

Annexes

A. The settlement of international disputes to which international organizations are parties

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Introduction

1. The present syllabus for a possible topic flows from earlier work of the Commission. It will be recalled that in 2011, the Commission adopted on second reading articles on the responsibility of international organizations,¹ of which the General Assembly has taken note.² Already in 2002, the Commission's Working Group on the Responsibility of International Organizations had mentioned "the widely perceived need to improve methods for settling ... disputes" concerning the responsibility of international organizations.³ In 2010 and 2011, the Commission held a general debate on the peaceful settlement of disputes, at which various suggestions for future topics were considered.⁴

2. The proposed topic would be limited to the settlement of disputes to which international organizations are parties.⁵ This would include disputes between international organizations and States (both member and non-member States), and disputes between international organizations. It would not cover disputes to which international organizations are not parties, but are involved in some other way. In that sense, dispute settlement under the auspices of an international organization (as in, for example, the United Nation's involvement in a dispute among Member States through measures taken pursuant to Chapter VI of the Charter) would be excluded. Similarly, disputes in which an international organization merely has an interest, such as a dispute among Member States over the interpretation of the organization's constituent instrument⁶, would fall outside the topic.

3. The present paper focuses primarily on disputes that are international, in the sense that they arise from a relationship governed by international law. It does not cover disputes involving the staff of international organizations ("international administrative law"). Nor does it cover questions arising out of the immunity of international organizations. It would

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)*, paras. 80-84.

² General Assembly resolution 66/100 of 9 December 2011.

³ *Yearbook of the International Law Commission*, 2002, vol. II (Part Two), p. 96, para. 486.

⁴ See the summary records of its plenary meetings on 29 July 2010 and 31 May and 1 June 2011: documents [A/CN.4/SR.3070](#), [A/CN.4/SR.3095](#) and [A/CN.4/SR.3096](#). In 2010 the Commission had before it a Note by the Secretariat on settlement of dispute clauses (document [A/CN.4/623](#)), and in 2011 a Working Paper on the peaceful settlement of disputes (document [A/CN.4/641](#)).

⁵ The term "international organization" is to be understood along the lines of the definition in the draft articles on the responsibility of international organizations (Art. 2 (a)): "international organization" means an organization established by treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities".

⁶ See, e.g., *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46, at p. 60, para. 26, where the ICJ noted: "The case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it). Yet in the proceedings before the Court, it is the act of a third entity — the Council of ICAO — which one of the parties is impugning and the other defending".

be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered.⁷

4. The question of the possible output of a topic in this field would need careful consideration. It could include proposals for developing existing and new procedures for the settlement of disputes to which international organizations are parties, and/or for model clauses for inclusion in relevant instruments or treaties. In addition, the Commission might wish to review the Manila Declaration on the Peaceful Settlement of International Disputes of 1982,⁸ to see how far its provisions might apply to international organizations.

Issues that might be considered within the proposed topic

5. There are some obvious difficulties common to the resolution of all international disputes to which international organizations are parties. These stem from the restricted *access* that international organizations have to the traditional methods of international dispute resolution, as well from barriers to the *admissibility* of claims brought both by and against international organizations. On the other hand, there are policy issues involved in an extension of traditional inter-State dispute settlement mechanisms to international organizations. International organizations are not States.

6. *Access*: There are various obstacles to the submission of disputes to which international organizations are parties to the dispute settlement mechanisms available to States.⁹ Most obviously, international organizations may not appear as applicants or respondents in contentious cases before the International Court of Justice, though certain other permanent courts and tribunals established in specific fields are open to them. Arbitration remains an option, but little practice exists to date to guide the procedure and international organizations are rarely bound by jurisdictional clauses. Resort may be had to non-legal methods like mediation, conciliation and enquiry, but, unlike States, international organizations often do not belong to institutions that may facilitate these processes. Member States of the United Nations or a regional organization, for example, may raise their disputes in a political forum so as to settle them with the aid of multilateral political input and procedures such as fact-finding missions. With such barriers to access before third-party dispute resolution mechanisms, the settlement of disputes to which international

⁷ Dispute settlement concerning such matters has to take account of the immunities enjoyed by international organizations, as well as the latter's obligation to make provisions for appropriate modes of settlement under certain treaties. It is quite common for provision to be made for special procedures, including arbitration, to cover such cases. The Council of Europe's Committee of Legal Advisers on Public international law (CAHDI) has on its agenda an item on 'Settlement of disputes of a private character to which an international organisation is a party' (see Meeting Report of the 50th meeting of CAHDI, Strasbourg, 24-25 September 2015, CAHDI (2015) 23, paras. 23-29). The CAHDI has sought the comments of States on the basis of a questionnaire, which are not yet publicly available (CAHDI (2016) 9 prov.).

⁸ General Assembly resolution 37/10 of 15 November 1982.

⁹ In principle, it is uncontested that the mechanisms for the peaceful settlement of disputes are open to international organizations (See *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, where the Court addressed, among others, the capacity of the United Nations to bring international claims against States). Such mechanisms include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice" (Art. 33 of the UN Charter). See also F. Dopagne, "Les différends opposant l'organisation internationale à un état ou une autre organisation internationale", in E. Lagrange and J-M. Sorel (eds.), *Droit des Organisations Internationales* (Paris: LGDJ, 2013), pp. 1101-1120, at p. 1109.

organizations are parties relies primarily on negotiation or mechanisms internal to the organization itself.

7. *Admissibility*: Difficulties facing the admissibility of claims by and against international organizations are most prominent in regards to the right of diplomatic protection and the corresponding requirement of the exhaustion of local remedies. Can international organizations, for example, assert the rights of their staff members in a manner analogous to the way that a State may assert the rights of its nationals? Alternatively, does the requirement of exhaustion of local (internal) remedies apply when a State is asserting the right of one of its nationals against an international organization?

(a) *International Court of Justice and other permanent courts and tribunals*

8. Article 34, paragraph 1 of the Statute of the International Court of Justice limits locus standi before the Court to States.¹⁰ Although paragraphs 2 and 3 provide for a certain level of cooperation between the Court and “public international organizations”,¹¹ such organizations are unable to appear as parties in contentious cases. Nevertheless, the United Nations and authorised specialised agencies may seek advisory opinions on legal questions.¹²

9. In light of these limitations in the Statute, the desire to utilise the Court in the settlement of international disputes to which international organizations are parties has manifested itself in two ways: the so-called “binding” advisory opinion, and calls for the amendment of the Statute.

10. Although an advisory opinion as such is non-binding, certain agreements stipulate the use of the advisory opinion procedure to settle disputes with “decisive” effect. A classic example is found in the Convention on the Privileges and Immunities of the United Nations (1946):

“If a difference arises between the United Nations on the one hand, and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.”¹³

¹⁰ “Only states may be parties in cases before the Court.”

¹¹ “2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. 3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.” See also Art. 43, paras. 2 and 3, of the Rules of Court, which were added in 2005.

¹² Art. 96, UN Charter. Specialised agencies, when authorised, may only request advisory opinions on legal questions arising within the scope of their activities.

¹³ Art. VIII, Sect. 30, Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, p. 15. See also, e.g., Art. IX, Sect. 32, Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), United Nations, *Treaty Series*, vol. 33, p. 261; Art. X, Sect. 34, Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959), United Nations, *Treaty Series*, vol. 374, p. 147; Art. XI, Sect. 21, Agreement (with exchange of notes) regulating conditions for the operation, in Chile, of Headquarters of the United Nations Economic Commission for Latin America (Santiago, 16 February 1953), United Nations, *Treaty Series*, vol. 314, p. 49; Art. XIII, Sect. 26, Agreement between the United Nations and the Government of Thailand relating to the

11. The Headquarters Agreement between the United Nations and the United States of America envisages a somewhat similar procedure in the context of binding arbitration as provided for in that agreement: either party may ask the General Assembly to request an advisory opinion on a legal question arising in the course of arbitral proceedings, to which the arbitral tribunal will “have ... regard” in rendering its final decision.¹⁴

12. There are obvious difficulties, however, in using the advisory jurisdiction of the Court for what are in reality contentious matters. Critics of the binding advisory procedure see it as a poor substitute for direct access to the Court by international organizations. The jurisdictional rules applicable to advisory procedures are too permissive. They are, however, also too limiting in other ways that both upset the equality of access among the parties as well as privilege the settlement of certain disputes over others.

13. Both of these undesirable results follow from the fact that only the United Nations and its specialised agencies may request an advisory opinion from the Court.¹⁵ Thus, in a dispute between one of these bodies and a State, only that body will be able to initiate a “claim”. Of course, where a treaty obligation requires the submission of a dispute to the advisory procedure, the United Nations or specialised agency would be bound to do so. Even here, however, the relationship among the parties is asymmetrical, as “the question to

Headquarters of the Economic Commission for Asia and the Far East in Thailand (Geneva, 26 May 1954), United Nations, *Treaty Series*, vol. 260, p. 35; all cited in J. Sztucki, “International Organizations as Parties to Contentious Proceedings before the International Court of Justice?”, in A.S. Müller et al. (eds.), *The International Court of Justice: Its Future Role After Fifty Years* (The Hague: Nijhoff, 1977), pp. 141-167, at notes 24-25.

¹⁴ Art. VIII, Sect. 21, Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, p. 12:

“(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed on both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court.”

See also Art. VII, Sect. 31, Agreement between the International Civil Aviation Organization and the Government of Canada regarding the Headquarters of the International Civil Aviation Organization (Montreal, 14 April 1951), United Nations, *Treaty Series*, vol. 96, p. 176.

¹⁵ Art. 65 of the ICJ Statute refers to Art. 96 of the UN Charter: “(a) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. (b) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.” Authorised organs include ECOSOC, the Trusteeship Council and the Interim Committee of the General Assembly. Authorised specialised agencies include the ILO, FAO, UNESCO, WHO, IBRD, IFC, IDA, IMF, ICAO, ITU, IFAD, WMO, IMO, WIPO and UNIDO. The IAEA has also been authorised to request advisory opinions, although it is not a UN specialised agency. See “Organs and Agencies of the United Nations Authorized to Request Advisory Opinions”, available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1> (visited 29 June 2016).

be submitted to the Court is in the hands of a particular organ without the member state concerned [or other party] being able to control the drafting process”.¹⁶

14. Similarly, the fact that only the United Nations and its authorised specialised agencies may request an advisory opinion means that the use of advisory procedures to settle disputes involving an international organization is primarily limited to disputes to which one of those international organizations is a party. Other disputants may of course petition the General Assembly or some other authorised body to request an opinion, but they could not be sure that an opinion would indeed be sought, or in the form desired.¹⁷ As the Commission itself has previously noted, an advisory opinion of this sort would be “imperfect”, “uncertain” and “fraught with too many uncertainties for a binding character to be attached to the opinion thus attained”.¹⁸

15. In light of the limitations on the Court’s ability to settle disputes to which an international organization is party,¹⁹ over the years a large number of proposals have been put forward to amend the Statute. In 1970, a discussion on the “Review of the Role of the International Court of Justice” took place in the General Assembly, which was followed up by survey including a question on “the possibility of enabling intergovernmental organizations to be parties before the Court”. Of the 31 responses to the survey (out of 130 parties to the Statute at the time), fifteen members replied positively to this question (Argentina, Austria, Canada, Cyprus, Denmark, Finland, Guatemala, Iraq, Madagascar, Mexico, New Zealand, Sweden, Switzerland, the UK and the US), and one replied negatively (France).²⁰ In 1997-1999, the General Assembly’s Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization considered proposals by Guatemala²¹ and Costa Rica²² to provide access to the Court to international organizations. Guatemala’s proposal was withdrawn in 1999, “its adoption in the foreseeable future [appearing] most unlikely”.²³

16. Quite apart from the political difficulties of amending the Statute, the various proposals have drawn attention to the questions of scope *ratione personae* and *ratione*

¹⁶ K. Wellens, *Remedies against international organizations* (Cambridge: Cambridge University Press, 2002), at p. 233. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 81, para. 36.

¹⁷ In this regard, see the complex dispute settlement clause in Art. 66.2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

¹⁸ *Yearbook of the International Law Commission*, 1980, vol. 2 (Part Two), pp. 87-88, paras. 9-11; *Yearbook of the International Law Commission*, 1982, vol. 2 (Part Two), p. 65, paras. 4-6. As the previous footnote reveals, States rejected these recommendations to leave advisory procedures out of the dispute settlement clause of what would become the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

¹⁹ Considerations of judicial economy have also been cited following the Federal Republic of Yugoslavia’s need to bring separate claims against all NATO members, rather than a single claim against NATO, in the *Legality of Use of Force* cases.

²⁰ *Review of the Role of the International Court of Justice, Report of the Secretary General*, document A/8382 (1971), Question III (a), pp. 6, 70-77, paras. 200-224. See also documents A/8382/Add.1, p. 6; A/8382/Add.3, p. 4; A/8382/Add.4, p. 3.

²¹ Document A/AC.182/L.95 and Rev.1 (1997).

²² Document A/AC.182/L.97 (1997).

²³ See Wellens (footnote 16 above), pp. 237-238; Ph. Couvreur, “Développements récents concernant l’accès des organisations intergouvernementales à la procédure contentieuse devant la Cour Internationale de Justice”, in E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Mohammed Bedjaoui* (The Hague: Kluwer Law International, 1999), pp. 293-323, at pp. 302-322.

materiae that must be addressed in any amendment to the Statute to confer standing before the Court on international organizations.

17. By contrast with the International Court of Justice, certain other permanent courts and tribunals operating under particular treaties are open to international organizations parties to the treaty concerned. This is the case, for example, with the International Tribunal for the Law of the Sea (ITLOS), established by the United Nations Convention on the Law of the Sea of 1982,²⁴ as well as the Appellate Body of the World Trade Organization.

(b) *International arbitration*

18. Arbitration is potentially a useful tool for the settlement of international disputes to which international organizations are parties. It not only avoids the difficulties of standing that arise before the International Court of Justice, but it also presents the parties with a flexible system that, if needed, can maintain confidentiality.

19. Previous efforts to encourage the use of arbitration to settle disputes involving an international organization date back to the International Law Association's 1964 resolution on international arbitration, which:

“Draws the attention of all States to the availability of international arbitral tribunals for the settlement of a variety of international disputes, including: (a) International disputes which cannot be submitted to the International Court of Justice ... (c) Disputes between States and international organizations.”²⁵

20. Similarly, the Sixth Committee's Working Group on the United Nations Decade of International Law in 1992 entertained a “proposal urging a wider use of the Permanent Court of Arbitration for the settlement of disputes between States as well as disputes between States and international organizations.”²⁶ The main question that arises is the extent to which international organizations are or indeed can be bound to submit their international disputes with States and other international organizations to arbitration. Unlike with States, there is at present no general treaty open to international organizations under which they could accept the obligation to submit such disputes to arbitration. There is no doubt a number of bilateral agreements containing such clauses. But no general survey exists of arbitration clauses in international agreements to which an international organization is a party, or of arbitration pursuant to such clauses. To date, there seem to be only four arbitrations between an international organization and a State that are in the public domain.²⁷

²⁴ See Annex IX to the 1982 Convention, art. 7 of which makes special provision for the case where an international organization and one or more of its member States are joint parties to a dispute, or parties in the same interest. The European Union has been a party to one case before the ITLOS Case No. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*.

²⁵ International Law Association, *Resolutions: International Arbitration*, Int'l L. Ass'n Rep. Conf., vol. 52 (1966), p. xii, para. 1.

²⁶ Document A/C.6/47/L.12 (1992), para. 15.

²⁷ *Tax regime governing pensions paid to retired UNESCO officials residing in France (France - UNESCO)*, UNRIAA, vol. XXV, pp. 231-266; *European Molecular Biology Laboratory (EMBL) v. Federal Republic of Germany*, ILR, vol. 105, pp. 1-74. Another recent case, terminated without an award, was *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS)* (PCA Case No. 2014-38) (<https://pcacases.com/web/view/109>); *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)* (PCA Case No. 2013-30) (<https://pcacases.com/web/view/25>), under Part XV of the United Nations Convention on the Law of the Sea, also concluded without an award.

21. A related issue is how arbitration clauses are drafted. Current practice is to include an arbitration clause reading as follows:

“Any dispute between the Parties arising out of, or relating to this Agreement, which is not settled by negotiation or another agreed mode of settlement, shall, at the request of either Party, be submitted to a Tribunal of three arbitrators. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairperson of the Tribunal. If, within thirty days of the request for arbitration, a Party has not appointed an arbitrator, or if, within fifteen days of the appointment of two arbitrators, the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint the arbitrator referred to. The Tribunal shall determine its own procedures, provided that any two arbitrators shall constitute a quorum for all purposes, and all decisions shall require the agreement of any two arbitrators. The expenses of the Tribunal shall be borne by the Parties as assessed by the Tribunal. The arbitral award shall contain a statement of the reasons on which it is based and shall be final and binding on the Parties.”²⁸

22. Questions could also arise in regards to procedure. Insofar these questions pertain to arbitral rules, however, they have largely been dealt with by the Permanent Court of Arbitration’s Optional Rules for Arbitration Involving International Organizations and States (1996). As those rules have been drawn up in light of “the public international law character of disputes involving international organizations and States, and diplomatic practice appropriate to such disputes”,²⁹ there might be little value in the Commission, for example, adapting its Model Rules on Arbitral Procedure of 1958 to disputes involving an international organization.

(c) *Non-legal mechanisms*

23. In keeping with its remedial focus, the International Law Association’s *Final Report on Accountability of International Organizations* draws attention to the “preventive potential” of “less formal action by an IO”.³⁰ Accordingly, its recommendations centre, in the first instance, on the creation of standing mechanisms internal to the international organization itself, including ombudsman offices and bodies along the lines of the World Bank Inspection Panel.³¹ For present purposes, such mechanisms are likely to be relevant only where a State is exercising diplomatic protection on behalf of its nationals (as to which, see the next section).

²⁸ Examples of recent agreements with provisions along these lines include: the 2010 Agreement concerning the establishment of UNISDR office in Incheon; UNICEF Egypt Agreement; 2010 UNDP-Shared Services Centre Agreement: Agreement between the Government of Malaysia and the United Nations Development Programme concerning the establishment of the UNDP global shared service centre (Kuala Lumpur, 24 October 2011), United Nations, *Treaty Series*, vol. 2794. For an earlier form of arbitration clause see, by way of example, Sect. 21 (a) of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Lake Success, 26 June 1947), United Nations, *Treaty Series*, vol. 11, p. 11. For an analysis of the obligation to arbitrate under such earlier clauses, see: *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, *I.C.J. Reports 1988*, p. 12; *Interpretation of Peace Treaties*, Advisory Opinion: *I.C.J. Reports 1950*, p. 65, at p. 77.

²⁹ Permanent Court of Arbitration, *Optional Rules for Arbitration involving International Organizations and States* (1996), at p. vii.

³⁰ International Law Association (Shaw and Wellens, co-rapporteurs), *Final Report on Accountability of International Organizations*, Int’l L. Ass’n Rep. Conf., vol. 71 (2004), p. 164, at p. 224.

³¹ *Ibid.*, recommendations 2-5, at pp. 223-224.

24. If the Commission's work focuses on dispute settlement in regards to disputes arising under international law, the relevant non-legal mechanisms will primarily be third-party mechanisms, such as enquiry,³² mediation and conciliation. The Commission could consider ways of encouraging recourse to such mechanisms. Although they are non-legal in form, these mechanisms may play an important role in settling legal disputes.

(d) *Admissibility of claims: functional protection*

25. The previous sections have dealt with questions regarding access to dispute settlement mechanisms. Even where access exists, however, issues are likely to arise as to how customary rules relating to admissibility of claims apply to international organizations. One particularly problematic area relates to the transferability of customary rules relating to diplomatic protection and exhaustion of local remedies.³³

26. According to the *Reparation for Injuries* advisory opinion, an international organization has the capacity "to exercise a measure of functional protection of its agents",³⁴ broadly analogous to the right of a State to exercise diplomatic protection on behalf its nationals. As a result of this analogy, it has been suggested that the requirement of exhaustion of local remedies³⁵ applies in the context of "functional protection" as it does in the context of diplomatic protection.³⁶

27. Yet a closer look shows that the comparison may not be exact. The Court's reasoning in the *Reparation for Injuries* opinion is actually quite different from the rationale underlying diplomatic protection. On the one hand, diplomatic protection derives from a State's "right to ensure, in the person of its subjects, respect for the rules of

³² The ILA recommends that an international organization "may consider the establishment of an international commission of inquiry into any matter that has become the subject of serious public concern" (*ibid.*, recommendation 6, at p. 224). It points in particular to the Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (S/1999/1257, annex) and the Report of the Secretary-General pursuant to general Assembly resolution 53/35 into the fall of Srebrenica (A/54/549) (*ibid.*, at p. 226).

³³ Practice prior to 1967 was briefly covered in the *practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat*, document A/CN.4/L.118 and Add.1 and Add.2 (1967), pp. 218-220, paras. 49-56 (in regard to the UN); p. 302, para. 23 (in regard to the specialised agencies).

³⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, at p. 184. Article 1 of the ILC Draft Articles on Diplomatic Protection, document A/61/10 (2006), defines diplomatic protection as "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."

³⁵ Articles 14-15 of the Draft Articles on Diplomatic Protection, *ibid.*, define the scope of the exhaustion requirement in the context of diplomatic protection.

³⁶ See C. Eagleton, "International Organizations and the Law of Responsibility", in *Recueil des Cours*, vol. 76, p. 319, at pp. 351-352; Dopagne (footnote 9 above), at p. 1108; C. Trindade, "Exhaustion of Local Remedies and the Law of International Organizations", *Revue de Droit International, de sciences diplomatiques et politiques*, vol. 57 (1979), p. 81, at pp. 82-83. Eagleton goes so far as to assert that the requirement of exhaustion applies to every claim by the United Nations, even "when it alleges injury against itself by a state" (at p. 352). This derives from the erroneous view that the exhaustion requirement applies also to direct injuries to a foreign State, and not just when a State is exercising diplomatic protection on behalf of a national. Amerasinghe rightly notes that, as for direct injuries to States, "the rule [of exhaustion] would not apply where a direct injury to the organization has been perpetrated". C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edition (Cambridge: Cambridge University Press, 2005), at p. 482.

international law”.³⁷ It is a general right that the State holds, deriving from the link of nationality. Functional protection, on the other hand, arises as an implied power of the organization necessary for the fulfilment of the organization’s functions.³⁸ As such, it is a limited power extending only insofar as it is required to allow the agent to perform his or her duties successfully.

28. Another question posed in relation to the exercise of functional protection by an international organization is whether it may be used to bring a claim against the staff member’s State of nationality.³⁹ The distinction between diplomatic protection arising from nationality and functional protection arising from functional considerations might suggest an affirmative answer.⁴⁰ In this regard, it should be mentioned that the *Mazilu* and *Cumaraswamy* advisory opinions both concerned disputes between the United Nations and the officials’ States of nationality.⁴¹

29. Different concerns arise when diplomatic protection is asserted against an international organization. In principle, the requirement of exhaustion of local remedies could apply *mutatis mutandis*; in this connection it would be better to speak of internal remedies, rather than local remedies.⁴² However, the Institut de Droit international, in a 1971 resolution, expressed a presumption against the requirement for exhaustion in the exercise of diplomatic protection against international organizations.⁴³ It has been further suggested that the rule is inapplicable, as it derives from the “jurisdictional connection between the individual and the respondent state.”⁴⁴ An instance where States seem to have exercised their right to diplomatic protection can be found in the 1965 and 1966 settlement agreements between the United Nations and Belgium, Greece, Italy Luxembourg and Switzerland. In those agreements, the United Nations agreed to pay compensation for damages caused by its operations in the Congo to nationals of the concerned States.⁴⁵

³⁷ *Mavrommatis Palestine Concessions (Greece v. UK)*, PCIJ Reports, 1924, Series A, No. 2, at p. 12.

³⁸ See *Reparation for Injuries Suffered in the Service of the United Nations*, at pp. 181-184.

³⁹ Cf. Art. 7, Draft Articles on Diplomatic Protection (footnote 34 above): “A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.”

⁴⁰ See Amerasinghe (footnote 36 above), at pp. 487-488.

⁴¹ See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion (footnote 16 above); *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Reports 1989, p. 177.

⁴² Jean-Pierre Ritter, ‘La protection diplomatique à l’égard d’une organisation internationale’, in *Annuaire français de droit international*, vol. 8 (1962), p. 427, at p. 454.

⁴³ Institut de Droit international (de Vischer, rapporteur), *Les conditions d’application des règles humanitaires relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées* (1971), Art. 8: “Il est également souhaitable que si de tels organismes ont été désignés ou institués par décision obligatoire des Nations Unies ou si la compétence d’organismes semblables a été acceptée par l’Etat dont la victime est un ressortissant, aucune réclamation ne puisse être introduite contre les Nations Unies par cet Etat avant épuisement préalable par la victime du recours qui lui aura ainsi été ouvert.”

⁴⁴ Amerasinghe (footnote 36 above), at p. 486.

⁴⁵ See: Exchange of letters constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (New York, 20 February 1965), United Nations, *Treaty Series*, vol. 535, p. 199; Exchange of letters constituting an agreement between the United Nations and Greece relating to the settlement of claims filed against the United Nations in the Congo by Greek nationals (New York, 20 June 1966), United Nations, *Treaty Series*, vol. 565, p. 5; Exchange of letters constituting an agreement between the United Nations and Italy relating to the settlement of claims filed against the United Nations in the

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B. Succession of States in respect of State responsibility

Pavel Šturma

Introduction

1. The International Law Commission agreed in 1998 that the selection of topics for the long-term programme of work should be guided by the following criteria: “the topic should reflect the needs of the States in respect of the progressive development and codification of international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; that the topic is concrete and feasible for progressive development and codification.”¹ The proposed topic seems to meet all the criteria.

2. The International Law Commission completed its work on Responsibility of States for internationally wrongful acts in 2001. However, it did not address situations where a succession of States occurs after the commission of a wrongful act. This succession may occur by a responsible State or by an injured State. In both cases, succession gives rise to rather complex legal relationships, and in this regard it is worth noting a certain development in views at the ILC and elsewhere. While in the 1998 report the Special Rapporteur, James Crawford, wrote that there was a widely accepted opinion that a new State generally does not succeed to any State responsibility of the predecessor State,² the Commission’s commentary to the 2001 Articles reads differently. It says 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.”³ The development of the practice, case law and doctrinal views from the negative succession rule to its partial rebuttal is succinctly described by J. Crawford.⁴

3. The ILC touched on this problem in the context of its work on State succession in the 1960s. In 1963, Prof. Manfred Lachs, the Chairman of the ILC’s Sub-Committee on Succession of States and Governments, proposed including succession in respect of responsibility for torts as one of possible sub-topics to be examined in relation with the work of the ILC on question of succession of States.⁵ Because of a divergence of views on its inclusion, the Commission decided to exclude the problem of torts from the scope of the topic.⁶ Since that time, however, State practice and doctrinal views have developed.

4. It is a normal and largely successful method for the ILC, after completing one topic, to work on other related subjects from the same area of international law. The ILC took this approach, *inter alia*, in two topics in the field of international responsibility by completing first its Articles on State Responsibility (2001) and then its Articles on Responsibility of International Organizations (2011), and in three topics in the field of succession of States,

¹ *Yearbook of the International Law Commission*, 1998, Vol. II, Part Two, p. 110.

² First Report on State Responsibility (Addendum No. 5), by Mr. James Crawford, 22 July 1998, UN Doc. A/CN.4/490/Add.5, § 282.

³ Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission, Report of the ILC, Fifty-third session, 2001, *Official Records of the General Assembly*, Suppl. No. 10 (A/56/10), p. 119, § 3.

⁴ J. Crawford, *State Responsibility. The General Part* (Cambridge: Cambridge University Press, 2013), pp. 435-455.

⁵ Report of the Sub-Committee on Succession of States and Governments, *Yearbook...*, 1963, Vol. II, p. 260.

⁶ *Yearbook...*, 1963, Vol. II, p. 299.

by completing draft articles for what later became the Vienna Convention on Succession of States in Respect of Treaties (1978) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983), as well as its Articles on Nationality of Natural Persons in relation to the Succession of States (1999).⁷ Although the two Vienna Conventions did not receive a high number of ratifications, it does not mean that the rules codified therein did not influence the State practice.⁸ On the contrary, in particular the States in Central Europe applied such rules to their own succession.⁹ In the same vein, non-binding documents such as Articles on State Responsibility or Articles on Nationality of Natural Persons have been largely followed in practice.

5. In principle, the question of succession in respect of State responsibility arises mainly in certain cases of succession of States, where the State that committed a wrongful act has ceased to exist, namely in cases of dissolution and unification of States. However, other cases, such as secession, may also profit from an in-depth analysis to confirm or to negate three hypotheses. First, the continuing State should, in principle, succeed not only to the relevant primary obligations of the predecessor State but also to its secondary (responsibility) obligations. Second, a newly independent State should benefit from the principle of clean slate (*tabula rasa*), but it could freely accept its succession with respect to State responsibility. Third, in case of a separation (secession), the successor State or States also may assume responsibility, in particular circumstances.

Development of State practice and doctrine in the past

6. Traditionally, neither State practice nor doctrine gave a uniform answer to the question whether and in what circumstances a successor State may be responsible for an internationally wrongful act of its predecessor. In some cases of State practice, however, it is possible to identify division or allocation of responsibility between successor states.

7. Early decisions held that the successor State has no responsibility in international law for the international delicts of its predecessor. In *Robert E. Brown Claim*,¹⁰ the claimant sought compensation for the refusal of local officials of the Boer Republics to issue licenses to exploit a goldfield. The tribunal held that Brown had acquired a property right and that he had been injured by a denial of justice, but this was a delict responsibility that did not devolve on Britain. Similarly, in *Frederick Henry Redward Claim*,¹¹ the claimants had been wrongfully imprisoned by the Government of the Hawaiian Republic, which was subsequently annexed by the United States. The tribunal held that “legal liability for the wrong has been extinguished” with the disappearance of the Hawaiian Republic. However, if the claim had been reduced to a money judgment, which may be considered a debt, or an

⁷ Text adopted in the annex to the General Assembly resolution 55/153 of 12 December 2000.

⁸ See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*, *Preliminary Exceptions. Judgment of 18 November 2008*, ICJ Reports 2008, para. 109.

⁹ E.g. both the Czech Republic and the Slovak Republic made a declaration, when depositing the instruments of ratification of the 1978 Vienna Convention, under Article 7, paras. 2 and 3, that they would apply the Convention to their own succession, which took place before the entry into force of the 1978 Convention. See Status of Treaties as at: 15-04-2014. Chapter XXIII: Law of Treaties (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en).

¹⁰ *Robert E. Brown Claim (United States v. Great Britain)*, American & British Claims Arbitration, Claim No. 30; 6 UNRIAA (1923), p. 120.

¹¹ *Frederick Henry Redward Claim (Great Britain v. United States)*, American & British Claims Arbitration, Claim No. 85; 6 UNRIAA (1925), p. 157, 158.

interest on the part of the claimant in assets of fixed value, there would be an acquired right in the claimant, and an obligation to which the successor State had succeeded.¹²

8. However, with respect to the *Brown* and *Redwards* awards, it has been observed that “These cases date from the age of colonialism when colonial powers resisted any rule that would make them responsible for delicts of states which they regarded as uncivilized. The authority of those cases a century later is doubtful. At least in some cases, it would be unfair to deny the claim of an injured party because the state that committed the wrong was absorbed by another state.”¹³

9. The early practice also includes the dissolution of the Union of Colombia (1829-1831) after which the United States invoked the responsibility of the three successor States (Colombia, Ecuador and Venezuela), leading to the conclusion of agreements on compensation for illegal acquisition of American ships. After the independence of India and Pakistan, prior rights and liabilities (including liabilities in respect of an actionable wrong) associated with Great Britain were allocated to the State in which the cause of action arose. Many devolution agreements concluded by the former dependent territories of the United Kingdom also provide for the continuity of delictual responsibility of the new States.¹⁴

10. Although decisions of arbitral tribunals are not uniform, in *Lighthouses Arbitration* the tribunal found that Greece was liable, as successor State to the Ottoman Empire, for breaches of the concession contract between that Empire and a French company after the union of Crete with Greece in 1913.¹⁵ According to this award, “the 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.”¹⁶ Some authors, however, take position that Greece was found liable for its own acts committed both before and after the cession of territory to Greece. The *Lighthouses* decision is also important for its critique of absolutist solutions both for and against succession with respect to responsibility: “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.”¹⁷

11. There are also some other cases outside Europe concerning the State responsibility in situations of unification dissolution and secession of States. One example was the United Arab Republic (UAR), created as result of the unification of Egypt and Syria in 1958. There are three examples where the UAR as successor State took over the responsibility for obligations arising from internationally wrongful acts committed by the predecessor States. All these cases involved actions taken by Egypt against Western properties in the context of the nationalization of the Suez Canal in 1956 and the nationalization of foreign-owned properties. The first case deals with the nationalization of the *Société Financière de Suez* by Egypt, which was settled by an agreement between the UAR and the private corporation (1958). In other words, the new State paid compensation to the shareholders for the act

¹² See D.P. O’Connell, *State Succession in Municipal Law and International Law*, vol. 1 (Cambridge: Cambridge University Press, 1967), pp. 482, 485-486.

¹³ Restatement (Third) of the Foreign Relations Law of the United States, § 209; Reporters’ Note 7 (1987).

¹⁴ See Materials on Succession of States, UN Doc. [ST/LEG/SER.B/14](#), 1967.

¹⁵ *Lighthouses Arbitration (France v. Greece, 1956)*, UNRIIAA, vol. 12, p. 155. See also ILR, vol. 23, p. 81.

¹⁶ *Ibid.*, p. 92.

¹⁷ *Ibid.*, p. 91.

committed by the predecessor State.¹⁸ Another example is an agreement between the UAR and France resuming cultural, economic and financial relations between the two States (1958). The agreement provided that the UAR, as the successor State, would restore the goods and property of French nationals taken by Egypt and that compensation would be paid for any goods and property not restituted.¹⁹ A similar agreement was also signed in 1959 by the UAR and the United Kingdom.²⁰

12. The UAR lasted only until 1961 when Syria left the united State. After the dissolution, Egypt, as one of the two successor States, entered into agreements with other States (e.g. Italy, Sweden, the United Kingdom, the United States) on compensation to foreign nationals whose property had been nationalized by the UAR (the predecessor State) during the period 1958-1961.²¹

13. More complicated situations arise in case of secession. After Panama seceded from Colombia in 1903, Panama refused to be held responsible for damage caused to the US nationals during a fire in the city of Colon in 1855. However, in 1926 the United States and Panama signed the Claims Convention. The treaty envisaged future arbitration proceedings with respect to the consequences of the 1855 fire in Colon, including the question whether, “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.” Although no arbitration ever took place, this example shows, at least implicitly, that both States had recognized the possibility of succession in respect of State responsibility.²²

14. Another example relates to the India’s independence. Both India and Pakistan became independent States on 15 August 1947. The 1947 Indian Independence (Rights, Property and Liabilities) Order deals issues of succession of States.²³ 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. In many cases Indian courts have interpreted Section 10 of the Order,²⁴ finding that India remains responsible for internationally wrongful acts committed before the date of succession.²⁵

Cases of succession in Central and Eastern Europe in 1990s

15. More recent cases concern situations of State succession in the second half of the 20th century, some of which gave rise to the question of responsibility. They include in

¹⁸ See L. Foscanneau, “L’accord ayant pour objet l’indemnisation de la compagnie de Suez nationalisée par l’Égypte”, *AFDI*, 1959, pp. 196.

¹⁹ Accord général entre le gouvernement de la République française et le gouvernement de la République arabe unie, in: *RGDIP*, 1958, p. 738 *et seq.*; cf. Ch. Rousseau, *Chronique des faits internationaux*, *RGDIP*, 1958, p. 681.

²⁰ Agreement between the Government of the United Kingdom and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt, UNTS, vol. 343, p. 159. Cf. E. Cotran, “Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States”, *ICLQ*, vol. 8, 1959, p. 366.

²¹ See B.H. Weston, R.B. Lillich, D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements* (Ardsley, N.Y.: Transnational Publ., 1999), pp. 139, 179, 185, 235. Cf. P. Dumberry, *State Succession to International Responsibility* (Leiden: Martinus Nijhoff, 2007), pp. 107-110.

²² Claims Convention between the United States and Panama (1926), in: UNRIIAA, vol. VI, p. 301. Cf. P. Dumberry, *op. cit.*, p. 165.

²³ In: M.M. Whiteman, *Digest of International Law*, vol. II (Washington, 1973), p. 873.

²⁴ Quoted in: D.P. O’Connell, *State Succession ...*, *op. cit.*, vol. I, p. 493.

²⁵ See P. Dumberry, P., *op. cit.*, p. 173.

particular the cases of succession in the Central and Eastern Europe in 1990s, such as the dissolution of the Czechoslovakia, Yugoslavia and the Soviet Union, as well as the unification of Germany. It is worth noting that according to Opinion No. 9 of the Badinter Commission, the successor States of the SFRY had to settle by way of agreements all issues relating to their succession and to find an equitable outcome based on principles inspired by the Vienna Conventions of 1978 and 1983 and by the relevant rules of customary international law.²⁶ Some cases also relate to Asia, and, although more rarely, to Africa, where a few cases of succession took place outside the context of decolonization (Eritrea, South Sudan). Relevant findings concerning these developments may be found in the jurisprudence of the International Court of Justice, other judicial bodies, treaties and other State practice.

16. The most important decision may be that of the ICJ in the *Gabčíkovo-Nagymaros* case (Hungary/Slovakia). It is true that the dissolution of Czechoslovakia was based on agreement and even done in conformity with its constitution. Yet both Czech and Slovak national parliaments declared before the dissolution their willingness to assume the rights and obligations arising from the international treaties of the predecessor State.²⁷ Art. 5 of the Constitutional Act No. 4/1993 even stated that “The Czech Republic took over rights and obligations which had arisen from international law for the Czech and Slovak Federal Republic at the day of its end, except of the obligations related to the territory which had been under the sovereignty of the Czech and Slovak Federal Republic, but not being under the sovereignty of the Czech Republic.”²⁸

17. The ICJ said concerning international responsibility of Slovakia:

“Slovakia ... 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 by Hungary.”²⁹

Notwithstanding the special agreement between Hungary and Slovakia, the Court thus seems to recognize the succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts.

18. The issues of State succession after the collapse of the former Yugoslavia were more complex than in the case of Czechoslovakia. One of the reasons was that, in 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) declared itself to be a continuator of the Socialist Federal Republic of Yugoslavia. However, the other former Yugoslav republics did not agree. The UN Security Council and General Assembly also refused to recognize the FRY as continuing State by resolutions of September 1992.³⁰ The Arbitration Commission (the Badinter Commission) took the same position.³¹ Finally, the FRY changed its position in 2000, when it applied for admission to the UN as a new State.³²

19. On the basis of recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues relating to succession of States by

²⁶ The EC Arbitration Commission for the settlement of disputes, Opinion No. 9, 4 July 1992.

²⁷ See Proclamation of the National Council of the Slovak Republic to Parliaments and Peoples of the World (3 December 1992); Proclamation of the National Council of the Czech Republic to all Parliaments and Nations of the World (17 December 1992).

²⁸ Constitutional Act No. 4/1993, on Measures relating to the extinction of the CSFR.

²⁹ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), ICJ Reports 1997, p. 78 (para. 151).

³⁰ SC Res. 777 (1992), 19 September 1992; GA Res. 47/1 (1992), 22 September 1992.

³¹ The EC Arbitration Commission for the settlement of disputes, Opinion No. 10, 4 July 1992.

³² GA Res. 55/12 (1 November 2000).

agreement. The Agreement on Succession issues was concluded on 29 June 2001.³³ According to its Preamble, the Agreement was reached after 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”. It must be pointed out that Article 2 of Annex F of the Agreement deals with the issues of internationally wrongful acts against third States before the date of succession:

“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.”

20. It can be assumed from this text that the obligations of the predecessor State do not simply disappear as a result of the SFRY.³⁴ In addition, Art. 1 of the Annex F refers to the transfer of claims from the predecessor State to the successor State.³⁵

21. The first “Yugoslav” case where the ICJ touched upon the issue of succession in respect of responsibility, though in indirect way, is *Genocide* case (*Bosnia and Herzegovina v. Serbia and Montenegro*). The Court was not called upon to resolve the question of succession but rather to identify the Respondent Party:

“The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State. ... The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. ... That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.”³⁶

22. The same solution was adopted by the ICJ in the parallel *Genocide* dispute between Croatia and Serbia in 2008.³⁷ However, this is only the recent final judgment in the case *Croatia v. Serbia* that dealt more in details with the issues of succession to State responsibility.³⁸ In spite of the fact that the Court rejected Croatia’s claim and Serbia’s counter-claim on the basis that the intentional element of genocide (*dolus specialis*) was lacking, the judgment seems to be the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession.

23. The ICJ recalled that, in its Judgment of 18 November 2008, it found that it had jurisdiction to rule on Croatia’s claim in respect of acts committed as from 27 April 1992, the date when the Federal Republic of Yugoslavia (FRY) came into existence as a separate

³³ UNTS, vol. 2262, No. 40296, p. 251.

³⁴ Cf. P. Dumberry, *State Succession to International Responsibility* (Leiden: Martinus Nijhoff, 2007), p. 121.

³⁵ “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.”

³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, pp. 75-76 (paras. 74, 77-78).

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*, Preliminary Exceptions. Judgment of 18 November 2008, ICJ Reports 2008, paras. 23-34.

³⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, ICJ Reports 2015.

State and became party, by succession, to the Genocide Convention, but reserved its decision on its jurisdiction in respect of breaches of the Convention alleged to have been committed before that date. In its 2015 judgment, the Court begins by stating that the FRY could not have been bound by the Genocide Convention before 27 April 1992, even as a State *in statu nascendi*, which was the main argument of Croatia.

24. The Court takes note, however, of an alternative argument relied on by the Applicant during the oral hearing in March 2014, namely that the FRY (and subsequently Serbia) could have succeeded to the responsibility of the SFRY for breaches of the Convention prior to that date. In fact, Croatia advanced two separate grounds on which it claimed the FRY had succeeded to the responsibility of the SFRY. First, it claimed that this succession came about as a result of the application of the principles of general international law regarding State succession.³⁹ It relied upon the award of the arbitration tribunal in the *Lighthouses Arbitration* (1956), which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make the successor State responsible for the former's wrongdoing.⁴⁰ Secondly, Croatia argued that the FRY, by declaration of 27 April 1992, had indicated "not only that it was succeeding to the treaty obligations of the SFRY, but also that it succeeded to the responsibility incurred by the SFRY for the violation of those treaty obligations".⁴¹

25. Serbia maintained, in addition to the arguments relating to jurisdiction and admissibility (a new claim introduced by Croatia, no legal basis in Article IX or other provisions of the Genocide Convention), that there was no principle of succession to responsibility in general international law. Quite interestingly, Serbia also maintained that all issues of succession to the rights and obligations of the SFRY were governed by the Agreement on Succession Issues (2001), which lays down a procedure for considering outstanding claims against the SFRY.⁴²

26. It is worth mentioning that the Court did not refuse and thus accepted the alternative argument of Croatia as to its jurisdiction over acts prior to 27 April 1992. The ICJ stated that, in order to determine whether Serbia is responsible for violations of the Convention,

"the Court would need to decide:

- (1) whether the acts relied on by Croatia took place; and if they did, whether they were contrary to the Convention;
- (2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

³⁹ *Ibid.*, para. 107.

⁴⁰ See the pleadings of Prof. J. Crawford, advocate for Croatia; Public sitting held on Friday 21 March 2014, at 10 a.m., at the Peace Palace, President Tomka presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), CR 2014/21, s. 21, para. 42: "We say the rule of succession can occur in particular circumstances if it is justified. There is no general rule of succession to responsibility but there is no general rule against it either."

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015*, para. 107.

⁴² *Cf.* the pleadings of Prof. A. Zimmermann, advocate for Serbia, who referred to Article 2 of Annex F of the Agreement, which provides for the settlement of disputes by the Standing Joint Committee. Public sitting held on Thursday 27 March 2014, at 3 p.m., CR 2014/22, s. 27, paras. 52-54.

(3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.”⁴³

27. It is important to note that the Court considers the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States.⁴⁴ However, not all the Judges of the ICJ shared the majority view. As it stays in the Declaration of Judge Xue, “to date, in none of the codified rules of general international law on treaty succession and State responsibility, State succession to responsibility was ever contemplated... Rules of State responsibility in the event of succession remain to be developed.”⁴⁵

28. Another interesting case is the investment arbitration *Mytilineos Holdings SA*. In this case, the arbitral tribunal noted that, after the commencement of the dispute, the declaration of independence of Montenegro took place. Although the tribunal was not called upon to decide on legal issues of State succession, it noted that it was undisputed that the Republic of Serbia would continue in the legal status of Serbia and Montenegro on international level.⁴⁶

29. Numerous examples providing evidence of State succession relate to German unification. After re-unification, the Federal Republic of Germany (FRG) assumed the liabilities arising from the delictual responsibility of the former German Democratic Republic (GDR).⁴⁷ One of the unsettled issues existing at the time of unification concerned compensation for possessions expropriated in the territory of the former GDR. Except for a few lump sum agreements, the GDR had always refused to pay compensation. It was only in the last period before the unification when the GDR adopted an act on settlement property issues (29 June 1990). In connection with this development the governments of FRG and GDR adopted the Joint declaration on the settlement of outstanding issues of property rights (15 June 1990).⁴⁸ According to Section 3 of the Joint declaration, the property confiscated after 1949 should be returned to the original owners. This may be mostly interpreted as the matter of delictual liability (torts) rather than that of State responsibility.

30. However, it is worth noting that the FRG Federal Administrative Court dealt with the issue of State succession in respect of aliens. Although the Court refused to accept the responsibility of the FRG for an internationally wrongful act (expropriation) committed by the GDR against a Dutch citizen, it recognized that the obligations of the former GDR to pay compensation transferred to the successor State.⁴⁹

31. Another example of the transfer of responsibility of the predecessor State to the successor State is the Agreement between the Government of the Federal Republic of Germany and the United States of America concerning the Settlement of Certain Property Claims (1992).⁵⁰ This agreement covers claims of the US nationals resulting from

⁴³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, para. 112.

⁴⁴ *Ibid.*, para. 115.

⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, Declaration of Judge Xue, para. 23.

⁴⁶ *Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia, Partial Award on Jurisdiction* (arbitration under the UNCITRAL Arbitration Rules), Zurich, 8 September 2006, § 158.

⁴⁷ Art. 24, Treaty on the Establishment of German Unity, 31 August 1990, ILM, vol. 30, p. 463.

⁴⁸ BGBl. 1990, vol. II, s. 1237.

⁴⁹ Decision of 1.7.1999, BVerwG 7 B 2.99. Cf. P. Dumberry, *op. cit.*, p. 90.

⁵⁰ UNTS, vol. 1911, p. 27.

nationalization, expropriation and other measures committed by the GDR between 1949 and 1976.

Views of the doctrine

32. In the past, the doctrine mostly denied the possibility of the transfer of responsibility to the successor State.⁵¹ Later, mostly during the past 20 years, however, the views have evolved, including some nuanced or critical views on the thesis of non-succession, or even admitting succession in certain cases.⁵² According to some authors, when the successor State takes over all rights of the predecessor State (such as the case of unification), it should also assume the obligations arising from the internationally wrongful acts. In these cases delictual obligations should be treated as contractual debts.⁵³

33. It is worth noting that the issue was treated by the International Law Association (2008)⁵⁴ and the Institute of International Law (2013). The lastly mentioned Institute (IDI) has established one of its thematic commissions to deal with the issue.⁵⁵ The Tallinn Session of the IDI (2015) finally adopted, on the basis of the Report of the Special Rapporteur (Prof. Marcelo G. Kohen), its Resolution on State Succession in Matters of State Responsibility, consisting of Preamble and 16 articles. The resolution rightly stresses the need for the codification and progressive development in this area.⁵⁶ Chapter I consists of two articles, namely Use of terms (Art. 1), building on the terms used in the Vienna Conventions of 1978 and 1983, and Scope of the present Resolution (Art. 2). Chapter II includes common rules applicable to all categories of succession of States (Articles 3 to 10). First, Art. 3 stresses a subsidiary character of the guiding principles. Articles 4 and 5 govern respectively the invocation of responsibility for an internationally wrongful act by or against the predecessor State before the date of succession of States. The common point is the continuing existence of the predecessor State. It reflects a general rule of non-

⁵¹ Cf. e.g. A. Cavaglieri, "Règles générales du droit de la paix", *RCADI*, vol. 26, 1929-I, p. 374, 378, 416 *et seq.*; K. Marek, *Identity and Continuity of States in Public International Law* (Geneva: Librairie Droz, 1968), p. 11, 189; P.M. Eisemann, M. Koskenniemi (Dir.), *State Succession: Codification Tested Against the Facts* (The Hague: Academy of International Law, Martinus Nijhoff Publ., 2000), p. 193-194; C.R. Craven, "The Problem of State Succession and the Identity of States under International Law", *EJIL*, vol. 9, 1998, No. 1, p. 149-150; J. Malenovský, "Problèmes juridiques liés à la partition de la Tchécoslovaquie", *AFDI*, vol. 39, 1993, p. 334; L. 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), p. 257; J.P. Monnier, "La succession d'Etats en matière de responsabilité internationale", *AFDI*, vol. 8, 1962, p. 65-90; D.P. O'Connell, *State Succession in Municipal law and International Law*. Vol. I (Cambridge: Cambridge University Press, 1967), p. 482.

⁵² Cf. e.g. W. Zaplinski, "State Succession and State Responsibility", *Canadian YBIL* 28 (1990), p. 346, 356; M.T. Kaminka, "State Succession in Respect of Human Rights Treaties", *EJIL*, vol. 7, 1996, No. 4, p. 483; V. Mikulka, "State succession and responsibility", in: J. Crawford, A. Pellet, S. Olleson, *Law of International Responsibility* (Oxford: Oxford University Press, 2010), p. 291; P. Dumberry, *State Succession to International Responsibility* (Leiden: Martinus Nijhoff Publ., 2007); D.P. O'Connell, "Recent Problems of State Succession in Relation to New States", *RCADI*, vol. 130, 1970-II, p. 162; B. Stern, "Responsabilité internationale et succession d'Etats". In: L. Boisson de Chazournes, V. Gowland-Debbas, *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff Publ., 2001), p. 336.

⁵³ W. Zaplinski, "State Succession ...", *op. cit.*, p. 357.

⁵⁴ Report of the ILA Conference (2008).

⁵⁵ Institut de Droit International, 14th Commission: State Succession in Matters of State Responsibility.

⁵⁶ IDI, 2015 Resolution, Preamble, al. 2: "Convinced of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations".

succession if the predecessor State continues to exist. The following article deals with devolution agreements and unilateral declarations. Chapter III (Articles 11 to 16) includes provisions concerning specific categories of succession of States, namely transfer of part of the territory, separation (secession) of parts of a State, merger of States and incorporation of a State into another existing State, dissolution of a State, and emergence of newly independent States.

Right to reparation in case of State succession

34. One of the principal reasons for questioning the thesis of non-succession to State responsibility is the “humanization” of international law which places an emphasis, *inter alia*, on reparation of damage suffered by individuals, whether by way of diplomatic protection or by way of other mechanisms. Therefore, the right to reparation on behalf of individuals should not disappear in the case of cession, dissolution or unification but should be transferred to the successor State.

35. Here the practice seems to be more robust than in the field of transfer of obligations arising from the commission of an internationally wrongful act. Therefore, the ILC was able to adopt, when codifying the Articles on Diplomatic Protection (2006), an exception to the rule of continuing nationality in cases where a natural person had a nationality of a predecessor State (see draft Article 5).⁵⁷ Similarly, a modified rule of continuing nationality of corporations was adopted in draft Article 10.⁵⁸

36. The rules codified in the Articles on Diplomatic Protection build on a long history of arbitration and other claims commissions, starting from the period after World War I,⁵⁹ which interpreted *inter alia* the rules of the Treaty of Versailles.⁶⁰ In modern practice, the most important role belongs to the United Nations Compensation Commission, which addressed to the dissolution of Czechoslovakia, Yugoslavia and the Soviet Union in its decision No. 10 in 1992.⁶¹

37. The practice of the UNCC clearly shows that the UNCC did not follow the rule of continuing nationality. Instead, for example, it allowed successor States of the former Czechoslovakia to receive compensation on behalf of their new nationals.⁶²

⁵⁷ Report of the ILC, Fifty-eighth session, 2006, *Official Records of the General Assembly, Suppl. No. 10 (A/61/10)*, p. 35: “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 date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.”

⁵⁸ *Ibid.*, p. 55: “1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State ...”

⁵⁹ Cf. e.g. *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, UK – Germany M.A.T., 14 December 1923 and 31 May 1924, *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, p. 233.

⁶⁰ Articles 296, 297e and 297h of the Treaty of Versailles.

⁶¹ Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session, 26 June 1992.

⁶² 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, 26 May 1994, Decision No. 20, UNCC Governing Council, UN Doc. [S/AC.26/Dec.20](#) (1994); 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, 20 October 1994, Decision No. 22, UNCC Governing Council, UN Doc. [S/AC.26/Dec.22](#) (1994).

38. The rights of individuals are addressed also in very recent agreements relating to the succession of States. For example, the Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters (2012) provides, *inter alia*, in Article 5.1.1 that “each Party agrees to unconditionally and irrevocably cancel and forgive any claims of non-oil related arrears and other non-oil related financial claims outstanding to the other Party ...” However, according to Article 5.1.3, “the Parties agree that the provisions of Article 5.1.1 shall not serve as a bar to any private claimants.” In addition, under Article 5.1.4, “the Parties agree to take such action as may be necessary, including the establishment of joint committees or any other workable mechanisms, to assist and facilitate the pursuance of claims by nationals or other legal persons of either State to pursue claims in accordance with, subject to the provisions of the applicable laws in each State.”

A codification task for the ILC

39. The issue of the succession of States with respect to State responsibility deserves examination by the ILC. This is one of the topics of general international law where customary international law was not well established in the past, therefore the ILC did not include it in its programme at an early stage. Now, it is the time to assess new developments in State practice and jurisprudence. This topic could fulfill gaps that remain after the completion of the codification of succession of States in respect of treaties (Vienna Convention of 1978) and in respect of State property, archives and debts (Vienna Convention, 1983), as well as in respect of nationality (Articles on Nationality of Natural Persons in relation to the Succession of States, 1999), on the one hand, and that of State responsibility on the other hand.

40. The work on the topic should follow the main principles of the succession of States in respect of treaties, concerning the differentiation of transfer of a part of territory, secession, dissolution, unification and creation of a new independent State. A realistic approach, supported by the study of case-law and other State practice, warrants a distinction between cases of dissolution and unification, where the original State has disappeared, and cases of secession where the predecessor State remains. The latter usually pose more problems, as States are far less likely to accept a transfer of State responsibility.⁶³ It is still important to distinguish between negotiated and contested (revolutionary) secession. Negotiated secession creates better conditions for agreement on all aspects of succession, including in respect of responsibility.

41. However, the work should focus more on secondary rules on State responsibility. It is important to point out that the project aims at both active and passive aspects of responsibility, i.e. the transfer (or devolution) of both obligations of the acting (wrongdoing) State and rights (claims) of injured State. The structure can be as follows: (a) general provisions on State succession, stressing in particular the priority of agreement; (b) residual (subsidiary) principles on transfer of obligations arising from State responsibility; (c) principles on the transfer of rights to reparation; (d) miscellaneous and procedural provisions.

42. One question which deserves further debate and consideration is whether to include the transfer of obligations arising from the responsibility of States to international organizations, including financial institutions. Another question concerns the transfer of obligations from the responsibility of States to individuals. Apart from the issues of diplomatic protection (e.g. exceptions from the continuing nationality rules), which however remain in the State to State relations, it seems that this question may be relevant

⁶³ See J. Crawford, *State Responsibility. The General Part* (Cambridge: CUP, 2013), p. 455.

where and to the extent individuals have direct rights against a State. This is a case of certain treaty regimes, such as the European Convention on Human Rights.⁶⁴

43. It is for a debate of the Commission how and when to address the issue. Without prejudice to a future decision, an appropriate form for this topic may be draft articles or principles with commentaries (following, in particular, the precedent of the Articles on State Responsibility and those that later became the Vienna Conventions of 1978 and 1983).

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⁶⁴ In this context, see *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, [GC], No. 60642/08, judgment, 16 July 2014.

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