ANNEX II

SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

(Pavel Šturma)

A. Introduction

1. The International Law Commission agreed in 1998 that the selection of topics for its 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 Commission completed its work on responsibility of States for internationally wrongful acts in 2001.[2] However, it did not address situations where a succession of States occurs after the commission of a wrongful act. This succession may concern a responsible State or 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 within the Commission and elsewhere. While in his first report, in 1998, the Special Rapporteur on the responsibility of States, 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,[3] the Commission's commentary to the 2001 draft articles on responsibility of States for internationally wrongful acts reads differently. It states: "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."[4] The development of practice, case law and doctrinal views from the negative succession rule to its partial rebuttal is succinctly described by Crawford.[5]

3. The Commission touched on this problem in the context of its work on State succession in the 1960s. In 1963, Manfred Lachs, the Chairperson of the Commission's Sub-Committee on Succession of States and Governments, proposed the inclusion of succession in respect of responsibility for torts as one of the possible sub-topics to be examined in relation to the work of the Commission on the issue of succession of States.[6] Because of a divergence of views on its inclusion, the Commission decided to exclude the problem of torts from the scope of the topic.[7] Since that time, however, State practice and doctrinal views have developed.

4. It is a normal and largely successful method for the Commission, after completing one topic, to work on other related subjects from the same area of international law. The Commission took this approach, *inter alia*, with two topics in the field of international responsibility by completing first its articles on responsibility of States for internationally wrongful acts (2001)[8] and then its articles on the responsibility of international organizations (2011),[9] and with three topics in the field of succession of States, by completing draft articles[10] for what later became the Vienna Convention on Succession of States in respect of Treaties (1978 Vienna Convention) and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983 Vienna Convention), as well as its articles on nationality of natural persons in relation to the succession of States (1999).[11] Although the two Vienna Conventions did not receive a high number of ratifications, this does not mean that the rules codified therein have not influenced State practice.[12] On the contrary, States in Central Europe, in particular, have applied such rules to their own succession.[13] In the

[1] *Yearbook ... 1998*, vol. II (Part Two), para. 553.

[2] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, chap. IV.

[3] *Yearbook … 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, p. 54, para. 279.

[4] Para. (3) of the commentary to draft article 11, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 52.

[5] J. Crawford, *State Responsibility: The General Part* (Cambridge, Cambridge University Press, 2013), pp. 435–455.

[6] Report of the Sub-Committee on Succession of States and Governments (A/CN.4/160 and Corr.1), *Yearbook … 1963*, vol. II, document A/5509, annex II, p. 260.

[7] *See Yearbook … 1963*, vol. II, p. 299.

[8] *Yearbook … 2001*, vol. II (Part Two) and corridgendum, paras. 76–77. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are annexed to General Assembly resolution 56/83 of 12 December 2001.

[9] *Yearbook … 2011*, vol. II (Part Two), paras. 87–88. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are annexed to General Assembly resolution 66/100 of 9 December 2011.

[10] The text of the draft articles on succession of States in respect of treaties, with commentaries, adopted by the Commission at its twenty-sixth session appears in *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 174; the text of the draft articles on succession of States in respect of State property, archives and debts, with commentaries, adopted by the Commission at its thirty-third session appears in *Yearbook ... 1981*, vol. II (Part Two), p. 20.

[11] *Yearbook … 1999*, vol. II (Part Two), paras. 47–48. The articles on nationality of natural persons in relation to the succession of States adopted by the Commission at its fifty-first session are annexed to General Assembly resolution 55/153 of 12 December 2000.

[12] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, p. 412, at p. 450, para. 109.

[13] For example, when depositing their instruments of ratification of the 1978 Vienna Convention, both the Czech Republic and the Slovak

same vein, non-binding documents, such as the articles on State responsibility or on nationality of natural persons, have largely been 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 or 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 a clean slate (*tabula rasa*), but it could freely accept its succession with respect to State responsibility. Third, in the case of separation (secession), the successor State or States may also assume responsibility, in particular circumstances.

B. Development of State practice and doctrine in the past

6. Traditionally, neither State practice nor doctrine gave a uniform answer to the question of 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 had no responsibility in international law for the international delicts of its predecessor. In the *Robert E. Brown claim*,[14] 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 that this was a delict responsibility that did not devolve on Britain. Similarly, in the *Frederick Henry Redward claim*,[15] the claimants had been wrongfully imprisoned by the Government of the Hawaiian Republic, which was subsequently annexed by the United States of America. The tribunal held that "legal liability for the wrong ha[d] been extinguished"[16] with the disappearance of the Hawaiian Republic. However, if the claim had been reduced to a money judgment, which might be considered a debt, or an interest on the part of the claimant in assets of fixed value, there would have been an acquired right in the claimant, and an obligation to which the successor State had succeeded.[17]

8. However, with respect to the *Brown* and *Redward* awards, it has been observed that "[t]hese cases date from the age of colonialism when colonial powers resisted any rule that would make them responsible for the delicts of States which they regarded as uncivilized. The authority of those cases a century later is doubtful. At least in some situations, it would be unfair to deny the claim of an injured party because the State that committed the wrong was absorbed by another State."[18]

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 United States 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.[19]

10. Although decisions of arbitral tribunals are not uniform, the tribunal in the *Lighthouses arbitration* 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.[20] 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."[21] Some authors, however, take the 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."[22]

11. There are also some other cases outside Europe concerning State responsibility in situations of unification, dissolution or secession of States. One example was the United Arab Republic, created as result of the unification of Egypt and Syria in 1958. There are three examples where the United Arab Republic, as successor State, took over responsibility for obligations arising from internationally wrongful acts committed by the predecessor States. All these cases involved actions taken by Egypt against

Republic made declarations, under article 7, paras. 2 and 3, that they would apply the Convention to their own succession, which took place before the Convention had entered into force. See *Multilateral Treaties Deposited with the Secretary-General*, chap. XXIII (available from https://treaties.un.org).

[14] *Robert E. Brown (United States) v. Great Britain*, 23 November 1923, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120.

[15] *F. H. Redward and Others (Great Britain) v. United States (Hawaiian Claims)*, 10 November 1925, *ibid*., p. 157.

[16] *Ibid*., p. 158.

[17] See D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I (Cambridge, Cambridge University Press, 1967), pp. 482 and 485–486.

[18] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minnesota, 1987), vol. 1, sect. 209, reporters' note 7.

[19] See *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5).

[20] *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)* (*Lighthouses* arbitration), 24/27 *July* 1956, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155; or ILR, vol. 23, p. 81.

[21] *Reports of International Arbitral Awards*, vol. XII, p. 198; or ILR, vol. 23, p. 92.

[22] *Reports of International Arbitral Awards*, vol. XII, p. 197; or ILR, vol. 23, p. 91.

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 *Suez Canal Company* by Egypt, which was settled by an agreement between the United Arab Republic and the private corporation (1958). In other words, the new State paid compensation to the shareholders for an act committed by a predecessor State.[23] Another example is an agreement between the United Arab Republic and France to resume cultural, economic and financial relations between the two States (1958). The agreement provided that the United Arab Republic, as 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 (art. 5).[24] A similar agreement was signed in 1959 by the United Arab Republic and the United Kingdom.[25]

12. The United Arab Republic 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 and the United States) on compensation to foreign nationals whose property had been nationalized by the United Arab Republic (the predecessor State) during the period 1958–1961.[26]

13. More complicated situations arise in the case of secession. After Panama seceded from Colombia in 1903, Panama refused to be held responsible for damage caused to United States nationals during a fire in the city of Colón in 1855. However, in 1926 the United States of America and Panama signed the Claims Convention. The treaty envisaged future arbitration proceedings with respect to the consequences of the 1855 fire in Colón, including the question of whether, "in case it 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.[27]

14. Another example relates to the independence of India. Both India and Pakistan became independent States on 15 August 1947. The Indian Independence (Rights, Property and Liabilities) Order, 1947, deals with issues of succession of States.[28] 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,[29] finding that India remains responsible for internationally wrongful acts committed before the date of succession.[30]

C. Cases of succession in Central and Eastern Europe in the 1990s

15. More recent cases concern situations of State succession in the second half of the twentieth century, some of which gave rise to the question of responsibility. They include, in particular, instances of succession in Central and Eastern Europe in the 1990s, such as the dissolution of 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 Arbitration Commission of the International Conference on the Former Yugoslavia (Badinter Commission), the successor States of the Socialist Federal Republic of Yugoslavia 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.[31] Some cases also relate to Asia and, although more rarely, to Africa, where a few cases of succession have taken 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 and other judicial bodies, treaties, and other State practice.

16. The most important decision may be that of the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case.[32] 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.[33] Article 5 of Constitutional Act No. 4/1993 even states: "The Czech Republic assumes all rights and obligations of the Czech and Slovak Federative Republic … resulting from international laws as of the date of dissolution of the Czech and Slovak Federative

[23] The agreement was signed in Geneva on 13 July 1958. See Lazar Foscaneanu, "L'accord ayant pour objet l'indemnisation de la Compagnie de Suez nationalisée par l'Egypte", *Annuaire français de droit international*, vol. 5 (1959), p. 161, at p. 196.

[24] General Agreement, Zurich, 22 August 1958, United Nations, *Treaty Series*, vol. 732, No. 10511, p. 85. See also "Accord entre le Gouvernement de la République française et le Gouvernement de la République arabe unie", *Revue générale de droit international public*, vol. 62, No. 4 (1958), p. 738; see further C. Rousseau, "Chronique des faits internationaux", *ibid.*, p. 665, at pp. 681–682.

[25] 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, Cairo, 28 February 1959, United Nations, *Treaty Series*, vol. 343, No. 4925, p. 159. See also Eugene Cotran, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly*, vol. 8 (1959), p. 346, at p. 366.

[26] See B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley (New York), Transnational, 1999), pp. 139, 179, 185 and 235. See also P. Dumberry, *State Succession to International Responsibility* (Leiden, Martinus Nijhoff, 2007), pp. 107–110.

[27] Convention between the United States of America and Panama for the Settlement of Claims, Washington, D.C., 28 July 1926, League of Nations, *Treaty Series*, vol. CXXXVIII, No. 3183, p. 119, at p. 122, art. I; or UNRIAA, vol. VI, p. 293. See further Dumberry (footnote 26 above), pp. 164–165.

[28] See M. M. Whiteman, *Digest of International Law*, vol. 2 (1963), pp. 873–874.

[29] See O'Connell, *State Succession …* (footnote 17 above), p. 493.

[30] See Dumberry (footnote 26 above), p. 173.

[31] Arbitration Commission of the International Conference on the Former Yugoslavia, opinion No. 9, 4 July 1992 (reproduced in A/48/874-S/1994/189, annex).

[32] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7.

[33] See the Proclamation of the National Council of the Slovak Republic to Parliaments and Peoples of the World (3 December 1992) and the Proclamation of the Czech National Council to all Parliaments and Nations of the World (17 December 1992) (reproduced in A/47/848, annexes II and I, respectively).

Republic, except for the rights and obligations of the Czech and Slovak Federative Republic linked to those sovereign territories of the Czech and Slovak Federative Republic which are not sovereign territories of the Czech Republic."[34]

17. Concerning the international responsibility of Slovakia, the International Court of Justice said:

> 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 of Hungary.[35]

Notwithstanding the special agreement between Hungary and Slovakia, the Court thus seems to recognize 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 Security Council and General Assembly also refused to recognize the Federal Republic of Yugoslavia as a continuing State by resolutions of September 1992.[36] The Badinter Commission took the same position.[37] Finally, the Federal Republic of Yugoslavia changed its position in 2000, when it applied for admission to the United Nations as a new State.[38]

19. On the basis of a recommendation by the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues relating to succession of States by agreement. The Agreement on Succession Issues was concluded on 29 June 2001. 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 to the Agreement deals with the issue of internationally wrongful acts against third States before the date of succession:

> All claims against the [Socialist Federal Republic of Yugoslavia] 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 [Socialist Federal Republic of Yugoslavia].

20. It can be assumed from this text that the obligations of the predecessor State did not simply disappear as a result of the dissolution of the Socialist Federal Republic of Yugoslavia.[39] In addition, Article 1 of annex F refers to the transfer of claims from the predecessor State to the successor State.[40]

21. The first "Yugoslav" case where the International Court of Justice touched upon the issue of succession in respect of responsibility, albeit indirectly, is the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*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.[41]

22. The Court adopted the same solution in the parallel case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* in 2008.[42] However, it is only the recent final Judgment in the *Croatia v. Serbia* case that has dealt in more detail with the issue of succession to State responsibility.[43] In spite of the fact that the Court rejected the claim of Croatia and counter-claim of Serbia 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 Court recalled that, in its Judgment of 18 November 2008, it had found that it had jurisdiction to rule on the Croatian claim in respect of acts committed from 27 April 1992, the date when the Federal Republic of Yugoslavia came into existence as a separate 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 Federal Republic of Yugoslavia 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.

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[34] Constitutional Act No. 4/1993 Coll., on Measures Related to the Dissolution of the Czech and Slovak Federative Republic.

[35] *Gabčíkovo-Nagymaros Project* (see foonote 32 above), p. 81, para. 151.

[36] Security Council resolution 777 (1992), 19 September 1992; General Assembly resolution 47/1, 22 September 1992.

[37] Arbitration Commission of the International Conference for the Former Yugoslavia, opinion No. 10, 4 July 1992 (reproduced in A/48/874-S/1994/189, annex).

[38] A/55/528-S/2000/1043, annex; see also General Assembly resolution 55/12 of 1 November 2000.

[39] *See* Dumberry (footnote 26 above), p. 121.

[40] "All rights and interests which belonged to the [Socialist Federal Republic of Yugoslavia] 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 [Socialist Federal Republic of Yugoslavia]) shall be shared among the successor States, taking into account the proportion for division of [the] financial assets [of the Socialist Federal Republic of Yugoslavia] in Annex C of this Agreement."

[41] *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, I.C.J. Reports 2007*, p. 43, at pp. 75–76, paras. 74 and 77–78.

[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008* (see footnote 12 above), pp. 421–423, paras. 23–34.

[43] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, I.C.J. Reports 2015, p. 3*.

24. The Court takes note, however, of an alternative argument relied on by the Applicant during the oral hearing in March 2014: that the Federal Republic of Yugoslavia (and subsequently Serbia) could have succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia for breaches of the Convention prior to that date. In fact, Croatia advanced two separate grounds on which it claimed that the Federal Republic of Yugoslavia had succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia. First, it claimed that this succession came about as a result of the application of the principles of general international law regarding State succession.[44] It relied upon the award of the arbitration tribunal in the *Lighthouses arbitration* (1956),[45] 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.[46] Second, Croatia argued that the Federal Republic of Yugoslavia, by declaration of 27 April 1992, had indicated "not only that it was succeeding to the treaty obligations of the [Socialist Federal Republic of Yugoslavia], but also that it succeeded to the responsibility incurred by the [Socialist Federal Republic of Yugoslavia] for the violation of those treaty obligations".[47]

25. Serbia maintained, in addition to the arguments relating to jurisdiction and admissibility (a new claim introduced by Croatia, with 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 Socialist Federal Republic of Yugoslavia were governed by the Agreement on Succession Issues (2001), which lays down a procedure for considering outstanding claims against the Socialist Federal Republic.[48]

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 Court stated that, in order to determine whether Serbia was 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 [Socialist Federal Republic of Yugoslavia] at the time that they occurred and engaged its responsibility; and
>
> (3) if the responsibility of the [Socialist Federal Republic of Yugoslavia] had been engaged, whether the [Federal Republic of Yugoslavia] succeeded to that responsibility.[49]

27. It is important to note that the Court considers that 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.[50] However, not all the Judges of the Court shared the majority view. As stated 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."[51]

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 the legal identity of the State Union of Serbia and Montenegro on the international level".[52]

29. Numerous examples providing evidence of State succession relate to German unification. After re-unification, the Federal Republic of Germany assumed the liabilities arising from the delictual responsibility of the former German Democratic Republic.[53] One of the unsettled issues existing at the time of unification concerned compensation for possessions expropriated in the territory of the former German Democratic Republic. Except for a few lump sum agreements, the German Democratic Republic had always refused to pay compensation. It was only in the period immediately before unification that the German Democratic Republic adopted an act on property settlement issues (29 June 1990). In connection with this development, the Governments of the Federal Republic of Germany and the German Democratic Republic adopted the Joint Declaration on the Settlement of Outstanding Issues of Property Rights (15 June 1990).[54] According to section 3 of the Joint Declaration, property confiscated after 1949 should be returned to its original owners. This may be interpreted mainly as a matter of delictual liability (torts) rather than State responsibility.

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[44] *Ibid*., pp. 53–54, para. 107.

[45] *Lighthouses* arbitration (see footnote 20 above).

[46] See the pleadings of Mr. James 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, p. 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" (available from www.icj-cij.org/en/case/118/oral-proceedings).

[47] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015* (see footnote 43 above), p. 54, para. 107.

[48] See the pleadings of Mr. Andreas Zimmermann, advocate for Serbia, who referred to article 2 of annex F to the Agreement on Succession Issues, which provides for the settlement of disputes by the Standing Joint Committee; public sitting held on Thursday, 27 March 2014, at 3 p.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 2014/22, p. 27, paras. 52–54 (available from www.icj-cij.org/en/case/118/oral-proceedings).

[49] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015 (see footnote 43 above), p. 55, para. 112.

[50] *Ibid*., pp. 56–57, para. 115.

[51] *Ibid*., Declaration of Judge Xue, p. 388, para. 23.

[52] *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, para. 158.

[53] Article 24, of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, Berlin, 31 August 1990, *International Legal Materials*, vol. 30 (1991), p. 463.

[54] *Official Gazette*, part II, No. 35 (1990), p. 1237.

30. However, it is worth noting that the Federal Administrative Court of the Federal Republic of Germany dealt with the issue of State succession in respect of aliens. Although the Court refused to accept the responsibility of the Federal Republic for an internationally wrongful act (expropriation) committed by the German Democratic Republic against a Dutch citizen, it recognized that the obligations of the former German Democratic Republic to pay compensation transferred to the successor State.[55]

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 Government of United States of America concerning the Settlement of Certain Property Claims (1992).[56] This agreement covers claims of United States nationals resulting from nationalization, expropriation and other acts committed by the German Democratic Republic between 1949 and 1976.

D. Views in the doctrine

32. In the past, the doctrine largely denied the possibility of the transfer of responsibility to the successor State.[57] Later, however, and mostly during the past 20 years, views have evolved to include some nuanced or critical views on the thesis of non-succession, even admitting succession in certain cases.[58] According to some authors, when a successor State takes over all rights of the predecessor State (such as in the case of unification), it should also assume the obligations arising from internationally wrongful acts. In these cases delictual obligations should be treated as contractual debts.[59]

33. It is worth noting that the issue has been tackled by the International Law Association (2008)[60] and the Institute of International Law (2013). The Institute of International Law established one of its thematic commissions to deal with the issue.[61] At the Session of Tallinn (2015), the Institute finally adopted, on the basis of the report of the Special Rapporteur, Marcelo G. Kohen,[62] a resolution on State succession in matters of State responsibility, consisting of a preamble and 16 articles. The resolution rightly stresses the need for codification and progressive development in this area.[63] Chapter I consists of two articles: "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 (arts. 3–10). First, article 3 stresses the subsidiary character of the guiding principles. Articles 4 and 5 govern, respectively, the invocation of responsibility for an internationally wrongful act by and against the predecessor State before the date of succession of States. The common point is the continuing existence of the predecessor State. This reflects a general rule of non-succession if the predecessor State continues to exist. The following article deals with devolution agreements and unilateral declarations. Chapter III (arts. 11–16) 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.

E. 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 for 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. As a result, the International Law Commission, when codifying the

[55] Decision of 1 July 1999, BVerwG 7 B 2.99. See Dumberry (footnote 26 above), p. 90.

[56] Bonn, 13 May 1992, United Nations, *Treaty Series*, vol. 1911, No. 32547, p. 27.

[57] See, for example, A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1929-I*, vol. 26, pp. 374, 378, and pp. 416 *et seq.*; K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie Droz, 1968), pp. 11 and 189; P. M. Eisemann and M. Koskenniemi (eds.), *State Succession: Codification Tested against the Facts* (The Hague, Martinus Nijhoff, 2000), pp. 193–194; M. C. R. Craven, "The problem of State succession and the identity of States under international law", *European Journal of International Law*, vol. 9 (1998), p. 142, at pp. 149–150; J. Malenovský, "Problèmes juridiques liés à la partition de la Tchécoslovaquie, y compris tracé de la frontière", *Annuaire français de droit international*, vol. 39 (1993), p. 305, at 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, 2003), p. 257; J.-P. Monnier, "La sucession d'Etats en matière de responsabilité internationale", *Annuaire français de droit international*, vol. 8 (1962), p. 65; O'Connell, *State Succession* ... (see footnote 17 above), p. 482.

[58] See, for example, W. Czaplinski, "State succession and State responsibility", *Canadian Yearbook of International Law*, vol. 28 (1990), p. 339, at pp. 346 and 356; M. T. Kamminga, "State succession in respect of human rights treaties", *European Journal of International Law*, vol. 7 (1996), p. 469, at p. 483; V. Mikulka, "State succession and responsibility", *in* J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford, Oxford University Press, 2010), p. 291; Dumberry (footnote 26 above); D. P. O'Connell, "Recent problems of State succession in relation to new States", *Collected Courses of The Hague Academy of International Law, 1970-II*, vol. 130, p. 162; B. Stern, "Responsabilité internationale et succession d'États", *in* L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague, Martinus Nijhoff, 2001), p. 327, at p. 336.

[59] Czaplinski, "State succession …" (see footnote 58 above), p. 357.

[60] International Law Association, *Report of the Seventy-third Conference*, Rio de Janeiro, 17–21 August 2008, p. 250.

[61] Institute of International Law, 14th Commission: State Succession in Matters of State Responsibility.

[62] "State succession in matters of State responsibility. final report", *Yearbook of the Institute of International Law*, vol. 76, pp. 509–606 (available from the website of the Institute: www.idi-iil.org).

[63] Institute of International Law, 2015 resolution on "State succession in matters of State responsibility", second paragraph of the preamble: "*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" (*ibid.*, p. 703).

articles on diplomatic protection (2006), was able to adopt an exception to the rule of continuing nationality in cases where a natural person had the nationality of a predecessor State (draft art. 5).[64] Similarly, a modified rule of continuing nationality of corporations was adopted in draft article 10.[65]

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 the First World War,[66] which interpreted *inter alia* the rules of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[67] In modern practice, the most important role belongs to the United Nations Compensation Commission, which addressed the dissolution of Czechoslovakia, Yugoslavia and the Soviet Union in its decision No. 10 in 1992.[68]

37. The practice of the Compensation Commission clearly shows that it 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.[69]

38. The rights of individuals are also addressed in some 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[70] provides, *inter alia*, in article 5.1.1 that "[e]ach 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, "[t]he 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, "[t]he 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".

F. A codification task for the International Law Commission

39. The issue of the succession of States with respect to State responsibility deserves examination by the Commission. This is one of the topics of general international law where customary international law was not well established in the past, so the Commission did not include the topic in its programme at an early stage. Now is the time to assess new developments in State practice and jurisprudence. This topic could fill gaps that remain after the completion of the codification of the law on succession of States in respect of treaties (1978 Vienna Convention) and in respect of State property, archives and debts (1983 Vienna Convention), as well as in respect of nationality (1999 articles on nationality of natural persons in relation to the succession of States),[71] on the one hand, and the law of State responsibility, on the other.

40. Work on the topic should follow the main principles of the succession of States in respect of treaties, differentiating between transfer of part of territory, secession, dissolution, unification and the 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.[72] 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 encompasses both the active and passive aspects of responsibility, *i.e.* the transfer (or devolution) both of the obligations of the acting (wrongdoing) State and of the rights (claims) of the injured State. The structure could 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 arising from the responsibility of States to individuals. Apart from issues of diplomatic protection (*e.g.* exceptions from continuing nationality rules), which, however,

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[64] "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" (*Yearbook … 2006*, vol. II (Part Two), p. 24, para. 49). The articles on diplomatic protection adopted by the Commission at its fifty-eighth session are annexed to General Assembly resolution 62/67 of 6 December 2007.

[65] "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 …" (*ibid*.).

[66] See, for example, *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.

[67] Articles 296, 297 (*e*) and 297 (*h*) of the Treaty of Versailles.

[68] Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th meeting, sixth Session, 26 June 1992 (S/AC.26/1992/10).

[69] 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 (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 (S/AC.26/Dec.22 (1994)).

[70] Concluded at Addis Ababa on 27 September 2012; the text of the Agreement is available from https://peacemaker.un.org/node/1617.

[71] See footnote 11 above.

[72] See Crawford, *State Responsibility: The General Part* (footnote 5 above), p. 455.

remain part of State-to-State relations, it seems that this question may be relevant where, and to the extent that, individuals have direct rights against a State. This is the case for certain treaty regimes, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[73]

43. It is for the Commission to debate 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 responsibility of States for internationally wrongful acts[74] and those that later became the Vienna Conventions of 1978 and 1983[75]).

[73] 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, ECHR 2014.

[74] See footnote 8 above.

[75] See footnote 10 above.

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