by the fact that in none of these cases examined did the successor State actually make use of the argument of succession to the right to reparation. It therefore seems that the theory of non-succession is more a doctrinal construction which, in fact, is never invoked by parties in their actual practice (with one exception)[313] and never applied by international judicial bodies.

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313 In fact, in the only case where the issue was explicitly mentioned by a State, that State refused to make use of the argument of succession to rights essentially for tactical reasons. This is the position of Slovakia in the *Case Concerning the Gabčíkovo-*

Therefore, the fact that an internationally wrongful act was committed before the date of succession is not treated in State practice and international case law *as an obstacle* preventing a successor State from receiving reparation.

In the context of internationally wrongful acts affecting *a national* of the predecessor State, there is only very limited support for the application of the strict rule of continuous nationality in the context of State succession. Several examples of State practice and international case law were found where the State responsible for internationally wrongful acts (committed before the date of succession) *did not raise any objection* to a claim submitted by a new State on behalf of its new national which did not have its nationality at the time the damage occurred. In fact, no example of State practice was found where a State made any objection on this ground. In a limited number of other cases, the State responsible for the internationally wrongful act committed before the date of succession *did object*, based on the traditional rule of continuous nationality, to a claim submitted by the successor State for its new nationals. However, with the exception of one case, such objections were not upheld by international judicial bodies. In fact, the *only* support for the application of the rule of continuous nationality in the context of State succession rests on one *obiter dictum* by the P.C.I.J.[314]

The general conclusion is therefore the same in both situations where the act committed by a third State *directly* affected the predecessor State and where it affected one of *its nationals*: the doctrine of non-succession does not apply. The fact that an internationally wrongful act was committed before the date of succession is generally (with very few exceptions) not considered by the State responsible for the act to be an *obstacle* preventing the successor State from receiving reparation. The principle according to which a successor State is entitled to claim reparation for itself or on behalf of its new nationals for damage which occurred before the date of succession is established in both State practice and international case law.

Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3.

314 *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., *Series A/B*, no. 76.

PART IV

GENERAL CONCLUSION

The present study addresses the issue whether there is State succession to rights and obligations arising from internationally wrongful acts committed before the date of succession. The analysis of this issue is twofold:

– Whenever an internationally wrongful act is committed by the predecessor State *against a third State* before the date of succession, what happens to the *obligation to repair* for which the predecessor State is the debtor before the date of succession?
– Whenever an internationally wrongful act is committed *by a third State* against the predecessor State, what happens to the *right to reparation* for which the predecessor State is the creditor before the date of succession?

There are three possible different sets of answers with respect to the obligation to repair and the right to reparation in the context of succession of States:

– the obligation and the right simply vanish along with the defunct State (in the context where the predecessor State ceases to exist, such as a dissolution of State); or
– the obligation and the right remain that of the continuing State (in the context where the predecessor State does not cease to exist, such as in cases of secession): or
– the obligation and the right are transferred to the successor State(s).

Any question of State succession involves two contradictory principles: continuity and break. The central issue is therefore whether the factual changes affecting a State lead to continuity or break of its legal rights and obligations existing prior to the date of succession. The study of any question of succession of States is therefore to determine *the point of equilibrium* between two extreme principles: *tabula rasa* and universal succession.[1] In the present study, the aim is to determine the point of equilibrium between the solution of succession or non-succession to

1 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 121.

Patrick Dumberry, State Succession to International Responsibility, pp. 419–435.

international responsibility. In other words, this enquiry is aimed at finding in which circumstances and under which conditions the successor State succeeds to the legal rights and obligations which were those of the predecessor State before the date of succession.

There is simply no *general and unique answer* to this issue. Any general theory either *in favour of or against* the *automatic transfer* of the right to reparation and the obligation to repair from the predecessor State to the successor State(s) would be illusory. Similarly to any other question of State succession, the issue is much too complex to be resolved by any general all-inclusive theory.[2] In fact, the analysis of any issue of State succession needs to take into account the "eminently important role of factual situations".[3]

This is precisely what the doctrine of non-succession fails to take into account in developing its general theory of strict and automatic non-succession to rights and obligations arising from internationally wrongful acts committed before the date of succession. Thus, quite apart from the weaknesses of the arguments put forward by writers supporting the general theory of non-succession, their analysis of State practice and case law suffers from two other important shortcomings. Firstly, it fails to conduct its investigation in the light of the fundamental distinction between different *types of succession of States*. Secondly, it fails to take into account the fact that the solution to the issue depends also on a variety of other *factors and circumstances*.

Ultimately, this study is aimed at responding to the proposition of I.L.C. Special Rapporteur Crawford that "[i]t is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory".[4] The present analysis of relevant State practice and international and municipal case law, as well as of doctrine, shows the emergence of rules and principles. The general conclusions of this analysis will now be examined.

1 The doctrine of non-succession is not representative of contemporary international law. The doctrine of non-succession is more a doctrinal construction than

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2 P.M. EISEMANN, "Rapport du Directeur de la section de langue française du Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits/State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, p. 64: "Le phénomène de la succession d'Etats n'est nullement rebelle au droit mais il conduit naturellement vers des solutions spécifiques adaptées à la variété des situations plutôt que vers l'application automatique de règles générales".

3 Brigitte STERN, "General Concluding Remarks", in: Brigitte STERN (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, The Hague, Martinus Nijhoff Publ., 1998, at p. 208.

4 *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), ch. IV.E.2), pp. 59 et seq., at p. 119, para. 3.

anything else. This doctrine is, in fact, only rarely invoked by States in their international relations and is not often referred to and applied by judicial bodies. This is especially true in the context of succession to the right to reparation. We have found several examples of State practice (involving different types of succession of States) and identified several different circumstances where the principle of the transfer of rights and obligations to the successor State has been accepted.

2 The issue of State succession to the obligation to repair essentially depends on the type of succession of States involved. This is a basic assumption that we adopted at the outset of this study. It has proven to be correct in light of State practice and case law.

State practice shows that in the context of unification and integration of States, the principle of *succession* to international responsibility finds application. State practice is not uniform in the context of dissolution of State, but a clear tendency emerges in modern State practice whereby the successor States take over the obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession.

The rule of *non-succession* is firmly settled in the context of cession and transfer of territory as well as in the context of secession: the continuing State remains responsible for internationally wrongful acts it committed before the date of succession. The examination of State practice and case law in the context of Newly Independent States shows a great variety of solutions supporting both the principles of succession and non-succession to international responsibility.[5]

3 The issue of State succession to the obligation to repair ultimately depends on whether or not the predecessor State continues to exist as a result of the events affecting its territorial integrity. The different solutions adopted in State practice and case law in the context of the different types of succession of State can be summarised with the following two propositions:

- In the context where the predecessor State *ceases to exist* as a result of the events affecting its territorial integrity (integration, unification and dissolution of State), the *tendency is clearly towards succession to the obligation to repair*. This is at least undoubtedly the case of *modern* State practice and case law;
- In the context where the predecessor State *continues to exist* as a result of the events affecting its territorial integrity (cession and transfer of territory, secession and Newly Independent States), the *overwhelming tendency is clearly toward non-succession to the obligation to repair*, whereby the continuing State remains responsible for the commission of *its own* internationally wrongful acts before the date of succession. The only few cases where the contrary

5 However, as previously noted, cases where the successor State was held responsible for pre-succession damage are not entirely convincing and their outcome were, ultimately, politically motivated and driven by special circumstances.

solution of succession was adopted can be explained by special circumstances or by the political context in which the events took place.

4 The issue of State succession to the obligation to repair essentially depends on the different factors and circumstances involved. The basic assumption adopted at the outset of this study was that *specific problems* of State succession to the obligation to repair require *specific solutions* depending on the different *factors and circumstances* involved. The soundness of this assumption is confirmed by this author's investigation of State practice and case law.

Several *specific circumstances* have been identified under which State practice and case law (as well as doctrine) support the application of the *principle of succession*, whereby the successor State takes over the obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession. Such would be the case, for instance, in the following circumstances:

- the successor State has accepted (after the date of succession) to take over the obligations arising from the commission of the internationally wrongful act;
- the internationally wrongful act is committed by an insurrectional movement during an armed struggle which eventually led to the creation of the new State;[6] or
- the internationally wrongful act is committed by an autonomous government (while still part of the predecessor State) with which the successor State has an "organic and structural continuity."

Several other *specific circumstances* have also been identified where the *principle of succession* should prevail even if there is only limited (or no) State practice and case law dealing with the issue. It is submitted that the successor State *should* take over the obligation to repair in the following circumstances:

- the predecessor State has recognised its own responsibility (before the date of succession) for the internationally wrongful act;
- a judicial body has found (before the date of succession) the predecessor State responsible for the internationally wrongful act; or
- the successor State maintains and continues after its independence the internationally wrongful act which was initially committed by the predecessor State before the date of succession.[7]

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6 However, as previously noted (*supra* p. 241), this is not a case of State succession *per se*.

7 In such a case, the successor State is responsible not only for its own internationally wrongful acts committed after the date of succession but also for the obligations arising from the acts committed by the predecessor State before the date of succession. However, this solution should not apply in the context where the predecessor State does not cease to exist (such as in cases of secession). In this last case, the continuing State should remain (after the date of succession) responsible for *its own* internationally wrongful acts committed before the date of succession.

There is clearly one *specific circumstance* under which the work of the I.L.C. and doctrine support the principle of *non-succession*: the successor State is not responsible for obligations arising from internationally wrongful acts committed *by the predecessor State* during the struggle led by an "insurrectional movement" to establish that new State. State practice is, however, not uniformly in support of this solution.

This analysis of State practice and case law led to several other conclusions. There is no general principle of succession whereby the successor State is automatically responsible for obligations arising from "odious" acts and other violations of *jus cogens* norms committed by the predecessor State before the date of succession. Similarly, no support has been found for the doctrinal proposition according to which the successor State that becomes party to a treaty by way of succession is automatically responsible for obligations arising from the breach of that treaty by the predecessor State before the date of succession. Also, the successor State is not automatically responsible for the obligations arising from an internationally wrongful act committed by the predecessor State *solely based* on the fact that such act took place prior to its independence on what is now its territory. However, the successor State should nevertheless be held responsible for the obligations arising from internationally wrongful acts committed by the predecessor State that are *specifically linked* to what is now its territory, such as violations of territorial regime obligations.

Finally, this investigation of State practice and case law has led to the identification of at least two *factors* which should *always* be taken into account to determine which of the continuing State or the successor State (and in the context of dissolution of State, which of the successor States) should be held responsible for obligations arising from internationally wrongful acts committed before the date of succession. These two important factors are the principle of unjust enrichment and the concept of equity. Thus, whenever a State (the continuing State or the successor State) has unjustly enriched itself as a result of an internationally wrongful act committed before the date of succession, that State should provide reparation to the injured third State.[8] It is also submitted that the question whether there is succession or not to international responsibility should be answered taking into account the principle of equity. Thus, the outcome of any allocation of liability between the different States (the continuing State and the successor State(s)) should

8 As already explained, in the context where the predecessor State does not cease to exist (such as in cases of secession), it should be determined which of the continuing State or the successor State has enriched itself as a result of the act committed before the date of succession. In the other context of dissolution of State, the question will be which of the different successor States benefited from the internationally wrongful act. In cases where more than one State benefited from the commission of such a delict, the partition of liability among these States should be in proportion to their actual benefit/advantage.

be fair and equitable, not only from their perspective but also from the point of view of the injured third State. As noted by Stern in the context of State succession in general, "the legal principles have to be applied with pragmatism, in order to arrive to a just and satisfactory result for the people concerned".[9] This observation applies *a fortiori* when issues of succession to responsibility arise.

5 The issue of State succession to the obligation to repair is ultimately resolved based on the application of three fundamental equitable principles. We have identified three basic rules that are fundamental to resolve problems of State succession to the obligation to repair:

- As a matter of principle, an internationally wrongful act committed before the date of succession should not remain unpunished simply because of the application of the mechanisms of State succession;
- The actual wrongdoer State should be the one responsible for the obligations arising from an internationally wrongful act committed before the date of succession; and
- The State that has benefited (after the date of succession) from the commission of an internationally wrongful act should be responsible for the obligations arising from it.

The *first* basic equitable rule which should always be taken into account to resolve issues of State succession to the obligation to repair is that an internationally wrongful act committed before the date of succession *should not remain unpunished simply because of the application of the mechanisms of State succession*. After the date of succession, an injured State victim of an internationally wrongful act should not be left with no debtor. The application of a strict rule of non-succession would be too favourable to the wrongdoer State and undoubtedly unfair for the injured State. This rule explains the rejection of the solution of strict non-succession in the context where the predecessor State ceases to exist (such as in cases of dissolution of State).

A *second* basic equitable rule is that the solution to problems of State succession to the obligation to repair requires the *identification of the actual wrongdoer State*. Thus, as a matter of principle, a State should not be held responsible for internationally wrongful acts *with which it has simply nothing to do*. This rule explains why in the context of *dissolution of State not all* the different successor States should equally be held responsible for pre-succession damage.

Logically, whenever the events affecting the predecessor State's territorial integrity *do not* lead to its extinction, the continuing State *remains* (in principle) responsible for *its own* internationally wrongful acts committed before the date of succession. This is certainly the rule applied in State practice and case law in the context of

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9 Brigitte STERN, "General Concluding Remarks", in: Brigitte STERN (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, The Hague, Martinus Nijhoff Publ., 1998, at pp. 208–209.

secession, cession/transfer of territory and (to some extent) the creation of *Newly Independent States*.

However, this basic rule of the identification of the actual wrongdoer State also explains why there will be some circumstances where the solution of succession should nevertheless be applied in the context where the predecessor State continues to exist. This will be the case whenever it can be shown that the wrongdoer State is in fact the new successor State and not the continuing State. For instance, the successor State takes over the obligations arising from internationally wrongful acts committed by an *insurrectional movement* or by an *autonomous government* before the date of succession.[10] This is so because there is an undeniable continuity of identity between these entities and the new State. In both situations, it would be unfair for the continuing State to be held responsible for such acts.

The concrete application of these first two basic rules leads to interesting results in the context where a successor State *maintains and continues* after its independence an internationally wrongful act which was initially committed by the predecessor State before the date of succession. The second rule which requires the identification of the actual wrongdoer State explains, for instance, why there should be no succession in cases of secession where the existence of the predecessor State is not affected by the territorial changes affecting its territory. Thus, there is no reason why the continuing State should not remain responsible for the portion of the obligation arising from the act which *it committed* before the date of succession. However, the application of this solution of non-succession in the context of dissolution of State would result in an internationally wrongful act remaining unpunished and the injured State left with no debtor. In such cases, the first equitable rule certainly calls for the successor State(s) to take over any obligation arising from these acts.

A *third* basic equitable rule is that the solution to problems of State succession to the obligation to repair requires the identification of the State which has *benefited* (after the date of succession) from the commission of an internationally wrongful act. The proposition that the concept of unjust enrichment is a useful tool to determine issues of liability in the context of State succession to international responsibility has already been examined.[11] The requirement to identify the actual beneficiary of the commission of a wrongful act explains why the successor State should be held responsible for the obligations arising from internationally wrongful acts committed by the predecessor State that are *specifically linked to its territory*. It also explains why, in the context of *unification and integration of State*, the successor State takes over the obligations arising from the commission of internationally wrongful acts. Thus, in these cases, there is a presumption that the

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10 Inversely, there is no succession by the new State for the acts which were committed *by the predecessor State* in fighting the rebels' efforts to achieve independence.

11 The present author's conclusions are summarised in: Patrick DUMBERRY, "The Use of the Concept of Unjust Enrichment to Resolve Issues of State Succession to International Responsibility", *R.B.D.I.*, 2006–2 (to be published).

successor State has benefited (after the date of succession) from such violations of territorial regimes obligations and from other violations of international law which took place before the date of succession on what is now its territory.

6 The issue of State succession to the obligation to repair remains largely based on the consent of the successor State. Although there are many situations and circumstances where State practice and case law show that the principle of the transfer of the obligation to repair to the successor State prevails, it remains that in almost all these cases the successor State explicitly or implicitly *agreed* to such transfer. Very few cases were found where a judicial body *imposed* the solution of succession on the successor State which had previously denied any such succession based on the ground that as a new State it could not be held responsible for obligations arising from internationally wrongful acts which took place before the date of succession.

One such case is Claim no. 4 decided by the Arbitral Tribunal in the *Lighthouse Arbitration* case.[12] There is, however, a doctrinal controversy as to whether the Arbitral Tribunal in fact held the successor State (Greece) responsible for the obligations arising from the commission of internationally wrongful acts which took place *before* the date of succession or only for its *own acts* committed after that date. Another case is the decision of a Greek municipal court of the Aegean Islands in the *Samos (Liability for Torts) case*.[13] The principle of the transfer of the obligation to repair to the successor State was also applied by the High Court and the Supreme Court of Namibia in the case of *Minister of Defence, Namibia v. Mwandinghi*,[14] although in this case the courts were, in fact, simply applying a provision of the Namibian Constitution and may also have been influenced by the political context in which Namibia became an independent State.

There are also several cases which were decided by French, Dutch and German municipal courts of the continuing State where it was held that it was, in principle, for the *successor State* to take over the consequences of internationally wrongful acts committed before the date of succession.[15] However, it should be noted that

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12 *Lighthouse Arbitration* case, Award of 24/27 July 1956, in: 23 *I.L.R.*, 1956, p. 81.

13 *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, N° 27, in: *Thémis*, vol. 35, p. 294, in: *Annual Digest*, 1923–1924, at p. 70.

14 *Minister of Defence, Namibia v. Mwandinghi*, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), in: 91 *I.L.R.*, p. 358. See also the previous decision of the High Court: *Mwandinghi v. Minister of Defence, Namibia*, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), in: 91 *I.L.R.*, p. 343.

15 *Poldermans v. State of the Netherlands*, Netherlands, Court of Appeal of The Hague (First Chamber), 8 December 1955, in: *N.J.*, 1959, no. 7 (with an analysis by Boltjes), reported in: *I.L.R.*, 1957, p. 69; *Poldermans v. State of the Netherlands*, Netherlands, Supreme Court, 15 June 1956, in: *Id. Van der Have v. State of the Netherlands*, District Court of The Hague, 12 January 1953, in: *N.J.*, 1953, no. 133, in: *I.L.R.*, 1953, p. 80; *Personal Injuries (Upper Silesia) Case*, Court of Appeal of Cologne, Federal Republic of Germany, 10 December 1951, in: *NJW*, 5 (1952), p. 1300, in: *I.L.R.*, 1951, pp. 67 et seq. French municipal courts consistently held that the new State of Algeria should

these municipal law cases *do not involve questions of succession to international responsibility*, as the wrongful acts were committed not against another State (or a national of another State) but by the predecessor State against *its own nationals* before the date of succession. Another important point is that none of the successor States were actually party to the proceedings before these municipal courts. Therefore, these court decisions did not formally hold any of the successor States responsible for these acts.

The fact of the matter is that, like any other problems of succession of States, State practice remains largely based on *political opportunity* rather than anything else.[16]

7 The successor State has the right to claim reparation for itself or on behalf of its new nationals for internationally wrongful acts committed by a third State before the date of succession. State practice and case law in the context of State succession to the right to reparation (analysed at Part III) is much more straightforward than the issue of succession to the obligation to repair. State practice and case law is, in fact, quite uniform. The fact that an internationally wrongful act was committed before the date of succession is generally (with very few exceptions)

(in principle) be responsible to provide compensation to the victims of internationally wrongful acts committed by the F.L.N. in its struggle to achieve independence. See *Perriquet*, Conseil d'Etat, case no. 119737, 15 March 1995, in: *Recueil Lebon*; *Hespel*, Conseil d'Etat, 2/6 SSR, case no. 11092, 5 December 1980, in: *Tables du Recueil Lebon*; Conseil d'Etat, 2/4 SSR, case no. 5059, 25 May 1970, in: *Tables du Recueil Lebon; Etablissements Henri Maschat*, Conseil d'Etat, case no. 04878, 10 May 1968, in: *Recueil Lebon*; *Consorts Hovelacque*, Conseil d'Etat, 2/6 SSR, case no. 35028, 13 January 1984, in: *Tables du Recueil Lebon*.

16 Brigitte STERN, "General Concluding Remarks", in: Brigitte STERN (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, The Hague, Martinus Nijhoff Publ., 1998, at p. 209; D.P. O'CONNELL, *The Law of State Succession*, Cambridge, Cambridge Univ. Press, 1956, p. 272. D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, pp. 117–118, identifies the limitation as follows: "The truth of the matter is that the 'practice' is likely to consist of decisions taken by public officials who have not achieved the necessary intellectual penetration of the problem to perceive the true issue, who may be more influenced by political or other ephemeral considerations than by juristic logic, who may even be ignorant of the nature of the problem, or of its ramifications, or may be equipped with obsolescent literature, or even no literature whatever". See also in: *Ibid.*, at p. 199. This is also the analysis of P.M. EISEMANN, "Rapport du Directeur de la section de langue française du Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits/State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, p. 33, for whom "la succession d'Etats est, avant tout, un phénomène politique" and States will "utiliser le droit international pour parvenir au but qu'ils se sont assignés plus qu'ils ne chercheront à appliquer des normes supposées 'objectivement' applicables". See also: Erik CASTREN, "Aspects récents de la succession d'Etats", *R.C.A.D.I.*, t. 78, 1951–I, p. 402.

not considered by the State responsible for the act to be an *obstacle* preventing a succession State from receiving reparation. The doctrine of non-succession is in fact (with only few exceptions) never invoked by States. What is more is the fact that this so-called principle of non-succession to the right to reparation is not applied by international judicial bodies (with one rather limited exception).

It therefore seems established in both State practice and international case law that a successor State can claim reparation for internationally wrongful acts committed by a third State before the date of succession.

In the context of internationally wrongful acts *directly* affecting the predecessor State, the *consequences* of the act committed before the date of succession against that State will continue to have an impact *even after the date of succession*. The successor State cannot simply be considered as a "third" State, since its territory will be affected and its population will be the victim of such an act. The successor State should be considered to be an "injured" State and, consequently, be allowed to submit a claim for reparation against the State responsible for the internationally wrongful act.

In the other context of internationally wrongful acts affecting *a national* of the predecessor State, the application of the rule of continuous nationality results in neither the continuing State nor the successor State being able to exercise diplomatic protection on behalf of an individual which suffered damage as a result of the act committed before the date of succession. The fact that the internationally wrongful act consequently remains unpunished is certainly unjust for the injured individual, who will continue to be affected (after the date of succession) by the consequences of such an act. The successor State should have the right to claim reparation on behalf of its new nationals against the State responsible for damage arising from an internationally wrongful act committed before the date of succession. The only exception is for claims directed against the former State of nationality of the new nationals of the successor State.

8 Several rules of customary international law have developed. Some writers believe that there is a *general* customary rule of international law *against* succession to the obligation to repair.[17] The present analysis of State practice and case law

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17 Lauri MÄLKSOO, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (A Study of the Tension between Normatively and Power in International Law)*, Leiden, Martinus Nijhoff Publ., 2003, at p. 257. *Contra*: Michael John VOLKOVITSCH, p. 2198 (see also at pp. 2172–2173), for whom the doctrine of non-succession "…lacks the necessary foundation in practice and theory to be accepted as a customary norm of international law. Both the provisions of international agreements and the history of diplomatic practice on the subject are inconsistent and have been frequently misunderstood. Nor do the varied decisions of international tribunals or municipal courts provide sufficient support for a theory of nonsuccession. Moreover, the various theoretical bases proposed for such a principle are each plagued by fundamental flaws". See also: Ernest H. FEILCHENFELD, Public Debts and State Succession, New York, Macmillan, 1931, p. 20, indicating that there is "no general custom exempting tort obligations from the rules of succession".

clearly rejects the existence of any such negative rule. Indeed, many examples have been found where the obligation to repair and the right to reparation were transferred from the predecessor State to the successor State. Some in doctrine have subscribed to the existence of a *general* customary rule *in favour* of succession to international responsibility.[18] Others have concluded that no such *general rule* exists. This is the position of Czaplinski[19] and that of Stern.[20] This is no doubt a sound position.

If no *general customary rule* of succession exists, it remains that the analysis of State practice and case law has clearly shown that for certain *types* of succession of States as well as in *specific situations and circumstances*, rules of a customary nature have indeed developed.

No customary rule of *succession* can be deemed to exist in the context of unification and integration of States because modern State practice is limited to only two sets of examples. The same is true in the context of dissolution of State since State practice is not entirely uniform. State practice and international case law shows the existence of customary rules of *succession* in the following *specific situations and circumstances*:

- In cases where the successor State has accepted (after the date of succession) to take over the obligations arising from internationally wrongful acts committed by the predecessor State, the principle of succession certainly applies as a customary rule of international law;
- When an internationally wrongful act is committed by an insurrectional movement during an armed struggle which eventually leads to the creation of a new State, the latter takes over the obligations arising from the act.[21] This is a rule of customary international law;[22]
- Consistent State practice and case law (with very few exceptions) shows that the successor State can claim reparation for internationally wrongful acts committed by a third State against the predecessor State before the date of succession. This rule is firmly established in both contexts where the internationally wrongful act *directly* affects the predecessor State and where the

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18 Michael John VOLKOVITSCH, p. 2162, who supports the establishment of "a customary norm of international law providing for a rebuttable presumption of succession to liability".

19 Wladyslaw CZAPLINSKI, p. 343, is of the view that State practice "shows a tendency to transfer delictual liability but it is not consistent" and that "the conclusion is that this practice does not prove the existence of a customary rule concerning the succession in respect of delictual obligations".

20 Brigitte STERN, Responsabilité, p. 338, who believes that "en l'absence de précédents significatifs" it cannot be concluded that there "existe une règle générale de transmission de la responsabilité".

21 However, as previously noted (*supra*, p. 241), this is not a case of State succession *per se*. The present author's conclusions are summarised in: Patrick DUMBERRY, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", 17(3) *E.J.I.L.*, 2006, pp. 605–621.

22 This is also the position of Brigitte STERN, Responsabilité, p. 344.

act affects *a national* of the predecessor State who becomes a national of the new State (after the date of succession).[23]

State practice and international case law has also shown the existence of customary rules of *non-succession* for certain other *types* of succession of States and in other *specific situations and circumstances*:

- This is clearly the case in the context of cession and transfer of territory. All examples of State practice (with one exception) show that whenever an internationally wrongful act was committed before the date of succession (and did not involve the acts of a local autonomous administration whose territory is later the object of cession), the continuing State remains responsible for obligations arising from the act;
- In the context of secession, all examples of State practice (with one exception)[24] show that the continuing State remains responsible for *its own* internationally wrongful acts committed before the date of succession and that obligations arising from the commission of such acts are not transferred to the successor State.[25]

9 Modern State practice and case law clearly support the principle of State succession to international responsibility. One cannot but notice a modern trend towards the principle of *continuity* of the obligations to repair and the rights to reparation. It can no longer be taken for granted that there is simply no succession to rights and obligations arising from internationally wrongful acts committed before the date of succession. Recent examples of succession of States in the 1990s are clearly in support of the principle of succession.[26]

In the context of succession to *obligations* arising from internationally wrongful acts committed before the date of succession, *all examples of modern State practice support the principle of succession*. In fact, not a single recent case was found where the successor State refused to be held responsible for pre-succession obligations. In all cases, the successor State *consented* to the transfer of pre-succession obligations.

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23 The only exception to this rule of succession seems to be for claims directed against the former State of nationality of the new national of the successor State.

24 The only significant case where the solution of succession was adopted is in the context of the secession of Belgium. However, as previously mentioned, the outcome of this case was no doubt *politically motivated* and can hardly support any legal principle in favour of succession in the context of secession.

25 A summary of this issue is found in: Patrick DUMBERRY, "Is a New State Responsible for Obligations arising from Internationally Wrongful Acts Committed before its Independence in the Context of Secession?", 43 *Canadian Y.I.L.*, 2005, pp. 419–453.

26 The present author's conclusions on this point are summarised in: Patrick DUMBERRY, "The Controversial Issue of State Succession to International Responsibility in Light of Recent State Practice" 49 *German Y.I.L.*, 2006 (to be published).

Thus, in the context of the integration of the Democratic Republic of Germany into the Federal Republic of Germany (1990), the *Treaty on the Establishment of German Unity*,[27] 1992 *Agreement for the Settlement of Property Claims* between the Federal Republic of Germany and the United States,[28] as well as different laws adopted by "unified" Germany on restitution and compensation for expropriated property in the G.D.R., all support the principle of succession. Similarly, in the 2001 *Agreement on Succession Issues* in the context of the dissolution of Yugoslavia (1991–1992), the different successor States agreed to take over the obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession.[29] The principle of succession is also supported by the *Compromis* entered into between Slovakia and Hungary to refer a dispute to the I.C.J. in the context of the dissolution of Czechoslovakia (1992).[30] The validity of the principle of succession was also recognised (at least implicitly) by the I.C.J. in the *Case Concerning the Gabčíkovo-Nagymaros Project*.[31] One recent example where the principle of succession was adopted is in the context of the independence of Namibia (1991), where two municipal court decisions[32] applied a provision of the Namibian Constitution stating that the new State was responsible for the obligations arising from internationally wrongful acts committed by South Africa (but also that Namibia may repudiate such acts).[33] Two treaties[34] and a

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27 *Treaty on the Establishment of German Unity*, 31 August 1990, in: 30 *I.L.M.*, 1991, p. 457.

28 *Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Settlement of certain Property Claims*, 13 May 1992, in: *T.I.A.S.* no. 11959; also in: Jan KLAPPERS (ed.), *State Practice Regarding State Succession and Issues of Recognition*, The Hague, Kluwer Law International, 1999, at p. 240.

29 *Agreement on Succession Issues* of 29 June 2001, in: 41 *I.L.M.*, 2002, p. 3. See in particular Article 2 of Annex F of the Agreement.

30 The Special Agreement (*Compromis*) of 2 July 1993 indicates that "the Slovak Republic is…the sole successor state in respect of…obligations relating to the Gabčíkovo-Nagymaros Project".

31 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 151. The Court held that based on the Special Agreement (*Compromis*) entered into by the Parties, the successor State (Slovakia) "may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia" (i.e. the predecessor State).

32 *Minister of Defence, Namibia v. Mwandinghi*, 25 October 1991, in: 1992 (2) *SA* 355 (NmS), in: 91 *I.L.R.*, p. 358. See also the previous decision of the High Court: *Mwandinghi v. Minister of Defence, Namibia*, 14 December 1990, in: 1991 (1) *SA* 851 (Nm), in: 91 *I.L.R.*, p. 343.

33 Article 140(3) of the *Constitution of Namibia*, adopted by the Constituent Assembly of Namibia on 9 February 1990, entered into force on 21 March 1991, U.N. Doc. S/20967/Add.2.

34 The first treaty is the *Cultural Agreement* entered into in 1992 between Germany and Russia: *Abkommen Zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über kulturelle Zusammenarbeit*, 16 December 1992,

national law[35] examined in the context of the break-up of the U.S.S.R. (1991) are not in opposition to the principle of succession to the obligation to repair. They are, in fact, an illustration of *another principle* that whenever a State (Russia, the continuing State) does not cease to exist as a result of territorial transformations, it should remain responsible for internationally wrongful acts *it committed* before the date of succession.

In the context of succession to *rights* arising from internationally wrongful acts committed before the date of succession, modern State practice also *clearly supports the principle of succession*. No recent case was found where the successor State was refused the right to reparation based on the ground that the act was committed against the predecessor State (or one of its nationals) before the date of succession.

The principle of succession is thus affirmed by the successor States in the 2001 *Agreement on Succession Issues* in the context of the dissolution of Yugoslavia (1991–1992).[36] The principle of succession is also supported by the *Compromis* entered into between Slovakia and Hungary to refer a dispute to the I.C.J. in the context of the dissolution of Czechoslovakia (1992).[37] The validity of the principle was also recognised (at least implicitly) by the I.C.J. in the *Case Concerning the Gabčíkovo-Nagymaros Project*.[38] The same can also be said concerning the claim submitted by the Czech Republic before the U.N.C.C.[39] Organs of the United Nations also passed resolutions supporting the principle of succession in the context of the

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in: *BGBl*., 1993, vol. II, p. 1256. The second treaty is the *Accord du 27 mai 1997 entre le Gouvernement de la République française et le Gouvernement de la Fédération de Russie sur le règlement définitif des créances réciproques financières et réelles apparues antérieurement au 9 mai 1945*, in: *R.G.D.I.P.*, 1997, p. 1091. The Agreement and the Memorandum of 26 November 1996 for mutual understanding were approved by the French National Assembly on 19 December 1997 (Bill No. 97–1160, in: *J.O.R.F.*, 15 May 1998).

35 Lithuania passed in June 2000 a *Law on Compensation of Damage Resulting from the Occupation by the U.S.S.R.: Valstybės žinios*, (2000) No. 52–1486, Law VIII-1727, of 13 June 2000.

36 *Agreement on Succession Issues* of 29 June 2001, in: 41 *I.L.M.*, 2002, p. 3. See in particular Article 1 of Annex F of the Agreement.

37 The Special Agreement (*Compromis*) of 2 July 1993, indicates that "the Slovak Republic is…the sole successor state in respect of rights…relating to the Gabčíkovo-Nagymaros Project". It should be noted that in its pleadings, Slovakia denied (largely for tactical reasons) the existence of any principle of succession to rights arising from the commission of internationally wrongful acts: *Counter-Memorial of the Slovak Republic*, vol. I, 5 December 1994, at paras. 3.60 et seq.

38 *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 3, at para. 151. The Court held that based on the Special Agreement (*Compromis*) entered into by the Parties the successor State (Slovakia) is "entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary".

39 *Report and Recommendations made by the Panel of Commissioners Concerning the Second Instalment of "F1" Claims*, U.N.C.C. Governing Council, U.N. Doc. S/AC.26/1998/12, 2 October 1998, see at footnote no. 3 of the Report.

independence of Namibia (1991).[40] The recent practice of the U.N.C.C. is a good example where the traditional rule of continuous nationality was not applied and where successor States submitted claims on behalf of their new nationals, even if these individuals did not have the nationality of these States at the time the damage occurred. Similarly, there are several examples of modern treaties where reparation was provided to the successor State for its new nationals which did not have its nationality at the time the damage occurred.[41] These are all examples where the doctrine of non-succession was not applied in modern State practice.

10 The tendency in favour of continuity of rights and obligations is in accordance with modern State practice in other fields of State succession. There is clearly a tendency towards the continuity of rights and obligations in other fields of State succession.[42] This is certainly the case in the context of succession to multilateral treaties.[43]

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40 Paragraph no. 6 of the *Decree No. 1 on the Natural Resources of Namibia* enacted on 27 September 1974 by the United Nations Council for Namibia, Addendum to the Report of the United Nations Council for Namibia, 29 U.N. GAOR Supp. 24A, at pp. 27–28, U.N. Doc.A/9624/add 1 (1975). See also: U.N. General Assembly Res. 40/52 of 2 December 1985, para. 14; U.N. General Assembly Res. 38/36 of 2 December 1983, para 42.

41 The present author's conclusions are summarised in: Patrick DUMBERRY, "Obsolete and Unjust: The Rule of Continuous Nationality in the Context of State Succession" 76(2) *Nordic J.I.L.*, 2007 (to be published). This is, for instance, the position of Austria which signed different bilateral agreements with several new States in the context of the 2000 *Austrian Reconciliation Fund Law: Bundesgesetz über den Fonds für freiwillige Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes (Versöhnungsfonds-Gesetz)* (*Federal Law Concerning the Fund for Voluntary Payments by the Republic of Austria to Former Slave Laborers and Forced Laborers of the National Socialist Regime* (the "Reconciliation Fund Law")), in: *ÖBGBl.*, I No. 74/2000 of 8 August 2000, entered into force on 27 November 2000. Another example is the position of Germany in the context of its 2000 *Law on the Creation of a Foundation "Remembrance, Responsibility and Future": Gesetz Zur Errichtung Einer Stiftung "Erinnerung; Verantwortung Und Zukunft"*, in: *BGBl.*, 2000, vol. I, p. 1263. The Law was amended by the Law of 4 August 2001 (entered into force on 11 August 2001, in: *BGBl.*, 2001–I, 2036) as well as by the Law of 21 August 2002 (entered into force on 28 August 2002, in: *BGBl.*, 2002–I, 3347).

42 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 422.

43 Recent State practice in the context of dissolution of State shows a clear tendency towards the continuity of multilateral treaties. This is the conclusion reached by the majority of writers in doctrine: Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, pp. 291–295; Photini PAZARTZIS, *La succession d'États aux traités multilatéraux à la lumière des mutations territoriales récentes*, Paris, Pedone, 2002, pp. 143–151, 158–159; International Law Association, *Rapport final sur la succession en matière de traités*, Committee on Aspects of the Law of State Succession, New Delhi Conference 2002, pp. 14–15; Hanna BOKOR-SZEGO, "Continuation et succession en matière de traités internationaux", in: Geneviève BURDEAU & Brigitte STERN (eds.), *Dissolution, continuation et succession en Europe de l'Est*, Paris, Cedin-Paris I, 1994, p. 54; Vladimir DEGAN, "La succession d'États en matière de traités et les États nouveaux (issus de l'ex-Yougoslavie)", 42 *A.F.D.I.*, 1996, p. 222; Edwin D. WILLIAMSON, "State Succession and Relations with Federal States", *A.S.I.L. Proceedings*, vol. 86, 1992,

It is also clear in the other context of territorial regimes.[44] In the field of succession to debts, the principle of continuity is affirmed by the rule requiring that the successor State take up an "equitable" part of the national debts of the predecessor State and by the rule requiring the transfer of localised debts to the successor State.[45]

This undeniable tendency towards continuity is dictated by the concern of the international community for the stability of international legal relations among States.[46] This requirement for stability has long been supported by O'Connell, for whom "the freedom of a successor State to pursue its goals is inherently limited by the responsibility of all States to promote the greater good of mankind" and "must not be at the expense of the principles of order and justice".[47] Stern also indicates that the new successor State "devient partie intégrante du système international préexistant, dont il se doit de respecter l'intégrité et la cohérence".[48]

It is undeniable that the principle of State succession to rights and obligations arising from internationally wrongful acts committed before the date of succession should be adopted from the perspective of the respect for order and stability of existing legal situations in international relations. The stability of the international legal order requires that the interests of injured States be protected in the context of succession of States. The application of the doctrine of non-succession does not support stability. It is too favourable to the interests of the wrongdoer State and is detrimental to those of the injured State. The requirement of predictability also militates in favour of the application of the principle of State succession to international responsibility.

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p. 12. *Contra*: P.M. EISEMANN, "Rapport du Directeur de la section de langue française du Centre", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI (Dir.), *La succession d'Etats: la codification à l'épreuve des faits/State Succession: Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, pp. 48–54; Tarja LANGSTÖM, "The Dissolution of the Soviet Union in the Light of the 1978 Vienna Convention on Succession of States in Respect to Treaties", in: Pierre Michel EISEMANN & Martti KOSKENNIEMI, *Ibid.*, p. 775. Many writers are in favour of a *presumption* of continuity. This is discussed in: Patrick DUMBERRY & Daniel TURP, "La succession d'États en matière de traités et le cas de la sécession: du principe de la table rase à l'émergence d'une présomption de continuité des traités", *R.B.D.I.*, 2003–2, p. 377, at pp. 407 et seq.

44 Maria del Carmen MARQUEZ CARRASCO, "Régimes de frontières et autres régimes territoriaux face à la succession d'États", *in*: Pierre Michel EISEMANN & Martti KOSKENNIEMI, *Ibid.*, pp. 493–577.

45 Brigitte STERN, "General Concluding Remarks", in: Brigitte STERN (ed.), *Dissolution, Continuation and Succession in Eastern Europe*, The Hague, Martinus Nijhoff Publ., 1998, at pp. 204–205.

46 Rein MULLERSON, "Law and Politics in Succession of States: International Law on Succession of States", in: Geneviève BURDEAU & Brigitte STERN (eds.), *Dissolution, continuation et succession en Europe de l'Est*, Paris, Cedin-Paris I, 1994, p. 44.

47 D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", *R.C.A.D.I.*, t. 130, 1970–II, p. 120.

48 Brigitte STERN, "La succession d'Etats", *R.C.A.D.I.*, t. 262, 1996, p. 119.

It is conceivable (and should be hoped) that with the requirement of legal continuity and stability of an increasingly globalised international society of States more rules of customary international law in favour of succession to international responsibility will develop.[49]

49 A similar conclusion is reached (in the context of State succession in general) by Brigitte STERN, *Ibid.*, at p. 122: "il n'est pas exclu de penser qu'avec l'approfondissement de la solidarité internationale et donc de l'intérêt général aux dépens des intérêts particuliers des Etats, les cas dans lesquels le droit international posera des règles tendant à assurer la continuité des relations ne feront que croître".

ANNEX 1

Number of Claims Submitted and Amount of Compensation Awarded (in US$) by the U.N.C.C. Governing Council to the Successor States in the Context of the Dissolution of Czechoslovakia[1]				
	Claims by individuals (claims categories A, B, C, D)	**Claims by corporations (claims category E)**	**Claims by government (claims category F)**	**Total amount in compensation awarded**
Czech Republic	271 claims 2,132,630.37	16 claims 12,170,425.60	1 claim 4,733.00	288 claims 14,307,788.97
Slovakia	145 claims 1,087,047.40			145 claims 1,087,047.40

Number of Claims Submitted and Amount of Compensation Awarded (in US$) by the U.N.C.C. Governing Council to Germany[2]				
	Claims by individuals (claims categories A, B, C, D)	**Claims by corporations (claims category E)**	**Claims by government (claims category F)**	**Total amount in compensation awarded**
Germany	313 claims 7,598,388.97	167 claims 48,861,585.55	11 claims 7,059,571.00	491 claims 63,519,545.52

1 These figures are taken from: *Addendum* to the *Report Submitted to the Executive Secretary to the Governing Council in Accordance with Article 16 of the Provisional Rules for Claims Procedure (Report no. 42)*, U.N.C.C., S/AC.26/2003/R.1/Add.1, 28 January 2003. This is the last available compilation of claims established by the U.N.C.C.

2 *Id.*

ANNEX 2

Number of Claims Submitted and Amount of Compensation Awarded (in US$) by the U.N.C.C. Governing Council to the Successor States in the Context of the Break-Up of the U.S.S.R.[1]				
	Claims by individuals (claims categories A, B, C, D)	**Claims by corporations (claims category E)**	**Claims by government (claims category F)**	**Total amount in compensation awarded**
Armenia				0
Azerbaijan				0
Belarus				0
Georgia				0
Kazakhstan				0
Kyrgyzstan				0
Moldova				0
Russia Tajikistan	6,588 claims 28,198,841.00	7 claims 89,887,591.30	2 claims 1,916,352.00	6,597 claims 120,002,784.30 0
Turkmenistan				0
Ukraine	183 claims 713,000.00			183 claims 713,000.00
Uzbekistan				0

1 *Addendum* to the *Report Submitted to the Executive Secretary to the Governing Council in Accordance with Article 16 of the Provisional Rules for Claims Procedure (Report no. 42)*, U.N.C.C., S/AC.26/2003/R.1/Add.1, 28 January 2003. As explained earlier, the three Baltic States (Estonia, Latvia and Lithuania) are not considered to be successor States to the U.S.S.R. They have, consequently, filed no claims before the U.N.C.C. The only exception being 4 claims filed by Estonia, on behalf of its nationals, for which it was awarded a total of US $24,000 in compensation.

ANNEX 3

Number of Claims submitted and Amount of Compensation Awarded (in US$) by the U.N.C.C. Governing Council to the Successor States in the Context of the Dissolution of Yugoslavia[1]				
	Claims by individuals (claims categories A, B, C, D)	**Claims by corporations (claims category E)**	**Claims by government (claims category F)**	**Total amount in compensation awarded**
Bosnia and Herzegovina	2,816 claims 10,251,855.10	10 claims 94,038,672.00		2,826 claims 104,290,527.10
Croatia	318 claims 1,684,016.72	15 claims 4,326,466.00		333 claims 6,010,482.72
Republic of Macedonia	573 claims 2,466,480.89	17 claims 8,398,750.00		590 claims 10,865,230.89
Serbia and Montenegro	2,600 claims 11,718,852.85	9 claims 24,433,577.00		2,609 claims 36,152,429.85
Slovenia	185 claims 934,508.81	3 claims 1,295,376.00		188 claims 2,229,884.81

1 *Addendum* to the *Report Submitted to the Executive Secretary to the Governing Council in Accordance with Article 16 of the Provisional Rules for Claims Procedure (Report no. 42)*, U.N.C.C., S/AC.26/2003/R.1/Add.1, 28 January 2003.

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DETAILED TABLE OF CONTENTS

PART I
GENERAL INTRODUCTION

PART II
SUCCESSION OF STATES TO THE OBLIGATION TO REPAIR

CHAPTER 1
ANALYSIS OF DOCTRINE

CHAPTER 2
ANALYSIS OF STATE PRACTICE AND CASE LAW

CHAPTER 3
ANALYSIS OF SPECIFIC ISSUES

CHAPTER 2
THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT AFFECTING A NATIONAL OF THE PREDECESSOR STATE

GENERAL INDEX

CASES INDEX

INDEX OF TREATIES

INDEX OF OTHER DOCUMENTS