

State Succession to Responsibility for Internationally Wrongful Acts

Developments in International Law

VOLUME 77

The titles published in this series are listed at *brill.com/diil*

State Succession to Responsibility for Internationally Wrongful Acts

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The Library of Congress Cataloging-in-Publication Data is available online at <https://catalog.loc.gov>
LC record available at <https://lcn.loc.gov/>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 0924-5332

ISBN 978-90-04-67940-5 (hardback)

ISBN 978-90-04-67941-2 (e-book)

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To my Daria, Lev, and Aurora



Contents

Acknowledgements XI

Abbreviations XII

Introduction 1

PART I

Succession of States

- 1 State Formation and Elements of State Succession 14
 - 1.1 The Origins of the State 14
 - 1.2 Succession 21

- 2 Succession to State Property 28
 - 2.1 Definition of State Property 28
 - 2.2 Principles and Rules for Succession to State Property 29
 - 2.3 Types of State Property 33
 - 2.4 State Practice with Continuing Legal Personality 35
 - 2.5 Practice of States without Continuing Legal Personality 66
 - 2.6 Conclusions 79

- 3 Succession to State Archives 83
 - 3.1 Definition of State Archives 83
 - 3.2 Principles and Rules for Succession to State Archives 84
 - 3.3 State Practice with Continuing Legal Personality 86
 - 3.4 State Practice without Continuing Legal Personality 93
 - 3.5 Conclusions 97

- 4 Succession to State Debt 99
 - 4.1 The Creditor as a Public or Private International Law Entity 99
 - 4.2 Types of Debt 100
 - 4.3 Principles and Rules for Succession to State Debt 106
 - 4.4 State Practice with Continuing Legal Personality 112
 - 4.5 State Practice without Continuing Legal Personality 131
 - 4.6 Conclusions 146

- 5 **Succession to Treaties** 149
 - 5.1 Definition of a Treaty 149
 - 5.2 Types of Treaties and Other Sources of International Law 153
 - 5.3 Principles and Rules for Succession to Treaties 160
 - 5.4 State Practice with Continuing Legal Personality 162
 - 5.5 State Practice without Continuing Legal Personality 185
 - 5.6 Conclusions 202

- 6 **Conclusions** 207
 - 6.1 Principles 207
 - 6.2 Confirmed Rules 209

PART 2

Responsibility of States for Internationally Wrongful Acts

- 7 **Definition of International Responsibility of States** 222
 - 7.1 Acts of a State 223
 - 7.2 International Wrongfulness 227

- 8 **Attribution of a Conduct** 231
 - 8.1 Conduct of State Organs in their Official Capacity 233
 - 8.2 Special Cases of Attribution 235

- 9 **Indirect Responsibility** 245
 - 9.1 Aid and Assistance 247
 - 9.2 Direction and Control over the Actions of Another State 250
 - 9.3 Coercion 251

- 10 **Rights and Obligations Arising from International Responsibility** 253
 - 10.1 Obligation of the Breaching State to Cease the Wrongful Conduct 254
 - 10.2 Assurances and Guarantees of Non-repetition 256
 - 10.3 Reparations 258
 - 10.4 Contribution of an Injured State to the Injury and Duty to Mitigate the Consequences 273
 - 10.5 Consequences of Serious Breaches of *Jus Cogens* 276
 - 10.6 Circumstances Precluding Wrongfulness 278

- 11 Invocation of International Responsibility 286
- 12 Conclusions 291

PART 3

State Succession to International Responsibility

- 13 Definition of State Succession to Responsibility for Internationally Wrongful Acts 298
 - 13.1 Object of State Succession to Responsibility for Internationally Wrongful Acts 298
 - 13.2 Time Frames for Succession to International Responsibility 304
 - 13.3 Theoretical Foundations of Succession to International Responsibility 305
 - 14 Types of State Succession to International Responsibility 312
 - 14.1 Fictitious Succession to International Responsibility 313
 - 14.2 Real Succession to International Responsibility 323
 - 15 Conclusions 336
- Literature 343
- Index 379

Acknowledgements

The present book is based on the doctoral dissertation that I defended on December 15, 2020, at the University of Ljubljana under the mentorship of Professor Vasilka Sancin. During my doctoral studies, I was awarded a Fulbright Scholarship for research at the George Washington University in Washington, DC, USA.

I would like to express my deep gratitude to Professor Pavel Šturma and Professor Sean Murphy, former members of the United Nations International Law Commission, and to my friends and colleagues Ambassador Dr Ana Polak Petrič and Dr Andraž Zidar for their help, advice, and support. Special thanks go to my wife Daria, mother Majda and sister Jasna for their never-ending encouragement, and to my little Lev and Aurora for brightening my every day.

Abbreviations

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BiH	Bosnia and Herzegovina
CIS	Commonwealth of Independent States
COMECON	Council for Mutual Economic Assistance
CSFR	Federal Republic of Czechoslovakia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
GDR	German Democratic Republic
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	The International Criminal Tribunal for the former Yugoslavia
IDI	International Law Institute (<i>Institut de Droit International</i>)
ILA	International Law Associations
ILC	United Nations International Law Commission
ILO	International Labor Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
LNTS	League of Nations Treaty Series
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice in The Hague
RIAA	Reports of International Arbitral Awards
SFRY	Socialist Federal Republic of Yugoslavia
UAR	United Arab Republic
UN	United Nations
UNGA	United Nations General Assembly
UNRIIA	United Nations Reports of International Arbitral Awards
UNSC	United Nations Security Council
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
WB	World Bank

Introduction

The purpose of the international responsibility of a State is not to punish the responsible State (i.e., the State to which the wrongful act is attributed) but to erase the consequences of the wrongful act.¹ International responsibility is a new legal relationship between a State that breaches its international obligations towards another State and the State whose rights have been violated by the wrongful act of the former.

This new legal relationship exists separately from the breached primary norm.² Therefore, after the wrongful act has been committed, there are two relationships between the concerned States: one based on the breached primary norm and one of international responsibility, which establishes new obligations for the responsible State and new rights for the injured State (so-called *secondary rights and obligations*).³ The latter relationship will continue to exist even if the primary norm ceases to bind the offending State after the wrongful act has been committed.⁴

International law does not require damage as a condition for international responsibility to arise.⁵ Nevertheless, it always arises, because “[e]very breach of an engagement vis-à-vis another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State.”⁶ In this regard, it is important to note that the rules on the responsibility of States divide secondary rights and obligations into two groups. The first is closely linked to the norm breached and comprises the obligations of the

1 Robert Kolb, *The international law of state responsibility: an introduction* (Edward Elgar Publishing 2017) 148; James R Crawford, *State responsibility: The general part (Cambridge studies in international and comparative law)* (Cambridge University Press 2013) 215; Danilo Türk, *Temelji mednarodnega prava* (2nd edn, GV Založba 2015) 222.

2 ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/49(Vol. 1)/Corr.4 (ARSIWA) art 9. See also: ILC, ‘Third report on State responsibility by James Crawford, Special Rapporteur, ILC, 52nd session’ (2000) UN Doc A/CN.4/507 para 26, 18.

3 Sean D Murphy, *Principles of international law* (2nd ed, Thomson/West 2012) 207.

4 *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* 20 UNRIAA para 106, 266.

5 ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) Yearbook of the International Law Commission (Commentary on the ARSIWA) para 9, 36; Crawford, *State responsibility* (n 1) 54–60.

6 ILC, ‘Second report on State responsibility (The origin of international responsibility) by Roberto Ago, Special Rapporteur’ (1970) UN Doc A/CN.4/233, 195.

responsible State to continue to respect the primary norm, cease the violation, and offer assurances and guarantees of non-repetition. This group of obligations can only exist while the primary norm continues to exist. Conversely, the second group contains obligations that exist independently of the primary norm. This group consists of reparations, about which the Permanent Court of International Justice (PCIJ) stated, in 1928, in *Factory at Chorzów*:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.⁷

However, situations may arise that cast doubt on the continued existence of the responsible State's obligations and the injured State's rights despite the continued existence of damage resulting from the wrongful act.

One such situation is that of the succession of States, a process that has marked the global political landscape since the emergence of the State as the basic subject of international law. A look at the map of the 20th century alone shows its profound consequences. As recently as 1913, the number of independent States in the world was merely 48, rising to 66 by 1933 and 75 by 1950.⁸ Since 1945, the number of member States of the United Nations (UN) has grown from the original 51 to 193 (the latest being South Sudan, admitted in 2011). It is also worth mentioning the non-UN member states with permanent observer status (Palestine and Holy See) and countries and other entities that have not (yet) been admitted to the UN (e.g., Kosovo).⁹

Succession accompanies any change of territory—that is, the transfer of territory from one State to another—and the question always arises of the persistence of the rights and obligations of the first State that existed in relation to the territory at hand until the date of the succession. These questions, inherent to the concepts of sovereignty, identity, and continuity,¹⁰ have been answered

7 *Factory at Chorzów* (Merits: Judgment No 13) [1928] PCIJ Rep Series A No 17, 47.

8 Herbert W Briggs, 'Community interest in the emergence of new states: The problem of recognition' (1950) 44 *American Society of International Law Proceedings* 170.

9 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2023.

10 Martti Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' in Pierre Michel Eisemann and Martti Koskenniemi (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the*

differently in the past. Older theories rejected the possibility of succession to the rights and obligations existing between States, which applied not merely to international responsibility¹¹ but to State succession in general.¹²

Although State succession is not a rare phenomenon (at least in the last century), the rules defining its consequences have been slow to evolve. The International Law Commission (ILC), a subsidiary organ of the UN General Assembly (UNGA) charged with the codification of law and its progressive development, produced three documents on succession towards the end of the 20th century. Two of them became conventions: the 1978 Vienna Convention on Succession of States in respect of Treaties (1978 Vienna Convention)¹³ and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983 Vienna Convention).¹⁴ In 1999, the ILC also adopted the Draft Articles on the Nationality of Natural Persons in Relation to Succession of States.¹⁵ In 2001, after almost half a century of efforts, the ILC also adopted the Articles on Responsibility of States for Internationally

facts (Martinus Nijhoff Publishers 2000) 97. For a detailed analysis of identity and continuity, see also: Krystyna Marek, *Identity and continuity of states in public international law* (Librairie Droz 1968) 15–72. For a detailed analysis of sovereignty, see: Brigitte Stern, 'La succession d'états' (1996) 262 *Recueil des Cours*, *Collected Courses of the Hague Academy of International Law* 92; Wladyslaw Czaplinski, 'La continuité, l'identité et la succession d'États—évaluation de cas récents' (1993) 2 *Revue Belge de Droit International* 374, 375; Nadezhda B Pastuhova, Государственный суверенитет: история и современность [*State sovereignty: history and modernity*] (Издательство Аспект Пресс 2013) 16–100; Ineta Ziemele, 'Is the Distinction between state continuity and state succession reality or fiction—The Russian Federation, the Federal Republic of Yugoslavia and Germany' (2001) 1 *Baltic Yearbook of International Law* 191–222.

11 Patrick Dumberry, *State succession to international responsibility* (Martinus Nijhoff Publishers 2007) 39–41.

12 Daniel Patrick O'Connell, 'Secured and unsecured debts in the law of state succession' (1951) 28 *British Yearbook of International Law* 6–11.

13 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 (1978 Vienna Convention). The ILC also adopted a Commentary on the Draft Articles, which later became the 1978 Vienna Convention: ILC, 'Draft articles on Succession of States in respect of Treaties with commentaries' (1974) UN Doc A/9610/Rev.1 (Commentary on the 1978 Vienna Convention).

14 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention). The ILC also adopted a commentary on the Draft Articles, which later became the 1983 Vienna Convention: ILC, 'Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries' (1981) UN Doc A/36/10 (Commentary on the 1983 Vienna Convention).

15 ILC, 'Nationality of Natural Persons in relation to the Succession of States' UN Doc A/54/10.

Wrongful Acts (ARSIWA),¹⁶ which set the rules concerning the occurrence and consequences of internationally wrongful acts.

Even though “State succession is an area of intersection between the fields of sovereignty and obligation,” as stated by the last ILC Special Rapporteur on State Responsibility, Professor James Crawford,¹⁷ ILC documents did not address State succession to responsibility for internationally wrongful acts until 2017. This may be because of a principled position that did not recognize succession to the predecessor State’s responsibility for internationally wrongful acts.¹⁸ However, State practice and the decisions of international tribunals have signaled changes in this area. The cases at the International Court of Justice (ICJ) or its predecessor the Permanent Court of International Justice (PCIJ)¹⁹

16 ARSIWA (n 2).

17 James R Crawford, ‘Responsibility to the international community as a whole’ (2001) 8(2) *Indiana Journal of Global Legal Studies* 309. Several works have been written on the subject. From earlier periods, it is worth mentioning Jean-Philippe Monnier, ‘La succession d’États en matière de responsabilité internationale’ (1962) 8 *Annuaire français de droit international* 65; Cecil JB Hurst, ‘State succession in matters of tort’ (1924) 5 *British Yearbook of International Law* 163. Since the early 1990s: Wladyslaw Czaplinski, ‘State Succession and State Responsibility’ (1990) 28 *Canadian Yearbook of International Law* 339; Michael John Volkovitsch, ‘Righting wrongs: Towards a new theory of state succession to responsibility for international torts’ (1992) 92(8) *Columbia Law Review* 2162; Brigitte Stern, ‘Responsabilité internationale et succession d’états’ in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *L’ordre juridique international, un système en quête d’équité et d’universalité* [*The International Legal System in Quest of Equity and Universality*] (Martinus Nijhoff Publishers 2001); Patrick Dumberry, ‘New state responsibility for internationally wrongful acts by an insurrectional movement’ (2006) 17(3) *European Journal of International Law* 605; Patrick Dumberry, ‘Is a new state responsible for obligations arising from internationally wrongful acts committed before its independence in the context of secession?’ (2005) 43 *Canadian Yearbook of International Law* 419.

18 For instance, the US–Great Britain Arbitral Commission: *Robert E. Brown (United State) v Great Britain, US-Great Britain Arbitral Commission Award* (1923) 6 RIAA 120 (1955); *F.H. Redward and Others (Great Britain) v United States (Hawaiian Claims), US-Great Britain Arbitral Commission Award* (1925) 6 RIAA 157 (1955).

19 For instance, *Lighthouses Case between France and Greece (France v Greece)* [1934] PCIJ Rep Series A/B No 62 (*Lighthouses 1934*); *Lighthouses in Crete and Samos (France v Greece)* [1937] PCIJ Rep Series A/B No 71 (*Lighthouses 1937*); *Affaire relative à la concession des phares de l’Empire ottoman (Grèce contre France)*, 12 UNRIAA 155 (24/27 July 1956) (*Lighthouses 1956*); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Crime of Genocide [Bosnia v Serbia and Montenegro]* [Judgment]); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections: Judgment) [1996] ICJ Rep 595 (*Crime of Genocide [Bosnia v Serbia and Montenegro]* [Preliminary Objections]); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*

as well as the European Court of Human Rights (ECtHR)²⁰ and the practice of States point in a particular direction, which has also been followed by international law experts, among which the Institut de Droit International (IDI).

At its 69th Session on May 31, 2017, the ILC included this topic in its long-term program of work and appointed Professor Pavel Šturma as Special Rapporteur.²¹ Professor Šturma had prepared five reports by the end of his mandate in the ILC in 2022, but the work continues.²² In 2015, two years before the ILC's work on the topic began, the IDI prepared a resolution with a preamble, sixteen articles,²³ and an accompanying report under the leadership of the Rapporteur, Professor Marcelo G. Kohen.²⁴ This was followed in 2019 by a book by rapporteur Kohen and Professor Patrick Dumberry with a commentary on the resolution.²⁵ The resolution regulates the succession of States to responsibility in the light of different forms of status changes. It concerns rules relating to different forms of succession and their consequences, including the meaning of unilateral acts by successor States and devolutionary agreements between successor and predecessor States.

Although they follow the structure of two Vienna conventions on State succession, the IDI Resolution on Succession of States in Matters of International

(Preliminary Objections: Judgment) [2015] ICJ Rep 412 (*Crime of Genocide [Croatia v Serbia]* [Preliminary Objections]); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Judgment) [2015] ICJ 3 (*Crime of Genocide [Croatia v. Serbia]* [Judgment]).

20 e.g. *Bijelić v Montenegro and Serbia* App No 11890/05 ECtHR, 28 April 2009; *Lakićević and Others v Montenegro and Serbia* App No 27458/06, 37205/06, 37207/06 and 33604/07 ECtHR, 13 December 2011; *Milić v Montenegro and Serbia* App No 28359/05 ECtHR, 11 December 2012; *Momčilo Mandić v Montenegro, Serbia and Bosnia and Herzegovina* App No 32557/05 ECtHR, 12 June 2012.

21 ILC, 'First report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 69th session' (2017) UN Doc A/CN.4/708 para 1, 2.

22 ILC, 'Fifth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 73rd session' (2022) UN Doc A/CN.4/751 para 9, 4–5.

23 Institut du Droit International, 'Succession of States in Matters of International Responsibility, Resolution' (2015) 76 *Annuaire de l'Institut de droit international* 703.

24 Institut du Droit International, 'Succession of States in Matters of International Responsibility, Provisional Report by Rapporteur Marcelo Kohen' (2015) 75 *Annuaire de l'Institut de droit international* 123.

25 Marcelo G Kohen and Patrick Dumberry, *The Institute of International Law's resolution on state succession and state responsibility: introduction, text and commentaries* (Cambridge University Press 2019). More than a decade before, in 2007, Professor Dumberry published the most thorough book on this subject to date. It encompassed a variety of State practices related to State succession to international responsibility: Dumberry, *State succession to international responsibility* (n 11).

Responsibility²⁶ and the work of the ILC Special Rapporteur treat succession to international responsibility independently of succession to other matters (property, archives, debts, and treaties). The present book, however, starts from the premise that the basic element of this phenomenon is the succession of States, in relation to which international responsibility is merely an object to be succeeded to. It follows logically that the object of succession—once it has been further defined—must be judged through the prism of the rules of succession, and not vice versa. This does not mean that all rules of succession that apply to other matters are also applicable to international responsibility, but they are nevertheless the primary point of departure for examining this field.²⁷

Following this premise, the book presents a detailed study of the field of State succession, including thorough State practice and the elaboration of rules applicable to other succession matters. These are then used as guiding points for integrating the field of international responsibility into the field of State succession. The rights and obligations stemming from internationally wrongful acts are therefore juxtaposed with rights and obligations related to other succession matters to form a coherent whole.

The book is divided into three parts. The introduction outlines its content and structure. The first and most comprehensive part deals with the succession of States, starting with theoretical views on sovereignty and State formation. This is followed by a comprehensive presentation of State practice with regard to the matters included by the ILC in two Vienna Conventions, namely, property, archives, debts, and treaties. In this part, the book also draws on the work of the International Law Association (ILA)²⁸ and the Third Restatement of the Foreign Relations Law of the United States (Third Restatement).²⁹ The practice presented is first divided by matter and then, within each matter, by type of succession and chronological progression. It should be noted that not all cases of succession have created a practice for all matters.

The second part examines in detail the rules of international responsibility of States to identify the elements that can be usefully addressed in relation to succession. This is followed by an in-depth analysis of the rights and

26 Institut du Droit International, 'Succession of States in Matters of International Responsibility, Resolution' (2015) 76 *Annuaire de l'Institut de droit international* 703 (IDI Resolution on State Succession to International Responsibility).

27 ILC, 'First report by Pavel Šturma' (n 21) para 73, 20–21.

28 International Law Association, 'Aspects of the law of state succession, Final Report—Part I, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008' (ILA 2008) 250.

29 Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987).

obligations arising from the wrongful act and a brief description of the procedural options available to the injured State and third States.

The third part builds on the conclusions of the previous two parts. After defining the concept of State succession to international responsibility, it presents two types of succession, *fictitious* and *real* succession to international responsibility. In both cases, the wrongful act was committed before the date of succession, and the confirmation of the legal consequences of this breach (e.g., a decision of a judicial tribunal or an agreement between the injured and responsible States) only occurred after this date. As the book shows, fictitious succession is based on the *rules of international responsibility*, whereas real succession is based on the *rules of succession of States*. This part also separates secondary rights and obligations into two groups: those related to the continued observance of the primary norm and those pertaining to the remedying of the consequences of the breach (i.e., reparations).

The final chapter of the third part builds on the rules of succession of States presented in the concluding chapters of the previous parts. It contains conclusions regarding State succession to international responsibility and general and specific rules that stem from them.

PART I

Succession of States



In the present book, the term “succession of States”¹ means that “one state replaces another in responsibility for the international relations of a territory.” This definition is also contained in these terms in the 1983 Vienna Convention,² the 1978 Vienna Convention,³ the Articles on Nationality of Natural Persons in Relation to the Succession of States,⁴ the IDI Resolution on the Succession of States with Respect to Property and Debts,⁵ and the First Opinion of the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission),⁶ as well as in substance in the Third Restatement,⁷ which is also supported by the ILA Report issued in 2008 in Rio de Janeiro.⁸

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- 1 The concept is widely discussed: see, e.g., Malcolm Nathan Shaw, *International Law* (7th edn, Cambridge University Press 2014) 693; James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007); Jan Klabbers and others (eds), *State Practice Regarding State Succession and Issues of Recognition/Pratique des États concernant la succession d'États et les questions de reconnaissance* (Kluwer Law International 1999); Eisemann and Martti Koskeniemi (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000); Krystyna Marek, *Identity and continuity of states in public international law* (Librairie Droz 1968); Daniel Patrick O'Connell, *The Law of State Succession* (Cambridge University Press 1956); Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 1; Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 2; Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff Publishers 1998); Ana Polak Petrič, 'Nasledstvo držav v mednarodnem pravu s posebnim poudarkom na članstvu Zvezne republike Jugoslavije v Organizaciji združenih narodov' (thesis, University of Ljubljana 2002); Mirjam Škrk, Ana Polak Petrič and Marko Rakovec, 'The Agreement on Succession Issues and some dilemmas regarding its implementation' (2015) 75 *Zbornik znanstvenih razprav* 213.
 - 2 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 2.
 - 3 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 (1978 Vienna Convention) art 2.
 - 4 ILC, 'Articles on Nationality of Natural Persons in relation to the Succession of States UN Doc A/RES/55/153 art 2.
 - 5 Institut du Droit International, 'State Succession in Matters of Property and Debts, Resolution' (2000–2001) 69 *Annuaire de l'Institut de Droit international* 712 (IDI Resolution on State Succession to Property and Debts).
 - 6 Opinions of the Arbitration Commission of the Conference on Yugoslavia (1992) 31 *International Legal Materials* 1494 (Badinter Commission), Opinion No 1(e).
 - 7 Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987) para 201 point c.
 - 8 International Law Association, 'Aspects of the law of state succession, Final Report—Part 1, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008' (ILA 2008) 250, 347.

Succession occurs when there is a change of sovereignty over a territory.⁹ That is, any passage of territory from one State to another constitutes a succession of States.¹⁰ Territorial changes and, thus, the succession of States take several forms and are broadly divided into two groups: succession with one successor State continuing the legal personality of the predecessor State and succession without such continuity. Both are the subject of this book and are discussed in the next chapter.

In this respect, the terms *state continuity* and *state succession* are used in English terminology.¹¹ The latter term has both a broader and a narrower meaning; the broader term is identical to the one used in the Vienna Conventions and other aforementioned documents, whereas the narrower term describes the succession of States without continuity of the legal personality of the predecessor State. This book uses the term “state succession” in its broader sense.

The book also adopts the definitions of the two Vienna Conventions for the terms “predecessor State” and “successor State.” A predecessor State is a State “which has been replaced by another State on the occurrence of a succession of States,”¹² and a successor State is a State “which has replaced another State on the occurrence of a succession of States.”¹³ However, the Vienna Conventions do not specifically define the successor State that, in the case of succession by continuity, continues the legal personality of the predecessor State, which has undergone changes in territory and population. The Conventions refer to this State as the “predecessor State,” which is not legally controversial, but in the book, the State that continues the legal personality of its predecessor State after the succession will be referred to as the “continuator State” to contrast it with the State that existed until the moment of succession (“predecessor State”).

Although the process of decolonization is still relevant to a very limited extent,¹⁴ the book does not elaborate on the succession of the so-called “newly independent States,” a term used to describe States that emerged from former dependent territories as a result of decolonization. The process of succession of these States took place in a specific way and differed significantly from

9 Shaw, *International Law* (7th edn) (n 1) 695.

10 Badinter Commission (n 6) Opinion No 1(e).

11 See, e.g., Crawford, *The Creation of States in International Law* (n 1) 667; IDI Resolution on State Succession to Property and Debts (n 5) art 3.

12 1983 Vienna Convention (n 2) art 2.

13 *ibid.*

14 Today, there are seventeen *non-self-governing* territories in the world that have not (yet) gone through the decolonization process. United Nations, ‘Decolonization’ <<https://www.un.org/dppa/decolonization/en/nsgt>> accessed 26 February 2026.

succession in other forms. The book addresses the specificities of this arrangement when appropriate but does not discuss them in detail.

The Vienna Conventions set a very general definition of the “date of succession” as “the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.”¹⁵ The ILC has opted for a general definition because, in practice, different dates are chosen.¹⁶ The date of succession is in substance a *questio facti* and, when there are several successor States to a single predecessor State, may vary from one to the next because the date of succession is the date on which a successor State replaces its predecessor State, which may be varied.¹⁷

The book covers the succession of States, and not other subjects of international law (e.g., international organizations). It also does not deal with changes of governments of States, a concept that is often discussed together with succession but does not in itself affect it.¹⁸

15 1983 Vienna Convention (n 2) art 2; 1978 Vienna Convention (n 3) art 2.

16 Theoretically, it is possible to use the date of the declaration of independence, the date of international recognition, the date of the acquisition of effective authority over the territory, or the date of the signature of the treaty of succession, among others. Mirjam Škrk, ‘Date of the succession of states’ (2003) 53(2) *Zbornik Pravnog fakulteta u Zagrebu* 347. See, e.g., the deliberations of the Law Commission on the Formation of Finland at the end of the First World War: “It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. (...) It would appear that it was in May, 1918, that the civil war ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.” Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question (1920) *League of Nations Official Journal*.

17 Badinter Commission (n 6) Opinion No 11.

18 Rein Müllerson, ‘Law and politics in succession of states: International law on succession of states’ in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff Publishers 1998) 8.

State Formation and Elements of State Succession

The replacement of one State by another in responsibility for the international relations of a territory means that the territory in question falls under the jurisdiction of the other State. In the past, a State could also be created on *terra nullius*, that is, on territory that did not belong to any other State.¹ Today, there are almost no such territories left (with the possible exception of newly formed volcanic islands and Antarctica), which means that any future territorial changes are almost necessarily linked to State succession.²

With the exception of the transfer of part of a territory between two existing States (cession), the other types of succession are related to the creation of a new State, the disappearance of an existing one, or both. In this context, it is useful to give a quick overview of the concept of the creation of States.

1.1 The Origins of the State

The starting point for this reflection is the Convention on the Rights and Obligations of States (Montevideo Convention) adopted in Montevideo in 1933,³ which stipulates that “the state as a person of international law should possess the following qualifications: a. a permanent population, b. a defined territory, c. government, and d. capacity to enter into relations with the other states.”⁴ Once an entity fulfils these conditions, this should *ipso facto* mean

1 Benjamin L Ederington, ‘Property as a natural institution: The separation of property from sovereignty in international law’ (1997) 13(2) *American University International Law Review* 263, 274–297. For an overview of theories of State creation see Daniel Patrick O’Connell, ‘Recent problems of state succession in relation to new states’ (1970) 130 *Recueil des Cours*, Collected Courses of the Hague Academy of International Law 95, 104–115.

2 Malcolm Nathan Shaw, *International Law* (7th edn, Cambridge University Press 2014) 144.

3 Convention on Rights and Duties of States (International Conference of American States) (adopted 26 December 1933) 165 *LNTS* 19 (Montevideo Convention).

4 *Ibid* art 1. Similarly, Opinions of the Arbitration Commission of the Conference on Yugoslavia (1992) 31 *International Legal Materials* 1494 (Badinter Commission) Opinion No 1(1b): “The Committee considers (...) that the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a State is characterized by sovereignty.” Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987) para 201, 72: “Under International law, a state is an entity that has a defined territory

that a State has come into existence. The Badinter Commission also states that “the existence or disappearance of the State is a question of fact” and the effect of recognition is “purely declaratory.”⁵

To satisfy the first criterion, the population does not need to be large, but it must be permanent (Antarctica, therefore, does not satisfy it).⁶ To meet the second criterion, the entire boundary does not have to be precisely defined, as it may still be an object of disputes with neighboring States,⁷ but there must be some coherent territory that is clearly under the authority of the State⁸ (even though it may not be so at a particular moment).⁹ Crawford believes that the openness of the criterion of territory suggests that it is an integral part of the criteria of government and independence rather than a separate criterion.¹⁰ International law will therefore accept as a State an entity that has no clearly defined territory and, consequently, also population.¹¹

The territory and the population on this territory must be effectively governed by a political structure, but no particular level of sophistication of this structure is required.¹² International law does not specify the conditions for the extent of control, except that it must include the enforcement of law and order and the establishment of at least basic institutions.¹³ Marek points to the existence of a legal order, in particular a *basic normative order*, as a prerequisite for the emergence and existence of the State.¹⁴ The basic normative order differs between all States and is therefore supposed to represent an objective difference between them. The continuous existence of such an arrangement is also evidence of the continuous existence of the State.¹⁵ According to others,

and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”

5 Badinter Commission (n 4) Opinion No 1(1a).

6 Third Restatement (n 4) para 201 point c, 73.

7 *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep para 46, 32.

8 Shaw, *International Law* (7th edn) (n 2) 145.

9 James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 50.

10 *ibid.*

11 Krystyna Marek, *Identity and continuity of states in public international law* (Librairie Droz 1968) 163.

12 Shaw, *International Law* (7th edn) (n 2) 146. Similarly, Badinter Commission (n 4) Opinion No 1(1c): “[T]he form of internal political organization and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government’s sway over the population and the territory.”

13 Crawford, *The Creation of States in International Law* (n 9) 59.

14 Marek, *Identity and continuity of states in public international law* (n 11) 168.

15 *ibid.*

the above thought cannot be applied uniformly as there are cases in which a State has acquired a fundamental normative regime from another State or a relationship of dependence exists between States. One such case is Canada, whose constitution could be amended by the UK Parliament until 1982.¹⁶ Nevertheless, the existence of a legal order, which is of course based on a basic normative order, is undeniably a condition for the functioning and, thus, creation of a State. The existence of such an order is, in most cases, a good indicator of the independence of the State, which Marek mentions as the main criterion of statehood and identity based on Lauterpacht's reflections.¹⁷

The conditions for an existing State are less strict than for a newly created one. If the new State is created with the consent of the previous sovereign, a lower level of control is required.¹⁸ The existence of a State is not affected by temporary military occupation or internal rebellions,¹⁹ but in the case of succession, a greater degree of effective control over the political structure of the State is required.²⁰ From this condition follows a fourth, which is essentially based on the concept of "independence"—namely, the ability to enter into relations with other subjects of international law. This criterion depends on the independence of the State,²¹ which, according to Crawford, is even "the central criterion for statehood."²² In his opinion on the customs regime between Germany and Austria, Judge Anzilotti wrote:

[T]he independence of Austria (...) is nothing else but the existence of Austria (...) as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law.²³

16 Crawford, *The Creation of States in International Law* (n 9) 95.

17 Marek, *Identity and continuity of states in public international law* (n 11) 162–189.

18 Thomas Buergenthal and Sean D Murphy, *Public international law in a nutshell* (6th edn, West Academic Publishing 2019) 44.

19 Third Restatement (n 4) points 2 and 3, 74.

20 Crawford, *The Creation of States in International Law* (n 9) 59.

21 Shaw, *International Law* (7th edn) (n 2) 147.

22 Crawford, *The Creation of States in International Law* (n 9) 62.

23 *Customs Regime between Germany and Austria* (Individual Opinion by D Anzilotti) [1931] PCIJ A/B No 41, 57.

The Third Restatement defines the capacity to enter into relations with other States more broadly: an entity should become a State when its constitutional structure and its political, technical, and financial capacities enable it to enter into relations with other States.²⁴

The fourth criterion can be considered part of the third criterion, or the third and fourth criteria could be combined into one criterion. This route seems to have been followed by some authors who list only population, territory, and government among the criteria whose changes affect the identity and continuity of a State.²⁵

Despite their relative clarity, the Montevideo Convention criteria are often overlooked in practice as States fail to obtain international recognition despite meeting all of them.²⁶ The meaning of recognition is a matter of doctrinal divergence.²⁷ In practice, the rules of State recognition and the criteria for establishing a State are often confused.²⁸ This area is therefore further presented to shed light on the manner in which States are created.

24 Third Restatement (n 4) para 201 point e, 73.

25 See, e.g., Marek, *Identity and continuity of states in public international law* (n 11) 162; International Law Association, 'Aspects of the law of state succession, Final Report—Part I, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008' (ILA 2008) 250, 347; Sergei N Baburin, *Мир империи: Территория государства и мировой порядок [The World of Empires: The Territory of the State and the World Order]* (Издательство Юридический центр 2005) 15–20.

26 Ryal Wun, 'Beyond traditional statehood criteria: the law and contemporary politics of state creation' (2013) 26 *Hague Yearbook of International Law* 316–317.

27 For a more detailed analysis of the meaning of recognition, see, e.g., Jure Vidmar, 'Explaining the legal effects of recognition' (2012) 61(2) *International and Comparative Law Quarterly* 361; Jure Vidmar, 'South Sudan and the international legal framework governing the emergence and delimitation of new states' (2012) 47 *Texas International Law Journal* 541; Jean D'Aspremont, 'The International Law of Statehood: Craftsmanship for the elucidation and regulation of births and deaths in the international society' (2013) 29(2) *Connecticut Journal of International Law* 201; Thomas D Grant, 'Regulating the creation of states from decolonization to secession' (2009) 5(2) *Journal of International Law and International Relations* 11; Wun, 'Beyond traditional statehood criteria' (n 26) 316; Cedric Ryngaert and Sven Sobrie, 'Recognition of states: International law or realpolitik: The practice of recognition in the wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24(2) *Leiden Journal of International Law* 467; Olivier Ribbelink, 'State succession and the recognition of states and governments' in Jan Klabbers and others (eds), *State Practice Regarding State Succession and Issues of Recognition/Pratique des États concernant la succession d'États et les questions de reconnaissance* (Kluwer Law International 1999) 32–79.

28 Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger Publishers 1999) 83.

1.1.1 *Recognition of States*

Recognition is supposed to be purely declaratory in nature according to most of the international law doctrine.²⁹ However, States determine whether, in their view, there are objective grounds on which the State could be recognized; that is, they establish whether, in their opinion, the State exists at all.³⁰ Hence, the conditions that the international community cites for recognition may be regarded as conditions for the creation of a State, or they may act as auxiliary tools.

Following the political turbulence associated with the breakups of the Socialist Federal Republic of Yugoslavia (SFRY), the Union of Soviet Socialist Republics (USSR), and the Czechoslovak Federal Republic (Czechoslovakia or CSFR), the European Community adopted the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union. In these guidelines, the Community and its Member States stated that, while respecting the right to self-determination, they would recognize those *new States* that respected international law, guaranteed minority rights and the inviolability of boundaries, accepted all disarmament and nuclear non-proliferation obligations, and were prepared to resolve all succession issues peacefully. Finally, they added that they would not recognize *entities* that are the result of aggression.³¹ The distinction between “new States” and “entities” in the guidelines may be important. The guidelines suggest that the Community and its Member States do not deny the status of States to “new States” but merely condition their recognition. However, the wording by default denies the status of States to “entities” that could be created by the use of force.

Vidmar notes that the declaratory theory, according to which the creation of a State is a *fait accompli* merely by fulfilling the criteria of the Montevideo Convention,³² is followed in practice if the State is created in agreement with the State to which this part of the territory belonged before the succession (i.e.,

29 Badinter Commission (n 4) Opinion No 1(1a). Mälksoo wrote, “International law neither ‘created’ States nor influenced their creation considerably. It just accepted the birth and extinction of States as historical facts.” Lauri Mälksoo, ‘State identity: Deconstruction and functional splitting: The case of illegal annexations’ (2002) 7 *Austrian Review of International and European Law* 92. Danilo Türk, *Temelji mednarodnega prava* (2nd edn, GV Založba 2015) 222.

30 Third Restatement (n 4) para 201 point h, 74.

31 Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (1992) 31 *ILM* 1487.

32 Montevideo Convention (n 3) art 6: “The recognition of a state merely signifies that the state which recognises it accepts the personality of the other with all the rights and duties determined by international law.”

the continuator State) or if the predecessor State no longer exists (e.g., due to dissolution).³³

The separation of part of a territory without the consent of the continuator State inevitably brings the right of self-determination of peoples into conflict with the right to territorial integrity of the State.³⁴ In *Secession of Quebec*, the Supreme Court of Canada found that international law does not confer a right to secede without consent (so-called unilateral secession)³⁵ but held that “[t]he ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession.”³⁶ This undoubtedly points in the direction of the constitutive nature of recognition.³⁷ According to the Court, in deciding whether to recognize Quebec, States would also assess “the actions of Quebec and Canada.”

Related to the actions of the continuator State is the theory of *remedial secession*, which, weighing the relationship between the rights to self-determination and territorial integrity, argues that secession must be recognized if, prior to the date of succession, the continuator State had violated or restricted the right of a nation to self-determination to the extent that the only way to protect said nation is to separate part of its territory.³⁸ However, as pointed out by Crawford, this is only a theory, as evidenced by the case of the protection of the Kurds in Northern Iraq, in which no part of the country was partitioned despite humanitarian violations.³⁹ Succession without the consent of the continuator State could be “sanitized” by universal recognition by

33 Vidmar, ‘Explaining the legal effects of recognition’ (n 27) 375.

34 On the provisions on the right to self-determination, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 26/25 (XXV) (24 October 1970) states: “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in conformity with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

35 Similarly in Badinter Commission (n 4) Opinion No 2.

36 *Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996 (Secession of Quebec)* Canada Supreme Court Reports vol 2 (1998) 217, 296.

37 Vidmar, ‘Explaining the legal effects of recognition’ (n 27) 363–372; Wun, ‘Beyond traditional statehood criteria’ (n 26) 358.

38 Grant, ‘Regulating the creation of states from decolonization to secession’ (n 27) 43.

39 Crawford, *The Creation of States in International Law* (n 9) 403–404.

the international community, but it is not clear how many States are sufficient for such recognition, as illustrated by the cases of Kosovo⁴⁰ and Palestine.⁴¹ In practice, however, it is clear that without the consent of the continuator State, universal recognition will never happen.⁴²

Practice has also confirmed that a violation of *jus cogens* prevents the creation of a new State. Such cases include the declarations of independence of Southern Rhodesia and the Bantustans (racism and apartheid) and Manchuria and Northern Cyprus (use of force)⁴³ and the secessions of Crimea and other parts of Eastern Ukraine subsequently annexed by Russia, South Ossetia, and Abkhazia (violation of territorial integrity). A violation of *jus cogens* also prevents all other States from recognizing such a State.⁴⁴ The obligation not to recognize a State created by a violation of the prohibition of the use or threat of force is also enunciated in the Third Restatement.⁴⁵

As Vidmar underlines, practice shows that States do not recognize new States that have been created in violation of primary norms, in particular the violation of the principle of territorial integrity and the prohibition of the use of force.⁴⁶ This rule is consistent with the principle of *commodum ex injuria sua nemo habere debet* and is also referred to in the two Vienna Conventions on succession, which regulate only “succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.”⁴⁷

Thus, taking into account the rules for the recognition of States, the criteria for the creation of a State include the permanence and stability of its State structure, the willingness of the new State to respect international law,⁴⁸ a certain level of development, and a structured legal order that allows the State to

40 Vidmar, ‘Explaining the legal effects of recognition’ (n 27) 378–381.

41 Wun, ‘Beyond traditional statehood criteria’ (n 26) 337–340, 356.

42 Crawford, *The Creation of States in International Law* (n 9) 404.

43 Wun, ‘Beyond traditional statehood criteria’ (n 26) 349–350.

44 ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/10 (ARSIWA) art 41.

45 Third Restatement (n 4) para 202, 77.

46 Vidmar, ‘Explaining the legal effects of recognition’ (n 27) 381–386.

47 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 (1978 Vienna Convention) art 6; Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 3.

48 The Badinter Commission gave a qualified opinion on the recognition of Croatia on the grounds that the new constitution was incompatible with the conditions of international law. Badinter Commission (n 4) Opinion No 5(3).

function.⁴⁹ These criteria depend on the specific situation and thus vary from State to State, while the basic criteria set out in the Montevideo Convention remain the same in every case. It is therefore reasonable to classify the latter as the main criteria and all others as subsidiary criteria.

1.2 Succession

State formation and succession are also linked to the question of the derivativeness and originality of the rights of the successor State.⁵⁰ As the Vienna Conventions state, with succession, the successor State replaces the predecessor State in the responsibility for the international relations of the territory. The successor State, therefore, takes over the territory that belonged to the predecessor State before the date of succession. In the event of unification and incorporation, the successor State even acquires the entire territory of the predecessor State, and in case of dissolution, the entire territory of the predecessor State is divided among the successor States. The same applies *mutatis mutandis* in these three types of succession to the population of the predecessor State. Consequently, it is possible to speak of *de facto* continuity, which is also the basis for *de facto* succession to certain rights and obligations of the predecessor State.⁵¹ Nevertheless, the successor State does not succeed to the sovereignty of the predecessor State in the slightest.⁵² The sovereignty of the successor State, like that of all States, is original,⁵³ but this does not result in an instantaneous separation from all the obligations and rights of its predecessor.⁵⁴ This may also be because the change of sovereignty does not in any way affect the territory, population, and legal relations between them.⁵⁵ Some authors even consider that succession *presupposes* that the successor State will

49 Crawford, *The Creation of States in International Law* (n 9) 89–95.

50 Martti Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' in Pierre Michel Eisemann and Martti Koskenniemi (eds), *La succession d'États: la codification à l'épreuve des faits/State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000) 100–101.

51 Rein Müllerson, 'New developments in the former USSR and Yugoslavia' (1993) 33(2) *Virginia Journal of International Law* 299, 301–302.

52 Daniel Patrick O'Connell, *The Law of State Succession* (Cambridge University Press 1956) 8.
53 ILC, 'Third report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, ILC, 71st session' (2019) UN Doc A/CN.4/731 para 32, 9; O'Connell, *The Law of State Succession* (n 52) 8.

54 ILC, 'Third report by Pavel Šturma' (n 53) para 32, 9. See also Müllerson, 'New developments in the former USSR and Yugoslavia' (n 51) 493.

55 O'Connell, *The Law of State Succession* (n 52) 9.

also succeed to the obligations of the predecessor State related to the territory at hand.⁵⁶

The question of the identity and continuity of the State cannot be equated with that of the continuity of the succeeding matter and the related object of succession. The predecessor State has certain rights and obligations up to the moment when these are succeeded by the successor State. The Vienna Conventions and the IDI Resolution on State Succession to Property and Debts stipulate that, at the moment of passing, the rights of the predecessor State cease and the rights of the successor State arise.⁵⁷ Thus, the ILC and the IDI emphasize that succession is not a continuous transfer of rights from one State to another. The successor State does not exercise the rights of the predecessor State but acquires “its own rights” based on its own sovereignty.⁵⁸ Nevertheless, it is understandable that the successor State succeeds to a particular matter as it was immediately before the succession. Therefore, it succeeds to identical rights to an identical extent. Accordingly, a more appropriate definition of succession was chosen by the Third Restatement, which, instead of stating that rights “extinguish/arise” chose the phrasing “terminate/are assumed.”⁵⁹ This terminology emphasizes the ongoing transition of the subject matter of succession from the predecessor State to the successor State.

It is also worth pointing out that, based on the principle *nemo plus iuris ad alium transferre potest, quam ipse haberet*, fewer rights could theoretically pass to the successor State, but certainly not more. The scope of the rights succeeded to is thus limited by the rights held by the predecessor State.

56 Malcolm Nathan Shaw, ‘State succession revisited’ (1994) 5 Finnish Yearbook of International Law 35, 36.

57 See, e.g., 1983 Vienna Convention (n 47) art 9: “[t]he passing of State property of the predecessor State entails the *extinction of the rights* of that State and the *arising of the rights* of the successor State to the State property which passes to the successor State” (emphasis added). Institut du Droit International, ‘State Succession in Matters of Property and Debts, Resolution’ (2000–2001) 69 *Annuaire de l’Institut de Droit international* 712 (IDI Resolution on State Succession to Property and Debts) art 13 para 3: “The passage of State property from the predecessor State to the successor State implies the extinction of the rights of the former and the birth of those of the latter” (Translated by the present author).

58 PK Menon, *The succession of states in respect to treaties, state property, archives and debt* (The Edwin Mellen Press 1991) 91.

59 Third Restatement (n 4) para 208, 100: “When a state succeeds another state with respect to particular territory, the capacities, rights, and duties of the predecessor state with respect to that territory *terminate and are assumed* by the Successor State, as provided in §§ 209–10” (emphasis added).

Many rights and obligations based on international treaties remain in force in the event of succession; rights and obligations relating to property and archives are passed on, and there is a particularly strong link with the predecessor State's debts. Although there is no transfer of sovereignty, "the Successor State is entitled to exercise the rights of the Predecessor State and is obliged to discharge the predecessor's duties, because international law so directs."⁶⁰ Moreover, just as it is bound by customary international law, the successor State is also constrained by the existing reality of legal relations: it succeeds to at least enough rights and obligations to be able to act as a State in the international community.⁶¹

1.2.1 *Types of Succession*

The succession of States can be divided into two groups depending on the existence of a continuator State, that is, one that continues the legal personality of the predecessor State. The division is essential because the continuation of the legal personality of the predecessor State means that it is legally identical, and it makes sense that it is not affected by the succession as regards most of its consequences.

1.2.1.1 Succession with Continuing Legal Personality

In cases of succession with continuing legal personality, the predecessor State continues to exist after the date of succession but with a modified territory. The territory may be either reduced or enlarged, without this affecting the legal personality of the predecessor State (the continuator State after the date of succession). Since it is legally an identical State, it is not, in the strict sense, a successor; it retains all the rights and obligations that existed before the succession, with the exception of those that can no longer exist in substance as they are intrinsically linked to the territory that is no longer part of it. However, some of the rights and obligations will also be succeeded to by the other successor State, which means that both States will be affected by the succession, one gaining and the other losing rights and obligations. Examples of such succession are the *separation* of part of a territory⁶² and the *cession* of part of a territory.

60 Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 1, 32.

61 Koskenniemi, 'Report of the Director' (n 50) 101.

62 In the past, the term *secession* was also used, but it is being abandoned in legal texts because of its political connotations. This book uses the terms "separation of a part of the territory" or "separation."

Separation describes situations when part of the territory of an existing State is separated from it and becomes a new State. Examples include the separations of Pakistan from India (1947), Montenegro from the State Union of Serbia and Montenegro (2006), and South Sudan from Sudan (2011). After separation, there is a continuator State (from which the territory was separated, e.g., Serbia and India) and a successor State (a new State created from the separated territory, e.g., Montenegro and Pakistan). In this context, a predecessor State is a State that existed before the date of succession (e.g., the State of Serbia and Montenegro or India up to the date of succession). A successor State is a new State that did not exist before the date of succession. The number of States is thus increased.

If the part that is being partitioned does not become a new State but is incorporated into another existing State, a *transfer of part of the territory (cession)* occurs. This type of succession was more common in the past, mainly in the form of a forceful annexation of part of another State. In the modern era, when the use of force is prohibited, forceful forms of succession are considered illegal and, as such, have no legal consequences for the sovereignty of a State over a territory. Consensual cessions include that of Alaska by the Russian Empire to the United States of America (1867). After the date of succession, there is a continuator State (from which the territory was separated) and a successor State (to which the territory was ceded). In this case, one could theoretically speak of two predecessor States (here, Russia and the US) up to the date of succession; however, as a rule, the term is used for the State by which the territory was ceded (in this case, the Russian Empire) as the succession changes will mainly affect the rights and obligations connected to this territory.

1.2.1.2 Succession without Continuing Legal Personality

The types of succession with no continuator State are *dissolution*, *unification*, and *incorporation*. While dissolution and unification are understandably cases of succession without continuation of the predecessor State's legal personality, incorporation poses a dilemma because the State to which the other State is incorporated retains its legal personality, while the State that is incorporated loses it. However, since most succession issues are related to the State that loses its legal personality, incorporation falls into this category.⁶³

63 The 1983 Vienna Convention and the Third Restatement also regulate incorporation and unification in the same article, and the IDI Resolution in the same paragraph. The doctrine also includes incorporation in the group of so-called *total succession*, see, e.g., O'Connell, *State Succession in Municipal Law and International Law* vol 1 (n 60) 373–383. Degan mentions another possible form of succession, which is not included in the work

What all three categories have in common is that the legal personality of the State that existed until the date of succession is extinguished by succession. At the same time, in the case of dissolution and unification, States are created that did not exist before the succession.

With *unification*, two or more independent States are brought together to form a new State. Examples include Egypt and Syria merging into the United Arab Republic (1958) and Tanganyika and Zanzibar merging into Tanzania (1964). In a mirror image, in a *dissolution*, an existing State breaks up into two or more parts, all of which constitute new States. The number of States increases by at least one, all new States are successor States, and the predecessor State ceases to exist after the date of succession. Examples from modern practice are the dissolutions of Yugoslavia into five successor States (1991–1992) and Czechoslovakia into two successor States (1993). In the case of *incorporation*, the entire existing State is incorporated into another State in such a way that the latter continues its own legal personality while the former's legal personality is extinguished. This form of succession (like cession) has also been associated with hostile invasions in the past, but in modern practice, the most famous case is the incorporation of the German Democratic Republic (GDR) into the Federal Republic of Germany (FRG) in 1990. In incorporation, only the continuator State exists after the date of succession. Again, there could theoretically be two predecessor States, but the term is used only for the State that has been incorporated.

The number of States increases in a separation of part of a territory and a dissolution, but in the former, one of the successor States will also be a continuator State, whereas this is not the case in the latter. With unification, a new State is created but several predecessor States are extinguished, so the total number of States is reduced. The only case in which the number of States before and after the date of succession is identical is cession. In both incorporation and cession, the so-called *moving frontier principle* is applied as the legal personality of the State that has acquired territory by incorporation or cession is extended to the newly acquired territory. As a general rule, all the rights and

of the ILC, ILA, and IDI, but which is interesting nonetheless: "partition" occurs when several (usually stronger) States divide the entire territory of a (usually weaker) State. The latter ceases to exist, while the former gains territory. Thus, partition is, from the point of view of the weaker State, a hybrid between dissolution and cession, and from the point of view of the larger States, a hybrid between cession and incorporation. Degan cites as examples the partition of Poland between Prussia, Austria, and Russia in 1795 and the (short-lived) partition of Poland between Germany and the Soviet Union during the Second World War. Vladimir-Djuro Degan, 'State succession, especially in respect of state property and debts' (1993) 4 Finnish Yearbook of International Law 130, 133.

obligations of this State are extended to the new territory, as if the frontiers had merely shifted. It is also possible for several different forms of succession to follow each other over a period of time—for instance, a unification may be followed by a dissolution (e.g., United Arab Republic), or a dissolution might be followed by further separations from one of the successor States (e.g., separations of Montenegro and Kosovo from one of the successor States of the former Yugoslavia).

In the absence of succession agreements, the decision on how to resolve outstanding succession issues depends, *inter alia*, on the factual situation, the relevance of the intervening period, and the changes applied.

1.2.2 *Scope of Succession and Links with the Successor State*

As for the scope of succession, three approaches are theoretically possible: the successor State succeeds to none, all, or some of the rights and obligations.⁶⁴ The first option relates to the so-called *clean-slate rule* (or *tabula rasa*), by which a State succeeds to none of the rights and obligations of its predecessor State. This option is extremely rare in practice and has been linked almost exclusively to the period of decolonization. The “newly independent States,” in particular as regards succession to treaties, took the view that they were not bound by any obligations arising from the treaties concluded by the colonizing States. The clean-slate rule also applies to so-called *odious debts*.⁶⁵ In almost all other cases, the object of succession is succeeded to either in whole or in part.

As shown in the following sections, in succession to each matter, the greatest difference arises between the general and special parts. In each matter of succession, a special part can be identified, which is subject to rules of succession that are completely different from the rest. The special part has a specific link to one of the constitutive elements of the predecessor State—either the territory, the population, or the government. Practice has shown that this special link gives rise to separate successions depending on which successor State succeeds to the constituent element of the predecessor State. The part of the matter with a special connection is therefore usually succeeded to in its entirety, while succession to the general part distinguishes between succession with the continuation of the legal personality of the predecessor State (i.e., the continuator State in its entirety) and succession without continuation (i.e., the equitable share rule). Because of the importance of the constituent element of the State, a special connection with it gives rise to a deviation from

64 Matthew CR Craven, ‘The Problem of State Succession and the Identity of States under International Law’ (1998) 9(1) *European Journal of International Law* 142, 147–152.

65 For more details on odious debts, see 4.2. *Types of debt*.

the otherwise normal rule of succession. Practice also indicates that the rules that have reached the level of customary international law are usually linked precisely to succession to a special part.

For example, State property that has a special link to a population and its culture (i.e., cultural heritage objects) is exclusively succeeded to by the successor State whose population and culture are linked to it.⁶⁶ Property with a special link with the territory (e.g., immovable property) shall also fall in its entirety to one successor State.⁶⁷ Successor States succeed to the archives that are indispensable for the functioning of their governments—the *principle of functionality*—in their entirety, as well as to treaties (in the context of archives) that relate to the territory of only one State.⁶⁸ The same can be said of the linkage of certain debts (so-called allocated debts) to one of the successor States because the funds acquired were used only on its territory: these debts belong entirely to said successor State.⁶⁹ Due to the contiguity of the national boundary of one of the successor States, succession to the national boundary occurs only with respect to this successor State.⁷⁰ Practical examples are presented in detail in the following chapters.

66 See, e.g., IDI Resolution on State Succession to Property and Debts (n 57) art 20(1).

67 See, e.g., Third Restatement (n 4) para 209, 102–103.

68 See, e.g., 1983 Vienna Convention (n 47) art 14(2) (cession), art 15(1) (new independent State), art 17(1) (separation), and art 18(1) (dissolution).

69 See, e.g., 1983 Vienna Convention (n 47) art 37, 40, and 41.

70 See, e.g., 1978 Vienna Convention (n 47) art 11 and 12.

Succession to State Property

2.1 Definition of State Property

The 1983 Vienna Convention defines the State property of the predecessor State as “property, rights and interests which, at the date of the succession of States, were, according to the internal law of the Predecessor State, owned by that State.”¹ This definition reflects customary international law.²

Under the Convention, the internal law of the predecessor State is relevant to the definition of State property. The IDI added that such legislation must be in accordance with international law.³ The Badinter Commission does not mention compliance with international law for the assessment of ownership but, like the Convention, limits itself to an internal law assessment.⁴ At this point, it is interesting to note that the Agreement on Succession Issues concluded by the successor States of the former Yugoslavia provides that international law is to be applied to determine whether a property is State property.⁵ This provision is problematic because international law does not usually offer answers to this question,⁶ as also noted by the ILC⁷ and the ILA.⁸ Additionally,

1 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 8.

2 Malcoln Nathan Shaw, *International Law* (7th edn, Cambridge University Press 2014) 715; James R Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 430.

3 Institut du Droit International, ‘State Succession in Matters of Property and Debts, Resolution’ (2000–2001) 69 *Annuaire de l’Institut de Droit international* 712 (IDI Resolution on State Succession to Property and Debts) art 12 para 1.

4 Opinions of the Arbitration Commission of the Conference on Yugoslavia (1992) 31 *International Legal Materials* 1494 (Badinter Commission) Opinion No 14(5).

5 Agreement on Succession Issues (adopted 29 June 2001) *Official Gazette of the Republic of Slovenia* No 71/2002, annex A art 6.

6 Shaw, *International Law* (7th edn) (n 2) 715.

7 ILC, ‘Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries’ (1981) UN Doc A/36/10 (Commentary on the 1983 Vienna Convention) para 4, 25.

8 International Law Association, ‘Aspects of the law of state succession, Final Report—Part I, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008’ (ILA 2008) 250, 329. On the question of monism and dualism in international and domestic law in the field of State succession, see, e.g., Vladimir-Djuro Degan, ‘State succession, especially in respect of state property and debts’ (1993) 4 *Finnish Yearbook of International Law* 130, 172. Degan points out that in the field of State succession, the dualistic approach is the only sensible one.

neither of these works distinguishes between State property in the sense of *public* domain and *private* domain.⁹

The relevant law is the law of the predecessor State, not the successor State(s), even if there is a continuator State among them—that is, the law as it existed on the date of succession. State property is defined as property, rights, and interests in property, both movable and immovable (on the territory of the predecessor State as well as abroad) that belonged to the predecessor State.¹⁰

The definition of “State property” is also relevant in the context of the property of *territorial units* (e.g., a federal republic or a city) and legal persons governed by public law. Property owned by a territorial unit at the date of succession is not State property and, as such, is not subject to succession given that it is not owned by the predecessor State. However, this does not mean that this property disappears. In accordance with the *principle of acquired rights*, the property of territorial units remains with these territorial units after the date of succession. The property of the territorial unit will therefore not be shared among all the successor States and will remain its own.

Similarly, the property of public-law legal persons performing public functions (e.g., a public undertaking) must be distinguished from that of private-law legal persons, even if they were created with public funds or were owned by the predecessor State at the time of succession. The property of the latter is not State property,¹¹ which was also underlined by the Badinter Commission.¹²

2.2 Principles and Rules for Succession to State Property

ILA confirmed that “the practice concerning state property was homogeneous in all cases of succession preceding the conclusion of the Convention of 1983, what is very rare.”¹³ This shows that the predecessor State’s property is

9 For a detailed discussion of the difference between these concepts, see Daniel Patrick O’Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 1, 199–204; PK Menon, *The succession of states in respect to treaties, state property, archives and debt* (The Edwin Mellen Press 1991) 77–78.

10 On succession to funds in bank accounts abroad, succession to diplomatic representation abroad, and ownership of works of art abroad, see, e.g., August Reinisch and Peter Bachmayer, ‘The Identification of Customary International Law by Austrian Courts’ (2012) 17 *Austrian Review of International and European Law* 1, 21–30.

11 IDI Resolution on State Succession to Property and Debts (n 3) art 12(2).

12 Badinter Commission (n 4) Opinions No 14(5), (6), and (7).

13 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 328.

succeeded to directly on the basis of international law.¹⁴ It is possible to highlight certain rules and principles that have been developed in practice and doctrine.

2.2.1 *Immutability of the State Property*

As regards the effects of succession to property, the 1983 Vienna Convention provides: “The passing of State property of the predecessor State entails the extinction of the rights of that State and the arising of the rights of the successor State to the State property which passes to the successor State.”¹⁵ This means that the successor State succeeds to identical rights, which are extinguished for the predecessor State. There are, however, separate and rare cases where the successor State succeeds to property in a different form than that “lost” by the predecessor State. Such is the case of the succession to the mines in the historically disputed Saar basin, where France succeeded to the property “free and clear of all debts and charges.”¹⁶ This type of clause is very rare as it also interferes with the rights of third parties, contravening the principle of *pacta tertiis nec nocent nec prosunt*, but peace treaties do occasionally include clauses based on historical events.

Succession to property without any encumbrances in rem (or other rights of the third party) existing at the date of succession could also violate the principle of *nemo plus iuris ad alium transferre potest quam ipse habet*: If the property acquired by the successor State ceases to be encumbered as a result of the succession, the successor State has succeeded to more than the predecessor State had. The extent of the rights succeeded to would thus be increased by the succession, which is *prima facie* contrary to this principle.

2.2.2 *Preservation and Safety of State Property*

The rule of preservation and safety of State property subject to succession is less relevant with regard to property situated on the territory of the successor State at the date of succession since this property is protected by the successor State itself. It is more relevant as concerns property abroad, both immovable and movable. The State in possession of the property in question is under obligation to take all appropriate measures to prevent damage to or destruction of the property. The 1983 Vienna Convention imposes the duty to safeguard

14 *ibid* 329.

15 1983 Vienna Convention (n 1) art 9.

16 Treaty of Peace between the Allied and Associated Powers and Germany (with amendments) and other treaty engagement (adopted 28 June 1919) (1925) His Majesty’s Stationery Office 1 (Treaty of Versailles) annex to art 50, ch 1 para 4.

the property only on the predecessor State,¹⁷ although it is more reasonable that all States (i.e., also third States) on whose territory the property of the predecessor State is situated at the date of succession have this duty. The IDI seems to have included other States in the duty to protect by using the term “the States concerned.”¹⁸

2.2.3 *Passing of State Property without Compensation*

The successor State succeeds to the property of the predecessor State without compensation, subject to any other agreement between the States concerned. An international tribunal may also decide otherwise.¹⁹ This rule is almost without exception confirmed by practice.²⁰ The IDI adds that to respect the fair share rule, compensation may also be agreed upon,²¹ particularly in relation to succession to debts.²² The possibility of a compensation arrangement is mentioned by the 1983 Vienna Convention in the case of the separation of part (or parts) of a territory and in that of the dissolution of a State.²³

2.2.4 *Irrelevance of the Method of Acquisition of the Property*

In succession to State property, in accordance with the principle of *locus in quo*, the manner in which the property was acquired and financed is irrelevant, and succession to State property is not affected by any loans and payments made on the property.²⁴ The same rule was established by the IDI.²⁵ However, the way in which a specific asset is financed affects another matter of succession: debts (so-called allocated debts). For succession to property, it is only relevant that the property belongs to the predecessor State at the date of succession.²⁶

17 1983 Vienna Convention (n 1) art 13 (Preservation and safety of State property): “For the purpose of implementing the provisions of the Articles of this Part, the predecessor State shall take all measures to prevent damage to or destruction of State property which, in accordance with these provisions, passes to the Successor State.”

18 IDI Resolution on State Succession to Property and Debts (n 3) art 18.

19 1983 Vienna Convention (n 1) art 11.

20 Commentary on the 1983 Vienna Convention (n 7) 27.

21 The term “compensation” in this case should not be understood in the context of the law of State responsibility (as a form of reparation).

22 IDI Resolution on State Succession to Property and Debts (n 3) art 7.

23 1983 Vienna Convention (n 1) art 17 and 18.

24 Badinter Commission (n 4) Opinion No 14(3–4).

25 IDI Resolution on State Succession to Property and Debts (n 3) art 16(4).

26 Stefan Oeter, ‘State succession and the struggle over equity: Some observations on the laws of state succession with respect to state property and debts in cases of separation and dissolution of states’ (1995) 38 German Yearbook of International Law 73, 94.

2.2.5 *Principle of Special Connection*

The principle of special connection, or the linking of property to the successor State, provides that property connected to the activities of one of the successor States is succeeded to by said successor State. It is the overarching principle that encompasses other established principles. The connection between the property and the successor State may be purely geographical (e.g., *principle of provenance*) or may arise from a different basis (e.g., *principle of functional pertinence*). Disregard for this principle may constitute a breach of the principle of good faith and the principle of equity.²⁷

2.2.6 *Principle of Equity*

The principle of equity is a basic rule covered by all relevant articles of the special part of the 1983 Vienna Convention²⁸ and is also included in the IDI Resolution on State Succession to Property and Debts.²⁹ It is also a basic element for the interpretation of the provisions of the 1983 Vienna Convention and can be defined as “the governing principle of the Convention or (...) the result sought after.”³⁰ According to the Convention, property not succeeded to under other rules passes to the successor States on the basis of equitable proportions, and equitable compensation may be determined.³¹ The Convention does not define “equity,” leaving its determination to the States themselves.³² This principle applies to all areas of the Convention, including archives and debts.

The importance of equity, fairness, and fair share has also been recognized by the Badinter Commission, which identified “*equitable outcome*” as a primary

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27 Commentary on the 1983 Vienna Convention (n 7) 30; Rudolf Streinz, ‘Succession of States in assets and liabilities—a New Regime: The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts’ (1983) 26 *German Yearbook of International Law* 198, 227.

28 1983 Vienna Convention (n 1) art 17, 18, 31, 37, 40, and 41 of 1983.

29 E.g., IDI Resolution on State Succession to Property and Debts (n 3) art 7, 8, and 11.

30 Martti Koskenniemi, ‘Report of the Director of Studies of the English-speaking Section of the Centre’ in Pierre Michel Eisemann and Martti Koskenniemi (eds), *La succession d’États: la codification à l’épreuve des faits /State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000) 91. On the importance of the principle of equity, see also Carsten Stahn, ‘The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia’ (2002) 96(2) *American Journal of International Law* 379, 383–384; Degan, ‘State succession, especially in respect of state property and debts’ (n 8) 188–192; and works devoted entirely to the subject: Oeter (n 26); Vladimir-Djuro Degan, *L’Équité et le droit international* (Martinus Nijhoff Publishers 1970; Christopher R Rossi, *Equity and international law: a legal realist approach to the international decisionmaking* (Transnational Publishers 1993).

31 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 333.

32 *ibid.*

objective of the succession to the rights and obligations of the former SFRY.³³ It has stated that achieving an equitable outcome is the main concern of the succession negotiations³⁴ and that equality of rights and obligations must be fully respected.³⁵

The 1983 Vienna Convention provided that equity and fair share should also be taken into account in the overall succession balance sheet in relation to all rights to and legal benefits of the obligations (especially debts) acquired by the successor State.³⁶ The articles of the Convention “do not require that each category of assets or liabilities be divided in equitable proportions but only that the overall outcome be an equitable division.”³⁷ Thus, “the result of the apportionment of property and debts must be equitable.”³⁸ Where equity is not achieved, it is necessary to attain it by other means—for instance, by surrendering some property or through financial compensation.³⁹

2.3 Types of State Property

The 1983 Vienna Convention⁴⁰ and the IDI Resolution⁴¹ divide State property into several categories: a) immovable property on the territory of the successor State, b) immovable property abroad (i.e., in third countries), c) movable property with a specific link to one of the successor States, and d) movable property without the link referred to in c).

The succession to immovable property by the successor State in whose territory it is located is one of the rules of customary international law.⁴² It can be found, for example, in the treaties on the cession of Louisiana by France (1803) and of Alaska by Russia (1867).⁴³ Among more recent treaties, this provision is included in the Agreement on Succession Issues of Yugoslavia.

33 See Badinter Commission (n 4) Opinions 9, 12, and 14.

34 *ibid* Opinion No 9(2) para 2.

35 *ibid* Opinion No 9(4) para 3.

36 See, e.g., 1983 Vienna Convention (n 1) art 40 and 41.

37 Badinter Commission (n 4) Opinion No 13(2).

38 IDI Resolution on Succession of States in respect of State Assets and Debts art 8(1).

39 *ibid* art 16(3).

40 1983 Vienna Convention (n 1) art 14–18.

41 IDI Resolution on State Succession to Property and Debts (n 3) art 19 and 20.

42 Degan, ‘State succession, especially in respect of state property and debts’ (n 8) 166; Malcolm Nathan Shaw, ‘State succession revisited’ (1994) 5 *Finnish Yearbook of International Law* 35, 88; Badinter Commission (n 4) Opinion No 14(3).

43 O’Connell, *State Succession in Municipal Law and International Law* vol 1 (n 9) 204.

In the case of succession with continuing legal personality, immovable property abroad generally remains with the continuator State⁴⁴ and is taken into account in the calculation of the equitable share.⁴⁵ For succession without continuing legal personality, it is distributed to the successor States in an equitable share (dissolution) or in whole (unification, incorporation).⁴⁶

The special link of one of the successor States with the movable property may be based on a geographical connection or cultural, historical, scientific, or other links. The Third Restatement established a simple geographical link by which a successor State succeeds to movable property located on its territory,⁴⁷ whereas the 1983 Vienna Convention sets as a basic criterion a connection “with the activity of the predecessor State in respect of the territory to which the succession of States relates.”⁴⁸ This is the *principle of functional pertinence*. The IDI chose an intermediate option, providing that the successor State succeeds to property that is “closely connected to a territory” it acquires⁴⁹ as well as property that is connected “to the activity of the predecessor State in relation to the territory to which the succession relates.”⁵⁰

The IDI also stipulates that the link can be based on cultural heritage: the successor State also succeeds to property of significant importance to its cultural heritage that originates from the territory it succeeds to.⁵¹ The IDI and State practice after the First World War also provide for a link based on cultural heritage in addition to a geographical connection.⁵² The cultural link relies on the nationality of the author, the link between the object (property) and the history of the nation, and other similar bases.⁵³

44 Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987) para 209 point 1, 105; IDI Resolution on State Succession in respect of State Assets and Debts art 19.

45 IDI Resolution on State Succession to Property and Debts (n 3) art 19 point 4.

46 *ibid* art 19 point 3.

47 Third Restatement (n 44) 102–103.

48 1983 Vienna Convention (n 1) art 14(2) (cession), art 15(1) (new independent State), art 17(1) (separation), and art 18(1) (dissolution).

49 IDI Resolution on Succession of States in respect of State Assets and Debts art 16(1).

50 *ibid* art 20(1). This provision is identical to the aforementioned provision of the 1983 Vienna Convention.

51 IDI Resolution on State Succession to Property and Debts (n 3) art 16(5).

52 Andrzej Jakubowski, ‘Territoriality and state succession in cultural heritage’ (2014) 21(4) *International Journal of Cultural Property* 375, 380–382.

53 *ibid* 380. See also Grega Pajnkihar (ed), *Sporazum o vprašanjih nasledstva—15 let pozneje / Agreement on Succession Issues—15 Years Later* (Ministrstvo za zunanje zadeve Republike Slovenije 2016) 21: Slovenia included works by authors of Slovene nationality among its claims for succession to cultural heritage objects.

2.3.1 *Determining the Special Part of Succession to State Property*

A special part of the succession concerns property that has a special link with the successor State. The special link may arise from a geographical or other connection. Because of the geographical link, immovable property situated on the territory of the successor State and cultural heritage linked to its territory and national identity must be included in this part.

The general part includes other property, together with all forms of rights and legal benefits of a kind that can be divided. This includes the financial property of the predecessor State and, as a general rule, property abroad. The general part is succeeded to differently, mainly influenced by the existence of a continuator State, and practice is divided. As a general rule, however, this property remains with the continuator State or, in the absence of one such State, is distributed proportionally among the successor States (dissolution) or succeeded to by the successor State (unification and incorporation).

2.4 State Practice with Continuing Legal Personality

Examples of such succession are the *separation* of part of a territory and the transfer of part of a territory (*cession*). A third example is the so-called “newly independent States,” which emerged in the process of decolonization and which are not discussed in this book.

2.4.1 *Separation of Part or Parts of a Territory*

In the event of the separation of part or parts of a territory, the continuator State continues the legal personality of the predecessor State. As it is legally an identical State, the consequences of succession for this State are understandably minimal. Therefore, as a rule, a successor State formed from a part that has separated from the parent State will succeed only to property that has a special connection with it by virtue of the *principle of special connection*. This usually includes immovable and movable property situated on its territory and cultural heritage.

The 1983 Vienna Convention provides that the successor State (i.e., the separated part) succeeds to the immovable property situated on its territory, the movable property connected with its activities, and other movable property in an equitable proportion.⁵⁴ The Convention does not mention immovable property abroad, which means that it remains the property of the continuator

54 1983 Vienna Convention (n 1) art 17.

State.⁵⁵ The IDI has made similar provisions (immovable property on the territory, movable property specifically connected with the activity of the predecessor State, and equitable distribution of the remaining movable property),⁵⁶ but then added two provisions not covered by the Convention. The first—according to which, in the event of separation, immovable property abroad “remains, in principle, the property of the predecessor State”⁵⁷—is substantively identical to the Convention, which simply does not define this because it is understandable and logical. However, the second provision is where the IDI Resolution on State Succession to Property and Debts and the Convention differ; namely, the Resolution provides that the aforementioned rule with respect to immovable property abroad also applies *mutatis mutandis* to movable property abroad.⁵⁸

2.4.1.1 State Practice before the two World Wars

The second half of the 19th century was marked by the emergence of a united Germany and Italy and three European Congresses. After the end of the Russo-Turkish War, the Congress of Berlin was convened in 1878, following the Congresses of Paris (1856) and London (1871). The final agreement concluded in Berlin (Treaty of Berlin)⁵⁹ derogated from most of the articles of the Treaties of Paris and London concerning the separation of parts of a territory and cessions.

At the Congress of Berlin, it was decided to grant Bulgaria broad autonomy within the Ottoman Empire.⁶⁰ At the same time, while its territory was redefined, Bulgaria did not gain independence by this act;⁶¹ thus, we cannot speak of a separation of part of its territory.⁶² For the first time, however, Montenegro

55 *ibid.* This article has the unusual provision that it also regulates cases in which a part is separated from the territory of a State “and united with another State,” which is the case of cession. However, cession is regulated in Article 14, which does not, for example, mention succession to movable property in an equitable share.

56 IDI Resolution on Succession of States in respect of State Assets and Debts art 19(1) and 20(1–3).

57 *ibid.* art 19(4), which adds: “Nevertheless, Successor States have the right to an equitable apportionment of the property of the predecessor State situated outside its territory.”

58 *ibid.* art 20(4).

59 Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East (adopted 13 July 1878) (1908) 2 AJIL 401 (Treaty of Berlin).

60 *ibid.* art 1.

61 It was not granted until 1908.

62 Oppenheim, meanwhile, states that Bulgaria was also recognized at the Berlin Congress. Lassa Francis Lawrence Oppenheim, *International law: A treatise* (Longmans, Green and Co 1912) vol 1, 118.

and Serbia were formally recognized.⁶³ They had already enjoyed very broad autonomy within the Ottoman Empire before 1878 but were still *de jure* part of the Ottoman State.⁶⁴ Their creation was therefore the result of a separation of part of their territory from the Ottoman Empire, but the Treaty of Berlin states that the succession associated with these two States is related to “the new territories assigned to her” by the Treaty.⁶⁵ In this case, it is disputed whether the succession is linked to the cession of territory or the separation of part of the territory. Yet, the more reasonable interpretation is that it is linked to a separation accompanied by minor cessions. The Treaty of Berlin also recognized Romania as an independent State (alongside Montenegro and Serbia), with some provinces added and some subtracted from its territory.⁶⁶

The Treaty of Berlin (1878) is very scarce on the issue of succession to State property. As regards the succession to State property by Serbia and Montenegro, it merely stipulates that two special commissions (Turkish-Serbian⁶⁷ and Turkish-Montenegrin⁶⁸) will be set up within three years to decide on the issue. However, they never were. Given the political situation that prevailed in the Balkan Peninsula up to the First World War, it is not surprising that the establishment of the commissions did not take place. The succession to State property linked to Romania is not mentioned in the Treaty of Berlin.

There were several other succession events leading up to the First World War, such as the Balkan Wars. The London Peace Conference of May 30, 1913, confirmed the separation of Crete⁶⁹ and Albania⁷⁰ from the Ottoman Empire. The cession of Crete to Greece and the independence and boundaries of Albania were confirmed later.

63 Treaty of Berlin (n 59) art XXVI and XXXIV.

64 Four months earlier, the Ottoman and Russian Empires had concluded the Treaty of San Stefano, which recognized, inter alia, the independence of Montenegro, Serbia, and Romania. However, the treaty concluded at the Berlin Congress superseded most of the substantive articles of the Treaty of San Stefano. The most significant changes concerned the “Greater Bulgaria” created by the Treaty of San Stefano, which was divided into three parts at the Berlin Congress. Preliminary Treaty of Peace between Russia and Turkey (adopted 9 February/3 March 1878) (1908) 2 AJIL 387 (Treaty of San Stefano).

65 Treaty of Berlin (n 59) art XXXIII and XLII.

66 *ibid* art XLIII–XLV.

67 *ibid* art XXXIX.

68 *ibid* art XXX.

69 Treaty of Peace between Turkey and the Balkan Allies (Bulgaria, Greece, Montenegro, Serbia) (adopted 30 May 1913) 8 AJIL 12 art 4.

70 *ibid* art 3.

2.4.1.2 Peace Treaties after the First World War

The First World War was followed by successions in other European countries.⁷¹ After the Paris Peace Conference, the peace treaties led to the separation of parts of the territories and cessions. The Treaty of Saint-Germain-en-Laye (September 10, 1919)⁷² saw Austria lose territories to Poland, Czechoslovakia, Romania, and the State of Serbs, Croats and Slovenes.⁷³ With the Treaty of Versailles (June 28, 1919),⁷⁴ Germany lost territories to, among others, Poland, Belgium, France, and Japan. With the Treaty of Trianon (June 4, 1920),⁷⁵ Hungary lost territories to Poland, Czechoslovakia, Romania, and the State of Serbs, Croats and Slovenes. The Treaty of Neuilly-sur-Seine (November 27, 1919)⁷⁶ had Bulgaria lose territories to the Kingdom of Serbia, Romania, and Greece. The Treaty of Sèvres (August 10, 1920)⁷⁷ with Turkey, which was not implemented, was followed only three years later by the Treaty of Lausanne (July 24, 1923),⁷⁸ which fixed the boundaries with Bulgaria, Greece, Syria, and Iraq. Iraq, Palestine, and Transjordan immediately became mandates of the United Kingdom and Syria and Lebanon mandates of France. These countries only gained their independence after the Second World War based on inter-war agreements with the countries administering the mandate. In the Arabian Peninsula, by the end of the First World War, Hedjaz separated from the Ottoman Empire and was annexed by the newly formed (nascent) Saudi

71 See also Ernst H Feilchenfeld, *Public debt and state succession* (The Macmillan Company 1931).

72 Treaty of Peace between the Allied and Associated Powers and Austria (with amendments) and other treaty engagements (adopted 10 September 1919) (1921) His Majesty's Stationery Office 1 (Treaty of Saint-Germain-en-Laye).

73 The name "State of Serbs, Croats and Slovenes" is used for the new State in the treaty adopted after the First World War and, in substance, meant the Kingdom of Serbs, Croats and Slovenes.

74 Treaty of Versailles (n 16).

75 Treaty of Peace Between the Allied and Associated Powers and Hungary and Protocol and Declaration (adopted 4 June 1920) 15 AJIL 1 (Treaty of Trianon).

76 Treaty of Peace between the Allied Powers and Bulgaria and Protocol (adopted 27 November 1919) 14 AJIL 185 (Treaty of Neuilly-sur-Seine).

77 Treaty of Peace between the Allied Powers and Turkey (adopted 10 August 1920) 15 AJIL 179 (Treaty of Sèvres).

78 Treaty of peace with Turkey, and other instruments (adopted 24 July 1923) together with Agreements between Greece and Turkey (adopted 30 January 1923) and subsidiary documents forming part of the Turkish Peace Settlement (1923) His Majesty's Stationery Office 1 (Treaty of Lausanne).

Arabia as early as 1925, and Yemen also separated from the Empire during this period.⁷⁹

The end of the First World War coincided with the independence of Armenia, Georgia, Azerbaijan, and other States, which were then annexed by the Soviet Union shortly afterwards (1920). Conversely, Russia signed peace treaties recognizing the independence of Estonia, Latvia, Lithuania, Finland, and Poland.⁸⁰ Their agreements are therefore also presented below.

The changes after the First World War brought both separations and cessions, as well as combinations of both (e.g., Poland regained its independence by acquiring territories from Germany, Austria-Hungary, and Russia). The independence of some States (e.g., the State of Slovenes, Croats, and Serbs) lasted for a very short period, and these cases have been seen by some as cessions rather than separations.⁸¹ The cessation of the Ottoman Empire and the

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79 Among these territories, Hejaz was the only party to the Treaty of Sèvres, whereby Turkey also recognized its independence (Treaty of Sèvres [n 77] art 98). However, it was not a party to the Treaty of Lausanne, which mentions it only in passing and not the other States (Yemen, Transjordan, and Palestine).

80 Andrzej Jakubowski, *State succession in cultural property* (Oxford University Press 2015) 80.

81 There are roughly three views on the succession associated with the establishment of the Kingdom of Serbs, Croats, and Slovenes. According to the first, the State of Slovenes, Croats and Serbs united with the Kingdom of Serbia. According to the second, it was incorporated to it. According to the third, it was not even created, but the territory of the Austro-Hungarian Empire, on which Slovenes, Croats, and Serbs had lived, was ceded to the Kingdom of Serbia after the First World War. See, e.g., 'Diplomatic note from the Chargé d'Affaires of the Kingdom of SHS Simitch to the US Foreign Office' (6 January 1919) in Green H Hackworth, *Digest of international law* (United States Government Printing Office 1943) vol 5 220: "In the reply to this address His Royal Highness the Crown Prince has proclaimed the Union of Serbia with the above mentioned independent State of Slovenes, Croats and Serbs into one single Kingdom: 'Kingdom of the Serbs, Croats and Slovenes.'"

On the other hand, after the First World War, a special arrangement was adopted for the territory of the Serbs, Croats, and Slovenes, which separated from Austria-Hungary at the end of 1918. This agreement was signed in Saint-Germain-en-Laye between the Principal Allies on the one hand and the State of Serbs, Croats, and Slovenes on the other. In the preamble, the contracting parties note that the Kingdom of Serbia acquired a large amount of territory since 1913 and that "the Serb, Croat and Slovene peoples of the former Austria-Hungarian Monarchy have of their own free will determined to unite with Serbia in a permanent union for the purpose of forming a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes," that the Prince Regent of Serbia and the government of Serbia agreed to this union, that the Kingdom of Serbs, Croats, and Slovenes was established as a consequence, and that it assumed sovereignty over all the territories of these peoples (Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State (adopted 10 September 1919) 14

Austro-Hungarian Empire, however, raises questions as to whether some of the successor States were also continuator States, that is, whether there was a dissolution or cessions and separations.

The Republic of Turkey, proclaimed on October 23, 1923, continued the legal personality of the Ottoman Empire and was thus a continuator State. Turkey itself also declared continuity.⁸²

Despite the fact that the Ottoman Empire lost almost 75% of its population and 85% of its territory between the Berlin Congress and the end of the First World War, there is still no question of dissolution.⁸³ Turkey's status as a continuator state was confirmed by the Treaty of Lausanne and the decision by PCIJ and the Permanent Court of Arbitration in cases regarding concession

AJIL 333). This formulation can be regarded as evidence of the incorporation of the State of Slovenes, Croats and Serbs to the Kingdom of Serbia. Yet, it is also possible to conclude that the Principal Allies took into account the fact that the State of Slovenes, Croats and Serbs existed only one month before the date of this succession and that in that time it had not yet managed to gain wider international recognition, let alone conclude international agreements.

Additionally, the *Serbian Loans* case heard by the PCIJ, in which the court decided in 1929 on debts relating to loans taken out by the Kingdom of Serbia in the years 1895 to 1913, also supports the idea of incorporation. The court made no mention of the creation of a new State, which can be understood as meaning that the Kingdom of Serbs, Croats, and Slovenes continued the legal personality of the Kingdom of Serbia. *Case concerning the payment of various Serbian loans issued in France* (Judgment No 14) [1929] PCIJ Rep Series A No 20/21.

On the formation and existence of the State of Slovenes, Croats and Serbs, see, e.g. Shaw, 'State succession revisited' (n 42) 45–46; Degan, 'State succession, especially in respect of state property and debts' (n 8) 135; Zlatko Matijević, 'The National Council of Slovenes, Croats and Serbs in Zagreb (1918/1919)' (2008) 1 *Review of Croatian History* 49; J Peritch, 'Principaux traits caractéristiques de la constitution du Royaume des Serbes, Croates et Slovènes (Yougoslavie) du 28 janvier 1921' (1928) 80(1) *Bulletin de la Société de Législation Comparée* 518. See the case before the US Court of Appeals, *Ivancevic v Artukovic* US Court of Appeals 9th Circuit 211 F.2d 565 (1954), in O'Connell, *State Succession in Municipal Law and International Law vol 1* (n 9) 6–7. See also Mervyn J Jones, 'State succession in the matter of treaties' (1947) 24 *British Yearbook of International Law* 360, 364.

In addition, on November 13, 1918, a few weeks before the formation of the Kingdom of Serbs, Croats, and Slovenes, Montenegro made the decision to unite with the Kingdom of Serbia into one State under the Karadjordjevic dynasty.

82 Wladyslaw Czaplinski, 'State Succession and State Responsibility' (1990) 28 *Canadian Yearbook of International Law* 339, 357.

83 Patrick Dumberry, 'Turkey's International Responsibility for Internationally Wrongful Acts Committed by the Ottoman Empire' (2012) 42(2) *Revue générale de droit* 561, 565–570.

contracts concerning lighthouses on succeeded to territories after the First World War.⁸⁴

In contrast, the form of the dissolution of the Austro-Hungarian Empire is a matter of dispute.⁸⁵ While Hungary declared itself a continuator State from which other States had separated,⁸⁶ Austria argued that the empire broke up into a multitude of successor States.⁸⁷ Austria's position was not shared by the Allies, who considered that the Austro-Hungarian territories had separated from the Austro-Hungarian Empire and that Austria and Hungary both continued the legal personality of the empire,⁸⁸ which was also implied by the Treaties of Saint-Germain-en-Laye and Trianon. The continuity of Austria and Hungary also derived from the separate peace treaties concluded with the two countries by the US in 1921⁸⁹ and the decisions of the Tripartite Claims Commission established between the US, Austria, and Hungary.⁹⁰ The notion of separation with two continuators is therefore to be accepted.⁹¹

The peace treaties after the First World War provided for succession to all State property of Germany, Austria-Hungary, the Ottoman Empire, and Bulgaria located on the territories that had separated from these States.⁹² The peculiarity of these treaties, excluding the Treaty of Lausanne, is that they

84 *Lighthouses Case between France and Greece (France v Greece)* [1934] PCIJ Rep Series A/B No 62 (*Lighthouses 1934*); *Lighthouses in Crete and Samos (France v Greece)* [1937] PCIJ Rep Series A/B No 71 (*Lighthouses 1937*); *Affaire relative à la concession des phares de l'Empire ottoman (Grèce contre France)*, 12 UNRIIA 155 (24/27 July 1956) (*Lighthouses 1956*).

85 On the dilemma of the continuation of the legal personality of the Austro-Hungarian Empire, see, e.g., O'Connell, *State Succession in Municipal Law and International Law* vol 1 (n 9) 4–5; Czaplinski, 'State Succession and State Responsibility' (n 82) 357; Shaw, 'State succession revisited' (n 42) 45–46; Degan, 'State succession, especially in respect of state property and debts' (n 8) 135.

86 Czaplinski, 'State Succession and State Responsibility' (n 82) 357.

87 Patrick Dumberry, *State succession to international responsibility* (Martinus Nijhoff Publishers 2007) 145; Gerhard Hafner and Elisabeth Kornfeind, 'The recent Austrian practice of state succession: Does the clean slate rule still exist?' (1996) 1(1) *Austrian Review of International and European Law* 1, 20–22.

88 Dumberry, *State succession to international responsibility* (n 87) 145.

89 Patrick Dumberry, 'Is a new state responsible for obligations arising from internationally wrongful acts committed before its independence in the context of secession?' (2005) 43 *Canadian Yearbook of International Law* 419, 428.

90 Dumberry, 'Turkey's International Responsibility for Internationally Wrongful Acts Committed by the Ottoman Empire' (n 83) 580–581.

91 ILC, 'Second report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 70th session' (2018) UN Doc A/CN.4/719; Degan, 'State succession, especially in respect of state property and debts' (n 8) 135.

92 Commentary on the 1983 Vienna Convention (n 7) 34.

provided for succession to State property on a non-gratuitous basis, which is an exception to the practice and theory. The Treaty of Neuilly-sur-Seine stipulated that all States that had acquired territory from Bulgaria would also succeed to all the State property situated therein but that this property would be included in the sum of the reparations owed by Bulgaria to those States.⁹³ It specifically stated that all property of special archaeological, historical, and artistic value that had been removed from their territory during the war would be returned to Greece, Romania, and the State of Serbs, Croats and Slovenes.⁹⁴ This was therefore a return of war booty and not a succession.

The Treaty of Versailles stipulated that States that acquired territory from Germany would also acquire all German property located on that territory.⁹⁵ In addition, the Treaty provides for succession not only to State property (“all movable or immovable property of public or private domain together with all rights whatsoever belonging to the German Empire or German States or to their administrative areas”⁹⁶) but also to the personal property of the former German Emperor (*private property*) and other royal personages.⁹⁷ Germany’s property abroad is not regulated by the treaty.

The successor States did not acquire this territory gratuitously. The Special Commission on Reparations assessed the value of the property acquired. This value had to be paid to the Commission by the successor States, and the funds were used to repay Germany’s war debt or reparations.⁹⁸

The Treaty of Versailles also provided for some exceptions. Belgium and France were not obliged to pay for the property received (cession).⁹⁹ Poland was also not obliged to pay for “buildings, forests and other State property” that had belonged to the Kingdom of Poland in the past.¹⁰⁰ Siam,¹⁰¹ Morocco (from then on a French protectorate),¹⁰² and Egypt (from then on a British protectorate) also received property located on their territories gratuitously.¹⁰³ These cases could also reasonably be considered cessions since indirect authority over these territories was transferred from Germany to other (existing) States.

93 Treaty of Neuilly-sur-Seine (n 76) art 142.

94 *ibid* art 126.

95 Treaty of Versailles (n 16) art 256(1).

96 *ibid* art 56(2).

97 *ibid* art 256(2).

98 *ibid* art 256(1).

99 *ibid* art 256(3),(4).

100 *ibid* art 92(3).

101 *ibid* art 136(1).

102 *ibid* art 144(1).

103 *ibid* art 153(1).

On succession to certain diplomatic and consular property abroad, the Treaty stipulates that it remains with the continuator State, namely, Germany.¹⁰⁴ In addition, each State that acquired part of Germany's territory also received part of the German public funds needed for the social insurance of the people living on those territories.¹⁰⁵

All the above provisions contained in the Treaty of Versailles are also covered *mutatis mutandis* by the Treaty of Saint-Germain-en-Laye¹⁰⁶ and the Treaty of Trianon.¹⁰⁷ These two treaties provide for exceptions where property is succeeded to gratuitously, including property of provinces, communes, and other autonomous institutions, as well as schools and hospitals.¹⁰⁸ The Treaty of Saint-Germain-en-Laye also makes specific reference to forests formerly belonging to the Kingdom of Poland in the context of gratuitousness.¹⁰⁹ In addition, the treaties state that succession does not apply to the property of Austria and Hungary abroad that is *not located* in the ceded territories or in the territories of the States that have separated.¹¹⁰

The treaties of Saint-Germain-en-Laye and Trianon separately define succession to objects of cultural, archaeological, scientific, and historical value for the successor States that were in the possession of the predecessor State or the Crown at the time of the "dissolution" of the Austro-Hungarian Empire.¹¹¹ Austria and Hungary should *endeavor* to conclude agreements with the successor States for the return of these objects.¹¹² The Treaty of Saint-Germain-en-Laye then contains, in annexes, specific additional provisions on the cultural heritage objects of certain States and provinces (Italy, Belgium, Poland, Czechoslovakia) that are to be succeeded to.¹¹³ In this case, it is not a question

104 *ibid.*, e.g., art 130(2) (China) and art 136(1) (Siam).

105 *ibid.* art 77 and 312.

106 See Treaty of Saint-Germain-en-Laye (n 72) art 208(1) (succession to all property situated in the territory received), 208(2) (succession also to the property of the King and other persons of the Court), 208(4) (repatriation of property), 111 and 115(2) (non-succession of diplomatic and consular missions in China and Siam), and 275 (succession to public funds necessary for social insurance).

107 See Treaty of Trianon (n 75) art 191(1) (succession to all property situated in the territory received), 191(2) (succession also to the property of the King and other persons of the Court), 191(4) (repayment of property), 99(2) and 95(1) (non-succession of diplomatic and consular missions in China and Siam), and 258 (succession to public funds necessary for social insurance).

108 Treaty of Saint-Germain-en-Laye (n 72) art 208(7); Treaty of Trianon (n 75) art 191(7).

109 Treaty of Saint-Germain-en-Laye (n 72) art 208(7).

110 Treaty of Saint-Germain-en-Laye (n 72) art 208(3); Treaty of Trianon (n 75) art 191(3).

111 Treaty of Saint-Germain-en-Laye (n 72) art 196; Treaty of Trianon (n 75) art 177.

112 Treaty of Saint-Germain-en-Laye (n 72) art 196; Treaty of Trianon (n 75) art 177.

113 Treaty of Saint-Germain-en-Laye (n 72) part 8 section 2 annexes 1–4.

of the return of war booty related to the First World War, which is covered by the preceding articles.¹¹⁴ The Treaty of Trianon also provides for Hungary to succeed to such property from Austria.¹¹⁵ In addition, the protection of property of special cultural or historical value for the successor States is also mentioned in the general provisions on succession to property in these two agreements. With regard to this type of property, which is connected with certain provinces of the predecessor State, the Reparations Commission may determine that it shall be succeeded to gratuitously by the successor State.¹¹⁶ Succession to cultural objects is also determined by the Treaty of Versailles,¹¹⁷ but, in this case, it mostly concerns war booty from the First World War. The treaty also covers some objects that were taken earlier (e.g., the original Koran and the skull of the Sultan of Mkwawa).¹¹⁸

The Treaty of Lausanne established gratuitous succession as the basic rule for succession to the property of the Ottoman Empire.¹¹⁹ With a few specific provisions relating to Greece, this treaty does not provide for exceptions (e.g., succession to cultural heritage). The Treaty of Lausanne also does not specifically mention property abroad.

Property that was pledged to repay the predecessor State's debt before the conclusion of the peace treaties became pledged under some peace treaties to repay the debt assumed by the successor State (as a result of the acquisition of territory) under those agreements. If the property pledged for the repayment of the debt before the peace treaties was located in several successor States, the lien on them only applies to the debt that has been assigned to them.¹²⁰

Peace treaties after the First World War had the following elements, which are laid out in the 1983 Vienna Convention, the IDI resolutions, and other documents (since cession and separation were often difficult to distinguish, in most cases, treaties do not distinguish them but rather set the implications for all cases in the general term "*ceded territory*"): the successor State succeeds to all property (movable and immovable) located on its territory. The peace treaties also recognized succession to cultural heritage—property was succeeded to as it was at the date of succession (i.e., encumbered by debts). Most agreements also provide for succession to financial property. Only the Treaty of Versailles

114 *ibid* art 191–195.

115 Treaty of Trianon (n 75) art 177(3).

116 Treaty of Saint-Germain-en-Laye (n 72) art 208(8); Treaty of Trianon (n 75) art 191(8).

117 Treaty of Versailles (n 16) art 245–247.

118 *ibid* art 246.

119 Treaty of Lausanne (n 78) art 60.

120 Treaty of Saint-Germain-en-Laye (n 72) art 203(1); Treaty of Trianon (n 75) art 186(3).

explicitly addresses succession to property abroad. Other treaties are silent on the subject, because the property did not exist, was taken away, or remained with the continuator State and, therefore, did not need to be defined. The most significant departure from today's arrangements is that the peace treaties in question did not provide for gratuitous succession.

The Treaty of Dorpat (October 14, 1920) between Finland and Russia recognized the independence of Finland, which it had declared in 1917. Finland also acquired the territory of Pechenga/Petsamo. The agreement on succession to State property opted for the *principle of territoriality*, according to which all Russian property located on Finnish territory belongs to Finland and *vice versa*.¹²¹ The property was succeeded to gratuitously.¹²² Each State was left with three buildings on the territory of the other, with associated plots of land for the operation of diplomatic and consular representation.¹²³ Finland undertook to return to Russia the State-owned ships located on its territory after 1918.¹²⁴ These were items that, although located in the successor State, were linked to the continuator State. Succession to property abroad was not regulated by the treaty, but it is reasonable to assume that the property remained with the continuator State.

With the Treaty of Riga concluded between the Soviet Republics of Russia and Ukraine on the one hand, and Poland on the other (Treaty of Riga [Poland]) on March 18, 1921, the parties also agreed on the succession to the predecessor State's (the Russian Empire's) property. In accordance with the principle of territoriality, all property located on the territory of one of the successor States is succeeded to by this successor State.¹²⁵ The exception is cultural heritage objects (see below). Property is defined as property of any kind owned by the State or State institutions, the property and all rights of the Crown and the Imperial family, and all property and rights donated by the Tsar of Russia.¹²⁶ All property shall be succeeded gratuitously unless otherwise specified in the peace treaty.¹²⁷

All rights in favor of the Russian budget on property of any kind located on Polish territory and all claims against natural or legal persons are entered

121 Treaty of Peace between Finland and Russia (adopted 14 October 1920) 3(1) LNTS 5 (Treaty of Dorpat) art 22.

122 *ibid.*

123 *ibid* art 22, footnote.

124 *ibid* art 23(1).

125 Treaty of Peace between the Soviet republics of Russia and Ukraine on the one hand and Poland on the other (adopted 18 March 1921) 6 LNTS 51 (Treaty of Riga [Poland]) art 12(1).

126 *ibid.*

127 *ibid* art 12(2).

into for the subsequent settlement of mutual claims.¹²⁸ These are claims that Polish individuals (natural and legal persons) may have against Russian and Ukrainian State banks that have been nationalized or liquidated.¹²⁹

Specifically, 30 million gold rubles were to be awarded to Poland for its role in the “economic life” of the former Russian Empire.¹³⁰ Poland also succeeded to a proportionate share of State-owned locomotives and wagons worth 29 million gold rubles, as well as river transport.¹³¹ Poland was returned property taken from individuals or State or local authorities between August 1, 1914, and October 1, 1915.¹³² It also succeeded to funds from trusts originating in Poland or whose purpose was connected with territory or individuals in Poland.¹³³

In addition, Poland was entitled to the property of individuals and public institutions held in Russian and Ukrainian banks,¹³⁴ but in this case, it had been the property of Poland (or its citizens) and not that of the predecessor State.

The parties also agreed to the exchange of cultural heritage objects (“libraries, archaeological collections and archives, collections of works of art, collections of any nature and objects of historical, national, artistic, archaeological, scientific and general educational value”¹³⁵) taken from the territory of Poland to Russia or Ukraine and vice versa since January 1, 1772,¹³⁶ as well as most war trophies except those from the First World War.¹³⁷ These objects were to be returned irrespective of the manner of acquisition and without regard to the owner at the time of acquisition or subsequently.¹³⁸ Excluding those with a particularly close link with Poland, objects shall not be returned to Poland (this applies only to Poland) if the integrity of the collection would be compromised thereby, subject to confirmation by a specially appointed commission. In this case, the object would remain in Russia or Ukraine, and Poland would receive an object of equal artistic or scientific value.¹³⁹ Similarly, Poland shall

128 *ibid* art 12(3).

129 *ibid* art 17.

130 *ibid* art 13.

131 *ibid* art 14.

132 *ibid* art 15.

133 *ibid* art 16(4).

134 *ibid* art 16(2–3).

135 *ibid* art 11(1b).

136 *ibid* art 11(1) and (3).

137 *ibid* art 11(1a) and (3).

138 *ibid* art 11(1) para 2.

139 *ibid* art 11(7).

not succeed to objects that have been voluntarily transferred to the territory of Russia or Ukraine by their rightful owner.¹⁴⁰

The agreements concluded between Russia and the three Baltic republics also cover succession to State property. The Treaty of Tartu (February 2, 1920) stipulates that Estonia shall succeed to all immovable and movable State property located on its territory, including military and other buildings, bases, ports, and ships.¹⁴¹ Estonia also succeeded to all claims of the Russian budget against Estonian individuals.¹⁴² In return, Estonia renounced all claims against Russia arising from its former status as part of the Russian Empire.¹⁴³ In addition, under the treaty, Estonia should receive 15 million gold rubles.¹⁴⁴ Russia undertook to return to Estonia any property of scientific or historical value that had been removed from Estonian territory to Russia, provided that it could be located. Special mention was made of such property of the University of Tartu.¹⁴⁵

The Treaty of Riga between Russia and Latvia of August 11, 1920 (Treaty of Riga [Latvia]) stipulated that Latvia shall succeed to all State property located on its territory¹⁴⁶ as well as State property taken to Russia after August 1, 1914.¹⁴⁷ It is implicit that Latvia shall succeed to all objects of cultural, scientific, and historical importance taken to Russia during the war (1914–1917).¹⁴⁸ Such property taken before the war shall be subject to the condition that its removal from Russian archives, museums, galleries, and libraries does not cause substantial damage to these institutions.¹⁴⁹ Other property “evacuated” by Russia during the First World War shall also be returned to Latvia.¹⁵⁰ The Peace Treaty of Moscow (July 12, 1920) concluded with Lithuania contained the same provisions as the Treaty of Riga (Latvia).¹⁵¹

140 *ibid* art 11(2b).

141 Treaty of Tartu between Estonia and Russia (adopted 2 February 1920) 11 LNTS 30 (Treaty of Tartu) art 11(1).

142 *ibid* art 11(2).

143 *ibid* art 11(4).

144 *ibid* art 12(1) first bullet point.

145 *ibid* art 12(1) fourth bullet point.

146 Treaty of Peace between Latvia and Russia (adopted 11 August 1920) 2(3) LNTS 196 (Treaty of Riga [Latvia]) art 10(1).

147 *ibid*.

148 *ibid* art 11(1).

149 *ibid* art (2).

150 *ibid* art 12–14.

151 Treaty of Peace between Lithuania and Russia (adopted 12 July 1920) 3(2) LNTS 105 (Treaty of Moscow) art 8, 9, and 10.

The Second World War was not followed by the separation of parts of territory but by cessions. Iraq, Palestine, Transjordan, Syria, and Lebanon, which became mandates of the victorious countries after the First World War and only gained independence after the Second World War, are special cases.

2.4.1.3 State Practice after the Second World War

Since the Second World War, there have been at least three cases of separation of part of a territory that did not (directly) result from decolonization: Pakistan (1947), Singapore (1963), and Bangladesh (1971).¹⁵²

2.4.1.3.1 *Pakistan*

Pakistan's separation from India in August 1947 coincided with India's independence. Since British India had already been a member of the UN,¹⁵³ the question arose of whether India and Pakistan were newly created States after separation. The UN Secretariat's view was that India continued the legal personality of British India, but Pakistan, as a new State, should apply for UN membership.¹⁵⁴ Pakistan thus became a member of the UN on September 30, 1947.¹⁵⁵

Prior to the independence of British India and the subsequent partition of Pakistan, the Indian Independence Act¹⁵⁶ was passed by the British Parliament on July 14, 1947, dividing British India into two parts. A month later, on August

152 The separation of the German Democratic Republic is not covered in this book. The question of succession to the debt of pre-war Germany never arose in the case of the GDR as its succession status is not clear and has been amended several times. The GDR was created in 1949. It first considered itself one of the two continuator States, then took the view that the predecessor State had collapsed and, thus, no longer existed, and that both the FRG and the GDR were successor States. However, the prevailing view in the doctrine seems to be that this was a separation of a part of the territory. The question of succession to the debt was only related to the war reparations agreed between the Allies in the Potsdam Agreement, which the USSR and Poland also demanded from the GDR. Post-war Germany was not a party to this agreement. The case of the GDR, which was also part of the Warsaw Pact from 1949, therefore points to the realpolitik of the Cold War rather than to the implementation of any provisions of international law. Dumberry, *State succession to international responsibility* (n 87) 148–149, 165–167.

153 It became a member on October 30, 1945. United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2023.

154 Rein Müllerson, 'Law and politics in succession of states: International law on succession of states' in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff Publishers 1998) 304.

155 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2023.

156 Indian Independence Act (promulgated 14 July 1947) His Majesty's Stationery Office.

14, 1947, the Indian Independence (Rights, Property and Liabilities) Order¹⁵⁷ (Indian Independence Order) was passed, defining certain succession issues. Among other things, the Order recognized the special autonomy of three provinces: Bengal, Punjab, and Assam. The first two were divided between Pakistan and India, while Assam belonged to India. On December 1, 1947, the two States also concluded a succession agreement, which largely followed the Indian Independence Order.¹⁵⁸

Under the Indian Independence Order, India and Pakistan succeeded to immovable State property located on their respective territories.¹⁵⁹ India succeeded to all immovable State property located abroad.¹⁶⁰ Bank accounts, goods, coins, and banknotes were also distributed according to these two rules.¹⁶¹

In addition, alongside the property distributed on a *territorial* basis, Pakistan succeeded to 17.5% of the State Bank's undistributed assets,¹⁶² leaving 82.5% to India. Pakistan also received a proportional share of the central government's financial resources, in the same proportion as the banknotes in circulation in Pakistan.¹⁶³ The property of the State Post and Railways (including locomotives and wagons) were divided between the two countries based on the share of the railways succeeded to by each. The armament factories went to India, which handed over funds to Pakistan to build a new munition factory, and Pakistan also succeeded to one-third of the military equipment.¹⁶⁴ The movable property was therefore distributed in *equitable proportions*.

British India (i.e., before the separation of Pakistan) succeeded to £1.160 billion under the agreement with the UK. These funds were transferred to a new Reserve Bank of India account in London.¹⁶⁵ Under subsequent agreements

157 Indian Independence (Rights, Property and Liabilities) Order (promulgated 14 August 1947) *The Gazette of India* (14 August 1947).

158 Minutes of the proceedings of the Partition Council held on 1st December, 1947 (Case No PC/218/20/47) (1948) 2 *Reserve Bank of India Bulletin* 72.

159 Indian Independence (Rights, Property and Liabilities) Order (n 157) art 4(a) and (b).

160 *ibid* art 4(c).

161 *ibid* art 6 and 7.

162 Daniel Patrick O'Connell, *The Law of State Succession* (Cambridge University Press 1956) 229–230.

163 ILC, 'Eighth report on succession of States in respect of matters other than treaties by Mohammed Bedjaoui, Special Rapporteur' (1976) UN Doc A/CN.4/292, 86.

164 O'Connell, *State Succession in Municipal Law and International Law vol 1* (n 9) 220–221.

165 Financial Agreement between the United Kingdom and India (adopted 14 August 1947) 147 *British and Foreign State Papers* art 1.

with the UK, these funds were divided between the two States¹⁶⁶ into approximately equal shares.¹⁶⁷

Succession to cultural heritage was mainly linked to the succession of the two States to the former colonizer, the UK.¹⁶⁸ The Indian Independence Order also provided that property rights and liabilities arising or to arise in the future would be distributed in a just and equitable manner (i.e., according to the principle of equity).¹⁶⁹

2.4.1.3.2 *Singapore*

Singapore¹⁷⁰ was one of three British dependencies, along with Sabah and Sarawak, incorporated into Malaya (which was renamed Malaysia) in 1963 via an agreement between the UK and the Federation of Malaya,¹⁷¹ which had been an independent State and a member of the UN since 1957.¹⁷² At the time of incorporation, all the rights, obligations, and liabilities of Singapore were transferred to Malaya.¹⁷³ Two years later, on August 9, 1965, Singapore separated from Malaysia and became an independent State. With the Separation Agreement of August 7, 1965, Singapore and Malaysia agreed that Singapore would succeed to all “property, movable and immovable, and rights, obligations and liabilities” belonging to the government of Singapore before the incorporation into Malaysia (known as Malaysia Day) and passed to the government of Malaysia on or after Malaysia Day.¹⁷⁴ Therefore, Malaysia succeeded to all State property that was not exclusively Singaporean. Thus, the

166 Exchange of Letters Constituting an Agreement between the United Kingdom of Great Britain and Northern Ireland and India extending the Financial Agreement of 14 August 1947 (adopted 15 February 1948) 134 UNTS 70.

167 O'Connell, *State Succession in Municipal Law and International Law* vol 1 (n 9) 221.

168 Jakubowski, *State succession in cultural property* (n 80) 91–94.

169 Indian Independence (Rights, Property and Liabilities) Order (n 157) art 13.

170 See: PK Menon, ‘The succession of states and the problem of state debts’ (1986) 6(2) *Boston College Third World Law Journal* 111, 139; LC Green, ‘Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity’ (1966) 3 *Canadian Yearbook of International Law* 3, 41; Commentary on the 1983 Vienna Convention (n 7) 108.

171 Agreement relating to Malaysia (with annexes, including the Constitutions of the States of Sabah, Sarawak and Singapore, the Malaysia Immigration Bill and the Agreement between the Governments of the Federation of Malaya and Singapore on common market and financial arrangements) (adopted 9 July 1963) 750 UNTS 2.

172 It became a member of the UN on September 17, 1957. United Nations, ‘Member States’ <<http://www.un.org/en/member-states/>> accessed 26 February 2023.

173 Menon, ‘The succession of states and the problem of state debts’ (n 170) 139.

174 Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State (adopted 7 August 1965) 563 UNTS 89 Annex B art 9.

property created during the period when Singapore was part of Malaysia was not subject to partition. While, at first sight, this raises doubts as to the fairness of the partition, it should be borne in mind that Singapore was part of Malaysia for only two years.

2.4.1.3.3 *Bangladesh*

Bangladesh became a de facto State on December 16, 1971, after military clashes with the central government, separating Bangladesh, hitherto East Pakistan, from Pakistan. As a new State, it became a member of the UN on September 17, 1974, while Pakistan, as a continuator State, continued its membership acquired in 1947.¹⁷⁵ It can be inferred that Bangladesh succeeded to all the State property located on its territory. Succession to the remaining State property cannot be ascertained.

2.4.1.4 State Practice after the Cold War

Recent examples include the breakup of the Soviet Union (1992) and the separations of Montenegro from the State Union of Serbia and Montenegro (2006), Kosovo from Serbia (2008), and South Sudan from Sudan (2011).¹⁷⁶

2.4.1.4.1 *Soviet Union*

The breakup of the Soviet Union began as a dissolution but ended as a separation of fourteen States from its core, the Russian Federation.¹⁷⁷ Viewed ex-post,

¹⁷⁵ John Dugard and David Raič, 'The role of recognition in the law and practice of secession' in Marcelo G Kohen (ed), *Secession, International Law Perspectives* (Cambridge University Press 2006) 120–123; Li-Ann Thio, 'International law and secession in the Asia and Pacific regions' in Marcelo G Kohen (ed), *Secession, International Law Perspectives* (Cambridge University Press 2006) 304–308; James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 140–147.

¹⁷⁶ There are additional examples, such as the separation of Eritrea from Ethiopia, which have not (yet) created a relevant practice. Eritrea was admitted as an independent State to the UN as early as May 28, 1993, but the separation was accompanied by armed conflicts with the continuator State, Ethiopia. The two countries only signed a joint declaration on the cessation of tensions on July 9 2018, and succession talks are likely to follow. See, e.g., Letter from the UN Secretary-General to the President of the UN Security Council (18 February 2019) UN Doc S/2019/154.

¹⁷⁷ For a more detailed description of the process, see: ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 8) 341–347; Paul R Williams and Jennifer Harris, 'State succession to debts and assets: The modern law and policy' (2001) 42(2) *Harvard International Law Journal* 355, 366–383; Hubert Beemelmans, 'State Succession in international law: Remarks on recent theory and state praxis' (1997) 15 *Boston University International Law Journal* 71, 111–113; PP Kremnev, *Распад СССР и правопреемство государств* [*The breakup of the USSR and the succession of states*] (Юрлитинформ 2012);

the Russian Federation is a de facto continuator State in most aspects of State succession, such as international (including multilateral) treaties, diplomatic relations, State property abroad, and membership in the UN and some¹⁷⁸ other international organizations.¹⁷⁹

The successor States of the former Soviet Union are divided into four groups. The first is the Russian Federation, which has de facto continuator status. The second is the Baltic States (Estonia, Lithuania, and Latvia), which do not have the status of new States but continue the status they had before the Soviet occupation in 1940. This status is recognized by the majority of the international community.¹⁸⁰ The third group includes Ukraine and Belarus, which have been members of the UN since October 24, 1945, although they were already part of the Soviet Union at that time.¹⁸¹ The fourth group includes the other nine successor States.¹⁸²

Immediately after their declaration of independence in 1990 and 1991, the Baltic States announced that they did not consider themselves successor States due to the half-century of occupation by the Soviet Union and, thus, did not take part in the succession talks. The remaining twelve successor States failed to adopt by consensus a single common binding legal instrument related to the termination of the Soviet Union.

In terms of succession to State property (and debt),¹⁸³ three documents are of particular relevance: the Memorandum of Understanding of October 28, 1991, the Minsk Agreement of December 4, 1991, and the so-called “zero-option”

ILC, ‘Second report by Pavel Šturma’ (n 91) 43; Dumberry, *State succession to international responsibility* (n 87) 202–218; Jan Klabbers and Martti Koskenniemi, ‘Succession in respect of state property, archives and debts, and nationality’ in Jan Klabbers and others (eds), *State Practice Regarding State Succession and Issues of Recognition/Pratique des États concernant la succession d’États et les questions de reconnaissance* (Kluwer Law International 1999) 124–136; Yehuda Z Blum, ‘Russia takes over the Soviet Union’s seat at the United Nations’ (1992) 3 *European Journal of International Law* 354.

178 Not all. The Russian Federation became a member of the IMF on July 1, 1992, the same year as the other successor States.

179 ILC, ‘Second report by Pavel Šturma’ (n 91) para 88, 43.

180 See, e.g., Ineta Ziemele, ‘State continuity, succession and responsibility: reparations to the Baltic states and their peoples?’ (2003) 3 *Baltic Yearbook of International Law* 165, 165–189.

181 Yolanda Gamarra, ‘Current questions of state succession relating to multilateral treaties’ in Pierre Michel Eisemann and Martti Koskenniemi (eds), *La succession d’États: la codification à l’épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000) 411–413.

182 *ibid* 414–419.

183 Because succession to the property of the Soviet Union is inextricably linked to succession to the debts, debts will be mentioned here to the extent necessary.

agreements.¹⁸⁴ The Memorandum regulated succession to debts, whereby the signatory States recognized their obligation to settle the debts of the Soviet Union with all types of creditors (both States and individuals).¹⁸⁵ It was signed by well over half of the successor States (Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, and Turkmenistan).¹⁸⁶

The Minsk Agreement of December 4, 1991, was supposed to be signed between the (then still existing) Soviet Union and all fifteen successor States, but only eight of these (Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Ukraine) signed it alongside the Soviet Union.¹⁸⁷ Consequently, it did not become valid. This agreement, which refers to the 1983 Vienna Convention in its preamble, established the shares for the division of the total debt and property of the Soviet Union.¹⁸⁸ It regulated only State property (immovable, movable, gold and other reserves, investments, and claims on other entities) abroad.¹⁸⁹ The criteria for the division of debt and property were the shares of each republic in the total gross national product, imports and exports, and population. On this basis, shares were determined for all fifteen successor States, including the Baltic States.¹⁹⁰ This was followed by the Agreement on the Sharing of All Foreign Assets of the Former Soviet Union, signed on July 6, 1992, by eleven countries (excluding Georgia and the Baltic States), which was also not implemented.¹⁹¹

Zero-option agreements were bilateral agreements concluded after July 1992 between the Russian Federation and other successor States after they were unable to conclude a succession agreement.¹⁹² Under these agreements,

184 Beemelmans (n 177) 111–112.

185 Memorandum of Understanding on the Debt to Foreign Creditors of the USSR and its Successors (adopted 28 October 1991) 260 *Известия*.

186 Kremnev (n 177) 101–102.

187 *ibid* 102–103. Unlike the Memorandum, this Agreement was signed by Georgia and Ukraine but not by Moldova and Tajikistan.

188 Agreement on Succession in respect of External State Debt and Assets of the USSR (adopted 4 December 1991) 2380 UNTS 95 art 4.

189 *ibid* art 1(b).

190 Williams and Harris (n 177) 372.

191 Natalia V Dronova, 'The division of state property in the case of state succession in the former Soviet Union' in Pierre Michel Eisemann and Martti Koskenniemi (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000) 811.

192 There were several other attempts, including in the framework of the newly established Commonwealth of Independent States. The willingness of the other successor States to conclude these agreements has also been "aided" by (controversial) decisions of the Russian Federation, such as the communication by Vneshekonombank on behalf of the other States of the newly established Commonwealth of Independent States on the joint

the Russian Federation took over all property abroad and all debt (in accordance with the shares established in the Minsk Agreement) of the other successor States.¹⁹³ The other parties to these agreements thus renounced their entire share of the common property in exchange for all their obligations on the common debt.¹⁹⁴ Russia concluded such agreements with all the remaining successor States except Ukraine, although the agreements were not identical.¹⁹⁵ Williams mentions that by threatening not to cooperate economically with them, Russia persuaded even the Baltic States to sign similar agreements, which they agreed to since these did not contradict their position on occupation.¹⁹⁶ Ukraine, which signed on December 9, 1994, but did not ratify the agreement, successfully demanded that some third countries prevent the disposal of “Soviet” property on their territory pending a proper agreement with Russia.¹⁹⁷

The immovable and movable State property on their territory remained with the successor States in accordance with customary international law, as confirmed by the agreement reached at the Commonwealth of Independent States (CIS) Summit in Bishkek on October 9, 1992.¹⁹⁸ The agreement was not signed by Turkmenistan and Ukraine, although the latter subsequently concluded a series of bilateral agreements with the other successor States, which confirmed the Bishkek Agreement.¹⁹⁹ The successor States further divided the movable property related to rail transport (wagons and other equipment), taking into account the actual use of these assets by each State to determine the share.²⁰⁰ Aeroflot’s aircraft belonged to the country of registration. It is not clear whether and how succession to the fishing boats took place.²⁰¹

Succession to military assets was resolved within the CIS via both bilateral and multilateral agreements. In a declaration on February 14, 1992, the CIS heads of State agreed that military movable property (equipment) would

and several liability of the successor States. ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 342–343.

193 Kremnev (n 177) 110.

194 Williams and Harris (n 177) 377.

195 Ukraine signed but did not ratify the agreement, so it never entered into force. However, the agreement with Georgia was ratified in 2001 and has been in force since then. Kremnev (n 177) 111–112.

196 Williams and Harris (n 177) 377.

197 Kremnev (n 177) 113–114.

198 Agreement on mutual recognition of rights and regulation of ownership relations (adopted 15 January 1993) Bulletin of international treaties No 4 art 1.

199 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 343.

200 Dronova (n 191) 819.

201 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 343.

remain on their territories.²⁰² Through a bilateral agreement between Russia and Ukraine on May 15, 1992, Ukraine also succeeded to a share of the tanks and military aircraft of the Soviet army.²⁰³ Military immovable property did not pass to the successor States ipso facto but on the basis of agreements.²⁰⁴ Particular complications arose with regard to the Black Sea Fleet. Russia and Ukraine concluded a series of treaties. Based on these, the immovable property belonged to Ukraine, and Russia had a 20-year right of use in exchange for rent.²⁰⁵ Ukraine also succeeded to 18.3% of the ships and vessels.²⁰⁶ Military assets were succeeded to by the States gratuitously.²⁰⁷ Several treaties were subsequently prolonged, such as the Agreement on the Status and Conditions of Stay of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine, the Agreement on the Parameters of the Division of the Black Sea Fleet, and agreements on mutual settlements related to the distribution of the Black Sea Fleet and the presence of the Black Sea Fleet of the Russian Federation on the territory of Ukraine. These treaties were prolonged for twenty-five years from May 28, 2017, by the agreement signed on April 21, 2010, with subsequent automatic extensions for five-year periods.²⁰⁸ However, after the illegal annexation of Crimea in 2014, Russia unilaterally denounced all the treaties pertaining to the Black Sea Fleet.

Ukraine, which opposed the zero-option agreements, also succeeded to thirty-six Soviet embassies and a share of merchant ships on the Danube and in the Black Sea through a bilateral agreement with Russia in April 1993.²⁰⁹ The Baltic States, which had a special status as a result of the Soviet occupation, “succeeded to” (or were returned) property that belonged to them before the occupation (e.g., an embassy in Germany, assets in the UK, and between two and three tons of gold in France for Estonia; approximately 2.5 tons of gold in

202 Dronova (n 191) 803–805.

203 *ibid* 804.

204 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 344.

205 Agreement between Ukraine and the Russian Federation on the status and conditions of stay of the Black Sea Fleet of the Russian Federation on the territory of Ukraine (signed 28 May 1997), Official Gazette of Ukraine No 17 (1999) act code 7164/1999 art 25.

206 Agreement between Ukraine and the Russian Federation regarding the Black Sea Fleet (signed 9 June 1995) Official Gazette of Ukraine No 25 (2007) act code 39351/2007 art 4.

207 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 344.

208 Agreement between Ukraine and the Russian Federation on the presence of the Black Sea Fleet of the Russian Federation on the territory of Ukraine (signed 21 April 2010) Official Gazette of Ukraine No 39 (2010) act code 51175/2010 art 1.

209 Williams and Harris (n 177) 382.

France for Lithuania).²¹⁰ They also succeeded to Soviet military movable assets on their territory for free.²¹¹

On February 14, 1992, the successor States concluded an Agreement on the Return of Cultural Objects, which established the *principle of provenance*, that is, the link with the territory, as the criterion for determining cultural heritage.²¹² However, it also stressed the importance of these objects for the “spiritual, cultural and historical heritage” of the successor States.²¹³ The Agreement comprises only seven articles, most of which refer to the creation of a special commission, but it does not lay down procedural rules such as the method and time limit for restitution and has therefore never been implemented.²¹⁴ Consequently, some successor States turned to bilateral cooperation, which has led to some successful repatriations of cultural heritage objects (e.g., frescoes from St. Michael Chrysostom Cathedral in Kyiv and the library of Petchory Uspenski Monastery in Estonia).²¹⁵

2.4.1.4.2 Montenegro

On February 4, 2003, Serbia and Montenegro, federal units of the Federal Republic of Yugoslavia (FRY), one of the five successor States of the SFRY, adopted the Constitutional Charter of the State Union of Serbia and Montenegro,²¹⁶ changing the name of the FRY to “the State Union of Serbia and Montenegro.”²¹⁷ In addition, the Constitutional Charter provided, in Article 60, entitled “Separation from the State Union of Serbia and Montenegro,” that after a period of three years, a federal entity could separate from the federation, subject to a referendum. The article also stipulated that if were to Montenegro separate, all international documents relating to the FRY would apply to Serbia as a continuator of the State Union and, thus, of the FRY (such a provision

210 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 347; Klabbers and Koskenniemi (n 177) 126.

211 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 346.

212 Agreement on the Return of Objects of Cultural and Historical Heritage to States of Origin (adopted 14 February 1992) Bulletin of International Treaties No 7 preamble para 1.

213 *ibid.*

214 Jakubowski, *State succession in cultural property* (n 80) 206–210.

215 *ibid.* 215.

216 Constitutional Charter of the State Union of Serbia and Montenegro, Official Gazette of Serbia and Montenegro (4 February 2003) No 01/2003.

217 The ICJ confirmed that this was merely a change of the name of the State without any effect on its legal personality. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Crime of Genocide [Bosnia v Serbia and Montenegro]* [Judgment]) para 76, 76.

was made only for Montenegro and not for Serbia.). A federated entity that separates from the federation would leave international legal personality to the other federating entity—the continuator. All issues would then be settled between the continuator and the independent State, namely, the one that separated.²¹⁸ On May 21, 2006, Montenegro held a referendum and decided to separate from the State Union. Montenegro became an independent and sovereign State on June 3, 2006, by adopting a Declaration of Independence. On July 10, 2006, the two States had already concluded an agreement on the regulation of membership in international financial organizations and the sharing of financial rights and obligations, which, among other things, allocated financial resources.²¹⁹ To date, no other succession agreement has been signed. Montenegro has proposed concluding an agreement to regulate succession to diplomatic and consular missions, archives, and other aspects of succession, but this has not been done to date.

Serbia and Montenegro regulated certain issues of State property on the territory of the FRY when the State was transformed into the State Union by the Constitution of February 4, 2003. This document stipulated that the property of the FRY located on the territory of one of the federal republics belonged to the federal republic in question, according to the *principle of territoriality*.²²⁰ Property abroad and property necessary for the functioning of the federal institutions belonged to the State Union.²²¹ To determine the latter, the States established a group of representatives of the two federal republics.²²²

The agreement between the two States allocated foreign currency accounts abroad, gold, shares, and dividends at the Bank for International Settlement (BIS),²²³ of which Montenegro received 5.88%.²²⁴ In doing so, the two States agreed that the amount of USD 2.5 million owed by the government of Montenegro and the public enterprise Montenegrin Airports to the government

218 Constitutional Charter of the State Union of Serbia and Montenegro (n 216) art 60(1), (2), (4), and (5).

219 Agreement between the Republic of Serbia and the Republic of Montenegro on the regulation of membership of international financial organizations and the sharing of financial rights and obligations (adopted 10 July 2006) Official Gazette of Serbia No 64/2006.

220 Constitutional Charter of the State Union of Serbia and Montenegro (n 216) art 59(2).

221 *ibid* 59(3).

222 Law for the Implementation of the Constitutional Charter of the State Union of Serbia and Montenegro (11 February 2003) Official Gazette of Serbia and Montenegro No 01/2003 art 21.

223 Agreement on the financial succession of the State Union of Serbia and Montenegro (n 219) art 8.

224 *ibid* art 2.

of Serbia would be deducted from the sum of the foreign exchange assets to be shared in the succession process.²²⁵ No succession agreements were concluded for other assets (e.g., diplomatic and consular missions, archives).

2.4.1.4.3 *Kosovo*

Kosovo separated from the Republic of Serbia as a consequence of its declaration of independence on February 17, 2008.²²⁶ Because the Republic of Serbia (the continuator State) rejects the legality of Kosovo's separation,²²⁷ the States have not yet signed a succession agreement.²²⁸

2.4.1.4.4 *South Sudan*

After twenty years of internal armed conflict, South Sudan separated from Sudan on July 9, 2011. On July 14, 2011, it was granted UN membership.²²⁹ The separation arrangements were settled under the watchful eye of the UN throughout.²³⁰ South Sudan and Sudan negotiated their succession in a special way. On September 27, 2012, they concluded an agreement to resolve succession issues. The agreement conditionally provided for a so-called zero-option solution, whereby Sudan, as a continuator State, retained all external debts in exchange for all property located abroad.²³¹ However, both States were to "take all necessary steps" within two years ("or such later date as shall be agreed by the two States") to ensure that Sudan's debt is canceled inasmuch as possible by the international community.²³² Failing to do so, the zero-option agreement

225 *ibid* art 10.

226 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep para 57.

227 Ana Kastelec and Vasilka Sancin, 'Srbija in Kosovo znova za pogajalsko mizo: prispevek Meddržavnega sodišča' (2011) 30(15–16) *Pravna praksa* 2, 2–7.

228 On the legal processes that preceded Kosovo's separation and on the potential problems of succession to property and debts if separation were occur in the future (although the author's predictions did not fully materialize), see Henry H Perritt, Jr, 'Resolving claims when countries disintegrate: The challenge of Kosovo' (2005) 80(1) *Chicago-Kent Law Review* 119.

229 'Selected Legal Opinions of the Secretariats of the United Nations and Related Intergovernmental Organizations' (2011) *UN Juridical Yearbook* 536.

230 The UN also established two missions that year: on June 27, 2011, the UN Interim Security for Abyei (UNIFSA) in Sudan (UNSC Res 1990 [27 June 2011] UN Doc S/RES/1990) and on July 8, 2011, the UN Mission in the Republic of South Sudan (UNMISS) in South Sudan (UNSC Res 1996 [8 July 2011] UN Doc S/RES/1996).

231 Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters <<https://peacemaker.un.org/node/1617>> accessed 26 February 2023 art 3.1.1.

232 *ibid* art 3.1.2, 3.1.3, and 3.1.4.

would lapse and the two States would negotiate in good faith to reach an agreement on the distribution of external debt and property abroad.²³³ The agreement for such a case should specify the criteria for the distribution of external debt but not for that of foreign assets.²³⁴ The two-year deadline has been extended several times by unanimity so far.

The division of State property on the territory of the successor States was primarily governed by the *principle of territoriality*, whereby each successor State succeeded to property that had a connection with its territory.²³⁵ According to this principle, any State property (not only movable and immovable) situated on the territory of the successor State would belong to this successor State.²³⁶

The Agreement specifically provided for succession to cultural heritage: "Property of particular importance to the cultural heritage of a State, or which originates from a State, shall pass to that State and, where practicable, shall be repatriated to that State."²³⁷ This agreement does not link succession to cultural heritage to the *principle of provenance* but only to the property's importance for the State. Cultural objects shall be succeeded to free of charge.²³⁸ The State in which these objects were located was responsible for repatriating them,²³⁹ but if this was not possible, the two States would agree on access to the objects.²⁴⁰

2.4.2 *Transfer of Part of a Territory to Another State (Cession)*

Cession is the only form of succession in which the predecessor and successor States exist both before and after the moment of succession. The predecessor State continues its legal personality but with a reduced territory. *Mutatis mutandis*, the successor State continues its legal personality increased by territory identical to that "lost" by the predecessor State. As a general rule, the cession is of a small part of the territory.

Even in the case of cession, the 1983 Vienna Convention gives priority to the arrangement of succession to State property by agreement.²⁴¹ In the absence of such an agreement, "immovable State property of the Predecessor State situated in the territory to which the succession of States relates shall pass to

233 *ibid* art 3.2.1. and 3.2.2.

234 *ibid* art 3.3 and 3.4.

235 *ibid* art 4.1.1.

236 *ibid* art 4.1.2.(a).

237 *ibid* art 4.3.1. (emphasis added).

238 *ibid* art 4.3.4.

239 *ibid* art 4.3.2.

240 *ibid* art 4.3.5.

241 1983 Vienna Convention (n 1) art 14(1).

the successor State.”²⁴² Likewise, “movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.”²⁴³ The Convention does not contain provisions on property abroad, which remains with the continuator State, that is, the State from which the territory separated. The Third Restatement provides only that property located in the territory passes to the successor State in the event of cession,²⁴⁴ while property located abroad generally remains with the successor State.²⁴⁵

The IDI Resolution on State Succession to Property and Debts sets the same rules for cession as for the separation of part of a territory: immovable property belongs to the State in whose territory it is located; immovable property abroad generally belongs to the continuator State, and the successor State is entitled to an equitable distribution.²⁴⁶ The same rules apply to movable and other State property.²⁴⁷ In addition, the movable property belongs to the successor State by virtue of the *principle of special connection* if it has a special link with the predecessor State’s activities on this territory.²⁴⁸ This also includes property of great importance for the cultural heritage of the successor State and originating from the territory subject to the cession.²⁴⁹

As already mentioned, the so-called *moving frontier principle* applies since the legal personality of the State that has acquired territory through cession is extended to the newly acquired territory. All the rights and obligations of that State are usually extended to this territory as if there had been a mere moving of frontiers.

Cession was more common in the past and was mostly linked to military conquests or peace treaties, with the victors dictating their terms. It is therefore difficult to speak of the free will of States in these cases.²⁵⁰ Since the creation of the UN, cession can only be carried out with the agreement of both States concerned. Cession without an agreement, as in the cases of Crimea and other Ukrainian territories occupied by Russia, is an occupation that is contrary to

242 *ibid* art 14(2) point a.

243 *ibid* art 14(2) point b.

244 Third Restatement (n 44) para 209, 102–103.

245 *ibid* point 1, 105.

246 IDI Resolution on State Succession to Property and Debts (n 3) art 19.

247 *ibid* art 20(4).

248 *ibid* art 20(1).

249 *ibid* art 16(5).

250 Commentary on the 1983 Vienna Convention (n 7) 90.

international law.²⁵¹ As mentioned, the 1983 Vienna Convention only regulates successions that have taken place in accordance with international law.²⁵²

2.4.2.1 State Practice before the Two World Wars

In 1867, at the time of the Great Congresses in Europe, the US purchased the Alaskan territory from the Russian Empire. The Agreement on the Cession of Alaska was signed by the US and the Russian Empire in Washington on March 30, 1867.²⁵³ With the cession of the territory, the US also succeeded to property rights to all “public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property.”²⁵⁴ It did not, however, succeed to the churches built by the Russian government on ceded territory. These continued to be owned by members of the Orthodox Church who were Alaska residents.²⁵⁵

When Puerto Rico was ceded by Spain to the US in 1898, Spain wanted to keep all military assets in San Juan, but the US objected. The US argued that, by law, all movable State property becomes immovable if it is so made or intended for permanent use or for the purposes of immovable property—the so-called *fixtures*.²⁵⁶

2.4.2.2 The Congress of Berlin

The Treaty of Berlin only mentioned succession to property in relation to Bulgaria,²⁵⁷ Montenegro,²⁵⁸ and Serbia²⁵⁹ (which can reasonably be understood as cases of separations of parts of a territory with parallel small cessions,

251 See, e.g., reflections on the annexation of Austria: James Wilford Garner, ‘Questions of state succession raised by the German annexation of Austria’ (1938) 32(3) *American Journal of International Law* 421; James L Foorman and Michael E Jehle, ‘Effects of state and government succession on commercial bank loans to foreign sovereign borrowers’ (1982) 1982(1) *University of Illinois Law Review* 9. On the annexation of Crimea: Daniel Costelloe, ‘Treaty succession in annexed territory’ (2016) 65(2) *International and Comparative Law Quarterly* 343; Odysseas G Repousis, ‘Why Russian investment treaties could apply to Crimea and what would this mean for the ongoing Russo-Ukrainian territorial conflict’ (2016) 32(3) *Arbitration International* 459.

252 1983 Vienna Convention (n 1) art 3.

253 Treaty concerning the cession of the Russian possessions in North America by His Majesty the emperor of all the Russias to the United States of America (adopted 30 March 1867) 15 Stat 539 (Agreement on the Cession of Alaska).

254 *ibid* art II.

255 *ibid*.

256 O’Connell, *The Law of State Succession* (n 162) 228–229.

257 Treaty of Berlin (n 59) art XII(2).

258 *ibid* art XXX(3).

259 *ibid* art XXXIX(2).

as noted previously) and provided that special commissions would be set up to divide the property of the State and religious institutions (*vakoufs*). In all other cases, including cessions, there is no mention of succession to State property.

2.4.2.3 Peace Treaties after the First World War

For the provisions of the peace treaties of Saint-Germain-en-Laye, Versailles, Trianon, Neuilly-sur-Seine, and Lausanne after the First World War, see 2.4.1. *Separation of part or parts of a territory.*

During this period, Italy and the newly formed Kingdom of the Serbs, Croats, and Slovenes signed the Treaty of Rapallo (November 12, 1920) and the Agreement of Rome (January 27, 1924) defining their border. Certain territories were transferred to one and others to the other. According to the Treaty of Rapallo, the predecessor and the successor States divided “provincial and municipal property together with the archives, relating thereto” equally.²⁶⁰

2.4.2.4 Peace Treaties after the Second World War

Succession processes continued during the Second World War, but their results were then largely enshrined in the peace treaties after the war. Some of those processes were illegal under international law, as they were mainly wartime occupations.²⁶¹ The Annex to the Peace Treaty with Italy stipulated that the States to which Italian territory was ceded would succeed, gratuitously, to Italian State and para-State property located on the ceded territory.²⁶² This meant the movable and immovable property of Italy, local authorities, public undertakings, and State-owned enterprises, as well as the movable and immovable property of the Fascist Party and its organizations.²⁶³ The exception was the Italian submarine cables, which remained for the most part the property

260 Treaty between Italy and the Kingdom of Serbs, Croats and Slovenes (adopted 12 November 1920) 15 AJIL 173 (Treaty of Rapallo) art 2(3).

261 These include, for example, the partition of Czechoslovakia beginning in 1938, the annexation of Austria (1938), the occupation of the Baltic States by the Soviet Union (1939), the dismemberment of Yugoslavia in 1942. O’Connell, *State Succession in Municipal Law and International Law vol 1* (n 9) 212–214 and 388–390. After the war, independence began in dependent territories that were under the rule of other states, such as Syria and Lebanon in 1946 (French mandate), Israel in 1948 (British mandate), Burma in 1948 (British dependency), Indonesia in 1949 (Dutch dependency). All of these independence were followed by succession arrangements (O’Connell, *State Succession in Municipal Law and International Law vol 1* (n 9) 222–226 and 431–433), but these are not covered in the book, as these are successions of the so-called “newly independent States.”

262 Treaty of Peace with Italy (adopted 10 February 1947) 49 UNTS 50 annex 14 point 1 para 1 (Economic and Financial Provisions Relating to Ceded Territories).

263 *ibid* para 2 point 1.

of Italy.²⁶⁴ These provisions deal with succession and not with post-war restitution, as the agreement additionally defines as null and void all transfers of State and para-State property after September 3, 1943.²⁶⁵

The Annex specifically provided for succession to cultural heritage. The successor State received all property of artistic, historical, or archaeological value for the cultural succession of the ceded territory. Such property was to be succeeded to if it was gratuitously removed from the ceded territory when the latter was under Italian rule and was in the possession of the Italian government or Italian public institutions.²⁶⁶ In addition, succession to property is also separately defined in the basic part of the Peace Treaty. Thus, Yugoslavia succeeded to all cultural heritage objects (i.e., of artistic, historical, scientific, educational, and religious significance) that were removed from these territories while Italy was in possession of them, in accordance with the post-First World War peace treaties.²⁶⁷ Other public property removed from these territories after the First World War shall also be returned.²⁶⁸

Albania succeeded to all State property (except diplomatic and consular facilities) on its territory that had previously belonged to Italy and Italian parastatal institutions.²⁶⁹ Similarly for Ethiopia,²⁷⁰ the peace treaty specifically stated that cultural heritage objects taken to Italy since 1935 shall be returned to Ethiopia.²⁷¹

The Peace Treaty with Japan, meanwhile, mentioned succession in a very limited way. It stipulated that Japanese property located in the territories that had separated from Japan would be subject to agreements between Japan and the local authorities, and vice versa.²⁷² Unlike Italy, Japan lost half of its submarine cables to the ceded territories.²⁷³

The Peace Treaty with Hungary stipulated that Hungary would hand over to Yugoslavia and Czechoslovakia cultural heritage objects originating from these territories (*principle of provenance*) that had come into the possession of Hungary or its public institutions after 1848.²⁷⁴ These included a) historical

264 *ibid* point 3.

265 *ibid* point 2.

266 *ibid* point 4.

267 Treaty of Peace with Italy (n 262) art 12(1).

268 *ibid* art 12(2).

269 *ibid* art 29.

270 *ibid* art 34.

271 *ibid* art 37.

272 Treaty of Peace with Japan (adopted 8 September 1951) 136 UNTS 45 art 4(a).

273 *ibid* art 4 (c).

274 The boundaries of Hungary and Yugoslavia remained the same as before the war, so there can be no question of cession with regard to Yugoslavia. Treaty of Peace with Hungary

archives, b) libraries, historical documents, antiquities, and other cultural objects belonging to Yugoslavia and Czechoslovakia, and c) original artistic, literary, and scientific objects that are the work of Yugoslav or Czechoslovak authors.²⁷⁵ These objects were not subject to succession if they had been acquired by purchase, by gift, or on the basis of a “legate” or if they are the work of Hungarian authors.²⁷⁶ It was specifically stated that Hungary would hand over to Yugoslavia the archives of Illyria relating to the 18th century.²⁷⁷

On June 29, 1945, in Moscow, Czechoslovakia and the USSR signed the Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine. According to the Agreement, Czechoslovakia ceded Transcarpathia, which had belonged to it under the Treaty of Saint-Germain-en-Laye, to Ukraine.²⁷⁸ By means of a protocol to the Agreement, the parties established a commission responsible, inter alia, for demarcation and permanent residents’ property issues.²⁷⁹ The commission was also tasked with determining the transfer of property from the ownership of Czechoslovakia to that of the USSR.²⁸⁰ Along with other property, the USSR also succeeded to all State public property (financial resources, cash, etc.) located on the territory of Transcarpathia.²⁸¹

2.4.2.5 State Practice after the Second World War

Among modern examples of cession, the only one that can be mentioned is the case of Upper Silesia,²⁸² which also formally became definitively Polish with the agreement between Germany and Poland on the confirmation of the common boundaries (November 14, 1990). However, in substance, this is a case from the end of the Second World War for which a formal settlement was only adopted after the German reunification.

(adopted 10 February 1947) 41 UNTS 135 art 1. Czechoslovakia, on the other hand, acquired territories from Hungary. Treaty of Peace with Hungary (adopted 10 February 1947) 41 UNTS 135 art 1 point 4.

275 Treaty of Peace with Hungary (n 274) art 11.1.

276 *ibid* art 11 point 2.

277 *ibid* art 11 point 3.

278 Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine (adopted 29 June 1946) 504 UNTS 299 art 1.

279 Protocol to the Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine (adopted 29 June 1946) 504 UNTS 302 art 3(1).

280 *ibid* art 3(2).

281 Commentary on the 1983 Vienna Convention (n 7) para 27 and 29, 36.

282 As far as Upper Silesia is concerned, the Treaty of Versailles of 1919 art 88 already provided for a plebiscite to decide to whom the region should belong. About one-third of the region went to Poland.

Poland's boundaries changed drastically after the Second World War. It lost a massive chunk of territory to the Soviet Union.²⁸³ However, "pending the final determination of Poland's western frontier," it gained part of Germany's territory, as agreed in the Potsdam Agreement between the Soviet Union, the US, and Great Britain at the Potsdam Conference between July 17 and August 2, 1945.²⁸⁴ The three countries "reaffirm[ed] their opinion that the final delimitation of the western frontier of Poland should await the peace settlement."²⁸⁵ No peace treaty with Germany was concluded after the Second World War, so the boundary issue also remained open until the agreements between Poland and the GDR in 1950²⁸⁶ and the FRG in 1970.²⁸⁷ The boundary was only definitively fixed after the fall of the Berlin Wall in 1990.²⁸⁸ These agreements did not regulate succession to property.

The same was true of the other territories Germany lost after the Second World War. The Treaty on the Final Settlement with Respect to Germany (the so-called "2 + 4 Treaty") signed on December 12, 1990, between the FRG, the GDR, France, the USSR, the UK, and the US agreed that after the date of succession, the external boundaries of the FRG and the GDR would be respected.²⁸⁹ Germany thus recognized the loss (cession) of the territories east of the Oder-Niese (East Prussia, Silesia, and Pomerania). The agreement only regulated succession to the boundaries. In 1995, Germany also signed an agreement with France on the settlement of the question of Saarland.²⁹⁰

283 Jakubowski, *State succession in cultural property* (n 80) 111.

284 Potsdam Agreement (adopted 1 August 1945) in Charles I Bevans (ed), *Treaties and Other International Agreements of the United States of America, 1776–1949* (US Department of State 1969) vol III 1207, part VIII point b.

285 *ibid.*

286 Agreement Concerning the Demarcation of the Established and the Existing Polish-German State Frontier (adopted 6 July 1950) 319 UNTS 93.

287 Treaty between Poland and the Federal Republic of Germany Concerning the Basis for Normalization of Their Mutual Relations (adopted 7 December 1970) 830 UNTS 327.

288 Agreement between the FRG and Poland on the Confirmation of the Common Border (adopted 14 November 1990) 1708 UNTS 382.

289 Treaty on the Final Settlement with Respect to Germany (adopted 12 September 1990) 1696 UNTS 115 art 1.

290 Agreement between the FRG and France on the settlement of the Saar issue (adopted 22 December 1995) Bundesgesetzblatt Part II No 36. See also: Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 2, 41.

2.5 Practice of States without Continuing Legal Personality

There are three types of succession without continuing legal personality: dissolution, unification, and incorporation. In the context of succession to property, the case of unification is the least complex, as successor States simply succeed to all the property of the predecessor States. *Mutatis mutandis*, in the case of incorporation, the successor State, which is also the continuator, succeeds to all the property of the acquired State. The situation is quite different in the case of the dissolution of a State, where at least two new States are created, between which all the property of the predecessor State is divided. This often entails a complex or at least lengthy procedure for the division of State property between all the successor States.

2.5.1 *Dissolution of States*

From a succession perspective, these are the most fascinating cases given that the State as a basic international legal entity ceases to exist. Understandably, the subject of succession is therefore the entirety of the State property since the alternative would merely mean that this property would be considered *res nullius*. As already mentioned, the rule that a successor State succeeds to immovable State property situated on its territory is one of customary international law. Theoretically, State property abroad could pass to the third State on whose territory it is located if the question of succession to that property is not resolved within a reasonable time. Some succession issues remain unresolved even decades after the date of succession, but the property is not seized; however, such cases are rare. One can imagine bank and similar accounts with financial institutions abroad that could simply be closed after a certain period due to inactivity. Again, this would not negate the practice of succession but merely confirm the rules of operation of financial institutions in a country.²⁹¹

The 1983 Vienna Convention adopted a simple formula, according to which all State property (movable and immovable) located on the territory of the successor State belongs to it in its entirety. All State property (movable and immovable) located abroad is succeeded to by all successor States in equitable shares.²⁹² The only exception is movable property “connected with the activity of the predecessor State in respect of the territories to which the succession of States relates,” which “shall pass to the successor State concerned,” that is,

291 See, e.g., Reinisch and Bachmayer (n 10) 21–30 on the succession of funds in bank accounts abroad, the succession of diplomatic representation abroad, and the ownership of works of art abroad.

292 1983 Vienna Convention (n 1) 18(1)(a), (b), and (d).

the notion of *functional pertinence*. It is transferred to the successor State in question.²⁹³ The IDI Resolution on cultural heritage provides identically²⁹⁴ while including a general section on cultural heritage applicable to all types of succession.²⁹⁵ The Third Restatement merely stipulates that the property of the predecessor State belongs to the successor State on whose territory it is located.²⁹⁶

2.5.1.1 State Practice before the Two World Wars

The dissolution of the United Netherlands in 1830 is considered a dissolution even though it is reminiscent of the separation of Belgium from the Netherlands.²⁹⁷ The Treaty of London of April 19, 1839, between the Allies (who took part in the negotiations) and Belgium and the Netherlands also states in an annex that Belgium “shall form an independent and perpetually neutral State.”²⁹⁸ The agreement stipulates that each of the successor States, within the newly established boundaries, renounces all claims to lands, towns, castles, and places situated on the territory of the other.²⁹⁹ It specifically mentions that facilities, such as canals and roads, financed in whole or in part by the Kingdom of the Netherlands would belong to the successor State in which they are located.³⁰⁰

2.5.1.2 State Practice after the Second World War

2.5.1.2.1 *United Arab Republic*

The United Arab Republic (UAR) was formed in 1958 by the unification of Egypt and Syria. Before the unification, both States were already members of the UN, the World Bank, and the International Monetary Fund (IMF).³⁰¹ The UAR ceased to exist on September 28, 1961, after the coup d'état in Syria, and Egypt

293 *ibid* art 18(1) point c.

294 IDI Resolution on State Succession to Property and Debts (n 3) art 16, 19, and 20.

295 *ibid* art 16(5).

296 Third Restatement (n 44) point 1, 105.

297 Commentary on the 1983 Vienna Convention (n 7) 112.

298 Treaty between Great Britain, Austria, France, Prussia, and Russia, on the one part, and Belgium, on the other (adopted 19 April 1839) in Charles P Sanger and Henry TJ Norton, *England's Guarantee to Belgium and Luxemburg, with the Full Text of the Treaties* (Charles Scribner's Sons 1915) 127 (Treaty of London) annex.

299 *ibid* art 6.

300 *ibid* art 15(1).

301 See Dumberry, *State succession to international responsibility* (n 87) 107–108; Paul R Williams, ‘State succession and the international financial institutions: Political criteria v. protection of outstanding financial obligations’ (1994) 43 *International & Comparative Law Quarterly* 776, 790.

continued to use the name UAR until 1971. The cessation of the UAR is treated as a dissolution, not as the separation of Syria.³⁰² Succession to the UAR's property was never settled. In this case, it would be reasonable to assume that the UAR embassies were used by Egypt (under the name UAR and thereafter) after the dissolution, but this cannot be stated with certainty.

2.5.1.2.2 *Federation of Mali*

The Federation of Mali was a very short-lived independent State. Formed by the unification of two French autonomous territories, French Sudan and Senegal, it existed as an independent State for only two months.³⁰³ In June 1960, a tripartite agreement between France and the two territories granted it independence, and procedures began for the admission of the Federation of Mali to the UN,³⁰⁴ but Senegal seceded before the end of the process. Both countries (Sudan under the name Mali) were then admitted to the UN as new States in September 1960,³⁰⁵ which is why the succession of the Federation of Mali is considered a dissolution.³⁰⁶ However, it offers no relevant practice.³⁰⁷

In the context of dissolution, reference is also made to the breakup of entities that were not independent States but territories with greater or lesser autonomy. The cessation of their existence was usually dealt with according to the rules of decolonization. Such is the case of the Rhodesia-Nyasaland Federation (1963)³⁰⁸ and Rwanda-Urundi (1962).³⁰⁹

302 See Commentary on the 1983 Vienna Convention (n 7), 108; Shaw, 'State succession revisited' (n 42) 77.

303 ILC, 'Proceedings of the 26th Session' (1974) UN Doc A/9610/Rev.1, 262–263.

304 Rosalyn Cohen, 'Legal Problems Arising from the Dissolution of the Mali Federation' (1960) 36 *British Yearbook of International Law* 375, 377.

305 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2023.

306 Crawford, *The Creation of States in International Law* (n 175) 392.

307 ILC, 'Proceedings of the 26th Session' (1974) UN Doc A/9610/Rev.1, 263.

308 JES Fawcett, 'Security Council Resolutions on Rhodesia' (1965–1966) 41 *British Yearbook of International Law* 103 103: "Though some of the rights exercised by the Federation, 'are attributes of an independent State, neither the Federation nor Rhodesia after the dissolution in 1963, exercised any of them to the fullest extent.'"

309 Williams, 'State succession and the international financial institutions' (n 301) 790. Regarding the WB loan for the construction of the highway and port: "Rwanda refused to accept any liability for the loan on the ground that the benefits from the highway and port project accrued entirely within the territory of Burundi. The disagreement was settled by Belgium agreeing to be held liable for the loan."

2.5.1.3 State Practice after the Cold War

2.5.1.3.1 *Socialist Federal Republic of Yugoslavia*

The dissolution of the SFRY was not amicable, leading not only to bloody wars and genocide but also to international legal complications in the area of succession.³¹⁰ Serbia and Montenegro, two of the six republics of the former SFRY, merged to form the Federal Republic of Yugoslavia (FRY), adopting the position that it was the continuator State of the former SFRY while the other four republics separated.³¹¹ This position was opposed not only by the other four republics but also by the international community. The dissolution was confirmed by UN in Security Council Resolutions 777 (1992), 821 (1993), and others, and by UNGA Resolution 47/1 (1992). The finality of the dissolution was also confirmed by the Arbitration Commission of the Conference on Yugoslavia (the so-called Badinter Commission), which was established by the European Community with the Declaration on Yugoslavia of August 27, 1991. In its Opinions 1, 8, and 10, the Commission confirmed that the dissolution of the SFRY was complete and that five successor States of equal status had been created in its place.³¹²

The Badinter Commission stated that State succession is governed by the principles of international law on which the 1978 and 1983 Vienna Conventions are based.³¹³ It also asserted that successor States should follow the principles contained in these two Conventions “and, where appropriate, general international law” when dealing with their succession issues.³¹⁴ The Badinter Commission placed the greatest emphasis on principles of equity, proportionality, and respect for international law.³¹⁵ It particularly underlined the well-established rule of the law of State succession “that immovable property situated on the territory of a successor State passes exclusively to that State.”³¹⁶ The Commission stressed that, as regards succession to this property, how it was financed was irrelevant since the question of loans or counter-loans had no bearing on succession to State property.³¹⁷ It furtherly stressed that

310 For a detailed description, see, e.g., Borut Bohte, ‘Status ZRJ v OZN’ (2000) 55(11–12) *Pravnik* 801; Williams and Harris (n 177) 383–400; Ana Stanič, ‘Financial aspects of state succession: The case of Yugoslavia’ (2001) 12(4) *European Journal of International Law* 751.

311 On the institutional framework of the negotiations and the resolution of the situation created by the FRY’s claim of continuity, see: Mirjam Škrk, ‘Slovenski pogledi na nasledstvo držav’ (1996) 51(1–3) *Pravnik* 45, 46–59.

312 *ibid* 50–51.

313 Badinter Commission (n 4) Opinion No 1(e).

314 *ibid* Opinion No 9(4) point 2.

315 *ibid* Opinion No 9(4) point 3.

316 *ibid* Opinion No 14(3).

317 *ibid*.

“[a]s regards other state property, debts and archives, a *commonly agreed principle* found in several provisions of the [1983 Vienna Convention] requires that they be divided between the successor States to the SFRY, if, as the date of succession, they belonged to the SFRY.”³¹⁸ The original financing is also irrelevant as regards the distribution of this property.³¹⁹ To determine which property belongs to a State, the domestic law relevant on the date of succession must be applied.³²⁰ Property that was owned by the federal republics prior to the dissolution is not subject to succession and belongs to these republics.³²¹ As concerns succession to all the above-mentioned types of property, the Badinter Commission pointed out that if the consequences of such succession are highly disproportionate, compensation between the successor States is possible.³²²

The successor States of the former SFRY only concluded the Agreement on Succession Issues in 2001, and it came into force in 2004. The agreement regulates succession to property in several parts: in an Appendix to the Agreement, it addresses succession related to the Bank for International Settlements (BIS); in Annex A, succession to movable and immovable property located on the territory of the SFRY; in Annex B, succession to diplomatic and consular missions; in Annex C, succession to financial assets and liabilities; in Annex D, succession to archives; and in Annex F, succession to other rights, legal benefits, and financial obligations (the remaining two annexes regulate the rights of individuals, specifically, pensions for Annex E and private property and acquired rights for Annex G).

As regards immovable and movable State property on the territory of the SFRY, the *principle of territoriality* was adopted: each successor State was entitled to the immovable property located on its territory³²³ and the movable property located on its territory on the date of its declaration of independence.³²⁴ The agreement lists two exceptions. The first is the movable military property and immovable property owned by the Yugoslav People’s Army and used for civilian purposes, for which separate agreements shall be concluded by the affected successor States.³²⁵ No such agreements have been concluded to date.

318 *ibid* Opinion No 14(4) (emphasis added).

319 *ibid*.

320 *ibid* Opinion No 14(5).

321 *ibid* Opinion No 14(6).

322 *ibid* Opinion No 14(8).

323 Agreement on Succession Issues (n 5) annex A art 2.

324 *ibid* art 3.

325 *ibid* art 4.

The second exception is movable property of “great importance to the *cultural heritage* of one of the successor States and which originated from the territory of that State,” which was to be succeeded to by the successor State concerned.³²⁶ The successor State also succeeded to cultural objects located abroad; these are assets located in diplomatic and consular missions that were succeeded to by the successor State in accordance with the provisions of Annex B.³²⁷ Therefore, the annex does not require that the cultural heritage originate from the territory of the successor State, but it is sufficient that it is of major importance to it.³²⁸

An interesting provision is that the successor State on whose territory the immovable and movable property is located was to determine for itself whether that property was that of the SFRY in accordance with international law.³²⁹ The agreement provided that property shall not be valued and shall be succeeded to gratuitously³³⁰ unless the consequences of succession would result in substantially unequal distribution.³³¹ In such a case, the successor States shall take a unanimous decision in the framework of the Joint Committee on Annex A.³³²

The succession to financial assets is regulated in two places in the agreement. The SFRY’s assets with the BIS were already distributed on April 10, 2001, which is specifically mentioned in the preamble of the agreement,³³³ with substantial paragraphs in the Appendix. The SFRY’s financial assets (“gold and other reserves, and shares”) with the BIS—that is, movable State property abroad—were distributed among the successor States in proportionate shares following the *principle of equity*,³³⁴ using the shares determined by the IMF for the division of debt.

The proportional shares for the distribution of the residual financial assets are laid out in Annex C.³³⁵ These shares differed from those for the distribution of BIS assets. Annex C agreed on the division of all financial assets of the

326 *ibid* art 3(2) (emphasis added).

327 Agreement on Succession Issues (n 5) annex B art 4(5).

328 Even the separation of South Sudan did not require that movable cultural heritage assets originate from the territory. It is sufficient that it is cultural heritage, that is, has a link with the culture of one of the successor States (see above).

329 Agreement on Succession Issues (n 5) annex A art 6.

330 *ibid* art 8(1).

331 *ibid* art 8(2).

332 *ibid*.

333 *ibid* Preamble para 4.

334 *ibid* Appendix.

335 *ibid* annex C art 5(2).

SFRY (“such as cash, gold and other precious metals, deposit accounts and securities”), which included primarily accounts and other financial assets in the name of ministries and departments of the Federal Government and the National Bank of Yugoslavia (NBY) (“held by the SFRY or the National Bank of Yugoslavia directly or with foreign banks, Yugoslav joint venture banks and agencies of Yugoslav banks abroad”³³⁶). It also regulated the division of the foreign currency assets of the SFRY or NBY and the reserves in gold and other precious metals, as well as the NBY’s claims on banks in other countries arising from unfinished interbank clearing arrangements and financial quotas and the drawing rights of the SFRY, NBY, and federal institutions in international financial organizations and their financial assets with these organizations.³³⁷ In addition, the agreement covered the distribution of funds held directly by the NBY.³³⁸ It should be noted that in practice, the bulk of the SFRY’s funds had already been distributed (or spent) by the time of the Agreement on Succession Issues,³³⁹ which was only adopted a decade after the dissolution of the SFRY.

Also with regard to the distribution of diplomatic property (i.e., diplomatic missions), the Agreement on Succession Issues of Yugoslavia adopted the principles enshrined in the 1983 Vienna Convention and the Badinter Commission’s opinions. The distribution of this property was carried out in accordance with the *principle of equity*, according to which each successor State received a proportionate share.³⁴⁰ The successor States drew up a list of diplomatic missions according to six geographical regions, with the successor States in each region receiving their proportionate share of the value of the diplomatic property.³⁴¹ The successor State that succeeded to the diplomatic mission also succeeded to the movable property located there³⁴² except for the aforementioned cultural heritage.³⁴³ The Joint Committee for Annex B may amend the list as necessary.³⁴⁴

The dissolution of the SFRY, taking into account the actual situation, took place in a way that is in line with the practice of the rest of the world. The departure from practice is the result of a dispute over the nature of the succession, which dragged on for almost a decade because of armed conflicts.

336 *ibid* art 5(1).

337 *ibid* art 1.

338 *ibid* art 5(1).

339 *ibid* annex A art 3(1).

340 *ibid* annex B art 3(1).

341 *ibid* art 4(1).

342 *ibid* art 4(4).

343 *ibid* art 4(5).

344 *ibid* art 5.

The successor States, therefore, proceeded from a state of affairs that had to be accepted as a fact when they concluded the Agreement on Succession Issues. This situation manifested, for example, in Serbia's use of the SFRY's diplomatic missions, but Serbia nevertheless took the position, at the time of the signing of the Agreement, that diplomatic missions and other related property should be distributed based on the *principle of equity*. After the fall of the Milošević regime, the successor States adopted the agreement and, with it, the principles and rules it encompasses. However, major succession issues had already been resolved before its conclusion, in particular, succession to debts and international agreements.

2.5.1.3.2 *Federal Republic of Czechoslovakia*

The CSFR, into which the former Czechoslovak Socialist Republic was transformed in 1989, split into two successor States, the Czech Republic and the Slovak Republic, on January 1, 1993. Before their dissolution, the CSFR had already concluded an agreement on the consequences of succession in the form of Constitutional Act No 541/1992,³⁴⁵ adopted by the Federal Parliament of the CSFR on November 13, 1992, which laid down the basic rules for the division of property and liabilities after the dissolution. This was followed on November 25, 1992, by Constitutional Law No 542/1992, whose Article 1 provides that the CSFR shall cease to exist on December 31, 1992, and that the Czech Republic and Slovak Republic shall become its successors from January 1, 1993.³⁴⁶ Constitutional Law No 541/1992 also stipulated that after the dissolution, the successor States would conclude a bilateral agreement implementing all the provisions of this law.³⁴⁷

The Czechoslovak Socialist Republic was transformed from a unitary into a federal state in 1969 by Constitutional Law 143/1968, establishing republican parliaments and ministries.³⁴⁸ The federal authorities were also given a triple composition: a federal, a Czech, and a Slovak part, each with its own premises and archives. Because, in accordance with generally accepted succession principles, the subject of division is State property—in this case, the

345 Constitutional Law of the CSFR No 541/1992 on the division of the property of the Czech and Slovak Federative Republic between the Czech Republic and the Slovak Republic and its passage to the Czech Republic and the Slovak Republic (8 February 1992) Collection of Laws of the CSFR No 110.

346 Constitutional Law of the CSFR No 542/1992 on the dissolution of the Czechoslovak Federative Republic (8 February 1992) Collection of Laws of the CSFR No 110 art 1.

347 Constitutional Law of the CSFR No 541/1992 (n 345) art 12 para 1.

348 D Macková, 'Some legal aspects of the dissolution of former Czechoslovakia' (2003) 53 *Zborník pravnog fakulteta u Zagrebu* 375, 377.

property of the federal State of the CSFR (and not of the Czech and Slovak federal republics)—the division of property, especially archives, was considerably facilitated.³⁴⁹

Constitutional Law 541/1992, which was later transposed by the successor States into their domestic legislation, provided for succession to movable and immovable property, financial and monetary assets and reserves, and other property and rights within and outside the territory of the CSFR.³⁵⁰ The basic principle was *territoriality*, which applied to immovable property without exception and to movable property only if it was part of an immovable object given its purpose or character.³⁵¹ The *principle of specific connection* applied to rights and obligations, which, as regards their substance, belong to one successor only.³⁵² Other property was divided in the ratio 2:1, with the Czech Republic receiving the greater share.³⁵³ The share was established on the basis of population.³⁵⁴ The *principle of efficiency* and the future use of the State property must be taken into account in the division.³⁵⁵

Different ratios for the division were used only for limited kinds of State property. The movable assets of the Privatization Fund were distributed based on the *territoriality principle*, while the ratio was 2.29:1 in favor of the Czech Republic for the assets obtained from the sale of privatization vouchers.³⁵⁶ As regards IMF membership quotas, it was agreed that these would be determined by the IMF itself, which subsequently distributed them in a ratio of 69.1% for the Czech Republic and 30.9% for Slovakia (approximately 2.24:1).³⁵⁷ For other shares in the capital with the World Bank, the International Financial Corporation, the International Agency for Investment Guarantees, and others, a 2:1 ratio prevailed. The two States also agreed to adopt a special law on the division of the federal television, radio, press agency, railways, post office, and so on,³⁵⁸ and another for the rights to manage the transit gas pipeline, the Czechoslovak airline, and State foreign trade companies, among others.³⁵⁹

349 Grega Pajnikihar, 'Uporabnost izkušnje nasledstva po nekdanji čSZR' (2018) 37(3) *Pravna praksa* 6, 6.

350 Constitutional Law of the CSFR No 541/1992 (n 345) art 2.

351 *ibid* art 3(1) point a.

352 *ibid* art 3(4).

353 *ibid* art 3(1) point b.

354 Pajnikihar, 'Uporabnost izkušnje nasledstva po nekdanji čSZR' (n 349) 6.

355 Constitutional Law of the CSFR No 541/1992 (n 345) art 3(2).

356 *ibid* art 13.

357 Williams and Harris (n 177) 404.

358 Constitutional Law of the CSFR No 541/1992 (n 345) art 13(2).

359 *ibid* art 13(6).

The two republics also agreed on special rules for the division of the property of public (or State-owned) enterprises with their headquarters in one successor State and a representative office in the other successor State.³⁶⁰

In practice, the allocation of diplomatic missions, which would also have been subject to a 2:1 ratio, has been different as the two countries agreed otherwise to ensure the efficient distribution of diplomatic representation. Some complications arose regarding the sharing of central bank assets and the proceeds from the sale of privatization vouchers.³⁶¹ In 1999, an agreement was reached whereby the two States confirmed the finality of the division of State property and the prohibition of further claims, with the sole exception of property subsequently found abroad.³⁶²

The division of cultural heritage was carried out in a separate procedure, with the conclusion of an agreement on the reciprocal management of cultural heritage issues and the establishment of a special commission based on this agreement.³⁶³ The commission prepared a report, which served as the basis for a political decision. The *principle of provenance* was adopted as a basic guideline, and the commission also took into account the manner in which each object was acquired. As the two national collections of cultural heritage objects had been kept separate until the dissolution, only a few objects were disputed, and the division was completed in less than three years.³⁶⁴

2.5.2 *Unification of States*

Unifications are always consensual. In practice, the international agreements under which two countries unite do not even cover the arrangements for succession to property.³⁶⁵ Indeed, in the case of a unification of States, it is “clearly and manifestly logical [...] that the Successor State acquires the whole property of the Predecessor States.”³⁶⁶ It is logical that all the property of the

360 *ibid* art 8.

361 Williams and Harris (n 177) 406.

362 Agreement between the Government of the Czech Republic and the Government of the Slovak Republic on the Status of the Commission for the Regularization of the Property of the Czechoslovak Socialist Republic after the dissolution of the Czechoslovak Socialist Republic (adopted 16 April 1999) Official Gazette of Slovak Republic No 55/1999.

363 Jakubowski, *State succession in cultural property* (n 80) 200.

364 *ibid*.

365 Succession to property is not covered in the documents on the creation of the US, the unification of Belgium and the Netherlands (1814), the creation of Austria-Hungary (1867), the creation of the Central American Republic (1897), the creation of the Soviet Union (1922), or the creations of the United Arab Republic (1958), Tanzania (1964), Vietnam (1975), and Yemen (1990).

366 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 331.

predecessor States becomes the property of the successor State given that unification entails the merging of two or more whole States, not merely of parts of them. This rule is respected in its entirety only if a unitary State is created.³⁶⁷ It is also possible for States to merge into a federal State and for each to retain title to its own property, but practice shows that even in these cases, it is usually the successor State that is responsible for the international relations relating to that property.³⁶⁸ This does not mean that an individual territorial unit cannot hold its property abroad, but in international relations, it will normally be the State as a whole that will dispose of it.³⁶⁹ The internal regulation of this property after unification (e.g., whether the property will belong to one of the territorial units or the State as a whole) is a matter of internal law.

As other chapters demonstrate, unification agreements regularly provide for succession to treaties and debts but not property, including archives, probably because of what the previous paragraph describes. In this case, the 1983 Vienna Convention also provided for succession to all State property (i.e., both immovable and movable, on the territory and abroad) in one sentence: “When two or more States unite and so form one successor State, the State property of the predecessor States shall pass to the successor State.”³⁷⁰ The IDI Resolution on State Succession to Property and Debts is identical in substance, stating the logical consequences of unification: all property in the territory of the predecessor States is succeeded to by the successor State.³⁷¹ So does the Third Restatement, which regulates unification in incorporation provisions: “[W]here a State is absorbed by another State, property of the absorbed State, wherever located, passes to the absorbing State.”³⁷²

2.5.3 *Incorporation of One State Into Another*

In the event of an incorporation, the whole State is incorporated into another State. As in the case of cession, the legal personality of the continuator State is simply extended to the territory incorporated according to the *moving frontier principle*. However, given that the entire State is absorbed and its legal personality is thus extinguished, incorporation can theoretically be considered a case both with and without continuity. Because the legal personality of the incorporated State is extinguished, it makes sense that its entire property should

367 ILC, ‘Eighth report by Mohammed Bedjaoui’ (n 163) para 34, 86.

368 *ibid.*

369 *ibid.*

370 1983 Vienna Convention (n 1) art 16.

371 IDI Resolution on State Succession to Property and Debts (n 3) art 16, 19(1), and 20.

372 Third Restatement (n 44) para 2–4, 101–102.

be succeeded to by the State into which it was incorporated. However, under the internal law of the successor State, this property may remain in the possession of the territorial unit into which the predecessor State is “converted.” Incorporation and unification are similar in this context and are therefore not distinguished by the 1983 Vienna Convention. Thus, incorporation does not have its own article in the Convention and is covered in substance by the provision on unification.³⁷³ The IDI has defined the consequences of unification and incorporation in identical terms.³⁷⁴ Similarly but vice versa, the Third Restatement has primarily dealt with the consequences of incorporation, which can also be applied to cases of unification.³⁷⁵

2.5.3.1 State Practice before the Two World Wars

In the past, incorporations, like cessions, were mainly linked to hostile conquests of national territories. The literature provides an example with the incorporation of Hanover by Prussia in the middle of the 19th century. The UK had an interest in the property of the Kingdom of Hanover, and its legal service issued an opinion arguing that, through incorporation, Prussia succeeded to all the movable and immovable assets of Hanover but not the personal assets of the King.³⁷⁶

Part 3 of the US Constitution governs the admission of new States into the US. It reads, “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”³⁷⁷ For example, when Texas was admitted as a new State in 1845,³⁷⁸ the US Congress declared in the Joint Resolution for Annexing Texas to the United States that Texas would surrender to the US all movable and immovable property connected with its defense (“public edifices, fortifications, barracks, ports and harbours, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence”).³⁷⁹ The US did not, however, succeed to any public funds, debts,

373 1983 Vienna Convention (n 1) art 16.

374 IDI Resolution on State Succession to Property and Debts (n 3) art 19(2) and 20(4).

375 Third Restatement (n 44) para 209(b), 103.

376 O’Connell, *The Law of State Succession* (n 162) 226.

377 US Constitution <<https://www.archives.gov/founding-docs/constitution-transcript>> accessed 26 February 2023.

378 An Incorporation Agreement was signed between Texas and the US, but Congress did not ratify it, instead passing the Joint Resolution for annexing Texas to the United States.

379 Joint Resolution for annexing Texas to the United States (1 March 1845) in Richard Peters (ed), *Public statutes at large of the United States of America from the organization of the government in 1789, to March 3, 1845* (Little, Brown & Co 1856) vol 5, 797, para 2, 798.

taxes, or other obligations of any form owed by or to Texas. Texas also retained vacant and unused land to be used to pay its debts.³⁸⁰

2.5.3.2 State Practice after the Cold War: The GDR and the FRG

The term “unification of Germany” implies that two States united and that the predecessor State ceased to exist. However, this was not the case. Notwithstanding the fact that the unification of the two States would have been in line with Article 146 of the FRG’s Constitution (*Grundgesetz*), the institution described in Article 23 of the *Grundgesetz* was in fact applied: the GDR was incorporated into the FRG. The GDR lost its legal personality and ceased to exist as a State. The FRG, for its part, continued its legal personality with the territory of the five *Länder* of the former GDR added to its territory.

On August 31, 1990, the GDR and the FRG concluded the Agreement on the Unification of Germany, which settled the issues related to the incorporation of the GDR into the FRG.³⁸¹ As of the date of succession, the FRG succeeded to all the GDR’s State property, including abroad. The Agreement on the Unification of Germany defines this property as that which was used directly for the GDR’s administrative (i.e., State) purposes.³⁸² It does not include property used by the *Länder*, local authorities, and other public administration agencies before October 1, 1989; the succession to this property is to be regulated by domestic law after the date of succession.³⁸³ State property that was in the possession of the Ministry of State Security (*Stasi*) shall be placed in the custody of a special agency (*Treuhandanstalt*).³⁸⁴ The same applied to financial assets.³⁸⁵

The FRG also succeeded to the GDR’s financial resources. Some went directly to the FRG, others to the *Treuhandanstalt*. Some of the funds acquired were subsequently redistributed to the *Länder* in accordance with internal legislation and proportional shares.³⁸⁶ Until the transfer took place, the Ministry of Finance of the GDR gained control of the assets.³⁸⁷ It was separately agreed that the property (and liabilities) of the GDR Railways and Post would be

380 *ibid.*

381 Agreement between the Federal Republic of Germany and the German Democratic Republic on the establishment of a united Germany (adopted 31 August 1990) Bundesgesetzblatt Vol 1990 Part 11 No 35 (Agreement on the unification of Germany).

382 *ibid* art 21(1).

383 *ibid.*

384 *Ibid.*

385 *ibid* art 22(1).

386 *ibid.*

387 *ibid* art 22(2).

succeeded to by the FRG but that this property would immediately be transferred to the Federal Railways and Post.³⁸⁸

In addition, the cultural institutions and their property would be administered by the *Länder*.³⁸⁹ The State collection of the former Prussia, which had been divided up after the war, was specially organized: the institutions, including “State Museums, State Libraries, Secret State Archives, Ibero-American Institute, State Musicology Institute,” were reunited in Berlin.³⁹⁰

The conclusion of the Agreement on the Unification of Germany was followed by the Treaty on the Final Settlement with Respect to Germany (the “2 + 4 Treaty”), signed on December 12, 1990, between the FRG, the GDR, France, the USSR, the UK, and the US. This agreement stipulated that the external boundaries of the FRG and the GDR would be respected after the date of succession.³⁹¹ Germany thereby recognized the loss (cession) of the territories east of the Oder and Niesse rivers (East Prussia, Silesia, and Pomerania). The agreement only regulated succession to boundaries.

2.6 Conclusions

In practice, international agreements often do not cover certain areas, which can lead to different conclusions. An example is the absence of stipulations on succession to property abroad in most peace treaties after the First World War. There are only three possible conclusions on this point: a) anything outside the boundaries of the predecessor State and located on the territory of third States becomes the property of that third State; b) such property remains the property of the continuator State; or (c) such property is acquired by the successor States (i.e., not by the continuator State) on some other basis. Option a) is not relevant to succession because if the third State were to nationalize the property, there would be no succession, which only concerns predecessor and successor States. In this case, it would be an act exclusively linked to the outcome of the war, and all other successor States would also lose the possibility of succeeding to that property.³⁹² Since the subject of the present book is only succession, such a situation remains beyond its scope. It is also clear that

388 *ibid* art 26 and 27.

389 *ibid* art 35(4).

390 *ibid* art 35(5).

391 Treaty on the Final Settlement with Respect to Germany (n 289) art 1.

392 It would be substantively equivalent to declaring immovable property abroad to be *res nullius*, followed by the appropriation of that property by other States or individuals.

if the successor State (i.e., non-continuator State) had succeeded to the property, the peace treaty would have specifically provided for this; hence, option c) can also be ruled out. This means that if the property was not nationalized by a third State and, therefore, succession can be discussed, the more logical conclusion is that the continuator State succeeds to the property (option b). Despite the logic of such a conclusion, the book does not accept similar conclusions unquestioningly, except when it is the only possible one.

The picture is different with regard to the succession arrangements for cultural heritage objects. This is a special kind of movable property and, consequently, requires a specific *lex specialis* provision in the succession agreements. In its absence, it is reasonable to conclude that succession to cultural heritage is not regulated in this case.

The case law under consideration confirms that in the event of unification, there is succession to absolutely all State property as entire States are merged and, thus, become part of the successor State. As stated by the ILA, “[i]n the case of the uniting of States, the clearly and manifestly logical solution provides that the Successor State acquires the whole property of the Predecessor States.”³⁹³ In this way, all types of property belonging to the predecessor States on the date of succession are succeeded to by the successor State. The exception is when the property remains the property of the territorial unit under the successor State’s internal law.

In the case of an incorporation, the succession is to all State property as the whole State is incorporated and becomes part of the other State. This conclusion follows the same logical premise as the rule in the case of unification. Thus, all types of property belonging to the acquired State on the date of succession are succeeded to by the continuator State. There are exceptions as well when the property remains the property of the territorial unit under the internal law of the successor State. Property that is not State property but belongs to territorial units is not subject to succession and, as such, remains with that territorial unit.

Immovable property is succeeded to by the successor State on whose territory it is located, as confirmed by all succession cases in all periods. The only exception is the Peace Treaty with Japan, which stated that this succession would be regulated by later bilateral agreements.

Practice differs on succession to immovable property abroad. In the practice involving States with continuing legal personality, a rule cannot be deduced with certainty until the end of the Cold War as succession to immovable

393 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 8) 331.

property abroad is only explicitly regulated in a few post–First World War agreements and only in the case of Pakistan thereafter. The post–Cold War practice of succession by separation of part of a territory shows that the property mostly remains with the continuator State. This stems from the succession of the USSR, in which the de facto continuator State retained all property abroad, with the exception of one successor State (Ukraine), which also succeeded to an equitable share of the diplomatic missions. In the primary scenario, all property abroad also remains with Sudan. As concerns dissolution, both recent cases confirm the division of such property into proportionate shares. In the case of unifications and incorporations, the successor succeeded to all the property.

Movable property located on the territory of the successor State is usually succeeded to by the successor State, but there are important exceptions. These are cultural heritage objects (see below) and individual types of movable property that are distributed for different reasons. The latter include movable property linked to railways, the postal service, or the military, and such property is often distributed in proportionate shares (e.g., the Peace Treaties of Versailles and Trianon and the successions of Pakistan, Montenegro, and the Soviet Union). An important departure from this rule is the succession of Czechoslovakia, where it was stipulated that the State would succeed in full only to the movable property that is functionally linked to the real property succeeded to. In this case, the remaining movable State property was distributed in proportionate shares. The Czechoslovak succession is also the only example of application of the 1983 Vienna Convention's provision on succession on the basis of the *principle of functional pertinence*, but Czechoslovakia used the connection with immovable property, whereas the Convention uses the connection with the territory.

Movable property abroad is succeeded to on a case-by-case basis. Most international agreements are silent on this issue. The agreements governing succession to diplomatic missions do not specifically address succession to the movable assets associated with these missions (furniture, vehicles, etc.), so it can be assumed that this movable property remains with the successor State. As regards dissolution, financial assets in banks and similar accounts abroad are succeeded to in proportionate shares (Yugoslavia, Czechoslovakia). In cases of separation, the practice is not uniform: with the dissolution of the USSR, all property was succeeded to by the de facto continuator State; for Montenegro, the financial property was divided into proportional shares, which probably had an impact on the willingness of the successor State to also accept the succession to property; in South Sudan, in the primary scenario, all property went

to the continuator State, and in the secondary scenario, each successor State received a proportional share.

Succession to cultural heritage has occurred in all periods and in all forms of succession, but the practice is not homogeneous. Older cases sometimes provide for succession to cultural heritage (e.g., the Peace Treaties of Versailles and Saint-Germain-en-Laye, the Peace Treaty with Italy after the Second World War), sometimes not (e.g., the Agreement on the Cession of Alaska, the Peace Treaty with Japan after the Second World War). However, since the end of the Cold War, succession to cultural heritage has been regulated in all cases where the successor States have regulated the succession (more or less) comprehensively. It has been provided for in the successions of the former Yugoslavia, Czechoslovakia, the Soviet Union, and Sudan. It should be added that succession to cultural heritage is also *implicitly* regulated in all cases of unification and incorporation. Among the more recent examples, succession to this property is not established only in the case of Montenegro, where the two States have not yet agreed on a comprehensive succession agreement but only on the sharing of financial resources.

Succession to cultural heritage (in cases where such succession has been established) is always conditioned by the *principle of provenance*. However, two recent examples additionally provide for succession without consideration for the provenance of the object (South Sudan and succession to the movable property located in the diplomatic missions of the former Yugoslavia).

The successor State always succeeds to the property as it was on the date of succession, which is also consistent with the principles of *pacta tertiis nec nocent nec prosunt* and *nemo plus iuris ad alium transferre potest quam ipse habet* and with the provision of the 1983 Vienna Convention on the effect of succession to property. Practice also confirms that the manner in which property was acquired by the predecessor State is relevant only for cultural heritage.

Succession to State Archives

3.1 Definition of State Archives

The 1983 Vienna Convention defines the State archives of a predecessor State as “all documents of whatever date and kind, produced or received by the Predecessor State in the exercise of its functions which, at the date of the succession of States, belonged to the Predecessor State according to its internal law and were preserved by it directly or under its control as archives for whatever purpose.”¹ Documents must be considered in the broadest sense. As long as they fulfill the above conditions, they may be written or non-written and in any medium (paper, parchment, fabric, stone, wood, glass, film, etc.).² They may also be numismatic and iconographic objects, photographs, and films, which are usually kept in museums, if they have been classified as archival material by the State and are kept in an archive.³ Their content is irrelevant,⁴ but the ILC has specifically excluded works of art,⁵ which are regulated by the provisions on succession to property, in particular cultural heritage objects. The ILC does not distinguish between so-called “living archives” and “historical archives,” both of which may be subject to succession.⁶

As in the case of State property, the domestic law of the predecessor State is relevant to the determination of what constitutes State archives.⁷ Only the documents that are defined as archives by the internal law of the predecessor State are therefore subject to succession. As with other matters of succession, archives that belonged to individual territorial units (e.g., federal republics) are not concerned. They remain with the territorial units after the date of

1 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 20.

2 ILC, ‘Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries’ (1981) UN Doc A/36/10 (Commentary on the 1983 Vienna Convention) para 3, 50.

3 *ibid* para 4, 50.

4 *ibid* para 5, 50.

5 *ibid* para 6, 50.

6 *ibid* para 1, 50.

7 PK Menon, *The succession of states in respect to treaties, state property, archives and debt* (The Edwin Mellen Press 1991) 122.

succession, and their possible reclassification as State archives depends on the internal law of the successor State.

In the area of succession to archives, a general and a special part can also be identified. The division is based on the principles governing the archives. Succession to the general part is regulated in different ways, either by division into proportional shares or by joint preservation with guaranteed access for all successor States. The special part relates to the relationship of each State with specific archives, and the successor State usually has the right to acquire these in their entirety.

With regard to succession to archives, the 1983 Vienna Convention provides that “[t]he passing of State archives of the predecessor State entails the extinction of the rights of that State and the arising of the rights of the successor State.”⁸ This provision is identical to those on succession to other matters.

3.2 Principles and Rules for Succession to State Archives

As with other succession matters, it is possible to highlight certain principles related to archives that are mainly rooted in the professional principles of the field.

3.2.1 *Principle of Provenance*

According to the *principle of provenance*, materials that originated in one part of the territory and were subsequently transferred belong to that part of the territory,⁹ as confirmed by State practice. These are usually materials created in the predecessor State by local authorities (e.g., the authorities of a federal republic) but then transferred to the central archives in accordance with the predecessor State’s internal law. These materials are therefore not only linked in substance (*principle of pertinence*) to a part of the territory (since they were the responsibility of the local authorities) but also originate from there.

3.2.2 *Principles of Historical and Territorial Pertinence*

Principles of historical and territorial pertinence provide a link between a successor State’s history or territory and the archival material, the material must relate exclusively or primarily to this State.¹⁰ In assessing the link, the State organs that produced the material and the reason for the transfer (e.g., an act

8 1983 Vienna Convention (n 1) art 121.

9 Commentary on the 1983 Vienna Convention (n 2) para 9, 56.

10 *ibid* para 15, 58.

of a State) must be taken into account, as well as the method of acquisition (e.g., purchase, loan), the means used (e.g., State or local).¹¹ If the link between the successor State and the archives is only indirect, they will clearly remain with the predecessor State, but the successor State may acquire the copies.¹²

3.2.3 *Principle of Functional Pertinence*

The archives necessary for the normal functioning of the successor State are succeeded to by that successor State.¹³ These are mainly the so-called administrative archives, that is, those necessary for the administration of the territory. They include, for example, land registry extracts, contracts on the acquisition of titles to immovable property, administrative files, current documentary material, and civil registers.

The 1983 Vienna Convention stipulates that “the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State.”¹⁴ The phrase “at the disposal of” is much broader than the term “passes to” the successor State. In the former case, the provision can be met even if the successor State is only provided with a copy or free and unfettered access to the archival material.

3.2.4 *Rule of Succession according to the Location of Preservation*

The *principle of territorial pertinence* differs from the *rule of succession according to the location of preservation*. While the former determines the substantive link of the archives with the territory or history of a nation, the latter determines the physical location of the archives before the date of succession. In practice, States sometimes (especially in cases of dissolution) provide that each successor State succeeds to those archives located on its territory. Such an arrangement makes sense because local archives often hold national archival material, which has a special link (either functional or territorial pertinence) with that part of the territory.

This rule is often regarded as primary, and succession is then established in the form of exceptions to it based on the principles of functional pertinence,

11 *ibid.*

12 *ibid.*

13 Borut Bohte, ‘Mednarodnopravni vidiki nasledovanja držav v luči novejših primerov nasledovanja držav’ (1999) 54(11–12) *Pravnik* 671, 682.

14 1983 Vienna Convention (n 1) art 27(2)(a), 28(1)(a), 30(1)(a), and 31(1)(a) (emphasis added).

provenance, or other. This rule is analogous to that concerning succession to movable property located on the territory of the successor State.

3.2.5 *Principle of Integrity or Indivisibility of Archival Fonds*

It is a principle of the archival profession that materials constituting an indivisible whole shall not be divided. Such material shall be succeeded to in its entirety, subject to other principles and rules.¹⁵ When designating archival fonds, the rules of the archival profession must be observed, and only material that actually constitutes an indivisible whole should be included. There have been cases of States creating significantly larger fonds, thus hindering the process of archival succession.

3.2.6 *Principle of Gratuitous Succession and Copying of Archival Material*

As with other State property, archival material is succeeded to gratuitously.¹⁶ An essential feature of archival material (with the exception of archival material of special historical or artistic interest) is the possibility of making a copy, which does not exist with other property. A State to which the originals do not belong, according to other principles and rules, can thus obtain (certified) copies. However, the cost of copying is subject to agreement between the States concerned, but on the reasonable assumption that it is borne by the State that has an interest in the copies.

3.3 State Practice with Continuing Legal Personality

3.3.1 *Separation of Part or Parts of a Territory*

With regard to succession to archives in the event of a separation of part or parts of a territory, the 1983 Vienna Convention provides that, in the absence of an agreement between the States concerned, the successor State succeeds to the part of the State archives necessary “for [the] normal administration of the territory to which the succession of States relates” (*principle of functional or territorial pertinence*).¹⁷ As regards the other materials “connected with the interests of their respective territories,” the two States shall make copies available to each other.¹⁸

15 1983 Vienna Convention (n 1) art 25.

16 *ibid* art 23.

17 *ibid* art 30(1).

18 *ibid* art 30(4).

The convention further stipulates that the predecessor State shall provide the successor State with “the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries.”¹⁹ It also states that agreements between the predecessor and successor States “shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.”²⁰

3.3.1.1 State Practice before the Two World Wars

The Berlin Congress, as well as the previous congresses in Paris and London, did not address succession to archives with respect to territories that had been partitioned or ceded.

3.3.1.2 Peace Treaties after the First World War

Conversely, the peace treaties concluded after the First World War regulated succession to archives in detail. The Treaty of Saint-Germain-en-Laye and the Treaty of Trianon stipulated that Austria and Hungary would hand over to the successor States all “archives, registers, plans, title-deeds and documents of every kind belonging to the civil, military, financial, judicial or other forms of administration in the ceded²¹ territories.”²² It is therefore the *principle of functional pertinence* that was used. It was also decided that Austria and Hungary would hand over, at the request of the successor State, the documents that could be found at that moment.²³ As concerns archives (except for military ones) that do not relate *exclusively* to the ceded territories but are equally necessary for the administration of Austria and Hungary, Austria and Hungary will provide the successor States with access to these archives on the condition of reciprocity.²⁴ The Treaty of Lausanne also provided for all of the above.²⁵

19 *ibid* art 30(2).

20 *ibid* art 30(3).

21 The term “ceded” also refers to the case of the separation of part of a territory.

22 Treaty of Peace between the Allied and Associated Powers and Austria (with amendments) and other treaty engagements (adopted 10 September 1919) (1921) His Majesty’s Stationery Office 1 (Treaty of Saint-Germain-en-Laye) art 93(1); Treaty of Peace Between the Allied and Associated Powers and Hungary and Protocol and Declaration (adopted 4 June 1920) 15 AJIL 1 (Treaty of Trianon) art 77(1).

23 *ibid*.

24 Treaty of Saint-Germain-en-Laye (n 22) art 93(2); Treaty of Trianon (n 22) art 77(2).

25 Treaty of peace with Turkey, and other instruments (adopted 24 July 1923) together with Agreements between Greece and Turkey (adopted 30 January 1923) and subsidiary documents forming part of the Turkish Peace Settlement (1923) His Majesty’s Stationery Office 1 (Treaty of Lausanne) art 139.

Meanwhile, the Treaty of Trianon does not include some of the provisions laid down for Austria's succession. Successor States also succeeded to all records, documents, and historical material from public institutions that directly related to the history of the ceded territories (*principle of historical pertinence*) and that were removed from there within ten years of the signing of the Treaty.²⁶ This is the *principle of provenance* given that the materials originated in the territory of the successor State. The same principle was used for the succession of the Ottoman Empire.²⁷ In addition, Austria was also obliged to return all archives, documents, antiquities and works of art, and scientific and literary materials it had alienated during the war.²⁸ However, this case is one of war reparations, not succession of States. The Treaty of Versailles provided for succession to archives only for the ceded territories. The same applies to the Treaty of Neuilly-sur-Seine.

During this period, Italy and the newly formed Kingdom of Serbs, Croats, and Slovenes signed the Treaty of Rapallo (November 12, 1920) and the Agreement of Rome (January 27, 1924), defining their border. Certain territories belonged to one and others to the other. According to the Treaty of Rapallo, the predecessor and the successor divided "provincial and municipal property together with the archives relating thereto" equally.²⁹

The Treaty of Riga (Poland) also includes stipulations on succession to archives. It was agreed that all archives, registers, extracts from archives, property lists, maps, and other documents of State institutions and self-governing, private, and ecclesiastical institutions that were taken out of Poland after January 1, 1772, and relate exclusively to Poland should be returned to Poland (*principle of provenance*).³⁰ Interestingly, Poland shall also succeed to the listed documents that do not relate exclusively to it if they cannot be divided.³¹

All archives, registers, extracts from archives, property lists, maps, and other documents *produced* by the legislatures, central ministries, departments and administrations, their provincial and local branches, and private and public institutions during the period of the common State (i.e., between January 1, 1772, and November 9, 1918) shall belong to the successor State to whose

26 Treaty of Saint-Germain-en-Laye (n 22) art 193.

27 Treaty of Lausanne (n 25) art 139(3).

28 Treaty of Saint-Germain-en-Laye (n 22) art 191.

29 Treaty between Italy and the Kingdom of Serbs, Croats and Slovenes (adopted 12 November 1920) 15 AJIL 173 (Treaty of Rapallo) art 2(3).

30 Treaty of Peace between the Soviet republics of Russia and Ukraine on the one hand and Poland on the other (adopted 18 March 1921) 6 LNTS 51 (Treaty of Riga [Poland]) art 11 para 4 part 1.

31 *ibid* art 11 para 4 part 2.

territory they relate (*principle of territorial pertinence*).³² As regards the succession to archives, registers, and other documents pertaining to the revolutionary movement in Poland after 1876, a special international agreement must be concluded between the two States.³³ In any case, archives, registers, and other documents containing military secrets relating to the period after 1870 were not succeeded to.³⁴

The return of archives (with the exception of secret military information) and cultural heritage objects taken from the territory of either side during the short period between August 1, 1914, and October 1, 1915, was also specifically provided for. These shall be returned³⁵ but only if they were in the possession of the State authorities or legal persons in their own State. The burden of proof was on the State that was alleged to be the possessor.³⁶ A special commission was set up to implement these provisions.³⁷

Succession to the predecessor State's archives was also recognized in the Treaty of Tartu between Russia and Estonia, but the two countries agreed to set up a special commission to discuss the division of the archives.³⁸ However, the Treaty itself stipulated that Estonia would receive all archives relating to State property (movable and immovable) of all kinds located on its territory.³⁹ At the same time, Russia would return (*principle of provenance*) all archives of educational (Tartu University is specifically mentioned), scientific, or historical value to Estonia that were taken from Estonia to Russia, provided that their location in Russia was known.⁴⁰

The Treaty of Riga (Latvia) between Latvia and Russia contains several provisions on archives, but these are connected to either war restitutions or archives as cultural heritage.⁴¹ However, under the provisions on succession to archives, Latvia received the archives of the central and municipal authorities of the predecessor State that related directly to Latvia (*territorial pertinence*).⁴²

32 *ibid* art 11 para 5.

33 *ibid* art 11 para 6 point a.

34 *ibid* art 11 para 6 point b.

35 *ibid* art 11 para 9–11.

36 *ibid* art 11 para 12.

37 *ibid* art 11 para 15.

38 Treaty of Tartu between Estonia and Russia (adopted 2 February 1920) 11 LNTS 30 (Treaty of Tartu) art 14(2) point 2.

39 *ibid* art 11(3).

40 *ibid* art 12(1) point 4.

41 Treaty of Peace between Latvia and Russia (adopted 11 August 1920) 2(3) LNTS 196 (Treaty of Riga [Latvia]) art 11 points 1–2 para 1; art 11 point 1 para 2; art 11 point 3.

42 *ibid* art 11 point 4.

The Treaty of Moscow provided for succession to the archives belonging to Lithuania in the same way as the agreement with Latvia, with the important difference that a special commission would be set up to determine succession to the archives of the central and municipal authorities of the predecessor State.⁴³

3.3.1.3 State Practice after the Cold War

Recent examples are the breakup of the Soviet Union (1992) and the separation of South Sudan from Sudan (2011).⁴⁴

3.3.1.3.1 *Soviet Union*

On July 6, 1992, the ten successor States of the former USSR⁴⁵ concluded a Succession Agreement on the State Archives of the former USSR within the framework of the CIS.⁴⁶ Three Baltic States, Georgia—which only became a CIS Member State in 1993—and Azerbaijan—which was a signatory to the Alma Ata Declaration—did not sign the agreement.

The successor States agreed that “on the basis of the principles of integrity and indivisibility of the archival fonds created as a result of the activities of the higher State structures of the former Russian Empire and the USSR, which are held in State archives outside their territories,” they would not claim succession to these archival fonds.⁴⁷ They decided that each republic should succeed to the former State archives held on its territory.⁴⁸

However, in accordance with the *principle of provenance*, the successor States succeeded to the archival material created on their territory and subsequently transferred outside their boundaries.⁴⁹ Nonetheless, they were not entitled to the originals if the specific material could not be “physically separated from the rest of materials” (*indivisibility of archival fonds*). In this case, they had the right to free access and the possibility of obtaining a copy.⁵⁰ If the

43 Treaty of Peace between Lithuania and Russia (adopted 12 July 1920) 3(2) LNTS 105 (Treaty of Moscow) art 9(4).

44 Montenegro and Kosovo have not yet signed an agreement on succession to archives with Serbia (the continuator State).

45 Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine.

46 Agreement on the Succession of the Archives of the Former USSR (adopted 6 July 1992) Bulletin of International Treaties No 8.

47 *ibid* art 1.

48 *ibid* art 2.

49 *ibid* art 3.

50 *ibid* art 4.

materials were of interest to several successor States, the States had to agree on additional ways of using them and preventing their destruction.⁵¹

The agreement thus established as basic the rule of succession according to the location of preservation and, interestingly, the *principle of the integrity or indivisibility of archival fonds*. It is clear that, pursuant to these principles, most archival material of this kind remained in Moscow.

3.3.1.3.2 *South Sudan*

Sudan and South Sudan have followed the *principles of functional pertinence* and *territorial pertinence* with regard to succession to archives. They determined that South Sudan is entitled to all parts of the archives that are necessary for the normal administration of its territory or relate directly to it or its territory.⁵² Sudan would provide South Sudan with the best available specimens, including maps and other documents, relating to titles to the territory and boundaries of South Sudan. It shall also provide all information necessary to clarify which materials belong to South Sudan.⁵³ The transfer of materials was to be gratuitous.⁵⁴

3.3.2 *Transfer of Part of a Territory to Another State (Cession)*

3.3.2.1 State Practice before the Two World Wars

The 1867 agreement between the US and Russia on the purchase of Alaska stipulated that the US would succeed to all archives relating to and located on the ceded territory. Russia may obtain certified copies thereof.⁵⁵

3.3.2.2 Peace Treaties after the First World War

For the provisions of the Treaties of Saint-Germain-en-Laye, Trianon, and Lausanne, see 3.1. *Separation of part or parts of a territory* as they also apply *mutatis mutandis* to succession by cession.⁵⁶

51 *ibid* art 8.

52 Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters <<https://peacemaker.un.org/node/1617>> accessed 26 February 2023 art 4.2.1.

53 *ibid* art 4.2.2.

54 *ibid* art 4.2.4.

55 Treaty concerning the cession of the Russian possessions in North America by His Majesty the emperor of all the Russias to the United States of America (adopted 30 March 1867) 15 Stat 539 (Agreement on the Cession of Alaska) art 11.

56 The Treaty of Neuilly-sur-Seine only provides for the repatriation of archives removed during the war, as it only includes a provision on the archives of Greece, Romania and the State of Serbs, Croats and Slovenes that were removed from their territories during the

The Treaty of Versailles provided for succession to archives only for the ceded territories. It stipulates that archives related to “civil, military, financial, judicial and other administrations” would be succeeded to by the States that had acquired territory from Germany (i.e., Belgium,⁵⁷ France,⁵⁸ and Japan).⁵⁹ Specific mention is made of Germany’s obligation to return to Belgium the archives taken during the First World War⁶⁰ and to France those taken during the First World War and the war of 1870–1871.⁶¹ There is also a specific provision on succession to the archives relating to the cession of mines in the Saar basin to France; in this respect, Germany is obliged to hand over all relevant archives.⁶²

With the Treaty of Dorpat, Finland and Russia agreed to exchange “at the earliest opportunity” all archives belonging to public institutions of the other party and relating exclusively or mainly to it or its history (*territorial and historical pertinence*).⁶³ They specifically agreed that Russia would hand over to the Finnish government all archives of the former Secretariat of State of the Grand Duchy of Finland, with the exception of material relating exclusively or mainly to Russia or its history. Finland may make copies of the latter.⁶⁴

3.3.2.3 Peace Treaties after the Second World War

The Annex to the Peace Treaty with Italy provided that the States to which Italian territory was ceded would also succeed gratuitously to all administrative archives (*principle of functional pertinence*) and archives of historical value (*principle of historical pertinence*) for the ceded territories.⁶⁵ It was specifically stipulated that Italy would hand over to France all pre-1860 administrative and historical archives relating to the territories ceded by Italy to France under the 1860 agreements,⁶⁶ to Yugoslavia all administrative archives removed from its

war. Treaty of Peace between the Allied Powers and Bulgaria and Protocol (adopted 27 November 1919) 14 AJIL 185 (Treaty of Neuilly-sur-Seine) art 126.

57 Treaty of Peace between the Allied and Associated Powers and Germany (with amendments) and other treaty engagement (adopted 28 June 1919) (1925) His Majesty’s Stationery Office 1 (Treaty of Versailles) art 38(1).

58 *ibid* art 52.

59 *Ibid* art 158.

60 *ibid* art 38(2).

61 *ibid* art 245.

62 Treaty of Versailles (n 57) annex to art 45–50 point 3 and 20.

63 Treaty of Peace between Finland and Russia (adopted 14 October 1920) 3(1) LNTS 5 (Treaty of Dorpat) art 29(1).

64 *ibid* art 29(2).

65 Treaty of Peace with Italy (adopted 10 February 1947) 49 UNTS 50 annex XIV point 1 para 1.

66 Treaty of Peace with Italy (n 65) art 7.

territory during the occupation between 1918 and 1924,⁶⁷ to China all archives connected to Tientsin, for which the lease was terminated,⁶⁸ and to Ethiopia all archives removed since 1935.⁶⁹ In a special annex governing the Free Territory of Trieste, it was stated that Italy and Yugoslavia would hand over to the Free Territory of Trieste all archives necessary to its normal functioning (*principle of functional pertinence*).⁷⁰ Italy also transferred to the Free Territory of Trieste all archives of historical value for Trieste, which, in turn, passed such archives to Yugoslavia.⁷¹

As mentioned above, the Peace Treaty with Hungary declared that Hungary would return to Yugoslavia and Czechoslovakia the cultural heritage objects originating in these territories (*principle of provenance*) that had come into its possession or that of its public institutions after 1848: a) historical archives, b) libraries, historical documents, antiquities, and other cultural objects belonging to Yugoslavia and Czechoslovakia, and c) original artistic, literary, and scientific objects that are the work of Yugoslav or Czechoslovak authors.⁷² Nevertheless, these objects would not be subject to succession if they were acquired by purchase, acquired on the basis of a legate, or donated or if they are the work of Hungarian authors.⁷³ It was specifically stipulated that Hungary would hand over to Yugoslavia the archives of Illyria pertaining to the 18th century.⁷⁴

The peace treaties with Japan, Bulgaria, and Romania do not regulate succession to archives.

3.4 State Practice without Continuing Legal Personality

3.4.1 *Dissolution*

3.4.1.1 State Practice before the Two World Wars

Regarding the dissolution of the United Netherlands in 1830, the Treaty of London (1839) stipulated that Belgium should succeed to all archives, maps,

67 *ibid* art 12.

68 *ibid* art 25.

69 *ibid* art 37.

70 *ibid* annex x (Economic and Financial Provisions Relating to the Free Territory of Trieste) point 4.

71 *ibid*.

72 Treaty of Peace with Hungary (adopted 10 February 1947) 41 UNTS 135 art 11 point 1.

73 *ibid* point 2.

74 *ibid* point 3.

plans, and other documents belonging to it (*principle of provenance*) or connected with its administration (*principle of functional pertinence*).⁷⁵

After the breakup of the union of Norway and Sweden in 1905, the two States concluded a succession agreement on April 27, 1906. Under this agreement, each State retained the archives that had not been transferred to the federation, and it was intended that the central archives could later be divided up. The *territorial principle* and the *principle of functional pertinence* were taken into account.⁷⁶ It was also agreed that Norway would succeed to those archives abroad that were exclusively linked to it.⁷⁷

3.4.1.2 State Practice after the Cold War

3.4.1.2.1 Socialist Federal Republic of Yugoslavia

The Agreement on Succession Issues defined as “State archives of the SFRY”

all documents, of whatever date or kind and wherever located, which were produced or received by the SFRY (or by any previous constitutional structure of the Yugoslav State since 1 December 1918) in the exercise of its functions and which, on 30 June 1991, belonged to the SFRY in accordance with its internal law and were, pursuant to the federal law on the regulation of federal archives, preserved by it directly or under its control as archives for whatever purpose.⁷⁸

It was agreed that, in keeping with the *principle of provenance*, the individual successor States would succeed to “SFRY State archives [that] were displaced from their proper location” within the former federal republics.⁷⁹ The successor States shall also, of course, succeed to republican (i.e., territorial unit) and other archives that had been transferred from the republic.⁸⁰ The agreement also takes into account the *principle of functional pertinence*, according to which the part of the national archives necessary for the normal administration of the territory of one or more States passes to these States, regardless of

75 Treaty between Great Britain, Austria, France, Prussia, and Russia, on the one part, and Belgium, on the other (adopted 19 April 1839) in Charles P Sanger and Henry TJ Norton, *England's Guarantee to Belgium and Luxemburg, with the Full Text of the Treaties* (Charles Scribner's Sons 1915) 127 (Treaty of London) annex art XIII(5) part 2.

76 Commentary on the 1983 Vienna Convention (n 2) para 2, 68.

77 *ibid.*

78 Agreement on Succession Issues (adopted 29 June 2001) Official Gazette of the Republic of Slovenia No 71/2002, annex D art 1.

79 *ibid* art 2.

80 *ibid* art 2 and 8.

where these archives are actually located.⁸¹ Likewise, according to the *principle of territorial pertinence*, the successor States succeed to

the part of the SFRY State archives which constitutes a group which (i) relates directly to the territory of one or more of the States, or (ii) was produced or received in the territory of one or more of the States, or (iii) consists of treaties of which the SFRY was the depository and which relates only to matters concerning the territory of, or to institutions having their headquarters in the territory of, one or more of the States (...) irrespective of where those archives are actually located.⁸²

All other national archives may be distributed among the successor States on an equitable basis within six months of the entry into force of the Agreement on Succession Issues, subject to a special agreement between the successor States. This must take into account all relevant circumstances, including, as far as possible, the *principle of integrity or indivisibility of archival fonds*,⁸³ without prejudice to the question of where a particular archival collection should be kept.⁸⁴ It is interesting that this principle is given only subordinate importance, and then only with regard to archives that have not been distributed based on other principles. All undivided State archives become the common heritage of the successor States, which have free and unfettered access to them.⁸⁵ The archives shall be succeeded to gratuitously, but the cost of any transport shall be borne by the successor State. If copies are made, the States shall agree on the sharing of the costs.⁸⁶

Thus, the successor States of the former SFRY followed the principles of provenance, functional pertinence, territorial pertinence, and, in the alternative, the principle of integrity or indivisibility of archival fonds.

3.4.1.2.2 *Federal Republic of Czechoslovakia*

Constitutional Law 541/1992 stipulated that the State that succeeded to a governmental body or a State institution would also succeed to the archival materials related to it.⁸⁷ The basic rules for the division of archival material

81 *ibid* art 3.

82 *ibid* art 4 para a.

83 *ibid* art 6.

84 *ibid*.

85 *ibid* art 6 para a.

86 *ibid* art 11.

87 Constitutional Law of the CSFR No 541/1992 on the division of the property of the Czech and Slovak Federative Republic between the Czech Republic and the Slovak Republic and

were the rule of succession according to the *location of preservation*, the *principle of functional pertinence*, and the *principle of integrity or indivisibility of archival fonds*.⁸⁸ Materials that were not divided based on these rules became common, with both successor States having the right of free and unfettered access to them.⁸⁹ It is worth pointing out that the Czech Republic and Slovakia have digitized all the archival material of their former parliaments (since 1918), which otherwise remained in Prague, and published it online, as they continue to do with all the acts of their parliaments.⁹⁰

The division of archives was relatively quick as they had been under the responsibility of the Ministries of the Interior of each republic since 1969. Archives of special importance had been kept separately in the federal bodies and institutions and were regulated by federal regulations.⁹¹ There were thus relatively few federal archives. The military archives (Ministry of Defence and central military authorities) followed the division of property, and the same principle was applied to the division of archives located in diplomatic and consular missions. Among the remaining archives, the Czech Republic received archival material held on its territory, such as material from the former Office of the President of the Republic.⁹² Thus, the successor States succeeded to the State archives located on their territory or related to the property they succeeded to.

3.4.2 *Unification of States*

As in the case of succession to property, all archives of the predecessor State are transferred to the successor State. Therefore, unification agreements do not contain provisions on succession to archives.⁹³ After the date of succession, the archives either remain with the territorial units or are transferred to the administration of the central authorities, in accordance with the internal legal arrangements.⁹⁴

its passage to the Czech Republic and the Slovak Republic (8 February 1992) Collection of Laws of the CSFR No 110, art 7.

88 Grega Pajnikihar, 'Uporabnost izkušnje nasledstva po nekdanji čsZr' (2018) 37(3) *Pravna praksa* 6, 7.

89 *ibid* 7–8.

90 *ibid* 8.

91 Lenka Linhartova, 'Ločitev arhivskega in dokumentarnega gradiva v zvezi z razpadom Češke in slovaške zvezne republike (čsZr)' (2018) 37(35) *Pravna praksa* 5, 5.

92 *ibid*.

93 No practical examples were identified by the ILC either.

94 Commentary on the 1983 Vienna Convention (n 2) para 1–8, 66–67.

3.4.3 *Incorporation of One State into Another*

3.4.3.1 State Practice after the Cold War: The GDR and the FRG

The GDR and the FRG regulated succession to archives in the annexes to the Agreement on the Unification of Germany, which set the legislative changes following the incorporation. The Federal Archives Act (*Bundesarchivgesetz*) of January 6, 1988, was amended to list as State archives “acts, documents, maps, plans and media, pictures, films, audio and other recordings which were produced by, transferred to, or intended for use by the institutions of the FRG, the GDR, the occupied territories, the German Reich or the German Confederation.”⁹⁵ In this way, the archives of all of these predecessor States (or, in the case of the German Reich, governments) became the archives of the successor State, namely, the FRG.

In the Agreement on the Unification of Germany itself, the State collection of the former Prussia, divided after the war, was specifically regulated: institutions, including “the State Museums, the State Libraries, the Secret State Archives, the Ibero-American Institute, the State Music Institute,” were reunited in Berlin.⁹⁶

3.5 Conclusions

The specificity of succession to archives stems from the fact that they can be copied, allowing several successor States to succeed to them at the same time. Practice shows that the archives of territorial units are not succeeded to in the context of State succession but remain with territorial units after the date of succession. Any subsequent reclassification as central archives (i.e., State archives) depends on the internal legal arrangements of the successor State.

In all factual cases, the primary rule is that of *succession according to the location of preservation*, that is, each successor State succeeds to the archives located on its territory. In practice, this usually means that the successor State in which the former capital of the predecessor State is located (in case of succession with continuing legal personality, this implies the continuator State) succeeds to them as the archives are kept in central archives in the capital cities.

95 Agreement between the Federal Republic of Germany and the German Democratic Republic on the establishment of a united Germany (adopted 31 August 1990) *Bundesgesetzblatt* Vol 1990 Part II No 35 (Agreement on the unification of Germany) annex 1 ch 2 section B section 2 point 2.

96 Agreement on the Unification of Germany (n 95) art 35(5).

In parallel with the primary rule, archives with a specific link to a territory or government are succeeded to by the successor State. The practice of succession to archives shows a particularly strong link with the territory (*principle of provenance, principle of territorial pertinence*) and government (*principle of functional pertinence*) of the successor State.

Succession to State Debt

The 1983 Vienna Convention defines State debt (or sovereign debt) as “any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law.”¹ The same definition is chosen in substance in the IDI Resolution.² It is a financial bond, that is, a debt that has a monetary aspect.³ The term “State debt” is only relevant from the passive side, namely, the side of the debtor State. On the creditor side, the debt is considered a claim and, thus, property of the State.⁴

4.1 The Creditor as a Public or Private International Law Entity

The 1983 Vienna Convention regulates only the State’s debt to international law entities and excludes debt to private law entities,⁵ which it specifically points out.⁶ Some authors also distinguish between types of debt depending on whether the creditor is a private or international law creditor,⁷ while others do not.⁸ In practice, this distinction is not made, nor is it recognized by

1 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 33.

2 Institut du Droit International, ‘State Succession in Matters of Property and Debts, Resolution’ (2000–2001) 69 *Annuaire de l’Institut de Droit international* 712 (IDI Resolution on State Succession to Property and Debts) art 22(1)(a).

3 ILC, ‘Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries’ (1981) UN Doc A/36/10 (Commentary on the 1983 Vienna Convention) para 44, 79.

4 *ibid* para 8, 73.

5 International Law Association, ‘Aspects of the law of state succession, Final Report of Economic Aspects of State Succession, Toronto Conference in 2006’ (ILA 2006) 305.

6 1983 Vienna Convention (n 1) art 6: “Nothing in this Convention shall be deemed in any way to prejudice the settlement of any question relating to the rights and obligations of natural or legal persons.”

7 For example, Tai-Heng Cheng, ‘Why New States Accept Old Obligations’ (2011) 2011(1) *University of Illinois Law Review* 1, 1–51.

8 For example: Daniel Patrick O’Connell, *The Law of State Succession* (Cambridge University Press 1956) 145.

the IDI Resolution on State Succession to Property and Debts⁹ and the Third Restatement.¹⁰ In fact, practice since the end of the Second World War and the Cold War includes many cases of debt owed to the London Club, an informal association of creditor banks (i.e., private law creditors). Debts owed to the London Club are not distinguished from debts owed to international law entities (e.g., succession of Yugoslavia, Czechoslovakia, and the USSR) in the treatment of succession issues.

However, it is clear that State debts do not include debts owed by private-law entities to other private-law entities, whether they are located in the predecessor State, the successor State, or a third country. In a succession, States may also provide for the protection of the rights and obligations of private-law entities, but this is not the case in the area of sovereign debt. States can enforce the rights of individuals under diplomatic protection.

4.2 Types of Debt

Debts can arise on different legal bases (international treaty, unilateral promise, as a result of a breach of an international legal norm).¹¹ However, the question of succession to a debt is not related to the question of succession to a legal basis but to the debt itself.

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4.2.1 *General, Localized, and Local Debt*

From a State succession perspective, the most important distinction between types of debt concerns a) the authority of the predecessor State that took over the debt (i.e., central or local) and b) the entity that benefited from the assets acquired in the debt. Accordingly, debt is divided into general State (non-allocated), localized (allocated), and local debt. General State debt is debt incurred by the central government for the benefit of the country as a whole (e.g., to settle government liabilities). Localized (allocated) debt is debt incurred by the central government for the benefit of a limited part of the territory (e.g., to finance an infrastructure project in a particular territorial unit).

9 IDI Resolution on State Succession in respect of State Assets and Debts art 22 point b and art 20(1).

10 Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987) para 209 point b, 103.

11 Ernst H Feilchenfeld, *Public debt and state succession* (The Macmillan Company 1931) 683–684.

Local debt is debt incurred by a local authority (e.g., municipality, federal republic) for the benefit of the territorial unit it governs.¹²

Local debt is not State debt (sovereign debt) as it is the responsibility of the territorial unit, which may have more or less autonomy in decision-making, including in the assumption of debt. Local debts will remain with the territorial unit after the date of succession, regardless of the successor State in which it is located.¹³ That debt of a territorial unit is not affected by succession and that such a debt “follows” the territorial unit is even considered by some authors to have the status of customary international law.¹⁴ If a territorial unit separates from the parent State and becomes a successor State in its own right (separation), its debts will become those of the successor State. However, if a territorial unit becomes part of another State (cession), its debts may remain with it even though it is itself located within another State (i.e., the successor State). This will only occur if the successor State’s internal legal order allows such a high degree of autonomy to its territorial units. In other cases, the debt of that territory will pass to the successor State.¹⁵

The IDI Resolution on State Succession to Property and Debts also mentions the debt of “local public institutions” (i.e., local debt) and stipulates that it remains the debt of these institutions after the date of succession; it is not the responsibility of the successor State unless a) the predecessor State was responsible for them or b) the successor State assumes this responsibility directly or indirectly.¹⁶

Since, from an international legal point of view, a territorial unit is only a part of a State, some authors group local and localized debt into one category: allocated debt.¹⁷ Others agree with the ILC and do not count local debt as sovereign debt.¹⁸ In the context of the distinction between general State debt

12 Paul R Williams and Jennifer Harris, ‘State succession to debts and assets: The modern law and policy’ (2001) 42(2) *Harvard International Law Journal* 355, 360–361.

13 Commentary on the 1983 Vienna Convention (n 3) para 16, 74.

14 Malcolm Nathan Shaw, *International Law* (7th edn, Cambridge University Press 2014) 722.

15 Third Restatement (n 10) para 209 point d, 104. See also Carsten Thomas Ebenroth and Matthew James Kemner, ‘The enduring political nature of questions of state succession and secession and the quest for objective standards’ (1996) 17(3) *University of Pennsylvania Journal of International Economic Law* 753, 784.

16 IDI Resolution on State Succession to Property and Debts (n 2) art 29.

17 For example: Williams and Harris (n 12) 361; Ana Stanič, ‘Financial aspects of state succession: The case of Yugoslavia’ (2001) 12(4) *European Journal of International Law* 751, 758; Mojmir Mrak, ‘Succession to the former Yugoslavia’s external debts: The case of Slovenia’ in Mojmir Mrak (ed), *Succession of states* (Kluwer Law International 1999) 160.

18 Commentary on the 1983 Vienna Convention (n 3) 74–76; International Law Association, ‘Succession of new states to the treaties and certain other obligations of their predecessor,

and localized debt, the ILC stated that a debt corresponds to the latter if i) the State, at the time of incurring the debt, intended to use the funds raised for the benefit of a specific territory (*criterion of intended use*), ii) the State actually used the funds in a specific territory (*criterion of actual use*), and iii) a specific territory actually benefited from these funds (*criterion of actual benefit*).¹⁹

To distinguish between local and localized debts, the ILC lists the following criteria: a) debtor (local authority or central government on behalf of the local authority), b) financial autonomy (whether the local authority has financial autonomy and to what extent), c) purpose (purpose of using the resources of the territorial unit or the country as a whole), and d) security of the debt (whether the debt is secured by the assets or revenues of the territorial unit).²⁰ The debt may be secured by a charge over specific assets (e.g., a pledge or mortgage) or the territorial unit's revenue.²¹ For a debt to be considered local, all the criteria must be met cumulatively. For example, a territorial unit may take on debt (criterion a) with a view to using it locally (criterion c) but be in fact exercising its powers under the authority of the central government, meaning that the criterion of financial autonomy (criterion b) is not met. In this case, we would therefore be talking about localized debt.

The distinction between general State and localized debt (local debt, as noted, is not counted as sovereign debt by the ILC) is not explicitly made by the 1983 Vienna Convention.²² It is implicit in the articles on specific types of succession of States, using the phrase "taking into account, in particular, the property, rights and interests which pass to the Successor State in relation to that State debt."²³

4.2.2 *Administrative Debt*

Administrative debt is debt incurred in the normal course of a State's or territory's administrative activities.²⁴ This may be either State government or local

Report of the Fifty-fourth Conference held in The Hague, 1970' (ILA 1971) 108; O'Connell, *The Law of State Succession* (n 8) 174 and 181; Malcolm Nathan Shaw, 'State succession revisited' (1994) 5 *Finnish Yearbook of International Law* 35, 93.

19 Commentary on the 1983 Vienna Convention (n 3) para 24, 76.

20 *ibid* para 20, 75.

21 ILA, 'Succession of new states to the treaties and certain other obligations of their predecessor' (n 18) 106.

22 Kevin H Anderson, 'International Law and State Succession: A Solution to the Iraqi Debt Crisis?' (2005) 2005(2) *Utah Law Review* 401, 406.

23 1983 Vienna Convention (n 1) art 37, 40, and 41.

24 O'Connell, *The Law of State Succession* (n 8) 180–181.

government debt depending on which public administration has contracted it. However, it is always public debt and not private debt.²⁵

4.2.3 *Debt Held by Public and State-Owned Enterprises*

The ILC refers specifically to the debt of public enterprises and other public institutions that have their own legal personality and administrative and managerial autonomy and are dedicated to the exercise of a specific activity or public function. The ILC substantively equates the debt of public undertakings with local debts, which are not “State debts” and, as such, are not subject to succession but remain an obligation of the public undertaking after the moment of succession.²⁶

On a completely different note, the IDI Resolution on State Succession to Property and Debts equates the debts of “public institutions and State owned enterprises which operate nationally” with general State debts, irrespective of the place of registration.²⁷ The provisions on localized debt also apply *mutatis mutandis* to State-owned enterprises operating nationally.²⁸ This logic was also followed by the Badinter Commission in the case of the dissolution of the SFRY, where the debt of public undertakings was particularly controversial due to so-called *social ownership*. The debt of public undertakings managing State property was mostly considered to be State debt because the intertwining of public, private, and social property elements in the cases of federal public undertakings meant that they were essentially State property.²⁹ Publicly owned companies (and their debts) were subject to succession if they performed a public function at the federal level or at least at the level of several federal States.³⁰ If such a company operated only within the framework of one federal unit, the succession belonged only to that successor State. However, if a socially owned company did not perform a public function, it was considered an “ordinary” private law entity; consequently, neither it nor its debts were subject to succession.³¹

25 Commentary on the 1983 Vienna Convention (n 3) para 32, 77.

26 *ibid* para 29–31, 76–77.

27 IDI Resolution on State Succession to Property and Debts (n 2) art 27(2).

28 *ibid* art 28(2).

29 Shaw, ‘State succession revisited’ (n 18) 85–87.

30 Opinions of the Arbitration Commission of the Conference on Yugoslavia (1992) 31 International Legal Materials 1494 (Badinter Commission) Opinion No 14(7).

31 *ibid*.

4.2.4 *Guarantee or Surety for Debts*

The debt may be secured by a pledge or other lien on the property.³² The consequences depend primarily on the substance of the rights that the creditor has to the pledged property, but, as the practice described in the following chapters shows, the debt relating to the pledged property is succeeded to by the successor State that succeeds to this property.³³

In the case of localized or local debt and debt owed by public companies, creditors can request a guarantee from the central government.³⁴ The strong similarity between localized debt, on the one hand, and local debt guaranteed by the central government, on the other hand, was already mentioned during the adoption of the 1983 Vienna Convention.³⁵ The same applies to the debt of public enterprises guaranteed by the central government since, in most cases, the management of public enterprises is subordinated to the State.³⁶ In practice, the debt and the guarantee are sometimes succeeded to separately. In cases of succession with a continuator State, the guarantee remains with the successor State for a long time or until the successor State and the continuator State conclude an agreement with the creditor on the transfer of the guarantee.³⁷

4.2.5 *Odious Debts*

These are debts that are not acquired for the benefit of, or even to the detriment of, the inhabitants of the territory.³⁸ They include *war debts* (to finance war), *hostile debts* intended to subjugate the population, and *regime debts*,

32 Daniel Patrick O'Connell, 'Secured and unsecured debts in the law of state succession' (1951) 28 *British Yearbook of International Law* 204, 210.

33 *ibid* 214.

34 See, e.g., the succession to debts in cases of the UAR and Singapore.

35 ILC, 'Ninth report on succession of States in respect of matters other than treaties by Mohammed Bedjaoui, Special Rapporteur' (1977) UN Doc A/CN.4/301 51–53.

36 *ibid* para 31, 53–54.

37 See, e.g., the succession to debts of Singapore.

38 Williams and Harris (n 12) 408; See: PK Menon, 'The succession of states and the problem of state debts' (1986) 6(2) *Boston College Third World Law Journal* 111, 117. The issue of odious debts has been widely discussed (including in the context of a change of government). See, e.g., Lee C Buchheit, G Mitu Gulati and Robert B Thompson, 'The dilemma of odious debts' (2007) 56(5) *Duke Law Journal* 1201, 1212–1216; Bradley N Lewis, 'Restructuring the odious debt exception' (2007) 25(2) *Boston University International Law Journal* 297; Lee C Buchheit and G Mitu Gulati, 'Responsible sovereign lending and borrowing' (2010) 73(4) *Law and Contemporary Problems* 63; Christiana Ochoa, 'From odious debt to odious finance: Avoiding the externalities of a function odious debt doctrine' (2008) 49(1) *Harvard International Law Journal* 109.

which are incurred by the autocrat or regime in the name of the State but for its own (personal) benefit.³⁹ Debts are *odious* if they meet three conditions: a) they are acquired without the consent of the population (e.g., parliament), b) the benefits derived from them do not extend to the population, and c) the creditor is aware of the odious nature of the debt.⁴⁰ If the creditor was not aware of this, the debt is succeeded to.⁴¹

Both practice and doctrine confirm that this type of debt is not subject to succession.⁴² The ILA notes that State practice establishes that a State that has acquired territory in war is not obliged to repay a debt incurred by that territory for the purpose of waging war on the conquering State (i.e., a war debt).⁴³ Because the invasion of a territory or another country is no longer legal since the creation of the UN, under the UN Charter, it is difficult to imagine such a practice today. However, an invaded country has the right of self-defense,⁴⁴ for which purpose it can presumably assume a debt. Such debt would therefore be legally permissible and would have to be succeeded to. The 1983 Vienna Convention does not treat odious debt separately; it is thus covered in the common provisions of the Convention on the different types of succession.⁴⁵

4.2.6 *Debts Arising from Internationally Wrongful Acts*

This kind of debt arises when a State breaches its international legal obligations and is therefore obliged to compensate the injured party. This debt is sometimes referred to as a *tort debt*.⁴⁶ From the point of view of succession to debts, it is important that the compensation is awarded or agreed upon

39 O'Connell, *The Law of State Succession* (n 8) 187.

40 Anderson, 'International Law and State Succession: A Solution to the Iraqi Debt Crisis?' (n 22) 408; Jeff A King, 'Odious debt: The terms of the debate' (2007) 32(4) *North Carolina Journal of International Law and Commercial Regulation* 605, 630; Ochoa, 'From odious debt to odious finance' (n 38) 116–117. The definition is not always the same; Alexander Sack's original definition in 1927 contained, instead of point a) here, the condition that the debt had to be taken on by the despot or the head of the regime. Point a) mentioned (consent of the people) is sometimes mentioned as a possible fourth condition.

41 O'Connell states that "[v]irtually the only occasions on which Successor States have refused to undertake the servicing of totally absorbed states or provinces have been those when such debt were suspect as obligations odiosae, and when the creditors were considered to have undertaken a risky investment giving rise to no equitable claims." O'Connell, 'Secured and unsecured debts in the law of state succession' (n 32) 218.

42 Williams and Harris (n 12) 408.

43 ILA, 'Succession of new states to the treaties and certain other obligations of their predecessor' (n 18) 111.

44 Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI art 51.

45 Commentary on the 1983 Vienna Convention (n 3) para 39, 78, and para 43, 79.

46 ILC, 'Ninth report by Mohammed Bedjaoui' (n 35) para 8, 55.

before the date of succession because, in this case, it will be succeeded to as a debt. However, if the decision on reparation has not been taken by the date of succession and the question of appropriate reparation for the internationally wrongful act is still open, succession to State responsibility may be relevant.⁴⁷

In preparing the 1983 Vienna Convention, the ILC decided not to single out these debts since, despite the different nature of their creation, they are debts governed by the rules on succession to debts, even though their creation and consequences are governed by the rules on the responsibility of States.⁴⁸

4.3 Principles and Rules for Succession to State Debt

Succession to State debt “entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of the State debts which pass to the successor State”⁴⁹ from the date of the succession of States unless “otherwise agreed by the States concerned or decided by an appropriate international body.”⁵⁰ This refers to debt assumed by the predecessor State before the date of succession.

At this point, it is necessary to refer again to the Third Restatement’s definition of succession, according to which the object of the succession does not “extinguish and then arise” but is “terminated and then assumed.”⁵¹ If the debts were extinguished, the succession would constitute a novation or the creation of a *de novo* relationship, although it makes more sense for the debts to be transferred⁵² given that, as a rule, all the elements of the debt relationship (maturity, interest, etc.) also remain identical.⁵³

In the case of succession to debt, a triple relationship is created between the predecessor State, the creditor, and the successor State. This triple relationship

47 ILC, ‘First report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 69th session’ (2017) UN Doc A/CN.4/708 para 79–80, 22.

48 Wladyslaw Czaplinski, ‘State Succession and State Responsibility’ (1990) 28 Canadian Yearbook of International Law 339, 352.

49 1983 Vienna Convention (n 1) art 34.

50 *ibid* art 35.

51 Third Restatement (n 10) para 208, 100: “When a state succeeds another state with respect to particular territory, the capacities, rights, and duties of the predecessor state with respect to that territory *terminate and are assumed* by the Successor State, as provided in §§ 209–10” (emphasis added).

52 PK Menon, *The succession of states in respect to treaties, state property, archives and debt* (The Edwin Mellen Press 1991) 157–158.

53 See below: *pacta sunt servanda*.

is also the essential difference with succession to property and archives, which involves only two parties (predecessor State and successor State).⁵⁴

The creditor's rights are also protected by the *principle of acquired rights*⁵⁵ and the *principle of pacta sunt servanda*, which is mentioned in the preamble of the 1983 Vienna Convention. In this regard, the provision that “[a] succession of States does not as such affect the rights and obligations of creditors” is essential.⁵⁶ It is important in light of the general rule that succession should not affect the rights and obligations of third parties.⁵⁷ Despite its clarity, it is necessary to ask how a change as profound as succession can avoid affecting the rights and obligations of the debtor State (i.e., the predecessor State) on the one hand and the creditors on the other, especially in cases where the predecessor State ceases to exist. A debt is a relationship between two parties: the creditor and the debtor. The parties to the relationship are the constitutive elements of the debt relationship, and it is therefore understandable that the cessation of the debtor's existence affects the creditor's chances of having its debt repaid.

The provision that succession *as such* does not affect the rights and obligations of the creditor is a formulation of the principle *pacta tertiis nec nocent nec prosunt*, which is enshrined in Articles 34⁵⁸ and 36⁵⁹ of the Vienna Convention on the Law of Treaties (1969 Vienna Convention)⁶⁰ and has the status of customary international law. Succession may create a relationship between the predecessor State and the successor State, but it cannot in itself create a direct relationship between the creditor and the successor State; the

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54 Menon, *The succession of states in respect to treaties, state property, archives and debt* (n 52) 172–173.

55 IDI Resolution on State Succession to Property and Debts (n 2) art 25.

56 1983 Vienna Convention (n 1) art 36.

57 International Law Association, ‘Aspects of the law of state succession, Final Report—Part I, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008’ (ILA 2008) 250, 332.

58 “A treaty does not impose obligations or confer rights on a third country without its consent.”

59 “1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

60 Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331.

debt relationship continues to exist between the creditor and the predecessor State.⁶¹ The latter has the possibility to apply the principle of *rebus sic stantibus* (see below) or take other appropriate steps to modify or terminate the debt relationship if the conditions for doing so are met.⁶²

In the case of succession without continuing legal personality, the predecessor State ceases to exist, and a reasonable question arises as to the continued existence of the debt relationship. When the legal personality of the predecessor State has been terminated, “the creditor would be seriously prejudiced if he did not automatically obtain rights, as a result of succession, against the successor State or States.”⁶³ As practice shows, in actual cases of succession, there is never even any doubt as to the obligation to settle the debts of the predecessor State.⁶⁴ Even in the case of succession without continuing legal personality, successor States are willing to settle the debt. Any reservations are usually only related to the question of the size of the share, the maturity, and so on. Therefore, the question of the consent of the successor State arises extremely rarely in practice (e.g., in the case of the reunification of Vietnam).

Succession to debts can be compared to succession to property in certain contexts. Succession to property does not affect the rights that a third country has to that property (the same is true of archives). Its rights are protected as *acquired rights*. This logic has also been followed by the ILC with regard to debts.⁶⁵ In these succession cases, creditors and successor States seem to be starting from the *principle of unjust enrichment*. The mere fact that funds have been made available to the predecessor State is sufficient to constitute succession. The question of succession to a treaty that is the legal basis for a loan has not been considered in practice as a *questio iuris* but only as a *questio facti*: the provisions of the treaty are relevant for the confirmation of the loan terms, such as interest and maturity, but not at all as a legal basis for succession.

For succession to debts, it is therefore essential to divide the types of succession according to the continuity of the legal personality of the predecessor State. If, after the date of succession, the successor State continues the legal personality of the predecessor State (i.e., as a continuator State), the

61 Menon, *The succession of states in respect to treaties, state property, archives and debt* (n 52) 173–174.

62 Oliver Dörr, ‘Codifying and developing Meta-Rules: the ILC and the Law of Treaties’ (2006) 49 *German Yearbook of International Law* 129, 151–153.

63 ILC Special Rapporteur Bedjaoui in Menon, *The succession of states in respect to treaties, state property, archives and debt* (n 52) 174.

64 O’Connell, ‘Secured and unsecured debts in the law of state succession’ (n 32) 218.

65 Menon, *The succession of states in respect to treaties, state property, archives and debt* (n 52) 173–174.

relationship with the creditor is normally unchanged. The continuator State may agree bilaterally with the other successor State that the latter will compensate it for a certain part of the funds it has paid to the creditor in repayment of the debt. Such an arrangement does not directly affect the creditor and, therefore, does not require its consent. The creditor and the successor State may also agree that the latter will assume part of the debt of the continuator State. In this case, the continuator State would be a “third party,” but such an arrangement would normally be in its favor and there would be a presumption of its consent.⁶⁶

4.3.1 *Pacta Sunt Servanda and the Principle of Good Faith*

According to the *principles of pacta sunt servanda* and *good faith*, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁶⁷ The 1969 Vienna Convention on the Law of Treaties codified these two principles, which also apply as customary international law. Notwithstanding that debts do not always arise from a treaty, the principles apply *mutatis mutandis* to other debts. A debt may arise from a contractual relationship but also from a breach of an existing treaty or of an applicable rule of customary international law.

The principles bind the parties (creditor and debtor in the event of a debt). However, succession to debts is limited to debts acquired by the predecessor State. Debts acquired by the successor State and/or continuator State after the date of succession are not subject to succession. The principle of *pacta sunt servanda* thus binds the creditor and the predecessor State. According to this principle, it is reasonable that, in cases of succession with continuing legal personality, the continuator State remains liable for the debts because it is, in a legal sense, the same State, albeit with a changed territory.⁶⁸ In this case, the principle of *rebus sic stantibus* may be applicable, as we will discuss later.

In the case of a successor State that is not a continuator (whether or not there is a continuator State), the successor State has, *stricto sensu*, nothing to do with the debts given that it did not exist at the time of their creation and did not consent to them. The implementation of the *pacta sunt servanda* principle is particularly acute in the case of the dissolution of a State, where the debt

66 Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (1969 Vienna Convention) art 36.

67 *ibid* art 26.

68 Williams and Harris (n 12) 362–363.

is distributed among the successor States in accordance with the 1983 Vienna Convention.⁶⁹

The principle of *pacta sunt servanda* is thus more closely related to the rights of the creditor than to the obligations of the debtor. It also states that the elements of the debtor relationship (e.g., amount, maturity, manner of repayment) that the successor State assumes under the principle of free consent must be substantially identical to those between the creditor and the predecessor State.

4.3.2 *Rebus Sic Stantibus*

The *rebus sic stantibus* principle (fundamental change of circumstances) is codified in the 1969 Vienna Convention and has the status of customary international law. Under this principle, a contracting party may invoke as a ground for termination or withdrawal from a treaty a substantial change in circumstances from those existing at the time of its conclusion and not foreseen by the contracting parties, if a) these circumstances were an essential basis for the contracting parties' consent to be bound by the international treaty and b) this change will radically transform the scope of the obligations still to be performed under the international treaty.⁷⁰ The changed circumstances cannot be invoked by a contracting party, *inter alia*, if it has breached its treaty obligations towards any other contracting party to the treaty.⁷¹

The principle may also apply *mutatis mutandis* to succession to debts. This principle is in itself an exception to that of *pacta sunt servanda*.⁷² It does not normally apply to a successor State that is not a continuator (whether or not there is one) because the latter is not normally a party to the debt relationship. However, it could be invoked in the event of discussions with the creditor. Undoubtedly, a continuator State could do so if the succession to debt meets the conditions laid out above. In the case of a separation of a small part of the territory not directly connected with the debt, it would be difficult to speak of radical changes; whether there are substantial enough changes for the *rebus sic stantibus* principle to be invoked must be examined case by case. The mere fact of succession does not constitute such a change.⁷³

69 *ibid* 363.

70 1969 Vienna Convention (n 66) art 62.

71 *ibid* art 62(1) point b.

72 Anderson, 'International Law and State Succession: A Solution to the Iraqi Debt Crisis?' (n 22) 403.

73 Third Restatement (n 10) para 209 point f, 104.

4.3.3 *Rule of Equitable Proportions and Final Beneficiary Rule*

Alongside these principles, the *rule of equitable proportions* (which is derivative of the *principle of equity*⁷⁴) and the *final beneficiary rule*, which are (implicitly) regulated in the 1983 Vienna Convention, have also gained importance in practice.⁷⁵

The *rule of equitable proportions* applies when two or more successor States (whether or not there is a continuator State) share the debt of the predecessor State. The convention does not specify what is meant by the term “equitable share,” nor does it describe how the successor States or the tribunal should determine these shares.⁷⁶ In practice, this leads to different solutions.⁷⁷ For example, the share of the overall population of the predecessor State,⁷⁸ the contribution of the former federal republics to the common budget⁷⁹ or gross domestic product, or the relative size of the territory can be taken into account for proportionality in the succession to property. Several criteria may also be considered simultaneously.⁸⁰

The *final beneficiary rule* applies to the case of localized debt, that is, debt assumed by the predecessor State for the benefit of one of its specific territorial units. The localized debt is succeeded to by the successor State on whose territory the final beneficiary of the funds is located.⁸¹ The rule is also followed if the debt was not incurred *ex tunc* for the benefit of a specific territory but was subsequently used de facto to this effect (e.g., the construction of flood protection infrastructure after a major flood). The final beneficiary rule corresponds in substance to the *principle of special connection*.

4.3.4 *Rule of Priority of the Succession Agreement*

The IDI Resolution on State Succession to Property and Debts prioritizes the obligation of the successor State to conclude a debt-sharing agreement.⁸² The

74 For more details on the principle of equity, see 2.2. *Principle and rules for succession to State property*.

75 1983 Vienna Convention (n 1) art 37, 40, and 41: “taking into account in particular the assets, rights and legal interests which, in relation to this State debt, are transferred to the Successor State.”

76 Vladimir-Djuro Degan, ‘State succession, especially in respect of state property and debts’ (1993) 4 Finnish Yearbook of International Law 130, 188.

77 Williams and Harris (n 12) 357–358.

78 For example, the debt of Czechoslovakia.

79 For example, the debt Soviet Union.

80 For example, the SFRY’s debt to the IMF.

81 For instance: Shaw, ‘State succession revisited’ (n 18) 93; Williams and Harris (n 12) 357–358; Stanič (n 17) 760.

82 IDI Resolution on State Succession to Property and Debts (n 2) art 23(2).

1983 Vienna Convention refers to such a duty in all types of succession except unification and incorporation⁸³ as, in these cases, it is only reasonable that the successor State will succeed to the sovereign debt. Three basic approaches to succession have emerged in line with the principles: the clean-slate rule (*rebus sic stantibus*), the continuity rule (*pacta sunt servanda*), and a combination of the two (*equity, final beneficiary rule*).

4.4 State Practice with Continuing Legal Personality

Under the *pacta sunt servanda* principle, the debts assumed by the predecessor State remain with the continuator State: it is, from a legal point of view, the same State, and there is thus no question of succession. Nevertheless, in some of these cases, it would be unfair or simply impossible to fulfill the obligation assumed by the predecessor State before the loss of part of its territory.⁸⁴ The first example is a debt assumed by the predecessor State before its territory was substantially reduced. The reduction of the territory may have significantly limited its ability to repay its obligations. Even more obvious is the case when a predecessor State took out a loan to build, for example, a hydroelectric power plant and undertook to repay the debt by supplying electricity to the lending State. If the part of the territory on which the hydroelectric power plant is located were to be subsequently separated from it, it would be impossible for the continuator State to fulfill its obligation. In such circumstances, the continuator State may be able to invoke the principle of *rebus sic stantibus*.⁸⁵

Practice and doctrine confirm that general State debt generally remains with the continuator State, and the localized debt is transferred to the (successor) State that benefited from the debt, according to the *final beneficiary rule*.

4.4.1 Separation of Part or Parts of a Territory

In the event of a separation of part of a territory, the 1983 Vienna Convention prioritizes an agreement between the successor and predecessor States.⁸⁶ In the alternative, it provides that the successor State succeeds to “the State debt of the predecessor State (...) in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State

83 1983 Vienna Convention (n 1) art 37, 38, 40, and 41.

84 Detlev F Vagts, ‘State succession: The Codifiers’ view’ (1993) 33 Virginia Journal of International Law 275, 282.

85 *ibid* 284.

86 1983 Vienna Convention (n 1) art 40(1).

in relation to that State debt.⁸⁷ In this way, the ILC regulated succession to both general State debt, which is succeeded to in equitable proportions, and allocated debt, to which the second part of the provision on the consideration of all benefits that have passed to the successor State in connection with this debt applies.

The IDI Resolution on State Succession to Property and Debts also gives priority to the agreement, choosing a provision on succession in the absence of one such agreement that is identical to the ILC's.⁸⁸ At the same time, the resolution also identifies specific consequences with regard to the type of debt, so the above is taken into account for general State debt. For localized debts, it states that "for reasons of equity," the succession to these debts will take special account of the succession to "property (objects/installations) connected to the debt and any profit from these projects or objects benefiting the Successor State on whose territory they are situated."⁸⁹ As regards local debts, it provides that they are succeeded to by the successor State on whose territory the local public institutions are situated after the date of succession but that this debt remains with these institutions: it is not the responsibility of the successor State unless a) the predecessor State was responsible for it or b) the successor State assumes this responsibility directly or indirectly.⁹⁰

Under the Third Restatement, general State debt is not divided into proportional shares but remains entirely with the continuator State.⁹¹ Exceptionally, the successor State and the continuator State may enter into an agreement on the division of the debt if changed circumstances linked to the succession would violate the principle of equity.⁹² This document also states that the successor State shall fully succeed to the allocated debts.⁹³

4.4.1.1 State Practice before the Two World Wars

The older practice for the separation of part of a territory is not uniform. There are few examples as parts of territories were usually not granted independence but annexed (conquered) to another State. The cases of independence

87 *ibid.*

88 IDI Resolution on State Succession to Property and Debts (n 2) art 23(2): "the State debt shall, in each type of succession, pass to the Successor State in an equitable proportion taking into account, notably, the property, rights and interests passing to the Successor State or Successor States in relation with such State debt."

89 *ibid* art 28.

90 *ibid* art 29.

91 Third Restatement (n 10) para 209 point e, 104.

92 *ibid* para 209 point d, 104.

93 *ibid.*

before the First World War usually refer to decolonization. While the older—admittedly few—cases deny responsibility for the debts of the predecessor State in the case of territorial divisions, from the Berlin Congress (1878) to the peace treaties concluded after the First and Second World Wars, practice has been unevenly tilted to one side or the other for various reasons.

Older examples include the separation of Texas from Mexico (1840) and Panama from Colombia (1905). Texas and Panama did not take on any debts from the continuator countries. Texas has stated that it has no such responsibility under the principles of international law.⁹⁴ Conversely, the German *Länder* united in the Rhenish Confederation took over a proportionate share of the debts of the *Länder* from which they had separated (e.g., Prussia, Bavaria, Württemberg), and Westphalia succeeded to a proportionate share of the general State debt of Prussia through the Treaty of Tilsit (1807).⁹⁵

4.4.1.1.1 *The Congress of Berlin*

Montenegro⁹⁶ and Serbia,⁹⁷ whose independence was formally recognized for the first time at the Berlin Congress, also acquired a proportionate share of the Ottoman Empire's general State debt.⁹⁸ Additionally, the Treaty of Berlin recognized Romania as an independent State (alongside Montenegro and Serbia), with some provinces added and some subtracted, but with no obligation to assume any of the Ottoman Empire's debt.⁹⁹ It is also usually mentioned at this juncture that Russia, the UK, and Austria did not receive, at the Berlin Congress, the debts connected with the parts of the territory of the Ottoman Empire that were transferred to them.¹⁰⁰ Yet, it should be noted that these were cessions of part of a territory and not separations.

94 O'Connell, *The Law of State Succession* (n 8) 160–162.

95 *ibid* 160.

96 Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East (adopted 13 July 1878) (1908) 2 AJIL 401 (Treaty of Berlin) art XXXIII: "As Montenegro is to bear a portion of the Ottoman public debt *for the new territories assigned to her* by the Treaty of Peace, the Representatives of the Powers at Constantinople shall determine the amount of the same in concert with the Sublime Porte on an *equitable basis*" (emphasis added).

97 *ibid* art XLII: "As Serbia is to bear a portion of the Ottoman Public Debt *for the new territories assigned to her* by the present Treaty, the Representatives at Constantinople shall fix the amount of it in concert with the Sublime Porte on an *equitable basis*" (emphasis added).

98 *ibid* art XXVI and XXXIV.

99 *ibid* art XLIII–XLV.

100 See, e.g., O'Connell, *The Law of State Succession* (n 8) 162; Commentary on the 1983 Vienna Convention (n 3) 87.

In terms of succession to debt, the Berlin Congress therefore brought about two categories of States: those that succeeded to debt and those that did not. The latter reflects both separation (Romania) and cession (e.g., Russia, the UK). Meanwhile, the former are Montenegro and Serbia as well as Bulgaria, in whose case there is no succession as it did not become an independent State but acquired the debt in exchange for the recognition of broad autonomy within the Ottoman Empire.

Thus, the Berlin Congress did not create a clear practice on debt succession. The States (or autonomous territorial units within the Ottoman Empire) that were in coalition with Russia—namely, Bulgaria, Serbia, Montenegro, and Romania—were rewarded for their role. It is also unclear how the proportionate share of the overall debt of the Ottoman Empire assumed by these countries was actually determined. Neither can it be said with certainty that this was in fact general State debt and not localized or even local debt.

4.4.1.2 Peace Treaties after the First World War

O'Connell noticed that “the Treaties of 1919 and afterwards could not be expected to adhere strictly to any general principle because to do so would be to destroy the economic structure of Europe and prejudice the large number of Allied private creditors.”¹⁰¹ At the same time, the question of succession to debts was inextricably linked to war reparations.¹⁰² The Allies did not want to financially ruin the defeated States and cause their insolvency, but they also ensured preferential treatment for their own claims by means of peace treaties.¹⁰³

For whatever reasons, the Treaties of Versailles, Saint-Germain-en-Laye, and Trianon adopted the rule of succession by pro rata share as regards the general State debt for all States created via separation or acquisition of part of the territory (cession) of the predecessor States. The Treaties of Saint-Germain-en-Laye and Trianon also provided for succession to localized debt.

The Treaty of Versailles stipulated that States that acquired part of their territory from Germany would also succeed to the share of the general State debt that existed on August 1, 1914.¹⁰⁴ This share would be calculated using the share of ceded territory in the German budget in 1911, 1912, and 1913.¹⁰⁵ The

101 O'Connell, *The Law of State Succession* (n 8) 163.

102 *ibid.*

103 Commentary on the 1983 Vienna Convention (n 3) para 13, 86–87.

104 Treaty of Peace between the Allied and Associated Powers and Germany (with amendments) and other treaty engagement (adopted 28 June 1919) (1925) His Majesty's Stationery Office 1 (Treaty of Versailles) art 254.

105 *ibid.*

calculation of Poland's share of the general State debt does not include the so-called *hostile debt* (*odious debt*) that was used to subjugate Poland.¹⁰⁶ Neither did France succeed to debt for the acquired Alsace-Lorraine.

Under the Treaty of Saint-Germain-en-Laye, the States that separated from Austria-Hungary after the First World War and those to which part of its territory was ceded also succeeded to a share of Austria-Hungary's general State debt.¹⁰⁷ The formula for calculating the share is the same as in the Treaty of Versailles (i.e., the share of the ceded territory in Austria's budget in 1911, 1912, and 1913).¹⁰⁸ In addition, this Treaty also specifically defines successor States' succession to *localized* debt. Any successor State that succeeds, with its territory, to railways, salt mines, and other assets securing the Austro-Hungarian debt shall also succeed to a part of this debt, but only in proportion to the property to which it succeeds.¹⁰⁹ O'Connell calls these debts *secured debts*.¹¹⁰ The Treaty explicitly rejects *joint and several liability*.¹¹¹ Like the Treaty of Saint-Germain-en-Laye, the Treaty of Trianon provided, *mutatis mutandis*, for succession to the Hungarian general State debt¹¹² and localized debt.¹¹³

The consequences of the territorial changes in Bulgaria after the First World War were regulated by the Treaty of Neuilly-sur-Seine. Bulgaria's territory was merely ceded to other countries, and no separation of parts of the Bulgarian territory (with the creation of a new State) took place. Each State to which Bulgarian territory was ceded also succeeded to a share of Bulgaria's general State debt.¹¹⁴ The key for determining the share is the same as in the aforementioned cases, namely, the share of the ceded territory in Bulgaria's total budget in the three years preceding the Balkan War of 1912.¹¹⁵

106 *ibid* art 255.

107 Treaty of Peace between the Allied and Associated Powers and Austria (with amendments) and other treaty engagements (adopted 10 September 1919) (1921) His Majesty's Stationery Office 1 (Treaty of Saint-Germain-en-Laye) art 203(2).

108 *ibid*.

109 *ibid* art 203 point 1 para 1.

110 O'Connell, *The Law of State Succession* (n 8) 170.

111 Treaty of Saint-Germain-en-Laye (n 107) art 203 point 1 para 2 and 3.

112 Treaty of Peace Between the Allied and Associated Powers and Hungary and Protocol and Declaration (adopted 4 June 1920) 15 AJIL 1 (Treaty of Trianon) art 186 point 2.

113 *ibid* art 186 point 1.

114 Treaty of Peace between the Allied Powers and Bulgaria and Protocol (adopted 27 November 1919) 14 AJIL 185 (Treaty of Neuilly-sur-Seine) art 141(1).

115 *ibid* art 141(3).

The Treaty of Lausanne provided for succession to debts for all territorial changes of the Ottoman Empire after the Balkan Wars (1912–1913).¹¹⁶ All States that separated from the Empire after the First World War and those to which part of its territory was ceded assumed a share of the general State debt proportional to the share of the ceded or seceded territory in the Empire's total budget.¹¹⁷

The treaties of Versailles, Saint-Germain-en-Laye, Trianon, and Lausanne did not recognize the succession to the debt of Germany, Austria, Hungary, and Turkey incurred after the outbreak of the World War—that is, the war debt (*odious debt*). Some countries (e.g., Hungary) considered that it was not in accordance with international law to distinguish between types of debt according to their origin, but the victorious countries took the view that it was wrong to hold other countries (especially those against which the defeated countries had fought) liable for a debt incurred for the purpose of aggression against them.¹¹⁸

Interestingly, succession to the general State debt of the former Austro-Hungarian Empire followed the rules of dissolution rather than those of separation of parts of a territory. As shown in section 2.4.5.1 (Dissolution of States), in the event of a dissolution, the general State debt is usually succeeded to in proportional shares, whereas in cases of separation, it is generally left to the continuator State. With regard to general State debt, Austria seems to have been successful in its declaratory rejection of the status of continuator State.¹¹⁹

Although the principle of debt sharing was respected in the Paris Peace Treaties, the States that emerged from the territories of the former Russian Empire did not succeed to the debts of their predecessor State.¹²⁰

Per the Treaty of Dorpat (October 14, 1920), whereby Russia recognized the independence of Finland, which also acquired the territory of Pechenga/Petsamo, the parties agreed that “neither Party shall be liable for the public

116 Treaty of peace with Turkey, and other instruments (adopted 24 July 1923) together with Agreements between Greece and Turkey (adopted 30 January 1923) and subsidiary documents forming part of the Turkish Peace Settlement (1923) His Majesty's Stationery Office 1 (Treaty of Lausanne) art 46.

117 *ibid* art 50 and 51.

118 Hans Cahn, ‘The responsibility of the Successor State for war debts’ (1950) 44(3) *American Journal of International Law* 477, 483.

119 For more details on the status of Austria and Hungary after the end of the First World War, see the Chapter 2.2.4.1.2. on succession of Austria-Hungary to property after the First World War.

120 Feilchenfeld (n 11) 539. For an overview of the agreements that followed the First World War, see pages 353–358.

debt and obligations of the other Party.”¹²¹ Under the Treaty of Riga (Poland), Poland succeeded neither to the internal or external debts and obligations of its predecessor State (the former Russian Empire) nor to any guarantees or sureties.¹²² The Treaty of Tartu, signed on July 12, 1920, recognizes the independence of Estonia,¹²³ which acquired 15 million gold rubles¹²⁴ and succeeded neither to a share of the general State debt nor to localized debt.¹²⁵ The Treaty of Riga (Latvia) recognizes the independence of Latvia.¹²⁶ However, “taking into account the destruction of Latvia in the period 1914–1917,” Latvia did not succeed to Russia’s share of the general State debt,¹²⁷ but it did succeed to localized debts.¹²⁸ With the Treaty of Moscow, signed on July 12, 1920, “taking into account the almost total destruction of Lithuania during the World War,” Lithuania succeeded neither to a share of the general State debt nor to any of the localized debt.¹²⁹

4.4.1.3 State Practice after the Second World War

Since the Second World War, there have been at least three cases of separation of part of a territory that did not (directly) result from decolonization: Pakistan (1947), Singapore (1963), and Bangladesh (1971).

4.4.1.3.1 *Pakistan*

As a continuator State, India also succeeded to its predecessor State’s general State debt.¹³⁰ The debts of the separate provinces (i.e., allocated debts) remained with them.¹³¹ As part of these provinces, Bengal and Punjab fell to

121 Treaty of Peace between Finland and Russia (adopted 14 October 1920) 3(1) LNTS 5 (Treaty of Dorpat) art 25.

122 Treaty of Peace between the Soviet republics of Russia and Ukraine on the one hand and Poland on the other (adopted 18 March 1921) 6 LNTS 51 (Treaty of Riga [Poland]) art 19.

123 Treaty of Tartu between Estonia and Russia (adopted 2 February 1920) 11 LNTS 30 (Treaty of Tartu) art 2.

124 *ibid* art 12(1).

125 *ibid* art 12(2).

126 Treaty of Peace between Latvia and Russia (adopted 11 August 1920) 2(3) LNTS 196 (Treaty of Riga [Latvia]) art 11.

127 *ibid* art XVI.

128 *ibid*: “All claims of Russia’s creditors, except those relating to Latvia, shall remain exclusively with Russia”.

129 Treaty of Peace between Lithuania and Russia (adopted 12 July 1920) 3(2) LNTS 105 (Treaty of Moscow) art 12(2).

130 Indian Independence (Rights, Property and Liabilities) Order (promulgated 14 August 1947) *The Gazette of India* (14 August 1947) art 9(a).

131 *ibid* art 9(b), (c), and (d).

Pakistan, and Pakistan acquired part of their debts. The general State debt thus went to India, but Pakistan and India agreed bilaterally that Pakistan would reimburse India for a share of the debt proportional to the property it succeeded to.¹³² Hence, no further consent was required from the creditors as the debtor country remained the same.¹³³ Pakistan also succeeded to the rights and obligations attached to the treaties that applied only to it.¹³⁴

4.4.1.3.2 *Singapore*

Through the Separation Agreement of August 7, 1965, Singapore and Malaysia also agreed on various existing loan agreements, the performance of which was guaranteed (surety) by the government of Malaysia and which were concluded between the government of Singapore and a third country or private party. Singapore undertook to negotiate new agreements whose obligations it would assume in their entirety, and Malaysia would be released from any.¹³⁵

A few months before the separation, the Public Utilities Board, Singapore's public enterprise, took out a loan from the World Bank to implement the Johore River Water Project.¹³⁶ Malaysia acted as the guarantor for this debt.¹³⁷ After the separation, the debt of the public enterprise remained with the public enterprise. At the time of the separation, Singapore and Malaysia agreed that Singapore would guarantee that the Public Utilities Board would honor its obligations under the so-called Water Agreement dated September 1, 1961, and September 29, 1962, between the City Council of Singapore and the government of the (State of) Johore. Malaysia, meanwhile, would guarantee that the agreement would also be honored by the government of the (State of) Johore.¹³⁸ As the guarantee is an ancillary transaction, it would have been reasonable for it to also pass from Malaysia to Singapore with the succession to the debt of the public enterprise, but this was not the case. The World Bank

¹³² O'Connell, *The Law of State Succession* (n 8) 166.

¹³³ *ibid.*

¹³⁴ Indian Independence (Rights, Property and Liabilities) Order (n 130) art 8(1)(a).

¹³⁵ Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State (adopted 7 August 1965) 563 UNTS 89 art 8.

¹³⁶ World Bank, 'Loan Agreement between IBRD and Public Utilities Board for the Johore River Water Project' (26 February 1965) Doc Name: Malaysia—Johore River Water Project: Loan 0405—Loan Agreement—Conformed.

¹³⁷ World Bank, 'Agreement between Malaysia, Singapore and IBRD for Amending Guarantee Agreement' (9 November 1977), Doc Name: Malaysia—Johore River Water Project, Loan 0405—Amending Guarantee Agreement—Conformed.

¹³⁸ Agreement Relating to the Separation of Singapore from Malaysia (n 135) annex B (An act to amend the constitution of Malaysia and the Malaysia Act) art 14.

documents up to 1977 refer to a Malaysian guarantee for this credit.¹³⁹ It was only in 1977 that Singapore, Malaysia, and the World Bank signed an agreement to modify the guarantee, which transferred it to Singapore.¹⁴⁰

It can be concluded that, upon separation, Singapore was entitled to all the rights, obligations, and responsibilities (including debts) that it brought with itself when it was incorporated into Malaysia. In respect of these, this marked a return to the *status quo ante*.¹⁴¹ There is no doubt, however, that Singapore did not succeed to the predecessor State's share of the general State debt.¹⁴²

4.4.1.3.3 *Bangladesh*

When Bangladesh became a member of the World Bank in August 1972, it undertook to settle the localized debt owed by Pakistan for loans used on the territory of Bangladesh (formerly East Pakistan).¹⁴³ After negotiations, Bangladesh agreed in 1974 to repay the vast majority (84%) of what the World Bank expected of it.¹⁴⁴ However, Pakistan accepted to remain liable for all debt that was not succeeded to by Bangladesh.¹⁴⁵ Following this formula, Bangladesh only took on (its) localized debt, while the entire general State debt remained with Pakistan.

4.4.1.4 State Practice after the Cold War

Recent examples include the dissolution of the Soviet Union (1992) and the separations of Montenegro from Serbia and Montenegro (2006), Kosovo from Serbia (2008), and South Sudan from Sudan (2011).

139 World Bank and International Bank for Reconstruction and Development, 'Report and recommendation of the president to the executive directors on a proposed loan to Malaysia for the Johore Land Settlement Project' (23 January 1974) WB Report No P1371MA, para 11, 3.

140 World Bank, 'Agreement between Malaysia, Singapore and IBRD for Amending Guarantee Agreement' (9 November 1977), Doc Name: Malaysia—Johore River Water Project, Loan 0405—Amending Guarantee Agreement—Conformed.

141 Menon, 'The succession of states and the problem of state debts' (n 38) 139.

142 Paul R Williams, 'State succession and the international financial institutions: Political criteria v. protection of outstanding financial obligations' (1994) 43 *International & Comparative Law Quarterly* 776, 791.

143 World Bank, 'Bangladesh: Proposed consolidation loan and credit' (24 January 1975) WB Report No P7736 para 1, 1.

144 *ibid* para 3, 1.

145 *Ibid* para 11, 4.

4.4.1.4.1 *Soviet Union*

As mentioned above, Russia, as a de facto continuator State, concluded zero-option or similar agreements with the other successor States, whereby it took over all the property abroad as well as all the debts of the former USSR. These agreements were concluded based on the Minsk Agreement of December 4, 1991, which established proportional shares for foreign assets and foreign debt. This agreement did not distinguish between general State debt and localized debt, with the exception of small items such as food vouchers.¹⁴⁶ Russia thus succeeded to almost all of the foreign debt of the Soviet Union. Russia's assumption of responsibility for the entire Soviet debt was also supported by its creditors, notably the Paris Club countries.¹⁴⁷ By concluding these agreements, the Paris Club also renounced its demand for the *joint and several liability* of all successor States.¹⁴⁸ The only exception was Ukraine, which refused to enter into an agreement; consequently, on January 13, 1993, it agreed to a separate protocol with Russia under which Ukraine succeeded to part of the property and a proportionate share (as defined in the Minsk Agreement) of the debt.¹⁴⁹

Succession to the debts of the former Soviet Union was therefore dealt with in a special way. Almost all of the debt of the predecessor State (both general State debt and localized debt) was transferred to the continuator State through agreements. In the course of their negotiations, the successor States also referred to the 1983 Vienna Convention, which gives priority to agreements between successor States in resolving succession issues. The separation of general State, localized, and local debts did not receive much attention during the negotiations. However, the successor States attached great importance to the rule of equitable proportions. Importantly, the obligation to repay debts was never in doubt. The legal principle of *pacta sunt servanda* played a central role.

4.4.1.4.2 *Eritrea*

Eritrea was admitted to the UN as an independent State on May 28, 1993.¹⁵⁰ The separation was accompanied by armed clashes with the continuator State,

¹⁴⁶ Williams and Harris (n 12) 371.

¹⁴⁷ Hubert Beemelmans, 'State Succession in international law: Remarks on recent theory and state praxis' (1997) 15 *Boston University International Law Journal* 71, 113.

¹⁴⁸ ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 57) 345.

¹⁴⁹ Stefan Oeter, 'State succession and the struggle over equity: Some observations on the laws of state succession with respect to state property and debts in cases of separation and dissolution of states' (1995) 38 *German Yearbook of International Law* 73, 82–83.

¹⁵⁰ United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2026.

Ethiopia, and the two countries only signed a joint declaration on the cessation of tensions on July 9, 2018. Shortly after the separation, the World Bank noted:

Eritrea is in a very favorable situation regarding its external debt. All obligations from the period before May 1991 have been taken over by Ethiopia, leaving Eritrea with no debt legacies. Reportedly, the country's only obligation at present is the IDA¹⁵¹ credit for the RRPE¹⁵² (US\$25 million).¹⁵³

Eritrea has therefore not succeeded to any share of the general State debt, but it has succeeded to (all) localized debt.

4.4.1.4.3 *Montenegro*

On July 10, 2006, Serbia and Montenegro signed an Agreement on Succession to Membership of International Financial Organizations and Sharing of Financial Rights and Obligations, whereby they agreed that Montenegro would assume 5.88% of the unallocated (i.e., general State) debt of the predecessor State (i.e., Serbia and Montenegro), leaving Serbia with 94.12%.¹⁵⁴ The share was determined according to the share of each federal republic in the total GDP in the period 1994–1998. Based on this agreement, the two countries entered into debt restructuring negotiations with the Paris and with individual creditors¹⁵⁵ and concluded bilateral agreements with most of them.¹⁵⁶

Montenegro also immediately began negotiations to take over the allocated debt. The World Bank noted:

Montenegro will need to assume legal responsibility for the various loans, credits and grants which have been provided or administered by the

¹⁵¹ International Development Association.

¹⁵² Recovery and Rehabilitation Program for Eritrea.

¹⁵³ World Bank, 'Eritrea: Options and strategies for growth' (10 November 1994) WB Report No 12930 26.

¹⁵⁴ Agreement between the Republic of Serbia and the Republic of Montenegro on the regulation of membership of international financial organizations and the sharing of financial rights and obligations (adopted 10 July 2006) Official Gazette of Serbia No 64/2006, art 2.

¹⁵⁵ As of December 31, 2021, an agreement has not yet been concluded with Libya and Kuwait as the succession issues of the former SFRY remain unresolved. Ministry of Finance of Montenegro, 'Report on the General Government Debt of Montenegro as of 31 December 2021' <<https://www.gov.me/en/article/report-on-the-general-government-debt-of-montenegro-as-of-december-31-2021>> accessed 26 February 2023.

¹⁵⁶ Ministry of Finance of Montenegro, 'National debt—31 December 2007' <<http://wapi.gov.me/download/b690e39f-e5c7-45cd-988b-8af6f5ff2e33?version=1.0>> accessed 26 February 2023.

Bank to [the State Union of Serbia and Montenegro], and its predecessor Federal Republic of Yugoslavia (FRY), *for the benefit of Montenegro*. This will be done through a tripartite Assumption and Amendment Agreement between the World Bank, Montenegro and Serbia.¹⁵⁷

Montenegro has succeeded to these debts.¹⁵⁸ They include, for example, all the debt of the State Enterprise Railway Infrastructure of Montenegro (Željeznička infrastruktura Crne Gore) with the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD) and that of the Railway Transport of Montenegro (Željeznički prevoz Crne Gore) with EUROFIMA.¹⁵⁹

Montenegro thus succeeded to a proportionate share of the general State debt and the total allocated debt, in agreement with the creditors and the continuator State. Serbia, as the continuator State, was no longer liable for the repayment of these debts at the moment of the Montenegrin takeover.

4.4.1.4.4 *Kosovo*

In 2001, the FRY signed an agreement with the World Bank on the restructuring of the SFRY debts to which it succeeded. The FRY and the World Bank agreed that all debt relating to Kosovo (allocated debt) would be pooled under the label “Consolidation Loan C.” As late as the end of 2007, the World Bank stated in a report concerning this debt that “Serbia currently has legal responsibility to ensure continued service of this loan, as well as similar Paris and London Club obligations.”¹⁶⁰ Serbia initially rejected the possibility of Kosovo taking over the allocated debt, fearing to implicitly recognize Kosovo’s independence. However, in May 2009, when it became clear that Kosovo’s applications for membership in the World Bank and IMF would be approved, it did not oppose to Kosovo’s obligation to succeed to all allocated debts with the World Bank.¹⁶¹

157 World Bank, ‘Republic of Serbia, Republic of Montenegro: Legal Amendments and Assumption of Responsibilities: second order restructuring (Project paper)’ (18 January 2008) WB Report No 49933 para 4 (emphasis added).

158 World Bank, ‘Kosovo: Consolidation Loan C Project: restructuring’ (29 June 2009) WB Report No 49182 para 6.

159 Ministry of Finance of Montenegro, ‘Report on the State Debt of Montenegro as of 31 December 2009’ <<https://www.gov.me/en/documents/4d3a1d15-4abc-4e20-85f3-fd858b9482a2>> accessed 26 February 2023.

160 World Bank, ‘Serbia, Country Partnership Strategy for the Republic of Serbia for the Period FY08-FY11’ (13 November 2007) WB Report No 41310YF para 101, 29.

161 Cheng (n 7) 29.

Serbia, as a continuator State, was no longer liable for the repayment of these debts as of the moment of Kosovo's takeover.

Unlike the World Bank, the IMF has announced that Serbia continued the membership of the State Union of Serbia and Montenegro and, thus, all its rights and obligations towards the IMF.¹⁶² It is not clear whether the IMF obligations also included the allocation of debts that should have fallen to Kosovo. Kosovo and Serbia never signed a succession agreement, which would also regulate Kosovo's share of the general State debt. The reasons lie in the political sphere.

4.4.1.4.5 *South Sudan*

Following the independence referendum, South Sudan applied for membership in the International Fund for Agricultural Development (IFAD), an international financial institution and specialized agency of the UN. IFAD therefore prepared a legal opinion on succession to debts in the event of Sudan splitting into two or being separated, as indeed happened.¹⁶³ Regarding the separation of South Sudan from "North Sudan," which would continue the legal personality of Sudan, the opinion states that North Sudan "will assume responsibility towards IFAD for the debts and other obligations." The exception would be the Southern Sudan Livelihood Development Project grant agreement, signed by representatives of South Sudan as authorized representatives of the government of Sudan. This agreement has a direct link to the government of South Sudan, which was responsible for its negotiation and conclusion and the implementation of the project.¹⁶⁴ The legal opinion states also that "[t]he Agreement could therefore qualify as a localized agreement, which means that the assets and liabilities related to it should be automatically transferred to Southern Sudan, if it joins IFAD membership."¹⁶⁵

As with Kosovo, the IMF argued that in the event of a separation of South Sudan, (North) Sudan would continue the legal personality of the predecessor State and, thus, its membership in the IMF, together with all its rights and obligations vis-à-vis the Fund.¹⁶⁶

162 IMF Press Release: IMF Offers Membership to Republic of Kosovo (8 May 2009) No. 09/158.

163 'Selected Legal Opinions of the Secretariats of the United Nations and Related Intergovernmental Organizations' (2011) UN Juridical Yearbook 537.

164 *ibid* 538.

165 *ibid*.

166 IMF Press Release: IMF Statement on South Sudan (25 July 2011) No 11/292.

As mentioned above, South Sudan and Sudan have negotiated their succession in a special way. On September 27, 2012, they concluded the *Agreement between Sudan and South Sudan on Certain Economic Matters*. The agreement conditionally provides for a zero-option solution, according to which Sudan, as the continuator State, retains all external debts in exchange for all property located abroad.¹⁶⁷ The consequences of the signing of this agreement demonstrate that the two States had both general State debt and localized debt in mind.¹⁶⁸ However, both States are to “take all necessary steps” within two years to ensure that the international community cancels Sudan’s debt to the greatest extent possible.¹⁶⁹

If they fail to do so, the zero-option agreement will expire,¹⁷⁰ and the countries will negotiate in good faith to reach an agreement on the distribution of foreign debt and property abroad.¹⁷¹ They will apply the final beneficiary rule to project loans (i.e., localized debt).¹⁷² Non-localized debt (i.e., general State debt) will be divided into proportional shares by weighing the relative development of physical infrastructure, human development, and population on the date of the separation of South Sudan.¹⁷³ The zero-option agreement has been extended several times, most recently until October 2022.¹⁷⁴ In 2021, the IMF wrote that “Sudan meets the requirements to reach the Decision Point under the HIPC Initiative.”¹⁷⁵ It can be concluded that the creditors accepted the agreement as the separation was carried out under the watchful eye of the international community. Additionally, as long as the zero-option is in force, the debtor remains unchanged.

167 Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters <<https://peacemaker.un.org/node/1617>> accessed 26 February 2023 art 3.1.1.

168 The IMF report states that “[a]t independence in July 2011, the country had neither domestic nor foreign debt.” International Monetary Fund, ‘Republic of South Sudan, Staff Report for 2016 Article IV Consultation—Debt Sustainability Analysis’ (23 March 2017) IMF Country Report No 2017/073 para 1, 2.

169 Agreement between Sudan and South Sudan on Certain Economic Matters (n 167) art 3.1.2, 3.1.3, and 3.1.4.

170 *ibid* art 3.2.1.

171 *ibid* art 3.2.2.

172 *ibid* art 3.4.

173 *ibid* art 3.4.2.

174 International Monetary Fund, ‘Sudan, Enhanced Heavily Indebted Poor Countries (HIPC) Initiative—Decision Point Document’ (1 July 2021) IMF Country Report No 21/144 para 12, 11.

175 *ibid* 2.

The legal opinion of IFAD, whose language is very affirmative, is important in the separation of Sudan. Although it does not cite the 1983 Vienna Convention or the practice of other countries, it makes it clear that it is a valid rule of State succession. IFAD did not lay down rules for the distribution of the general State debt but considered that all the debt belonged to the continuator State. However, it took the view that localized debt was succeeded to by the State that benefited from it. South Sudan and Sudan have also introduced the final beneficiary rule with regard to localized debt in the succession agreement and have added criteria for determining the portion to be shared in the general State debt. Both apply only on the condition that the zero-option solution fails. The fact that they have extended the *status quo* several times so far suggests that they favor the zero-option route or that it is a form of pressure on the creditors of these heavily indebted countries to agree to substantial debt relief after all.

4.4.2 *Transfer of Part of a Territory to Another State (Cession)*

The 1983 Vienna Convention,¹⁷⁶ the IDI Resolution on State Succession to Property and Debts,¹⁷⁷ and the Third Restatement¹⁷⁸ address the consequences of succession to debts in the event of cession in the same way as in cases of separation of part of a territory, naturally taking into account that the successor State is the State to which the territory has been transferred.

In this context, the ILC commented that neither practice nor doctrine is uniform on succession to a proportional share of the general State debt. Conversely, there is almost complete consensus and uniform practice regarding succession to localized debt.¹⁷⁹

In the case of cession, the so-called *moving frontier principle* applies as if the boundary of the successor State simply moved to include the ceded territory. In this way, everything relating to that territory simply passes to the successor State.

4.4.2.1 State Practice Regarding General State Debt

Sweden assumed a pro rata share of Denmark's debt when it acquired Norway from Denmark with the Treaty of Kiel (1814).¹⁸⁰ With the Zurich Agreement

176 1983 Vienna Convention (n 1) art 37.

177 IDI Resolution on State succession with regard to State property and debts art 23(2).

178 Third Restatement (n 10) para 209 point e, 104.

179 Commentary on the 1983 Vienna Convention (n 3) 84–89 and para 36, 90.

180 O'Connell, *The Law of State Succession* (n 8) 160.

(1859), Sardinia took over part of the Austrian debt.¹⁸¹ France also succeeded to a small part of Sardinia's general State debt from the Kingdom of Sardinia in 1860 with the cession of Nice and Savoy.¹⁸² Similarly, Prussia assumed part of Denmark's debt for the ceded territory of Schleswig-Holstein after the Second Silesian War.¹⁸³ In 1866, Italy accepted, with the cession of Romagna, Marchesa, Umbria, and Benevento, part of the debt of the Holy See proportional to its population. Based on this criterion, in 1881, Greece also succeeded to a part of the general State debt of the Ottoman Empire when it acquired the territory of Thessaly.¹⁸⁴

The Agreement on the Cession of Alaska between the US and the Russian Empire does not specifically address succession to debts. It does, however, state that the territory is ceded *free and unencumbered* by reservations, privileges, franchises, grants, or estates of anyone other than individuals.¹⁸⁵ It can therefore be understood that the US did not succeed to any debt.

As already mentioned, in 1878, the Congress of Berlin decided that countries that had acquired territory from the Ottoman Empire should also assume a proportionate share of the general State debt, but this did not apply to Romania and the Russian Empire, which refused to succeed to the debts of territories acquired from the Ottoman Empire during the Russo-Turkish War.¹⁸⁶ There was also no sharing of debts for the ceded territories of Cyprus, which went to the UK, and Bosnia and Herzegovina (BiH), which came under the control of Austria-Hungary but technically remained part of the Ottoman Empire until Austria-Hungary annexed it in 1908.¹⁸⁷ A few years later (1883), Chile also refused to succeed to the general State debt linked to the cession of the Tarapacá territory by Peru. So did Japan in 1905 when it acquired the southern part of the Sakhalin Peninsula from Russia.¹⁸⁸

The early 20th century was a period of recognition of the succession to a proportional share of the general State debt in cases of cession. After the

181 *ibid* 161. Metternich was of the opinion at the time that "the principles as a rule recognise that the ceded territory must continue to support a proportionate share of the debt of the State of which it was a part" (*ibid*).

182 Commentary on the 1983 Vienna Convention (n 3) para 12, 86.

183 O'Connell, *The Law of State Succession* (n 8) 161.

184 Commentary on the 1983 Vienna Convention (n 3) para 12, 86.

185 Treaty concerning the cession of the Russian possessions in North America by His Majesty the emperor of all the Russias to the United States of America (adopted 30 March 1867) 15 Stat 539 (Agreement on the Cession of Alaska) art vi.

186 Commentary on the 1983 Vienna Convention (n 3) para 16, 87.

187 O'Connell, *The Law of State Succession* (n 8) 162.

188 Commentary on the 1983 Vienna Convention (n 3) para 19, 88.

Italo-Turkish War (1911–1912), Italy assumed part of the Ottoman Empire's debt for territories ceded (conquered) by the Treaty of Lausanne (1912).¹⁸⁹ The expert commission that decided on peace after the First Balkan War was also of the opinion that any State that had acquired part of the territory of the Ottoman Empire “shall assume a part of the whole of the general debt of the Ottoman Empire proportional to the revenues of the ceded territory.”¹⁹⁰

This was followed in practice after the First World War. The peace treaties of the time recognized, in principle, the succession to a pro rata share of general State debts. The reasons may have been purely political or pragmatic given that if the debt remained entirely with the continuator State, whose territory had been substantially reduced, the possibility of repayment for creditors would also be substantially reduced.¹⁹¹ For this reason, the Treaties of Saint-Germain-en-Laye (Austria), Trianon (Hungary), Versailles (Germany), Neuilly-sur-Seine (Bulgaria), and Lausanne (Turkey) stipulated that the States to which territory was ceded after the war would also succeed to part of the debts of the continuator States. These peace treaties also included exceptions, such as the refusal of succession to debts linked to the cession of Alsace-Lorraine from France to Germany,¹⁹² but this exception is historically justified. When this province was ceded to Germany by the Agreement of Frankfurt (May 10, 1871), Germany refused to take over the debts, and France, to which the province reverted with the Agreement of Versailles (June 28, 1919), also declined to assume the debts incurred during the period of German rule over this province, that is, from 1871 to 1919.¹⁹³

The Treaty of Dorpat (1920) exchanged some territories between Finland and Russia. In this agreement, Russia ceded the territory of Pechenga/Petsamo, which had been an independent State since 1917.¹⁹⁴ It was agreed that “neither party shall be liable for the public debt and obligations of the other party.”¹⁹⁵ Thus, Finland did not succeed to any part of Russia's general State debt.

A turning point in practice came with the post–Second World War peace treaties, which adopted the position that, in the case of cession, the general State debt of the continuator State (or its pro rata share) was not to be

189 O'Connell, *The Law of State Succession* (n 8) 162.

190 *ibid.*

191 *ibid.* 163.

192 Treaty of Versailles (n 104) art 255.

193 Commentary on the 1983 Vienna Convention (n 3) para 13, 87.

194 *ibid.*; also in Treaty of Dorpat (n 121) art 4.

195 *ibid.* art 25.

succeeded to.¹⁹⁶ This may be connected to the fact that the territorial changes after the Second World War were considerably smaller than those after the First World War. The great European empires defeated in the First World War had already lost huge chunks of territory by then. The territorial changes after the Second World War did not jeopardize the debtors' ability to repay the general State debt to the extent that the victorious countries, which had acquired parts of the territory, would also be prepared to succeed to this type of sovereign debt. This was also the case with the Pechenga/Petsamo territory mentioned above: after the end of the Second World War, which Finland faced on the defeated side, this territory was ceded (back) to the Soviet Union by the Peace Treaty (1947).¹⁹⁷ This treaty does not mention succession to the debts related to this territory, perhaps also because it imposes heavy war reparations on Finland.¹⁹⁸ For more details on succession cases after the First World War, see sub-section 2.4.4.1.2. on separations of part or parts of a territory.

4.4.2.2 State Practice Regarding Localized Debt

While the practice of succession to general State debt is divided, localized debt has been subject to succession almost without exception. Among the agreements recognizing succession to localized debts, the ILC cites the Breslau and Berlin Agreements (1742), whereby Austria ceded Silesia to Prussia after the First Silesian War, the Peace of Campo Formio between Austria and France (1797) and the related Agreement of Lunéville (1801), the Agreement of Pressburg between Austria and France (1805), the Agreement of Tilsit between France and Prussia (1807), the Agreement of Fontainebleau between France and the Netherlands (1807), the Agreement of Paris between France and Wurtemberg (1807), and the Agreement between Prussia and Westphalia (1811) and others.¹⁹⁹ One of the rare exceptions is the Treaty of Versailles (related to Alsace-Lorraine), but it is based on historical fact (see previous sub-section 2.4.4.2.1.).

Although they recognized the succession to a proportionate share of the general State debt, the peace treaties that followed the First World War also provided for succession to localized debt, which was specifically highlighted. The Treaties of Saint-Germain-en-Laye and Trianon underlined the debts

196 See, e.g., Treaty of Peace with Italy (adopted 10 February 1947) 49 UNTS 50 art 81 and annex XIV para 6; Treaty of Peace with Japan (adopted 8 September 1951) 136 UNTS 45 art 18.

197 Treaty of Peace with Finland (adopted 10 February 1947) 48 UNTS 203 art 2.

198 *ibid* art 23.

199 Commentary on the 1983 Vienna Convention (n 3) para 25–31, 89–90.

secured by the railway infrastructure, salt mines, and other property.²⁰⁰ The successor States that acquired territory containing this property were also liable for the debts secured by these assets²⁰¹ but only for the part of the debt that was incurred to purchase them.²⁰² For more details on succession cases after the First World War, see sub-section 2.4.4.1.2. on separations of part or parts of a territory. There are other examples (e.g., the assumption of the debts of Crete, ceded by the Ottoman Empire to Greece in 1913), but in these cases, the debts are local and not localized due to the high degree of autonomy of the ceded territories.

As mentioned above, the peace treaties after the Second World War did not, as a rule, recognize succession to general State debt. However, they did provide for succession to the localized debt of the ceded territories. Territorial changes after the Second World War were considerably smaller than those after the First World War. Thus, the transfer of territories is covered by the peace treaties with Italy, Japan, and Hungary, whereas there were no changes for Romania²⁰³ and Bulgaria.²⁰⁴

The Peace Treaty with Italy stipulates that the successor States (i.e., those that acquired the ceded territory) do not succeed to part of Italy's general State debt²⁰⁵ but do to Italy's localized debt, provided that four conditions are met: a) the debt is linked to the public works or the civil administration of the ceded territories, b) the debt was incurred before the outbreak of the war and is not linked to military investments (*odious debt*), c) the territories benefited from the debt, and d) the creditors are residents of the territories.²⁰⁶ This unusual formulation was proposed for the draft peace treaty by the UK with the support of the US. France and the USSR suggested that the successor States should assume the entire localized debt related to infrastructure and other public works,²⁰⁷ but, in the end, the UK's proposal prevailed. The entire general State debt and the remaining localized debt thus remained with the continuator State.

200 O'Connell, *The Law of State Succession* (n 8) 170.

201 *ibid.*

202 Treaty of Saint-Germain-en-Laye (n 107) art 203(4).

203 Treaty of Peace with Romania (adopted 10 February 1947) 42 UNTS 3.

204 Treaty of Peace with Bulgaria (adopted 10 February 1947) 41 UNTS 21.

205 Treaty of Peace with Italy (n 196) annex XIV art 6.

206 *ibid.*

207 Proposed item 3 of annex 3, Draft Treaty of Peace with Italy prepared by the Council of Foreign Ministers (18 July 1946) in S Everett Gleason (ed), *Foreign Relations of the United States* (United States Government Printing Office 1970) vol IV, 41.

The Peace Treaty with Japan stipulated that the debts owed by Japan or its residents whose creditors are local authorities of territories that separated from Japan after the war would be subject to agreements between Japan and those local authorities.²⁰⁸ The Peace Treaty with Hungary provided that the State on whose territory the property of Hungary or its nationals was now located may seize it, up to the value of the reparations and other debts due to it.²⁰⁹ This was particularly the case for Czechoslovakia, which acquired territories from Hungary through this agreement.²¹⁰ The Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine did not regulate succession to debts.²¹¹

The only recent example of cession that can be mentioned is the case of Upper Silesia,²¹² which formally became definitively Polish with the agreement between Germany and Poland on the confirmation of the common boundaries (November 14, 1990). However, in substance, this is a case from the end of the Second World War for which a formal settlement was only adopted after the German “unification.” The related agreements did not regulate succession to debts.

4.5 State Practice without Continuing Legal Personality

4.5.1 *Dissolution of the State*

The 1983 Vienna Convention establishes the primacy of agreements between the successor States. In the absence of one, it provides that “the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account, in particular, the property, rights and interests which pass to the successor States in relation to that State debt.”²¹³ The IDI Resolution on State Succession to Property and Debts and the Third Restatement should be understood in a substantively identical way, with these two documents defining the succession to localized and local debt separately (albeit in the same substantive way as the Convention). Accordingly, in the event of a dissolution,

208 Treaty of Peace with Japan (n 196) art 4(a).

209 Treaty of Peace with Hungary (adopted 10 February 1947) 41 UNTS 135 art 22.

210 *ibid* art 1(3).

211 Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine (adopted 29 June 1946) 504 UNTS 299.

212 As far as Upper Silesia is concerned, article 88 of the Treaty of Versailles (n 104) already provided for a plebiscite to decide to whom the region should belong. About one-third of the region went to Poland.

213 1983 Vienna Convention (n 1) art 41.

the general State debt passes to the successor States in equitable proportions and the allocated debt in full.

4.5.1.1 State Practices before the Two World Wars

The Kingdom of Westphalia collapsed in 1813, but it was not until 1842 that its successor States²¹⁴ concluded an agreement on succession issues.²¹⁵ Although they agreed to succeed to the predecessor State's debt, they explicitly rejected succession to the *tort* debts that it had not recognized.²¹⁶ It can be concluded that this was a general State debt.

Great Colombia (also known as the Union of Colombia) was formed in 1821 by the union of New Granada, Ecuador, and Venezuela. Shortly after its creation, between 1829 and 1831, it broke up into the three countries that had founded it.²¹⁷ The creditor of Great Columbia, the UK, initially wanted to impose joint and several liability on the successor States, but this did not happen.²¹⁸ The three successor States themselves determined the proportional shares of the general State debt (50%, 21.5%, and 28.5%), to which the UK agreed as the creditor.²¹⁹

After the dissolution of the United Netherlands in 1830, it took nine years for the Allies (who had participated in the negotiations) and Belgium and the Netherlands to agree on the Treaty of London, which was concluded on April 19, 1839.²²⁰ During the nine years of negotiations, the Allies and the Netherlands were of the opinion that, in the event of the dissolution of the United Netherlands, it was only fair that each party should assume a proportionate share of the general State debt. This view was also based on the fact that the two countries had only been united for sixteen years before and that the successor State had then taken over the debts of the predecessor States. With the Treaty of London, the two successor States—Belgium and the Netherlands—each took over one-half of the predecessor State's debt.²²¹

214 Prussia, Hanover, Hesse, Lüneburg, and Brunswick.

215 Patrick Dumberry, *State succession to international responsibility* (Martinus Nijhoff Publishers 2007) 99.

216 Michael John Volkovitch, 'Righting wrongs: Towards a new theory of state succession to responsibility for international torts' (1992) 92(8) *Columbia Law Review* 2162, 2175.

217 Commentary on the 1983 Vienna Convention (n 3) para 6, 108.

218 O'Connell, *The Law of State Succession* (n 8) 158.

219 *ibid.*

220 Treaty between Great Britain, Austria, France, Prussia, and Russia, on the one part, and Belgium, on the other (adopted 19 April 1839) in Charles P Sanger and Henry TJ Norton, *England's Guarantee to Belgium and Luxembourg, with the Full Text of the Treaties* (Charles Scribner's Sons 1915) 127 (Treaty of London) annex art VII.

221 Commentary on the 1983 Vienna Convention (n 3) para 13, 111.

To this effect, Belgium paid the Netherlands the sum of 5 million forints for the repayment of its share.²²² Thus, succession to the general State debt was agreed upon. The two countries also agreed on succession to localized debt. They specifically stipulated that facilities such as canals and roads financed in whole or in part by the Kingdom of the Netherlands would belong to the successor State in which they were located.²²³ The successor succeeded to this property with all their liabilities,²²⁴ including the loans taken for their construction (i.e., localized debt).²²⁵

The State Union of Norway and Sweden was dissolved in 1905. Norway had joined Sweden in 1814 via cession by Denmark, with the King of Sweden as the head of State.²²⁶ Under the Treaty of Stockholm of March 23, 1906, the two States agreed to share the general State debt of their predecessor State in such a way that Norway would pay Sweden a proportionate share of the debt in the ratio established for the foreign affairs budgets. At the same time, each of them also assumed its local debt.²²⁷ It can be concluded that this was local debt and not localized debt.²²⁸

4.5.1.2 State Practice after the Second World War

4.5.1.2.1 *United Arab Republic*

The UAR was formed in 1958 via the unification of Egypt and Syria. It ceased to exist on September 28, 1961, after the coup d'état in Syria, and Egypt continued to use the name UAR until 1971. In the time on the existence of the UAR, on December 22, 1959, the World Bank granted a loan to the Suez Canal Authority,²²⁹ a government agency to which Egypt had already transferred the management of the Suez Canal in 1957.²³⁰ The debt remained with the public enterprise, and the loan was guaranteed by the UAR. After the collapse, the guarantee went to Egypt, and it is not clear whether this was because it succeeded to the State agency and the canal or simply because it retained the

222 Treaty of London (n 220) annex art XIII.

223 *ibid* art XV.

224 *ibid* art XV(1).

225 *ibid* art XV(2).

226 Commentary on the 1983 Vienna Convention (n 3) para 14, 111.

227 *ibid*.

228 O'Connell, *The Law of State Succession* (n 8) 176.

229 World Bank, 'Loan Agreement between IBRD and Suez Canal Authority' (22 December 1959) Doc Name: Arab Republic—Suez Canal Development Project: Loan 0243—Loan Agreement—Confirmed.

230 Declaration on the Suez Canal and the Arrangements for its operation (24 April 1957) UN Doc A/3576-S/3818 3.

name of UAR until 1971.²³¹ In any case, the guarantee was not for general State debt but for localized debt or even the debt of a public enterprise.

4.5.1.3 State Practice after the Cold War

4.5.1.3.1 *Socialist Federal Republic of Yugoslavia*

At the time of the collapse of the SFRY, the Badinter Commission stressed the importance of the principle of proportionality and respect for international law.²³² It specifically stated that the sharing of the SFRY debt should follow the principle of proportionality.²³³

As mentioned above, the successor States did not sign the Agreement on Succession Issues until ten years after the start of the State's dissolution, so the succession to debts had already been largely settled when the agreement was concluded. At the time of the process of dissolution, the SFRY's external debt with international organizations, States, and banks amounted to USD 15.145 billion, including USD 3.145 billions of general State debt and USD 12 billions of localized debt.²³⁴ Among the latter, the approximate debt of the FRY was USD 5.375 billion, that of Croatia USD 2.683 billion, that of Slovenia USD 1.791 billion, that of BiH USD 1.487 billion, and that of Macedonia USD 664 million.²³⁵ Immediately after the end of the process of dissolution in 1992, creditors started talks with the successor States on debt succession. The IMF was the first to step in, calculating the proportional shares of the total sovereign debt attributable to each republic on the basis of economic criteria (the contribution of each republic to the federal budget and their shares of GDP and exports).²³⁶ The localized debt was allocated to the successor State in its entirety, and the general State debt was allocated to the successor State proportionately.²³⁷ Because the World Bank loans were given to the SFRY for specific projects (localized debt), the World Bank used the *final beneficiary rule* to

231 Williams, 'State succession and the international financial institutions' (n 142) 790; Gioia A, 'State succession and international financial organizations' in Eisemann PE and Koskenniemi M (eds), *La succession d'États: la codification à l'épreuve des faits/State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000) 363.

232 Badinter Commission (n 30) Opinion No 9(4) point 4.

233 *ibid* point 6.

234 Mojmir Mrak and France Arhar, 'Succession issues in allocating the external debt of SFR Yugoslavia and achieving Slovenia's financial independence' in Mojmir Mrak, Matija Rojec and Carlos Silva-Jáuregui (eds), *Slovenia: from Yugoslavia to the European Union* (World Bank Publications 2004) 101.

235 *ibid*.

236 Mirjam Škrk, 'Slovenski pogledi na nasledstvo držav' (1996) 51(1-3) *Pravnik* 45, 59-61.

237 Oeter (n 149) 86-87.

determine the successor State. Therefore, each successor State succeeded to the localized debt for those assets in which it had a beneficial interest.²³⁸

These principles (proportional share of general State debt and succession to total localized debt) were also applied by other creditors, such as the London Club and the Paris Club. A deviation occurred in the negotiations with the London Club, which demanded that the successor States should be jointly and severally liable for the general State debt. In 1988, the last debt restructuring of the 1983 agreement was concluded between the London Club, on the one hand, and the Central Bank of Yugoslavia and ten (central and commercial) banks from various Yugoslav federal republics, on the other. The agreement, called the New Financial Agreement, established the joint and several liability of debtors.²³⁹ Slovenia, which was the first to join the London Club, proposed to assume its entire localized debt and a pro-rata share (according to the IMF key) of the general State debt. The London Club first rejected the proposal and required Slovenia to repay the entire debt in accordance with the joint and several liability provisions. However, Slovenia eventually agreed to take on a slightly larger share in exchange for the termination of the solidarity clauses. The London Club concluded similar agreements with other successor States.²⁴⁰

By the time of the Agreement on Succession Issues, the successor States had, for the most part, already concluded agreements with the IMF, the World Bank, the London and Paris Clubs, and the EIB.²⁴¹ The Agreement on Succession Issues explicitly confirmed the then-established practice of the successor States, stating that “[a]located debt is not subject to succession and shall be accepted by the Successor State on the territory of which the final beneficiary is located.”²⁴² As regards the distribution of the general State debt, the proportional shares set in the agreement for the distribution of financial resources were applied.²⁴³ In this way, a balance was also struck between the rights acquired in relation to the financial assets and the financial obligations of the successor States.

238 Stanič (n 17) 760.

239 *ibid* 761–762.

240 *ibid* 762–763.

241 Agreement on Succession Issues (adopted 29 June 2001) Official Gazette of the Republic of Slovenia No 71/2002 annex C art 3. See also Mirjam Škrk, Ana Polak Petrič and Marko Rakovec, ‘The Agreement on Succession Issues and some dilemmas regarding its implementation’ (2015) 75 *Zbornik znanstvenih razprav* 213, 232–235.

242 Agreement on Succession Issues (n 241) annex C art 2(b).

243 *ibid* art 5(2).

The use of these shares was also proposed by the UN Secretary-General with regard to the SFRY's unpaid obligations to the UN²⁴⁴ and was adopted through the UN General Assembly in Resolution 63/249.²⁴⁵ This debt remains outstanding to the present day.²⁴⁶ The problem could stem from (non)payments during the disintegration process as the first successor State—(Slovenia) became independent on June 25, 1991, and the last—the FRY) on April 27, 1992. An additional issue is the unclear status of the FRY at the UN until its admission on November 1, 2000.

In 2013, the successor States were able to agree to assume their pro rata shares of the outstanding International Atomic Energy Agency (IAEA) commitments.²⁴⁷ To date, however, the division of the SFRY's so-called clearing debt to the Czech Republic, for example, remains open. On December 10, 2018, the Czech Republic and Serbia concluded an agreement under which Serbia will reimburse the Czech Republic for its share of the Yugoslav debt.²⁴⁸ It can be inferred that Serbia and the Czech Republic took into account the successor shares from the Agreement on Succession Issues of Yugoslavia, but it is not clear how they determined the basis on which these shares were applied.

Succession to debts in the case of the SFRY has further highlighted the difference between succession to general State debt and to localized debt.²⁴⁹ It was confirmed that localized debt is succeeded to in its entirety (using the *final beneficiary rule*), whereas general State debt is succeeded to in proportional shares. The joint and several liability that the London Club wished to impose on the successor States was not based on general rules of international law but on the New Financial Agreement concluded at the time of the predecessor State with the London Club. Importantly, there was never any doubt about succession to the debts itself. Negotiations were held only on the amount of the shares and the possible restructuring of the debt.

244 'Unpaid assessed contributions of the former Yugoslavia, Report of the Secretary-General' (16 September 2005) UN Doc A/60/140.

245 UNGA Res 63/249 (24 December 2008) UN Doc A/RES/63/249.

246 UNGA, 'Financial report and audited financial statements for the year ended 31 December 2021 and Report of the Board of Auditors' UN Doc A/77/5 297.

247 Škrk, Petrič and Rakovec (n 241) 235.

248 'Srbija vraća stari klirinški dug Češkoj uplatom 9,8 miliona dolara' *Danas* (10 December 2018) <<https://www.danas.rs/ekonomija/srbija-vraca-stari-klirinški-dug-ceskoj-uplatom-98-miliona-dolara/>> accessed 26 February 2026.

249 Williams and Harris (n 12) 389.

4.5.1.3.2 *Federal Republic of Czechoslovakia*

The Czech Republic and Slovakia also applied the 2:1 ratio (Czech Republic: 2; Slovakia: 1) established for the division of the property of the former CSFR to liabilities to financial institutions (e.g., International Bank for Reconstruction and Development [IBRD], International Financial Corporation) unless their substance meant that they would accrue to only one successor.²⁵⁰ The successor States also used this ratio for the division of convertible currency debts. As the exception, it was agreed that the sharing of the membership quota and obligations towards the IMF would be determined in negotiations with the latter.²⁵¹ As a result, the membership quota was divided into a ratio of 69.1% for the Czech Republic and 30.9% for Slovakia (roughly 2.24:1). Yet, the debt of USD 1.5 billion assumed by the CSFR in 1991 was partitioned according to a ratio of 2.29:1, to which Slovakia initially objected before eventually accepting the IMF proposal.²⁵² Liabilities relating to only one successor State (localized debts) were succeeded to by that successor State only.²⁵³

4.5.2 *Unification of States*

The unification of States refers to two or more States being united, ending their legal personality and creating a new State. In this form of succession, it is reasonable for the successor State to assume the obligations of the predecessor States, which henceforth form part of it. Cases in which the debt of the predecessor State would be extinguished as a result of the unification are very rare. The formation of the Soviet Union is one, but this exception is more closely related to the posture that the Communist government took vis-à-vis the old Tsarist rule.²⁵⁴ In all other cases, the debt of the predecessor States

²⁵⁰ Constitutional Law of the CSFR No 541/1992 on the division of the property of the Czech and Slovak Federative Republic between the Czech Republic and the Slovak Republic and its passage to the Czech Republic and the Slovak Republic (8 February 1992) Collection of Laws of the CSFR No 110, art 4.

²⁵¹ *ibid.*

²⁵² Williams and Harris (n 12) 404.

²⁵³ Constitutional Law of the CSFR No 541/1992 (n 250) art 3(4), 5(2), and 5(3).

²⁵⁴ "International law sharply distinguishes the succession of states, which may create a discontinuity in statehood, from a succession of governments, which leaves statehood unaffected. A challenge to the distinction was posed by the USSR after the Revolution of October 1917. The new regime insisted that it was not merely a new government but represented a new state, and that therefore the USSR was not responsible for the international obligations assumed by the previous regime, including its debts. Other states rejected that position and continued to call on the USSR to carry out the obligations of the previous regime. The Soviet government itself frequently claimed rights belonging to Tsarist Russia, and accepted treaties to which Tsarist Russia had adhered as effective, even if it sometimes invoked the defense of *rebus sic stantibus* (...) to escape obligations under

was passed on to the successor State. This is an implementation of the rule *res transit cum suo onere*, which is also accepted in principle in legal doctrine.²⁵⁵ Understandably, there is no distinction between general State debt and localized debt given that the successor State succeeds to the entire debt of the predecessor State.

However, if the successor State is organized as a federal State and the predecessor State retains a certain level of autonomy within it, its debt may remain with the predecessor State (i.e., a territorial unit of the successor State) even after the date of succession.²⁵⁶ As indicated above, these are cases that depend on the internal legal regime of the successor State. Nonetheless, in accordance with the principle of *pacta sunt servanda*, these debts are not extinguished but survive the date of succession in one way or another.²⁵⁷

The 1983 Vienna Convention is brief on succession to debts in the event of unification. The provision comprises only one sentence: “When two or more States unite and so form one successor State, the State debt of the predecessor States shall pass to the successor State.”²⁵⁸ The Third Restatement, which uses the same terms as the Convention, adds that in the event of unification, the successor State is *deemed* to assume the State debt, otherwise “no source of payment would be available to creditors, and the Successor State might be unjustly enriched, acquiring territory and other assets without corresponding obligations.”²⁵⁹ It further stipulates that if the predecessor State retains a certain level of autonomy within the successor State, the debt may remain with it despite the unification.²⁶⁰ The IDI Resolution on State Succession to Property and Debts does not contain specific provisions on succession to debt in the event of unification, but its general rules apply to this case as well.

4.5.2.1 State Practice before the Two World Wars

One of the oldest relevant examples is the creation of the United States of America, whose Constitution states that “[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the

them. It also took other positions inconsistent with discontinuity.” Third Restatement (n 10) 101. See also: Dumberry, *State succession to international responsibility* (n 215) 154.

255 Commentary on the 1983 Vienna Convention (n 3) para 2, 105.

256 For succession to local debts, see 4.2 *Types of debts*.

257 See, e.g., Arthur Berriedale Keith, *Theory of State Succession with special reference to English and Colonial law* (Waterlow and Sons Limited 1907) 97; Feilchenfeld (n 11) 664–666.

258 1983 Vienna Convention (n 1) art 39.

259 Third Restatement (n 10) para 209 point c, 103–104.

260 *ibid.*

Confederation.”²⁶¹ All debts prior to the creation of the US were therefore assumed by the US.²⁶²

On July 21, 1814, Belgium and the Netherlands were united into a single country via a unification agreement, which also defined succession to debts and stipulated that the debts of the predecessor States were to be succeeded to by the successor State after unification.²⁶³ Similar provisions were also contained in the international acts of the unification of the Central American countries. For example, the Agreement of June 15, 1897, between Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador establishing the Republic of Central America provided that the successor State should assume the debts of the predecessor States.²⁶⁴ After the dissolution of the Central American Republic, Costa Rica, El Salvador, Honduras, and Nicaragua concluded the Pact of the Union of Central America on January 19, 1921, which specified that the federal government would take care of external and internal debt obligations.²⁶⁵

On December 21, 1867, Austria and Hungary concluded the so-called Compromise (*Ausgleich*), which established a dual monarchy. The agreement did not regulate succession to debts. The Austrian Act of December 21, 1867, stipulated in Article 4 that the two States would conclude an agreement regarding the national debt existing before unification. A substantially identical internal act was adopted by Hungary on June 12, 1867.²⁶⁶

An exception to this practice is the creation of the Soviet Union on September 30, 1922, with the Agreement on the Establishment of the USSR between Russia, Belarus, Ukraine, and the Trans-Soviet Republic. Despite Western opposition, the USSR always refused to take responsibility for the debts incurred by Tsarist Russia (i.e., until the 1917 Revolution).²⁶⁷

4.5.2.2 State Practice after the Second World War

4.5.2.2.1 *United Arab Republic*

As mentioned above, Egypt and Syria merged to form the UAR in 1958. On March 5, 1958, a provisional constitution was adopted, which stipulated that

261 US Constitution <<https://www.archives.gov/founding-docs/constitution-transcript>> accessed 26 February 2023 art VI(1).

262 Menon, ‘The succession of states and the problem of state debts’ (n 38) 137.

263 Commentary on the 1983 Vienna Convention (n 3) para 3, 106.

264 *ibid* para 5, 106.

265 *ibid*.

266 *ibid* para 7, 106–107.

267 Dumberry, *State succession to international responsibility* (n 215) 154.

only the national parliament of the UAR would have the power to incur debts²⁶⁸ and that there would be a common budget for the two regions (i.e., Egypt and Syria).²⁶⁹ This implies that only the UAR was responsible for debt servicing.²⁷⁰ Similarly, Syria's and Egypt's outstanding obligations to UNESCO, which were incurred before unification, were considered to be the UAR's obligation.²⁷¹

4.5.2.2.2 *United Republic of Tanzania*

The United Republic of Tanzania was formed on April 26, 1964, by the unification of Tanganyika and Zanzibar. The original name of the United Republic of Tanganyika and Zanzibar was changed to the United Republic of Tanzania the same year (October 29, 1964). Both predecessor States were independent States and members of the UN at the time of the unification—Tanganyika from December 14, 1961, and Zanzibar from December 16, 1963.²⁷² Zanzibar was an independent State for only a few months.²⁷³ The successor State succeeded to Tanganyika's UN membership.²⁷⁴ Tanzania also succeeded to Tanganyika's membership in the IMF²⁷⁵ and the World Bank.²⁷⁶ At the time of the unification, some competences, such as foreign affairs and defense, were transferred to the federal authorities, while others remained with the former authorities. Additional powers were transferred to the federal authorities shortly thereafter; in 1965, a new currency and a central bank, the Bank of Tanzania, were established, with powers extending to Zanzibar.²⁷⁷ The Bank of Tanzania

268 Provisional Constitution of the United Arab Republic (5 March 1958) 163 British and Foreign State Papers 976 art 29.

269 *ibid* art 70.

270 Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 1, 386.

271 Commentary on the 1983 Vienna Convention (n 3) footnote 484 para 10, 107.

272 World Bank, 'Tanzania at the turn of the century' (28 February 2002) WB Report No 23738 3.

273 In this context, it is also important to highlight the marked disproportion in the size of the two Predecessor States. While Tanganyika covered 880,600 km², Zanzibar was an archipelago with two main islands totaling 2,332 km².

274 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2026.

275 International Monetary Fund, 'Annual Report of the executive directors for the fiscal year ended April 30, 1965' (1965) 31.

276 World Bank, 'Member States' <<http://www.worldbank.org/en/about/leadership/members>> accessed 26 February 2026. Tanzania has been a member since September 10, 1962.

277 WB, Tanzania, Prospects for economic development in East Africa, Vol. III: Tanzania, Part One: Prospects for economic development in Tanzania, Doc. Name: Tanzania: Prospects for economic development in Tanzania, Report no. AF58b of 31.8.1967, Washington 2010, p. 11.

also took over all rights and obligations in the East African Common Services Organisation (EASCO)²⁷⁸ relating to Tanzania.²⁷⁹

It seems that Tanzania simply succeeded to Tanganyika's debt along with World Bank membership. The IBRD reports on Tanzania mention the unification of Tanganyika with Zanzibar, but their economic analyses do not distinguish between an independent Tanganyika and the new Tanzania. These analyses also include Tanzania's external debt and describe its trend from 1961 (i.e., before unification) to the later years after the unification.²⁸⁰

Zanzibar, which existed as an independent State for only a few months after the decolonization process, had no external debts until unification. The debt that the successor State (Tanzania) succeeded to is therefore exclusively the debt that belonged to Tanganyika before unification. Nevertheless, the creation of Tanzania confirms that, in the event of a unification, the successor State succeeds to all the debts of its predecessors.

4.5.2.2.3 *Vietnam*

Notwithstanding the UNGA's proposition for South Vietnam and the Democratic Republic of Vietnam to be admitted to the UN as two separate countries,²⁸¹ some experts consider this merger not as the reunification of two independent countries but as the reunification of parts of the same country that had temporarily had two governments.²⁸² The UN, nevertheless, states on its website that "[t]he Democratic Republic of Viet-Nam and the Republic of South Viet-Nam (the latter of which replaced the Republic of Viet Nam) united on 2 July 1976 to constitute a new State, the Socialist Republic of Viet-Nam (Viet-Nam)."²⁸³

AQ_6

278 East African Common Services Organisation, whose members were Kenya, Tanzania and Uganda, three former East African British Colonies.

279 World Bank, 'Tanzania: Prospects for economic development in Tanzania' (31 August 1967) WB Report No AF58B 11.

280 *ibid.* See, e.g., page 10 ("The biggest increase has been in respect of debt servicing which rose from Sh 37 million in 1961/62 to Sh 94 million in 1966/67") and Table 12 (in the footnote: "includes certain revenues in respect of Zanzibar").

281 UNGA Res 3366 (XXX) (19 September 1975) UN Doc A/RES/3366 (XXX).

282 See, e.g., ILC, 'Transcript of the 3431st Meeting of the 70th Session, UN Doc A/CN.4/SR.3431, 17–18, 13; Yoshiro Matsui, 'Problems of divided state and the right to self-determination in the case of Vietnam' (1976) 20 *Japanese Annual of International Law* 17; Jeffrey J Brown, 'The jurisprudence of the Foreign Claims Settlement Commission: the Vietnam claims' (1986) 27(1) *Virginia Journal of International Law* 99. For a detailed discussion of Vietnam as a "divided State," see James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 472–478.

283 United Nations, United Nations Treaty Collection, 'Historical Information' <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026. It is also

In any case, the issue of South Vietnam's debts after reunification remained unresolved. After reunification, Vietnam announced that it would not take responsibility for the debts assumed by the South Vietnamese government, which the creditor countries did not agree with.²⁸⁴ During negotiations with the Paris Club on debt restructuring, Vietnam later agreed to take over South Vietnam's debts.²⁸⁵ It should be noted that Vietnam's acceptance was linked to its need to acquire new debts and restructure old ones.²⁸⁶

4.5.2.3 State Practice after the Cold War

4.5.2.3.1 *Republic of Yemen*

The Republic of Yemen was formed on May 22, 1990,²⁸⁷ by the unification of the Arab Republic of Yemen and the People's Democratic Republic of Yemen.²⁸⁸ The Agreement on the Unification of the Yemeni states that the legal personalities of the predecessor States will be integrated into a single legal personality of the successor State on the date of unification and that the Republic of Yemen will have a single legislative, executive, and judicial authority.²⁸⁹ On May 19, 1990 (i.e., after the signing of the agreement), the Foreign Ministers of the two Yemeni informed the Secretary-General of the UN by letter that the Republic of Yemen would replace the two predecessor States in UN membership, international agreements, and international relations in general. The Republic of Yemen shall be deemed a party to treaties from the date on which the first of the predecessor States became a party.²⁹⁰ The

included among the unifications in Marcelo G Kohen and Patrick Dumberry, *The Institute of International Law's resolution on state succession and state responsibility: introduction, text and commentaries* (Cambridge University Press 2019) 114.

284 Dieter Papenfuß, 'The fate of the international treaties of the GDR within the framework of German unification' (1998) 92 *American Journal of International Law* 469, 474.

285 *ibid.*

286 *ibid.*

287 The Unification Agreement signed on April 22, 1990, mentions May 26, 1990, as the date of succession, while the joint letter of the Foreign Ministers of the two Yemeni sent on May 19, 1990, to the UN Secretary-General cites May 22, 1990 (see below). The latter was accepted by the UN.

288 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2026.

289 Agreement Establishing a Union between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen (adopted 22 April 1990) 30 *ILM* 822 (Agreement on the Unification of the Yemeni) art 1, 822–823.

290 Joint Letter of the Foreign Ministers of the two Yemeni to the Secretary-General of the United Nations (19 May 1990) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

Republic of Yemen has thus been a member of the UN since September 30, 1947.²⁹¹

Shortly after unification, Yemen entered into debt relief and restructuring talks with creditor countries and the Paris Club.²⁹² As a result of the talks, the Republic of Yemen also assumed the debts of the predecessor States.²⁹³

4.5.3 *Incorporation of One State into Another*

The 1983 Vienna Convention and the Third Restatement regulate incorporation in the same article as unification seeing as the predecessor State completely passes into the successor State and loses its legal personality. According to the *moving frontier principle*, it makes sense that all its national debt (as in the case of a unification) passes to the successor State (in this case, the continuator). The possibility that, if the predecessor State retains a high degree of autonomy within the continuator State, the debts of the former would not be transferred to the latter is the same as in the case of a unification of States.²⁹⁴

There is no uniform practice on succession to debts in the event of an incorporation. There have been several incorporations in the past, but they have taken the form of forced annexations and colonization. Consensual incorporations have been rare.

4.5.3.1 State Practice before the Two World Wars

In some cases of incorporation, the conquering countries took over the debts of the conquered countries, notably Tahiti in 1880 (France) and Korea in 1910 (Japan). In the latter case, succession to the debts was agreed upon through a treaty, in the former through domestic law.²⁹⁵ For the incorporation of Hawaii, the US Congress passed a resolution by which the US assumed the Hawaiian debt.²⁹⁶ The UK denied the obligation to assume the debt when it acquired Fiji (1874) and Burma (1886), but it later agreed to repay it on an *ex gratia* basis. In contrast, it accepted debt succession for the Boer Republics in 1900.²⁹⁷ In other cases, such as the incorporation of Madagascar into France in 1895 and

291 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2026.

292 IMF, 'Republic of Yemen: Selected Issues' (20 April 2001) IMF Staff Country Report No 01/61, 26–28.

293 *ibid* 23.

294 See previous chapter.

295 Commentary on the 1983 Vienna Convention (n 3) para 3, 91.

296 O'Connell, *The Law of State Succession* (n 8) 150.

297 *ibid* 151.

that of the Congo into Belgium in 1907, the continuator States refused debt succession.²⁹⁸

There are further differences between these cases. France took on the debts of annexed Tahiti but refused to do so for Tunisia (1881) and Madagascar. The difference was justified on the grounds that Tahiti no longer had fiscal autonomy after the incorporation, whereas Tunisia and Madagascar did.²⁹⁹ The debt thus remained with Tunisia and Madagascar and was not extinguished by the incorporation. In principle, incorporated States (e.g., into a federal State as another federal State) with greater fiscal autonomy retained their debts.³⁰⁰ In such cases, there is no formal question of succession as the debt remains with the same debtor.

The importance of the scope of fiscal autonomy was also highlighted during the incorporation of Texas into the US in 1845.³⁰¹ Texas and the US signed an incorporation agreement under which the US would assume the debt of Texas up to USD 10 million. The US Congress did not ratify the agreement but passed a resolution of incorporation that made Texas a new US state. The resolution stated that “in no event are said debts and liabilities to become a charge upon the government of the United States.”³⁰² Nevertheless, the State of Texas and the United States later concluded an agreement granting Texas USD 10 million in securities from the central government to rehabilitate its foreign debt. Texas’s debt was largely based on securities issued mostly by British individuals; consequently, the UK took the US to an arbitration tribunal to protect its citizens. The primary issue before the arbitrators was the extent of Texas’s fiscal autonomy, which would determine who was the debtor and whether the debt was subject to succession. The tribunal’s decision was not based on substantive grounds but on procedural ones and, unfortunately, did not provide an answer to these questions.³⁰³ However, it is clear that the debt of Texas remained with Texas even after the incorporation. It is also relevant that the debt was not extinguished by the succession.

298 Commentary on the 1983 Vienna Convention (n 3) para 4, 92.

299 O’Connell, *The Law of State Succession* (n 8) 150–151.

300 *ibid* 154, 156.

301 Petros B Parlavantzas, ‘L’Application de la succession d’États à l’établissement, la modification et la dissolution des liens fédératifs (Les traites et les dettes publiques)’ (1963) 16 *Revue Hellenique de Droit International* 53, 66–67.

302 Joint Resolution for annexing Texas to the United States (1 March 1845) in Richard Peters (ed), *Public statutes at large of the United States of America from the organization of the government in 1789, to March 3, 1845* (Little, Brown & Co 1856) vol 5, 797, para 2, 798.

303 O’Connell, *The Law of State Succession* (n 8) 155–156.

4.5.3.2 State Practice after the Second World War

At first glance, the incorporation of Singapore into the Federation of Malaya may seem to be a modern practice, but Singapore (like Sabah and Sarawak) was a dependent territory of the UK at the time of incorporation. Because the incorporation was the result of an agreement between the UK and the Federation of Malaya, this case cannot be considered an incorporation (of an independent State) into another independent State.

4.5.3.3 State practice after the Cold War: The GDR and the FRG

According to the Agreement on the Unification of Germany concluded on August 31, 1990, between the FRG and the GDR, all debts of the GDR central budget (i.e., external and internal debt) were taken over by the FRG and transferred to a special fund managed by the Finance Minister of the FRG.³⁰⁴ The two States agreed that, after the liquidation of the fund on January 1, 1994, the debts would be transferred to the FRG and the *Länder* in proportions to be determined by law at a later date.³⁰⁵ The FRG also succeeded to the guarantees, sureties, and indemnities it had taken over before the incorporation and charged to the GDR's central budget,³⁰⁶ however 50% of these guarantees, sureties, and indemnities was additionally *indirectly guaranteed* by the incorporated *Länder* and Berlin, jointly and severally.³⁰⁷

Arrangements for the succession to debts arising from the State's monopoly on foreign trade and foreign currencies or the exercise of other GDR functions vis-à-vis third countries and the FRG were henceforth managed by the Federal Minister of Finance.³⁰⁸ These debts were therefore subject to special arrangements. The two countries also agreed that debts arising from the GDR's membership in the Council for Mutual Economic Assistance (COMECON) "may be the subject of separate arrangements."³⁰⁹ The FRG also took over the

304 Agreement between the Federal Republic of Germany and the German Democratic Republic on the establishment of a united Germany (adopted 31 August 1990) Bundesgesetzblatt Vol 1990 Part II No 35 (Agreement on the unification of Germany) art 23(2) and 23(3). See also Jan Klabbers and Martti Koskenniemi, 'Succession in respect of state property, archives and debts, and nationality' in Jan Klabbers and others (eds), *State Practice Regarding State Succession and Issues of Recognition/Pratique des États concernant la succession d'États et les questions de reconnaissance* (Kluwer Law International 1999) 120–124; Richard M Buxbaum, 'Sovereign debtors before Greece: The Case of Germany' (2016) 65(1) *University of Kansas Law Review* 59, 83–84.

305 Agreement on the Unification of Germany (n 304) art 23(4).

306 *ibid* art 23(6).

307 *ibid*.

308 *ibid* art 24(1).

309 *ibid* art 24(3).

debts of the GDR's State-owned railway and postal companies and transferred them to special funds for the railways (*Deutsche Reichsbahn*) and the post office (*Deutsche Bundespost*).³¹⁰

In practice, not everything went so smoothly. The FRG argued that succession to debts was not automatic and refused to grant succession to late payments of UN peacekeeping dues. The UN Secretary-General argued that, under international law, the GDR's incorporation also constituted succession to its debts. The FRG subsequently paid this debt but explicitly on an *ex gratia* basis.³¹¹

4.6 Conclusions

Practice shows that, even in the case of debt succession, the basic distinction relies on the division of the matter into a general part (general State debt) and a special part (localized debt). Thus, succession does not affect the debt of territorial units (local debt).

The question of whether the successor State assumes the debt of the territory acquired (through cession, unification, or incorporation) or remains with that territory rarely arises in practice (the incorporation of Texas into the US is one such example). The basic rule is that the debt passes in full to the successor State, which is liable for its repayment from the date of succession.

Succession to general State debt differs depending on whether there is continuing legal personality or not. In cases of continuity of legal personality, modern practice since the end of the Second World War has shown that the debt belongs entirely to the continuator State. The only clear exception is Montenegro. The other cases (Ukraine, Pakistan, and Sudan) each have their own specificities, and the older practice does not allow conclusions to be drawn because it is too fragmented. The cases without continuation of legal personality confirm that, according to the *principle of equity*, the successor State also succeeds to a pro rata share (dissolution) or the entire debt (unification and incorporation). In the case of dissolution, the general State debt is distributed in a pro rata share, which is confirmed by all the cases of practice from all periods. The only ambiguity concerns the UAR. Cases of unification

³¹⁰ *ibid* art 26 and 27.

³¹¹ Klabbers and Koskenniemi (n 265) 120–124; ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 57) 340. The ILA states here that the FRG took over the entire *internal* and *external debt* of the GDR and that the problematization of the debt to the UN falls under the so-called *foreign debt*.

and incorporation are specific because the predecessor State passes entirely into the successor State. The debt mostly passes to the successor State, but if the successor State has a federal system, this debt may remain with the territorial unit. However, such cases are rare. Similarly, unification and incorporation entail no distinction between general State debt and localized debt.

Examples of denial of succession to debts as such in cases of unification and incorporation are mainly limited to the colonial practices of the 19th and early 20th centuries. An exception in this respect is the incorporation of the GDR into the FRG, where the successor State considered that no succession had taken place with regard to a limited part of the external debt (debt to the UN).

Succession to localized debt also differs depending on the continuity of legal personality. In cases with continuity of legal personality, practice since the end of the Second World War has tended to favor the transfer of the entire localized debt to the Successor State that has a specific link to this debt, in accordance with the *final beneficiary rule* (i.e., the expression of the principle of special connection), but there are also cases to the contrary. The older practice is unclear. Cases from the 18th and early 19th centuries confirmed succession to localized debt. It is also supported by the two Paris Peace Treaties concluded after the First World War (Saint-Germain-en-Laye and Trianon) but explicitly contradicted by the peace treaties with the USSR. After the Second World War, succession to this kind of debt is recognized in the peace treaty with Italy, but the others either do not deal with it (Hungary) or the final outcome is unclear. The post-Second World War cases mostly confirm succession to this type of localized debt (Pakistan, Bangladesh). The exception is Singapore, which was part of a federal State for only two years after decolonization and, therefore, de facto assumed the status of a decolonized State and a clean-slate position in relation to debts.

After the Cold War, succession to all localized debt is supported by the cases of Eritrea, Montenegro, and Kosovo, and subsidiarily by South Sudan. Succession after the breakup of the USSR took place in a specific way and did not distinguish between general State and localized debt; the continuator State assumed the whole debt in exchange for the entire property, with some exceptions. Often, localized debt has been succeeded to by the other successor State even in cases where the entire general State debt was succeeded to by the continuator State (e.g., Bangladesh, Eritrea, Kosovo).

Cases without continuity of legal personality confirm succession to localized debt through the application of the *final beneficiary rule* or the principle of special connection. This is supported by all cases of dissolution in all periods. With unifications and incorporations, the successor State succeeds to the whole localized debt as it does to the general State debt.

Practice shows the strong role of the *pacta sunt servanda* principle and the principle of special connection. Post–Second World War practice indicates that all successor States understood that debts are succeeded to, with only a few examples to the contrary. It also confirms that there is no denial of succession to debts in cases of unification and incorporation. The only exception is a limited part of the debt of the former GDR when it was absorbed by the FRG.

The principle of equity plays a stronger role in cases of dissolution, where both general State debt and localized debt are shared equitably. The succession to localized debt also reflects the role of the principle of equity in most cases featuring a continuation of legal personality.

Concerning more specific issues, State practice shows that there is no distinction based on the international law status of the creditor as debts to private law creditors (e.g., the London Club) are also succeeded to. The joint and several liability of the successor (and predecessor) States for the debt has never once been applied in practice. In a few cases, this possibility arose during the negotiations (e.g., the collapse of the Soviet Union), but it was not agreed to in the final deal. As concerns the SFRY, joint and several liability was decided in the debt restructuring agreement itself, so discussions on the topic did not stem from succession issues but from *pacta sunt servanda* principles. Despite the above, this type of liability was not accepted as a final solution in the case of the SFRY either. The issue of odious debts has not arisen in modern and recent practice in the context of succession.³¹²

AQ_7

³¹² The issue of succession to odious debts has arisen in recent doctrine in connection with regime change (e.g. in Iraq). Based on the rules on succession to odious debts, authors have variously argued that these debts should or should not be extinguished even in the event of a significant regime change (see, e.g., Anna Gelpern, 'What Iraq and Argentina might learn from each other' (2005) 6(1) *Chicago Journal of International Law* 391; Sarah Ludington and Mitu Gulati, 'A convenient untruth: Fact and fantasy in the doctrine of odious debts' (2008) 48(3) *Virginia Journal of International Law* 595. However, non-succession to these debts is only possible if the creditor was aware of the odiousness of the debt.

Succession to Treaties

5.1 Definition of a Treaty*

The rules defining the succession of States in respect of treaties are derived from customary international law and the 1978 Vienna Convention.¹ The 1978 Vienna Convention uses the term “treaty,” which was already defined in the 1969 Vienna Convention as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.”² The 1978 Vienna Convention only regulates succession to treaties concluded between States. While treaties governed by international law include those between a State and an international organization or between the latter, the convention is limited to treaties between States. Nevertheless, succession to treaties affecting international organizations is to some extent also covered by this convention since it addresses succession to “any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.”³ It also regulates succession to “any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”⁴

In practice, becoming a party to the constituent treaty of an international organization usually entails membership in that organization. However, since membership is generally decided by the organs of the international organization before the admission of a new member (unless the constituent treaty provides otherwise), automatic succession with respect to the constituent treaty does not automatically result in succession to membership as well. Both the 1978 Vienna Convention and post–Cold War practice confirm that there can

* The information on the current status of treaties, their parties, and types of conclusion (etc.) in this part of the book was acquired directly from the United Nations Treaty Series Online (<https://treaties.un.org/>) unless otherwise noted.

1 Malcolm Nathan Shaw, *International Law* (7th edn, Cambridge University Press 2014) 700.

2 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 (1978 Vienna Convention) art 2 and Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (1969 Vienna Convention) art 2.

3 1978 Vienna Convention (n 2) art 4(1) point a.

4 *ibid* art 4(1) point b.

be no automatic succession to membership in an international organization because “the law of the international organisation prevails over the law of succession of States with respect to treaties.”⁵ The ILA found that the provision of Article 4 of the 1978 Vienna Convention has the status of customary international law.⁶

5.1.1 *Modalities for the Entry into Force of a Treaty for a Successor State*

A successor State may become bound by treaties to which its predecessor State was a party in five basic ways: i) by concluding a treaty (or acceding to it),⁷ ii) by succession, iii) by automatic succession, iv) by continuing the predecessor State’s legal personality (replacement of the predecessor State), and v) by consenting to their entry into force before the date of succession. Automatic succession and continuation of the legal personality of the predecessor State are only subtypes of succession, but they are mentioned separately because of their particular importance.

- i) A State may conclude a treaty “by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”⁸ A contracting State is a State “which has consented to be bound by the treaty, whether or not the treaty has entered into force.”⁹ Accession (or other means of concluding a treaty) is not strictly speaking a matter of succession and is governed by general rules for the conclusion of treaties. Its distinction from succession is important: unless otherwise agreed, a treaty binds the contracting parties *ex nunc*, that is, from the moment of its conclusion onwards.¹⁰ A successor State may conclude or accede to a treaty after the date of succession (i.e., after its creation) in the same manner as any other State. In this case, the treaty will not apply to acts, facts, and conditions existing before the time of its conclusion. The State can also make reservations.
- ii) Meanwhile, *succession* presupposes that the successor State became a contracting party on the date of succession. Since the procedural steps

5 International Law Association, ‘Aspects of the law of state succession, Final Report—Part 1, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008’ (ILA 2008) 250, 320.

6 *ibid.*

7 The term “conclusion” is usually used for bilateral treaties and “accession” for multilateral ones.

8 1969 Vienna Convention (n 2) art 11.

9 *ibid* art 1(1) point f.

10 *ibid* art 28.

- relating to succession are usually completed only after the date of succession, such a treaty becomes binding *ex tunc*. Succession therefore usually constitutes an exception to the prohibition of retroactivity. Additionally, the successor State normally succeeds to the treaty in the same state as when it bound the predecessor State (e.g., with the reservations of the predecessor State, need for ratification, etc.). In this respect, succession to a treaty is similar to succession to sovereign debts in that the latter is also succeeded to in the same state (maturity, interest, etc.) as on the date of succession.
- iii) The third form, *automatic succession*, defines cases where succession to a treaty occurs without any action by the successor State and the other parties to the treaty. This succession has all the hallmarks of an “ordinary” succession (i.e., *ex tunc*, in force at the date of succession). For some types of treaties (e.g., boundary treaties), automatic succession is already fully established, whereas it is under discussion for others (e.g., treaties in the field of international humanitarian law). States are also bound from the outset by the other two sources of international law: customary international law and general principles of law. However, the validity of these two sources cannot be equated with (automatic) succession to the treaties of the predecessor State given that the successor State does not replace the predecessor State in relation to the rules derived from these sources but is bound by them in its own right—that is, independently of the succession. These two sources indeed bind it automatically from its very creation, but they do so originally and not derivatively.
- iv) A special case is the replacement of a predecessor State, where the successor State simply takes the place of the predecessor State. This can occur with separation and cession as well as with incorporation (e.g., FRG) and unification (e.g. Yemen)—hence, with all types of succession except dissolution. In cases of continuing legal personality, the same State is legally involved as the continuator State *is* the predecessor State from a legal point of view. The successor State is thus bound by the treaty not from the date of succession but from the date on which the treaty became binding on the predecessor State. Incorporation also entails a State that continues its legal personality, namely, the State into which the other State has been incorporated. The latter ceases to exist after the date of succession, and, as a rule, the treaties binding it until the date of succession cease to apply to it after this date. Certain types of treaties (e.g., treaties defining a border) are exceptions. Sometimes, in the case of unification, the successor States simply replace the predecessor

States in their relations with other States (e.g., Yemen). In this case, it would also be possible to speak of succession based on the next point.

- v) In accordance with the principle of *pacta sunt servanda*, States may agree to be bound by a treaty in any way that does not contradict *jus cogens*.¹¹ A successor State may also decide (with the agreement of the other contracting parties) to be bound by a treaty not only from the date of succession but also for the period before its creation. Such cases are not common, but they may include the explicit consent of the Republic of Yemen, which is considered a party to certain treaties from the date on which the first of its predecessor States became a party.

Because of the differences in the effects of succession and accession, the United Nations Treaty Collection (UNTC) indicates separately whether a treaty was acceded to or succeeded to, alongside the successor States.

5.1.1.1 Devolution Agreements and Unilateral Declarations

Before or after the date of succession, the predecessor and successor States may adopt an agreement for the devolution of treaty obligations or rights from a predecessor State to a successor State.¹² In this agreement, the two States should agree that the successor State will succeed to the status of contracting party to the predecessor State's treaties. This kind of agreement has come to be referred to as a *devolution agreement*. In this way, the rights and obligations held by the predecessor State are transferred to the successor State, which affects the position of the third State (a contracting party). This situation is not in line with the principle of *pacta tertiis nec nocent nec prosunt*,¹³ at least in the part on the successor State's succession to rights.¹⁴ Hence, the 1978 Vienna Convention provides that a successor State does not succeed to rights and obligations by reason only of a devolution agreement.¹⁵ The ILC notes that, even in the UN and State practice, the meaning of such

¹¹ *ibid* art 53.

¹² 1978 Vienna Convention (n 2) art 8.

¹³ 1969 Vienna Convention (n 2) art 34: "A treaty does not create either obligations or rights for a third State without its consent."

¹⁴ Article 36 of the 1969 Vienna Convention provides for a presumption that a third State consents to an agreement conferring rights on it. However, the ILC notes that for the "vast majority" of treaties, it is difficult to distinguish between rights and obligations, which is why the provision of Article 8 of the 1978 Vienna Convention was adopted, according to which devolutionary agreements do not per se affect succession. ILC, 'Draft articles on Succession of States in respect of Treaties with commentaries' (1974) UN Doc A/9610/Rev.1 (Commentary on the 1978 Vienna Convention) para 9, 184.

¹⁵ 1978 Vienna Convention (n 2) art 8.

an agreement is primarily an expression of the successor State's intention to become a contracting party.¹⁶ It is the practice of the UN Secretary-General, as the Registrar of Treaties under Article 102 of the UN Charter, to seek further confirmation from successor States regarding specific treaties on the basis of a devolution agreement.¹⁷

Successor States also occasionally make unilateral declarations of succession to certain multilateral treaties to the UN Secretary-General.¹⁸ The ILC notes that these declarations are not transmitted to the Secretary-General in his capacity as Registrar or as depositary of multilateral treaties. The ILC remarks that the purpose of unilateral declarations has usually been more general and that they have been adopted by successor States primarily for the purpose of transmitting them to other States.¹⁹ Unilateral declarations concerning bilateral agreements, which are transmitted directly to States parties, are also in practice transferred with a view to concluding a specific agreement confirming the succession to the negotiated treaties.²⁰ *Mutatis mutandis*, therefore, unilateral declarations by successor States have an effect similar to that of devolution agreements.²¹ However, if it complies with the conditions of formality and is transmitted to the depositary or, in the alternative, all State parties,²² a unilateral declaration can be considered a "notification of succession," which is defined by the 1978 Vienna Convention as follows: "notification of succession' means in relation to a multilateral treaty any notification, however phrased or named, made by a Successor State expressing its consent to be considered as bound by the treaty."²³

5.2 Types of Treaties and Other Sources of International Law

As is clear from the 1978 Vienna Convention, the consequences of succession differ for bilateral and multilateral treaties. Among the latter, the convention specifically distinguishes so-called *closed multilateral treaties*, which require

16 Commentary on the 1978 Vienna Convention (n 14) para 1–23, 182–187.

17 *ibid* para 12–13, 185.

18 1978 Vienna Convention (n 2) art 9.

19 Commentary on the 1978 Vienna Convention (n 14) para 13, 192.

20 *ibid* para 14–16, 192–193.

21 *ibid* para 16, 193.

22 1978 Vienna Convention (n 2) art 22.

23 *ibid* art 1 point g.

the consent of the other contracting parties.²⁴ It does not specifically highlight universal treaties. At this point, it is worth highlighting some specific types of treaties.

5.2.1 *International Treaties Establishing Boundaries and Other Territorial Regimes*

Different terms are used for treaties defining boundaries and other territorial regimes (e.g., easements), such as territorial, dispositive, real, or localized treaties.²⁵ With regard to boundary regimes, the 1978 Vienna Convention provides: “A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.”²⁶ This rule has the status of customary international law²⁷ and is widely supported in practice. It has even been adopted in the case of newly independent States, which are otherwise subject to the clean-slate rule.²⁸

It is important to note that the 1978 Vienna Convention provision primarily refers to a boundary established by a treaty and not to the treaty itself. The convention also provides that succession does not affect the obligations and rights established by the treaty *and* relating to the boundary regime. The provisions of a treaty that do not relate to the boundary regime are not governed by this rule. Consequently, the rule does not determine the effects of succession on the treaty itself but on its *consequences*, that is, on the boundary itself and on the rights and obligations arising therefrom. These are transferred to the successor State.²⁹ It is important to bear in mind that they are nevertheless consequences arising from the treaty, and the ILC considered that it would be artificial to separate the question of succession to the consequences of a treaty from succession to the treaty itself.³⁰ For this reason, this area is included in the 1978 Vienna Convention.

The importance of the stability of the boundary regime is also enshrined in the 1969 Vienna Convention, which limits one of the fundamental principles of law in this regard, the principle of *rebus sic stantibus*, by providing that “[a] fundamental change of circumstances may not be invoked as a ground for

24 See also: Borut Bohte and Mirjam Škrk, ‘Pomen Avstrijske državne pogodbe za Slovenijo in mednarodnopravni vidiki njenega nasledstva’ (1997) 52(11–12) *Pravnik* 601.

25 Commentary on the 1978 Vienna Convention (n 14) para 1, 196.

26 1978 Vienna Convention (n 2) art 11.

27 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 5) 292.

28 Commentary on the 1978 Vienna Convention (n 14) para 16, 28.

29 *ibid* para 18, 201.

30 *ibid* para 19, 201.

terminating or withdrawing from a treaty (...) if the treaty establishes a boundary.³¹ The lack of effect of succession on the boundary is also reflected in two fundamental principles of international law, the *principle of territorial integrity* and the *principle of the immutability of boundaries*,³² as the ICJ confirmed that the delimitation of a boundary is in essence the delimitation of a territory and vice versa.³³ Thus, regarding succession to boundaries, the principle of automatic succession is in place.

The *principle of uti possidetis juris* states that in the event of the separation of part of a territory, cession, or dissolution of a State, the internal (administrative) boundaries between former territorial units (e.g., States) become the State borders between them after the date of succession. It must be distinguished from the principle of *succession* to boundaries.³⁴ This principle has also acquired the status of customary international law,³⁵ but it concerns State boundaries that did not exist in this form before the date of succession as they were located within the predecessor State. Thus, it does not belong to the field of succession of States to treaties.

The 1978 Vienna Convention adopted a similar provision on boundary succession with regard to other territorial regimes:

A succession of States does not as such affect:

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;
- (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.³⁶

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The ICJ confirmed that Article 12 of the 1978 Vienna Convention also codifies customary international law.³⁷

31 1969 Vienna Convention (n 2) art 62(2).

32 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 292.

33 *Frontier Dispute* (Judgment) [1986] ICJ Rep para 17, 563.

34 Rein Müllerson, 'Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) 42(3) *International and Comparative Law Quarterly* 473, 485.

35 *ibid.*

36 1978 Vienna Convention (n 2) art 12(1) (emphasis added).

37 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep para 123, 72.

Territorial regimes determine the use of a specific territory for a specific purpose and are similar to easements. They must be interpreted narrowly; that is, they must relate to the territory and its use by another State.³⁸ For example, two countries may agree on the right to pass through a territory, use a port, and navigate a river.³⁹ In the case of *Free Zones of Upper Savoy and the District of Gex*, the PCIJ confirmed, in 1930, following the transfer of part of the territory of Sardinia to France, that France had to respect the provisions of the agreement concluded between Switzerland and Sardinia in 1815, which established a free trade zone in St. Gingolph. The Court stated, that “the agreement (...) confers on the creation of the zone of Saint-Gingolph the character of a treaty stipulation which France is bound to respect, as she has succeeded Sardinia in the sovereignty over that territory.”⁴⁰

Although “practice may support both options,” even in the case of succession related to territorial regimes, the ILC chose to include this question in the 1978 Vienna Convention as one of succession to the rights and obligations arising from a treaty rather than succession to the treaty as such,⁴¹ like in the case of succession to boundaries.

However, in *Gabčíkovo-Nagymaros*, the ICJ took a different view of succession to treaties defining boundary and territorial regimes. It asserted that these provisions of the 1978 Vienna Convention should be read in the context of the fact that many treaties establishing boundary and territorial regimes are no longer in force and, importantly, added: “Those that remained in force would nonetheless bind a Successor State.”⁴² As a result, it ruled that Slovakia had succeeded to the whole agreement and not exclusively to the provisions relating to territorial regimes.⁴³

In addition to the paragraph quoted above, the 1978 Vienna Convention contains a provision on succession related to territorial regimes established for the benefit of several States or with *erga omnes* effect.⁴⁴ These include the

38 Commentary on the 1978 Vienna Convention (n 14) para 35, 206.

39 For a plethora of examples from practice, see: Commentary on the 1978 Vienna Convention (n 14) para 21–29, 202–204; Daniel Patrick O’Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 2, 234–262.

40 *Free Zones of Upper Savoy and the District of Gex (second phase)* (Order) [1930] PCIJ Rep Series A No 24, 17.

41 Commentary on the 1978 Vienna Convention (n 14) para 30, 204.

42 *Gabčíkovo-Nagymaros Project* (n 37) 72.

43 *ibid* point 2A, 83.

44 1978 Vienna Convention (n 2) art 12(2). The provision on this type of territorial regimes differs somewhat from the “general” provision on territorial regimes: “A succession of States does not as such affect: (a) obligations relating to the use of any territory, or to

right of navigation in international waters and international rivers and the right of innocent passage through straits and territorial waters.⁴⁵ These territorial regimes often indeed derive from a treaty, and many also have the status of customary international law. Therefore, the successor State cannot invoke the *pacta tertiis* rule in respect of these regimes either.⁴⁶

However, the provisions regarding territorial regimes do not apply to treaties establishing foreign military bases on the territory subject to succession.⁴⁷ After the date of succession, the successor State and the contracting State may agree to maintain the treaty in force or conclude a new one. However, it is not subject to the automatic succession rule as is the case for other territorial treaties. The successor State also has full sovereignty over its natural resources and wealth,⁴⁸ which also means that any territorial regimes related to natural resources and wealth are not automatically succeeded.⁴⁹

5.2.2 Customary International Law

Treaties may include provisions that have the status of customary international law. Customary international law binds every State, regardless of the date of its creation, termination, or other change in status. Every State is bound by its provisions at all times.

The importance of customary international law has been specifically highlighted by both the 1969 Vienna Convention and the 1978 Vienna Convention. The latter provides that a State has a duty “to fulfil any obligation embodied in the treaty to which it is subject under international law independently of the treaty,” that is, even if it is not bound by such a treaty by virtue of succession.⁵⁰ As mentioned in the previous section, succession thus does not affect

restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory; (b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.”

45 For a detailed analysis of the right of free passage through international straits, see William L Schachte, Jr and J Peter A Bernhardt, ‘International Straits and Navigational Freedoms’ (1993) 33(3) *Virginia Journal of International Law* 527, 538–543.

46 Commentary on the 1978 Vienna Convention (n 14) para 30, 204; Malgosia Fitzmaurice, ‘Third parties and the law of treaties’ (2002) 6 *Max Planck Yearbook of United Nations Law* 37, 82.

47 1978 Vienna Convention (n 2) art 12(3).

48 *ibid* art 13.

49 George K Walker, ‘Integration and disintegration in Europe: Reordering the treaty map of the continent’ (1993) 6 *The Transnational Lawyer* 1, 33.

50 1978 Vienna Convention (n 2) art 5.

the obligation of a successor State to comply with customary international law. However, it is bound by it entirely independently of succession-related factors, and no specific action by the successor State is required in this regard. Jenks stated in 1952 that “[i]t is generally admitted that a new State is bound by existing rules of customary international law.”⁵¹ Since the rules of customary international law, *ius cogens*, rules applicable *erga omnes*, and general principles of law bind a State from the very beginning of its existence, some authors have argued that their validity could be considered to constitute automatic succession.⁵² However, such a statement is not reasonable given that their validity vis-à-vis the successor State is original and binds it in the same way as all other States. These provisions do not bind the successor State because they had previously bound the predecessor State and the successor State would have succeeded to them, but they are its “own” rights and obligations.

5.2.3 *International Treaties on Humanitarian and Human Rights Law*

A doctrinal trend has emerged according to which State succession does not affect treaties in the field of humanitarian and human rights law or these treaties are subject to automatic succession.⁵³ In a dissenting opinion, Judge Shahabuddeen of the ICJ in *Crime of Genocide (Bosnia)* put forward the idea that the rights deriving from these treaties are the rights of the people and not of the contracting States themselves. If States were to accede to these treaties, there would be a period within which these rights would not be protected. He added:

It is difficult to appreciate how the inevitability of such a break in protection could be consistent with a Convention the object of which was “on the one hand ... to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.”⁵⁴

51 Wilfred C Jenks, ‘State succession in respect of law-making treaties’ (1952) 29 *British Yearbook of International Law* 105, 107.

52 Stanislav V Chernichenko, *Контуры международного права: Общие вопросы* [*Outlines of international law: General issues*] (Издательство Научная книга 2014), 392–393.

53 See e.g. Müllerson, ‘Continuity and Succession of States’ (n 34) 490–492; Menno T Kamminga, ‘State Succession in Respect of Human Rights Treaties’ (1996) 7(4) *European Journal of International Law* 469, 482; Isabelle Poupart, ‘Succession aux traités et droits de l’homme: vers la reconnaissance d’une protection ininterrompue des individus’ in Pierre Michel Eisemann and Martti Koskeniemi (eds), *La succession d’États: la codification à l’épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000).

54 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections: Judgment)

The reasons for automatic succession to these types of treaties were also given by Judge Weeramantry in a dissenting opinion in the same case. Concerning the application of the principle of *pacta tertiis nec nocent nec prosunt* to this context, he notably stated that the holders of the rights under these treaties are individuals, and “[t]he principle that *res inter alios acta* are not binding (...) does not therefore apply to such conventions.”⁵⁵ Hence, it is a matter of application of the principle of acquired rights.⁵⁶

Even the UN Human Rights Committee, when deciding on the options for withdrawing from the International Covenant on Civil and Political Rights, declared that the fundamental rights deriving from the covenant “belong to the people living in the territory of the State party.” It further asserted that “once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession.”⁵⁷ This was the position adopted by the Committee with regard to the successor States of the former USSR and SFYR.⁵⁸

This statement was also quoted by the ECtHR in *Bijelić v Montenegro and Serbia* when it ruled that Montenegro was bound by the European Convention on Human Rights (ECHR)⁵⁹ not from the date of succession but from that of the accession of its predecessor State.⁶⁰ The same decision was taken by the ECtHR in *Konečný v the Czech Republic*. In its judgment, the Court noted: “The Court observes that the period to be taken into consideration only began on 18 March 1992, when the recognition by the Czech and Slovak Federal Republic, to which the Czech Republic is one of the Successor States, of the right of individual petition took effect.”⁶¹ The special status of these treaties is also

[1996] ICJ Rep 595 (*Crime of Genocide [Bosnia v Serbia and Montenegro]*) [Preliminary Objections] 635, Separate Opinion of Judge Shahabuddeen.

55 *ibid* 651, Separate Opinion of Judge Weeramantry.

56 Anthony Cullen and Steven Wheatley, ‘The human rights of individuals in de facto regimes under the European Convention on Human Rights’ (2013) 13(4) *Human Rights Law Review* 691, 721.

57 UNGA, ‘Annex VII (General Comment under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights) to the Report of the Human Rights Committee’ (1998) UN Doc A/53/40.

58 Kamminga (n 53) 474–475.

59 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 5 CETS (ECHR).

60 *Bijelić v Montenegro and Serbia* App No 11890/05 ECtHR, 28 April 2009 para 67–69, 11–12.

61 *Konečný v the Czech Republic* App No 47269/99, 64656/01 and 65002/01 ECtHR, 26 October 2004 para 62.

provided for in the 1969 Vienna Convention, which stipulates that contracting States cannot claim (temporary) termination of the validity of the provisions of these treaties on the grounds of a breach by the other contracting State.⁶²

The doctrine also links the rights of individuals deriving from such treaties to the *principle of acquired rights*, which was highlighted in the case of *German Settlers in Poland* before the PCIJ.⁶³ If the principle of acquired rights can be applied to civil law legal rights, it is a fortiori reasonable that it can also be applied to fundamental rights and freedoms.⁶⁴

According to some authors, the practice of States demonstrates that the principle of automatic succession applies to this type of treaty⁶⁵ or, with additional practice, is likely to apply in the future.⁶⁶ After reviewing State practice, the ILA concluded that, automatic succession is not yet possible for these treaties due to inhomogeneous practice.⁶⁷

5.3 Principles and Rules for Succession to Treaties

5.3.1 *Pacta Sunt Servanda and the Principle of Good Faith*

As already mentioned in connection with succession to State debts, according to the principles of *pacta sunt servanda* and good faith, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁶⁸ The 1969 Vienna Convention has codified these two principles, and they are also applicable as customary international law.

Succeeding to treaties generally binds the successor State in the same way as the treaties bound the predecessor State on the date of succession (e.g., including reservations) given that the former replaces the latter in the responsibility for the international relations of the territory.

5.3.2 *Consensus of States*

As practice shows, succession to a treaty requires the consent of the successor State and the other contracting parties. The exception to this is boundary and

62 1969 Vienna Convention (n 2) art 60(5).

63 *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) [1923] PCIJ Rep Series B No 6.

64 Kamminga (n 53) 472.

65 See, e.g., Kamminga (n 53) 482; Cullen and Wheatley (n 56) 721.

66 Oscar Schachter, ‘State succession: The once and future law’ (1992–1993) 33 *Virginia Journal of International Law* 253, 259; Poupart (n 53) 489.

67 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 5) 301.

68 1969 Vienna Convention (n 2) art 26.

territorial regimes. It is also understandable that the consent of the continuator State is not required because the succession does not affect its sovereignty and, thus, its identity. Therefore, it generally remains a contracting party despite the succession.

5.3.3 *Prohibition of Retroactivity*

The prohibition of retroactivity is not a principle of succession but of the law of treaties. According to it, unless the contracting parties agree otherwise, a treaty binds them *ex nunc*, that is, from the date on which the treaty enters into force for them.⁶⁹ However, treaty succession often means that a treaty binds a State *ex tunc* as the succession agreement is usually concluded with a delay (i.e. after the date of succession). The fact that the contracting parties agree on this is thus not a violation of the prohibition of retroactivity but rather an exception to this rule.

5.3.4 *Rebus Sic Stantibus Principle*

This principle is defined in detail in 4.3. *Principles and rules for succession to State debt*. It appears throughout the 1978 Vienna Convention in the form of the formula “[if this] would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.”⁷⁰

5.3.5 *Moving Frontier Principle*

Upon cession or incorporation, the treaties of the predecessor State cease to apply for the part of the territory that has been ceded, and the treaties of the successor State (i.e., the State to which the part of the territory has been ceded) come into force. This rule does not apply if this is incompatible with the object and purpose of the treaty or radically changes the conditions for its operation.⁷¹ As a general rule, the law of the State to which part of the territory (cession) or the whole State (incorporation) is transferred simply extends to the acquired territory.

5.3.6 *Territorial Limitations of a Treaty*

In accordance with the principle of *pacta sunt servanda*, the contracting parties may agree that a treaty will apply only to a part of the territory of a

69 *ibid* art 28.

70 1978 Vienna Convention (n 2) art 17, 18, 19, 27, 31, 32, 33, 34, 35, 36, and 37. See also 2.4.3. *Principles and rules for succession to State debt*.

71 *ibid* art 15.

contracting State. The situation is different when a territorial unit of a State has the autonomy to conclude treaties applicable to its territory.⁷²

The latter situation also arises in cases of unifications and incorporations, where the successor State is made up of parts that were independent States before the date of succession. Even after the date of succession, the treaties that bound these predecessor States might bind only their territory and not the whole territory of the successor State. The same might be true in the case of cession, where a treaty bound only the part of the territory that was ceded to the successor State. In the case of cessions and incorporations, under the *moving frontier principle*, the treaties concluded by acquired territory usually cease to have effect after the date of succession, but this is not always the case.

In all these cases, the territorial treaties of incorporated territories can cease to apply or continue to apply to these parts of the territory. The outcome depends on the arrangements made between the successor State and the contracting parties. The successor State may also simply refuse to allow the treaties to apply locally.

5.4 State Practice with Continuing Legal Personality

It makes sense that succession does not, as a rule, affect the treaty status of the continuator State given that it continues the legal personality of the predecessor State. An exception to this occurs if the contracting parties agree otherwise (*pacta sunt servanda*) or if the application of the treaty to the successor State would be incompatible with the object and purpose of the treaty or substantially alter the conditions for its execution (*rebus sic stantibus*).⁷³

5.4.1 Separation of Part or Parts of a Territory

The 1978 Vienna Convention regulated succession in the event of the separation of part of a territory in an unusual way in two articles. The first refers to cases where part or parts of a territory are separated to form a new State, irrespective of “whether or not the predecessor State continues to exist.”⁷⁴ It

72 See, e.g., Constitution of the Swiss Confederation (18 April 1999) Amtliche Sammlung des Bundesrechts AS 1999 2556 art 56(1), 2556–2610: “A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers.” This right is, of course, very limited (see also art 56(3) and 172), but it is possible for a canton to conclude agreements, at least to a limited extent.

73 1978 Vienna Convention (n 2) art 34(2).

74 *ibid* art 34.

therefore deals with the separation of parts of a territory and dissolution. The second article defines the situation of a State that continues its legal personality after the separation of part of its territory.⁷⁵ Thus, it concerns only the continuator State but is identical in substance to the first article.

The two articles provide that treaties in force on the date of succession in respect of a territory that subsequently becomes a successor State (either a continuator or another successor State) stay in force for this successor State.⁷⁶ If a treaty relating to the whole territory of the predecessor State was in force, it remains so for all successor States; if it was in force only for a limited territory, it stays in effect for this territory.⁷⁷ The reasonable interpretation is that a treaty that applied only to a *part of the part* that subsequently became a successor State continues to be applicable only to that limited part and not to the whole of the successor State. This does not apply if the States (i.e., the successor State and the other contracting parties) agree otherwise, or if this would be inconsistent with the purpose of the treaty or radically alter the terms of its performance.⁷⁸

5.4.1.1 State Practice before the Two World Wars

The Congress of Berlin recognized the independence of Romania, Serbia, and Montenegro, thus *de jure* separating them from the Ottoman Empire. The Treaty of Berlin (July 13, 1878) stipulates regarding Serbia that all trade and navigation agreements will remain in force until otherwise decided.⁷⁹ The same holds for Bulgaria, which only gained greater autonomy, not independence. Later amendments to treaties “succeeded” to by Bulgaria can only be made with the agreement of the Allies.⁸⁰ The validity of (succession to) treaties concerning Montenegro and Romania is not mentioned in the Treaty.

The Treaty of Berlin is also characterized by the provision that the successor States assume all the obligations of their predecessor States related to the construction of the railway.⁸¹ The Treaty of Berlin, which largely replaced/

75 *ibid* art 35.

76 *ibid* art 34(1) and 35(1).

77 *ibid*.

78 *ibid* art 34(2) and 35(2).

79 Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East (adopted 13 July 1878) (1908) 2 AJIL 401 (Treaty of Berlin) art XXXVII.

80 *ibid* art VIII.

81 *ibid* art LI (Romania), LVIII (Serbia), X (Bulgaria), and XXIX (whereby it was agreed that Montenegro and Austria-Hungary would conclude an agreement on the right to build a railway).

amended the provisions of the Treaties of Paris and London, left in force their provisions governing navigation on the Danube, the Black Sea, and the Bosphorus and Dardanelles straits. These are rights and obligations concerning territorial regimes, in respect of which the 1978 Vienna Convention provides for automatic succession.

The delimitation of the boundary does not follow any previously adopted treaty but is instead determined directly by the Treaty of Berlin.⁸² The Treaty also established some *easements*, such as Montenegro's right to navigate the Bojana River and its prohibition (i.e., easement of other parties) from erecting any fortifications along the river.⁸³

5.4.1.2 Peace Treaties after the First World War

The peace treaties concluded after the First World War established the borders of Germany, Austria-Hungary, the Ottoman Empire, and Bulgaria, as well as the territories that were separated from or ceded by these States. These treaties sometimes followed the established boundaries, sometimes not.

The Treaty of Versailles respected Germany's boundaries as they existed before the war,⁸⁴ but these were partly changed as a result of the war.⁸⁵ The boundaries with Poland,⁸⁶ Denmark,⁸⁷ and the newly created Czechoslovakia⁸⁸ were completely redefined. Under the Treaty of Saint-Germain-en-Laye, the borders of Austria and Switzerland remained unchanged,⁸⁹ as did Germany's,⁹⁰ whereas amendments were made to the boundaries with Italy,⁹¹ Hungary⁹² and, of course, the novel Czechoslovakia⁹³ and the State of Serbs, Croats, and Slovenes (the latter also taking into account the old boundary between Austria

82 See, e.g., *ibid* art II (Bulgaria), xxviii (Montenegro), and xxxvi (Serbia).

83 *ibid* art xxix para 4.

84 Treaty of Peace between the Allied and Associated Powers and Germany (with amendments) and other treaty engagement (adopted 28 June 1919) (1925) His Majesty's Stationery Office 1 (Treaty of Versailles) art 27.

85 *ibid* art 27 point 1 (Belgium), 2 (Luxembourg), 3 (France), 5 (Austria), and 6 (Czechoslovakia).

86 *ibid* art 27 point 3.

87 *ibid* at 27 point 8.

88 *ibid* art 27 point 6.

89 Treaty of Peace between the Allied and Associated Powers and Austria (with amendments) and other treaty engagements (adopted 10 September 1919) (1921) His Majesty's Stationery Office 1 (Treaty of Saint-Germain-en-Laye) art 27 point 1.

90 *ibid* art 27 point 7.

91 *ibid* art 27 point 2.

92 *ibid* art 27 point 5.

93 *ibid* art 27 point 6.

and Hungary).⁹⁴ All borders that were not amended by the peace treaty thus remained unchanged. *Mutatis mutandis*, the same provisions are contained in the Treaty of Trianon.⁹⁵ The Treaty of Lausanne redefined Turkey's boundaries with Bulgaria and Greece.⁹⁶ As regards the eastern frontiers, it stipulated that the border with Syria should remain as fixed by the Franco-Turkish Agreement of 1921⁹⁷ and that an agreement with the UK on the boundary with Iraq would be reached within nine months.⁹⁸ Bulgaria's old boundaries with the State of Serbs, Croats, and Slovenes, Greece, and Romania were partly taken into account by the Treaty of Neuilly-sur-Seine⁹⁹ but were also adjusted to the results of the war.

The Treaties of Saint-Germain-en-Laye, Trianon, and Neuilly-sur-Seine set up boundary commissions to determine the borderlines on the ground. These commissions had no power to modify the international borders that already existed in August 1914 but only to re-establish the boundary markers.¹⁰⁰ The Treaties of Versailles and Lausanne did not contain such provisions.

The Treaty of Versailles specifically recognized the continued validity of navigation on the Rhine, which had been established jointly with the Rhine Commission at the Congress of Vienna and later in the Mannheim Agreement.¹⁰¹ The Treaties of Saint-Germain-en-Laye and Versailles also overwhelmingly respected the free navigation of the river established by the Congress of Berlin.¹⁰²

The peace treaties list multilateral treaties that remain in force between the Allied *and associated powers* and the continuing power. These multilateral treaties would be in force from the entry into force of the peace treaty (i.e., *ex*

94 *ibid* art 27 point 4.

95 Treaty of Peace Between the Allied and Associated Powers and Hungary and Protocol and Declaration (adopted 4 June 1920) 15 AJIL 1 (Treaty of Trianon) art 27–29.

96 Treaty of peace with Turkey, and other instruments (adopted 24 July 1923) together with Agreements between Greece and Turkey (adopted 30 January 1923) and subsidiary documents forming part of the Turkish Peace Settlement (1923) His Majesty's Stationery Office 1 (Treaty of Lausanne) art 2.

97 *ibid* art 3 point 1.

98 *ibid* art 3 point 2.

99 Treaty of Peace between the Allied Powers and Bulgaria and Protocol (adopted 27 November 1919) 14 AJIL 185 (Treaty of Neuilly-sur-Seine) art 27.

100 Treaty of Saint-Germain-en-Laye (n 89) art 29.; Treaty of Trianon (n 95) art 29.; Treaty of Neuilly-sur-Seine (n 99) art 29.

101 Treaty of Versailles (n 84) art 354–362.; Commentary on the 1978 Vienna Convention (n 14) para 33, 205.

102 Commentary on the 1978 Vienna Convention (n 14) para 32, 205; O'Connell, *State Succession in Municipal Law and International Law vol 2* (n 39) 270.

nunc).¹⁰³ The peace treaties (except the Treaty of Lausanne) provided that the Allies may, within a period of six months, notify the successor State of bilateral agreements that would be “revived” from the date of succession. The date of notification was considered to be that of the revival. All other bilateral agreements shall cease to have effect.¹⁰⁴ In this respect, agreements that are not in conformity with the peace treaties could not be revalidated.¹⁰⁵

These provisions did not apply to successor States created as a result of the separation of part or parts of a territory. The principal Allied and associated powers concluded separate agreements with Poland¹⁰⁶ and Czechoslovakia,¹⁰⁷ whereby the new States undertook to accede to the listed multilateral agreements within a specified period of twelve months; they were given the option of notifying their accession to the additional agreements within twelve months.¹⁰⁸ For the latter (i.e., the majority), the clean-slate principle was therefore applied.¹⁰⁹

A special arrangement was adopted for the territories of Austria-Hungary on which Slovenes, Croats, and Serbs lived and which separated from Austria-Hungary at the end of 1918. An additional agreement was signed in Saint-Germain-en-Laye between the principal Allies on the one hand and the State of Serbs, Croats, and Slovenes on the other. After the union, all agreements in force between Kingdom of Serbia and the Allies on August 1, 1914, or concluded after that date (i.e., until Saint-Germain-en-Laye) became *ipso facto* binding on the entire territory of the Kingdom.¹¹⁰

103 Treaty of Versailles (n 84) art 282 et seq Treaty of Saint-Germain-en-Laye (n 89) art 234 et seq; Treaty of Trianon (n 95) art 217 et seq.; Treaty of Lausanne (n 96) art 99 et seq; Treaty of Neuilly-sur-Seine (n 99) art 162 et seq.

104 Treaty of Versailles (n 84) art 289; Treaty of Saint-Germain-en-Laye (n 89) art 241; Treaty of Neuilly-sur-Seine (n 99) art 168.

105 *ibid.*

106 Treaty between the Principal Allied and Associated Powers and Poland (adopted 28 June 1919) 6 Int'l Conciliation 924.

107 Treaty between the Principal Allied and Associated Powers and Czecho-Slovakia (adopted 10 September 1919) 14 AJIL 311.

108 Treaty between the Principal Allied and Associated Powers and Poland (n 106) art 19(1 and 3); Treaty between the Principal Allied and Associated Powers and Czecho-Slovakia (n 107) art 20(1 and 3).

109 Commentary on the 1978 Vienna Convention (n 14) 14, 263.

110 Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State (adopted 10 September 1919) 14 AJIL 333 art 12. For detailed description of creation of Kingdom of Serbs, Croats and Slovenes see footnote 169.

The peace treaties respected the existing arrangements regarding boundaries but changed them to some extent when the results of the war made it necessary.

The post–First World War peace treaties thus regulated succession to (multilateral and bilateral) treaties, mainly for the continuator States but additionally for some new States (Poland and Czechoslovakia). The basic principle was the clean-slate rule, according to which treaties not listed exhaustively ceased to apply. However, treaties listed taxatively and those for which the successor States had notified their succession were binding *ex nunc*, that is, from the date of the conclusion of the peace treaty or the date of notification. The *moving frontier principle* was adopted for the Kingdom of Serbs, Croats, and Slovenes.

The Treaty of Dorpat between Finland and Russia redefined the boundaries between the two States.¹¹¹ There are no specific provisions on succession to treaties in the peace treaty, which reflects the clean-slate rule. The clean-slate rule in Finland's relation to Russia's succession to treaties is also apparent from the views of some countries: the UK refused the status of contracting party to any successor State created based on the separation of part of a territory, except for "local" obligations such as easements (e.g., navigation of rivers); it also considered that Finland had not succeeded to any international treaty to which the UK was a party.¹¹² However, through an exchange of diplomatic notes on November 11, 1919, Sweden and Finland agreed on succession to certain bilateral treaties concluded between Sweden and Russia. This notably concerned the 1900 Agreement on the non-taxation of imports of consular supplies and the 1915 Agreement on the recognition of certain enterprises.¹¹³

The ILC stated that the clean-slate rule was considered to be a traditional view of the creation of new States, which has also been taken into account in procedures for the dissolution of States or the separation of parts of a territory, such as in the cases of Belgium, Panama, Ireland, Poland, Czechoslovakia, and Finland.¹¹⁴

With the Treaty of Riga (Poland), the parties redefined the boundaries between Poland, Russia, and Ukraine—specifically, only those that did not exist before the date of succession as they were within the predecessor State. The Treaty also recognized the independence of Ukraine. It stipulated that the

111 Treaty of Peace between Finland and Russia (adopted 14 October 1920) 3(1) LNTS 5 (Treaty of Dorpat) art 2.

112 O'Connell, *State Succession in Municipal Law and International Law* vol 2 (n 39) 99.

113 ILC, 'Survey of International Law and other documents' (1971) 2(2) UN Doc A/CN.4/SER.A/1971/Add.1 (Part 2), para 106, 171.

114 Commentary on the 1978 Vienna Convention (n 14) para 3, 211.

Repatriation Agreement signed on February 24, 1921, between these parties would remain in force.¹¹⁵ However, it provided that Polish citizens would enjoy rights in accordance with the *principle of equality of nations*.¹¹⁶

The Treaties of Tartu,¹¹⁷ Riga (Latvia),¹¹⁸ and Moscow¹¹⁹ defined the boundaries between Russia and the individual Baltic States. Succession to treaties is not regulated by the Treaties of Tartu and Moscow. Only the Treaty of Riga (Latvia) contains a provision of this kind, which stipulates that the Agreement on the Return of Refugees signed by the two States on June 12, 1920, will remain in force.¹²⁰

The Second World War was not followed by the partitioning of parts of territories but by cessions. Already during the war, Iceland separated from Denmark. The former was part of Denmark until 1918 when it gained limited autonomy before achieving full independence in 1944. After the separation, all the agreements that had been in force for the predecessor State (e.g., the 1742 trade agreement between Denmark and France) remained in force for Iceland.¹²¹

5.4.1.3 State Practice after the Second World War

Since the Second World War, there have been at least three cases of the separation of part of a territory that did not (directly) result from decolonization: Pakistan (1947), Singapore (1963), and Bangladesh (1971).

5.4.1.3.1 *Pakistan*

India and Pakistan concluded a devolution agreement¹²² that provided for automatic succession, but this did not happen.¹²³ Either Pakistan or other

115 Treaty of Peace between the Soviet republics of Russia and Ukraine on the one hand and Poland on the other (adopted 18 March 1921) 6 LNTS 51 (Treaty of Riga [Poland]) art 9(1).

116 *ibid* art 7.

117 Treaty of Tartu between Estonia and Russia (adopted 2 February 1920) 11 LNTS 30 (Treaty of Tartu) art 3.

118 Treaty of Peace between Latvia and Russia (adopted 11 August 1920) 2(3) LNTS 196 (Treaty of Riga [Latvia]) art III.

119 Treaty of Peace between Lithuania and Russia (adopted 12 July 1920) 3(2) LNTS 105 (Treaty of Moscow) art II.

120 Treaty of Riga (Latvia) (n 118) art IX.

121 O'Connell, *State Succession in Municipal Law and International Law* vol 2 (n 39) 111–112.

122 Indian Independence (International Arrangements) Order 1947 (promulgated 4 August 1947) UN Doc. A/C.6/161.

123 Patrick Dumberry and Daniel Turp, 'State succession with respect to multilateral treaties in the context of secession: From the principle of tabula rasa to the emergence of a presumption of continuity of treaties' (2013) 13 *Baltic Yearbook of International Law* 27, 35–37. Succession to treaties and Pakistan's membership in international organizations

contracting States have decided to apply the clean-slate rule to certain treaties. Nevertheless, Pakistan has subsequently *acceded* or notified *succession* to some multilateral and bilateral treaties of its own initiative.¹²⁴ Pakistan's succession to treaties is closer in substance to the experience of decolonized States ("newly independent States") than to the separation of part of a territory.¹²⁵

5.4.1.3.1.1 Multilateral Treaties

Pakistan notified its succession to certain multilateral treaties of the League of Nations to which the UK was a party. Today, by virtue of succession, it is a party to fourteen multilateral agreements whose depositaries are the UN Secretary-General, the Director-General of the International Labour Organization (ILO), and the government of France. These include, for example, the Convention on Certain Questions relating to the Conflict of Nationality Laws¹²⁶ signed at The Hague on April 12, 1930, and the International Convention relating to the Simplification of Customs Formalities¹²⁷ adopted on November 3, 1923. On July 29, 1953 (i.e., six years after the date of succession), Pakistan notified the UN Secretary-General that "by reason of article 4 of the Schedule to the Indian Independence (International Arrangements) Order, 1947, the rights and obligations under the above-mentioned Convention and Protocol devolve upon Pakistan, and that it therefore considers itself a Party to these agreements."¹²⁸ It was only on July 12, 1974, that Pakistan notified the UN Secretary-General that it would succeed to another multilateral treaty of the League of Nations, the General Act of Arbitration (Pacific Settlement of International Disputes)¹²⁹

are covered in several articles, e.g.: Michael P Scharf, 'Musical chairs: The dissolution of states and membership in the United Nations' (1995) 28(1) *Cornell International Law Journal* 29, 34–41; Daniel Patrick O'Connell, 'Independence and succession to treaties' (1962) 38 *British Yearbook of International Law* 84, 136; Mervyn J Jones, 'State succession in the matter of treaties' (1947) 24 *British Yearbook of International Law* 360, 370–372; Hans Aufricht, 'State succession under the law and practice of the International Monetary Fund' (1962) 11(1) *International and Comparative Law Quarterly* 154, 165–170; David O Lloyd, 'Succession, secession, and state membership in the United Nations' (1994) 26 *New York Journal of International Law & Politics* 761, 774–775.

124 Paul R Williams, 'The Treaty obligation of the Successor States of the former Soviet Union, Yugoslavia and Czechoslovakia: Do they continue in force?' (1997) 23(1) *Denver Journal of International Law and Policy* 1, 12–13.

125 Commentary on the 1978 Vienna Convention (n 14) para 17, 264.

126 Convention on Certain Questions relating to the Conflict of Nationality Laws 179 LNTS 89.

127 International Convention relating to the Simplification of Customs Formalities 30 LNTS 371.

128 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nation' (1953) 171 UNTS 426.

129 General Act of Arbitration (Pacific Settlement of International Dispute) 93 LNTS 343.

of August 16, 1929, but without the reservations made by the UK. The withdrawal of the reservation was triggered by India's objection to the manner in which Pakistan could become a party in the first place.¹³⁰ With respect to all the above-mentioned treaties, Pakistan is considered a party by virtue of succession.

Pakistan notified the Director-General of the ILO (the Depository) that it was bound by seven ILO Conventions to which India was a party before 15 August 1947.¹³¹ The ILO website shows that Pakistan is considered a party to some conventions even before the date of succession, such as the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week.¹³² It also succeeded some International Civil Aviation Organisation (ICAO) treaties, among which the International Air Services Transit Agreement, to which India has been a party since May 2, 1945. On March 24, 1948, Pakistan notified the Depository (the US Government) that it wished to succeed to this treaty. Pakistan is considered a party to it from the date of its separation from India, namely, August 15, 1947.¹³³ It has acceded to some multilateral treaties, such as the Geneva Convention for the Relief of the Wounded and Sick in Armed Forces on the Battlefield,¹³⁴ to which it is considered to have been a party since February 2, 1948.

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5.4.1.3.1.2 Bilateral Treaties

On June 1, 1948, Pakistan sent a diplomatic note to the US regarding the Agreement relating to air services concluded on November 14, 1946, between British India and the US. In the note, Pakistan indicated that it considered itself bound by the provisions of the agreement and requested the US to confirm its validity, which it did.¹³⁵ India had also concluded the same agreement with France and the Netherlands before the separation of Pakistan. Pakistan

¹³⁰ See India's comment under footnote 11 to the information on the status of the General Act of Arbitration (n 129) (para 29).

¹³¹ 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations (1949) 38 UNTS 104.

¹³² Convention limiting the hours of work in industrial undertakings to eight in the day and forty-eight in the week (adopted 28 November 1919) as modified by the Final Articles Revision Convention (1946) 38 UNTS 17. See information on Pakistan on the ILO website: ILO, 'Ratifications of ILO Conventions by country' <<https://www.ilo.org/dyn/normlex/en/>> accessed 26 February 2026.

¹³³ ILC, 'Materials on Succession of States, United Nations Legislative Series' (1967) UN Doc ST/LEG/SER.B/14, 225.

¹³⁴ Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field (adopted 27 July 1929) 118 LNTS 303.

¹³⁵ Commentary on the 1978 Vienna Convention (n 14) para 4, 242.

subsequently concluded a new agreement with both; an exchange of notes between the Netherlands and Pakistan in 1952 stated that the agreement between the Netherlands and India, which continued to apply to Pakistan, would cease to apply with the new agreement. The agreement with France (1950) does not mention that with India.¹³⁶

An interesting example is the extradition treaty concluded between Argentina and the United Kingdom on May 22, 1889. When Pakistan wanted to succeed to this treaty in 1952, Argentina took the position that, as a new country, it could not do so. A year later, Pakistan asked Argentina to reconsider its position, which was accepted by the latter as “a desire to keep the treaty in force”; however, the treaty between the countries remained in force not on the basis of succession but as a new treaty.¹³⁷

On August 28, 1956, Pakistan also concluded a new agreement with Thailand as the latter did not recognize Pakistan’s succession to the 1937 Thailand-United Kingdom Treaty of Friendship, Commerce and Navigation.¹³⁸

The UK and Afghanistan concluded the Treaty of Kabul in 1921, which, among other things, defined the border. This boundary later became the border between Afghanistan and Pakistan along the so-called Durand Line. Afghanistan questioned the validity of this agreement based on the principle of *rebus sic stantibus* and the clean-slate rule.¹³⁹ Afghanistan also argued, *inter alia*, that a bilateral treaty cannot bind the other party without its consent.¹⁴⁰ The UK wrote at the time that the validity of certain parts of the agreement, which are political in nature, could be reconsidered, but that the provisions of the agreement that had already been implemented, such as those establishing an international border, could not be changed.¹⁴¹ The dispute between Pakistan and Afghanistan has not yet been resolved.

5.4.1.3.2 *Singapore*

Malaysia and Singapore also had a *devolution* agreement as part of the Singapore separation agreement.¹⁴² This provided that any treaty concerning

136 ILC, ‘Succession of States in respect of bilateral treaties: Second and third studies prepared by the Secretariat (Air transport agreements and Trade agreements)’ (1971) UN Doc A/CN.4/243, 121–122.

137 ILC, ‘Materials on Succession of States’ (n 133) 7.

138 ILC, ‘Succession of States in respect of bilateral treaties’ (n 136) 155–156.

139 Commentary on the 1978 Vienna Convention (n 14) para 15, 200.

140 ILC, ‘Materials on Succession of States’ (n 133) 2.

141 Commentary on the 1978 Vienna Convention (n 14) para 15, 200.

142 Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State (adopted 7 August 1965) 563 UNTS 89 annex B art 13.

Singapore concluded by the government of Singapore or the government of Malaysia with another country before the separation would continue to bind it.¹⁴³ Singapore would also be bound by all decisions taken by international organizations and endorsed by the government of Malaysia insofar as they concerned Singapore.¹⁴⁴ The agreement thus provided for automatic succession.

However, like Pakistan, Singapore adopted the view that the clean-slate rule should be applied as the basic approach to its succession and that mutual consent is required for treaties to be valid. Some States opposed this, but it was left to Singapore to decide which multilateral treaties it would notify the depositary of succession and which it would not.¹⁴⁵ For example, Singapore acceded to the 1959 Geneva Convention after its separation from Malaysia in 1965.¹⁴⁶

To date, Singapore has become a party to thirty-one treaties by virtue of succession, most of them related to the General Agreement on Tariffs and Trade. On June 7, 1966, Singapore notified the UN Secretary-General that it considered itself bound by the following treaties,¹⁴⁷ “the application of which had been extended to its territory before the attainment of independence”: the International Convention for the Suppression of the Traffic in Women and Children dated September 30, 1921,¹⁴⁸ the International Agreement for the Suppression of White Slave Traffic signed in Paris on May 18, 1904 (as amended by the Protocol signed at Lake Success, New York on May 4, 1949),¹⁴⁹ and the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material dated November 7, 1952.¹⁵⁰ The UN does not consider Singapore to be a party to those multilateral treaties for which it has not made a notification.¹⁵¹

143 *ibid* art 13 para 1.

144 *ibid*.

145 Commentary on the 1978 Vienna Convention (n 14) para 18, 264. See also S Jayakumar, ‘Singapore and state succession: International relations and internal law’ (1970) 19(3) *International and Comparative Law Quarterly* 398.

146 ILC, ‘Succession of States to multilateral treaties: Seventh study prepared by the Secretariat’ (1970) UN Doc A/CN.4/150, 91.

147 Listen in: ‘Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations’ (1967) 564 UNTS 1.

148 International Convention for the Suppression of the Traffic in Women and Children 9 LNTS 415.

149 International Agreement for the Suppression of White Slave Traffic signed in Paris on May 18, 1904 (as amended by the Protocol signed at Lake Success, New York on May 4, 1949), 92 UNTS 19.

150 International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, 221 UNTS 255.

151 Commentary on the 1978 Vienna Convention (n 14) para 18, 264.

Singapore has adopted the same approach with regard to bilateral treaties. On April 23, 1969, it notified the US that it would consider the 1931 US–UK extraction agreement valid (subject to the necessary formal amendments) on the basis of reciprocity if the US also regarded it as such. The US replied that it considered the agreement to be valid.¹⁵²

Meanwhile, the vast majority of bilateral air services agreements remained in force after Singapore's separation. Subsequently, Singapore concluded new agreements with contracting States to replace the previous ones,¹⁵³ which does not affect the question of its succession to treaties.

5.4.1.3.3 *Bangladesh*

Bangladesh and Pakistan did not conclude a devolution agreement, but Bangladesh, like Singapore, adopted the clean-slate rule as a basic principle and decided for itself to which multilateral treaties it would notify succession.¹⁵⁴ To date, Bangladesh has only succeeded to seven multilateral treaties. The UN Secretary-General is the depositary of three of these (the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations, and the Vienna Convention on Consular Relations), for which it received a notification of succession on January 13, 1978.¹⁵⁵ The government of Switzerland is the depositary of the other four (the four Geneva Conventions of 1949 (the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, the Geneva Convention relative to the protection of civilian persons in time of war, the Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, and the Geneva Convention relative to the treatment of prisoners of war) and received a notification of succession to all four on April 4, 1972.¹⁵⁶

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152 ILC, 'Succession of States in respect of bilateral treaties: Study prepared by the Secretariat' (1970) UN Doc A/CN.4/229 para 89, 118.

153 ILC, 'Succession of States in respect of bilateral treaties' (n 136) 138–142.

154 Dumberry and Turp (n 123) 38–39.

155 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations (1987) 1066 UNTS 326, 330, and 332.

156 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations' (1978) 823 UNTS 374.

5.4.1.4 State Practice after the Cold War

Recent examples include the dissolution of the Soviet Union (1992) and the separations of Montenegro from Serbia and Montenegro (2006), Kosovo from Serbia (2008), and South Sudan from Sudan (2011).

5.4.1.4.1 *Soviet Union*

As previously explained, although the dissolution of the USSR is an example of a dissolution of a State, for political reasons, its results are more similar to a separation of eleven States (excluding the Baltic States) from Russia. The fact that all fifteen successor States never signed the common document is also an issue.

On December 8, 1991, Russia, Belarus, and Ukraine signed the Agreement on the Establishment of the Commonwealth of Independent States in Minsk.¹⁵⁷ On December 21, 1991, the Protocol to the Agreement was signed in Alma Ata by eleven former republics, which thus became members of the CIS.¹⁵⁸ The Baltic States and Georgia were not among these, but Georgia nevertheless acceded to both the protocol and the agreement in 1993. Under the protocol, all States also became parties to the agreement establishing the CIS.¹⁵⁹ The agreement and protocol provided that the successor States of the USSR, which ceased to exist, would assume “the responsibility of fulfilling the international obligations arising from the treaties of the former USSR.”¹⁶⁰ It also stipulated that the successor States wished to guarantee to the nationals of the co-parties to this agreement and to stateless persons on their territory all rights in keeping with universally recognized international human rights provisions.¹⁶¹ This intention, as well as the intention to ensure succession to treaties in the field of human rights protection, was reaffirmed two years later in a declaration on September 24, 1993.¹⁶²

It is also important to note that on December 21, 1991, the Decision of the Council of Heads of State of the CIS countries was signed in Alma Ata, whereby

157 Agreement on the Establishment of the Commonwealth of Independent States (adopted 8 December 1991) 31 ILM 143 (Agreement on the Establishment of the CIS).

158 Protocol to the Agreement Establishing the Commonwealth of Independent States (adopted 30 December 1991) UN Doc A/47/60, 3.

159 *ibid* art 2.

160 Agreement on the Establishment of the CIS (n 157) art 12.

161 *ibid* art 2.

162 Declaration of the Heads of State of the Member States of the Commonwealth of Independent States on International Obligations in the Field of Human Rights and Fundamental Freedoms (adopted 23 September 1993) Bulletin of International Treaties No 9 art 1.

the other CIS countries expressed their support for Russia to replace the USSR in its membership in the UN and its organs.¹⁶³ Following this, the President of Russia forwarded a diplomatic note to the UN Secretary-General announcing that Russia would continue the USSR's membership in the UN in all its organs and bodies.¹⁶⁴

On the date of succession, the USSR was a party to more than 600 multilateral agreements and some 15,000 bilateral agreements.¹⁶⁵ With regard to multilateral treaties, Russia informed the UN Secretary-General that "the Russian Federation maintains full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General."¹⁶⁶ It also requested that the title "USSR" be replaced everywhere with "Russian Federation."¹⁶⁷ Russia subsequently communicated to all diplomatic and consular missions in Moscow, on January 13, 1992, that it assumed all the obligations of the former USSR arising from treaties and that Russia should be considered a party to all treaties of the USSR in place.¹⁶⁸

As (founding) members of the UN, Ukraine and Belarus were parties to many multilateral treaties, but for most others, they notified *accession* rather than *succession*. Other successor States notified accession for both multilateral and bilateral treaties, except for a few multilateral agreements.¹⁶⁹ For example, all successor States but Russia, Ukraine, and Belarus acceded to the Convention on the Prevention and Punishment of the Crime of Genocide;¹⁷⁰ the latest being Turkmenistan on March 26, 2019. Kazakhstan, Tajikistan, and

163 Decision of the Council of Heads of State of the Commonwealth of Independent States (adopted 21 December 1991) UN Doc A/47/60, annex v, 8.

164 Agreements establishing the Commonwealth of Independent States (1992) 31 International Legal Materials 138.

165 PP Kremnev, *Распад СССР и правопреемство государств* [*The breakup of the USSR and the succession of states*] (Юрлитинформ 2012) 89.

166 Letter from the President of the Russian Federation notified the Secretary-General (24 December 1991) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

167 *ibid.*

168 Kremnev (n 165) 91. The author rightly notes that Russia could not be a continuator State with regard to all treaties as not all of them could apply to it, including some of the boundary agreements.

169 Number of *successions* to multilateral treaties by successor State: Armenia (7), Azerbaijan (1), Belarus (14), Estonia (1), Georgia (8), Kazakhstan (11), Kyrgyzstan (7), Latvia (0), Lithuania (0), Moldova (2), Tajikistan (16), Turkmenistan (9), Turkmenistan (9), Ukraine (6), Uzbekistan (0).

170 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277.

Turkmenistan have not yet acceded to the International Convention on the Suppression and Punishment of the Crime of Apartheid,¹⁷¹ many of whose provisions codify customary international law.

The UNTS database shows that Russia, Ukraine, and Belarus are considered parties from the date on which the USSR, the Ukrainian Soviet Socialist Republic, and the Belarusian Soviet Socialist Republic became parties.¹⁷² In some cases, they are still referred to by their “old names” in the course of the proceedings.¹⁷³

According to the ILA, only three successor States (Moldova, Uzbekistan, and Turkmenistan) have adopted the clean-slate rule as a basic principle, while the others have accepted the meaning of succession in one way or another. The ILA concludes that the fact that the successor States subsequently became parties (albeit by accession) to treaties also ensured a certain continuity in the validity of those treaties. The ILA has called this phenomenon *optional succession*.¹⁷⁴

5.4.1.4.1.1 Bilateral Agreements

As regards bilateral agreements, the successor States have usually exchanged diplomatic notes with third countries confirming which agreements remain in force.¹⁷⁵ Russia, the de facto continuator State, simply replaced the USSR *ex tunc*, giving a general notification of its view on succession to other States and international organizations. Moreover, all States declared in the Agreement Establishing the Commonwealth of Independent States that they assumed all obligations under the USSR’s treaties, but the practice was different.

Practice confirms the succession to boundaries.¹⁷⁶ Territorial regimes also remain in place. The ILA mentions the interesting situation of the succession to the Belgrade Convention concluded on August 18, 1948, which defines navigation on the Danube. The USSR, Yugoslavia, and Czechoslovakia were also

171 International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) UN Doc A/RES/3068(XXVIII).

172 Among the vast number of such treaties, see, for instance, the status of States parties to the International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171, to which Russia is considered a party upon ratification as of October 16, 1973, on the basis of its signature on March 18, 1968.

173 See, e.g., the status of State parties to the Convention on the Prevention and Punishment of the Crime of Genocide (n 170).

174 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 5) 275: “This has resulted in optional successions, which means that a certain continuity has been ensured in this case as well, by the accession of the State to the treaties to which the predecessor State was a party.” (Translated by the present author).

175 Kremnev (n 165) 91–97.

176 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 5) 292.

parties to this convention. After the date of succession, Russia expressed its willingness to remain a party to the convention but was unable to do so as it has no territorial link with the Danube.¹⁷⁷ The ILA concludes its review of practice by noting that automatic succession to territorial regimes is limited to those States directly linked to said regimes.¹⁷⁸

5.4.1.4.2 *Montenegro*

On June 3, 2006, Montenegro adopted the Declaration of the Independent Republic of Montenegro.¹⁷⁹ The declaration stated that, “accepting the principles endorsed in the documents of the UN, the Council of Europe, the OSCE and other international organisations, [Montenegro] will start the procedures for full membership of these organisations.”¹⁸⁰ In addition, it “accepts and will assume the rights and obligations arising from the existing arrangements with the EU, the UN, the Council of Europe and the OSCE and other international organisations concerning Montenegro, which are in conformity with its legal order.”¹⁸¹ As regards bilateral agreements, the declaration asserts that, “on the basis of the principles of international law, [Montenegro] will establish and develop bilateral relations with other countries, accepting the rights and obligations under the previous arrangements, and pursue an active policy of good neighbourly relations and regional cooperation.”¹⁸² On the same day, it adopted the Decision on the Declaration of Independence of the Republic of Montenegro, in which it stated that it would “apply and accept the treaties and agreements adopted or acceded to by the State Union of Serbia and Montenegro, which are applicable to Montenegro and which are in conformity with its legal order.”¹⁸³ Thus, nowhere is it written that Montenegro will *succeed* to these treaties but that it will “apply and accept them.” The provisions of these instruments are written in the future tense, not in the present or past.

Nevertheless, after considering which treaties it wished to accede to, Montenegro notified its succession to these to the international organizations that are their depositaries. According to the UN website, the UN Secretary-General has received notifications of succession from Montenegro in respect

177 *ibid* 296.

178 *ibid*.

179 Declaration of the Independent Republic of Montenegro (5 June 2006) Official Gazette of the Republic of Montenegro No 36/2006.

180 *ibid* art 2(1).

181 *ibid* art 2(2).

182 *ibid* art 3.

183 Decision on the declaration of independence of the Republic of Montenegro (5 June 2006) Official Gazette of the Republic of Montenegro No 36/2006 art 3.

of 224 treaties. A letter from the government of the Republic of Montenegro to the UN Secretary-General dated October 10, 2006, states that “the Republic of Montenegro decided to succeed to the treaties to which the State Union of Serbia and Montenegro was a party or signatory.”¹⁸⁴ This was a *succession* and not an *accession*, as the letter emphasized:

the Republic of Montenegro succeeds to the treaties listed in the attached Annex and undertakes faithfully to perform and carry out the stipulations contained therein as from June 3rd 2006, which is the date the Republic of Montenegro assumed responsibility for its international relations and the Parliament of Montenegro adopted the Declaration of Independence.

This is further indicated by Montenegro’s notification that it also succeeds to all reservations, declarations, and objections made by Serbia and Montenegro.¹⁸⁵ Montenegro succeeded to the status of contracting party on the date of its succession, June 3, 2006.

Montenegro also notified its succession with regard to other multilateral treaties whose depositaries are international organizations, such as the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), the International Maritime Organisation (IMO), and others.¹⁸⁶ Not counting the treaties whose depositary is the Council of Europe, Montenegro has succeeded to a total of 343 multilateral treaties. These represent the vast majority of all such treaties to which the State of Serbia and Montenegro has been a party—the State Union had been a party to 375 multilateral treaties (including twelve of the closed type, such as the Convention concerning fishing in the waters of the Danube).

Montenegro’s succession to membership in the Council of Europe and to the Council of Europe’s treaties was decided by the Committee of Ministers of the Council of Europe. On June 6, 2006, Montenegro notified its wish to obtain succession status to all Council of Europe treaties to which its predecessor State was a party. The Committee of Ministers had already decided on June

184 Letter from the Government of the Republic of Montenegro to the Secretary-General of the United Nations (10 October 2006) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

185 *ibid.*

186 ‘Montenegro’s response to the Questionnaire on the code of conduct on politico-military aspects of security by the OSCE Forum for Security Cooperation’ FSC.EMI/124/12 (20 April 2012).

14, 2006, that Montenegro succeeded to the “open” agreements. The decision on the “closed” agreements (including the European Convention on Human Rights) and membership was made only at the meeting between May 9 and 11, 2007, but it established that Montenegro had succeeded to all the agreements since June 6, 2006, the date of notification.¹⁸⁷ Montenegro is considered a member of the Council of Europe since May 11, 2007.¹⁸⁸ In the *Bijelić* case, the ECtHR went one step further: it confirmed that it has jurisdiction to rule on the validity of the ECHR *ratione temporis* in relation to the contracting States and, interpreting the Montenegrin Constitution and legislation, found that Montenegro has been bound by the ECHR not merely since independence but since March 3, 2004, two years before the succession and independence of Montenegro.¹⁸⁹ This is the date when its predecessor State became a party to the Convention.

As regards bilateral treaties, Montenegro initiated bilateral consultations with other countries on the basis of the Decision on the Declaration of Independence. The consultations resulted in a harmonized list of bilateral treaties, succession to which was regulated by a succession agreement between Montenegro and other contracting parties. These agreements confirmed the succession to bilateral agreements since the date of independence of Montenegro, the most recent one so far being the agreement with the Czech Republic concluded on November 19, 2018.¹⁹⁰ Montenegro has also succeeded to the agreements defining the boundaries and the boundary regime.¹⁹¹

187 Opinion of the Venice Commission in the case of *Bijelić v Montenegro and Serbia*: European Commission for Democracy through Law (Venice Commission) No 495/2008 CDL-AD(2008)021 (20 October 2008) para 13, 4.

188 Council of Europe, ‘Montenegro’ <<https://www.coe.int/en/web/portal/montenegro>> accessed 26 February 2026.

189 *Bijelić v Montenegro and Serbia* (n 60) para 67–69, 11–12.

190 See, e.g., Norway: Decision on the publication of the Agreement between Montenegro and the Kingdom of Norway on the regulation of bilateral contractual relations (28 December 2011) Official Gazette of the Republic of Montenegro (international agreements) No 17/2011; Greece: Decision on the publication of the Agreement between Montenegro and the Republic of Greece on the regulation of bilateral contractual relations (28 December 2011) Official Gazette of the Republic of Montenegro (international agreements) No 17/2011; Czech Republic: Decision on the publication of the Agreement on the Status of Bilateral Agreements between Montenegro and the Czech Republic (19 November 2018) Official Gazette of the Republic of Montenegro No 11/2018.

191 See, e.g., Vesna Barić Punda and Valerija Filipović, ‘Protokol o privremenom režimu uz južnu granicu (2002.) s posebnim osvrtom na odluke vlada Republike Hrvatske i Crne Gore o istraživanju i eksploataciji ugljikovodika u Jadranu’ (2015) 54(169) *Poredbeno pomorsko pravo* 73.

The separation of Montenegro did not affect the status of Serbia (i.e., the continuator State) with regard to treaties and membership in international organizations. Thus, on June 3, 2006, Serbia informed the UN Secretary-General that it continued its status as a party to all the multilateral treaties to which the predecessor State was a party.¹⁹² On the same date, Serbia also informed the UN that it was continuing the membership of the predecessor State in the UN; Serbia is considered a member of the UN since November 1, 2000, that is, since the membership of the Federal Republic of Yugoslavia.¹⁹³ The Council of Europe merely confirmed that Serbia had succeeded to all the treaties to which the predecessor State was a party as well as membership.¹⁹⁴ Serbia also continues the membership of the predecessor State in this international organization.¹⁹⁵

In addition, Serbia has retained its status as a contracting party to the bilateral agreements of its predecessor State.¹⁹⁶ Serbia being a continuator State, the continuity approach therefore applied. Serbia simply informed international organizations of the new fact, but the question is whether this was necessary at all.

5.4.1.4.3 *Kosovo*

Interestingly, on December 8, 2011, the Republic of Kosovo adopted the Law on International Treaties, which details how treaties are concluded but does not mention the possibility of succession to treaties.¹⁹⁷ The list of States Parties to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (the so-called Apostille Convention) indicates that Kosovo, which ratified the convention on November 6, 2015, became a party on July 14, 2016, on the basis of *accession*. It should be noted that Montenegro,

192 UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoryCallInfo.aspx>> accessed 26 February 2026.

193 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2026.

194 Opinion of the Venice Commission in *Bijelić v Montenegro and Serbia* (n 187) para 12, 4.

195 Council of Europe, 'Serbia' <<https://www.coe.int/en/web/portal/serbia>> accessed 26 February 2023.

196 The website of the Ministry of Foreign and European Affairs of the Republic of Croatia lists 29 agreements that are in force between Croatia and Serbia today to which the latter became a party before the separation of Montenegro. Ministry of Foreign and European Affairs of the Republic of Croatia <<https://mvep.gov.hr/foreign-policy/bilateral-relations/overview-of-bilateral-treaties-of-the-republic-of-croatia-by-country/22801>> accessed 26 February 2026.

197 Law No 04/L-052 on International Relations (2011) Official Gazette of the Republic of Kosovo No 28/2011.

which also separated from Serbia and ratified the Convention on January 30, 2007, became a contracting party to the convention on June 3, 2006, on the basis of *succession*.¹⁹⁸ Serbia has been a contracting party to the convention on the same basis since April 27, 1992, and ratified it on 26 April 2001.¹⁹⁹

However, Kosovo has succeeded to at least seventeen agreements with Austria, including some to which the SFRY was a party.²⁰⁰ These agreements have been succeeded to by Kosovo and are in force from the date of succession (February 17, 2008).²⁰¹ A number of international agreements between the UK and the SFRY are also in effect for Kosovo.²⁰²

5.4.1.4.4 *South Sudan*

To date, South Sudan has become a party to twenty-five treaties of which the UN Secretary-General is the depositary. It has acceded to all but one of them, only succeeding to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, to which it is thus bound from the date of succession, July 9, 2011. Among these international treaties there are sixteen to which Sudan was a party at the time of the separation, most of them environmental²⁰³ and two related to international organizations.²⁰⁴ However, there are also human rights treaties (two

198 Hague Conference on Private International Law, 'Status Table 12: Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents' <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>> accessed 26 February 2026.

199 *ibid.*

200 Among them, for instance, the Agreement between the Republic of Austria and the SFRY on Mutual Legal Assistance. See Announcement by the Federal Chancellor of Austria on bilateral agreements between Austria and Kosovo (30 December 2010) Bundesgesetzblatt für die Republik Österreich No 147/2010 Part III.

201 *ibid.*

202 These include, for example, the Cultural Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Federal Republic of Yugoslavia, to which Kosovo succeeded United Kingdom Treaties Online, 'UK Compendium of International Treaties' <<https://treaties.fco.gov.uk/>> accessed 26 February 2023.

203 Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987) 1522 UNTS 3; Vienna Convention for the Protection of the Ozone Layer 1513 UNTS 293; United Nations Framework Convention on Climate Change (adopted 19 May 1992) 1771 UNTS 107; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (adopted 14 October 1994) 1954 UNTS 3.

204 Agreement establishing the African Development Bank done at Khartoum (adopted 4 August 1963) as amended by resolution 05-79 adopted by the Board of Governors (adopted

conventions and related protocols)²⁰⁵ for which there should be *automatic succession* according to modern legal thought, but this has not been the case. Not only has South Sudan not succeeded to these treaties via notification (i.e., “not automatically”), it has “merely” acceded to them and is therefore bound by them *ex nunc*.²⁰⁶

At the date of succession, Sudan was party to 119 international treaties. Most of these are treaties to which South Sudan has neither succeeded nor acceded to date, despite the fact that some are very important treaties in the field of humanitarian law, such as the Convention on the Prevention and Punishment of the Crime of Genocide, to which Sudan has been a party since October 13, 2003.

South Sudan did not declare its willingness to follow treaties when it separated from Sudan. Its approach is more akin to the clean-slate rule but not entirely similar as it has succeeded to one of the treaties. Sudan, as a continuator State, has succeeded to all international treaties and membership of international organizations.

5.4.2 *Transfer of Part of a Territory to Another State (Cession)*

According to the *moving frontier principle*, the general rule of the 1978 Vienna Convention is that, upon cession, the treaties of the predecessor State cease to apply to the part of the territory that has been partitioned, and the treaties of the successor State (i.e., the one to which the part of the territory has been ceded) come into force. This rule does not apply if this would be inconsistent

17 May 1979) 1276 UNTS 3; Agreement establishing the International Fund for Agricultural Development (13 June 1976) 1059 UNTS 191.

205 Convention on the Rights of the Child (adopted 20 November 1989) 1577 UNTS 3 (Sudan is a party since September 2, 1990); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000) 2173 UNTS 222 (Sudan is a party since August 26, 2005); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000) 2171 UNTS 227 (Sudan is a party since December 2, 2004); Convention relating to the Status of Refugees 189 UNTS 137 (Sudan is a party since May 23, 1974); Protocol relating to the Status of Refugees (adopted 31 January 1967) 606 UNTS 267 (Sudan is a party since May 23, 1974).

206 Sudan was not a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85 at the time of its succession (it only signed it on June 4, 1986); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979) 1249 UNTS 13; United Nations Convention against Corruption (adopted 30 October 2003) 2349 UNTS 41 (it became a party after the date of succession on October 2, 2014); Convention on Biological Diversity (adopted 5 June 1992) 1760 UNTS 79 (it only signed it on September 6, 1992).

with the purpose of the treaty or would radically alter the terms of performance of the treaty.²⁰⁷

5.4.2.1 State Practice before the Two World Wars

In 1867, at the time of the great congresses in Europe (Paris in 1856, London in 1871, and Berlin in 1878), the US purchased the territory of Alaska from the Russian Empire. The Agreement on the Cession of Alaska does not mention treaty succession.²⁰⁸ The UK was generally of the view that the US did not succeed to the provisions of the 1825 agreement between the UK and Russia through this cession.²⁰⁹ However, in connection with the cession, the UK argued that its right of navigation (*easement*) under the 1825 agreement remained in force, which the US seemed to oppose.²¹⁰ The UK also argued that the US had succeeded to *provisions (recitals)* of the international agreements between the UK and Russia that define the boundary.²¹¹

5.4.2.2 Peace Treaties after the Second World War

The Peace Treaty with Italy provided that, after ceding the Plateau of Mont Cenis and the Tenga-Briga district to France, Italy would also acquire an easement to produce electricity from these areas.²¹² The easement was created anew and is therefore not a succession. The cession was also established in favor of Yugoslavia,²¹³ Greece,²¹⁴ and Albania.²¹⁵

The Peace Treaty with Italy stipulated that Italy accepts all agreements that have been (or will be) reached on the liquidation of the League of Nations, the Permanent Court of International Justice, and the International Finance Commission in Greece.²¹⁶ In this respect, there can be no question of succession to treaties because Italy was not a party to these instruments. On

²⁰⁷ 1978 Vienna Convention (n 2) art 15.

²⁰⁸ Treaty concerning the cession of the Russian possessions in North America by His Majesty the emperor of all the Russias to the United States of America (adopted 30 March 1867) 15 Stat 539 (Agreement on the Cession of Alaska).

²⁰⁹ O'Connell, *State Succession in Municipal Law and International Law* vol 2 (n 39) 40.

²¹⁰ *ibid* 235–237.

²¹¹ Opinion of Foreign Office (26 December 1867) FO 83/225 appendix 33 in O'Connell, *State Succession in Municipal Law and International Law* vol 2 (n 39) 40; Sergei N Baburin, *Мир империи: Территория государства и мировой порядок* [*The World of Empires: The Territory of the State and the World Order*] (Издательство Юридический центр 2005) 244.

²¹² Treaty of Peace with Italy (n 196) art 6.

²¹³ *ibid* art 11.

²¹⁴ *ibid* art 14.

²¹⁵ *ibid* art 27.

²¹⁶ *ibid* art 39.

succession to bilateral treaties, the peace treaty provided that the victorious States would notify Italy within six months of which bilateral agreements they wished to keep in force or *revive*. As a result, all provisions that were not in line with the Peace Treaty would cease to apply. All bilateral agreements for which the winning States did not give notification would be terminated.²¹⁷ Importantly, these agreements did not require Italy's consent; treaties continued to apply if the winner agreed. It could be argued that Italy, by signing the Peace Treaty, gave its *general consent* to succession to bilateral treaties, but it must be borne in mind that this is a peace treaty in which the influence of the losing parties on the adoption of the provisions was limited; many of the provisions were imposed. The same provisions on succession to multilateral and bilateral treaties are contained in the peace treaties with Bulgaria,²¹⁸ Hungary,²¹⁹ Romania,²²⁰ Finland,²²¹ and Japan (bilateral only).²²²

The Peace Treaty with Japan maintains in force all easements related to the stationing of foreign troops in Japan established on the basis of treaties.²²³ In this respect, the Peace Treaty differs from the provisions of the 1978 Vienna Convention.

The Peace Treaty with Finland "restored" the Peace Treaty between the Soviet Union and Finland, which the two countries signed in Moscow on March 12, 1940, but modified some of its articles.²²⁴ It provided for succession to an easement regarding the demilitarization of the Aaland Islands.²²⁵

On June 29, 1945, in Moscow, Czechoslovakia and the USSR signed the Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine. According to this agreement, Czechoslovakia ceded the

217 *ibid* art 44.

218 Treaty of Peace with Bulgaria (adopted 10 February 1947) 41 UNTS 21 art 7–8.

219 Treaty of Peace with Hungary (adopted 10 February 1947) 41 UNTS 135 art 9–10.

220 Treaty of Peace with Romania (adopted 10 February 1947) 42 UNTS 3 art 9–10.

221 Treaty of Peace with Finland (adopted 10 February 1947) 48 UNTS 203 art 11–12.

222 Treaty of Peace with Japan (adopted 8 September 1951) 136 UNTS 45 art 7.

223 *ibid* art 6.

224 Treaty of Peace with Finland (n 221) art 4.

225 *ibid* art 5. This is the successor to the easement created by the Treaty of Peace of 1856 between France, the United Kingdom, and Russia, which required the Aaland Islands to remain a demilitarized zone—an easement in favor of France and the United Kingdom. After the separation of Finland from Russia, these islands became part of Finland, which also succeeded to this easement (territorial regime). Commentary on the 1978 Vienna Convention (n 14) para 5, 197. For more details on this issue, see O'Connell, *State Succession in Municipal Law and International Law vol 2* (n 39) 267–270; Norman J Padelford and K Gosta A Andersson, 'The Aaland Islands Question' (1939) 33(3) *American Journal of International Law* 465.

territory of Transcarpathia, which had belonged to it under the Treaty of Saint-Germain-en-Laye, to Ukraine.²²⁶ The agreement stipulates that the (internal) boundaries that existed between Slovakia and Transcarpathia before the war become the boundary between Czechoslovakia and the Soviet Union;²²⁷ this is an application of the principle of *uti possidetis juris*.

5.5 State Practice without Continuing Legal Personality

Succession to treaties in cases without continuing legal personality varies from one type of succession to another. The common feature is that the predecessor State ceases to exist, but this does not necessarily mean that the treaties must also cease to apply.

5.5.1 *Dissolution of States*

As already mentioned, the 1978 Vienna Convention regulates succession in the event of dissolution in the same article as the separation of parts of a territory (with a separate article on the latter topic devoted solely to the succession of the continuator State). The successor States should therefore remain bound by the treaties in force for their territory on the date of succession.²²⁸ This rule does not apply if this would be inconsistent with the purpose of the treaty or radically alter the conditions for its performance.²²⁹

5.5.1.1 State Practice before the Two World Wars

Regarding the dissolution of the United Netherlands in 1830, the Treaty of London (1839) stipulated that each of the successor States, within their newly established boundaries, renounced all claims to lands, cities, castles, and towns situated on the territory of the other.²³⁰ It specifically stated that facilities such as canals and roads financed in whole or in part by the Kingdom of the Netherlands would belong to the successor in which they were located.²³¹ At

226 Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine (adopted 29 June 1946) 504 UNTS 299 art 1(1).

227 *ibid* art 1(2).

228 1978 Vienna Convention (n 2) art 34(1).

229 *ibid* art 34(2).

230 Treaty between Great Britain, Austria, France, Prussia, and Russia, on the one part, and Belgium, on the other (adopted 19 April 1839) in Charles P Sanger and Henry TJ Norton, *England's Guarantee to Belgium and Luxemburg, with the Full Text of the Treaties* (Charles Scribner's Sons 1915) 127 (Treaty of London) annex art vi.

231 *ibid* art xv(1).

the same time, a specific decision was taken concerning the territorial regime established at the Congress of Vienna. It was decided at the Congress that fortifications would be erected on the French-Dutch border. After the breakup, the four Great Powers (the UK, Austria, Prussia, and Russia) were of the opinion that Belgium and the Netherlands, as the successor States of the United Netherlands, should succeed to the obligation to respect this territorial regime. Both countries accepted this obligation.²³²

5.5.1.2 State Practice after the Second World War

5.5.1.2.1 *United Arab Republic*

The dissolution of the UAR went very smoothly, mainly because the two successor States were already members of the UN and other international organizations before the unification (unlike in the case of Pakistan) and because Egypt seems to have understood the dissolution as a separation of Syria from the UAR. Egypt used the name UAR until 1971.

Following the dissolution, the Syrian government decided to remain bound by all treaties (both multilateral and bilateral) concluded during the existence of the UAR.²³³ On June 13, 1962, Syria transmitted the text of the decision²³⁴ to the UN Secretary-General, and the UN adopted the position that both States would continue to be bound by “any instrument concluded under the auspices of the United Nations” in relation to their territories and, in addition, by agreements concluded before their unification into the UAR.²³⁵

Syria also accepted that all treaties concluded by Syria before unification are automatically binding on Syria. Egypt did not accept any declaration, apparently considering that Syria had separated from the UAR. The two States also “continued” their membership in the UN and other organizations, as if the unification and the dissolution had never taken place. Similarly, bilateral agreements were unaffected by succession and continued to apply in the same way as multilateral agreements.²³⁶

²³² Commentary on the 1978 Vienna Convention (n 14) para 32, 205.

²³³ ILC, ‘Succession of States in relation to general multilateral Treaties of which the Secretary-General is the Depositary—Memorandum prepared by the Secretariat’ (1962) UN Doc A/CN.4/150, 120–121.

²³⁴ “It follows from article 2 of the text in question that obligations contracted by the Syrian Arab Republic under multilateral agreements and conventions during the period of the Union with Egypt remain in force in Syria. The period of the Union between Syria and Egypt extends from 22 February 1958 to 27 September 1961.” UNCTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

²³⁵ Commentary on the 1978 Vienna Convention (n 14) para 8, 262.

²³⁶ *ibid* para 9, 262.

5.5.1.2.2 *Federation of Mali*

The formation, the few months of existence, and the termination of the Federation of Mali are too specific to set a precedent.²³⁷ Before its dissolution, the Federation of Mali had concluded seven cooperation agreements with France. Senegal, which subsequently annulled its ratification of the Constitution, informed France that it considered that the agreements remained in force for it as far as its territory was concerned. France accepted this position.²³⁸ The rest of the federation, which retained the name Mali, adopted a clean-slate rule.²³⁹

5.5.1.3 State Practice after the Cold War

5.5.1.3.1 *Socialist Federal Republic of Yugoslavia*

As mentioned previously, the Badinter Commission argued that the successor States of the SFRY must follow the principles of international law embodied in the Vienna Conventions of 1978 and 1983 on succession issues. In particular, it emphasized the principle of proportionality and gave priority to agreements between the successor States concerning the division of property.²⁴⁰ The SFRY was a party to 224 (open) multilateral treaties.²⁴¹ The successor States of the former SFRY notified succession to treaties in different ways. Slovenia declared that it wished to succeed to all international treaties concluded by the former SFRY (“The Republic of Slovenia therefore in principle acknowledges the continuity of treaty rights and obligations under the international treaties concluded by the SFRY before 25 June 1991”), while stating that some of these treaties are no longer applicable or are outdated owing to Slovenia’s independence and that it was therefore reviewing each of them. By that time, it had identified fifty-five that were still in force and was notifying succession to these; it would provide a list of the others after the review.²⁴² Slovenia has been bound

237 *ibid* para 11, 262.

238 *ibid*.

239 *ibid*.

240 Opinions of the Arbitration Commission of the Conference on Yugoslavia (1992) 31 International Legal Materials 1494 (Badinter Commission) Opinion No. 9(1) and 9(2).

241 See also: Michael C Wood, ‘Participation of former Yugoslav states in the United Nations and multilateral treaties’ (1997) 1 Max Planck Yearbook of United Nations Law 231; Photini Pazartzis, ‘State succession to multilateral treaties: recent developments’ (1998) 3 Austrian Review of International & European Law 397.

242 Letter from the Government of the Republic of Slovenia to the Secretary-General of the United Nations (1 July 1992) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

“When declaring independence on 25 June, 1991 the Parliament of the Republic of Slovenia determined that international treaties which had been concluded by the SFRY [Socialist Federal Republic of Yugoslavia] and which related to the Republic of Slovenia

by these treaties since the date of its independence, June 25, 1991. The ILA specifically pointed out that some of the treaties mentioned in Slovenia's note are, by their very nature, founding documents of international organizations. Since the status of a contracting party to such treaties is linked to membership in the organization, the internal rules of the organizations take precedence with regard to their succession.²⁴³

Similar declarations have been adopted by Croatia²⁴⁴ and Macedonia.²⁴⁵ After almost a decade, the FRY abandoned the position that it was itself a continuator state to the former SFRY and transmitted to the UN Secretary-General a list of treaties to which it notified succession.²⁴⁶ BiH sent neither a general notification nor a list but notified succession in respect of individual treaties.²⁴⁷ Nevertheless, BiH succeeded to a comparable number (135) of international treaties to which the UN is the depositary *and* to which the SFRY was a party

remained effective on its territory (Article 3 of the Constitutional Law on the implementation of the Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia ...). This decision was taken in consideration of customary international law and of the fact that the Republic of Slovenia, as a former constituent part of the Yugoslav Federation, had granted its agreement to the ratification of the international treaties in accordance with the then valid constitutional provisions.

The Republic of Slovenia therefore in principle acknowledges the continuity of treaty rights and obligations under the international treaties concluded by the SFRY before 25 June 1991, but since it is likely that certain treaties may have lapsed by the date of independence of Slovenia or may be outdated, it seems essential that each treaty be subjected to legal examination.

The Government of the Republic of Slovenia has examined 55 multilateral treaties for which [the Secretary-General of the United Nations] (...) has assumed the depositary functions. (...) [T]he Republic of Slovenia considers to be bound by these treaties by virtue of succession to the SFR Yugoslavia in respect of the territory of the Republic of Slovenia (...).

Other treaties, for which the Secretary-General of the United Nations is the depositary and which had been ratified by the SFRY, have not yet been examined by the competent authorities of the Republic of Slovenia. [The Government of the Republic of Slovenia] will inform [the Secretary-General] on [its] position concerning these treaties in due course."

243 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 320.

244 Letter from the Government of the Republic of Croatia to the Secretary-General of the United Nations (27 July 1992) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

245 By 2007, the government of the former Yugoslav Republic of Macedonia had transmitted to the Secretary-General notifications of succession for 110 specific multilateral treaties.

246 Letter from the Government of FRY to the UN Secretary-General (8 March 2001) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

247 UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

as the other successor States. Slovenia has, to date, succeeded to 119, Croatia to 126, the FRY (now Serbia) to 173, and Macedonia (now North Macedonia) to 110 treaties. In practice, the result is thus comparable among the successor States, the only difference being the content of the notifications. The difference in the number of treaties succeeded to may also be due to the fact that not all treaties applied equally to the territory of the successor States.

The successor States also forwarded similar notifications of succession to treaties to other depositories, such as international organizations (e.g., IAEA, UNESCO, ILO, IMO, WIPO) and individual States (e.g., the UK and the Netherlands). Taking these international treaties into consideration, Slovenia has succeeded to 184, Croatia to 184, Serbia to 202, BiH to 180, and Macedonia to 155 treaties.

5.5.1.3.1.1 Bilateral International Treaties

Following consultations with the contracting Parties of the former SFRY, the successor States—Slovenia,²⁴⁸ Croatia,²⁴⁹ Serbia,²⁵⁰ BiH,²⁵¹ and Macedonia²⁵²—also succeeded to bilateral agreements.

The successor States have specifically mentioned succession to boundaries in their highest internal acts: succession to the boundary regime was mentioned by Slovenia in the Fundamental Constitutional Charter on the Independence and Sovereignty of Slovenia,²⁵³ by Croatia in the Constitutional Decree of the

248 E.g., Act of Notification of the Succession to the Agreements of the former Yugoslavia with the Republic of Italy (14 August 1992) Official Gazette of the Republic of Slovenia No 40/1992; Act of Notification of the Succession of the Agreements of the former Yugoslavia with the Republic of Finland (14 August 1992) Official Gazette of the Republic of Slovenia No 40/1992; Act of Notification of the Succession of the Agreements of the former Yugoslavia with the Kingdom of Thailand (4 December 1992) Official Gazette of the Republic of Slovenia No 58/1992.

249 See Decision on publication of the list of bilateral international agreements to which the Republic of Croatia is a party on the basis of succession (19 September 1997) Official Gazette of the Republic of Croatia No 13/1997.

250 All bilateral agreements are listed for each country: Ministry of Foreign and European Affairs of the Republic of Croatia, 'Overview of bilateral international objections of the Republic of Croatia by country' <<https://mvep.gov.hr/foreign-policy/bilateral-relations/overview-of-bilateral-treaties-of-the-republic-of-croatia-by-country/22801>> accessed 26 February 2023.

251 Ministry of Justice of BiH lists under the tab "Laws/Conventions" and "International Agreements and Conventions" all the international agreements that BiH has succeeded to <<http://www.mpr.gov.ba/>> accessed 15 December 2022.

252 Ministry of Justice of North Macedonia, 'International Legal Assistance Agreements' <<http://www.pravda.gov.mk/mpd-bilateral5>> accessed 26 February 2023.

253 Fundamental Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No 1/91-1 and 19/91 art 2:

Sabor of the Republic of Croatia on the Sovereignty and Independence of the Republic of Croatia,²⁵⁴ and by Macedonia in the Constitutional Law for the Implementation of the Constitution of the Republic of Macedonia.²⁵⁵

5.5.1.3.2 *Czechoslovakia*

The CSFR was a party to 220 multilateral treaties of which the UN Secretary-General was the depositary. To date, the Czech Republic has succeeded to 187 of these treaties and Slovakia to 186. The ILA notes that at the date of succession, the CSFR was party to 800 multilateral and 2,000 bilateral treaties.²⁵⁶

The two States also succeeded to the status of signatory to treaties that had not yet entered into force at the date of succession.²⁵⁷ Among these is the 1978 Vienna Convention itself, in respect of which the Czech Republic and Slovakia even made separate declarations stating that they would apply the provisions of the Convention in relation to any of its signatories or contracting States that

“The state borders of the Republic of Slovenia are the internationally recognised state borders between the hitherto SFRY and the Republic of Austria, the Republic of Italy, and the Republic of Hungary in the part where these states border the Republic of Slovenia, and the border between the Republic of Slovenia and the Republic of Croatia within the hitherto SFRY.”

254 Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia (1991) Official Gazette of Croatia No 31/1991 art 5: “The State borders of the Republic of Croatia are the internationally recognised State borders of the former SFRY in the part of the Republic of Croatia which are related to the Republic of Croatia, and the borders between the Republic of Croatia and the Republic of Slovenia, BiH, Serbia and Montenegro within the former SFRY.”

255 Constitutional Law for the Implementation of the Constitution of the Republic of Macedonia (22 November 1991) Official Gazette of the Republic of Macedonia No 52/1991 art 2: “The national border of the Republic of Macedonia is the existing border with the Republic of Albania, the Republic of Bulgaria, the Republic of Greece and the Republic of Serbia.”

256 ILA, ‘Aspects of the law of state succession, Final Report—Part I’ (n 5) 264.

257 Excerpt from the Czech Republic’s notification to the UN Secretary-General of February 16, 1993, concerning the succession to signatures: “The Czech Republic, in accordance with the well-established principles of international law, *recognizes signatures* made by the Czech and Slovak Federal Republic in respect of all signed treaties as if they were made by itself” (emphasis added). UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026. Excerpt from the notification of Slovakia dated May 19, 1993: “The Slovak Republic wishes further to maintain its status as a contracting State of the treaties to which Czechoslovakia was a contracting State and of the Czech and Slovak Federal Republic, as well as the status of *a signatory* State of the treaties which were previously signed but not ratified by Czechoslovakia as listed in the Annex to this letter” (emphasis added). UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

accept this declaration. Slovakia ratified the 1978 Vienna Convention on April 24, 1995, and the Czech Republic on July 26, 1999.

Immediately after the date of succession, both States notified the UN Secretary-General of their succession to multilateral treaties of which the Secretary-General is the depositary.²⁵⁸ In almost identical terms, they stated that, in accordance with the principles of international law, they were considered successors to the multilateral treaties that had bound their predecessor State. These treaties, together with the reservations and declarations made by the predecessor State, bound them from the date of succession, that is, January 1, 1993. They also attached to the notification a list of multilateral treaties.²⁵⁹ The Czech Republic and Slovakia proceeded on the basis of the principle of automatic succession and only asked the Secretary-General to notify the other States of their succession.²⁶⁰ As there were no objections to their notifications, the Czech Republic and Slovakia are considered contracting parties or signatories to the multilateral agreements referred to in their notifications from January 1, 1993. Same approach was followed by other international organizations, such as WIPO, the IMO, and ICAO.

Nevertheless, there were few exceptions. One of them is UNESCO, which considers these two States to be parties to some agreements from the date of succession²⁶¹ and to others under the principle of accession from the date of notification.²⁶² The other two concerned succession to the treaties adopted under the auspices of the Universal Postal Union (UPU) and the Council of Europe.²⁶³ Their notification of succession was considered by the UPU Secretary-General as a request for accession.²⁶⁴ As early as January 1, 1993, the Czech Republic and Slovakia informed the Council of Europe that they wished to continue their membership in the organization and to succeed to the outstanding international treaties, a list of which was annexed to their letters. With regard to these treaties, the Council of Europe accepted the succession of

258 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 265–266.

259 UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoryCallInfo.aspx>> accessed 26 February 2026.

260 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 265–266.

261 See, e.g., the Record of succession of the Czech Republic and Slovakia to the Universal Copyright Convention (done 31 March 1993) 1720 UNTS 290.

262 See, e.g., the record of succession of the Czech Republic and Slovakia to the Convention for the establishment of a European Organization for Nuclear Research (1993) 200 UNTS 149.

263 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 266.

264 *ibid.*

both States from the date of succession.²⁶⁵ Despite the fact that the two States did not become members of the Council of Europe until June 30, 1993, and that the Council of Ministers of the Council of Europe decided that they were parties to the ECHR from the date of succession (i.e., January 1, 1993), the ECtHR, in its decisions on the *ratione temporis* application of the ECHR, considers the two States to have been parties to the convention from March 18, 1992, the date on which their predecessor State became a party,²⁶⁶ similarly to the case of Montenegro.

The two States also immediately took steps to succeed to bilateral treaties based on the principle of *ipso iure* continuity (automatic succession) established in Article 34 of the 1978 Vienna Convention.²⁶⁷ Agreements on the confirmation of succession have already been concluded with the contracting States for the majority of the bilateral treaties relevant to the successor States.²⁶⁸

5.5.2 *Unification of States*

The primary rule is that, after the unification of States, all treaties applicable to the predecessor States remain in force for the part of the territory formed by the predecessor State within the successor State.²⁶⁹ This rule does not apply if the successor State notifies succession to an open multilateral treaty for its entire territory or if, in the case of a closed multilateral treaty and a bilateral treaty, the other contracting parties agree that it applies to the entire territory. However, if this is inconsistent with the purpose of the treaty or would radically alter the conditions for its performance, the treaty shall not apply to part or all of the territory of the successor State.²⁷⁰

5.5.2.1 State Practice before the Two World Wars

The ILC noted that authors sometimes distinguish between federal and unitary successor States but concludes that “the distinction has no great significance.”²⁷¹ The treaties binding predecessor States usually remain in force

265 Report of the 484th Meeting of the Committee of Ministers’ Deputies of the Council of Europe (Conclusions of the 484th Meeting of the Ministers’ Deputies) CM/Del/Concl(93)484ter (8 January 1993) item 2, 23–25.

266 *Bijelić v Montenegro and Serbia* (n 60) para 68, 12.

267 Mateja Grašek, ‘Nasledstvo Republike Slovenije glede mednarodnih pogodb nekdanje SFRJ’ in Petrič AP, Agius AJ and Zidar A (eds), *Pravo mednarodnih pogodb: priročnik, strokovni prispevki in dokumenti* (FDV Založba 2013) 130.

268 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 5) 269–271.

269 1978 Vienna Convention (n 2) art 31(1) and 31(2).

270 *ibid.*

271 Commentary on the 1978 Vienna Convention (n 14) para 6, 254.

at least for the part of the territory of the successor State that was the predecessor State until the succession. Examples include the creation of the German Federation, Switzerland, and the Republic of Central America in the 19th century, and the creation of the Soviet Union in 1922. In all these cases, the agreements of the predecessor States remained in force beyond the date of succession, with territorial limitations.²⁷² At the creation of the German Federation,²⁷³ navigation treaties with the Netherlands, China, Chile, Siam, and Turkey remained in force, as did commercial and consular treaties.²⁷⁴

5.5.2.2 State Practice after the Second World War

5.5.2.2.1 *United Arab Republic*

As Egypt and Syria united to form the UAR in 1958, the Ministry of Foreign Affairs of the UAR notified the UN Secretary-General on February 24, 1958, that Egypt and Syria had united and that all international treaties to which they were parties remained in force *within the territory* for which they were concluded and in accordance with international law.²⁷⁵ This wording was contained in Article 69 of the Provisional Constitution of the new State.²⁷⁶ Egypt and Syria were, to a certain extent, treated as separate entities after unification,²⁷⁷ even

²⁷² *ibid* para 6–10, 254.

²⁷³ O'Connell puts forward the theory that the southern German States joined the northern German Confederation and that there can therefore be no question of unification. Similar dilemmas also exist with regard to the formation of Italy, where there is disagreement among authors as to whether the Italian States were successively annexed to Sardinia or whether these were unifications. O'Connell, *State Succession in Municipal Law and International Law vol 2* (n 39) 28 and 56–57.

²⁷⁴ *ibid* 59.

²⁷⁵ Text of the notification: "It is to be noted that the Government of the United Arab Republic declares that the Union henceforth is a single Member of the United Nations, bound by the provisions of the Charter and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid *within the regional limits* prescribed on their conclusion and in accordance with the principles of international law." UNTC, Status of Treaties: Historical Information <https://treaties.un.org/Pages/His_toricalInfo.aspx> accessed 26 February 2026.

²⁷⁶ Provisional constitution of the United Arab Republic (5 March 1958) 163 *British and Foreign State Papers* 976 art 69: "The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between each state of Syria and Egypt and the foreign powers. These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion, according to the rules and regulations of the International Law."

²⁷⁷ Commentary on the 1978 Vienna Convention (n 14) para 13 and 14, 255.

though the former States (now part of the UAR) had no foreign policy-related powers under the Provisional Constitution of the UAR.

The UAR informed the UN Secretary-General that it would also succeed Syria and Egypt in the context of membership in the UN and all its organs, to which no one objected. The UAR was therefore not obliged to apply for membership. In addition, no objection was made in the case of the specialized agencies.²⁷⁸

Other States accepted the provision of Article 69 of the Provisional Constitution *mutatis mutandis* with regard to bilateral agreements as well. The bilateral treaties reviewed by the ILC (extradition, trade agreements, and air transport) continued to apply to the UAR within the territory for which they were concluded.²⁷⁹

5.5.2.2.2 *United Republic of Tanzania*

As mentioned previously, the unification of Tanganyika and Zanzibar is unique in that Tanganyika had been an independent State for less than three years and Zanzibar for a few months. An additional specificity of the situation is the influence of the so-called Nyerere Declaration adopted by the President of Tanganyika, Julius Kambarage Nyerere, at the time when Tanganyika gained its independence as a newly independent State. Tanganyika announced that all treaties adopted so far would remain in force only on a provisional basis (for two years) until it decided on their continued validity. In doing so, it acknowledged the possibility that some treaties would remain in force on the basis of customary international law, presumably referring to boundary agreements and other localized agreements.²⁸⁰ As regards Zanzibar, however, there was never any doubt that it was not bound by any of the treaties of its colonizer, with the exception of localized agreements.²⁸¹ The abovementioned issue of succession to international agreements in the context of the decolonization of Tanganyika and Zanzibar was largely settled before the unification and, therefore, had no bearing on the process of succession in the context of the unification.

On May 6, 1964, the Ministry of Foreign Affairs of the new State sent a diplomatic note to the UN Secretary-General stating that Tanganyika and Zanzibar constituted one State from the signing of the Unification Agreement. It also declared that they were now one member State of the UN and that

278 *ibid* para 15, 255.

279 *ibid* para 16, 256.

280 *ibid* para 18, 256.

281 *ibid*.

all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.²⁸²

Before unification, Tanganyika was a party to four Geneva Conventions. Today, Tanzania is listed as a party to them from the date on which Tanganyika acceded to it (December 9, 1961), and it is not clear whether this concerns the whole territory or only the territory of Tanganyika.²⁸³ The situation with the Paris Convention for the Protection of Industrial Property is similar.²⁸⁴ The government of the United Republic of Tanzania subsequently confirmed to the UN Secretary-General that the new State remained bound by the multi-lateral agreements of which they were the depositary and to which Tanganyika was a party.²⁸⁵ Zanzibar was not a party to any international treaty.²⁸⁶

In the case of Tanzania, there was also no objection to continued membership in the UN, its organs and specialized agencies, or the IAEA. The date of membership is the date on which Zanzibar became a member if it did so before Tanganyika (which was the case with WHO).²⁸⁷ Tanzania is considered a member of the UN from the date of Tanganyika's membership.²⁸⁸ Most of Tanganyika's bilateral treaties under the Nyerere Declaration expired after two years. The agreements that "survived" remained in force after unification but only for the territory for which they were concluded by the two predecessor States.²⁸⁹ They seem to have remained in force *ipso iure*. The visa waiver

282 UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoryCallInfo.aspx>> accessed 26 February 2026.

283 Commentary on the 1978 Vienna Convention (n 14) para 21, 257.

284 *ibid.*

285 UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoryCallInfo.aspx>> accessed 26 February 2026.

286 Commentary on the 1978 Vienna Convention (n 14) para 20, 257.

287 *Ibid* para 19–20, 256–257.

288 United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2026: "Tanganyika was a Member of the United Nations from 14 December 1961 and Zanzibar was a Member from 16 December 1963. Following the ratification on 26 April 1964 of Articles of Union between Tanganyika and Zanzibar, the United Republic of Tanganyika and Zanzibar continued as a single Member, changing its name to the United Republic of Tanzania on 1 November 1964."

289 Commentary on the 1978 Vienna Convention (n 14) para 22–23, 257–258.

agreements of Tanganyika with Germany and Israel were among these agreements, as were the trade agreements with the USSR, Czechoslovakia, and the SFRY.²⁹⁰

5.5.2.2.3 *Vietnam*

There is no document in the UNTS concerning succession to treaties in the context of Vietnam's (re)unification.²⁹¹

5.5.2.3 State Practice after the Cold War

5.5.2.3.1 *Republic of Yemen*

The Yemen Unification Agreement does not mention succession to treaties.²⁹² However, it stipulates that after unification, the country will have a single legislature, executive, and judiciary. On May 19, 1990, after the signing of the Agreement, the Foreign Ministers of the two Yemeni informed the UN Secretary-General by letter that the Republic of Yemen would replace the two predecessor States in terms of membership in the UN, international agreements, and international relations in general.²⁹³ With respect to all treaties of which it is a depositary, the UN simply changed the title of the contracting party (predecessor State) to that of the successor State, from the date on which the first of the two predecessor States became a contracting party.²⁹⁴ Since the successor State is thus bound by treaties dating back to the time when the predecessor States existed, it has rights and obligations extending from the period

290 *ibid* para 23, 258.

291 The only succession that can be found is that of 1950, that is, after independence from France.

292 Agreement Establishing a Union between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen (adopted 22 April 1990) 30 ILM 822 (Agreement on the Unification of the Yemeni) art 1.

293 "The People's Democratic Republic of Yemen and the Yemen Arab Republic will merge in a single sovereign State called the Republic of Yemen (short form: Yemen) with Sana'a as its capital, as soon as it is proclaimed on Tuesday, 22 May 1990. The Republic of Yemen will have single membership in the United Nations and be bound by the provisions of the Charter. All treaties and agreements concluded between either the Yemen Arab Republic or the People's Democratic Republic of Yemen and other States and international organizations in accordance with international law which are in force on 22 May 1990 will remain in effect, and international relations existing on 22 May 1990 between the People's Democratic Republic of Yemen and the Yemen Arab Republic and other States will continue." Joint Letter of the Foreign Ministers of the two Yemeni to the Secretary-General of the United Nations (19 May 1990) UNTC Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2023.

294 UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.

before its creation. In theory, it could be held liable for breaches of these treaties that occurred before the date of succession, just as Montenegro and the Czech Republic were held responsible before the ECtHR.

The ILA also noted with regard to Yemen that “the originality of the Yemeni unification lies in the fact that it was conceived, not as a continuation of the legal personality of one or the other state, but as a true fusion, an addition of their two personalities.”²⁹⁵ The successor State has thus replaced not only one predecessor State but both, in a way that it continues the predecessor States’ status of contracting party or member in the organization.

In doing so, Yemen has not limited the validity of the successor agreements to the territory of the predecessor State that concluded the agreement. All international treaties thus apply to the whole territory. Today, Yemen is considered a party to fifty-two multilateral treaties concluded before unification. These agreements apply to the whole country. For instance, the Democratic Republic of Yemen acceded on February 9, 1987, to the Slavery Convention signed in Geneva on September 25, 1926, and amended by the Protocol, and the successor State, Yemen, is considered a contracting party.²⁹⁶ On March 6, 1995, Yemen and the European Economic Community concluded a bilateral Agreement in the form of an Exchange of Letters amending the Cooperation Agreement between the European Economic Community and the Yemen Arab Republic.²⁹⁷ The purpose of the Agreement was to regulate the consequences of a territorial change of a contracting Party. Yemen declared at the time that the agreement concluded between the European Economic Community (EEC) and the Arab Republic of Yemen now applied to the territory of the Republic of Yemen²⁹⁸ and asked for the EEC’s consent, which it received.²⁹⁹

The Republic of Yemen succeeded to (replaced) the membership of the Arab Republic of Yemen in the UN. Other international organizations of which

295 ILA, ‘Aspects of the law of state succession, Final Report—Part 1’ (n 5) 315.

296 Slavery Convention amended by the Protocol (adopted 25 September 1926) 212 UNTS 17.

297 Agreement in the form of an Exchange of Letters amending the Cooperation Agreement between the European Economic Community and the Yemen Arab Republic [1995] OJEC L57/78.

298 *ibid.*: “With reference to the consultations held between the representatives of the European Community and the Republic of Yemen with a view to adapting the Cooperation Agreement between the European Economic Community and the Yemen Arab Republic, following the unification of the Yemen Arab Republic and the People’s Democratic Republic of Yemen on 22 May 1990 to form the Republic of Yemen, I have the honour to declare that, in accordance with the principles of international law, the provisions of that Cooperation Agreement apply to the territory of the Republic of Yemen.”

299 *ibid.*

the predecessor States were members (FAO, UNIDO, IMF, World Bank, etc.) adopted the same approach.³⁰⁰ Both the status of contracting party to international treaties and membership in international organizations were based on the combination of the two predecessor States—that is, from the date when the first of the two predecessor States became a party or member. Thus, Yemen is regarded by the WHO as having been a member since November 20, 1953 (the date of accession of the Arab Republic of Yemen); at the same time, it is considered to have accepted the amendments to Articles 24 and 25, which were ratified only by the People's Democratic Republic of Yemen.³⁰¹

Apart from the Foreign Minister's note, no succession notification can be found in the UNTS collection, nor any treaties succeeded to. Hence, it appears that the successor State simply *replaced* the predecessor States, not in the sense of succession but in the literal sense of the word. It is as if the successor State had existed throughout the existence of the predecessor States.

The French Foreign Ministry's website lists the bilateral agreements currently in force between France and Yemen.³⁰² According to the website, the only agreements in force between the two countries are those concluded between France and the two predecessor States, the most recent of which was signed on April 27, 1984.³⁰³ These include the agreements concluded with both the Arab Republic of Yemen³⁰⁴ and the People's Democratic Republic of Yemen.³⁰⁵ Agreements dating back to the years before the partition can also be found.³⁰⁶

The UK and Yemen also have bilateral agreements in place,³⁰⁷ both with the Arab Republic of Yemen³⁰⁸ and the People's Democratic Republic of

300 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 315–316.

301 *ibid.*

302 Ministry of Foreign Affairs of France, 'Traités et accords de la France' <https://basedoc.diplomatie.gouv.fr/exl-php/recherche/mae_internet__traites> accessed 26 February 2026.

303 Accord entre le gouvernement de la République française et le gouvernement de la république arabe du Yemen sur l'encouragement et la protection des investissements 1668 UNTS 235.

304 E.g., Agreement on cultural and technical cooperation between the Government of the French Republic and the Government of the Arab Republic of Yemen (adopted 16 February 1977) 1306 UNTS 205.

305 E.g., Framework agreement on cultural, scientific and technical cooperation between the Government of the French Republic and the Government of the People's Democratic Republic of Yemen (adopted 29 May 1977) 1106 UNTS 165.

306 E.g., Treaty of Amity between the French Republic and the Kingdom of Yemen (adopted 25 April 1936) RGTF Serie 1 Vol 3, 115.

307 United Kingdom Treaties Online, 'UK Compendium of International Treaties' <<https://treaties.fco.gov.uk/>> accessed 26 February 2023.

308 E.g., Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Yemen Arab Republic for the Promotion and Protection of Investments (signed 25 February 1982) OJ C198/1.

Yemen³⁰⁹ (or one of their predecessor constitutional forms), which predate the creation of present-day Yemen. Such agreements are also in force with Sweden (October 29, 1983) and the Netherlands (March 18, 1985).³¹⁰

5.5.3 *Incorporation of One State into Another*

The 1978 Vienna Convention does not regulate incorporation separately but rather together with unification, which has not proved to be the right decision in practice. In fact, incorporation differs from unification in that one country continues to exist after the date of succession, so its legal order remains essentially unchanged. Thus, an incorporation is in many ways similar to a cession, for which the basic rule on the succession to treaties is the *moving frontier principle*. Practice also demonstrates the application of this principle.

The primary rule under the 1978 Vienna Convention is that, after the incorporation, all treaties applicable to the predecessor State remain in force on its territory.³¹¹ This rule does not apply if the successor State notifies succession in respect of an open multilateral treaty *for the whole of its territory* or if, in the case of a closed multilateral treaty or a bilateral treaty, the other contracting parties agree that it would apply to the whole of its territory. However, if this is inconsistent with the purpose of the treaty or would radically alter the conditions for the performance of the treaty, the treaty shall not apply to part or all of the territory of the successor State.³¹²

5.5.3.1 State Practice before the Two World Wars

Among the older practice, the incorporation of Texas into the US in 1845 is of great importance. At the time of incorporation, the US decided that all international treaties concluded by Texas up to the date of succession would cease to apply. This was initially opposed by the UK and France but was later accepted.³¹³ However, in accordance with the *moving frontier principle*, US

309 E.g., Memorandum of Agreed Points relating to Independence for South Arabia (the People's Republic of Southern Yemen) (with Financial Note and Final Communique) (29 November 1967) UK Treaties Online <<https://www.gov.uk/guidance/uk-treaties>> accessed 26 February 2023.

310 List of Bilateral Investment Agreements in force OJEU C 198/1.

311 1978 Vienna Convention (n 2) 31(1) and 31(2).

312 *ibid.*

313 Commentary on the 1978 Vienna Convention (n 14) para 11, 254.

treaties entered into force on the territory of Texas. The same was true for the incorporations of Hawaii into the US, the Boer Republics into the UK, and the Transvaal into Portugal, among others.³¹⁴

5.5.3.2 State Practice after the Cold War: The GDR and the FRG

In the Agreement on the Unification of Germany, the FRG and the GDR agreed that all international agreements of the FRG, including agreements on membership in international organizations, would remain in force. They also stated that all treaties, with the exception of specific ones, would apply to the whole territory of the successor State.³¹⁵ The agreements whose applicability does not extend to the whole territory are listed in Annex I; these are the nine agreements relating mainly to the right of the victorious States of the Second World War to station military installations and troops and the ten agreements pertaining to the North Atlantic Treaty Organization (NATO).³¹⁶ According to the Agreement on the Unification of Germany, in the event of any need to amend a treaty, the successor State will negotiate with the contracting party.³¹⁷ Before its incorporation, the FRG already included a clause in its treaties to cover the possible incorporation of the GDR.³¹⁸ Similar clauses were also featured in the GDR agreements.³¹⁹

Unlike the treaties of the FRG, which were presumed to remain in force (for the whole territory) and to be amended if necessary, the GDR treaties stayed in effect if the successor State so decided. However, the Agreement on the Unification of Germany does not explicitly state that the GDR treaties were automatically terminated. With regard to these, the successor State was to negotiate with the contracting parties on the modification, termination, or continuation of the agreements, taking into account the legitimate expectations and interests of both parties, the GDR's contractual obligations, and the principles of a free and democratic rule of law, as well as the competences of the European Communities.³²⁰ If the competencies also concern the European Communities, the latter would be consulted by the successor State.³²¹ If, after

³¹⁴ O'Connell, *State Succession in Municipal Law and International Law* vol 2 (n 39) 34–36.

³¹⁵ Agreement between the Federal Republic of Germany and the German Democratic Republic on the establishment of a united Germany (adopted 31 August 1990) *Bundesgesetzblatt* Vol 1990 Part II No 35 (Agreement on the unification of Germany) art 11.

³¹⁶ *ibid* annex 1 ch 1 section 1.

³¹⁷ Agreement on the Unification of Germany (n 315) art 11.

³¹⁸ ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 261.

³¹⁹ *ibid* 264.

³²⁰ Agreement on the Unification of Germany (n 315) art 12(1).

³²¹ *ibid* art 12(2).

the consultations, the successor State wishes to become a contracting party to these treaties or a member of international organizations, an agreement to this effect would be concluded with the States or international organizations concerned and the European Communities, if appropriate.³²²

The GDR had already withdrawn from important multilateral agreements, the Warsaw Pact, and COMECON before the incorporation, with effect from October 3, 1990, the date of the succession,³²³ and from the bilateral Friendship Agreement with the USSR at the same time.³²⁴ Consultations on the validity of the GDR's bilateral agreements were carried out with 130 countries, and 2,044 of these agreements expired on the date of succession.³²⁵ Some agreements were terminated unilaterally by the FRG, which can be justified procedurally by the application of the principle of *rebus sic stantibus* and that of the above-mentioned clauses.³²⁶ The social security agreements concluded by the GDR with Bulgaria, Poland, Romania, Hungary, and the USSR remained in force.³²⁷

However, the succession of the Germanies deviated significantly from the principles of the 1978 Vienna Convention regarding the territorial regimes established in international treaties. The GDR was party to six agreements on navigation, fisheries, and the environmental protection of the Oder and maritime boundary areas, as well as four agreements with Czechoslovakia on the use of boundary rivers, navigation on the Elbe, and the boundary system, and two more agreements on the delimitation of maritime areas related to the continental shelf and fishing zones with Sweden and Denmark. Neither of these agreements remained in force; instead, they were amended or replaced by new agreements.³²⁸

Germany's approach was not opposed by other countries. The only exception was the Netherlands, which did not agree to the application of the *moving frontier* principle, that is, of the FRG's agreements to the whole territory of the new country. In this respect, the Netherlands referred to Article 31 of the 1978 Vienna Convention. The Treaty on the Final Settlement with Respect to Germany (the so-called "2 + 4 Treaty") stipulated that the external boundaries of the FRG and the GDR would be respected after the date of succession.³²⁹

322 *ibid* art 12(3).

323 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 262.

324 *ibid*.

325 *ibid* 263.

326 *ibid* 262.

327 *ibid* 263.

328 *ibid*.

329 Treaty on the Final Settlement with Respect to Germany (adopted 12 September 1990) 1696 UNTS 115 art 1.

5.6 Conclusions

Practice shows that the importance of the distinction between succession with and without continuing legal personality is even more pronounced in the case of succession to treaties than in that of property, archives, and debts. Treaties are part of a country's legal order, so it is understandable that succession has a minimal impact on the treaty status of the continuator State. The continuator State is legally identical to the predecessor State, which has undergone territorial changes. Succession in this area affects the continuator State only if the application of the treaty to the successor State would be incompatible with the object and purpose of the treaty or substantially modify the conditions for its execution.³³⁰ This is demonstrated by all the practice since the end of the Second World War.³³¹ This applies to multilateral as well as bilateral treaties. Crucially, in most cases, the continuator States are considered to be parties to the treaty from the date on which the latter was concluded by the predecessor State, and not only from the date of succession.

The practice of other successor States (i.e., not the continuator State) in cases of succession with continuing legal personality is not uniform. The practice until the end of the Cold War confirms the approach based on the clean-slate rule: these successor States usually did not succeed to the treaties (both multilateral and bilateral) of the predecessor State. In practice, after the Second World War but before the end of the Cold War, both Pakistan (at the time of its separation from India) and Singapore concluded a devolution agreement that recognized automatic succession but, in effect, selected which treaties to succeed to (thirty-one for Singapore, fourteen for Pakistan). Bangladesh, which did not conclude a devolution agreement, adopted the same approach.

Post-Cold War practice shows a different picture: the clean-slate rule has only been applied in the cases of Kosovo and South Sudan, whose origins are specific. The successor States of the USSR and Montenegro declared the continuity approach, but most of the successor States of the USSR then *acceded* to the USSR's treaties and did not *succeed* to them. Conversely, Montenegro did *succeed* to them, having consulted the contracting parties. However, the approach was followed at least at the declaratory level. This applied to both multilateral and bilateral treaties. The only significant difference lies in how the succession is confirmed. In the case of multilateral treaties, the successor State usually informs the depositary, which either obtains the consent of the

330 1978 Vienna Convention (n 2) art 34(2).

331 The old practice, mainly linked to the peace treaties of the 19th and 20th centuries, is not uniform and tends towards succession and non-succession.

other contracting parties (in the case of closed multilateral treaties) or informs them and, in the absence of objections, notifies the successor State of the succession. For bilateral treaties, however, the successor State and the contracting party usually review the treaties in respect of which succession is possible and then adopt a separate agreement confirming the list. The review is not in itself an obstacle to succession because it is merely a revision by the two States of those treaties that are not appropriate between them on the ground of incompatibility of purpose or object.

Montenegro's succession to the ECHR is a special case, on which the ECtHR ruled that Montenegro is bound not from the date of succession but from the date of its predecessor State's accession to the convention. As a consequence of the ECtHR's decision, Montenegro has the status of contracting party to the ECHR and, thus, all the rights and obligations arising from the convention since before the date of succession. Montenegro was therefore held responsible for breaches of international law that occurred while it was still part of its predecessor State.

In the case of cession, the *moving frontier principle* applies, whereby the law of the State to which the territory is ceded simply extends to the ceded part. The legal order of the predecessor State ceases to apply in the ceded part on the date of succession, and the legal order of the successor State becomes applicable. Exceptions are boundary and territorial regimes (see below). As with the separation of part of a territory, succession as such does not affect the validity of the continuator State's treaties, which continue to bind it from the date on which it became a contracting party (and not only the date of succession).

The practice regarding succession without continuing legal personality is different. In the event of the dissolution, the treaties concluded by the predecessor State were succeeded to by the successor States. This is confirmed by the practice after the Second World War (UAR) and after the end of the Cold War (SFRY and Czechoslovakia). The ILA noted that in the dissolutions of the SFRY and Czechoslovakia, the principle of automatic succession was applied, which was implemented through the negotiation of individual treaties. The ILA has also stated that negotiations in which States have agreed to terminate certain treaties (because they are either no longer relevant or politically inappropriate) do not diminish the importance of the basic point that treaties should remain in force unless States agree otherwise.³³²

As concerns incorporation and unification, the treaties of the predecessor State may remain in force after the date of succession, subject to *territorial*

332 ILA, 'Aspects of the law of state succession, Final Report—Part 1' (n 5) 291.

limitations, and bind only the part of the successor State that was formed from the predecessor State. Examples are the formation of the UAR and Tanzania and, with regard to certain treaties, the unification of Germany. In contrast, the treaties of Yemen's predecessor States apply to the entire territory of the successor State.

In cases of unification, treaties between predecessor States may apply (with or without territorial limitations) to the successor State not from the date of succession but from the date the predecessor State became a contracting party.³³³ This situation is defined by the ILA as a *fusion*.³³⁴ For example, the treaties of the two Yemeni bind the successor State Yemen from the moment one of the predecessor States first became a party. The same applies or has applied to Tanzania and the UAR.

The consequences of incorporation for the State to which the other State is attached are similar to those of a cession. In these cases, the *moving frontier principle* is also generally applied, according to which the legal order of the State into which the other State is incorporated enters into force on the territory attached, and the treaties of the latter cease to have effect. The *moving frontier principle* can also be applied to a limited extent to certain international treaties (e.g., related to NATO in the FRG). At the same time, the treaties of an incorporated State may remain in force with a territorial limitation to that territory.

Succession does not affect the border. This is proven by State practice in all forms of succession and all periods. In the past, peace treaties after wars established new borders, but even in these cases, the existing borders were taken as a basis. Succession does not, as a rule, affect the territorial regime either. Successor States also succeed to a territorial regime if it is relevantly linked to them—for instance, the Czech Republic did not succeed to the Belgrade Convention on the Navigation of the Danube as the Danube flows only through Slovakia.³³⁵ Boundaries and the territorial regime are succeeded to irrespective of whether the treaty that establishes them is as well.

State practice does not prove automatic succession to treaties covering humanitarian and human rights law, as the doctrine claims. However, it should be pointed out that in recent practice, the successor States (e.g., Soviet Union, Yugoslavia, and Czechoslovakia) have, at least at the declaratory level, recognized a special status for succession to these treaties.

333 Commentary on the 1978 Vienna Convention (n 14) para 25 et seq, 258. See also ILA, 'Aspects of the law of state succession, Final Report—Part I' (n 5) 315 and 319.

334 ILA, 'Aspects of the law of state succession, Final Report—Part I' (n 5) 315.

335 *ibid* 296–297.

Succession does not affect the binding nature of customary international law. Every State, including the successor State, has a duty “to fulfil any obligation embodied in the treaty to which it is subject under international law independently of the treaty,”³³⁶ even if it is not bound by this treaty by virtue of succession. The above applies a fortiori to *jus cogens*.

The treaty may also apply from a date before the date of succession. It is clear that the separation of part of a territory does not affect the treaty status of the continuator State.³³⁷ The same applies in cessions to the continuator State from which the ceded part has been separated. Treaties therefore bind the continuator State from the date it became a contracting party, not the date of succession. The ECtHR has ruled that a successor State (not the continuator) may also be bound by an agreement in cases of separation of part of a territory (Montenegro) and dissolution of the State (Czech Republic).

Even in an incorporation, succession does not generally affect the legal order of the State into which another State is incorporated. In this case, its legal order may remain applicable only on its territory (territorial limitation) or, following the *moving frontier principle*, on the whole territory. In the first scenario, it is clear that the validity of the treaties extends to the date of their conclusion and not only that of succession. In the second scenario, both options are possible.

Successor States are sometimes considered to be contracting parties (with or without territorial limitation) from the date on which their predecessor State became one, even in unifications (e.g., Yemen). It is therefore important to determine the practical implications of this phenomenon. The two options are as follows: a) the successor State is indeed a contracting party from a date before the date of succession, but all consequences (i.e., rights and obligations) apply to it only from the date of succession; or b) the successor State is a contracting party from a date prior to the date of succession, from which date the treaty is in full force and effect for it. With regard to option a), the question arises of whether it is even possible to have the status of a contracting party to which the treaty does not apply *ratione temporis* and what would this status entail in such a case. A reasonable conclusion would be that such a State is in fact a contracting party only from the date of succession. The ILC stated that the situation described by option b) seems *excessive* and that it is “difficult to believe, that the [successor States] which have expressed themselves as becoming parties from the date of their predecessor’s notification,

336 1978 Vienna Convention (n 2) art 5.

337 Unless the application of the treaty to the successor State would be incompatible with the object and purpose of the treaty or would materially alter the conditions for its execution.

accession, acceptance or approval of the treaty intended such a result.”³³⁸ It does not follow from the ILC’s opinion that such a situation is not possible or that it contravenes any rules. According to the principle of *pacta sunt servanda*, any agreement not contrary to *jus cogens* is possible. Hence, it is also possible for successor States to accept (explicitly or implicitly) the validity of such an agreement. This has been confirmed by the ECtHR based on the opinion of the Venice Commission when it ruled, in a number of cases related to the successions of Montenegro and the Czech Republic, that a treaty can bind a successor State before the date of succession.³³⁹ Option b) is therefore possible, at least to some extent.

338 Commentary on the 1978 Vienna Convention (n 14) para 6, 234–235. The ILC speaks of the succession of *newly independent States*, but the idea can also be applied to a broader context.

339 *Bijelić v Montenegro and Serbia* (n 60) para 69, 12.

Conclusions

A review of succession to individual matters shows that there are common features that form rules applicable to the whole field of State succession. The existence of these rules also demonstrates the coherence of the international law of State succession and the possibility of using inductive reasoning to fill legal gaps in narrow and specific areas not yet covered by legal instruments (e.g., succession to responsibility for internationally wrongful acts). The conclusions can be grouped into the following categories: principles, rules, and findings.

6.1 Principles

6.1.1 *Principle of Special Connection*

The principle of special connection is a thread running through the whole area of succession. It is linked, above all, to a special part of the matter. According to this rule, a matter that has a special connection with the successor State is succeeded to by that State.

It is not possible to give a general definition of the principle of special connection. However, the manifestations of this principle that apply to a particular matter are subject to professional interpretation and standards. As regards succession to archives, this rule is covered by the *principles of functional, historical, or territorial pertinence and provenance*, which are defined in detail by the rules of the archival profession. In the case of succession to debts, this rule takes the form of the *final beneficiary rule*, which is also identifiable. The link between the property and the territory (movable and immovable property) or the population (cultural heritage) and the connection between the treaty and the border, the government, or the investment project are also clear in the assessment of the specific case.

6.1.2 *Principle of Equity*

As mentioned above, the principle of equity is covered by all the relevant articles of the special part of the 1983 Vienna Convention.¹ It is also addressed

¹ Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 17, 18, 31, 37, 40, and 41.

by the IDI Resolution on State Succession to Property and Debts.² Equity is a basic element for the interpretation of the provisions of the convention and can be described as “the governing principle of the Convention or (...) the result sought after.”³ The convention does not define “equity,” leaving its determination to the States themselves.⁴ The importance of equity and fair share has also been recognized by the Badinter Commission, which listed “equitable outcome” as a primary objective of succession to the rights and obligations of the former SFRY.⁵ It highlighted the achievement of an equitable outcome as the main concern of the succession negotiations⁶ and asserted that the equality of rights and obligations must be fully respected.⁷

The 1983 Vienna Convention provides that equity and fair share should also be taken into account in the overall succession balance sheet concerning all rights and legal benefits related to the obligations (especially debts) acquired by the successor State.⁸ The articles of the convention “do not require that each category of assets or liabilities be divided in equitable proportions but only that the overall outcome be an equitable division.”⁹

6.1.3 General Legal Principles

Among the general legal principles mentioned in the ICJ statute as sources of international law, *pacta sunt servanda*, *pacta tertiis nec nocent nec prosunt*, *nemo plus iuris ad alium transferre potest, quam ipse haberet* and *res transit cum suo onere* are particularly relevant in the context of succession.

2 E.g., Institut du Droit International, ‘State Succession in Matters of Property and Debts, Resolution’ (2000–2001) 69 *Annuaire de l’Institut de Droit international* 712 (IDI Resolution on State Succession to Property and Debts) art 7, 8, and 11.

3 Martti Koskenniemi, ‘Report of the Director of Studies of the English-speaking Section of the Centre’ in Pierre Michel Eisemann and Martti Koskenniemi (eds), *La succession d’États: la codification à l’épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000) 91. On the importance of this principle for succession, see also Vladimir-Djuro Degan, ‘State succession, especially in respect of state property and debts’ (1993) 4 *Finnish Yearbook of International Law* 130, 188–193.

4 International Law Association, ‘Aspects of the law of state succession, Final Report—Part 1, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008’ (ILA 2008) 250, 333.

5 Opinions of the Arbitration Commission of the Conference on Yugoslavia (1992) 31 *International Legal Materials* 1494 (Badinter Commission) Opinions No 9, 12, and 14.

6 *ibid* Opinion No 9(2).

7 *ibid* Opinion No 9(4) point 3.

8 See, e.g., 1983 Vienna Convention (n 1) art 40 and 41.

9 Badinter Commission (n 5) Opinion No 13(2).

6.2 Confirmed Rules

Three general rules can be identified. The first relates to the matter and object of succession and, thus, applies to succession as a whole. The second refers to the division of the matter into specific and general parts, and the third to specific circumstances.

6.2.1 *Rules Regarding the Matter and Object of Succession*

The rules on the matter and object of succession apply to all forms of succession. There is only a partial divergence in the case of succession to treaties because treaties as such are expressions of rights and obligations existing between the contracting parties. The distinction between matter and object is thus more difficult to make.

The matter of succession is a mere objective fact (*questio facti*), which is not affected by the legal institution of State succession. As a result, the matter persists since it cannot be said that property and archives or assets placed in debt cease to exist after the date of succession. The legal changes of the predecessor State have no impact on the world of objective reality. The impact of succession on the *rights and obligations* that the predecessor State had vis-à-vis this matter is different. These rights and obligations—which are the object of succession—are profoundly affected by succession. The relationship between the matter and the object of succession is shown in the following sections.

6.2.1.1 Rights and Obligations as an Object of Succession

The two Vienna Conventions defined succession in general terms identically: “Succession of States means the replacement of one State by another in the responsibility for the international relations of territory.”¹⁰

That the *rights and obligations* of the predecessor State relating to its property,¹¹ archives,¹² and debts,¹³ and not the property, archives, and debts as such,

10 1983 Vienna Convention (n 1) art 2(1); Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 (1978 Vienna Convention) art 2(1).

11 1983 Vienna Convention (n 1) art 9: “The passing of State property of the predecessor State entails the *extinction of the rights* of that State and the *arising of the rights* of the successor State to the State property which passes to the successor State” (emphasis added).

12 *ibid* art 21: “The passing of State archives of the predecessor State entails the *extinction of the rights* of that State and the *arising of the rights* of the successor State to the State archives which pass to the successor State” (emphasis added).

13 *ibid* art 34: “The passing of State debts entails the *extinction of the obligations* of the predecessor State and the *arising of the obligations* of the successor State in respect of the State debts which pass to the successor State” (emphasis added).

are the object of succession is explicitly stated in the provisions of the 1983 Vienna Convention. With regard to all three matters, and in particular property and archives, the above should be understood in the light of all-encompassing substitution, which means that the successor State is entitled to all the rights of the predecessor State. As concerns *tangible* property and archives, it implies that the successor State also succeeds to the right of ownership, which allows it to dispose fully of the items in question. A successor State that has succeeded to a title to property may therefore take possession of and dispose of that property in the same way as the predecessor State could.¹⁴

Rights and obligations are also specifically highlighted in certain articles of the 1978 Vienna Convention (succession to treaties), notably with regard to individual rights and obligations in the context of the consequences of devolution agreements¹⁵ and unilateral declarations¹⁶ as well as the boundary regime¹⁷ and other territorial regimes.¹⁸ It should be borne in mind that the treaty relationship is a set of rights and obligations of the contracting parties and that it defines their position in relation to the other contracting parties. According to the definition of succession, the successor State *replaces* the predecessor State for the other contracting parties, which means that it assumes all of the rights and obligations of the predecessor State in this relationship. Consent to the conclusion of a treaty given before the date of succession by the predecessor State in relation to a territory “establishes a legal nexus between the territory and the treaty and (...) to this nexus certain legal incidents attach.”¹⁹ In this respect, the matter of succession is rather a legal relationship between States bound by a primary norm.

The conclusion that the object of succession is rights and obligations is important because both the IDI and the ILC have decided that, including in State succession to international responsibility, the object of succession will be not the international responsibility itself (as a legal relationship between the responsible State and the injured State) but instead the rights and obligations arising from this relationship.

14 To avoid possible disputes in the interpretation of the provisions, some treaties have therefore preferred to provide that the object of succession is the *property of the successor State* and not the rights *attached to that property*. See, e.g., Agreement on Succession Issues (adopted 29 June 2001) Official Gazette of the Republic of Slovenia No 71/2002 annex A art 1 and annex F art 1 (English version).

15 1978 Vienna Convention (n 10) art 8.

16 *ibid* art 9.

17 *ibid* art 11.

18 *ibid* art 12.

19 ILC, ‘Proceedings of the 26th Session’ (1974) UN Doc A/9610/Rev.1, para 49, 167.

6.2.1.2 Non-necessity of Succession to the Legal Basis of the Matter

Succession is usually not linked to the existence of a legal basis (e.g., a contract of purchase or credit) for the matter to belong to the predecessor State. Once the substance is recognized as belonging to the predecessor State (i.e., rights and obligations related to State property, archives, debts, and arising from international treaties), it is no longer relevant whether the legal basis on which the property, archives, and debts became that of the State is still in force or how the State became a party to the treaty in question.²⁰

The domestic law of the predecessor State is usually applied to determine whether the property and archives are State property. Once this fact has been established, the law of State succession applies, according to which the object of succession passes to the successor State. Once it is confirmed that a boundary exists, the successor State succeeds to it. The mere existence of the fact of the debt between the creditor and the predecessor State is sufficient for succession to the obligations relating to the debt since “a succession of States does not as such affect the rights and obligations of creditors.”²¹ This is very clear, for example, in the succession to the Yugoslav debt by Slovenia, where the successor State and the creditor merely confirmed the existence of the debt as a *de facto* situation, followed by a confirmation of the amount of the debt. The successor State and the creditor did not conclude an annex to the credit agreement, which was considered a mere objective fact on which basis the circumstances of the debt relationship were confirmed.²²

The boundary is succeeded to even if it is not based on a treaty but on customary international law. It is not the treaty that is succeeded to but the

20 This does not affect the possibility of challenging the legal basis for various acquisitions of property, debts of a territory, and so on. However, challenging the validity of—for example—a treaty through which a State has acquired property or a debt is not a succession issue. Thus, for instance, the Baltic States did not dispute the succession of the Soviet Union but rather their participation in that succession. The successor State, for example, claims that the boundary agreement was concluded illegally in the past and therefore does not recognize it. Nonetheless, the fact that a State does not recognize the validity of an agreement does not affect succession to the boundary as such. A State recognizes the succession to a boundary but not on the basis of a treaty that it considers to be legally defective.

21 1983 Vienna Convention (n 1) art 36.

22 See, e.g., Act on the ratification of the Agreement between the Government of the Republic of Slovenia and the Government of the Kingdom of Norway on the consolidation of the debt of the Republic of Slovenia (BNOKD) (9 July 2001) Official Gazette of the Republic of Slovenia No 57/2001; 583,585. Act on the Membership of the Republic of Slovenia in the International Monetary Fund (14 January 1993) Official Gazette of the Republic of Slovenia No 2/1993.

boundary and territorial regime established by the treaty,²³ which does not exclude the possibility that the treaty itself might be succeeded to if it is still binding on the predecessor State on the date of succession.²⁴ The absence of an impact of succession to the boundary is also reflected in two fundamental principles of international law: the *principle of territorial integrity* and the *principle of the immutability of frontiers*.

6.2.1.3 Immutability of the Succession Matter

Practice shows that the successor State acquires the same form of matter as that lost by the predecessor State or that the matter passes unchanged to the successor State. Thus, for example, in the absence of a specific agreement, the successor State succeeds to a treaty as it was on the date of succession (i.e., signature, ratification, reservations), and the same can be confirmed with regard to the property and debts, which are to be succeeded to in their form (interest, maturity) on that date.²⁵ Property is also succeeded to in the form it had on the date of succession; any subsequent expropriation by the successor State is already outside the scope of State succession.

The immutability of the matter of succession is usually followed by the immutability of the object. In this respect, the Third Restatement's definition of succession is more appropriate, according to which the object of the succession does not "extinguish and arise" but "terminate and is assumed" ("the capacities, rights, and duties of the Predecessor State (...) are assumed by the Successor State") in relation to the successor State.²⁶

The immutability of the debt and treaties (to be) succeeded to also derives from general principles of international law, such as *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt*, and that of the succeeded to property from *nemo plus iuris ad alium transferre potest, quam ipse habet*.

23 ILC, 'Draft articles on Succession of States in respect of Treaties with commentaries' (1974) UN Doc A/9610/Rev.1 (Commentary on the 1978 Vienna Convention) para 18, 201.

24 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 72.

25 Theoretically, an exception could be made for the guarantee, which was succeeded to separately from the debt in the case of Singapore and the UAR, but Singapore later assumed said guarantee, and Egypt considered itself a continuator of the UAR.

26 Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987) para 209, 102–103.

6.2.2 *Rule of the Division of the Matter into Specific and General Parts*

6.2.2.1 Existence of a Special Part of the Succession Matter

State practice demonstrates the essential importance of the division of matters into general and special parts. The designation of a special part derives from the connection (*principle of special connection*) of this matter with one of the successor States. On this basis, the special part of the matter is succeeded to differently from the general part and is governed by separate rules.

In the area of State property, a special part covers succession to immovable property on the territory of the successor State, cultural heritage, and property with a special link to a particular successor State. In the area of State archives, these are archives that are necessary for the functioning of the successor State (*functional pertinence*) or originate in its territory (*provenance*). A special part of debts is represented by so-called allocated or localized debts. In succession to treaties, this group includes boundaries and territorial regimes and, potentially, treaties in the field of human rights and humanitarian law as well.

A special part has a strong link to one or more of the constitutive elements of a State: territory, population, or government. Cultural heritage has a special link to the population, archives necessary for the functioning of the State have a special link to the government, and other elements (immovable property and other assets with a special link, allocated debts, the boundary, and the territorial regime) have a link to the territory. International human rights and humanitarian law treaties also have a link to the population.

6.2.2.2 Establishment of the Rules of Succession to a Special Part of the Matter

While succession to the larger general part of the matter is governed by rules that are often not uniform, rules with *lex specialis* status have developed for the special part in relation to succession to the rest of the matter. Moreover, some of the rules of succession to a special part are so well established as to attain the status of customary international law. This status is granted to succession to immovable property on the territory of the successor State (property) and the boundary and territorial regime (treaties). The ILC, ILA, and IDI do not refer to a rule of this kind in the field of succession to archives, but there is an established State practice in respect of archives necessary for the functioning of a territory and originating from it. There is also an almost homogeneous practice concerning succession to allocated debts.²⁷ As for international

27 See the review of the case law in ILC, 'Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries' (1981) UN Doc A/36/10 (Commentary on the 1983 Vienna Convention) para 25, 85.

human rights and humanitarian law treaties, the non-homogeneous practice does not allow for the emergence of a rule, but the doctrine reveals an emerging rule pointing towards automatic succession. Both practice and doctrine confirm that a special part of the matter is always succeeded to in its entirety, by a successor State whose constitutive element has a special connection with the matter.

6.2.2.3 Rules of Succession to the General Part

The practice of succession to the general part of the matter is less homogeneous and varies between types of succession.

In cases of succession with continuing legal personality, the general part of the matter usually remains in its entirety with the continuator State. This is usually the case for succession to property and debt. There is a special regime for succession to archives, which, because of their nature, can be copied and distributed among all the successor States (although the originals usually remain with the continuator), and to which all the successor States have general and unimpeded access. There are also specificities with regard to international treaties since they can be (under the usual conditions) succeeded to by all successor States if they are relevant to them. However, a treaty may also cease to be relevant to a successor State after the date of succession (e.g., the successor State is no longer a maritime State, so the shore-use provisions are no longer relevant to it) or the terms of performance of the treaty would be radically altered by the succession changes. Such treaties are therefore not succeeded to by the continuator. However, the continuator State continues the legal personality of the predecessor State and remains a contracting State not *ex nunc* from the date of succession but *ex tunc* from the date on which it became a contracting State (or became bound by the primary rule). The successor State also continues its membership in international organizations (i.e., its status as a contracting State to the constituent instruments of the international organizations).

In cases of dissolution, successor States usually succeed to the matter in equitable or proportional shares, for instance, through the distribution of diplomatic missions and banking assets abroad and the division of debts into proportional shares. As mentioned above, archival material can be copied and accessed, so its equitable distribution can be adjusted in the way it is copied. No sharing is necessary with regard to treaties as all successor States may succeed to them, but practice is heterogeneous in this respect and shows that successor States take different approaches to the validity of treaties on their territory (accession, succession, automatic succession, etc.). Succession by incorporation and unification is described below.

6.2.2.4 Importance of the Division of the Matter of Succession into Special and General Parts

State practice confirms that the division of types of succession according to the existence of a continuator State is only relevant for the general part of the matter as it usually remains with the continuator State. This division, however, does not affect succession to a special part of the matter, which—independently of the existence of a continuator State—is succeeded to by a successor State that has a specific link with it.

Two criteria are used to determine the consequences of succession: the *division of the matter of succession* and the *division of the types of succession*. Accordingly, the primary requirement is to determine to which part the portion of the matter belongs (the criterion of the *division of the matter of succession*). In this way, the matter is divided into a general part and a special part. The special part is succeeded to in its entirety by the successor State with a special connection to it. For the remaining (general) part, the criterion of the *division of the types of succession* is then applied using rules that depend on the type of succession and the existence of a continuator State.

6.2.3 *Rules with Limited Application*

6.2.3.1 Succession by the Continuator State

The existence of a successor State with continuator status is essential for assessing the consequences of succession to all the matters as the continuator State is legally identical to the predecessor State. A mere change in the size of the territory does not affect its legal personality, nor does it alter the legal title of all the matters. Therefore, its legal titles remain not *ex nunc* from the date of succession but *ex tunc* from the date on which it (as the predecessor State) acquired them.

As the previous section shows, the existence of a continuator State has an impact only on the general part of the matter that normally remains with it but has no effect on the special part, which, by virtue of the *principle of special connection*, is succeeded to by the successor State that has a specific connection with it.

6.2.3.2 Succession in Incorporation and Unification

After unification, the predecessor State can form a territorial unit of the successor State. The predecessor State may retain some elements of its former legal personality after the date of succession, but the level of its competence will depend on the internal legal order of the successor State. Such a situation may arise if the successor State is a federal State, in which case the predecessor State may retain a certain level of jurisdiction and, thus, potentially also

succeed to the matter within it.²⁸ In contrast, in the case of unitary states (e.g., Yemen), it is quite clear that the predecessor State loses its legal personality.

6.2.3.2.1 *Succession to Property, Archives, and Debts*

Regarding succession to property, archives, and debts, the ILA wrote that it is “clearly and manifestly logical” for the successor State to succeed to all the property of the predecessor States in the scenario of a unification of States.²⁹ This is confirmed by State practice, as legal instruments concluded in connection with unification often do not even mention succession to property and archives. The Third Restatement has taken an equally strong position on succession to debts, stating that in the event of a unification, the successor State “is deemed to assume” the predecessor State’s debts, otherwise “no source of payment would be available to creditors, and the successor state might be unjustly enriched, acquiring territory and other assets without corresponding obligations.”³⁰ The same is also clear from the 1983 Vienna Convention itself.³¹ All three positions on succession to property (including archives) and debts are largely confirmed by practice, and the above can also be applied to incorporation. An exception is, for instance, the relationship of the federally constituted FRG with the GDR’s debt to the UN.

It can be concluded that with incorporation and unification into a unitary State, the successor State succeeds to all the property, archives, and debts of the predecessor State(s)—both the general and the special part. However, in the case of incorporation and unification into a federal State, a detailed examination of the successor State’s internal legal system and the competence of the territorial units (e.g., *Länder* in the case of the FRG) is necessary.

6.2.3.2.2 *Succession to Treaties*

Succession to treaties differs in this respect from the other three matters. In the case of unification, the difference is not significant: whether the predecessor States remain bound by a treaty with territorial limitations (as territorial units) or whether the successor State as a whole is bound by it depends on the successor State’s internal legal order (and the consent of the contracting parties).

Some successor States (e.g., Tanzania) have decided that treaties will continue to apply after the date of succession with a territorial limitation (e.g.,

28 See, e.g., United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2000) UN Doc A/RS/59/38 art 2(1) point 2(b).

29 ILA, ‘Aspects of the law of state succession, Final Report—Part I’ (n 4) 331.

30 Third Restatement (n 26) para 209 point c, 103–104.

31 1983 Vienna Convention (n 1) art 39.

only on the territory of the former Tanganyika). However, successor States may decide (with the agreement of the contracting parties) to be bound by the treaties in respect of their whole territory. In both cases, the treaty is succeeded to from the date of succession.

There are also cases (e.g., Yemen) where, following unification, the predecessor States' treaties bind the successor State not from the date of succession but from the date on which they were concluded by the predecessors. This is possible with the consent of the successor State and the contracting parties.

In the case of incorporation, the *moving frontier principle* applies, according to which the treaties of the acceding State cease to apply on its territory and those of the continuator State enter into force.

6.2.3.3 Succession to the Matter of the Territorial Units

The succession of a State does not as such affect succession to the matter of the territorial units that are transferred with them to the successor State. In this case, the rule *res transit cum suo onere* applies, which is also accepted in principle in legal doctrine.³² In all forms of succession, except for the separation of an entire territorial unit, whether the successor State will succeed to the whole of the matter or remain in the territorial unit depends on the internal legal order of the successor State.

6.2.3.4 Applicability of Treaties after the Date of Succession

Specific rules have been developed on the validity of treaties in the event of succession. This is because, following the principle of *pacta sunt servanda*, treaties bind the contracting parties in accordance with their (express or implied) will. The peculiarity of treaties as concerns the other three succession matters is that succession may also affect their temporal validity. Succession does not usually affect the validity of treaties vis-à-vis the continuator State.³³ In this context, it is of great importance that a treaty remains in force for the continuator State not only from the date of succession but from the date on which it was concluded by the predecessor State.

The same is true in the case of a State that has been incorporated into another State because the latter also continues its legal personality and is, from this point of view, a continuator State. Its treaties, at least as regards its territory, apply from the date of their conclusion (and not the date of succession); if so agreed with the other contracting parties, these treaties may also apply to

32 Commentary on the 1983 Vienna Convention (n 27) para 2, 105.

33 Unless they cease to be relevant as a result of the succession or the succession radically changes the terms of fulfilment of the treaty.

the newly acquired territory, in accordance with the *moving frontier principle*. However, in this case, it will be necessary to determine whether the applicability to the territory of the incorporated State begins at the date of succession or conclusion.

However, the successor State may also be bound by a treaty from the date of its conclusion by the predecessor State in the case of a unification (see e.g., Yemen). ECtHR case law and the opinions of legal experts have confirmed that treaties can also bind successor States from a date before the date of succession in the event of the separation of part of a territory (see Montenegro and the Czech Republic).

PART 2

*Responsibility of States
for Internationally Wrongful Acts*



This part of the book examines the foundations of the responsibility of States for internationally wrongful acts. Responsibility derives from the State's status as a (primary) subject of international law and is original. Since no act can be performed by a State per se given that it is performed by individuals, the responsibility of States is established progressively. First, it is necessary to determine whether an act of an individual constitutes an act of the State (rules of attribution). Acts of individuals that can be attributed to the State are considered ipso facto acts of the State and are not first "theirs" and only then those of the State. It is then determined whether this act can be considered wrongful, that is, unlawful. At this stage, the time at which the act occurred or how long it lasted, the existence of a (primary) legal norm binding the State at the time of the act, and whether there are circumstances precluding wrongfulness must be confirmed. If the act also meets this criterion, we can speak of international responsibility. It is then necessary to define the legal consequences of the wrongful act and the rights of the injured State.

Chapter 1 defines the concept of State responsibility, focusing on the definition of the act and international wrongfulness. Chapter 2 describes the rules of attribution of acts to the State. The attribution of acts of insurgents and other movements is described in greater detail, as well as consent to the acceptance of the act. The next chapter deals with indirect responsibility, which distinguishes between the attribution of acts and the attribution of responsibility to the State. The consequences of breaches of international law are dealt with in Chapter 4; these consist of the rights of the injured State and the obligations of the violating State. The rights and obligations related to responsibility could be subject to succession, just as the rights and obligations related to property, archives, debts, and international treaties are. For this reason, the consequences of a breach are discussed in depth. Chapter 5 deals with the rules for the enforcement of international responsibility, which are procedural in nature and, therefore, not per se relevant to succession to responsibility but are nevertheless briefly presented. The last chapter draws conclusions and highlights elements of the international responsibility of States that could be subject to succession.

Definition of International Responsibility of States

It is undisputable, that “State responsibility is a fundamental principle of international law, arising out of the nature of the international legal system and the doctrines of state sovereignty and equality of states.”¹ International responsibility refers to the new relationship that arises between the offending State and the injured State. This relationship arises ipso facto from the moment of the breach.² Hence, international responsibility, as a system of secondary rules, has a certain degree of non-autonomy because it only comes into being when the primary rule is violated.³ At that moment, new obligations are created for the violating State and new rights for the injured State.⁴ The content of these rights is also linked to the primary rules, but international responsibility exists independently.

Thus, after a breach, there are two relations between the relevant States: one based on the international legal norm that has been breached, and the international responsibility that results from the breach of that norm.⁵ While the injured State may decide whether to avail itself of the rights it acquires through the creation of a new legal relationship,⁶ the existence of the obligation of the violating State does not depend on the will of the injured State:⁷ “The general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State.”⁸ Thus, the ILC has treated the

1 Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge University Press 2017) 589.

2 ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) Yearbook of the International Law Commission (Commentary on the ARSIWA) para 2, 32.

3 Brigitte Stern, ‘The obligation to make reparation’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 565.

4 Sean D Murphy, *Principles of international law* (2nd ed, Thomson/West 2012) 207.

5 ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/49(Vol. 1)/Corr.4 (ARSIWA) art 29.

6 Robert Kolb, *The international law of state responsibility: an introduction* (Edward Elgar Publishing 2017) 148.

7 Andre Nollkaemper and Dov Jacobs, ‘Shared responsibility in international law: A conceptual framework’ (2013) 34(2) Michigan Journal of International Law 359, 402.

8 ILC, ‘Third report on State responsibility by James Crawford, Special Rapporteur, ILC, 52nd session’ (2000) UN Doc A/CN.4/507 para 26, 18.

protection of the rule of law as an independent legal concept.⁹ Similarly, the purpose of the institution of international responsibility is not to punish the wrongdoer but to restore the *status quo ante*.¹⁰

As regards the scope of State responsibility, it is reasonable to refer to the ARSIWA, which have been elaborated by the ILC, together with its commentaries.¹¹ The ARSIWA stipulate that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”¹²

7.1 Acts of a State

An internationally wrongful act (or breach) of a State exists if the act (or conduct) can be attributed to that State under international law and if said act constitutes a breach of its international obligations.¹³ A conduct can be both active or passive, the commission or omission of a conduct, or a combination of both.¹⁴

For a breach of international law to arise and exist, two elements must thus be combined: a conduct and a legal rule it violates.¹⁵ If a State’s conduct violates its international obligations, we speak of a wrongful act (or breach) from which the consequences of international responsibility flow.¹⁶

To determine whether a conduct constitutes a breach of a State’s international obligations, a primary rule assessment is required. The ARSIWA do not in themselves require the occurrence of damage (injury) for responsibility to arise.¹⁷ In the words of Special Rapporteur Crawford, Articles 1 and 2 of the ARSIWA “do not, of course, deny the relevance of damage, moral and material, for various purposes of responsibility. They simply deny that there is a categorical requirement of moral or material damage before a breach of an international norm can attract responsibility.”¹⁸

9 Nollkaemper and Jacobs (n 7) 402.

10 Kolb (n 6) 148.

11 Commentary on the ARSIWA (n 2).

12 ARSIWA (n 5) art 1.

13 *ibid* art 2.

14 Commentary on the ARSIWA (n 2) para 1, 32.

15 Dionisio Anzilotti, ‘La responsabilité de l’État à raison des dommages soufferts par des étrangers’ (1906) 13 *Revue générale de droit international public* 5, 14.

16 ARSIWA (n 5) art 2.

17 Commentary on the ARSIWA (n 2) para 9, 36.

18 James R Crawford, *State responsibility: The general part (Cambridge studies in international and comparative law)* (Cambridge University Press 2013) 59.

If the primary rule specifically requires damage, this condition will have to be fulfilled for a breach to occur. Nevertheless, the primary rule often does not specify all the details,¹⁹ and it is recognized that damage may also be intangible (i.e., of a moral, political, or legal nature),²⁰ the value of which is difficult to determine. This is also stated by the ARSIWA: “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”²¹

The fact that damage is not necessarily a condition for international responsibility does not mean that the reverse is also true since damage is a consequence of every wrongful conduct.²² The difficulty of calculating the value of moral damages is not an argument against recognizing the existence of such damages²³ because moral damages can also be assessed and, thus, be the subject of a claim for financial reparation (most likely compensation).²⁴

19 Murphy (n 4) 202–203.

20 *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* 20 UNRIAA 215 (1990) (*Rainbow Warrior Affair*) para 110, 267.

21 ARSIWA (n 5) art 31(2).

22 Dionisio Anzilotti, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale* (F. Lumachi Libraio-Editore 1902) 89. On the role of damages in relation to international responsibility, see also Stephan Wittich, ‘Non-material damage and monetary reparation in international law’ (2004) 15 *Finnish Yearbook of International Law* 321; Gunther Handl, ‘Territorial sovereignty and the problem of transnational pollution’ (1975) 69(1) *American Journal of International Law* 50; Alan E Boyle, ‘State responsibility and international liability for injuries consequences of acts not prohibited by international law: A necessary distinction’ (1990) 39(1) *International and Comparative Law Quarterly* 1; John M Kelson, ‘State responsibility and the abnormally dangerous activity’ (1972) 13(2) *Harvard International Law Journal* 197. With a focus on environmental damage: Benoit Mayer, ‘Climate change reparations and the law and practice of state responsibility’ (2017) 7(1) *Asian Journal of International Law* 185; Christina Voigt, ‘State responsibility for climate change damages’ (2008) 77(1–2) *Nordic Journal of International Law* 1; Caroline E Foster, ‘Compensation for material and moral damage to small island states’ reputations and economies due to an incident during the shipment of radioactive material’ (2006) 37(1) *Ocean Development and International Law* 55.

23 *Opinion in the Lusitania Cases* 7 UNRIAA 32 (1 November 1923) (*Lusitania*) 40: “Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages.”

24 Christian Tomuschat, ‘International law: Ensuring the survival of mankind on the eve of a new century: general course on public international law’ (1999) 281 *Recueil des Cours, Collected Courses of the Hague Academy of International Law* 2 para 40, 299.

As regards the need for a specific relationship (fault) of the State to the breach, there are two principles: the *principle of objective responsibility* and the *principle of subjective responsibility*.²⁵ According to the first, a State is responsible for the mere failure to fulfill its international law obligation.²⁶ Responsibility under the second principle is satisfied only if the State commits a breach with a certain degree of culpability.²⁷ Case law is familiar with the application of both principles, but the majority is on the side of objective responsibility.²⁸ The ARSIWA have taken the view that the need for State culpability depends on the primary rule. Generally, therefore, fault is not necessary for international responsibility to arise unless required by the primary norm (e.g., in the case of genocide, where a subjective attitude of the State towards the objective fact is required in addition to the objective fact).²⁹

7.1.1 *Duration of the Breach*

A breach may be single, continuing, or composite. It is necessary to distinguish the consequences from the breach itself (the performance of the unlawful act) as they may last for a longer period but are not part of the act itself. The fact that an act has significant *consequences* does not mean that it is a continuing breach.³⁰

A single breach takes place at the moment of its occurrence,³¹ whereas a continuing breach lasts for the entire period during which the conduct

25 Shaw, *International Law* (8th edn) (n 1) 593.

26 Commentary on the ARSIWA (n 2) para 3, 34; Ian Brownlie, *System of the law of nations, State Responsibility, Part 1* (Clarendon Press 1983) 132; Danilo Türk, *Temelji mednarodnega prava* (2nd edn, GV Založba 2015) 222.

27 Shaw, *International Law* (8th edn) (n 1) 593.

28 *ibid*; Patrick Dumberry, 'Compensation for moral damages in investor-state arbitration disputes' (2010) 27(3) *Journal of International Arbitration* 247, 270–271.

29 For a more detailed discussion of the need for fault, see: Andre Nollkaemper, 'Concurrence between individual responsibility and state responsibility in international law' (2003) 52(3) *International and Comparative Law Quarterly* 615; Oliver Diggelmann, 'Fault in the law of state responsibility—Pragmatism ad infinitum' (2006) 49 *German Yearbook of International Law* 293. For a more detailed analysis of the nature and legal foundations of fault, see: Riccardo Pisillo-Mazzeschi, 'The due diligence rule and the nature of the international responsibility of states' (1992) 35 *German Yearbook of International Law* 9. On the comparison of domestic and international legal views on fault: David J Bederman, 'Contributory fault and state responsibility' (1990) 30(2) *Virginia Journal of International Law* 335. Also on the issue of fault in the relationship of the State with non-State actors: Robert P Barnidge, Jr, 'The due diligence principle under international law' (2006) 8(1) *International Community Law Review* 81.

30 *Posti and Rahko v Finland* App No 27824/95 ECtHR, 21 May 2003 para 40, 8–9.

31 ARSIWA (n 5) art 14(1).

continues and remains in violation of the international obligation of the State.³² Determining whether a situation can be considered wrongful (i.e., part of a continuing breach) or merely the consequence of a breach is often difficult and depends on the primary norm and the specific circumstances.³³ The relevant analysis concerns whether the breaching State can be required to end the unlawful situation (*cessation*):³⁴ if cessation is possible (e.g., the release of hostages), we can speak of a continuing breach; if cessation is not possible because the offending State is no longer carrying out an act, there are likely to be consequences (e.g., emotional problems of hostages already released). To confirm whether an act constitutes a breach, a primary rule assessment is required. Thus, in some cases, the threat or attempt to commit an act is sufficient to constitute a wrongful act.³⁵ It is accepted, however, that *preparatory* acts in themselves do not usually constitute a breach as long as they do not “predetermine the final position to be taken.”³⁶

A special case is *composite* wrongful acts, where individual acts may not be unlawful in themselves but constitute a breach in combination with other acts.³⁷ It is also possible that, while a single act is wrongful (e.g., the killing of individuals belonging to specific ethnic groups), it becomes part of another wrongful act (e.g., genocide) in combination with other acts. Once the acts exceed the threshold required for a composite breach, the period of the wrongful act extends from the first act that forms part of the combination.³⁸

The timing of the act is important for determining whether the State was bound by international law at a given moment. It is also relevant to confirm the jurisdiction of the tribunal *ratione temporis*,³⁹ but this latter question does not in itself affect the existence of an obligation under international law. The ICJ has already held in several cases that although it had no legal basis for jurisdiction, the obligation did not cease to exist. Obligations retain their validity and legal force, and States must continue to respect them.⁴⁰

32 *ibid* art 14(2).

33 Deliberated in e.g., *Papamichalopoulos and Others v Greece* App No 14556/89 ECtHR, 31 October 1995, para 40,13; *Ilaşcu and others v Moldova and Russia* App No 48787/99 ECtHR, 8 July 2004 para 402, 93; *Phocas v France* App No 17869/91 ECtHR, 26 March 1996 para 49; *Loizidou v Turkey* App No 15318/89 ECtHR, 23 March 1995 para 27, 8.

34 ARSIWA (n 5) art 30.

35 Commentary on the ARSIWA (n 2) para 13, 61.

36 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep para 79, 54.

37 ARSIWA (n 5) art 15(1).

38 *ibid* art 15(2).

39 See, e.g., *Tričković v Slovenia* App No 39914/98 ECtHR, 12 June 2001 3.

40 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Crime*

7.2 International Wrongfulness

International legal responsibility can only arise from a breach of an international legal norm. A violation of the domestic law of a State does not in itself constitute a violation of an international obligation of the State, nor can a State invoke its domestic law in defense of a breach of an international norm,⁴¹ as the 1969 Vienna Convention also states.⁴² Even if the act is in accordance with the domestic law of the State, there may be a breach of its international obligations. Moreover, State power holders' conduct may be in breach of the State's international obligations even if domestic law requires them to take the action in question.⁴³ However, the domestic law of a State is relevant for assessing whether an individual can be considered an organ of the State, that is, for the question of *attribution*, but only when an international legal norm refers to it.⁴⁴

7.2.1 Nature of the Breached Primary Rule

State responsibility is the result of a State's breach of its international law obligation. It is irrelevant from what legal basis this obligation originates; breaches may arise from bilateral and multilateral treaties as well as from customary international law.⁴⁵ In the *Rainbow Warrior* case, the ICJ stated that "any breach by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation."⁴⁶ It similarly noted, in the *Gabčíkovo-Nagymaros* case: "It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect."⁴⁷

of Genocide [Bosnia v Serbia and Montenegro] [Judgment] para 148, 104; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction of the Court and Admissibility of the Application: Judgment) [2006] ICJ Rep (*Armed Activities* [Jurisdiction and Admissibility]) para 127, 52–53.

41 ARSIWA (n 5) art 3. On the relationship between international and domestic law, see also: Mirjam Škrk, 'Odnos med mednarodnim pravom in notranjim pravom v praksi Ustavnega sodišča' (2007) 62(6–8) *Pravnik* 275.

42 Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (1969 Vienna Convention) art 27.

43 Commentary on the ARSIWA (n 2) para 1, 104–105.

44 Kolb (n 6) 71–72.

45 ARSIWA (n 5) art 12. On violations of general legal principles (e.g., *sic utere tuo ut alienum non laedes*), see Mirjam Škrk, 'Varstvo okolja pred onesnaževanjem v mednarodnih odnosih' (1988) 48 *Zbornik znanstvenih razprav* 157.

46 *Rainbow Warrior Affair* (n 20) para 75, 251.

47 *Gabčíkovo-Nagymaros Project* (n 36) para 47, 38.

The ARSIWA contain a specific article related to the violation of *jus cogens*.⁴⁸ The ICJ has also ruled in many cases that certain rules of international law are of such a nature as to have *erga omnes* effect.⁴⁹ These obligations affect all States: “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.”⁵⁰

7.2.2 *Applicability of the Primary Rule*

The international legal norm must bind the State at the time the act is committed.⁵¹ This rule also derives directly from the 1969 Vienna Convention.⁵² It is one of the general legal principles of international law, which prevents the retroactive application of legal rules and provides legal predictability and legal certainty.

The other side of this rule is that a State does not cease to be responsible if the primary obligation that bound it at the time of the breach subsequently ceases to do so. Once international responsibility is established, it will remain in force regardless of subsequent changes in the obligations between the breaching and injured States.⁵³ A State will not be able to plead that it is no longer bound by a rule it violated at the time of the conduct. It is true that if the primary rule subsequently ceases to apply, the breach ceases from that moment on since it is not possible to breach something that is no longer binding.⁵⁴ This is particularly important in the case of continuing breaches. However, this does not mean that the State is not responsible for the breach committed at the time; its responsibility does not disappear simply because the primary rule has lost its validity. In *Rainbow Warrior Affair*, the Tribunal confirmed that international

48 ARSIWA (n 5) art 26. See, e.g., ILC, ‘Peremptory norms of general international law (jus cogens), Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, International Law Commission, 71st session’ (2019) UN Doc A/CN.4/L.936; Gennady M Danilenko, ‘International jus cogens: Issues of law-making’ (1991) 2(1) *European Journal of International Law* 42; W Jan Wouters and Sten Verhoeven, ‘The prohibition of genocide as a norm of ius cogens and its implications for the enforcement of the law of genocide’ (2005) 5(3) *International Criminal Law Review* 401; James A Green, ‘Questioning the peremptory status of the prohibition of the use of force’ (2011) 32(2) *Michigan Journal of International Law* 215, 234–251.

49 See, e.g., *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep (*Barcelona Traction* [Judgment]) para 33, 32; *Armed Activities* (Jurisdiction and Admissibility) (n 40) para 60, 30.

50 See, e.g., *Barcelona Traction* (Judgment) (n 49) para 33, 32.

51 ARSIWA (n 5) art 13.

52 1969 Vienna Convention (n 42) art 28.

53 Commentary on the ARSIWA (n 2) para 7–8, 58–59.

54 *Rainbow Warrior Affair* (n 20) para 105, 265–266.

responsibility exists as a separate relationship between the breaching State and the injured State: “the claims (...) have an existence independent of the expiration of the (...) Agreement and entitle [the injured State] to obtain adequate relief for these breaches.”⁵⁵ Of course, the procedural question of consent to the jurisdiction of the Tribunal remains open, since a treaty that is no longer in force does not provide a legal basis for a claim.⁵⁶

In this case, the Tribunal cited the 1969 Vienna Convention, which states that “[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty (...) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.”⁵⁷ A similar thought can be found in the ECHR, which provides, with regard to the denunciation of a convention by a contracting party, that

[s]uch a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.⁵⁸

A State may also accept certain consequences for a conduct that was not wrongful for it at the time it occurred (e.g., because it was not bound by the primary norm at the time). A State may therefore accept responsibility retroactively for an act that did not constitute a breach of its obligations at the time it was committed.⁵⁹ The ARSIWA also allow for this possibility under the *lex specialis* rule.⁶⁰ This rule is not to be confused with the acknowledgment and adoption of a conduct, which is set in Article 11 of the ARSIWA.⁶¹ In this case, the State was (as a rule) bound by the primary rule at the time of the commission of the act, but the act itself could not be attributed to it.

55 *ibid* para 106, 266.

56 *Case concerning the North Cameroons (Cameroon v United Kingdom)* (Preliminary Objections: Judgment) [1963] ICJ Rep 35.

57 1969 Vienna Convention (n 42) art 70(1).

58 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 5 CETS (ECHR) art 58(2).

59 Commentary on the ARSIWA (n 2) para 6, 58: “It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State.”

60 ARSIWA (n 5) art 55.

61 See 8.2. *Special cases of attribution*.

The third option is the consent of the State to be bound by the primary rule itself retroactively, that is, from a date before it became a contracting party (in the case of treaties). This option is also conditionally provided for in the aforementioned article of the 1969 Vienna Convention, which allows the possibility of retroactive application of a treaty if this was the intention of the parties or if it is otherwise established.⁶² This rule is confirmed in practice. After examining the Montenegrin Constitution, legislation, and statements of its government, the ECtHR found that Montenegro is considered a party to the ECHR and its protocols from the moment its predecessor State acceded to it (March 3, 2004),⁶³ even though Montenegro did not become independent until June 3, 2006.⁶⁴ The case of the Republic of Yemen, which was formed in 1990 through the unification of two States, can also reasonably be considered to belong to this category. Yemen is regarded as a party to a treaty of its own volition from the moment when one of its predecessor States first became a party to it. The Republic of Yemen is thus considered a party to the Slavery Convention, signed in Geneva on September 25, 1926, and amended by the protocol since February 9, 1987. Hence, the primary rule binds Montenegro and Yemen from a date before their existence.

There are three possibilities: a) the acceptance of certain consequences for a conduct that was not wrongful for the State at the time it took place (in line with Article 55 of the ARSIWA), b) the acknowledgment and adoption of a conduct that, although it would constitute a breach of the State's obligations, is not attributable to the State (in conjunction with Article 11 of the ARSIWA), and c) the acceptance of the retroactive application of the primary rule, irrespective of the existence of the act or the possibility of attribution (in line with Article 13 of the ARSIWA). The retroactive applicability of the primary rule does not prejudice the existence of an act (breach) attributable to the State. Nor does the existence of the act prejudice imputability to the State. In order for a State to be responsible for an act, all three conditions must be present simultaneously: the existence of a rule, the existence of an act (breach), and the attribution of this act to the State. For all three (individually or jointly), the State may consent to retroactive application.

62 "Unless a different intention appears from the treaty or is otherwise established." 1969 Vienna Convention (n 42) art 28.

63 "Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004." *Bijelić v Montenegro and Serbia* App No 11890/05 ECtHR, 28 April 2009 para 69, 12.

64 *ibid* para 67–69, 11–12.

Attribution of a Conduct

Attribution is a legal fiction that links a conduct (act or omission) of an individual to a State.¹ The acts of a State are essentially the acts of individuals who have the authority to act on its behalf or are otherwise connected to it.² However, a conduct of an individual does not constitute a conduct of the State merely because of a cause-and-effect relationship, but it must be judged through the lens of international law.³ Attribution is, therefore, “the process by which international law establishes whether the conduct of a natural person or other such intermediary can be considered an ‘act of state.’”⁴ It is important to note that this is not a conduct of an individual that is transferred to the State but a conduct that is considered to be that of the State from the outset.⁵

Attributing a conduct to a State is the first (subjective) condition that must be fulfilled before the question of whether this conduct constitutes an internationally wrongful act (objective condition) can be answered. The basic rule is that a conduct of a State is an act of its organs or other persons acting on instructions or under the direction or control of the State. The mere general connection of an individual with a State, such as nationality or domicile, does not mean that their acts are attributable to the State.⁶

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- 1 Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge University Press 2017) 593. For a further discussion of attribution rules, see Kristen E Boon, ‘Are control tests fit for the future: The slippage problem in attribution doctrines’ (2014) 15(2) *Melbourne Journal of International Law* 330. Specifically on the current difficulty of attribution for cyberattacks: Peter Margulies, ‘Sovereignty and cyber attacks: Technology’s challenge to the law of state responsibility’ (2013) 14(2) *Melbourne Journal of International Law* 496; William Banks, ‘State responsibility and attribution of cyber intrusions after Tallinn 2.0’ (2017) 95(7) *Texas Law Review* 1487. On attribution for omissions: Gordon A Christenson, ‘Attributing acts of omission to the state’ (1991) 12(2) *Michigan Journal of International Law* 312, 360–365.
 - 2 *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) [1923] PCIJ Rep Series B No 6 22.
 - 3 James R Crawford, *State responsibility: The general part* (*Cambridge studies in international and comparative law*) (Cambridge University Press 2013) 114.
 - 4 *ibid* 113.
 - 5 Robert Kolb, *The international law of state responsibility: an introduction* (Edward Elgar Publishing 2017) 70.
 - 6 ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) *Yearbook of the International Law Commission* (Commentary on the ARSIWA) para 1–3, 38.

A detailed description of various possibilities of attribution surpasses the scope of this book, which focuses only on the conduct of State organs in their official capacity and on special cases of attribution. Others are described in Articles 4–9 of the ARSIWA and can be grouped into the following categories: a) conduct of State organs placed at the disposal of a State by another State,⁷ b) conduct of other individuals,⁸ c) conduct of individuals authorized to perform public functions,⁹ d) conduct of individuals acting on instructions or under the direction or control of the State,¹⁰ and e) conduct of individuals

7 See: ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/49(Vol. 1)/Corr.4 (ARSIWA) art 6; Commentary on the ARSIWA (n 6) para 1–7, 44–45; Crawford, *State Responsibility* (n 3) 135–136; *Case of X. and Y. v Switzerland* App No 7289/75 and 7349/76 ECtHR, 14 July 1977.

8 See: Crawford, *State Responsibility* (n 3) 126; Oona H Hathaway and others, 'Ensuring responsibility: Common Article 1 and state responsibility for non-state actors' (2017) 95(3) *Texas Law Review* 539, 547; Kolb (n 5) 73–79; Richard J Goldstone and Rebecca J Hamilton, 'Bosnia v. Serbia: Lessons from the encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 *Leiden Journal of International Law* 95, 97–98; Ian Brownlie, *System of the law of nations, State Responsibility, Part 1* (Clanderon Press 1983) 136; Marko Milanović, 'State responsibility for genocide' (2006) 17(3) *European Journal of International Law* 553, 587; Gordon A Christenson, 'The doctrine of attribution in state responsibility' in Richard B Lillich (ed), *International law of state responsibility for injuries to aliens* (University Press of Virginia 1983) 332–333; Enrico Milano, 'The investment arbitration between Italy and Cuba: The application of customary international law under scrutiny' (2012) 11(3) *Law and Practice of International Courts and Tribunals* 499, 512.

9 Crawford, *State Responsibility* (n 3) 127–131.

10 See: ARSIWA (n 7) art 8; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits: Judgment) [1986] 1CJ Rep 14 (*Nicaragua*); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] 1CJ Rep 43 (*Crime of Genocide [Bosnia v Serbia and Montenegro]* [Judgment]); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] 1CJ Rep 3 (*Crime of Genocide [Bosnia v Serbia and Montenegro]* [Judgment]); *Prosecutor v Duško Tadić* (Judgment on Appeal) ICTY-94-1-A (15 July 1999); *Prosecutor v Aleksovski* (Judgment on Appeal) ICTY-95-14/1-A (24 March 2000); *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo* (Judgment on Appeal) ICTY-96-21-A (20 February 2001); *Prosecutor v Kordic and Cerkez* (Judgment on Appeal) ICTY-95-14/2-A (17 December 2004). On accountability for non-State actors acting on instructions or under the direction or control of a State, see also Boon (n 1) 341–352; Berenice Boutin, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control' (2017) 17 *Melbourne Journal of International Law* 154; Tom Dannenbaum, 'Translating the standard of effective control into a system of effective accountability: How liability should be apportioned for violations of human rights by member state troop contingents serving as United Nations peacekeepers' (2010) 51(1) *Harvard International Law Journal* 113; Antonio Cassese, 'The Nicaragua and Tadic

who, in the absence of official authority, exercise elements of the governmental authority.¹¹

8.1 Conduct of State Organs in their Official Capacity

The conduct of any State organs is considered an act of the State. Which branch of government said organ belongs to is irrelevant, as are the function it performs within the organization of the State and whether it is part of the central authority or the territorial units (e.g., federal republics) of the State.¹² This rule has the status of customary international law.¹³

The ILC stated that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State.”¹⁴ By using the word *includes*, the ARSIWA have prevented States from invoking domestic law to deny the status of State organ to persons who are in fact one.¹⁵ Despite

tests revisited in light of the ICJ judgment on genocide in Bosnia’ (2007) 18(4) European Journal of International Law 649, 663; Nikolaos Tsagourias, ‘The Nicaragua case and the use of force: The theoretical construction of the decision and its deconstruction’ (1996) 1(1) Journal of Armed Conflict Law 81; Cedric Ryngaert, ‘Apportioning responsibility between the UN and member states in UN Peace-Support Operations: An inquiry into the application of the effective control standard after Behrami’ (2012) 45(1) Israel Law Review 151; Jörn Griebel and Milan Plücker, ‘New developments regarding the rules of attribution? The International Court of Justice’s decision in Bosnia v. Serbia’ (2008) 21(3) Leiden Journal of International Law 601. In addition, a critical commentary on the latter article: Marko Milanović, ‘State responsibility for acts of non-state actors: A comment on Griebel and Plücker’ (2009) 22(2) Leiden Journal of International Law 307, 315–324.

11 ARSIWA (n 7) art 9; Commentary on the ARSIWA (n 6) para 1–5, 49; Crawford, *State Responsibility* (n 3) 169; Kolb (n 5) 79; Cedric Ryngaert, ‘Human rights obligations of armed groups’ (2008) 41(1–2) *Revue Belge de Droit International* 355, 361.

12 ARSIWA (n 7) art 4(1). Violations are not limited to the executive branch of government; a violation of international law may also be committed by the judicial branch (e.g., in the case of an incorrect interpretation of a treaty or a failure to recognize the effect of an obligation under a treaty; Brownlie [n 8] 144) and certainly also in the case of a “denial of justice” (*Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep (*Barcelona Traction* [Judgment]) para 91, 47). With regard to breaches committed by the legislative branch, some are of the opinion that they occur only when a law itself causes damage, not merely its enactment. However, the more accepted view is that the occurrence of damage per se is not of primary importance, what matters is to assess the provisions of the primary rule and establish the State’s actual obligation. Christenson, ‘The doctrine of attribution in state responsibility’ (n 8) 330–331; Commentary on the ARSIWA (n 6) para 12, 57.

13 Crawford, *State Responsibility* (n 3) 117.

14 ARSIWA (n 7) art 4(2).

15 Commentary on the ARSIWA (n 6) para 11, 40.

the *prima facie* importance that the ARSIWA gave to domestic law, a State's domestic law is used only because international law refers to it and, therefore, remains subordinate to international law.¹⁶ The broad definition also makes the act of the lowest official in the State structure an act of the State; this is an application of the *principle of the unity of the State*.¹⁷ It is generally accepted that the position of an individual in the internal hierarchy is irrelevant to the attribution of conduct, which makes sense given that most of the concrete decisions of the State are made by officials in subordinate positions in the State structure.¹⁸

As concerns the acts of the organs of territorial units, the level of autonomy enjoyed by the territorial unit of the State to which the organ belongs is irrelevant.¹⁹ A special case is territorial units (e.g., federal States) with limited international legal personality, that is, the autonomy to conclude international treaties themselves. Their contracting parties have accepted the circumstances; in the event of a breach, their options will be limited by the actual competence of the territorial unit. Such cases require case-by-case analyses as they constitute *lex specialis* with regard to the rules on State responsibility.²⁰ The division of State conduct into *acta iure gestionis* and *iure imperii* is also irrelevant to the question of attribution.²¹

Tribunal decisions²² and doctrine confirm that the conduct of State organs beyond their powers (*ultra vires*) can also be imputed to the State if the organ acted within an *apparent official capacity* or under *color of official authority* (*within the scope of the function*). The latter is the broadest situation, where acts can be attributed to officials even though they did not act within the apparent authority.²³ Such cases include a police officer who abuses their position for personal revenge, but in a way that the average observer would consider to be normal police activity.²⁴ A problem arises when a representative of a State organ acts for their personal gain (e.g., a bribe), but their personal gain is only

16 Kolb (n 5) 72–73.

17 Commentary on the ARSIWA (n 6) para 5, 40.

18 Brownlie (n 8) 135.

19 Commentary on the ARSIWA (n 6) para 9, 40.

20 *ibid* para 10, 42.

21 *ibid* para 6, 41.

22 E.g., *Estate of Jean-Baptiste Caire v Mexico (France/Mexico)* 5 RIAA 516 (1929); Mexican-US Claims Commission *Thomas H. Youmans (USA) v United Mexican States* (1926) 4 UNRIAA 110 (2006) 110–117.

23 Christenson, 'The doctrine of attribution in state responsibility' (n 8) 329.

24 Brownlie (n 8) 144.

possible because of the office they hold.²⁵ In this case, too, although the official may have abused their office, this may be an act of the authority (and, thus, of the State),²⁶ but there are limitations. Such a conduct of a State organ can only be imputable to the State if the authority acted in an *apparent official capacity*, that is, the average observer could have been of the opinion that the organ was exercising its powers.²⁷ Consequently, the mere fact that an act was performed by a State organ is not sufficient to decide on the State's responsibility; a case-by-case assessment is required.²⁸ If the action of the authority is so clearly outside the scope of its competence that it should be obvious to anyone, the act cannot be attributed to the State.²⁹ The possibility of attributing *ultra vires* acts to the State therefore also depends on the legitimate expectations of the observer.³⁰

8.2 Special Cases of Attribution

Specific cases include the attribution of acts to insurrectional and other movements and the acknowledgment and adoption of an act as one's own.

8.2.1 *Insurrectional and Other Movements*

Insurrectional and other movements require more attention because of their links to the area of State succession.³¹ It is a generally accepted rule that the State is not responsible for the actions of insurgent movements as their

25 Bruce W Klaw, 'State responsibility for bribe solicitation and extortion: Obligations, obstacles, and opportunities' (2015) 33(1) *Berkeley Journal of International Law* 60, 71.

26 Commentary on the ARSIWA (n 6) para 13, 40.

27 Brownlie (n 8) 132.

28 *ibid.*

29 *ibid* 145.

30 Kolb (n 5) 86.

31 Insurrectional and other movements and related rules of attribution have been widely discussed. See, e.g., Jean D'Aspremont, 'Rebellion and state responsibility: Wrongdoing by democratically elected insurgents' (2009) 58(2) *International and Comparative Law Quarterly* 427, 431–433; Jean D'Aspremont, 'Responsibility for coups d'état in international law' (2010) 18(2) *Tulane Journal of International and Comparative Law* 451, 468–470. For a detailed definition of the different forms of movements (rebels, insurgents, belligerents), see Andrew Clapham, 'Human rights obligations of non-State actors in conflict situations' (2006) 88(863) *International Review of the Red Cross* 491. Concerning human rights violations and related attribution problems: Jan Arno Hessbruegge, 'Human rights violations arising from conduct of non-state actors' (2005) 11 *Buffalo Human Rights Law Review* 21, 64–66.

activities are inherently antithetical to the existing State structure and are separate from it. Similarly, such movements are not considered to act on the instructions or under the direction or control of the State.³²

The State can thus only be held liable for its own actions, such as negligence in preventing insurgencies³³ or other misconduct of its own in countering the insurgency (e.g., actions of its authorities, persons under its control, *ultra vires* actions, etc.).³⁴ The State could successfully defend itself in the event of damage to foreigners by proving that it protected the property of individuals equally regardless of nationality. However, in modern practice, the responsibility of the State for the consequences of negligence in fighting insurgents has not yet been confirmed.³⁵

The ARSIWA provide for exceptions to this, which depend on the success of the insurrectional movement. Only the acts of a successful movement (i.e., one that achieves its objective and takes power in an existing State or establishes a new State) are subject to attribution:³⁶ “The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.”³⁷ They further state that “[t]he conduct of a movement, insurrectional *or other*³⁸ which succeeds in establishing a new State in part of the territory of a pre-existing State *or in a territory under its administration*³⁹ shall be considered an act of the new State under international law.”⁴⁰

The *raison d'être* of this exception is the link between the movement itself and the government of the (new) country. In both cases, the insurrectional movement (or its members) becomes the new government; thus, it makes

32 Crawford, *State Responsibility* (n 3) 170. See also *Socony Vacuum Oil Company*, in which the Tribunal declared that Yugoslavia could not be held responsible for the acts of the independent State of Croatia since Croatia was not under its control during the inter-war period. *Socony Vacuum Oil Company* (1948) US International Claims Commission in Elihu Lauterpacht (ed) *International Law Reports* (Butterworth & Co. 1956) vol 23, 55–63.

33 Commentary on the ARSIWA (n 6) para 3, 50.

34 ARSIWA (n 7) art 10(2).

35 James R Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 552.

36 John Bassett Moore, *A Digest of International Law* (Government Printing Office 1906) vol 1, 44.

37 ARSIWA (n 7) art 10(1).

38 “Or other” is only mentioned in the second paragraph of Article 10 of the ARSIWA; the first paragraph does not include this phrase.

39 “Or in the territory under its administration” covers the case of “newly independent States.”

40 ARSIWA (n 7) art 10(2) (emphasis added).

sense to attribute their actions to it because, according to the *theory of organic or structural continuity*, they are the same body, usually even made up of the same persons.⁴¹ A successful insurrectional movement, therefore, has an organic link to the structure of the (new) State⁴² and could be considered a new government *in statu nascendi* from its inception.⁴³ If there are several insurrectional groups and the group that comes to power did not overthrow the government but merely took advantage of the vacuum and occupied the position, it is logical to hold the (new) State accountable for the actions of all these groups since they were all working towards the same goal: overthrowing the government.⁴⁴

No one is held responsible for the acts of a failed movement unless the movement has attained such a status that it can be attributed international legal personality;⁴⁵ in which case it can be held responsible for its own acts. In particular, its members (i.e., natural persons) can also be held liable under the rules of criminal responsibility.⁴⁶

8.2.1.1 Nature of the Rules for the Attribution of Acts to a State

It is a rule of customary international law that a change of power in an existing State does not affect the question of that State's responsibility.⁴⁷ A change of power has no effect on the legal personality of the State, which remains identical, as was recognized even in the case of the October Revolution in Tsarist Russia.⁴⁸ The creation of a new State on part of the territory of another State is, however, substantively a matter of State succession. Nevertheless, the ILC has held that the attribution of acts of insurrectional movements is a *rule of State*

41 Patrick Dumberry, 'New state responsibility for internationally wrongful acts by an insurrectional movement' (2006) 17(3) *European Journal of International Law* 605, 611–612.

42 Gérard Cahin, 'Attribution of conduct to the state: Insurrectional movements' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 249.

43 Anthony Cullen and Steven Wheatley, 'The human rights of individuals in de facto regimes under the European Convention on Human Rights' (2013) 13(4) *Human Rights Law Review* 691, 693.

44 Dumberry, 'New State Responsibility' (n 41) 612.

45 The ILC specifically states that the ARSIWA do not regulate the potential liability of a failed resistance movement. Commentary on the ARSIWA (n 6) para 16, 52.

46 Cahin (n 42) 254–255.

47 Crawford, *State Responsibility* (n 3) 174–175.

48 Rein Müllerson, 'Law and politics in succession of states: International law on succession of states' in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff Publishers 1998) 8.

responsibility and not a *rule of State succession*.⁴⁹ Thus, although a State is credited with acts that occurred before its formation because of the past actions of its new government, it is not because of State succession but because of the continuity between the actions of the movement and the new government of the (new) State.⁵⁰ It is important to note that these are not *rules of attribution of responsibility* but *rules of attribution of conduct*.⁵¹ Responsibility would be attributed to the rebel movement, which is problematic because the ILC does not require the movement to have legal personality and responsibility cannot be attributed to an entity without international legal personality.⁵² These rules attribute to the State (or government) the *conduct* of the insurrectional movement.

In the case of a succession of government, if the conduct violated the primary legal norm binding the State at the time, State responsibility arises despite the fact that the acts of the insurrectional movement are otherwise entirely separate from those of the State.⁵³ However, in the case of a separation of part of a territory, this primary rule will have to bind the successor State in the period before its creation because that is when the act of the insurrectional movement attributed to it took place. Acts do not in themselves constitute a breach of international law; for such a breach to occur, there must also be a primary rule of law in force at the time of the commission of the act that is breached by said act. Since the successor State does not succeed to the responsibility of the insurrectional movement but only “succeeds” to its acts (i.e., the acts of the resistance movement are considered acts of the new State), the primary rule must bind this State at the time of the commission of the act.

By defining the attribution of acts of insurrectional and other movements, the ILC covered the gap that existed regarding responsibility for acts that occur during an insurgency and that are generally not attributable to the State. The attribution of acts of an insurgency to an *existing* State constitutes an exception to the rule that an existing State cannot be held responsible for the acts of a movement. This is the case only when an insurrectional movement succeeds

49 D'Aspremont, 'Rebellion and state responsibility' (n 31) 430; Dumberry, 'New State Responsibility' (n 41) 609.

50 Commentary on the ARSIWA (n 6) para 6, 50–51.

51 Chapter 11 of the ARSIWA is entitled “Attribution of conduct to a state.”

52 Andre Nollkaemper and Dov Jacobs, 'Shared responsibility in international law: A conceptual framework' (2013) 34(2) Michigan Journal of International Law 359, 369: “[R]ebel groups are bound by international humanitarian law, yet international law seems to lack a conception of international responsibility of such groups for internationally wrongful acts.”

53 D'Aspremont, 'Rebellion and state responsibility' (n 31) 430–431.

in seizing power. If the movement creates a new State, its actions are imputable to the new State, whereas the actions of a failed movement are not imputable to the State.⁵⁴

There is disagreement among authors as to the validity of the rules for attributing the acts of insurrectional movements to the State.⁵⁵ Whether the rule in Article 10(2) has the status of customary international law was also considered by the ICJ in its 2015 judgment in *Crime of Genocide (Croatia v Serbia)*, but the ICJ ultimately did not rule on the issue.⁵⁶ In this case, the ICJ stated regarding the application of the provisions of Article 10(2) of the ARSIWA that the

Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles that: “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”⁵⁷

The Court argued that FRY became a party to the Genocide Convention when it became a State (i.e., a successor State). Only from that date onwards was the FRY bound by its provisions. The ICJ therefore concluded that in the period before the “formation of the FRY,” neither the FRY nor the rebel movement could have been bound by the provisions of the Convention. They could, however, be bound by the prohibition of genocide as customary international law.⁵⁸ Hence, according to the ICJ’s judgment, the new State cannot be considered to

54 On the question of which primary rules of international humanitarian law could be binding in (internationalized) internal armed conflicts, see the detailed analysis in: Vasilka Sancin, Dominika Švarc and Matjaž Ambrož, *Mednarodno pravo oboroženih spopadov* (Poveljstvo za doktrino, razvoj, izobraževanje in usposabljanje 2009) and Vasilka Sancin, ‘Uporaba mednarodnega humanitarnega prava v internacionaliziranih notranjih oboroženih spopadih’ (2005) 65 *Zbornik znanstvenih razprav* 301.

55 *Pro*: Commentary on the ARSIWA (n 6) para 12, 51; Cahin (n 42) 255: “The wording of the article can be considered as a concise and distinct expression of international customary law.” *Contra*: D’Aspremont, ‘Rebellion and state responsibility’ (n 31) 427: “Article 10 [...] rests neither on sound precedential nor systemic ground”; Dumbery, ‘New State Responsibility’ (n 41) 612: “an analysis of state practice leads to the conclusion that the ground on which this principle rests is not as solid as is often indicated in doctrine.”

56 *Crime of Genocide (Croatia v Serbia)* (Judgment) (n 10) para 102–105, 51–53.

57 *ibid* para 104, 52.

58 *ibid* para 104–105, 52–53: “Article 10(2) cannot, therefore, serve to bring the dispute regarding those acts within the scope of Article IX of the Convention.”

have violated any rule of international law that did not bind it or the movement at the time of the act. As a rule, since a successor State is not bound by any rule that existed before its formation, it can be concluded that the only way to hold a State responsible for the acts of an insurrectional movement is by its mere consent to *assume responsibility* or *accept a treaty retroactively* (as done by Slovakia, the Czech Republic, and Montenegro for the ECHR). However, the fact remains that the State is attributed acts committed before its formation, as confirmed by the ICJ in the case cited above.

8.2.1.2 Definition of an Insurrectional Movement

The ARSIWA themselves do not define “insurrectional and other movements.” The ILC has stated that a movement may be based on the territory of the State against which it is fighting or on that of a third State.⁵⁹ To assist in assessing whether a movement is insurrectional, the ILC suggests the use of the Additional Protocol to the Geneva Conventions,⁶⁰ which declares that only hierarchically organized armed groups exercising effective control over certain territory under *responsible command* that enables them to conduct military operations are considered an insurgency.⁶¹ The ARSIWA have thus excluded the use of this term to refer to various internal disturbances and groups of individuals that do not reach this level. The addition of “*and other movements*” covers all forms of movements that meet the definition of the Additional Protocol. It does not, however, encompass various political groups or groups of individuals seeking to separate parts of the State and operating within the framework of the functioning of the State system.⁶² The ILC also explicitly states that the attribution rules under this article do not apply to insurrectional movements that, at the end of their “activity,” agree with the existing government on cooperation, power-sharing, or some other option (*national reconciliation*). In this case, the acts of the movement are not attributable to the State.⁶³

Several situations can thus arise in relation to insurrectional movements. If the movement is unsuccessful, in principle no one is held accountable for its actions; the State is only held accountable for its own violations, and the movement itself in rare cases. If the movement is successful, the new government (if the movement has replaced the government) or the new State (if the

59 Commentary on the ARSIWA (n 6) para 9, 51.

60 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 60, 609.

61 Commentary on the ARSIWA (n 6) para 9, 51.

62 *ibid* para 10, 51.

63 *ibid* para 7, 51.

movement has succeeded in establishing one) will be held accountable. If an otherwise successful movement does not overthrow the government but agrees with it on cooperation, power-sharing, or some other option (*national reconciliation*), no one is held responsible for its actions.⁶⁴

8.2.1.3 Duration of the Insurrectional Movement

Insurrectional and other movements are only temporary phenomena, which come to an end either through their success or through their destruction.⁶⁵ To assess the beginning of the existence of an insurrectional or other movement, the ILC—as already mentioned—proposes to apply the provisions of the Additional Protocol to the Geneva Conventions. The commencement of the activities of insurrectional and other movements is a *questio facti* and must be determined on a case-by-case basis. From the outset, these are merely the actions of individuals who are not yet organized; thus, they constitute simple protests and demonstrations and do not meet the threshold of an “insurrectional movement.”⁶⁶ Until a group of people has established effective authority over a territory and its members, it cannot be considered an insurrectional movement because it is not clear whether certain acts were carried out under instructions or solely on the spontaneous initiatives of individual members.⁶⁷ Once a movement has acquired organization and structure, whether its actions could be attributed to the State can be established.⁶⁸ If such a movement eventually succeeds in taking power or establishing a new government, the illegal acts will be attributed to the State retroactively from the moment of the establishment of the movement: the State (existing or new) will be deemed to have committed these acts.⁶⁹

As mentioned above, the attribution of the acts of a movement to a State depends on the success of the movement. In this context, it is necessary to mention the situation in which the movement or resistance itself lasts for an extremely long time. This is the case of long-lasting States of de facto authority (also referred to as unrecognized States, quasi-States, or de facto States), which exercise effective authority over part of the territory of a State for a prolonged

64 *ibid* para 7, 51.

65 Cahin (n 42) 248. See also Michael Schoiswohl, ‘De facto regimes and human rights obligations—The twilight zone of public international law’ (2001) 6 *Austrian Review of International and European Law* 45.

66 Commentary on the ARSIWA (n 6) para 2, 50.

67 Cahin (n 42) 255.

68 Commentary on the ARSIWA (n 6) para 2, 50.

69 Moore, *A Digest of International Law* (n 36) 44.

period and are difficult to distinguish in substance from independent but unrecognized States.⁷⁰ An insurrectional movement may at some point reach a state that closely resembles that of a legitimate government, which occurs when the movement replaces the representatives of the regular government and takes over their positions and functions, thus becoming a *de facto* authority.⁷¹ In these parts of their territories, the titular States cannot effectively exercise authority. Without referring to the elements of statehood and the question of the declaratory or constitutive nature of the recognition of States, it is possible to conclude that at least some of the *de facto* authorities have the elements of an insurrectional or other movement that has not yet achieved its purpose of partitioning part of its territory.⁷² Consequently, if they succeed, it is reasonable to apply the rules of Article 10 of the ARSIWA.⁷³

8.2.1.4 Legitimacy of the Insurrectional Movement and Other Forms of State Formation

The ILC has confirmed that the legitimacy and legality of an insurrectional movement are without prejudice to the rules contained in Article 10. The new government or State will not be able to claim that the movement lacked legitimacy or was not legal to deny responsibility.⁷⁴

Dumberry points out that it makes sense to apply the rules of attribution of acts of insurrectional movements in the case of the partition of part of the territory to other cases of State succession as they are no different in essence. In his view, the rules could also be applied to the *dissolution* and *unification* of a State since, in both cases, there is structural continuity and a new State is created, which means that both conditions are met.⁷⁵ The absence of structural continuity is probably the reason why the ARSIWA reject the possibility of attribution in an incorporation of part of a State into another State⁷⁶ or in the case of *cession*; yet, for reasons of fairness and equity, it would be logical to extend the application of the rules of attribution to these cases as well.⁷⁷

⁷⁰ Cullen and Wheatley (n 43) 708.

⁷¹ Moore, *A Digest of International Law* (n 36) 41.

⁷² Cullen and Wheatley (n 43) 698.

⁷³ Acts of *de facto* regimes may also be attributable to another State if its conduct qualifies as acts covered by other articles of the ARSIWA (n 7).

⁷⁴ Commentary on the ARSIWA (n 6) para 11, 51.

⁷⁵ Dumberry, 'New State Responsibility' (n 41) 617.

⁷⁶ Commentary on the ARSIWA (n 6) para 10, 51.

⁷⁷ Dumberry, 'New State Responsibility' (n 41) 619–620.

The rules could also be applied to *incorporations* even though no new State is created and, possibly, even structural continuity is broken.⁷⁸

8.2.2 *Conduct Acknowledged and Adopted by a State as Its Own*

Actions that cannot be attributed to a State may nevertheless be acknowledged and adopted by the State as its own. This occurs on the condition and in the context of an acknowledgement or acceptance.⁷⁹ A State usually first acknowledges the existence of an act and then adopts it as its own.⁸⁰ Acts are attributed to a State only in the context of their adoption, not more broadly.⁸¹

Acknowledgment or adoption may be explicit or result from implicit actions. Among the former, the authors⁸² usually cite the case of the *United States Diplomatic and Consular Staff in Tehran*, in which the US argued, inter alia, that the statements and attitude of the Iranian authorities made it possible to attribute to Iran the actions of individuals (militants) who had captured US diplomats. As the Iranian authorities explicitly supported the actions of the individuals and deliberately perpetuated the unlawful situation created by the individuals, the ICJ ruled that the Iranian State endorsed and accepted the actions of the individuals as its own. This made the militants agents of the Iranian State.⁸³ The acts of the individuals, which did not in themselves have the characteristics of an internationally wrongful act, became acts of the State by virtue of Iran's acknowledgement and adoption. Thus, in combination with the relevant rules binding Iran at the time when they were committed, the acts were reclassified as internationally wrongful acts.⁸⁴

The acknowledgement and adoption of implied acts are illustrated in the *Lighthouses*, in which the PCIJ ruled that Greece accepted the situation regarding the concession contract for lighthouses operating in Crete (which Greece acquired after the First World War) as if it were a normal transaction and continued to do so even after the acquisition of Crete. The PCIJ therefore concluded that Greece responsible for the consequences of the breach of the

78 *ibid* 620.

79 ARSIWA (n 7) art 11; Tom Ruys and Sten Verhoeven, 'Attacks by private actors and the right of self-defence' (2005) 10(3) *Journal of Conflict and Security Law* 289.

80 Kolb (n 5) 88.

81 ARSIWA (n 7) art 11.

82 See e.g. Shaw, *International Law* (8th edn) (n 1) 600; Crawford, *State Responsibility* (n 3) 182; Commentary on the ARSIWA (n 6) para 3–6, 52–53; Kolb (n 5) 91.

83 *United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep (*US Diplomatic and Consular Staff in Tehran*) para 74, 35.

84 Kolb (n 5) 89.

said contract.⁸⁵ Other cases include that of the Nazi officer Adolf Eichmann, who was kidnapped by a group of Israeli citizens in Argentina and transported to Israel, where he was sentenced to death and executed. The UN Security Council also considered the case for violation of Argentina's sovereignty⁸⁶ and adopted Resolution 138 (1960).⁸⁷ The ILC stated that Eichmann's admission to prison and subsequent trial and execution can be understood as acceptance of the act of kidnapping.⁸⁸

When Article 11 was adopted, it was criticized for the retroactive effect of recognition and acceptance. The issue of attribution should be clear at the time of the commission of the wrongful act, not afterward, as this undermines legal predictability. The injured State should already know at the time of the commission of the act whether it is attributable to another State.⁸⁹ This criticism has a rational basis, but its opponents believe that there are at least two arguments against it. The first is based on the fact that the initial legal situation is ambiguous in other cases as well—for instance, in the case of responsibility for the acts of successful insurrectional movements that only *later* achieve their objective, subsequent agreements on reciprocal claims, and succession of States. The second concerns the fact that the ambiguity is “sanitized” by the subsequent act of acknowledgement and adoption.⁹⁰ In this way, the injured party is better off because acknowledgement and adoption are only necessary when the act cannot be attributed to the State on any other basis. The *principle of equity* is therefore also plays in favor of this rule.

85 *Lighthouses in Crete and Samos (France v Greece)* [1937] PCIJ Rep Series A/B No 71 (*Lighthouses 1937*) 11. Similar in *Affaire relative à la concession des phares de l'Empire ottoman (Grèce contre France)*, 12 UNRIAA 155 (24/27 July 1956) (*Lighthouses 1956*) 198.

86 Commentary on the ARSIWA (n 6) para 6, 53.

87 UNSC Res 138 (23 June 1960) UN Doc S/4349.

88 Commentary on the ARSIWA (n 6) para 5, 53.

89 Kolb (n 5) 92.

90 *ibid.*

Indirect Responsibility

The term indirect responsibility refers to the responsibility of a third State in relation to the acts of a wrongdoing State.¹ In these cases, a tripartite relationship is created between the wrongdoing State, the injured State, and the third State.²

The ARSIWA identify three situations: *aid and assistance*,³ *direction and control*,⁴ and *coercion*.⁵ Despite the basic rule that the State that commits an unlawful act is responsible for it,⁶ ILC members were of the view that special circumstances may lead to a shift of responsibility to another State. The term indirect responsibility thus describes situations in which a State other than the State to which the act is attributed is responsible for the act.⁷ This means that the act has been attributed to one State by *rules of attribution of conduct*, but another State is also held responsible for the act because of the special link between the two States. Again, the difference between *attribution of conduct* and *attribution of responsibility* is highlighted.

Indirect responsibility today⁸ is based on the theory of control, which is founded on the relationship between responsibility and the freedom of the

1 James D Fry, 'Coercion, causation, and the fictional elements of indirect state responsibility' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611; Pieter Jan Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or direct responsibility or both?' (2010) 7(1) *International Organizations Law Review* 9.

2 Fry (n 1) 615.

3 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/49(Vol. 1)/Corr.4 (ARSIWA) art 16.

4 *ibid* art 17.

5 *ibid* art 18. As late as 1979, Special Rapporteur Ago mentioned only two possibilities: the first was aid and assistance, and the second covered situations in which a State is responsible for acts that it did not itself commit but has such a special relationship with the offending State that responsibility can be imputed to it indirectly, by implication. ILC, 'Eighth Report on State responsibility by Mr. Roberto Ago, Special Rapporteur' (1979) UN Doc A/CN.4./318 para 1–2, 4.

6 ARSIWA (n 3) art 1.

7 "Most members of the Commission recognized that there may be special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed." ILC, 'Eighth Report by Roberto Ago' (n 5) para 1–2, 4.

8 Special Rapporteur Ago summarized previous views on the subject as follows. In the past, lawyers have tried to justify this special link between the two States using various arguments. The argumentation popular in the early 20th century was based on the *theory of*

State. An act can be attributed to the State if the State was free in its decisions. If one State is dominant to the extent that the subordinate State is not free to act, responsibility must be attributed to the former. The subordinate State is therefore responsible to the extent of its own freedom or control over the act.⁹

If the subordinate State has no freedom, the dominant State is directly responsible. This is the case when the activities of the subordinate State are actually carried out by the authorities of the dominant State. Shared responsibility (direct for the subordinate and indirect for the dominant) will arise if the authorities of the subordinate State, while acting on their own and, thus, being responsible for the acts, are doing so on the instructions or direction of the dominant State, which also controls the execution of the acts.¹⁰ This is a pure case of indirect responsibility as the acts are attributed to the subordinate State. If these acts constitute a breach of the subordinate State's obligations, it is directly responsible for the breach. If, because of the special relationship between the two States, responsibility can also be attributed to the dominant State, it is responsible because of its role or because of the special relationship it has with the subordinate State.¹¹

representation. This relationship is said to arise when one State is subordinate to another although it retains its legal subjectivity. Subordination can occur voluntarily or involuntarily and can be *de jure* (e.g., a protectorate or mandate) or *de facto* (e.g., occupation or "quisling"/"puppet" State). In case of subordination, the dominant State represents the subordinate State in its relations with other States. Thus, the subordinate State cannot be held accountable for its own wrongful acts. Since international responsibility cannot simply disappear, the dominant State must be held accountable for the acts of the subordinate State.

The flaws in this reasoning were pointed out in the 1930s based on the logical conclusion that mere representation does not affect liability. Namely, the simple fact that a claim for liability cannot be brought directly against the responsible State but against the representing State does not shift the liability of the represented State to the representing State. Reparation is still made by the first State, albeit through the representative State, which is irrelevant in relation to the injured State. The represented State remains responsible, but a detour is now necessary. Therefore, this is still a case of direct liability and not indirect liability.

This argumentation subsequently faded, and new arguments had to be mobilized to justify vicarious liability. These new arguments were based on the actual relationship between dominant and subordinate States and the practical difficulties that such a relationship creates. The *protection theory* (*Schutztheorie*) defended indirect responsibility from the simple position that the injured State could not, in practice, enforce responsibility without the consent of the subordinate State. The dominant State will act as a shield against the liability of the subordinate State, so it makes sense that the actions of the subordinate State are the responsibility of the dominant State (ibid 616–617).

9 ibid para 17, 13.

10 ibid para 18, 13.

11 ibid para 17–18, 13–14.

The mere existence of a relationship of subordination is not sufficient to give rise to indirect responsibility. An element of freedom must also be included: the freer the subordinate State is to perform acts, the more the acts are attributable to it and inversely). Both States are attributed the act in the context of the freedom they exercised in performing it.

The ARSIWA also specifically point out that the indirect responsibility of a third State does not exclude the responsibility of the State that committed the breach. The latter is therefore (directly) responsible, subject to the indirect responsibility of the dominant State.¹² In this regard, the ILC “recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.”¹³

As mentioned above, the ARSIWA, under the heading “State responsibility in relation to acts of another State,” give the following examples: aiding and assisting, directing and controlling, and coercion. All three articles require that the responsible State be implicitly aware of the circumstances of the internationally wrongful act. This is a question of awareness of the facts and not of awareness of the wrongfulness of the act, which is also in line with the principles of *ignorantia iuris nocet* and *ignorantia facti non nocet*.¹⁴

9.1 Aid and Assistance

A State may aid or assist another State in violating its obligations. The ARSIWA strictly uphold the *principle of independent and exclusive responsibility*, according to which each State can only be held responsible for its own conduct.¹⁵ This does not mean that a State cannot be held responsible for its role in the breach of an international rule by another State but that it is nevertheless responsible for its own act and not that of the State that it assists.¹⁶

The responsibility of the assisting State depends on the primary rule. It may arise directly from violations of the primary rule that binds it (e.g., a State that

12 ARSIWA (n 3) art 19.

13 ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) Yearbook of the International Law Commission (Commentary on the ARSIWA) para 1, 70.

14 *ibid* para 5, 70.

15 Andre Nollkaemper and Dov Jacobs, ‘Shared responsibility in international law: A conceptual framework’ (2013) 34(2) Michigan Journal of International Law 359, 381.

16 Commentary on the ARSIWA (n 13) para 10, 67.

makes its territory available to another State for an unlawful attack on a third State may itself be in breach of the primary rule¹⁷) or derivatively from the violation committed by the wrongdoing State.¹⁸ In the first case, the assistance is qualified as unlawful by the primary rule; in the second case, the assistance is unlawful based on the secondary rule. In the latter, it is possible to speak of indirect responsibility because one State is responsible for the international breach committed by the other.¹⁹

The ILC has ruled that a State that aids or assists another State in the commission of an internationally wrongful act is responsible if it does so with knowledge of the circumstances of the wrongful act and if the act would also be wrongful for it.²⁰ This rule has the status of customary international law, according to the ICJ.²¹ The ILC Commentary states that a State can only be responsible for assistance if the organ of the assisting State a) is aware that it is assisting in an unlawful act, b) acts with the intention of contributing to the commission of the unlawful act and its assistance actually contributes to it, and c) the act would also be unlawful for the assisting State.²² This means that if the assisting State were to act in the same way as the assisted State, it would be the author of an internationally wrongful act.²³

The ILC has not specifically indicated which acts are of such gravity as to cross the threshold of assistance. It makes sense that there must be a strong link between the act and the violation. If the State's acts play only a peripheral role in the violation, such as encouragement and acquiescence, they cannot be considered to constitute assistance.²⁴ State aid has been the subject of cases before the ECtHR in which the Court has ruled on the assistance of Poland and Romania—States parties to the ECHR—to US agents in the imprisonment

17 See, e.g., UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314 (XXIX).

18 Georg Nolte and Helmut Philipp Aust, 'Equivocal helpers—Complicit states, mixed messages and international law' (2009) 58(1) *International and Comparative Law Quarterly* 1, 5.

19 Commentary on the ARSIWA (n 13) para 8, 65. The Commentary only mentions this interpretation for Article 18, but it can also be reasonably applied to Articles 16 and 17.

20 ARSIWA (n 3) art 16.

21 *Crime of Genocide (Bosnia v Serbia and Montenegro)* (Judgment) (n 10) para 420, 217.

22 Commentary on the ARSIWA (n 13) para 3, 66.

23 Christian Dominicé, 'Attribution of conduct to multiple states and the implication of a state in the act of another state' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 286.

24 Commentary on the ARSIWA (n 13) para 9, 65.

and torture of individuals.²⁵ The Court confirmed, *inter alia*, that the violations were carried out by agents of another State (the US), but that assistance was a mandatory condition for the effective performance of the act.²⁶ The acts of assistance in this case included the adaptation of the premises to the needs of the foreign agent and the provision of security and logistics.²⁷

The requirement that the assisting State has knowledge of the commission of the violation by another State was stated by the ICJ in *Crime of Genocide (Bosnia)*, where it found that the assisting State cannot be held responsible for aiding another State if its authorities did not have knowledge of the specific intent (*dolus specialis*) of the primary perpetrator.²⁸ In *Al Nashiri v Poland*, the ECtHR stated that at the time of extradition, Poland knew that there was a real risk that the individual would be the victim of a violation of the ECHR.²⁹

By requiring that the assisting State act with the intention of assisting the wrongful act, the ILC has created an exception to the general rule that responsibility does not require fault or a specific attitude of the State towards the act.³⁰ If we were to apply the same illegality requirements to the assisting State, we would effectively be equating it with an accomplice.³¹

Additional obligations of third States are linked to violations of *jus cogens* under Article 41 of the ARSIWA.³² According to the latter, all States are prohibited from recognizing the consequences of a violation of *jus cogens* as lawful, and aiding and assisting in the maintenance of that situation is also not permitted.³³ This could include, for example, the actions of a permanent member of the UN Security Council to cover up the use of chemical weapons against

25 *Husayn (Abu Zubaydah) v Poland* App No 7511/13 ECtHR, 24 July 2014; *Al Nashiri v Poland* App No 28761/11 ECtHR, 24 July 2014; *Al Nashiri v Romania* App No 33234/12 ECtHR, 31 May 2018.

26 “While, as noted above, the interrogations of captured terrorist suspects was the CIA’s exclusive responsibility and the local authorities were not to be involved, the cooperation and various forms of assistance of those authorities, such as for instance customizing the premises for the CIA’s needs, ensuring security and providing the logistics were the necessary condition for the effective operation of the CIA secret detention facilities.” *Al Nashiri v Poland* (n 25) para 530, 199.

27 *ibid* para 530, 199.

28 *Crime of Genocide (Bosnia v Serbia and Montenegro)* (Judgment) (n 10) para 421, 218.

29 *Al Nashiri v Romania* (n 25) para 5, 291.

30 Nolte and Aust (n 18) 13. Another example of the use of fault is covered in the calculation of damages under Article 39 of ARSIWA (n 3): “In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission” (emphasis added).

31 Nolte and Aust (n 18) 12.

32 Commentary on the ARSIWA (n 13) para 9, 65.

33 ARSIWA (n 3) art 41.

rebels in another country. The ILC Commentary to this article asserts that it should be read through the prism of Article 16. With regard to assistance in *jus cogens* violations, the ARSIWA do not specifically mention the condition of knowledge of the circumstances of the violation as this is presumed for acts of this magnitude.³⁴

Assistance can therefore be unlawful on three legal bases—two secondary and one primary: deriving from Articles 16 and 41 of the ARSIWA, which entail a presumption of knowledge of the circumstances, and deriving directly from a primary rule that may itself prohibit the State from aiding (e.g., the Convention on the Prevention and Punishment of the Crime of Genocide).³⁵

9.2 Direction and Control over the Actions of Another State

The ARSIWA provide that

[a] State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: a) that State does so with knowledge of the circumstances of the internationally wrongful act; and b) the act would be internationally wrongful if committed by that State.³⁶

The title is very reminiscent of Article 8 of ARSIWA (“Conduct directed or controlled by a State”). The first difference between the two Articles is that Article 8 is a rule of *attribution of conduct* of an individual to a State, whereas, in Article 17, the conduct has already been attributed to the State, which has thereby entered into a relationship of international responsibility; it remains an open question whether the responsibility is attributed to the right State. In the first case, there is *original responsibility* for one’s acts since the acts of individuals are directly attributable to the State. In the second case, it is a *derivative responsibility* as the *responsibility* of one State is attributed to another.³⁷ If a

34 Commentary on the ARSIWA (n 13) para 11, 115.

35 Nolte and Aust (n 18) 17.

36 ARSIWA (n 3) art 17.

37 August Reinisch, ‘Aid or assistance and direction on control between states and international organizations in the commission of internationally wrongful acts’ (2010) 7(1) *International Organizations Law Review* 63, 76. Although the author speaks of the responsibility of an international organization for the acts of a State, the dilemma is essentially the same.

State has directed and controlled the acts of another State, it is itself indirectly responsible for the breach. It is therefore not a question of *attribution of conduct* but of *attribution of responsibility*.

The second difference with Article 8 is that the test concerns whether the State has directed *or* controlled the individual, whereas in the case of responsibility of one State for the acts of another, the cumulative fulfillment of both prerequisites (i.e., direction *and* control) is required. The subordinate State must carry out the act at the direction of the dominant State, which also controls the performance of the act.³⁸

This article must also be distinguished from Article 6 (“Conduct of organs placed at the disposal of a State by another State”). In this situation, the second State would place its authorities at the disposal of the first State, which would also act on behalf of the first State under its direction *or* supervision. Again, this is an area of *attribution of conduct*.

The cases described in Article 17 are very rare today. They refer to a relationship of dependence of one State on another, as with protectorates. This is limited to cases where one State *actually* directs and controls another State; the mere possibility of influence is insufficient.

Dependence can be established by occupation or by a treaty that gives one State broad powers over another. A point was also made regarding human rights violations related to interrogations in Afghanistan and Iraq, according to which States that exercised direction and control over the authorities there might be held responsible under the principles set out in Article 17 of the ARSIWA.³⁹

9.3 Coercion

The final example of indirect responsibility is coercion, when the first State coerces the second into committing a wrongful act. Unlike direction and control, coercion is usually a short-term relationship between two States.⁴⁰

A State that coerces another into performing an act is internationally responsible if a) the act, taking into account the coercion, is unlawful even for

38 Dominicé (n 23) 287.

39 Association of the Bar of the City of New York & Center for Human Rights and Global Justice, ‘Torture by proxy: International and domestic law applicable to extraordinary renditions’ in *Record of the Association of the Bar of the City of New York* (2005) vol 60(1) 13, 162.

40 ILC, ‘Eighth Report by Roberto Ago’ (n 5) para 5, 6.

the coerced State, and b) the coercing State is aware of the circumstances of the act.⁴¹ As mentioned above, the second condition relates to the *questio facti*. According to this provision, a State that coerces another is jointly responsible for the act of the coerced State, irrespective of whether it is itself bound by the primary rule binding the coerced State. In the case of aid and assistance and direction and control, the indirectly responsible State (i.e., the one directing and controlling) is also required to be bound by the primary rule that is violated in this way. This requirement is absent in the case of coercion because, in such a situation, the injured State could be left without legal options as the coerced State may defend itself with a force majeure argument.⁴² A State that coerces another into a violation would thus potentially violate its “own” primary rule (e.g., Article 2 of the UN Charter) and, *derivatively*, the primary rule binding the coerced State.⁴³

The institution of indirect responsibility describes a situation in which a third State assumes responsibility for a wrongful act on the basis of its special link with the responsible State. This institution does not offer a solid ground for deliberations on State succession to responsibility because of the principle of independent and exclusive responsibility and, additionally, because the indirectly responsible State (i.e., the one that is aiding, directing, or coercing) must have knowledge of the wrongfulness of the situation. Nevertheless, it offers some theoretically tangential support as it confirms that one State may be responsible based on the attribution of the conduct and a second State based on its special relationship with the wrongdoing State and the wrongful act.

41 ARSIWA (n 3) art 18.

42 Commentary on the ARSIWA (n 13) para 6, 70.

43 Marco Roscini, ‘Threats of armed force and contemporary international law’ (2007) 54 *Netherlands International Law Review* 229, 263.

Rights and Obligations Arising from International Responsibility

The primary purpose of international responsibility is to restore the balance that existed between the offending State and the injured State before the commission of the wrongful act.¹ The breach of a primary rule automatically establishes a new—that is, additional—legal relationship between these two States: international responsibility. The *dominus negotiis* of this relationship is the injured State since the content of international responsibility consists, for the most part, of the obligations of the wrongdoing State. The injured State thus can demand that the wrongdoer act in certain ways² but is not obliged to do so,³ and the existence of the international responsibility relationship does not depend on the exercise of international responsibility by the injured State.⁴ The only consequence, which is largely independent of the will of the injured State, is the obligation of the wrongdoing State to cease the wrongful act, which we address in greater detail in the next section.

An internationally wrongful act has two sets of consequences: one looking to the past, the other to the future.⁵ The latter includes the obligation of the wrongdoer to cease the wrongful act (*cessation*), assurances, and guarantees of non-repetition, together with the obligation of continued observance of the primary norm. This group of consequences seeks to improve future relations. The first group seeks to remedy the consequences of a past act and consists of reparations, which include restitution, compensation, and satisfaction. The obligation to settle these is an immediate corollary of international responsibility.⁶

1 Robert Kolb, *The international law of state responsibility: an introduction* (Edward Elgar Publishing 2017) 148.

2 *ibid.*

3 Iain Scobbie, 'The invocation of responsibility for the breach of "Obligations under peremptory norms of general international law"' (2002) 13(5) *European Journal of International Law* 1201, 1214.

4 Annie Bird, 'Third state responsibility for human rights violations' (2011) 21(4) *European Journal of International Law* 883, 890.

5 Kolb (n 1) 148.

6 ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2(2) *Yearbook of the International Law Commission (Commentary on the ARSIWA)* para 4, 91.

The principle of *pacta sunt servanda* is one of the basic rules of the consequences of a breach: a primary rule does not, by reason of the breach alone, cease to bind the contracting parties.⁷ This means that, despite the breach, the breaching State remains obliged to comply with the primary rule.⁸ This further confirms that international responsibility is an *additional* relationship between States and exists separately (in parallel) from the primary relationship based on the primary rule. While a primary rule may cease to bind as a result of a breach, this is not an automatic, direct consequence of the breach. The injured State has the option to request the suspension or termination of the treaty⁹ through the envisaged procedure.¹⁰ This is possible in relation to the treaty; customary rules remain unaffected. As mentioned above, the fact that the primary rule breached subsequently ceased to apply to the parties does not affect the existence of a breach that occurred while it was in force. Thus, it does not influence the existence of international responsibility.

10.1 Obligation of the Breaching State to Cease the Wrongful Conduct

That a primary rule does not cease to exist merely because of a breach is directly linked to the first consequence of the breach: the obligation of the breaching State to put an end to the wrongful act (cessation).¹¹ If the primary rule continues to bind the State and the State continues to breach it (i.e., the breach is continuing),¹² the breaching State has an obligation to cease the breach.¹³

7 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/49(Vol. 1)/Corr.4 (ARSIWA) art 29.

8 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep para 114, 68: "The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination."

9 Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (1969 Vienna Convention) art 60(1): "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."

10 *ibid* art 65. See also Malgosia Fitzmaurice, 'Material breach of treaty: Some legal issues' (2001) 6 *Austrian Review of International and European Law* 3, 36–37.

11 ARSIWA (n 7) art 30.

12 See, e.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 (*Arrest Warrant*) point 3, 33.

13 See, e.g., *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* 20 UNRIAA

This is a rule of customary international law or even a general principle of law.¹⁴

The obligation of cessation is in fact merely a formulation of the principle of *pacta sunt servanda*.¹⁵ It is thus accepted that the cessation of the breach is in the interest of the international community at large and not just of the injured State as it ensures respect for the rule of law.¹⁶ The corollary of this conclusion is that any (international law) entity can call on the violating State to put an end to the violation.¹⁷

In addition, because of the link with *pacta sunt servanda*, the obligation to put an end to the breach has elements of both primary and secondary rules: primary because it only emphasizes the need to comply with the primary rule, which is the whole point of the rule in the first place, and secondary as a consequence of the breach of the primary rule.¹⁸

The basic condition for the obligation to bring a wrongful act to an end is that the wrongful act continues. For a wrongful act to continue, two conditions must be met: the existence of a primary norm and the existence of the act constituting its breach. If the primary rule no longer binds the wrongdoer, the breach no longer exists.¹⁹ This follows logically from the principle that a State can only be held responsible for a breach of a rule by which it was bound at the time of the breach (*nulla lex nulla iniuria*). This is one of the differences between the *obligation to cease a wrongful conduct* and *restitution* as the latter is not precluded by the cessation of the primary rule.²⁰

The second condition is that there is an ongoing wrongful act, which implies a *continuing* or *composite* wrongful conduct.²¹ If the act were a single act, the

215 (1990) (*Rainbow Warrior Affair*) para 113, 270; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits: Judgment) [1986] ICJ Rep 14 (*Nicaragua*) point 12, 149; *United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep (*US Diplomatic and Consular Staff in Tehran*) para 95, 149. 44; *Haya de la Torre* (Judgment) [1951] ICJ Rep 82; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Construction of a Wall*) para 150, 197.

14 *Rainbow Warrior Affair* (n 13) para 113, 270.

15 Olivier Corten, 'The obligation of cessation' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 546.

16 See, e.g., *ibid* 546; Commentary on the ARSIWA (n 6) para 5, 89.

17 Commentary on the ARSIWA (n 6) para 4, 89; ARSIWA (n 7) art 48.

18 Corten (n 15) 546.

19 Kolb (n 1) 150.

20 Christine Gray, 'The choice between restitution and compensation' (1999) 10 *European Journal of International Law* 413, 420.

21 Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge University Press 2017) 606; Corten (n 15) 547.

wrongful conduct would have already been completed and, thus, could not be terminated.

10.2 Assurances and Guarantees of Non-repetition

Assurances and guarantees of non-repetition are considered by some authors to be a type of *satisfaction*,²² and the ILC states that they “may be sought by way of satisfaction,”²³ which indicates that, in practice, the two overlap. However, other authors point out that the two should not be equated, which is presumably why the ILC included assurances and guarantees of non-repetition in the article addressing the *obligation of cessation* rather than *satisfaction*.²⁴ This is also confirmed by the possibility for third States to invoke international responsibility in cases of breaches of the obligation *erga omnes partes* and *erga omnes*. While third States can demand the cessation of the breach and assurances or guarantees of non-repetition from the breaching State on their own behalf, only the injured State (or other States on its behalf) can claim satisfaction.²⁵

Assurances and guarantees of non-repetition are not a common remedy in practice.²⁶ In normal circumstances, the injured State must have *bona fides* confidence in the attitude of the violating State.²⁷ For a court to grant its request for assurances or guarantees of non-repetition, there must be circumstances that undermine this confidence.²⁸ The ARSIWA do not define the term “circumstances,” but it is reasonable to consider that they are characterized by three elements: a) the risk of repetition, b) the gravity of the breach (or of the threatened harm), and c) the nature of the norm breached.²⁹ While the first

22 See, e.g., Lori F Damrosch and Sean D Murphy, *International law, cases and materials* (7th edn, West Academic Publishing 2019) 514.

23 Commentary on the ARSIWA (n 6) para 11, 90.

24 Christian Tomuschat, ‘Reparation in cases of genocide’ (2007) 5(4) *Journal of International Criminal Justice* 905, 911.

25 ARSIWA (n 7) art 48.

26 Sean D Murphy, *Principles of international law* (2nd ed, Thomson/West 2012) 207.

27 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep para 150, 267: “As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed.”

28 Tomuschat, ‘Reparation in cases of genocide’ (n 24) 912.

29 Sandrine Barbier, ‘Assurances and guarantees of non-repetition’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 551.

element must be present, only one of the other two is necessary. The combination “obliged/to offer” implies that the wrongdoer is obliged to offer a suitable and satisfactory promise or guarantee and that the injured party has the option to accept or refuse.³⁰

Like the obligation of cessation, assurances and guarantees of non-repetition are essentially an articulation of the principle of *pacta sunt servanda*.³¹ It is therefore also a condition for this remedy that the primary rule continues to bind the violating State,³² as soon as the primary rule ceases to apply, so does the obligation not to repeat the breach. Here, it is worth reiterating that assurances and guarantees of non-repetition exist alongside the primary rule and do not replace it. As long as the primary rule exists, so do both obligations.³³

Their distinctive feature is that, although they are secondary obligations and, as such, a reaction to a violation of the primary rule, they command the offending State to act *in the future*.³⁴ Assurances and guarantees of non-repetition had already been sought before the ICJ before the *LaGrand* judgment (e.g., in *Gabčíkovo-Nagymaros*³⁵ and *Fisheries Jurisdiction*³⁶), but the number of claims increased after this judgment.³⁷ In some cases, the Court did not grant the request, whereas in others it found that the request had been substantively satisfied by some other acts of the opposing party.³⁸ Although there is no clear practice regarding the specific elements of this remedy, it can be noted that the ICJ usually at least considers requests for assurances or guarantees of non-repetition. It is also the consistent practice of the ECtHR to

30 *ibid* 559.

31 Tomuschat, ‘Reparation in cases of genocide’ (n 24) 911.

32 Kolb (n 1) 151.

33 Yann Kerbrat, ‘Interaction between the forms of reparation’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 574.

34 Barbier (n 29) 551.

35 *Gabčíkovo-Nagymaros Project* (n 8) para 127 and 129, 74–75.

36 *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction: Judgment) [1998] ICJ Rep 432.

37 E.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 para 466, 166–167; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep (Land and Maritime Boundary) para 318, 452; *Dispute regarding Navigational and Related Rights* (n 27) para 150, 267; *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep (Avena) para 150, 69; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 (*Armed Activities* [Judgment]) para 257, 256.

38 Barbier (n 29) 551.

decide for these in the form of mandatory reporting on compliance with the decision.³⁹

An assurance is usually made verbally, while a guarantee requires something more,⁴⁰ such as the publication of a court judgment, instructions to relevant State bodies and officials on how to implement the judgment, changes to laws and regulations, or structural reforms of administrative and judicial systems.⁴¹

10.3 Reparations

This chapter introduces the second group of consequences of a wrongful act: reparations. After a description of the general rules, the common features of the three forms of reparation are presented, including the question of order and the basis for their determination. This is followed by the observation that once State responsibility has been confirmed, the focus of the process shifts from the act itself to its consequence, the injury (damage). The nature of the injury is important for the choice of the type of reparation, with the act itself taking a back seat.

“Reparations” is a general term for the different methods by which a State can fulfill its responsibilities.⁴² The obligation to make reparations is governed by international law and does not depend on the domestic law of States.⁴³ Moreover, just as a State cannot rely on domestic law to protect its internationally wrongful act, it cannot rely on it regarding its reparation obligation:⁴⁴ “The obligation to make reparations established by international courts is governed, as has been universally accepted, by international law in all its aspects: scope, nature, forms, and the determination of beneficiaries, none of which the respondent State may alter by invoking its domestic law.”⁴⁵

To connect the reparations to the wrongful act and to their purpose and manner of application, it is most useful to first refer to the findings of the PCIJ

39 Alexander Orakhelashvili, ‘European Convention on Human Rights and International Public Order’ (2002–2003) 5 *Cambridge Yearbook of European Legal Studies* 237, 267.

40 Commentary on the ARSIWA (n 6) para 13, 90.

41 Orakhelashvili, ‘European Convention on Human Rights and International Public Order’ (n 39) 267.

42 See, e.g., Damrosch and Murphy (n 22) 512.

43 Shaw, *International Law* (8th edn) (n 21) 607.

44 ARSIWA (n 7) art 32.

45 *Case of Suárez-Rosero v Ecuador* (Judgment: Reparations and Costs) IACHR (20 January 1999) para 42, 11.

in *Factory of Chorzów*, which have also been cited in subsequent cases.⁴⁶ On the link between the international law violation and the obligation to make reparation, the PCIJ stated:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.⁴⁷

On the purpose of the reparations:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.⁴⁸

On the form of the reparations:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁴⁹

All three findings are also codified in the ARSIWA. The first two, in particular, are covered in Article 31, which provides that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁵⁰ It also provides that “[i]njury includes any damage,

46 See, e.g., *Gabčíkovo-Nagymaros Project* (n 8) para 152, 81; *Avena* (n 37) para 119, 59; *Armed Activities (Judgment)* (n 37) para 257, 259. Additionally, *Papamichalopoulos and Others v Greece* App No 14556/89 ECtHR, 31 October 1995 para 36, 12.

47 *Factory at Chorzów* (Jurisdiction: Judgment No 8) [1927] PCIJ Rep Series A No 9, 21.

48 *Factory at Chorzów* (Merits: Judgment No 13) [1928] PCIJ Rep Series A No 17, 47.

49 *ibid.*

50 ARSIWA (n 7) art 31(1).

whether material or moral, caused by the internationally wrongful act of a State.”⁵¹ The third finding is contained in Articles 34 et seq.

10.3.1 *Link between Reparations and Internationally Wrongful Act*

The first finding regarding the link between reparation and the internationally wrongful act was formulated by the ILC in the ARSIWA as an obligation of the wrongdoing State (to make full reparation) rather than as a right of the injured State (to claim full reparation).⁵² This decision was made to clarify the formulation in cases involving multiple injured States,⁵³ but it is clear that the obligation of the offending State is the mirror image of the right of the injured State. The phrase “indispensable complement” implies that responsibility arises automatically with the commission of the breach, that is, without any specific activity on the part of the injured State.⁵⁴ This is also codified in with Article 1 of the ARSIWA. The automatic establishment of the consequences of a breach has already been recognized by the PCIJ, which has held that the obligation to make full reparation arises even if it is not provided for by the primary rule.⁵⁵ However, if the primary rule explicitly provides for the specific consequences of the breach or even excludes other forms of consequences, such a rule must be regarded as *lex specialis* within the meaning of Article 55 of the ARSIWA.⁵⁶

The State is only obliged to provide full reparation for the damage caused by the breach. There must be a legally relevant causal link between the breach and the damage, and not merely a cause-and-effect relationship.⁵⁷ Any consequences that occurred outside this scope are not covered by reparation, and the breaching State does not need to settle them.

51 *ibid* art 31(2).

52 *ibid* art 31.

53 Commentary on the ARSIWA (n 6) para 4, 91.

54 *ibid*.

55 *Factory at Chorzów* (Jurisdiction: Judgment) (n 47) 21: “Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”

56 Commentary on the ARSIWA (n 6) para 2, 86–87. See, in addition, Rosalyn Higgins, ‘Overview of Part Two of the Articles on State Responsibility’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 537–539.

57 Commentary on the ARSIWA (n 6) para 9–10, 92–93. For more on causation, see: Michael S Moore, *Causation and responsibility: An essay in law, morals, and metaphysics* (Oxford University Press 2009). See also the cases of *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic* (Award) ICSID Case No ARB/02/1 (25 July 2007) para 50, 12; *Rantsev v Cyprus and Russia* App No 25965/04 ECtHR, 7 January 2010 para 341, 83.

The ILC did not include the occurrence of injury among the conditions for international responsibility, stating that the question of injury depends on the primary rule.⁵⁸ Theoretically, international responsibility would arise even if no injury had occurred because international responsibility is ipso facto established by the breach.⁵⁹

However, the existence of an injury is a necessary element for the question of reparations given that “[t]he responsible State’s obligation to make full reparation relates to the ‘injury caused by the internationally wrongful act.’”⁶⁰ ILC also stated that “[t]he existence of actual damage will be highly relevant to the form and quantum of reparation.”⁶¹ Theoretically, even if an internationally wrongful act occurred without causing damage, the offending State would still be obliged to cease the breach (cessation) and offer assurances and guarantees of non-repetition, and the injured State would have the right to countermeasures. However, in practice, at least non-material damage always occurs⁶² and, as the Tribunal has noted, “[t]his damage is of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of [the State] as such, but of its highest judicial and executive authorities as well.”⁶³ Special Rapporteur Ago also argued that “[e]very breach of an engagement vis-à-vis another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State.”⁶⁴ The existence of a damage was also explicitly described by Anzilotti, according to whom “international responsibility derives its *raison d’être* exclusively from the violation of another State’s right and (...) any violation of a right constitutes damage.”⁶⁵

58 Commentary on the ARSIWA (n 6) para 9, 36.

59 Commentary on the ARSIWA (n 6) para 2, 32.

60 *ibid* para 5, 91.

61 *ibid* para 7, 92.

62 See, e.g., *Rainbow Warrior Affair* (n 13) para 107 and 109, 266–267: France argued that New Zealand was not entitled to reparations because it “suffered no damage, not even moral,” but the two States later agreed that “legal or moral damage” could also occur: “Unlawful action against non-material interests, such as acts affecting the honour, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.”

63 *ibid*.

64 ILC, ‘Second report on State responsibility (The origin of international responsibility) by Roberto Ago, Special Rapporteur’ (1970) UN Doc A/CN.4/233 para 54, 195.

65 Dionisio Anzilotti, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale* (F. Lumachi Libraio-Editore 1902) 89. On the role of damages in relation to international responsibility, see also Stephan Wittich, ‘Non-material damage and monetary reparation in international law’ (2004) 15 *Finnish Yearbook of International Law* 321; Gunther Handl, ‘Territorial sovereignty and the problem of transnational pollution’ (1975) 69(1) *American Journal of International Law* 50; Alan E Boyle, ‘State responsibility and international

In another case, the ICJ stated that reparations must be “appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it.”⁶⁶ However, “[w]hat constitutes ‘reparation in an adequate form’ clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury.”⁶⁷

Reparation is therefore inextricably linked to injury and less so to the breach and the nature of the primary rule violated.⁶⁸ It is true that the ARSIWA provide for specific consequences for breaches of *ius cogens*, but these are additional to the general ones.⁶⁹

Nollkaemper argues that the ARSIWA contain a paradox because although the basic articles (1 and 2) do not require damage for international responsibility to arise but link it exclusively to the violation of a primary norm, the principles defining reparations connect them to the existence of damage: “In other words, there is no responsibility without injury.”⁷⁰

10.3.2 *Purpose of the Reparation*

The second finding of the PCIJ in *Factory of Chorzów* is twofold: reparations must, as far as possible, remedy the consequences of the wrongful act while also restoring the situation that would probably have existed if the wrongful act had not occurred. The two parts are *prima facie* identical, but the second one is considerably more complex than the first. The first part (the step back in time) requires the deletion of consequences that objectively exist and can be identified. The second part (the step into the potential future) calls for a prediction of what the situation would be in the present if the wrongful act had not occurred. This is understandably a mere assumption and not a factual one, which is why the term “re-establish” seems strange in the context of a situation that has never existed.

The ILC has decided to include both parts in the ARSIWA, but not in full. The first part is integrated with limitations into the provisions on specific types

liability for injuries consequences of acts not prohibited by international law: A necessary distinction’ (1990) 39(1) *International and Comparative Law Quarterly* 1; John M Kelson, ‘State responsibility and the abnormally dangerous activity’ (1972) 13(2) *Harvard International Law Journal* 197.

66 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep (*Pulp Mills*) para 274, 104.

67 *Avena* (n 37) para 119, 59.

68 *Kerbrat* (n 33) 580.

69 See Chapter 3 of Part 2 of the ARSIWA (n 7).

70 Andre Nollkaemper, ‘Constitutionalization and the unity of the law of international responsibility’ (2009) 16(2) *Indiana Journal of Global Legal Studies* 535, 555.

of reparations.⁷¹ The second part (i.e., the establishment of the situation that would have existed if the breach had not occurred) is featured in a limited form as provisions on lost profits⁷² and interest⁷³ and in a limited reverse form in the provisions on the injured party's contribution to the total damage.⁷⁴ This formulation includes an additional limitation (aside from the causal link) to the settlement of reparations: a ceiling is set whereby the violating State is not obliged to settle anything more than the consequences of the violation and, in part, the restoration of the situation that would have existed in the absence of the violation. Anything beyond this can already be called punitive damages.⁷⁵ While it is true that tribunals occasionally award damages that can be said to exceed the actual damage and that how the wrongful act was committed sometimes affects the amount of the damages, such cases are rare and sporadic. They are usually specifically related to compensation for non-pecuniary damage suffered by an individual, which is difficult to assess objectively.⁷⁶ It should also be noted that some primary rules link the amount of reparation (damages) to the gravity of the breach and the circumstances in which it was committed.⁷⁷ In such cases, tribunals have also sometimes taken into account the fault (i.e., whether the act was intentional or negligent) to calculate the amount of the reparation.⁷⁸

The amount of the reparation is also related to the expression used in the first finding in *Factory of Chorzów*, namely, that the violating State is obliged to make reparations in an adequate form. Two consequences follow from

71 ARSIWA (n 7) art 35: "A State responsible (...) is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed," in combination with Articles 36 and 37. The return to the *status quo ante* is covered in particular by the provisions on restitution.

72 *ibid* art 36 para 2. See, e.g., John Barker, 'The different forms of reparation: Compensation' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 608–609.

73 ARSIWA (n 7) art 38.

74 *ibid* art 39.

75 *Opinion in the Lusitania Cases* 7 UNRIAA 32 (1 November 1923) (*Lusitania*) 39: "The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought."

76 Stephan Wittich, 'Awe of the gods and fear of the priests: Punitive damages and the law of state responsibility' (1998) 3(1) *Austrian Review of International and European Law* 101, 115–116.

77 Marten Zwanenburg, 'The Van Boven/Bassiouni Principle: An appraisal' (2006) 24(4) *Netherlands Quarterly of Human Rights* 641, 667.

78 Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Oxford University Press 1992) vol 1, 532.

this “adequacy test”: the first, already mentioned, is that the violating State is obliged to make full reparations, and the second is that the reparations must be proportionate to the damage.⁷⁹ The proportionality rule is incorporated in all forms of reparation (restitution,⁸⁰ compensation,⁸¹ and satisfaction⁸²).⁸³ It can also be found in practice.⁸⁴

Moreover, according to the proportionality test, reparations depend on the injury and not on the type of breach or the nature of the primary rule. The obligation to make reparation is, to some extent, independent of the existence of the primary rule after the wrongful act has been committed. The cessation of the validity of the primary rule after the wrongful act does not relieve the offending State of its obligation to make reparations. Both the existence of an obligation to make reparation and its amount are therefore mirror images of the injury and are linked to it.

10.3.3 *Forms of Reparation*

In *Factory of Chorzów*, the PCIJ mentioned only two types of reparation (restitution and compensation), but there is also *satisfaction*. They can be used separately, all three together, or in any other combination that leads to the ultimate goal, the elimination of the entire injury through the settlement of the whole reparation.⁸⁵

Like *Factory of Chorzów*, the ARSIWA set hierarchical rules between types of reparation. They establish restitution as the basic measure. The responsible State has the obligation to make restitution (i.e., to restore the *status quo ante*,

79 Kerbrat (n 33) 579.

80 ARSIWA (n 7) art 35 point b: “Restitution (...) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

81 *ibid* art 31, implicitly stating that compensation is limited to the actual damage and subject to adequate causation.

82 *ibid* art 37(3): “Satisfaction shall not be out of proportion to the injury.”

83 Brigitte Stern, ‘The obligation to make reparation’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 566–567.

84 See, e.g., *Lusitania* (n 75) 39 (“The remedy should be commensurate with the loss, so that the injured party may be made whole”); *Desert Line project L.L.C. v Yemen (Award)* ICSID Case No ARB/05/17 (6 February 2008) para 290, 65–66. See also: Christine Gray, ‘The different forms of reparation: restitution’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 596–597; Christian J Tams, ‘Do serious breaches give rise to any specific obligations of the responsible state?’ (2002) 13(5) *European Journal of International Law* 1161, 1169–1170.

85 ARSIWA (n 7) art 34.

that is, the situation as it existed before the breach).⁸⁶ For the extent of the damage that has not been repaired by restitution, the State is obliged to provide compensation.⁸⁷ For the damage that has not been made good by restitution or compensation, the State is obliged to provide satisfaction.⁸⁸

As already mentioned, the ARSIWA have limited all three types of reparation with the proportionality rule. The responsible State is required to make restitution within what is materially possible and provided that the burden of restitution is not wholly disproportionate to the benefits that could be obtained through compensation.⁸⁹ Compensation is limited to proven “financially assessable damage,” including lost profits.⁹⁰ However, the compensation must not be disproportionate to the damage and must not take an offensive form.⁹¹ The article on satisfaction also mentions its possible forms, but these are given only by way of example and not exhaustively.

This hierarchical order is not confirmed in practice.⁹² Even in *Factory of Chorzów*, the Court awarded compensation. While case law usually supports the primacy of restitution declaratorily, it is rarely determined in actuality.⁹³ The arbitral tribunal even sometimes denies the mandatory hierarchical nature of reparations in specific cases.⁹⁴ It should be noted that the injured State generally—there are exceptions—has a choice as to which form of reparation to seek, including whether to seek restitution at all,⁹⁵ which is also

86 Ibid art 35: “The State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.”

87 Ibid art 36(1): “The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”

88 Ibid art 37(1): “The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.”

89 Ibid art 35 points a and b: “provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

90 Ibid art 36(2): “The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

91 Ibid art 37(3): “Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.”

92 See, e.g., Gray, ‘The choice between restitution and compensation’ (n 20) 416; Kerbrat (n 33) 581–583.

93 Kerbrat (n 33) 581.

94 E.g., *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (Award: Merits) Ad Hoc Arbitration, Gunnar Lagergren (10 October 1973) (*BP Exploration Company*).

95 Gray, ‘The different forms of reparation: restitution’ (n 84) 593.

covered by the ARSIWA.⁹⁶ It seems that the primacy of restitution is set up as a guarantee of the integral character of reparations and not to put forth a choice of different forms of reparation. In this light, restitution represents a benchmark to be achieved through other forms of reparation.⁹⁷

10.3.3.1 Restitution

As explained, restitution⁹⁸ is a basic form of reparation. ARSIWA established the primacy of restitution and limited it to the obligation of the breaching party to restore the *status quo ante*. Therefore, restitution under the ARSIWA does not cover the creation of a situation that would exist had the breach not occurred.⁹⁹ The ARSIWA provide that “[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.”¹⁰⁰

Restitution can be roughly divided into *substantive*¹⁰¹ and *legal*,¹⁰² the former entailing the implementation of a concrete act (e.g., return of seized objects, withdrawal of an army, liberation of an individual) and the latter the modification of a legal act or a legal situation (e.g., modification of a law or judgment that violates a treaty).¹⁰³ Given that an assessment is required regarding which

96 ARSIWA (n 7) art 43(2)(b).

97 Kerbrat (n 33) 586. See also the quotation from *BP Exploration Company* (n 94) in Shaw, *International Law* (8th edn) (n 21) 608.

98 See e.g. Kerbrat (n 33) 581–586; Higgins (n 56) 537–544; Gray, ‘The choice between restitution and compensation’ (n 20) 413–423; Kolb (n 1) 154–158; Commentary on the ARSIWA (n 6) para 1–11, 96–98.

99 Commentary on the ARSIWA (n 6) para 1–3, 96.

100 ARSIWA (n 7) art 35.

101 E.g., *Construction of a Wall* (n 13) para 153, 198 (“Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person”); *Land and Maritime Boundary* (n 37) para 314, 451: “The Court notes that Nigeria is under an obligation in the present case expeditiously and without condition to withdraw its administration and its military and police forces from that area of Lake Chad.” See also, e.g., *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits: Judgment) [1962] ICJ Rep 6, 36–37; *US Diplomatic and Consular Staff in Tehran* (n 13) 44–45; *Armed Activities* (Judgment) (n 37) 181.

102 CACJ *El Salvador v Nicaragua* (1917) 11(3) *American Journal of International Law* 674, 674–730. El Salvador argued that the treaty concluded between Nicaragua and the US threatened its vital interests and that Nicaragua should therefore not implement it. See also, e.g., *Martini (Italy v Venezuela)* (Sentence) 2 UNRIAA 1975 (3 May 1930) 1002; *Affaire de la Société Radio-Orient (États du Levant sous mandat français contre Égypte)* 3 UNRIAA 1871 (2 April 1940) 1871–1881; *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep (*Barcelona Traction* [Judgment]) 10.

103 Commentary on the ARSIWA (n 6) para 5, 97.

act is necessary to achieve the *status quo ante*, the content of the restitution will often depend on the primary rule that has been violated.¹⁰⁴ Restitution was more common in the past than it is today.¹⁰⁵

In accordance with the principle of proportionality, the ARSIWA limit restitution. The responsible State is obliged to make restitution “provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”¹⁰⁶ The phrase “to the extent” means that partial restitution is also possible. The offending State is obliged to make restitution not exceeding the situations mentioned under a) and b). Restitution must thus be made within the limit of what is *materially* possible and the limit of proportionality. For the part that exceeds these two limits, the other two forms of reparation may be awarded.

If restitution is materially impossible, it is indisputable that it cannot be ordered. This is the situation in *LaGrand*, where Germany first sought legal restitution to exonerate the defendants, but this restitution naturally fell through after the executions of the convicted persons.¹⁰⁷ It is also substantively impossible if the object can be returned but not in the same form as it was before the violation.¹⁰⁸ If the right in rem in the object has already passed to a third party, restitution is not possible as long as the third party has acted in good faith.¹⁰⁹ However, restitution is not materially impossible if it would present a purely domestic law problem (the invocation of domestic law as a reason for not enforcing reparations is also precluded by the ARSIWA themselves¹¹⁰) or a practical problem for the violating State or cause it certain political difficulties.¹¹¹

104 *ibid.*

105 Shaw, *International Law* (8th edn) (n 21) 208.

106 ARSIWA (n 7) art 35. See also *Pulp Mills* (n 66) para 273, 103.

107 *LaGrand (Germany v United States of America)* (Judgment) [2001] 1CJ Rep 466: although Germany first sought legal restitution (para 10, 472), once the US had executed LaGrand, this option was of course dropped. The ICJ granted *assurances of non-repetition*. Restitution was also impossible in *Crime of Genocide (Bosnia v Serbia and Montenegro)* (Judgment) (n 37) para 460, 233.

108 *Forests of Central Rhodopis* (Sentence) 3 UNRIAA 1389 (4 November 1931) 1432.

109 Commentary on the ARSIWA (n 6) para 10, 98.

110 ARSIWA (n 7) art 32.

111 Commentary on the ARSIWA (n 6) para 8, 98. It should be noted that at the interface between civil law and national and international law—i.e., in cases of expropriation—a broader interpretation of the notion of “impossible” might arise. In the majority of cases of the oil companies against Libya, it was ruled that restitution was not possible as its (forced) execution would constitute a violation of the sovereignty of the State. It has also been suggested that expropriation, which is an act *de iure imperii*, does not in itself constitute an internationally wrongful act. Shaw, *International Law* (8th edn) (n 21) 608–609.

This difficulty of implementation is not an obstacle to the determination of restitution as long as it does not exceed the limit of proportionality. The disproportionality between the burden of restitution on the responsible State and the benefit to the injured State provided by the compensation must be grave.¹¹² This point also includes situations in which restitution would endanger the political independence or economic stability of the offending State. As recently as 1999, this formulation was included in a draft of Article 43 of the ARSIWA, which, at that time, governed restitution and also limited it to cases in which its provision would “seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.”¹¹³ The ILC later removed this limitation, arguing that it was too expansive and would allow too broad an interpretation in practice. However, it found that this limitation was adequately covered by proportionality (i.e., the current point b).¹¹⁴

Restitution cannot either be waived in favor of compensation if this would be inappropriate in the circumstances. Thus, an injured State cannot choose to pursue international responsibility if, for example, the life or health of individuals are at stake (e.g., captured hostages).¹¹⁵

Restitution is often confused with the obligation to cease a wrongful conduct,¹¹⁶ and it may not be obvious which of the two has been awarded.¹¹⁷ For instance, in the substantive restitution cases cited above, the question was whether Israel’s obligation to return “land, orchards, olive groves” and Nigeria’s obligation to “withdraw its military and police forces” constitute an obligation to cease a wrongful conduct or restitution. However, there are also cases when restitution is wrongly confused with an obligation of cessation.¹¹⁸ The latter is only possible if the wrongful conduct is ongoing. Meanwhile, restitution is also possible if the wrongful act has already ceased but there are consequences (damage) that restitution would remedy. Restitution is possible even if the primary rule has already ceased to bind the wrongdoing State.

112 Commentary on the ARSIWA (n 6) para 11, 98.

113 ILC, ‘Proceedings of the 48th session’ (1996) UN Doc A/CN.4/SER.A/1996/Add.I (Part 2), 63.

114 ILC, ‘Proceedings of the 52nd session’ (2000) UN Doc A/CN.4/SER.A/2000/Add.I (Part 2), para 180, 38.

115 Commentary on the ARSIWA (n 6) para 6, 120.

116 See, e.g., *Arrest Warrant* (n 12) point 3, 33.

117 Kerbrat (n 33) 584 cites cases before the ECtHR.

118 See, e.g., *Rainbow Warrior Affair* (n 13) para 113–114, 269–271.

In sum, there are three exceptions to the obligation to make restitution: a) an agreement between States and the right to choose when invoking international responsibility, b) the *material* impossibility of implementation, and c) the rule of proportionality.

10.3.3.2 Compensation

Although the ARSIWA and the case law cited above refer to restitution as the primary remedy, in practice, it is compensation that is most often sought.¹¹⁹ The reason lies in its flexibility as it can be tailored to any type of damage, unlike restitution and satisfaction.¹²⁰ Compensation is flexible because it is primarily a monetary payment.¹²¹ The ARSIWA define the obligation of the responsible State regarding compensation as follows:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.¹²²

Given that international law does not allow punitive damages, the value of compensation can be mathematically determined in relation to the total damage and restitution. The ARSIWA first lay out the basic purpose of reparation: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”¹²³ With regard to injury, they explain: “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”¹²⁴ This means that injury is equivalent to “total damage” and so is full reparation.

119 See, e.g., the decisions of various tribunals: *Factory at Chorzów* (Jurisdiction: Judgment) (n 47); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, (Compensation: Judgment) [2012] ICJ Rep 324; *Gabčíkovo-Nagymaros Project* (n 8) para 152, 81; *Nicaragua* (n 13) 14; *M/V “Saiga” (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) ITLOS Rep 1999; *Papamichalopoulos* (n 46); *A and others v UK* App No 3455/05 ECtHR, 19 February 2009 para. 27; *Velásquez Rodríguez v Honduras case* (1988) IACHR Series C No 4; *Tippettts, Abbett, McCarthy, Stratton v TAMSAFFA Consulting Engineers of Iran* (1984) Iran-US Claims Tribunal Reports vol 6; *Cargill, Incorporated v United Mexican States* ICSID Case No ARB(AF)/05/2 (18 September 2009); *LG&E Energy Corp* (n 57).

120 Stephan Wittich, ‘Compensation’ in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) vol 1, para 14, 501.

121 Wittich, ‘Non-material Damage and Monetary Reparation in International Law’ (n 65) 322.

122 ARSIWA (n 7) art 36.

123 *ibid* art 31(1).

124 *ibid* art 31(2).

[full reparation] = [total injury] = [restitution] + [compensation] + [satisfaction].

Since compensation covers “any financially assessable” damage and that satisfaction only concerns the part of the damage that cannot be covered by restitution and compensation (i.e., only damage that is not financially assessable), the calculation of compensation and satisfaction is theoretically straightforward: the value of the restitution awarded must be deducted from the total damage. The part of the difference between the total damage and the restitution that is financially assessable is covered by compensation; the part that is not is covered by satisfaction.¹²⁵

The differences between compensation and satisfaction arise mainly in the case of “moral damage” (non-material damage) caused to the State. This is linked to the respect and prestige of the State¹²⁶ and is the subject of satisfaction.¹²⁷ Other damage (i.e., material damage directly caused to the State and material and moral damage caused to individuals) is financially assessable and is thus, for the most part, subject to compensation. Hence, moral harm is only relevant in the context of compensation if it is suffered by an individual.¹²⁸

Material damage caused directly to a State may include, for example, the sinking of a ship,¹²⁹ the detention of a ship,¹³⁰ damage related to the failure to construct an agreed facility,¹³¹ the violation of sovereignty,¹³² or the violation of the inviolability of diplomatic facilities, property, archives, and documents.¹³³ In the case of damage caused to individuals, a distinction must be made between diplomatic protection, in which scenario the State has suffered so-called indirect damage as a result of the damage caused to the individual,¹³⁴

125 While satisfaction can, to a very limited extent, take the form of money, this is a very different function from that of compensation. Moral damage to the State can theoretically be assessed financially but only in a “highly approximate and notional way.” Commentary on the ARSIWA (n 6) para 4, 99.

126 Wittich, ‘Non-material Damage and Monetary Reparation in International Law’ (n 65) 336.

127 Commentary on the ARSIWA (n 6) para 1, 98–99.

128 Wittich, ‘Non-material Damage and Monetary Reparation in International Law’ (n 65) 360.

129 *Corfu Channel Case* (Judgment) [1949] ICJ Rep 4, 10.

130 *M/V Saiga (No 2)* (n 119) point a para 175, 66.

131 *Gabčíkovo-Nagymaros Project* (n 8) para 155 point 2(D), 83.

132 *Nicaragua* (n 13) para 15, 20.

133 *US Diplomatic and Consular Staff in Tehran* (n 13) 45.

134 E.g., *LaGrand* (n 107) 466, para 7, 516 (Germany claimed compensation for the execution of a German national, but the ICJ did not award it. It awarded *assurances of non-repetition and satisfaction*); *M/V Saiga (No 2)* (n 119) para e and f, para 175, 66–67 (The International

and special legal regimes (mainly in the field of human rights law), in which individuals themselves claim appropriate compensation before tribunals.¹³⁵ Issues of compensation to individuals are most commonly divided into personal injury and violation of substantive rights.¹³⁶ The latter includes investment disputes, in which individuals (usually legal persons) seek reparations from States for a breach of investment agreements, especially in relation to expropriations.¹³⁷ The ARSIWA (as well as the present book) deal only with injury (both direct and indirect) caused to the State.

Despite their clarity in principle, the rules for determining compensation are complex.¹³⁸ The most difficult issue is the assessment of the amount of the damages (including lost profits, interest, and the issue of causation), which essentially rests on the question of what constitutes damage in the first place.¹³⁹

The use of “fair market value” has become established for the valuation of objects even though the cost to the owner (and hence the damage) may have been higher.¹⁴⁰ Financially assessable damage also includes lost profits,¹⁴¹ but only those that are proven (“insofar as it is established”).¹⁴² The latter requirement is redundant because the remaining damages must also be proved and the responsible State is only liable for damages for which a causal link has been established.

To achieve “full reparation,” tribunals may also set interest. Interest is not necessarily linked to the compensation¹⁴³ but is usually awarded by tribunals

Tribunal for the Law of the Sea (ITLOS) also awarded compensation for the unlawful detention of the captain and crew); *Nicaragua* (n 13) para 15, 20 (Nicaragua wanted the ICJ to award it compensation also “in respect of wrongs inflicted upon its nationals”); S.S. *T'm Alone* (Canada, United States) (Award) 3 UNRIAA 1609 (30 June 1933 and 5 January 1935) 1618.

135 E.g., *Suárez-Rosero* (Reparations and Costs) (n 45); *Papamichalopoulos* (n 46); *Husayn* (n 25); *Al Nashiri v Poland* (n 25); *Al Nashiri v Romania* (n 25).

136 Murphy (n 26) 208–209.

137 See, e.g., *LG&E Energy Corp* (n 57) para 50, 12; *SD Myers Inc. v Government of Canada* (Partial Award) UNCITRAL (13 November 2000) para 325–326, 80.

138 See, e.g. Irmgard Marboe, *Calculation of compensation and damages in international investment law* (2nd ed, Oxford University Press 2017). See also the reasoning of the tribunal in *SD Myers* (n 137) 75–79 (Chapter “Principles on which compensation should be awarded”).

139 Wittich, ‘Non-material Damage and Monetary Reparation in International Law’ (n 65) 322–323.

140 Marboe (n 138) 36–37.

141 See, e.g., *M/V Saiga (No 2)* (n 119) point b, para 175, 66.

142 ARSIWA (n 7) art 36.

143 Commentary on the ARSIWA (n 6) para 1, 107.

at the same time since it is expressed in monetary terms. Interest runs from the time when the principal should have been settled until it is paid.¹⁴⁴ In practice, certain rules have developed regarding the amount of interest, the compounding of interest, and when interest is not appropriate.¹⁴⁵

10.3.3.3 Satisfaction

Satisfaction is a third form of reparation, which is only available if the injury could not be covered by restitution and compensation.¹⁴⁶ It is usually awarded for an injury that is not financially assessable. Given that material damage to the State and material and moral damage to individuals are usually financially assessable, satisfaction will normally be awarded for moral damage to the State.¹⁴⁷ There are very few cases where compensation (i.e., not satisfaction) has been awarded to a State for moral damages;¹⁴⁸ Dumberry mentions *S.S. I'm Alone*.¹⁴⁹

Satisfaction thus often has a symbolic meaning and includes forms such as “an acknowledgement of the breach, an expression of regret, [and] a formal apology.”¹⁵⁰ To this can be added disciplinary measures against the persons responsible.¹⁵¹ Today, the most common form of satisfaction is the recognition by a tribunal of the wrongfulness of the wrongful act by the offending State.¹⁵²

The ILC lists among the examples of moral injury to the State the insult of State symbols, the violation of sovereignty and territorial integrity, attacks on ships and aircraft, insults or attacks on official representatives of the State, and the violation of the inviolability of diplomatic premises.¹⁵³ Interestingly, the

144 ARSIWA (n 7) art 38(2).

145 For more on interests: Commentary on the ARSIWA (n 6) para 1–12, 107–109; Kolb (n 1) 162–163; Penelope Nevill, ‘Awards of interest by international courts and tribunals’ (2008) 78(1) *British Yearbook of International Law* 255.

146 ARSIWA (n 7) art 37(1).

147 Commentary on the ARSIWA (n 6) para 1–3, 105–106.

148 Patrick Dumberry, ‘Compensation for moral damages in investor-state arbitration disputes’ (2010) 27(3) *Journal of International Arbitration* 247, 251.

149 *S.S. I'm Alone* (n 134) 1618: “the United States ought formally to acknowledge its illegality, and to apologize to His Majesty’s Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of \$25,000 to His Majesty’s Canadian Government.”

150 ARSIWA (n 7) art 37(3).

151 Murphy (n 26) 210.

152 E.g., *Rainbow Warrior Affair* (n 13) para 123, 273; *M/V Saiga (No 2)* (n 119) point b, para 176, 66; *Arrest Warrant* (n 12) para 75, 31; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] 1CJ Rep 177 para 205, 246–247. See also Wittich, ‘Non-material Damage and Monetary Reparation in International Law’ (n 65).

153 Commentary on the ARSIWA (n 6) para 4, 106.

ICJ did not grant any satisfaction in the cases of *US Diplomatic and Consular Staff in Tehran* (inviolability of diplomatic premises and property), *Military and Paramilitary Activities in Nicaragua* (violation of sovereignty and territorial integrity), and *Arrest Warrant* (honor of a representative of the State).¹⁵⁴

Like reparation in general, satisfaction is—crucially—not punitive. It is intended to cover, in combination with the other two types of reparation, all the actual damage suffered by the injured State. Satisfaction must therefore be proportionate to the damage and must not be of a humiliating nature.¹⁵⁵

10.4 Contribution of an Injured State to the Injury and Duty to Mitigate the Consequences

Contribution to the injury refers to actions taken before or during the occurrence of the breach, whereas the duty to mitigate concerns the conduct of the injured State after the breach has already been committed. Both have an impact on the amount of the reparation. Contribution is also defined in a separate article in the ARSIWA: “In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”¹⁵⁶

This is in line with the basic principle that limits reparation to the amount of the actual damage caused by the breach. Damage may also arise for other reasons unrelated to the breach, but the breaching State is only responsible for the damage that it has caused. Damage caused by the conduct of the injured State itself is not to be regarded as damage resulting from the wrongful act and is, therefore, not to be compensated for by the offending State.

Theoretically, the injured State can contribute the full spectrum of 0–100% to the damage caused, which must be properly recognized in the determination of the reparations. The ILC has limited the acts of the injured party that can contribute to the damage to intentional and negligent acts.¹⁵⁷ In this case, too, the ILC has introduced the element of *fault* and the *principle of subjective responsibility*. Consequently, in relation to injury as the result of a wrongful act, the wrongdoing State is responsible under the *principle of objective*

154 Wittich, ‘Non-material Damage and Monetary Reparation in International Law’ (n 65) 340.

155 ARSIWA (n 7) art 37(3).

156 *ibid* art 39.

157 Commentary on the ARSIWA (n 6) para 2, 110.

responsibility, that is, including for damage that occurs by accident (*casus*), irrespective of the degree of its connection to the damage. For the purpose of reparation, the injury caused by the injured State shall be deducted from this damage. The latter is taken into account according to the *principle of subjective responsibility* and does not cover damage that is caused by accident (*casus*) even if the reasons for its occurrence are on the part of the injured State.¹⁵⁸

The importance of the causal link and the responsibility of the violating State only for the damage caused by the wrongful act is also reflected in the *duty to mitigate*, which regulates the conduct of the injured party *post factum* (i.e., after the violation has been committed). Under it, the injured State is expected to take reasonable measures available to it after the breach has been committed to ensure that the damage resulting from the wrongful act is not aggravated. Despite the use of the term “duty,” it is not a legally binding obligation, which would affect the scope of the wrongfulness of the violating State’s conduct,¹⁵⁹ as the ILC asserts.¹⁶⁰ Therefore, even if the injured State does not take any measures, this does not reduce the wrongfulness of the act.¹⁶¹ At this point, it is worth pointing out that the duty to mitigate is not included in the ARSIWA themselves but merely mentioned by the ILC in the commentary on the causal link in the article on reparations.¹⁶²

Nevertheless, as the purpose of the judicial procedure is to determine which injury is attributable to the wrongful act, the duty to mitigate has some weight in the determination of reparation. Tribunals recognize that it is *equitable* to deduct from the harm existing at the time of the decision the harm resulting from the injured party’s passivity or failure to take reasonable steps. The deduction of the damage caused by the conduct of the injured party does not diminish the wrongfulness of the wrongdoer’s conduct, nor does it affect the obligation of the wrongdoer to make full reparation by covering the entire injury caused by the wrongful act. The injury caused as a result of the breach

158 Interestingly, in the cases cited by the ILC, the Tribunal found no contribution. In *SS Wimbledon*, the PCIJ considered whether the actions of the ship’s master contributed to the ultimate damage and found that they did not. *S.S. Wimbledon (UK v Japan)* [1929] PCIJ Series A No 1, 31. In *LaGrand*, the ICJ referred to Germany’s late reaction, but this does not seem to have ultimately influenced the reparations decision. *LaGrand* (n 107) para 119, 509. Contribution was also considered in *Ahmadou Sadio Diallo*, where the ICJ ruled on the contribution to the damage by a Guinean individual and found it had not been proved. *LaGrand* (n 107) para 31–32, 337.

159 Higgins (n 56) 540.

160 Commentary on the ARSIWA (n 6) para 11, 93.

161 *ibid.*

162 *ibid.*

still “belongs” entirely to the wrongdoer. Any additional damage is the liability of the injured State. The latter does not cover it by direct payment, but this damage is deducted from the total damage existing at the time of the tribunal’s decision.

The basis on which the injured State is expected to limit the consequences of the violation is unclear, as is which expectations are even legally justified.¹⁶³ On the one hand, the duty to mitigate is no more than a matter of ascertaining the actual damage caused by the wrongdoing State. On the other hand, case law does, in fact, impose on the injured party an obligation to remedy and limit the consequences of a breach that it did not itself commit and in which it is the injured party. In this regard, the commentary to the ARSIWA states that “[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury.”¹⁶⁴

In *Gabčíkovo-Nagymaros*, Slovakia argued that such an obligation already exists as a general principle of international law.¹⁶⁵ The Court did not deny the existence of the duty but asserted that the inactivity of the injured party would not affect the wrongfulness of the act but would *possibly* have an impact on the calculation of damages.¹⁶⁶ In this particular case, there was no need to decide on the application of this rule at a later stage.

Kolb gives further examples.¹⁶⁷ The duty to mitigate was mentioned by the Eritrea-Ethiopia Claims Commission, which, like the ICJ, implicitly recognized this obligation but found that Ethiopia had acted in accordance with it.¹⁶⁸ Two cases before the UN Compensation Commission dealing with the conduct of individuals in relation to violations by Iraq are also relevant here. In *Category C Claims*, the Commission was “of the opinion that the compensation payable

163 Kolb (n 1) 164.

164 Commentary on the ARSIWA (n 6) para 11, 93.

165 *Gabčíkovo-Nagymaros Project* (n 8) para 80, 55: “It is a general principle of international law that a party injured by the non-performance of another contracting party must seek to mitigate the damage he has sustained.”

166 *ibid*: “While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.”

167 Kolb (n 1) 164–165.

168 “Ethiopia also charged Eritrea with failing to mitigate its damages by expending ERN 2,451,836 for the temporary hospital rather than building a new one, and objected to Eritrea’s claiming 90% rather than 75% of the costs of replacing looted property” and “[t]he Commission does not, however, agree that Eritrea failed to mitigate its damages by constructing the temporary hospital.” *Eritrea-Ethiopia Claims Commission* (Final Award: Eritrea’s Damages Claims) 27 UNRIAA 505 (17 August 2009) para 125 and 126, 554.

to claimants should reflect claimants' efforts to mitigate their losses"¹⁶⁹ and further declared that "[i]nternational law recognizes (...) an obligation on the part of an injured party to mitigate his or her losses," which includes the duty to take *reasonable* steps, not just *any* steps.¹⁷⁰ In an even more affirmative manner, the Commission stated the obligation in *Well Blowout* by arguing that the injured party is "not only permitted but indeed obliged to take reasonable steps (...) to mitigate the loss, damage or injury."¹⁷¹

Therefore, practice does not limit the injured State's duty to mitigate to acts of willful intent and negligence but has applied the *principle of objective responsibility*. It should be reiterated that the duty to mitigate does not affect the responsibility of the wrongdoing State for the wrongful act but only for the injured State's "share" in the damage existing at the time of the decision on reparations. As with the contribution of the injured State, the duty to mitigate is an assessment of the actual role of the injured State in the damage. These two instruments also establish a strong link between damage and reparation. While the causal link between the wrongful act and the damage is still the most important institution in determining reparations, the actual and objective existence of the damage and the role of the States in its occurrence are also significant.

10.5 Consequences of Serious Breaches of *Jus Cogens*

The ARSIWA establish specific consequences for violations of *jus cogens*, limiting them to *serious* breaches,¹⁷² that is, gross or systematic ones.¹⁷³ The term "serious" refers to the intensity of the violation and concerns situations when the values protected by the provision are attacked "directly and openly" by a State.¹⁷⁴ The systematic nature of the violation is reflected in its organized and deliberate nature.¹⁷⁵ Hence, for a

169 *Category C Claims* in Elihu Lauterpacht, Christopher J Greenwood and Andrew G Oppenheimer (eds), *International Law Reports* (Cambridge University Press 1998) vol 109, 388.

170 *ibid* 389.

171 *Well Blowout Control Claim* in Elihu Lauterpacht, Christopher J Greenwood and Andrew G Oppenheimer (eds), *International Law Reports* (Cambridge University Press 1998) vol 109, 554–555.

172 ARSIWA (n 7) art 40(1).

173 *ibid* art 40(2).

174 Commentary on the ARSIWA (n 6) para 8, 113.

175 *ibid*.

violation to be systematic, the culpability or culpable attitude of the State is required.¹⁷⁶

The specific consequences are threefold: a) all States must endeavor to bring the breach to an end by using the permitted means,¹⁷⁷ b) no State may recognize as lawful a situation created by the breach,¹⁷⁸ and c) no State may render aid or assistance in maintaining the situation.¹⁷⁹ The violation may not be recognized as lawful by the violating and injured States themselves as the term “no State” refers also to them.¹⁸⁰

Bearing in mind that Articles 40 and 41 of the ARSIWA deal only with serious breaches of *jus cogens*, breaches below the threshold of seriousness are dealt with based on the “general rules” (i.e., in accordance with the other articles).¹⁸¹ Some legal experts argue that in practice, the specific provisions of these two articles do not impose specific obligations on the violating State¹⁸² and that their consequences are no different from those of violations of other norms.¹⁸³ On the prohibition of the recognition of the consequences of breaches of *erga omnes* provisions, which include *jus cogens*, Judge Higgins of the ICJ wrote: “That an illegal situation is not to be recognised or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of ‘erga omnes’. (...) The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of erga omnes.”¹⁸⁴ Nor does a violation of *jus cogens* affect the rules of attribution; the same rules as in other cases apply.¹⁸⁵

Among the specific consequences, the obstacle to the free will of the injured State to invoke international responsibility and choose reparations stands out.¹⁸⁶ Whereas, in the case of other violations, the injured party may decide for itself what type of reparation to seek and whether or not to pursue

176 Enrico Milano, ‘Territorial disputes, wrongful occupations and state responsibility: Should the International Court of Justice go the extra mile’ (2004) 3(3) *Law and Practice of International Courts and Tribunals* 509, 524.

177 ARSIWA (n 7) art 41(1).

178 *ibid* art 41(2).

179 *ibid*.

180 Commentary on the ARSIWA (n 6) para 9, 115.

181 Milano, ‘Territorial disputes, wrongful occupations and state responsibility’ (n 176) 512.

182 See, e.g., Tams (n 84) 1179; Nollkaemper, ‘Constitutionalization and the unity of the law of international responsibility’ (n 70) 549.

183 Tams (n 84) 1179.

184 Separate opinion of Judge Higgins in *Construction of a Wall* (n 13) para 38, 216–217.

185 *Crime of Genocide (Bosnia v Serbia and Montenegro)* (Judgment) (n 37) para 379, 199.

186 Alexander Orakhelashvili, ‘Peremptory norms and reparation for internationally wrongful acts’ (2003) 3 *Baltic Yearbook of International Law* 19, 28.

international responsibility, it should not be able to do so in the case of serious violations of *jus cogens*.¹⁸⁷ Often (e.g., in cases of human rights violations), the State will not be able to refuse restitution and opt for monetary compensation (damages),¹⁸⁸ but this does not mean that restitution is always possible (e.g., destruction of cultural sites or nuclear radiation after an attack).¹⁸⁹ Neither does this suggest that restitution, when possible, can always wipe out the consequences of the violation. Compensation and satisfaction will be necessary, for instance, if a person has been illegally imprisoned for a long time.¹⁹⁰

The special significance of *jus cogens* norms is reflected in the fact that a State cannot invoke circumstances precluding wrongfulness for acts that violate these norms (e.g., a State cannot take countermeasures in violation of *jus cogens* norms).¹⁹¹ The most important consequence of a violation of *jus cogens* is the widening of the circle of States that can invoke international responsibility against the violating State.¹⁹²

10.6 Circumstances Precluding Wrongfulness

The ARSIWA list six circumstances that preclude the wrongfulness of an act. That is, although the act of a State has all the elements of an internationally wrongful act, the presence of these circumstances precludes its wrongfulness.¹⁹³ The exclusion applies only during the existence and to the extent of those circumstances. Crucially, the act would be internationally wrongful in the absence of these circumstances. This also means that a State that alleges the existence of such circumstances and cannot prove them admits that its act was wrongful.¹⁹⁴ An example of such an act is the overflight of national airspace by a foreign aircraft. Overflights are usually wrongful; however, if a State conducts overflights with the permission (i.e., consent) of the State that would otherwise be the injured State, wrongfulness is precluded. Other examples of

187 *ibid.*

188 *ibid.* 34.

189 Christian Tomuschat, 'International crimes by states: an endangered species?' in Karel Wellens (ed), *International law: Theory and practice. Essays in honour of Eric Suy* (Martinus Nijhoff Publishers 1998) 256.

190 Orakhelashvili, 'Peremptory norms and reparation for internationally wrongful acts' (n 186) 40.

191 ARSIWA (n 7) art 26.

192 See *n. Invocation of international responsibility*.

193 Commentary on the ARSIWA (n 6) para 1–2, 71.

194 *Gabčíkovo-Nagyymaros Project* (n 8) para 48, 39.

these circumstances are *self-defense*,¹⁹⁵ *countermeasures*,¹⁹⁶ *force majeure*,¹⁹⁷ *distress*,¹⁹⁸ and *necessity*.¹⁹⁹ The book does not deal with most of these circumstances in detail, but one of their common consequences is relevant.

Circumstances that preclude wrongfulness do not in themselves affect the validity of the primary rule. It remains valid but cannot be used to establish the international responsibility of a State at the time and in the particular circumstances.²⁰⁰ Circumstances act as a “shield” against the obligations of the primary rule, but they are not a “sword” against its validity.²⁰¹ As soon as the circumstances cease to exist, the primary rule can be applied again.²⁰² Here, the ILC quotes the ICJ in *Gabčíkovo-Nagymaros*: “As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.”²⁰³

For the purposes of this book, it must be noted that the assertion of circumstances precluding wrongfulness is without prejudice to “the question of compensation for any material loss caused by the act in question.”²⁰⁴ The ILC points out that the term “compensation” in this case is not to be confused with the type of reparation with the same title but must rather be understood as a broader meaning of the word “compensation.” In this context, ARSIWA has conveniently used the term “material loss” rather than “damage” or “injury.” Material loss has a broader meaning.²⁰⁵

195 See, e.g., Federica I Paddeu, ‘Use of force against non-state actors and the circumstance precluding wrongfulness of self-defence’ (2017) 30(1) *Leiden Journal of International Law* 93, 93–116.

196 James R Crawford, ‘Counter-measures as interim measures’ (1994) 5(1) *European Journal of International Law* 65, 66.

197 See, e.g., Sandra Szurek, ‘Circumstances precluding wrongfulness in the ILC Articles on state responsibility: Force Majeure’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010).

198 Sandra Szurek, ‘Circumstances precluding wrongfulness in the ILC Articles on state responsibility: Distress’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010).

199 See, e.g., Andreas Laursen, ‘The use of force and (the state of) necessity’ (2004) 37(2) *Vanderbilt Journal of Transnational Law* 485, 485–526.

200 Commentary on the ARSIWA (n 6) para 2–4, 71; James R Crawford and Simon Olleson, ‘The exception of non-performance: Links between the law of treaties and the law of state responsibility’ (2000) 21 *Australian Yearbook of International Law* 55, 73.

201 Commentary on the ARSIWA (n 6) para 2, 71.

202 *ibid.*

203 *Gabčíkovo-Nagymaros Project* (n 8) para 47, 38.

204 ARSIWA (n 7) art 27; ILC, ‘Provisional summary record of the 3374th meeting of the 69th session of the ILC (second part)’ (2017) UN Doc A/CN.4/SR.3374.

205 Commentary on the ARSIWA (n 6) para 4, 86.

The ILC thus allows for the possibility that a State whose action does not qualify as a wrongful act at a particular moment in time may be held liable for its consequences. There are undeniably consequences with a causal link to the acts of the State, but these are acts that, according to international responsibility in the strict sense, would not entitle the injured State to any kind of reparation. The injured State may therefore claim “compensation” from a State for the consequence of an act that, although linked to that State, does not establish a relationship of international responsibility between the two States because the State that committed it cannot be considered to be a wrongdoer.

When including stipulation on compensation for material loss in the ARSIWA, the ILC faced the dilemma of choosing a legal basis for compensation for acts that are not unlawful. It opted to leave the wording of the article open, as “without prejudice.”²⁰⁶ However, the basic thrust of Article 27 is that it is unfair (i.e., contrary to the principle of equity)²⁰⁷ for the injured State to bear the damage caused by the acts of another State if the injured State neither caused nor contributed to the situation.²⁰⁸ Importantly, the ARSIWA adopted rules of exculpation rather than the idea of (temporary) invalidity of the primary rule. This creates an “abstract wrongfulness”: there has been a violation of the primary rule *in abstracto*, but the “causing” State is not responsible for it.²⁰⁹

The idea that the State should compensate for acts occurring in circumstances that preclude their wrongfulness has been supported by some authors in the field of international investment disputes, who argue that international practice points in the direction of an obligation to compensate in these circumstances.²¹⁰ At this point, three cases can be highlighted, the first two

206 Yaël Ronen, ‘Avoid or compensate—Liability for injury to civilians inflicted during armed conflict’ (2009) 42(1) *Vanderbilt Journal of Transnational Law* 181, 189.

207 “[T]he Committee had again decided to retain that basic balance, so as to ensure that the State invoking the circumstance would bear the costs, as a matter of equity.” ILC, ‘Proceedings of the 2681st meeting of the 53rd session of the ILC (first part)’ (2001) UN Doc A/CN.4/SR.2681 para 80–81, 99.

208 Ronen (n 206) 189.

209 James R Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10(2) *European Journal of International Law* 435, 443–444.

210 See, e.g., August Reinisch, ‘Necessity in international investment arbitration—An unnecessary split of opinions in recent ICSID cases—Comments on CMS v. Argentina and LG&E v. Argentina’ (2007) 8(2) *Journal of World Investment Trade* 191, 207–208; Christina Binder, ‘Stability and change in times of fragmentation: The limits of pacta sunt servanda revisited’ (2012) 25(4) *Leiden Journal of International Law* 909, 920 (“[I]nternational practice points towards a duty to compensate”); Robert D Sloane, ‘On the use and abuse of necessity in the law of state responsibility’ (2012) 106(3) *American Journal of International Law* 447, 506 (“[C]ustomary international law [...] requires payment of prompt, adequate and effective compensation”).

supporting this idea and the third challenging it. In *Gabčíkovo-Nagymaros*, the ICJ stated that “Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.”²¹¹ This case and Article 27 of the ARSIWA were cited by the International Centre for Settlement of Investment Disputes (ICSID) in *CMS v Argentina*. The Tribunal argued that “[t]he plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed.”²¹² However, in the later case of *LG&E v Argentina*, the ICSID held that Article 27 does not determine whether it is necessary to pay any compensation at the time of the necessity. It added that “[t]he Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor,”²¹³ not the State that invoked the state of necessity.

The ARSIWA and its Commentary do not limit the obligation under Article 27 to the injured State: the State could be obliged to compensate for the costs of material damage all those who have suffered such damage, including third States and individuals. The possibility of providing such compensation was initially envisaged only for cases of consent, distress, force majeure, and necessity (i.e., not for countermeasures and self-defense) but was eventually adopted in Article 27 of the ARSIWA for all circumstances precluding wrongfulness.²¹⁴ The rationale for this is clear with regard to most of the circumstances that preclude wrongfulness: it is reasonable that a State that is forced to cause material harm on the territory of a neighboring State to protect its own interests (as in *Gabčíkovo-Nagymaros*) compensates the neighboring State for the costs of repairing that damage. This obligation is less obvious in the case of countermeasures, which are therefore dealt with separately.

10.6.1 Countermeasures

As already mentioned, countermeasures are one of the circumstances that preclude wrongfulness. Countermeasures are acts that in themselves constitute a violation of a State’s obligations under international law but whose unlawfulness is excluded by the particularity of the circumstances. They are

211 *Gabčíkovo-Nagymaros Project* (n 8) para 48, 39.

212 *CMS Gas Transmission Company v The Argentine Republic* (Award) ICSID Case No ARB/01/8 (12 May 2005) para 388, 112.

213 *LG&E Energy Corp* (n 57) para 50, 12.

214 Stephan Wittich, ‘The International Law Commission’s articles on the responsibility of states for internationally wrongful acts adopted on second reading’ (2002) 15(4) *Leiden Journal of International Law* 891, 898.

acts of the injured State in reaction to an international violation by the offending State to the detriment of the former. Their purpose is to *induce* the offending State to comply with the (breached) obligations.²¹⁵

A State that believes that its rights have been violated by another State may decide to take countermeasures. If it later turns out that there was no primary violation, the State that imposed the countermeasures will not be able to invoke circumstances precluding wrongfulness and will thus be responsible for a violation of international law.²¹⁶ Therefore, States impose countermeasures at their own risk,²¹⁷ and the ILC has established the rules, conditions, and limits for their adoption. Accordingly, countermeasures may be adopted by the injured State a) as a reaction to a wrongful conduct by the breaching State to induce the latter to cease the wrongful conduct and make full reparation; b) they may be directed only against the breaching State and not against a third State; c) as temporary measures (i.e., until their purpose is achieved), they must be such that once they are terminated, a return to the *status quo ante* is possible; d) they must be proportionate; e) they must not involve violations of human rights obligations, humanitarian law, *jus cogens*, and so on; f) they must not adversely affect the peaceful settlement of disputes and must not violate the diplomatic inviolability of the State against which they are directed.²¹⁸ In this context, procedural steps are set that the injured State must follow before countermeasures can be taken.²¹⁹ If a State violates the rules above, wrongfulness is not precluded, and the State that imposed the countermeasures is consequently responsible for its own internationally wrongful breach vis-à-vis the State against which the countermeasures were directed.

215 ARSIWA (n 7) art 49(1).

216 Commentary on the ARSIWA (n 6) para 3, 130.

217 Crawford, 'Counter-measures as interim measures' (n 196) 66.

218 Commentary on the ARSIWA (n 6) para 6, 129. See also Enzo Cannizzaro, 'The law of proportionality in the law of international countermeasures' (2001) 12(5) *European Journal of International Law* 889 (on assessing the proportionality of countermeasures); Lori Fisler Damrosch, 'The legitimacy of economic sanctions as countermeasures for wrongful acts' (2019) 46(1) *Ecology Law Quarterly* 95 (on the procedural and substantive legitimacy of certain types of countermeasures); David J Bederman, 'Counterintuiting countermeasures' (2002) 96(4) *American Journal of International Law* 817; Jacqueline Peel, 'New state responsibility rules and compliance with multilateral environmental obligations: Some case studies of how the new rules might apply in the international environmental context' (2001) 10(1) *Review of European, Comparative & International Environmental Law* 82.

219 ARSIWA (n 7) art 52.

10.6.1.1 Countermeasures by the Injured State against Third States

The relationship of countermeasures to third States and vice versa is of particular relevance to this book. As concerns the purposes and limitations of countermeasures, the ARSIWA provide that they may only be taken by the injured State against the offending State,²²⁰ and, therefore, actions directed against a third State do not exclude wrongfulness. In the case of such acts, two situations may arise depending on whether an international law relationship (e.g., a bilateral or multilateral international treaty or a customary law norm) exists between the injured State and the third State.²²¹ If such a relationship exists and the injured State breaches its obligations towards the third State by performing the act,²²² an internationally wrongful act (and, thus, international responsibility) may arise in relation to that third State. However, if there are no such international obligations between the injured State and the third State, no relationship of international responsibility arises between them because the State that has imposed the countermeasures cannot be responsible for breaching a non-existent primary rule.²²³

In the first case, “classic” international responsibility is created between the State that imposed the countermeasures and the third State. The latter has at its disposal the full spectrum of consequences of an internationally wrongful act, namely, a demand for cessation of the breach, an assurance of non-repetition, and reparation. In the second case, a situation could arise as defined in Article 27 of the ARSIWA discussed in the previous section: a third State that has suffered material damage as a result of the countermeasures imposed could be entitled to compensation. The act of the injured State cannot be characterized as an internationally wrongful act, but this is *without prejudice* to the question of the recovery of costs for material harm.²²⁴ It is important to note that the ILC does not mention the provisions of Article 27 in its commentary on this point but states that it is understandable that collateral damage may arise when countermeasures are imposed, which cannot be excluded; it adds, “[i]f they

220 *ibid* art 49(1).

221 Michael N Schmitt and Christopher Pitts, ‘Cyber countermeasures and effects on third parties’ (2014) 14 *Baltic Yearbook of International Law* 1, 4–6.

222 Countermeasures may also violate the international law rights of other entities, such as investors; see Tillmann Rudolf Braun, ‘Globalization-driven innovation: The investor as a partial subject in public international law; An inquiry into the nature and limits of investor rights’ (2014) 15(1–2) *Journal of World Investment & Trade* 73, 104–106. They may also violate those of individuals; see Schmitt and Pitts (n 221) 16–20.

223 Schmitt and Pitts (n 221) 4–6.

224 ARSIWA (n 7) art 27.

have no individual rights in the matter they cannot complain.”²²⁵ However, it is clear from its provisions that Article 27 of the ARSIWA applies to all circumstances that preclude wrongfulness and, therefore, also to countermeasures.

This example describes a situation in which countermeasures are directed against a third State that has no formal international legal relationship with the imposing State. However, collateral damage can also arise when countermeasures are properly directed against the offending State but cause damage to a third State. Even if the countermeasures against the offending State are justified and, hence, preclude wrongfulness against it, this alone does not preclude wrongfulness against the third State.²²⁶

10.6.1.2 Third State Countermeasures against the Wrongdoing State

As shown in Chapter 3.5, *Invocation of international responsibility*, as regards breaches of obligations arising from multilateral treaties (*erga omnes partes*)²²⁷ or rules (both treaties and customary law) with *erga omnes* effect, certain rights are also available to third States (i.e., States that are not directly affected by the breach but have a legitimate interest in its cessation because the obligation is owed to them).²²⁸ These are only States that are parties to these multilateral treaties or to which the rules of customary law also apply. The ARSIWA provide that these States may impose measures that are identical in substance to the institution of countermeasures and that are taken with the same purpose—specifically, to obtain the cessation of the breach and the payment of reparations by the breaching State.²²⁹ In adopting the ARSIWA, the ILC noted that the practice of States in this area was inconsistent and did not create for those States a clearly recognized entitlement to take countermeasures. Consequently, the ARSIWA and their Commentary thus refer to them as *lawful measures* to distinguish them from the institution of countermeasures.²³⁰ Examples include the economic sanctions adopted by the US against Uganda for genocide or against South Africa for apartheid, the collective sanctions imposed by the Member States of the European Community and the US against Iraq for the occupation

225 Commentary on the ARSIWA (n 6) para 5, 130.

226 Schmitt and Pitts (n 221) 6.

227 Only if these contracts create protection for a collective interest. ARSIWA (n 7) art 48(1)(b).

228 On the invocation of international responsibility by third countries, see *n. Invocation of international responsibility*.

229 ARSIWA (n 7) art 54.

230 Commentary on the ARSIWA (n 6) para 6–7, 139.

of Kuwait, and the abrogation of the Cooperation Agreement with the FRY in 1991 by the Member States of the European Community.²³¹

These lawful measures by third States are limited if there is an injured State, that is, a State that is harmed (*especially affected*) by a wrongful act of the infringing State.²³² As the examples just cited show, the violations do not necessarily result in concrete harm to the other State and to the injured State itself. However, if it does exist, third States cannot impose “lawful measures” without the consent of the injured State,²³³ as confirmed by the ICJ in the *Nicaragua* case.²³⁴ In cases of wrongdoing where there is no specific injured State (or other right holders), third States will only be able to demand, by way of these measures, the cessation of the conduct and assurances of non-repetition. They will not, however, be able to claim reparations.²³⁵

231 *ibid* para 3–4, 137–139.

232 For the term defining the injured State in this context, see ARSIWA (n 7) art 42.

233 Peel (n 218) 85; Bruno Simma, ‘The work of the International Law Commission at its fifty-second session’ (2000) 70(1–2) *Nordic Journal of International Law* 183, 205.

234 Commentary on the ARSIWA (n 6) footnote 816, 139.

235 Peel (n 218) 86.

Invocation of International Responsibility

The ARSIWA set procedural rules for the invocation of international responsibility by the offending State. As mentioned in the previous chapters, international responsibility arises *ipso facto* from an internationally wrongful act. It is an additional relationship that is established between the wrongdoing State and the injured State. The creation of this relationship is independent and not contingent on its invocation.¹ Even if the injured State does not exercise its right, the existence of the relationship of international responsibility is not affected.² Additionally, the rules on the jurisdiction of the tribunal and the admissibility of the claim should not be confused with the existence of international responsibility.³

The central role in the invocation is played by the injured State (i.e., the State whose rights have been affected by the violation).⁴ In addition to the injured State, other States may invoke international responsibility under certain conditions. This chapter focuses only on these cases.

The traditional view was based on the idea that treaties (including multilateral ones) create purely bilateral rights and obligations between two parties. Even if the treaty is multilateral, a concrete relationship is created only between the two States entering into a relationship based on this treaty. In this view, international responsibility is generated only between the State that is in

1 ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2(2) Yearbook of the International Law Commission (Commentary on the ARSIWA) 116.

2 Annie Bird, 'Third state responsibility for human rights violations' (2011) 21(4) European Journal of International Law 883, 890.

3 The ICJ has repeatedly held that "[t]he fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 para 148, 104. Similar wording is found in: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 (*Armed Activities* [Judgment]) para 127, 52–53. On procedural issues related to violations of the *erga omnes* rules, see Shabtai Rosenne, 'Decolonisation in the International Court of Justice' (1996) 8(1) African Journal of International and Comparative Law 564, 570–571.

4 Commentary on the ARSIWA (n 1) 116.

breach and the State that is injured.⁵ Later on, a theory developed according to which certain multilateral treaties give rise to indivisible rights and obligations vis-à-vis all contracting parties. This theory is reflected in Article 60 of the 1969 Vienna Convention, which lays out the conditions for withdrawal from a multilateral treaty in the event of a breach, even by parties that have not been directly injured. This has been followed by the notion that multilateral treaties and customary international law can also create obligations to the international community as a whole,⁶ or *erga omnes* obligations, as the ICJ called them in *Barcelona Traction*.⁷ The latter view raises the question of which State has the right to invoke international responsibility and whether States not directly injured by the acts of the breaching State might also have the right to do so to protect the international legal order. The first two views are included in the basic Article 42 of the ARSIWA on the invocation of international responsibility, while the latter is included in the special Article 48.

The right for injured States to invoke international responsibility, both in bilateral and multilateral relations, is covered by the basic provision of the ARSIWA, which states that “[a] State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole.”⁸

The injured State may therefore also invoke international responsibility for breaches relating to obligations towards a group of States or the international community as a whole. However, the latter option (point b) is limited to cases where the breach “(i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”⁹

The examples covered in these two points (i and ii) refer only to multilateral primary norms with *erga omnes partes* and *erga omnes* effect. All these cases concern the injured State (“A State is entitled as an injured State”) and not third States; however, the number of injured States differs. An example of a breach arising from a multilateral treaty but relating to the obligations of the

5 Edith Brown Weiss, ‘Invoking state responsibility in the twenty-first century’ (2002) 96(4) *American Journal of International Law* 798, 800–801.

6 *ibid* 801.

7 *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep (*Barcelona Traction* [Judgment]) para 33, 32.

8 ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/49(Vol. 1)/Corr.4 (ARSIWA) art 42 part 1 (emphasis added).

9 *ibid* art 42 part 2.

offending State regarding the rights of one State individually is, for example, a violation of the Vienna Convention on Diplomatic Relations. This is a multilateral treaty, but the breach can only relate to one State.¹⁰ The same is true for violations of customary international law (e.g., in diplomatic relations). Meanwhile, the examples corresponding to (ii) relate to agreements such as a multilateral disarmament agreements.¹¹ In this case, each State party will be considered an injured State and will have all the options arising from the international breach available to it.

If there are several wrongdoing States, reparations can be claimed from each but not for more than the total injury,¹² which is the basic rule for reparations. The basic rule of international responsibility, according to which each wrongdoing State is individually responsible only for the acts attributable to it, must also be respected. However, a situation may arise in which several States have contributed to a common breach.¹³ If a breach involves multiple injured States, each may invoke international responsibility; in doing so, they are not bound by joint appearance with the other injured States.¹⁴

In addition, the ARSIWA include a provision under which States not directly injured have a (limited) right to invoke international responsibility.¹⁵ These States (“any State other than an injured State”) may invoke the international responsibility of the offending State if “(a) the obligation breached is owed to a group of States including that State, *and* is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.”¹⁶

A “non-injured State,” or a third State or interested State, can be defined as a State that is not directly injured by the violation but has a legal interest in the meaning of the violated norm.¹⁷ Such cases do not include all multilateral

10 Commentary on the ARSIWA (n 1) para 6–10, 118.

11 *ibid* para 13, 119.

12 ARSIWA (n 8) art 47.

13 E.g., *Corfu Channel Case* (Judgment) [1949] ICJ Rep 4.

14 ARSIWA (n 8) art 46.

15 See Iain Scobbie, ‘The invocation of responsibility for the breach of “Obligations under peremptory norms of general international law”’ (2002) 13(5) *European Journal of International Law* 1201, 1207–1215; Malgosia Fitzmaurice, ‘Material breach of treaty: Some legal issues’ (2001) 6 *Austrian Review of International and European Law* 3, 41; Brown Weiss (n 5) 803–809; Pierre-Marie Dupuy, ‘Back to the future of a multilateral dimension of the law of state responsibility for breaches of “obligations owed to the international community as a whole”’ (2012) 23(4) *European Journal of International Law* 1059, 1061–1063.

16 ARSIWA (n 8) art 48(1) (emphasis added).

17 Bird (n 2) 883–884.

treaties but only those that protect a specific collective interest of a group. As a general rule of practice, multilateral treaties usually protect the rights of a specific State in a specific situation rather than the rights of all signatories (e.g., the breach of the Convention on Diplomatic Relations already mentioned).¹⁸ In these cases, third States will not have the right to invoke international responsibility. Treaties protecting a collective interest can include multilateral environmental or security agreements.¹⁹ Such cases are also violations of *jus cogens* norms, where most States will not suffer material damage; their interest will lie primarily in protecting the fundamental legal structure of the international community. Their assertion of international responsibility will thus be a form of *actio popularis* in international law.²⁰

This provision was included by the ILC in the ARSIWA not as a codification of international law but as a progressive development of it.²¹ Some authors are also of the opinion that practice does not follow this rule.²² Additionally, the provision is important in light of the basic rule that the injured State is not obliged to make use of its rights arising out of international responsibility. In that case, violations of the most important rules would be left without closure. Based on this provision, however, the international responsibility of the offending State may be invoked by other States.²³

Third States only have the option to require the cessation of the wrongful conduct and an assurance or guarantee of non-repetition.²⁴ In addition, they may demand all other forms of reparation but only in the interest of the injured State.²⁵ As in the case of countermeasures by third States, they cannot begin to invoke international responsibility without the consent of the “specially affected” State, namely, the injured State, if any.²⁶ If there is no such injured State (or other right holder) but damage has nevertheless been done (e.g., the destruction of the Amazon rainforest by Brazil), third States will not be able to claim reparations, that is, the removal of the damage.

18 Jacqueline Peel, ‘New state responsibility rules and compliance with multilateral environmental obligations: Some case studies of how the new rules might apply in the international environmental context’ (2001) 10(1) *Review of European, Comparative & International Environmental Law* 82, 82–83.

19 Commentary on the ARSIWA (n 1) para 7, 126.

20 Dupuy (n 15) 1061.

21 Commentary on the ARSIWA (n 1) para 12, 127.

22 See, e.g., Dupuy (n 15) 1062.

23 Scobbie (n 15) 1214.

24 ARSIWA (n 8) art 48(2).

25 *ibid.*

26 Peel (n 18) 85.

As regards grave breaches of *jus cogens*, it depends on the specific situation whether other States can be considered *injured* or merely *third countries with a legitimate interest*. States could be considered injured States if the breach is “of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”²⁷ If it is not, the third States’ options will be limited to cooperating with other States “to bring to an end through lawful means” any such breach.²⁸

27 ARSIWA (n 8) art 42 part 2.

28 *ibid* art 41(1).

Conclusions

This part of the book has broadly presented the elements of international responsibility and the related legalities. Several of them can form the basis for further analysis in relation to the succession of States, which is elaborated on in Part 3. The analysis of international responsibility presents the importance of the following elements.

1. International responsibility arises *ipso facto* from the breach of a primary rule. In accordance with the well-established *principle of objective responsibility*, secondary rules do not require a specific attitude on the part of the offending State but merely link the incurrance of international responsibility to the violation of the primary rule. International responsibility as such is not conditional on invocation by the injured State.¹ Importantly, the primary rule may cease to apply as soon as international responsibility has arisen, without this affecting the existence of international responsibility as a relationship between the wrongdoing State and the injured State. Despite the termination of the primary rule, the breaching State remains obliged to make full reparation and remedy the consequences caused by the breach.
2. The existence of a primary rule is a prerequisite for that of so-called *continuing* and *composite* wrongful acts because a breach cannot exist without the simultaneous existence of a primary rule that the act breaches. Since a breach may start before the date of succession and continue after it, it provides a starting point for analyzing the effects of succession on the course of continuing and composite acts.
3. The emergence of international responsibility is not linked to the creation of injury (damage), but most of the consequences of international responsibility are. The obligations of continued observance of the primary norm, cessation, and assurances and guarantees of non-repetition are essentially expressions of the principle of *pacta sunt servanda*. However, since the purpose of international responsibility is to erase the consequences of the wrongful act and not to punish the offending State,²

1 ILC, 'Third report on State responsibility by James Crawford, Special Rapporteur, ILC, 52nd session' (2000) UN Doc A/CN.4/507 para 26, 18.

2 Robert Kolb, *The international law of state responsibility: an introduction* (Edward Elgar Publishing 2017) 148.

reparation is inextricably linked to injury. It can be argued that rights and obligations associated with injury—which is an objective fact—are just as capable of being succeeded to as those associated with the State's property, archives, and debts—also objective facts.

4. The application of the rules of attribution of acts of insurrectional and other movements does not represent succession to responsibility as the successor State does not succeed to the responsibility of the predecessor State but rather to acts of the insurgency. The insurgency itself is separate from the predecessor State. Nonetheless, from a temporal point of view, these acts occurred before the successor State came into existence, and they are attributed to the successor State because of its special link with the insurrectional movement. If the successor State is bound by the primary rule at the time of the commission of the acts and the latter constitute a violation of a primary rule, international responsibility is established for these breaches, which occurred before the successor State came into being. At the same time, it should be kept in mind that the ILC explicitly stated that these articles apply the rules of *attribution of conduct* and not *attribution of responsibility* and specifically noted that the ARSIWA's reasoning is not based on the law of succession of States.
5. A State may acknowledge and adopt an act as its own even though it cannot be attributed to it using the general rules of attribution. In this way, by explicit or implicit consent of the State, the act becomes an act of that State. A State may also consent to be bound by a primary rule for a period or under conditions in which it would not otherwise be bound. Consent can therefore give rise to international responsibility of a State if all the conditions are met. There is no countering the argument that a State cannot consent to acts or effects of a primary rule for a period preceding its creation.
6. The institution of indirect responsibility is less developed in theory and practice, but the distinction between the rules of attribution of acts and attribution of responsibility makes it relevant to the field of State succession. When the ARSIWA were adopted, the members of the ILC were of the opinion that, due to special circumstances, State responsibility may also pass to a third State to which an act cannot be attributed. The third State would be responsible under the rules of attribution of responsibility based on its connection to the breach. This reasoning implies that, in theory, it could be possible for a State to which the acts are not attributable to be responsible for making full reparation. While the ARSIWA provide specific examples of situations in which there may be indirect

responsibility on the part of a third State—which, in these examples, must already exist at the time of the breach—this area is also of considerable relevance to succession to responsibility because of the possibility of attributing responsibility on the basis of a specific link.

7. The circumstances precluding wrongfulness offer an interesting argument that allows for the *de facto* settlement of an injury (material loss) even though international responsibility cannot be attributed to a State. In these circumstances, the primary rule remains valid, and the act attributable to the State violates it *in abstracto*, producing consequences that would be characterized as an injury in different circumstances. However, for the State that committed those acts, international responsibility did not arise because of the particular circumstances. Nevertheless, theory and practice confirm that the State that caused these abstract breaches and abstract injury can be held liable to compensate the injured State for the material loss (abstract reparation) based on the link between the act and the consequences.
8. The rules on the invocation of responsibility by third States are of lesser interest for State succession as third States are limited to the possibility of requiring cessation and assurances and guarantees of non-repetition. They can also demand reparation but only in the interest of the injured State. From the point of view of State succession, this area might be of interest in cases of succession of the injured State and relevant to the question of its successor State's options. Since reparation can only be invoked in the name of the injured State, this would not be possible when there is no continuity of the legal personality since the injured State no longer exists. Nor would it be possible—for the same reason—to require cessation in relation to the predecessor State. If the wrongful conduct were to continue, it would do so in relation to the successor State, making it the injured State. Theoretically, such a successor State could invoke only assurances or guarantees of non-repetition.

PART 3

State Succession to International Responsibility



As mentioned in the introduction, succession to State responsibility for internationally wrongful acts was included in the ILC's Long-Term Program of Work in 2017. The ILC's work in this area is not yet complete; however, Special Rapporteur Pavel Šturma presented five reports by 2022 (2017, 2018, 2019, 2021, and 2022) that have been under consideration by the ILC.¹ Already in 2015, the IDI presented its final resolution in this area (IDI Resolution on State Succession to International Responsibility)² along with a report by Rapporteur Marcelo G. Kohen,³ who, together with Professor Patrick Dumberry, published a book commenting on the resolution in 2019.⁴

This resolution, which is followed by the ILC to some extent, has the same structure as the two Vienna Conventions on succession: the first part sets the general rules, and the second part defines the consequences of each type of succession. Both the ILC and the IDI have recognized the particular importance of separating the types of succession according to the existence or absence of a continuator State.

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- 1 ILC, 'First report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 69th session' (2017) UN Doc A/CN.4/708; ILC, 'Second report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 70th session' (2018) UN Doc A/CN.4/719; ILC, 'Third report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, ILC, 71st session' (2019) UN Doc A/CN.4/731; ILC, 'Fourth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 72nd session' (2021) UN Doc A/CN.4/743; ILC, 'Fifth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 73rd session' (2022) UN Doc A/CN.4/751.
 - 2 Institut du Droit International, 'Succession of States in Matters of International Responsibility, Resolution' (2015) 76 *Annuaire de l'Institut de droit international* 703 (IDI Resolution on State Succession to International Responsibility).
 - 3 Institut du Droit International, 'Succession of States in Matters of International Responsibility, Provisional Report by Rapporteur Marcelo Kohen' (2015) 75 *Annuaire de l'Institut de droit international* 123.
 - 4 Marcelo G Kohen and Patrick Dumberry, *The Institute of International Law's resolution on state succession and state responsibility: introduction, text and commentaries* (Cambridge University Press 2019). The book published by Rapporteur Kohen and Professor Dumberry covers the argumentation of both the IDI Resolution and the report to the Resolution, so this dissertation relies on the book only. Brigitte Stern was also a member of the IDI and wrote an article on the subject in 2001: Brigitte Stern, 'Responsabilité internationale et succession d'états' in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *L'ordre juridique international, un système en quête d'équité et d'universalité* [*The International Legal System in Quest of Equity and Universality*] (Martinus Nijhoff Publishers 2001).

Definition of State Succession to Responsibility for Internationally Wrongful Acts

The concept of State succession to responsibility for internationally wrongful acts is composed of two parts: State succession and international responsibility of States. It is important to note that the basic element is State succession, in relation to which international responsibility is merely an object. It follows logically that, once it has been further defined, the object of succession must be assessed through the prism of the rules of succession, and not vice versa.

13.1 Object of State Succession to Responsibility for Internationally Wrongful Acts

Both the IDI and the ILC have accepted the view that the object of succession is not international responsibility as such but the rights and obligations arising therefrom.¹ The object of succession is thus the rights and obligations deriving from the secondary rules of international responsibility, that is, secondary rights and obligations. These are defined in Part 2 of the ARSIWA, which deals with the general rules on the consequences of wrongful acts and, specifically, reparations.²

In this way, the IDI and the ILC effectively circumvented the first provision of the ARSIWA, according to which “[e]very internationally wrongful act of a State entails the international responsibility of *that* State.”³ The wrongdoing State remains internationally responsible because international responsibility stays with it even after the date of succession; only the rights and obligations

1 ILC, ‘First report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 69th session’ (2017) UN Doc A/CN.4/708 para 20, 6; Institut du Droit International, ‘Succession of States in Matters of International Responsibility, Resolution’ (2015) 76 *Annuaire de l’Institut de droit international* 703 (IDI Resolution on State Succession to International Responsibility). Similarly: Patrick Dumberry, *State succession to international responsibility* (Martinus Nijhoff Publishers 2007) 6.

2 The second part also covers Articles 40 and 41, which define specific consequences for breaches of *jus cogens*.

3 ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/49 (Vol. 1)/Corr.4 (ARSIWA) art 1 (emphasis added).

are succeeded to. In this connection, after the date of succession, the predecessor State may be internationally responsible, and the successor State may succeed to secondary obligations. It can also be stated that “the fact that the Successor State may be accountable for the consequences arising from the commission of the pre-succession portion of a wrongful act committed by an organ does not prevent the Predecessor State from being responsible for the same portion of the act.”⁴

Hence, succession to secondary obligations does not exclude international responsibility.⁵ In this respect, international responsibility is similar to sovereignty, which is also not subject to succession, but this does not result in the cessation of the obligations and rights of the predecessor State.⁶ Although it does not succeed to sovereignty, the successor State succeeds to the rights and obligations relating to the predecessor State’s property, archives, debts, and treaties. Therefore, succession to the rights and obligations arising from international responsibility does not derogate from the rules of succession to other types of matters.

As mentioned in Part 2 of the present book, the rights and obligations arising from international responsibility consist of two groups: the first relates to continued compliance with the primary norm, and the second to the remedying of the consequences of the breach.

13.1.1 *Rights and Obligations Related to Continued Compliance with the Primary Norm*

The group of secondary obligations related to continued compliance with the primary norm comprises continued duty of performance,⁷ cessation,⁸ and assurances and guarantees of non-repetition.⁹ It is useful to mention that these obligations are only possible as long as the primary rule binds the

4 Marcelo G Kohen and Patrick Dumberry, *The Institute of International Law’s resolution on state succession and state responsibility: introduction, text and commentaries* (Cambridge University Press 2019) 62. Similarly: ILC, ‘Second report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 70th session’ (2018) UN Doc A/CN.4/719 para 48, 12–13.

5 *ibid.*

6 ILC, ‘Third report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, ILC, 71st session’ (2019) UN Doc A/CN.4/731 para 32, 9. See also Rein Müllerson, ‘Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia’ (1993) 42(3) *International and Comparative Law Quarterly* 473, 493.

7 ARSIWA (n 3) art 29.

8 *ibid* art 30.

9 *ibid.*

violating State;¹⁰ this distinguishes this group of rights and obligations from reparations, which exist separately from the primary rule after the commission of the wrongful act and, therefore, after the establishment of international responsibility.¹¹ In addition, the obligations of continued duty of performance and cessation exist only in the case of continuing¹² and composite breaches.¹³

It follows logically that succession to the first group of rights and obligations depends entirely on whether the successor State has succeeded to the primary norm that the predecessor State breached. For the successor State to succeed to this group of secondary obligations, which oblige it to continue to comply with the primary norm, it must also succeed to the primary norm itself. Otherwise, it would be obliged to continue to comply with a norm that does not bind it at all or cease to perform a conduct that is not unlawful in relation to it.

13.1.1.1 Cases in Which the Successor State Succeeds to the Breached Primary Norm

If the successor State succeeds to the primary legal norm, it may theoretically also succeed to the secondary obligations associated with it. In practice, this could mean that on the date of succession, the successor State succeeds to both the primary norm and the secondary obligations of continued duty of performance of that same primary norm, cessation of the breach of the primary norm, and assurances of non-repetition regarding that norm.

From the moment of succession, the successor State would therefore be bound to comply with this primary norm on two bases: the primary norm itself (*pacta sunt servanda*) and the secondary obligation of continued duty of performance. Although, at first sight, such a situation would appear to constitute a duplication of identical obligations, it should be borne in mind that the relationship of international responsibility exists separately from, or in parallel to, the relationship based on the primary norm.¹⁴ Even in cases outside of the scope of succession, the wrongdoing State is bound simultaneously by the primary norm and by the secondary obligations created by its breach.¹⁵ The simultaneous existence of a primary norm and secondary obligations that are

10 Robert Kolb, *The international law of state responsibility: an introduction* (Edward Elgar Publishing 2017) 150.

11 Christine Gray, 'The choice between restitution and compensation' (1999) 10 *European Journal of International Law* 413, 420.

12 Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge University Press 2017) 606.

13 Olivier Corten, 'The obligation of cessation' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 547.

14 Sean D Murphy, *Principles of international law* (2nd ed, Thomson/West 2012) 207.

15 ARSIWA (n 3) art 29.

succeeded to by the successor State thus does not constitute a derogation from the general rules of international responsibility.

For a secondary obligation of continued compliance with the primary norm to be succeeded to, the primary norm must be the same as the one that bound the predecessor State. In light of Heraclitus's dictum that one cannot step twice into the same river, the question is therefore whether the primary norm that binds the successor State is the same as that which bound the predecessor State. The primary norm is merely the expression of a legal relationship between the parties. Since one of the parties changed, it could be concluded that the successor State is not bound by the same primary norm but only by the identical one.

This is undoubtedly the case with the *accession* of a successor State to a primary norm because, in this situation, the successor State becomes bound by the primary norm like any other State (i.e., without a specific correlation with the successor State). With accession, therefore, the successor State is not bound by the same primary norm but only by an identical one. The phenomenon of State *succession*, whereby the successor State *replaces* the predecessor State, is quite different.¹⁶ If the successor State succeeds to the primary norm, it is deemed to have replaced the predecessor State with respect to that primary norm. In the case of succession, the primary norm binds the successor State from the date of succession in the same way it had bound the predecessor State.¹⁷ The successor State thus takes the place of the predecessor State.

In all cases where a successor State succeeds to a primary norm, it is reasonable to conclude that it may also succeed to the predecessor State's secondary obligations related to the continued observance of said primary norm. Special Rapporteur Šturma underlines that the obligation to cease the wrongful conduct is linked to continuing and composite acts and cannot be applied to a single breach. The situation is different with regard to the obligation of continued duty of performance and the assurances and guarantees of non-repetition as they may exist even in the case of a single breach. All three obligations require that the primary rule continues to bind the breaching State after the breach or its commencement.¹⁸

16 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 (1978 Vienna Convention) art 2(1); Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 2(1).

17 See the introductory sections of 2.5. *Succession to treaties*.

18 A very comprehensive analyses on succession to obligation of cessation and assurances and guarantees of non-repetition is provided in ILC, 'Fourth report on succession of states

13.1.1.2 Cases in Which the Successor State Does Not Succeed to the Breached Primary Norm

In all other cases where the successor State does not succeed to the primary norm that has been breached, it cannot succeed to the secondary obligations associated with compliance with that norm. It is theoretically possible to argue that succession to international responsibility necessarily entails automatic succession to the primary norm, but such an argument is unsound because even in circumstances not involving succession, the existence of the primary norm after the breach is irrelevant to that of international responsibility. International responsibility and its attendant secondary consequences exist irrespective of the continued validity of the primary rule.¹⁹ Since such an obligation does not apply in ordinary circumstances, it is reasonable that it does not apply in the case of succession.

If, after a breach, the primary rule no longer binds the responsible State, secondary obligations related to compliance with this primary rule understandably also cannot exist. The same is true in the case of succession: if the successor State does not succeed to the primary rule, it cannot succeed to this group of secondary rights and obligations but only to secondary obligations related to the remedying of the consequences of the breach—that is, reparations.

13.1.2 *Rights and Obligations Related to the Remedying of the Consequences of a Wrongful Act*

The obligations relating to the remedying of the consequences of the breach concern reparation, consisting of restitution, compensation, and satisfaction.²⁰ As already explained, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act,”²¹ which includes “any damage, whether material or moral.”²² As noted in the chapters on reparations, these are inextricably linked to the injury caused by the responsible State. Since the purpose of reparations is to remedy the consequences of the breach and restore the situation that would have likely existed had the breach not occurred rather than to punish the responsible

in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 72nd session’ (2021) UN Doc A/CN.4/743 para 102–136, 27–36.

19 ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) Yearbook of the International Law Commission (Commentary on the ARSIWA) para 7–8, 58–59.

20 ARSIWA (n 3) art 31 and 34–39.

21 *ibid* art 31(1).

22 *ibid* art 31(2).

State,²³ reparations are limited to the actual injury suffered and ideally represent a mirror image of it. Thus, without the occurrence of injury, there are also no secondary obligations related to the repair of an injury.²⁴ These secondary consequences arise from the injury itself, as is clear from the ARSIWA, which linked the basic provisions on the incurrance of international responsibility exclusively to the breach of the primary norm, and reparation to the fact of the damage and its extent.²⁵

The obligation to make full reparation is also separate from the validity of the primary rule and binds the responsible State regardless of its existence. Even if the primary rule no longer binds the responsible State after the breach, that State is still bound by the secondary obligation to make full reparation. This means that if the successor State does not succeed to the primary rule, this in no way affects the potential succession to secondary obligations related to the reparation. These are contingent on the occurrence of the damage. Moreover, and only theoretically, if the successor State has not succeeded to the primary norm, and the wrongful act of the predecessor State (*in abstracto*) has not caused damage, the successor State will not succeed to any secondary obligations. In that case, it could not be obliged to comply with a primary norm that does not bind it, nor to remedy the damage that has not occurred.

However, “[e]very breach of an engagement vis-à-vis another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State.”²⁶ In practice, therefore, since damage occurs at least in an immaterial form,²⁷ succession to international responsibility if the successor State does not succeed to the primary norm is limited to secondary obligations related to the remedying of the breach. This effectively means that succession in these cases is inextricably linked to the damage caused by the predecessor State.

23 Kolb (n 10) 148; *Opinion in the Lusitania Cases* 7 UNRIAA 32 (1 November 1923) 39.

24 Andre Nollkaemper, ‘Constitutionalization and the unity of the law of international responsibility’ (2009) 16(2) *Indiana Journal of Global Legal Studies* 535, 555.

25 *ibid.*

26 ILC, ‘Second report on State responsibility (The origin of international responsibility) by Roberto Ago, Special Rapporteur’ (1970) UN Doc A/CN.4/233 para 54, 195.

27 *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* 20 UNRIAA 215 (1990) (*Rainbow Warrior Affair*) para 107 and 109, 266–267. See also John E Noyes and Brian D Smith, ‘State responsibility and the principle of joint and several liability’ (1988) 13(2) *Yale Journal of International Law* 225.

13.2 Time Frames for Succession to International Responsibility

Succession to the international responsibility of States is only possible if there is a succession of States. In this respect, the ILC and the IDI have set time frames for the occurrence or duration of an internationally wrongful act and the confirmation of its legal consequences (e.g., a decision of a tribunal or an agreement between the injured and wrongdoing States).²⁸ As pointed out by Special Rapporteur Šturma, for succession to international responsibility to be established, the wrongful act must take place before the date of succession, whereas the confirmation of its legal consequences must occur only after the date of succession.²⁹ If the confirmation of the legal consequences took place before the date of succession, these consequences would be defined as a debt of the predecessor State, which would be succeeded to by the successor State in accordance with the rules on succession to debts³⁰ or to treaties if the wrongdoer (predecessor) State and the injured party concluded a reparation agreement.³¹

This can be illustrated by the debt of the former SFRY to which Slovenia and Croatia succeeded. In 1975, the SFRY undertook to conclude with Italy an agreement on a compensation of USD 110 million for the damage suffered by Italian individuals and companies on Yugoslav territory as a result of nationalization and expropriation, which was eventually signed in Rome in 1983.³² Slovenia and Croatia succeeded to this agreement and undertook to settle a share of the debt each.³³ In this case, there can be no question of the successor States' succession to international responsibility for the act of the predecessor State because the successor States succeeded to the treaty based on which they assumed the debt. It is the succession to the treaty or debt that is at issue, not international responsibility.³⁴

28 ILC, 'First report by Pavel Šturma' (n 1) para 38, 12; IDI Resolution on State Succession to International Responsibility (n 1) art 4 and 5.

29 ILC, 'First report by Pavel Šturma' (n 1) para 76–80, 21–22.

30 *ibid* para 79, 22.

31 Jean-Philippe Monnier, 'La succession d'États en matière de responsabilité internationale' (1962) 8 *Annuaire français de droit international* 65, 67.

32 Agreement between the SFRY and the Republic of Italy on the definitive settlement of all mutual obligations arising from Article 4 of the Treaty signed at Osimo on 10 November 1975 (adopted 18 February 1983) *Official Gazette of the SFRY* No 7/85.

33 On Slovenia, see: Act of Notification of the Succession of the Agreements of the former Yugoslavia with the Republic of Italy (14 August 1992) *Official Gazette of the Republic of Slovenia* No 40/1992.

34 On July 19, 1948, Yugoslavia also concluded an agreement with the US on compensation for the expropriation of individuals and enterprises: Agreement between the Governments of the USA and the Federal People's Republic of Yugoslavia (FPRY) on monetary claims

Special Rapporteur Šturma points to the words of O'Connell, who did not define the consequences of claims arising from municipal tort (i.e., a violation of domestic law) as an acquired right. The injured party of a tort does not have a right to a specific object or a specific sum of money but can merely bring legal proceedings before a court, which may (or may not) decide that it is entitled to compensation. Only the court will decide what the injured party is legally entitled to (e.g., restitution or payment of a specific amount). Such a decision by the court would, according to O'Connell, constitute an acquired right.³⁵ Special Rapporteur Šturma agrees with the essence of this definition and suggests that the basic idea should also be applied to the international responsibility of a State.³⁶

If both events (the wrongful act and the confirmation of its consequences) occur after the date of succession, only the international responsibility of the (successor) State arises, not the issue of succession. Therefore, if both events are contemporaneous, either before or after the date of succession, there can be no question of succession to international responsibility. A very different situation arises if the breach was committed (or commenced) before the date of succession but the State was not held responsible for it because the succession of either the responsible or the injured State took place before that date; such a situation describes succession to the international responsibility of a State.³⁷

13.3 Theoretical Foundations of Succession to International Responsibility

As with succession to all other matters, succession to international responsibility can be approached on the basis of three general rules: the rule of non-succession (*clean-slate* or *tabula rasa*), the rule of automatic succession, and an intermediate approach.

Although the rule of non-succession almost never arises in other succession matters—exceptions are mainly related to the so-called *newly independent States* (i.e., decolonized States) and odious debts—it has been considered

of the USA and its citizens (19 July 1948) Official Gazette of the Presidium of the People's Assembly of the FPRY No 25/1951.

35 Daniel Patrick O'Connell, *The Law of State Succession* (Cambridge University Press 1956) 201, cited in ILC, 'First report by Pavel Šturma' (n 1) para 77, 21.

36 ILC, 'First report by Pavel Šturma' (n 1) para 78–80, 22.

37 *ibid* para 79, 22.

a basic rule as regards succession to international responsibility.³⁸ This book does not specifically address the reasons why succession to this matter would be theoretically impossible and instead proposes solutions for building the foundations of succession to international responsibility.

The arguments against succession to international responsibility are amply summarized in the literature on the subject.³⁹ In his analysis of the main theories on the topic, Dumberry states that these are mainly based on the view that each State is responsible for its own conduct and the personal nature of international responsibility.⁴⁰ The first notion corresponds to the first provision of the ARSIWA but is not relevant in the context of this book, which follows the view of the IDI and the ILC that the object of succession is the rights and obligations arising from international responsibility, and not international responsibility as such. The second notion is rejected by Dumberry because of the outdated principles on which it is built: the principle of Roman law on inheritance *action personalis moritur cum persona*, according to which obligations *ex delicto* cannot be succeeded to, is not relevant because a State, as a legal person governed by public law, cannot be equated with a natural person.⁴¹ One of the reasons for this is that the cessation of the existence of a State cannot be compared to the death of an individual since, according to the theory of organic succession, the legal personality of a State does indeed cease (in cases of succession without continuing legal personality), but this does not mean that the constitutive elements of the State disappear. At the very least,

38 ILC, 'Second report by Pavel Šturma' (n 4) para 49, 13.

39 See Pavel Šturma, 'State succession in respect of international responsibility' (2015–2016) 48 *George Washington International Law Review* 653, 659–669; Dumberry, *State succession to international responsibility* (n 1) 35–52; Patrick Dumberry, 'Is a new state responsible for obligations arising from internationally wrongful acts committed before its independence in the context of secession?' (2005) 43 *Canadian Yearbook of International Law* 419, 422–444; Michael John Volkovitsch, 'Righting wrongs: Towards a new theory of state succession to responsibility for international torts' (1992) 92(8) *Columbia Law Review* 2162, 2173–2174; Wladyslaw Czaplinski, 'State Succession and State Responsibility' (1990) 28 *Canadian Yearbook of International Law* 339, 353–355; Cecil JB Hurst, 'State succession in matters of tort' (1924) 5 *British Yearbook of International Law* 163, 166–173; Hercules Booyens, 'Succession to tort liability: A Namibian precedent' (1991) 24(2) *Comparative and International Law Journal of Southern Africa* 204, 206–207. See also Marcelo G Kohen, 'Succession of states in the field of international responsibility: The case for codification' in Marcelo G Kohen, Robert Kolb and Djacoba Tehindrazanarivelo (eds), *Perspectives of International Law in the 21st century/Perspectives du droit international au 21e siècle* (Martinus Nijhoff Publishers 2012); Monnier (n 31) 73–85.

40 Dumberry, *State succession to international responsibility* (n 1) 43–52.

41 *ibid* 46–47.

the successor State succeeds to the territory and the population,⁴² and it may also succeed to the organs of the predecessor State. *Ex delicto* obligations are not comparable either given that the international wrongdoing of a State is not based on its culpability (fault).⁴³

It is important to bear in mind that the theories and their critiques cited by Dumberry and other authors are not specific to succession to international responsibility but have also been applied in the past to other succession matters. Menon mentions them in the context of sovereign debts⁴⁴ and O'Connell in relation to State succession in general.⁴⁵ As early as 1956, O'Connell noted that the justification of succession on the basis of the Roman law on inheritance was also contradicted by the practice of States.⁴⁶ In 1967, he produced a detailed survey of the theories of succession, including those cited by Dumberry regarding succession to international responsibility.⁴⁷

The examples on which the theory of non-succession was built in the past were well summarized by Hurst in 1924.⁴⁸ They relied mainly on the argument that civilized States cannot be held accountable for the actions of the underdeveloped nations they colonized. Regarding these cases, Volkovitch argued that international law, if it "is to have any contemporary relevance," must move away from such rhetoric and argumentation.⁴⁹

An acceptable modern argument against succession to international responsibility could be the absence of a codified primary rule (e.g., a convention) determining succession to this matter. At the same time, the possibility of developing a customary law rule is also minimal as the practice in this area is "diverse, context-specific and sensitive."⁵⁰ However, the absence of a rule of succession does not point in the direction of an absolute rule of

42 *ibid* 48–49.

43 *ibid* 50–51.

44 PK Menon, 'The succession of states and the problem of state debts' (1986) 6(2) Boston College Third World Law Journal 111, 124–126.

45 O'Connell, *The Law of State Succession* (n 35) 6–11.

46 *ibid* 7.

47 Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 1, 8–35.

48 Hurst (n 39) 166–173.

49 Volkovitch (n 39) 2186.

50 ILC, 'Third report by Pavel Šturma' (n 6) para 7, 4. On the occurrence of customary international law rules on State succession, see: Vladimir-Djuro Degan, 'State succession, especially in respect of state property and debts' (1993) 4 Finnish Yearbook of International Law 130, 149–141; Helmut Philipp Aust, *Complicity and the law of state responsibility* (Cambridge University Press 2011) 174–191.

non-succession given that the latter almost never arises in the area of succession to other matters.⁵¹

That the absolute rule of non-succession may be outdated was also noted by the authors of the Third Restatement, which points out that “there is some authority that a Successor State should be liable, at least where it would otherwise be enriched unjustly.”⁵² The document does not make any specific arguments.

Crucially, international law, and in particular the law of international responsibility, does not preclude the institution of succession to international responsibility but allows it at least in certain circumstances, among which *consent to assume responsibility* stands out in particular.⁵³ The fact that rights and obligations arising out of an international breach may be subject to succession is of great importance as it represents a further departure from older theories, which built their argument on the link to the succession of natural persons in Roman law on inheritance.

13.3.1 *Consent of a State to Assume International Responsibility and Acknowledge or Accept an Act as Its Own*

Just as a State can accept an act as its own, it can also accept the rights and obligations arising from international responsibility. This was mentioned in course of discussion at the ILC as a clearly expressed possibility of succession to international responsibility.⁵⁴ Dumberry states that nothing in international law prevents a successor State from assuming responsibility for the wrongful act of its predecessor State.⁵⁵ In addition to citing voluminous literature, Dumberry confirms this view using the *Gabčíkovo-Nagymaros* case heard by the ICJ.⁵⁶ In an agreement with Hungary (the Compromise), Slovakia accepted that it was “the sole Successor State with respect to the rights and obligations in relation to the Gabčíkovo-Nagymaros project,”⁵⁷ and the Court acknowledged this

51 ILC, ‘Provisional summary record of the 3480th meeting of the 71st session of the ILC (second part)’ (2019) UN Doc A/CN.4/SR.3480, 6.

52 Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987) point g para 209, 105 and 107. See also Schachter, who mentions that non-succession with regard to responsibility is not a given: Oscar Schachter, ‘State succession: The once and future law’ (1992–1993) 33 *Virginia Journal of International Law* 253, 256.

53 Commentary on the ARSIWA (n 19) para 6, 58.

54 ILC, ‘Provisional summary record of the 3374th meeting of the 69th session of the ILC (second part)’ (2017) UN Doc A/CN.4/SR.3374, 15.

55 Dumberry, *State succession to international responsibility* (n 1) 215.

56 *ibid.*

57 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 para 151, 81.

position as a fact.⁵⁸ As a consequence, under the Compromise, Slovakia would be responsible for compensation not only for its own wrongful acts but also for those of the predecessor State.⁵⁹

In this case, whether Slovakia succeeded to the treaty by which Czechoslovakia (the predecessor State) and Hungary agreed in 1977 to build the project was also crucial. In fact, the two States specifically agreed, in the Compromise, that the dispute concerned the implementation of this treaty. There was no doubt that the treaty was in force for the predecessor State at the time of the breach, the only question was whether Slovakia had succeeded to it, which the ICJ confirmed. The Court found that Slovakia had succeeded to the treaty automatically because it was a treaty defining a territorial regime.⁶⁰ Slovakia succeeded to the treaty from the date of succession and not from the date of its conclusion in 1977.⁶¹ The ICJ also confirmed that the predecessor State (Czechoslovakia) had breached its international obligations and, thus, committed an internationally wrongful act.⁶²

In its final judgment, the ICJ ruled, among other decisions, that Slovakia was responsible for compensation for the damage it caused, as well as for the damage caused by Czechoslovakia.⁶³ In doing so, the Court confirmed that Slovakia was responsible for its own acts occurring after the date of succession and constituting a breach of the treaty it succeeded to. At the same time, the Court also imposed secondary obligations on Slovakia in relation to the breaches committed by its predecessor State, which it was able to do because Slovakia consented to assume those consequences.

13.3.2 *Additional Arguments in Favor of Succession to Responsibility*

Two additional arguments could reinforce the view that succession to secondary rights and obligations related to international responsibility does not violate the essence of the law of international responsibility. Both are fully discussed in the part on international responsibility, and only their most relevant features are presented here.

58 Dumberry, *State succession to international responsibility* (n 1) 215.

59 *Gabčíkovo-Nagymaros Project* (n 57) para 151, 81.

60 *ibid* para 123, 72.

61 *ibid* point 2A, 83.

62 *ibid* para 78, 54.

63 *ibid* point 2D, 83.

13.3.2.1 Circumstances Precluding Wrongfulness

As already stated, the object of succession is not international responsibility as such but the rights and obligations attached to it. International responsibility remains with the responsible State, and succession effectively refers primarily to rights and obligations concerning reparations. As mentioned, reparations are inextricably linked to injury. The argument that succession to these rights and obligations is contrary to the law of international responsibility can be countered by the feature of circumstances precluding wrongfulness, which allows the *de facto* existence of rights and obligations regarding reparation despite the absence of international responsibility.

Commenting on the ARSIWA's provision that circumstances precluding wrongfulness are "without prejudice to (...) the question of compensation for any material loss caused by the act in question,"⁶⁴ the ILC stated that the term "compensation" in this case does not mean a type of reparation, nor is "material loss" identical to "damage."⁶⁵ The ILC's reference makes sense as there is no wrongful act, but there are clearly consequences with a causal link to the State's conduct. The basic thrust of Article 27 is that it is unfair that the injured State should bear the damage caused by the actions of another State if the injured State neither caused nor contributed to the situation.⁶⁶ The former that is therefore not responsible for the wrongful act or its consequences, nevertheless becomes liable for these consequences based on its connection to them. This reasoning implies that the fact that the successor State is not an internationally responsible State does not mean that material loss caused by the acts of the predecessor State cannot be settled on some other legal basis

64 ARSIWA (n 3) art 27.

65 Commentary on the ARSIWA (n 19) para 4, 86. See also ILC, 'Proceedings of the 2681st meeting of the 53rd session of the ILC (first part)' (2001) 2(2) Yearbook of the International Law Commission. ILC, 'Proceedings of the 2681st meeting of the 53rd session' 98–99.

66 ILC, 'Proceedings of the 2681st meeting of the 53rd session' (n 65) para 80–81, 99. See also Yaël Ronen, 'Avoid or compensate—Liability for injury to civilians inflicted during armed conflict' (2009) 42(1) *Vanderbilt Journal of Transnational Law* 181, 189; August Reinisch, 'Necessity in international investment arbitration—An unnecessary split of opinions in recent ICSID cases—Comments on CMS v. Argentina and LG&E v. Argentina' (2007) 8(2) *Journal of World Investment Trade* 191, 207–208; Christina Binder, 'Stability and change in times of fragmentation: The limits of *pacta sunt servanda* revisited' (2012) 25(4) *Leiden Journal of International Law* 909, 920 ("[I]nternational practice points towards a duty to compensate"); Robert D Sloane, 'On the use and abuse of necessity in the law of state responsibility' (2012) 106(3) *American Journal of International Law* 447, 506 ("[C]ustomary international law (...) requires payment of prompt, adequate and effective compensation"). See also the three relevant cases cited in 10.6. *Circumstances precluding wrongfulness*.

or, vice versa, that the successor State of the injured State could not demand “compensation” for material loss suffered on its territory.

13.3.2.2 Indirect Responsibility

When the ARSIWA were adopted, the ILC members were of the opinion that there might be special circumstances that could lead to the devolution of responsibility to another State. The term *indirect responsibility* thus describes situations when a State other than the State to which the act is attributed is responsible for the act.⁶⁷ Nollkaemper points out that the ARSIWA strictly uphold the *principle of independent and exclusive responsibility*, according to which each State can only be held responsible for its own acts.⁶⁸ However, this does not mean that a State cannot be held responsible for its role in the violation of a primary rule by another State but that it is nevertheless responsible for its own act and not for that of the directly responsible State.⁶⁹

This argument is less useful with regard to succession to international responsibility, but it provides some basis for arguing that the successor State may, by virtue of its role (following the *principle of special connection*), succeed to certain secondary rights and obligations that would otherwise have belonged to the responsible predecessor State.

67 ILC, ‘Eighth Report on State responsibility by Mr. Roberto Ago, Special Rapporteur’ (1979) UN Doc A/CN.4./318 para 1–2, 4.

68 Andre Nollkaemper and Dov Jacobs, ‘Shared responsibility in international law: A conceptual framework’ (2013) 34(2) Michigan Journal of International Law 359, 381.

69 Commentary on the ARSIWA (n 19) para 10, 67.

Types of State Succession to International Responsibility

In addition to the time frames requiring the commission of the wrongful act before the date of succession,¹ the question of which State was attributed the wrongful act is also relevant to succession to international responsibility. As mentioned above, although the wrongful act was committed before the date of succession, using the rules of international responsibility, it can be attributable to the predecessor or successor State. If the successor State is responsible for the wrongful act, there can be no succession. In this case, the successor State itself is internationally responsible, and the law of succession of States does not apply. Succession to international responsibility is only possible if the predecessor State is internationally responsible for the act and the secondary rights and obligations are the object of succession.

In this respect, there is a division between *fictitious* and *real* succession. In both types, secondary rights and obligations relate to a wrongful act committed before the date of succession. However, these rights and obligations are the object of succession only in the case of *real succession*, which means that the wrongful act was attributed to the predecessor State, and its rights and obligations were then succeeded to by the successor State. In the case of *fictitious succession*, an act that was otherwise committed before the date of succession has been attributed directly to the successor State, which is therefore, as the responsible State, the holder of these secondary rights and obligations. Consequently, they are not subject to succession. As shown in the following sections, in the case of fictitious succession, the rules of *State responsibility* apply, whereas real succession is based on the rules of *State succession*.²

The succession linked to a successor State with the status of continuator State derogates to a certain extent from the consequences of this division since this State does not change its legal personality despite the succession and is thus (even after the date of succession) legally identical to the State before this date. Nevertheless, a succession involving a continuator State, as illustrated in the next section, is considered to be a *fictitious* succession; in its case, too,

1 See 13.2. *Time frames for succession to international responsibility*.

2 ILC, 'Second report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 70th session' (2018) UN Doc A/CN.4/719 para 49–50, 13.

succession to responsibility is based on the application of the rules of State responsibility.

The division of types of succession based on the law of international responsibility finds its basis in the reports of the ILC Special Rapporteur and the IDI Resolution on State Succession to International Responsibility. According to these documents, if a wrongful act is attributed to a successor State, the successor State is responsible per the rules of international responsibility. However, if the act is attributed to the predecessor State, the latter remains internationally responsible, and the successor State becomes subject to secondary rights and obligations.³ The IDI Resolution on State Succession to International Responsibility refers to succession to the rights and obligations arising out of an internationally wrongful act⁴ but does not elaborate on these rights and obligations. A detailed overview of the impact of succession on various secondary rights and obligations was provided by Special Rapporteur Šturma in his Fourth Report.⁵

14.1 Fictitious Succession to International Responsibility

In cases of fictitious succession, the wrongful act took place before the date of succession, but its consequences are decided only after that date. However, the wrongful act (and, thus, responsibility) is attributed directly to the successor State. It is important to bear in mind that, in all cases except for continuator States, the successor State exists only after the date of succession. Because the successor State does not exist as such before that date, the wrongful act occurred before its formal creation. Nevertheless, both theory and the practice of international tribunals demonstrate that this wrongful act can be attributed to the successor State by applying the rules of international responsibility, in particular the rules of attribution of conduct, as shown in the following chapters.

For a State's conduct to constitute a breach of international law, it must not only be attributed to that State but also constitute a breach of its international

3 *ibid* para 50, 13.

4 *ibid*; Marcelo G Kohen and Patrick Dumberry, *The Institute of International Law's resolution on state succession and state responsibility: introduction, text and commentaries* (Cambridge University Press 2019) art 2 para 1 of the Resolution, 20–21.

5 ILC, 'Fourth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 72nd session' (2021) UN Doc A/CN.4/743 10–32.

obligations.⁶ The successor State must, at the time of the act, be bound by the primary rule that it violates. The mere existence of an act is not sufficient to constitute a breach under international law.⁷ Since the successor State (which exists as a State only after the date of succession) is responsible for the acts committed (or commenced) before the date of succession, it should, in theory, also have been bound by the primary rule in the period before its creation. Notwithstanding the fact that the binding nature of the primary rule before the date of succession is, at first sight, impossible or paradoxical, the chapters on State succession in the present book show that States have also accepted such binding force via explicit or implicit consent (e.g., Montenegro in relation to the ECHR and Yemen in respect of treaties to which its predecessor States were parties). According to the principle of *pacta sunt servanda*, contracting parties may bind themselves in the manner to which they consent if this is not contrary to *jus cogens*.⁸ Additionally, the primary rule binds the continuator State *ex tunc* from the date on which it became a contracting party (for treaties) or from the date of entry into force of the customary law rule, and not merely *ex nunc* from the date of succession.⁹

In cases of fictitious succession to international responsibility, the conduct is attributed directly to the successor State that was also bound by the primary legal norm at the time of the conduct. International responsibility arises directly in relation to it and not to the predecessor State. The successor State is therefore internationally responsible from the outset and does not succeed to the responsibility of the predecessor State. Thus, the wrongful act, international responsibility, and its consequences “belong” to the successor State according to the rules of international responsibility.¹⁰ The link to succession is only illusory and arises from the fact that international responsibility emerged *before* the date of succession and survived beyond it since it was not adjudicated before.

6 ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/49 (Vol. 1)/CORR.4 (ARSIWA) art 2; Ian Brownlie, *System of the law of nations, State Responsibility, Part 1* (Clanderon Press 1983) 132; Patrick Dumberry, ‘Compensation for moral Damages in investor-state arbitration disputes’ (2010) 27(3) *Journal of International Arbitration* 247, 270–271.

7 Dionisio Anzilotti, ‘La responsabilité de l’État à raison des dommages soufferts par des étrangers’ (1906) 13 *Revue générale de droit international public* 5, 14.

8 Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (1969 Vienna Convention) art 53.

9 See 5.4. *State practice with continuing legal personality*.

10 ILC, ‘Second report by Pavel Šturma’ (n 2) para 49, 13.

Such cases include (i) conducts of continuator States, (ii) acts attributed to successor State based on the rules regarding insurrectional and other movements, and (iii) other cases.

14.1.1 *Conduct of the Continuator State*

A successor State with the status of continuator is a State whose territory has been reduced (cession, separation of part of its territory) or increased (incorporation) as a result of the succession. A change in the size of its territory does not affect its legal personality. A continuator State is “*that State*” in the provision of ARSIWA whereby “[e]very internationally wrongful act of a State entails the international responsibility of *that State*.”¹¹ As a result of its own wrongful act, the State becomes internationally responsible before the date of succession, and this responsibility remains with it after that date—that is, despite the effective succession.¹² The continuator State is internationally responsible from the date of the breach onwards, which means that it is not only subject to secondary rights and obligations but also to international responsibility as such.

Before Montenegro’s separation, the State Union of Serbia and Montenegro had violated its international law obligations under the ECHR, but the ECtHR ruled on some of these violations only after the separation. In many cases, the Court merely found that Serbia was a continuator State and, therefore, remained a respondent.¹³ The ECtHR stated in the opening provisions of its judgments: “From 3 June 2006, following Montenegro’s declaration of independence, Serbia remained the sole respondent in the proceedings before the Court”¹⁴ and “[t]he case originated in an application (...) against the State

11 ARSIWA (n 6) art 1 (emphasis added).

12 Brigitte Stern, ‘Responsabilité internationale et succession d’états’ in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *L’ordre juridique international, un système en quête d’équité et d’universalité* [*The International Legal System in Quest of Equity and Universality*] (Martinus Nijhoff Publishers 2001) 354.

13 These cases include *Bodrožić v Serbia* App No 32550/05 ECtHR, 23 June 2009; *Filipović v Serbia* App No 27935/05 ECtHR, 20 November 2007; *Jevremović v Serbia* App No 3150/05 ECtHR, 17 July 2007; *Kin-Stib and Majkić v Serbia* App No 12312/05 ECtHR, 20 April 2010; *Kostić v Serbia* App No 41760/04 ECtHR, 25 November 2008; *Lepojić v Serbia* App No 13909/05 ECtHR, 6 November 2007; *Marčić and 16 Others v Serbia* App No 17556/05 ECtHR, 30 October 2007; *Matijašević v Serbia* App No 23037/04 ECtHR, 31 March 2008; *Milošević v Serbia* App No 31320/05 ECtHR, 28 April 2009; *Molnar Gabor v Serbia* App No 22762/05 ECtHR, 8 December 2009; *Salontaji-Drobnjak v Serbia* App No 36500/05 ECtHR, 13 October 2009; *Stojanović v Serbia* App No 34425/04 ECtHR, 19 May 2009; *V.A.M. v Serbia* App No 39177/05 ECtHR, 13 March 2007; *Vrenčev v Serbia* App No 2361/05 ECtHR, 23 September 2008.

14 See, e.g., *Bodrožić v Serbia* (n 13) para 1, 1.

Union of Serbia and Montenegro, succeeded by Serbia on 3 June 2006.¹⁵ As the decisions on the breaches committed before the date of succession were taken only after that date, international responsibility was established exclusively in relation to Serbia as a continuator State.

Similarly, in the *Crime of Genocide* cases before the ICJ, BiH and Croatia (separately) brought cases against the FRY, from which Montenegro later separated (after its renaming to the State Union of Serbia and Montenegro). On March 20, 1993, BiH filed a case against the FRY, but the final judgment was only delivered in 2007, after Montenegro had already separated from that State.¹⁶ The ICJ confirmed that the acts to which BiH's claim related occurred during the period when Montenegro and Serbia formed one State,¹⁷ but it ruled that only Serbia could continue as a defendant.¹⁸ This decision relied on the fact that Serbia accepted "continuity between [the State Union of] Serbia and Montenegro and the Republic of Serbia,"¹⁹ and the facts "clearly show that the Republic of Montenegro does not continue the legal personality of [the State Union of] Serbia and Montenegro."²⁰ The ICJ also based its decision on jurisdiction on the necessity of consent to the jurisdiction of the Court, which applies to the FRY: while Serbia had succeeded it with legal personality, Montenegro had not.²¹ The same was the substance of the proceedings in the case brought by Croatia, which was lodged on July 2, 1999, and decided on February 3, 2015.²²

The Court issued a judgment on BiH's application, which "[f]inds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995."²³ In its assessment of the facts, the ICJ referred to the acts of the FRY (i.e., the predecessor State),²⁴

15 See, e.g., *Filipović v Serbia* (n 13) para 1, 1.

16 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (Crime of Genocide [Bosnia v Serbia and Montenegro] [Judgment]) para 67–79, 73–76.

17 *ibid* para 74, 75.

18 *ibid* para 77, 76.

19 *ibid* para 75, 75.

20 *ibid* para 76, 76.

21 *ibid* para 76, 76.

22 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3 (*Crime of Genocide [Croatia v Serbia]* [Judgment]).

23 *Crime of Genocide (Bosnia v Serbia and Montenegro)* (Judgment) (n 16) point 5, 238.

24 E.g., "[f]or the reasons stated above (...), it will confine itself to the FRY's conduct vis-à-vis the Srebrenica massacres." *ibid* para 433, 223.

but the judgment was rendered in relation to Serbia as a continuator State.²⁵

14.1.1.1 Partial Conclusions

These cases confirm that a continuator State is internationally responsible for breaches that occurred before the date of succession, that is, before its existence as a successor State. International responsibility in this respect was established by virtue of the State's legal identity with the predecessor State or its continued legal personality. However, the continuator State did not *succeed* to international responsibility (or the rights and obligations that accompany it) as the acts were attributed to it and it was bound by the primary rule at the time of the act. The continuator State is therefore internationally responsible according to the rules of State responsibility.

14.1.2 Attribution of Acts Based on the Rules Regarding Insurrectional and Other Movements

A detailed analysis of the attribution of acts of insurrectional and other movements is provided in the chapter on State responsibility. At this point, it should be underlined that the ARSIWA provide that “[t]he conduct of a movement, insurrectional *or other*²⁶ which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.”²⁷ There are several reasons for attributing acts of insurrectional and other movements to the successor State,²⁸ but the most prominent is the *theory of organic*

25 In *Crime of Genocide (Croatia)*, the final judgment was also rendered in relation to Serbia. *Crime of Genocide (Croatia v Serbia)* (Judgment) (n 22) 154.

26 “Or other” is only mentioned in the second paragraph of Article 10 of ARSIWA, the first paragraph does not use this phrase.

27 ARSIWA (n 6) 10(2).

28 For a detailed analysis, see also: Patrick Dumberry, *State succession to international responsibility* (Martinus Nijhoff Publishers 2007) 239–246; Jean D’Aspremont, ‘Rebellion and state responsibility: Wrongdoing by democratically elected insurgents’ (2009) 58(2) *International and Comparative Law Quarterly* 427, 431–433; Jean D’Aspremont, ‘Responsibility for coups d’etat in international law’ (2010) 18(2) *Tulane Journal of International and Comparative Law* 451, 468–470. For a granular definition of the various forms of movements (rebels, insurgents, belligerents), see: Andrew Clapham, ‘Human rights obligations of non-State actors in conflict situations’ (2006) 88(863) *International Review of the Red Cross* 491. In relation to human rights violations and the related attribution problems: Jan Arno Hessbruegge, ‘Human rights violations arising from conduct of non-state actors’ (2005) 11 *Buffalo Human Rights Law Review* 21, 64–66. Some authors are also of the opinion that these rules of attribution of acts of rebel movements have reached the level of customary international law: Gérard Cahin, ‘Attribution of conduct to

or *structural continuity*, which is based on the thesis that insurgents and the new government are essentially the same entity,²⁹ a view also accepted by the ILC.³⁰ One could use the term “succession of authority.”³¹ This thesis is also similar to the idea that insurrectional and other movements could constitute a State *in statu nascendi*,³² which was pointed out as a subsidiary argument by Croatia in *Crime of Genocide (Croatia)* before the ICJ.³³

The provision deals only with *attribution of conduct*, that is, the field of international responsibility, and not with the rules on succession of States. Crawford, for his part, states that the *rights and obligations* of successful insurrectional movements continue to apply to the State so established.³⁴ Therefore, it is also necessary to reiterate the ICJ’s assertion that this provision of ARSIWA is

[c]oncerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles that: “An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”³⁵

This means that a successor State can only be held responsible for a conduct related to the acts of an insurrectional movement if, at the time of those acts, it (the State) was bound by the primary rule that these acts violate. Both elements of the wrongful act (attributed act and applicable primary norm) thus relate to a period before the date of succession. The ICJ rejected the possibility

the state: Insurrectional movements’ in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 255.

29 Dumbery, *State succession to international responsibility* (n 28) 245; Cahin (n 28) 249.

30 ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) 2(2) Yearbook of the International Law Commission (Commentary on the ARSIWA) para 5, 50.

31 ILC, ‘Second report by Pavel Šturma’ (n 2) para 188, 45.

32 James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 658–665; Anthony Cullen and Steven Wheatley, ‘The human rights of individuals in de facto regimes under the European Convention on Human Rights’ (2013) 13(4) Human Rights Law Review 691, 693.

33 *Crime of Genocide (Croatia v Serbia)* (Judgment) (n 22) para 81, 44. For a detailed analysis see ILC, ‘First report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 69th session’ (2017) UN Doc A/CN.4/708 para 55, 16.

34 Crawford, *The Creation of States in International Law* (n 32) 658.

35 *Crime of Genocide (Croatia v Serbia)* (Judgment) (n 22) para 104, 53 (emphasis added).

of holding a successor State responsible for acts of insurrectional movement without the concurrent application of a primary rule.³⁶

The ILC does not explicitly define insurrectional and other movements, but the terms are not meant to refer to various groups of individuals promoting independence.³⁷ It can be inferred from the ILC's statements that the provisions on insurrectional and other movements do not apply to the authorities of federal republics and other territorial units promoting independence. However, the practice of the ECtHR, which is based on the *theory of organic or structural continuity*, extends the notion of "and other movements" to these bodies.

In cases involving violations of the ECHR by the State Union of Serbia and Montenegro, the Court attributed wrongful acts effectively committed by the authorities of the Montenegro federal unit before the date of succession to Montenegro the successor State.³⁸ These decisions contradict the basic premise of the responsibility of the continuator State (Serbia), which may be the reason why the Court based its decision in this case on the *rules of international responsibility* and not on the *rules of succession of States*. In *Bijelić v Serbia and Montenegro*,³⁹ the ECtHR sought the opinion of the Venice Commission,⁴⁰ which referred directly to the provisions of Article 10 of the ARSIWA: the Commission stated that "[i]t is undoubtedly reasonable to hold (...) Montenegro responsible for all the violations of the ECHR committed in Montenegro between 3 March 2004 and 6 June 2006."⁴¹ The first date refers to the accession of the FRY to the ECHR, and the second is the date of succession. The Commission based the above on the "full continuity" between the authorities of Montenegro as a federal unit and the authorities of Montenegro as an independent State⁴² and on the high degree of autonomy of the federal republics within the State Union of Serbia and Montenegro.⁴³

This reasoning was followed by the ECtHR, which stated that the action against Montenegro was admissible *ratione personae* because "the impugned proceedings have been solely within the competence of the Montenegrin

36 *ibid* para 105, 54.

37 Commentary on the ARSIWA (n 30) para 10, 51.

38 See also: ILC, 'Second report by Pavel Šturma' (n 2) para 121, 29.

39 *Bijelić v Montenegro and Serbia* App No 11890/05 ECtHR, 28 April 2009.

40 Opinion of the Venice Commission in the case of *Bijelić v Montenegro and Serbia*: European Commission for Democracy through Law (Venice Commission) No 495/2008 CDL-AD(2008)021 (20 October 2008).

41 *ibid* para 43, 9.

42 *ibid* para 43, 9.

43 *ibid* para 9, 3.

authorities.”⁴⁴ For the same reason, it considered that the action was not admissible in respect of Serbia.⁴⁵ Thus, the acts were attributed to Montenegro.

However, attributed conduct alone is not sufficient to constitute a wrongful act. Hence, the ECtHR had to confirm that Montenegro was bound by the primary norm at the time of the attributed conduct. The ECtHR relied on the Constitutional Law for the Implementation of the Constitution of Montenegro,⁴⁶ which declares that “[t]he provisions of the international agreements on human rights and freedoms to which Montenegro acceded before 3 June 2006 will be applied in relation to legal relations created after the signing [of these agreements].”⁴⁷ The ECtHR ruled that Montenegro thus consented to be bound by the ECHR not only from the date of succession but from the date on which the convention entered into force for its predecessor State (the State Union), namely, March 3, 2004.⁴⁸ By combining the two elements, the ECtHR confirmed Montenegro’s international responsibility for the violations that began before the date of succession.⁴⁹ The Court cited the *Bijelić* case and ruled the same way in other similar cases regarding violations committed by Montenegro in the period before its separation.⁵⁰

The fact that these cases involved breaches of a continuing nature did not affect the potential question of succession to international responsibility in the present context since Montenegro was found internationally responsible for its own wrongful acts and not on the reasoning related to continuing breaches.

14.1.2.1 Partial Conclusions

The examples above prove that, based on the rules for the attribution of conducts of insurrectional and other movements, acts committed by the organs of the predecessor State can be imputed to the successor State. This is possible if the factual circumstances confirm the continuity between the organs of the breakaway territorial unit and those of the new State. In the case of Montenegro,

44 *Bijelić v Montenegro and Serbia* (n 39) para 70, 12.

45 *ibid.*

46 Constitutional Law for the Implementation of the Constitution of Montenegro (19 October 2007) Official Gazette of the Republic of Montenegro No 01/07, 9/08 and 4/09.

47 *ibid* art 5 cited in *Bijelić v Montenegro and Serbia* (n 39) para 42, 6.

48 *Bijelić v Montenegro and Serbia* (n 39) para 69, 12.

49 *ibid* para 85, 15.

50 *Lakićević and Others v Montenegro and Serbia* App No 27458/06, 37205/06, 37207/06 and 33604/07 ECtHR, 13 December 2011; *Milić v Montenegro and Serbia* App No 28359/05 ECtHR, 11 December 2012; *Momčilo Mandić v Montenegro, Serbia and Bosnia and Herzegovina* App No 32557/05 ECtHR, 12 June 2012.

this was verified by the high degree of autonomy of the Montenegrin authorities within the predecessor State.

The cases mentioned previously additionally establish that, in the context of *fictitious succession to international responsibility*, attributing the conduct is insufficient as a primary rule binding the successor State at the time of the conduct is also required. In *Bijelić*, the Court based the validity of the primary rule mainly on the consent of the successor State to be bound retroactively. The simultaneous existence of an attributed act and a breached primary norm creates international responsibility ipso facto per the rules of international law. Thus, the successor State is internationally responsible from the moment of the breach and does not succeed to it.

If the primary rule did not bind the successor State, the attributed conduct could (in the context of the *principle of special connection*) imply a special link of the successor State with the consequences of the wrongful act, which is discussed in the chapter “Real succession to international responsibility.”

14.1.3 *Other Examples of Fictitious Succession to International Responsibility*

Other cases of fictitious succession to international responsibility comprise all other situations in which an act is attributed to a successor State in relation to a primary norm binding it at the time the act was committed. In these cases, the successor State is internationally responsible based on the rules of State responsibility.

This is also possible through the State’s acknowledgment and adoption of a conduct as its own, when the State accepts as its own an act that is not otherwise attributable to it.⁵¹ Acknowledgment and adoption may be explicit or may arise from implied acts. This situation could theoretically arise, for example, in relation to Yemen if it were to accept as its own an act committed during the existence of its predecessor States. On May 19, 1990—after the signing of the unification agreement—the foreign ministers of the two Yemeni informed the UN Secretary-General by letter that the Republic of Yemen would *replace* the two predecessor States in terms of membership in the UN, international agreements, and international relations in general.⁵² Today, Yemen is considered a party to fifty-two multilateral treaties concluded before unification,

51 ARSIWA (n 6) art 11; Jean-Philippe Monnier, ‘La succession d’États en matière de responsabilité internationale’ (1962) 8 *Annuaire français de droit international* 65, 67.

52 Joint Letter of the Foreign Ministers of the two Yemeni to the Secretary-General of the United Nations (19 May 1990) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2023.

which apply to the whole country. They include the Slavery Convention, signed in Geneva on September 25, 1926, and amended by the Protocol, to which the Democratic Republic of Yemen acceded on February 9, 1987, and the successor State Yemen is now considered to be a party from that date. As the successor State is bound by treaties dating back to the time when the predecessor States existed, the successor State has both rights and obligations originating from the period before its creation. If Yemen were to acknowledge and adopt as its own wrongful acts committed at the time when the relevant primary rule was in force, it would ipso facto also become a responsible State. A similar situation could arise in respect of the Czech Republic or Slovakia, which are considered parties to the ECHR from the date of the accession of their predecessor State (Czechoslovakia),⁵³ or, for the same reason, Montenegro.⁵⁴

A State can also accept an act as its own by implication, as shown by the cases regarding concession contracts concerning lighthouses, in which the Permanent Court of Arbitration held that Greece adopted the wrongful conduct of the predecessor State (Ottoman Empire) in Crete and was therefore responsible for the consequences of the breach.⁵⁵

14.1.4 *Partial Conclusion*

As the previous chapters demonstrate, in the case of fictitious succession to international responsibility, all successor States are treated as continuator States because their international responsibility extends from the date on which the act constituting the internationally wrongful act (committed before the date of succession) was attributed to them or accepted by them as their own. The above also confirms that fictitious succession to international responsibility is only a virtual succession given that the rights and responsibilities arising from the international responsibility of States are not succeeded to but belong to the successor State from the outset.

Fictitious succession to international responsibility also departs from the normal definition of the object of succession to international responsibility. Because, in these cases, the successor State is responsible from the outset, it remains so after the date of succession. In this context, the successor State is

53 *Konečný v the Czech Republic* App No 47269/99, 64656/01 and 65002/01 ECtHR, 26 October 2004 para 62, 7.

54 *Bijelić v Montenegro and Serbia* (n 39) para 69, 12.

55 *Lighthouses in Crete and Samos (France v Greece)* [1937] PCIJ Rep Series A/B No 71 (Lighthouses 1937) 11, similar in: *Affaire relative à la concession des phares de l'Empire ottoman (Grèce contre France)*, 12 UNRIAA 155 (24/27 July 1956) (Lighthouses 1956) 198. See also: ILC, 'First report by Pavel Šturma' (n 33) para 41, 12.

the holder not only of secondary rights and obligations but also of the full status of internationally responsible State. Nevertheless, it can be confirmed that in these cases, the successor State is responsible for internationally wrongful acts that occurred before the date of its formal creation, which makes them similar to the cases of State succession. However, secondary rights and obligations have not passed to it by virtue of the succession procedure.

14.2 Real Succession to International Responsibility

Real succession defines cases in which an act is attributed to a predecessor State that was also bound by the primary rule at the time the act was committed. The predecessor State is thus internationally responsible. In this context, it is not superfluous to reiterate the position of the ILC and the IDI that the object of succession is not international responsibility as such but the rights and obligations associated with it,⁵⁶ which is also the common denominator with all other matters (property, archives, debts, and treaties).⁵⁷ The rights and obligations arising from the international responsibility of the predecessor State are subsequently the object of succession and are succeeded to by the successor State. Succession to the rights and obligations arising from its international responsibility must therefore be assessed based on the *rules of succession of States*, which distinguishes these cases from cases of fictitious succession.

14.2.1 *Special Part of the Matter of Succession to International Responsibility*

The IDI and the ILC linked the rules on succession to the rights of the injured State to the connection of the injury to the territory and population of the successor State⁵⁸ and those on succession to the obligations of the wrongdoing

56 ILC, 'First report by Pavel Šturma' (n 33) para 20, 6; Institut du Droit International, 'Succession of States in Matters of International Responsibility, Resolution' (2015) 76 *Annuaire de l'Institut de droit international* 703 (IDI Resolution on State Succession to International Responsibility) art 2 para 1; the same also Dumberry, *State succession to international responsibility* (n 28) 6.

57 See 6.2.1.1. *Rights and obligations as an object of succession*.

58 IDI Resolution on State Succession to International Responsibility (n 56) art 11(2) (cession), art 12(2) (separation of parts of territory), art 15(2) (dissolution). Articles proposed by the ILC Special Rapporteur: draft art 14 (cession, separation), art 16 (dissolution). ILC, 'Fifth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 73rd session' (2022) UN Doc A/CN.4/751, 41–42.

State to situations in which the wrongful act was committed by an organ that later became an organ of the successor State (*structural continuity of organs*).⁵⁹ In some cases, the IDI and ILC added the need to assess other relevant circumstances (e.g., the specific link of the successor State to the act, the population, the size of the territory, and the avoidance of unjust enrichment).⁶⁰ Similarly, Special Rapporteur Šturma addressed the connection between organ, territory, and population on the one hand, and injury, on the other, in his Fourth Report.⁶¹ In addition, the report addresses the question of the “material impossibility” of providing restitution, as well as different types of reparations in the light of State succession.⁶²

Situations in which an unlawful act was committed by an organ of a territorial unit that was subsequently subject to succession are not identical to those described in the chapter on fictitious succession to international responsibility, which deals with reasoning based on the rules for the attribution of acts of insurrectional and other movements.⁶³ In those cases, the wrongful act was attributed to the successor State, which was also bound by the primary norm. In cases described by this paragraph, the wrongful act is attributed to the predecessor State, but there is also structural continuity between the authorities of the territorial unit of the predecessor State and the authorities of the successor State.⁶⁴ In his Fifth Report, Special Rapporteur Šturma describes *Zaklan v Croatia* before the ECtHR.⁶⁵ In that case, the Court held that a violation of the Convention had been initiated by the authorities of the predecessor State (SFRY), but “that Croatia [successor State] had taken over the administrative offence proceedings against the applicant, a national of Croatia.” On that basis, the Court confirmed that the wrongful act was attributable to Croatia. The Special Rapporteur highlights the institutional link (or devolution) between an

59 IDI Resolution on State Succession to International Responsibility (n 56) art 11(3) (cession), art 12(3) (separation of parts of territory), art 15(3) (dissolution). Articles proposed by the ILC Special Rapporteur: art 7(2) (separation), art 9(2) (cession). ILC, ‘Third report by Pavel Šturma’ (n 1) 41–42.

60 IDI Resolution on State Succession to International Responsibility (n 56): art 12(5) (separation of part of a territory), art 15(3) (dissolution). ILC, ‘Fifth report by Pavel Šturma’ (n 58): draft art 12 (dissolution): States should take into account “any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.”

61 ILC, ‘Fourth report by Pavel Šturma’ (n 5), e.g., para 53, 15 and para 63, 18.

62 *ibid* para 34–47, 10–14.

63 See Kohen and Dumbery (n 4) 88.

64 *ibid*.

65 *Zaklan v. Croatia* App No 57239/13 ECtHR, 16 December 2021.

organ of a territorial unit (republic) of the Yugoslav federation, as the author of a violation, and an organ of a successor State.⁶⁶

As with other succession matters, the definition of the special part in the case of international responsibility is based on its connection with one of the constitutive elements of the successor State—on the side of the injured State, the territory and population of the successor State in particular, and on the side of the wrongdoing State, structural continuity between the organs of the territorial unit of the predecessor and the organs (government) of the successor State. This continuity is the basis for the identification of the special matter of succession. In this context, it is not negligible that structural continuity is relevant only because the predecessor State's organs have committed an internationally wrongful act; that is, the structural continuity of the organs is relevant because of their link to the international responsibility of the predecessor State.

14.2.2 *Succession to Rights and Obligations Linked to Continued Compliance with the Primary Norm*

This chapter deals only with succession to the rights and obligations related to the continued observance of a primary norm; succession regarding reparations is addressed in the next chapter. As mentioned above, succession to the rights and obligations pertaining to the continued observance of the primary norm is only possible with prior succession to the primary norm as these secondary obligations are inextricably linked to it. The secondary obligations in this group are the violating party's obligation of *continued duty of performance*,⁶⁷ obligation to cease the wrongful conduct (*cessation*),⁶⁸ and obligation to offer *assurances and guarantees of non-repetition*.⁶⁹

While succession to the first and third obligations is clear,⁷⁰ an additional explanation is needed regarding *cessation*.⁷¹ The obligation of cessation is only relevant if the breach is ongoing, which means that the conduct must be of a continuing or composite nature.⁷² In fact, in the case of a single

66 ILC, 'Fifth report by Pavel Šturma' (n 58) 16.

67 ARSIWA (n 6) art 6.

68 *ibid* art 30.

69 *ibid*.

70 See 13.1.1. *Rights and obligations related to continued compliance with the primary norm*. A very comprehensive analyses on succession to assurances and guarantees of non-repetition is provided in ILC, 'Fourth report by Pavel Šturma' (n 5) para 122–136, 32–36.

71 See also ILC, 'Fourth report by Pavel Šturma' (n 5) para 102–108, 27–29.

72 See, e.g., *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two*

breach, it is not possible to require cessation given that the breach is no longer ongoing.⁷³

14.2.2.1 Obligation of Cessation of Continuing and Composite Breaches

Both the ILC and the IDI specifically highlight continuing and composite breaches as a possible basis for succession to international responsibility.⁷⁴ The difference between these types of breaches is described in the chapters on international responsibility. At this point, it is stressed that in both cases the breach extends throughout the time when the act constitutes a breach of the primary obligation, which distinguishes these two types from a single breach.⁷⁵ While a continuing breach essentially consists of one violation, in the case of a composite breach, there are several successive acts, which together, as a chain, constitute one breach.⁷⁶ Each individual act may constitute a breach in itself, but this is not necessarily the case. A composite breach only arises when the last act is performed, completing the whole chain; nonetheless, once the last act has been performed, the duration of the breach is deemed to extend throughout the period from the first act to the last.⁷⁷

14.2.2.1.1 *Succession to the Obligation of Cessation of Continuing and Composite Breaches*

The basis for the ILC's and the IDI's deliberations on whether this institution can provide a basis for succession to responsibility is the idea that a breach committed by the predecessor State could flow seamlessly into a breach

States and which related to the problems arising from the Rainbow Warrior Affair 20 UNRIAA 215 (1990) (*Rainbow Warrior Affair*) para 113, 270; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 (*Nicaragua*) point 12, 149; *United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep 3 (*US Diplomatic and Consular Staff in Tehran*) para 95, 44; *Haya de la Torre* (Judgment) [1951] ICJ Rep 71, 82; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep para 150, 197.

73 *Rainbow Warrior Affair* (n 72) para 105, 265–266.

74 IDI Resolution on State Succession to International Responsibility (n 56) art 9; Kohen and Dumbery (n 4) 58–64. ILC, 'Second report by Pavel Šturma' (n 2) para 59, 13–19, ILC, 'Fifth report by Pavel Šturma' (n 58), draft art 5[7], art 6 [7bis], 30.

75 ARSIWA (n 6) art 14(2). Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge University Press 2017) 606; Olivier Corten, 'The obligation of cessation' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 547.

76 Kohen and Dumbery (n 4) 63–64; ILC, 'Fourth report by Pavel Šturma' (n 5) para 109–121, 29–32.

77 *ibid.*

committed by the successor State, which would *replace* the predecessor State (in the sense of succession) in the role of breaching State as well.⁷⁸ To be able to speak of a continuation of the breach, the successor State would have to succeed to the primary norm and continue the conduct of the predecessor State. The conduct of the successor State would thus constitute a continuation of the conduct of the predecessor State.

Such a case may arise if the predecessor State initiated a continuing breach of a primary rule at some point before the date of succession and this breach had not ended by the date of succession (e.g., illegal detention of a third State's diplomats, which violates the Vienna Convention on Diplomatic Relations⁷⁹). From the date of succession onwards, the successor State would succeed to the primary rule (i.e., replace the predecessor State in respect of that rule) and, at the same time, continue to engage in an identical breach of said rule (i.e., replace the predecessor State in conduct).

This case should be divided into two parts according to the timing vis-à-vis the date of succession. A breach (or part of it) that takes place after the date of succession is not in dispute and clearly belongs to the successor State since it is its own conduct violating a primary norm to which it is bound.⁸⁰ Nor is there a question of succession in this case.

The situation is quite different for a breach by the predecessor State that began before the date of succession and continued until that date. This breach (or part of it) can only be attributed to the predecessor State under the rules of international responsibility. For the successor State to succeed (i.e., replace the predecessor State) to the secondary obligation of cessation, it would have to continue this continuing breach of the predecessor State. If the successor State starts its "own" continuing breach, succession to the secondary obligation to cease the breach is not relevant given that the new breach creates a new, separate, and distinct international responsibility of the successor State.

In the resulting situation, theoretical reasoning necessarily comes up against the cliffs of its practical implementation. To satisfy the idea of succession to an obligation of cessation, the successor State must, from the date of succession, act identically to and breach the exact same legal norm as the predecessor State. Irrespective of whether there is succession to the breach of the predecessor State, the breach (e.g., illegal detention of diplomats) after the date of succession will be the result of the conduct of the successor State alone. Whether

78 *ibid* 61. ILC, 'Second report by Pavel Šturma' (n 2) para 54, 14. On composite acts, see: ILC, 'Fourth report by Pavel Šturma' (n 5) para 109–121, 29–32.

79 Vienna Convention on Diplomatic Relations (adopted 18 April 1961) 500 UNTS 95.

80 Kohen and Dumberry (n 4) 61; ILC, 'Second report by Pavel Šturma' (n 2) para 59, 14.

that breach will still qualify as a succession to (or continuation of) the predecessor's breach does not change the fact that it is the conduct of the successor State (which is itself illegally detaining foreign diplomats and is also the only one able to let them go). The obligation of cessation of that breach (i.e. its own) thus cannot be separated from the case in which the successor State would—in relation to the violation it succeeds to—succeed to the obligation of cessation of the same breach from the predecessor State. Practical separation is also not possible because regardless of whether the conduct qualifies as a continuation of the conduct of the predecessor State or as a conduct of the successor State, it is still the *same* conduct of the successor State. The difference would therefore lie only in the qualification of the conduct. This Gordian knot is cut by the primary premise that a breach that continues after the date of succession is a breach by the successor State, which means that succession to the obligation of cessation is not per se possible.

Unlike in the case of continuing breaches (one infringement lasting for a long time), composite breaches entail several acts. The predecessor State could have committed one part of the chain of the breach and the successor State the final breach concluding the chain. However, after the final act, the whole chain will constitute a single wrongful act, so the reasoning that has been put forward with regard to continuing breaches can be applied *mutatis mutandis* to composite acts as well. The successor State could succeed to the obligation of cessation of acts committed by the predecessor. Nevertheless, as those acts would not be attributable to it, there would be no “closing of the chain”: the final breach would not constitute a chain and, hence, a composite breach.

The IDI and ILC effectively combined succession to this kind of breach with the acknowledgment and adoption of the act as one's own,⁸¹ citing the ILC's opinion that the latter by the successor State would also entail the acceptance of responsibility for those acts.⁸² In this case, the successor State would be internationally responsible for the entire conduct, including the part that was committed before the date of succession.⁸³ Kohen and Dumberry specifically point out that the question is then not one of succession to international responsibility but of direct responsibility of the successor State, which has adopted the act as its own.⁸⁴ It is therefore a matter of *fictional* succession. However, acknowledgment and adoption can provide a special link on which *real* succession can be based.

81 Kohen and Dumberry (n 4) 60; ILC, 'Fifth report by Pavel Šturma' (n 58) draft art 5, 30.

82 Commentary on the ARSIWA (n 30) para 3, 52.

83 Kohen and Dumberry (n 4) 64.

84 *ibid.*

14.2.2.2 Partial Conclusions

It can be concluded that real succession to a secondary obligation of cessation in cases of continuing and composite breaches is not possible per se. Nonetheless, by acknowledging and adopting the act as its own, which is an institution of the law of international responsibility, the successor State could become directly internationally responsible for the entire act. Thus, the obligation of cessation is its own secondary obligation and not one succeeded to from the predecessor State.⁸⁵ These cases should therefore be considered fictitious successions to international responsibility.

The possibility of succession to the continued duty of performance and the obligation of assurances and guarantees of non-repetition remains in force. However, the scope of the continued duty of performance is theoretical rather than practical since succession to this secondary obligation is conditional on the validity of the primary norm, which itself binds the State. Hence, the only real practical application concerns the obligation of assurances and guarantees of non-repetition. It is theoretically conceivable that a third State, the international community, or an international court could require a successor State to provide such assurances and guarantees not to repeat the breaches of the predecessor State. Similarly, the successor State of the injured State could *mutatis mutandis* require such assurances from the injuring State.⁸⁶

14.2.3 *Succession to Rights and Obligations Relating to the Remediating of the Consequences of the Breach*

While succession to rights and obligations related to the continued observance of the primary norm is an area of purely theoretical interest, the core of succession to secondary rights and obligations arising from international responsibility concerns succession to reparations,⁸⁷ which are inextricably linked to the injury caused by the breach.⁸⁸ Since the legal basis of international responsibility and of the secondary rights and obligations deriving therefrom is not

85 *ibid.*

86 See also: ILC, 'Fourth report by Pavel Šturma' (n 5) para 122–136, 32–36.

87 ILC, 'Second report by Pavel Šturma' (n 2) para 50, 13.

88 Yann Kerbrat, 'Interaction between the forms of reparation' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 580; Andre Nollkaemper, 'Constitutionalization and the unity of the law of international responsibility' (2009) 16(2) *Indiana Journal of Global Legal Studies* 535, 555. For a more detailed description of the relationship between reparation and damage obligations, see 13.1.2 *Rights and obligations relating to the remediating of the consequences of a wrongful act.*

injury but the wrongful act alone, it is necessary to examine the relationship between injury, wrongful act, and international responsibility.

14.2.3.1 Injury as a Consequence of a Breach and Its Relationship with International Responsibility

Despite the fact that injury is a consequence of all internationally wrongful acts, the ILC has not included its occurrence among the conditions for international responsibility. Theoretically, international responsibility would arise even if no injury occurred because it is ipso facto established by the wrongful act.⁸⁹

When discussing the Third Report, Special Rapporteur Šturma emphasized that he was not proposing to replace “wrongful act” with “injury” as the (legal) basis for international responsibility.⁹⁰ Some ILC members also expressed the view that the obligation to make reparations is based on the violation itself and not on the injury resulting from the violation⁹¹ and that, for this reason, the articles should avoid referring to injury as a condition for invoking international responsibility.⁹²

In the case of an abstract wrongful act causing no injury, only secondary rights and obligations linked to continued compliance with the primary norm would arise. Secondary rights and obligations relating to the remedying of the consequences of the breach (i.e., the injury) naturally arise only in relation to the injury. The existence of an injury is therefore a necessary element for the question of reparation given that the aim of reparation is to remedy the consequences of the wrongful act as much as possible,⁹³ and the responsible State “is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁹⁴ It should also be reiterated that injury arises as

89 Commentary on the ARSIWA (n 30) para 2, 32. Crawford stated: “Articles 1 and 2 do not, of course, deny the relevance of damage, moral and material, for various purposes of responsibility. They simply deny that there is a categorical requirement of moral or material damage before a breach of an international norm can attract responsibility.” James R Crawford, *State responsibility: The general part* (Cambridge studies in international and comparative law) (Cambridge University Press 2013) 59.

90 ILC, ‘Provisional summary record of the 3480th meeting of the 71st session of the ILC (second part)’ (2019) UN Doc A/CN.4/SR.3480, 5.

91 Opinion of ILC Member Grossman Guiloff in ILC, ‘Provisional summary record of the 3479th meeting of the 71st session (second part)’ (2019) UN Doc A/CN.4/SR.3479, 6.

92 Opinion of ILC member Auresco in ILC, ‘Provisional summary record of the 3476th meeting of the 71st session of the ILC (second part)’ (2019) UN Doc A/CN.4/SR.3476, 17.

93 *Factory at Chorzów* (Merits: Judgment No 13) [1928] PCIJ Rep Series A No 17, 47.

94 ARSIWA (n 6) art 31(1).

a consequence of any wrongful act and, therefore, accompanies any international responsibility.⁹⁵

This in no way changes the meaning of the wrongful act as a basis for international responsibility. The basis is still the wrongful act, but the scope of the secondary rights and obligations arises in relation to the injury to be repaired. This book thus does not deviate from the views expressed by the ILC members regarding international responsibility as such. The legal basis of international responsibility and, thus, of the consequences of a breach is the wrongful act. Injury is merely an objective fact that emerges as its consequence. By virtue of succession to secondary obligations, the successor State does not become the internationally responsible State; international responsibility, the legal basis of which is the wrongful act, remains with the wrongdoing State.

Nevertheless, the determination of not only the extent but also the very existence of the right and obligation of reparation depends on the injury. The existence of an injury is, of course, relevant only in relation to reparation and not to other secondary rights and obligations (see previous chapter).

14.2.3.2 Injury as a Matter of Succession

As concerns succession to reparations, we propose to treat injury (an objective fact existing at the date of succession) as a *matter* of succession and the secondary rights and obligations related to the remedying of the consequences of the breach (i.e., the injury) as an *object* of succession. By this logic, the wrongful act is the (legal) basis (in the case of property, the contract of purchase), the rights and obligations of reparations are the object of succession (in the case of property, the right of ownership), and the injury is the matter of succession (the property itself). Just as the legal basis of property is not the contract of purchase, neither is the wrongful act the legal basis of the injury. However, there is a link between them because the contract of purchase gives rise to rights and obligations relating to the property, and the wrongful act brings about rights and obligations relating to the injury.

The analysis presented in the following paragraphs demonstrates the relevance of this premise, which corresponds to the rules on the matter and object

95 Anzilotti and Ago specifically state that the mere violation of a right of the injured State constitutes damage and that damage therefore occurs whenever an unlawful act occurs. ILC, 'Second report on State responsibility (The origin of international responsibility) by Roberto Ago, Special Rapporteur' (1970) UN Doc A/CN.4/233 195; Anzilotti D, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale* (F. Lumachi Libraio-Editore 1902) 89. This also follows from the judgments of the tribunals, including *Rainbow Warrior Affair* (n 72) para 107 and 109, 266–267.

of State succession. This implies that the rules and principles of succession applicable to the other matters of succession could also be applied *mutatis mutandis* to succession to secondary rights and obligations of reparation.

14.2.3.3 Relevance of the Premise to the Rules and Principles of Succession
The following comparison with other matters refers exclusively to succession to rights and obligations related to the remedying of the breach and not to the continued observance of the primary norm.

14.2.3.3.1 *Rights and Obligations as the Object of Succession*

At the date of succession, there is a factual situation vis-à-vis the predecessor State, which is treated as an objective fact. This factual situation relates to the existing property, archives, debts, and treaties for which the predecessor State is the holder of rights and obligations. The 1983 Vienna Convention explicitly states that it is the rights and obligations arising out of the relationship of the predecessor State with these items (property, archives, and debts) that are the object of succession. Since the property, archives, and debts exist as a factual situation after the date of succession, the successor State succeeds to the rights and obligations relating to them. The latter replaces (i.e., succeeds) the predecessor State in respect of these rights and obligations.

This is perfectly consistent with “succession in relation to the injury” given that the ILC and the IDI have also held that the objects of succession are the secondary rights and obligations.⁹⁶ At the date of succession, an injury exists as a factual situation in relation to which the predecessor State has (secondary) rights and obligations of reparation. If no succession had occurred, the predecessor State would have been obliged (or entitled) to provide (or request) reparations, that is, to erase the injury. Because the injury, as a factual situation, continues to exist after the date of succession, it is reasonable to argue that the rights and obligations related to it pass to the successor State just like the rights and obligations pertaining to other matters. The successor State replaces the predecessor State in its responsibility for the international relations of the territory,⁹⁷ which implies an all-encompassing replacement and not merely a transfer of individual rights and obligations.

96 ILC, ‘First report by Pavel Šturma’ (n 33) para 20, 6; IDI Resolution on State Succession to International Responsibility (n 56) art 2(1).

97 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 (1978 Vienna Convention) art 2(1); Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14 (1983 Vienna Convention) art 2(1).

14.2.3.3.2 *Non-necessity of Succession to the Legal Basis of the Matter*

Succession to property, archives, and debts is not usually linked to the existence of a legal basis (e.g., a purchase or credit agreement) for the matter to belong to the predecessor State. Once the ownership of the matter (i.e., the rights and obligations attached to State property, archives, debts, and treaties) by the predecessor State is recognized, it is no longer relevant whether the legal basis on which the State acquired the property, archives, and debts or the manner in which it became a party to the treaty is still valid.⁹⁸ All that is relevant is the confirmation that the predecessor State is the holder of the rights and obligations on the date of succession and that the successor State is the subject of the succession. Once this fact has been established, the law of succession of States shall apply, according to which the object of succession passes to the successor State.⁹⁹ The successor State need not enter into an annex to the purchase contract relating to the property succeeded to or otherwise succeed to said purchase contract. Once the existence of the boundary is confirmed, it shall be succeeded to by the successor State.¹⁰⁰ The mere existence of a debt between the creditor and the predecessor State is sufficient for the debt-related succession processes to take place as “[a] succession of States does not as such affect the rights and obligations of creditors.”¹⁰¹ This is clearly illustrated, for example, in the case of succession to the SFRY’s debt by Slovenia, where the successor State simply confirmed with the creditor the existence of the debt as a de facto situation and the fact of succession, followed by a determination of the amount of the debt to be succeeded to. The successor State and the creditor did not conclude an annex to the credit agreement, which was considered a mere objective fact on the basis of which the circumstances of the debt relationship were confirmed.¹⁰² The legal basis of all the aforementioned matters

98 The above does not affect the possibility of challenging the legal basis for various acquisitions of property, debts of particular territories, and so on since the successor State succeeds to the subject matter of the succession in the same state as it was for the predecessor State—that is, including all defects and errors of law and fact.

99 See, e.g.: August Reinisch and Peter Bachmayer, ‘The Identification of Customary International Law by Austrian Courts’ (2012) 17 *Austrian Review of International and European Law* 1, 21–30 on succession to funds in bank accounts abroad, succession to diplomatic representation abroad, and ownership of works of art abroad.

100 1978 Vienna Convention (n 97) art 11; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 para 123, 72.

101 1983 Vienna Convention (n 97) art 36.

102 See, e.g.: Act on the ratification of the Agreement between the Government of the Republic of Slovenia and the Government of the Kingdom of Norway on the consolidation of the debt of the Republic of Slovenia (BNOKD) (9 July 2001) Official Gazette of the Republic of Slovenia No 57/2001; Act on the Membership of the Republic of Slovenia in

thus remains *in abstracto* with the predecessor State. Succession to treaties is again special because a treaty is solely a confirmation of a contractual relationship, which is itself an expression of rights and obligations.

The lack of need for succession to a legal basis is also applicable to the case of succession in relation to injury. As stated above, the legal basis of international responsibility is the wrongful act, which also constitutes a legal basis with regard to the rights and obligations arising from international responsibility. The wrongful act, like international responsibility itself, remains with the predecessor State; the object of succession is only the rights and obligations, as in the case of succession to property, archives, and debts.

14.2.3.3.3 *Immutability of the Matter of Succession*

The practice presented in Part 2 demonstrates that the successor State acquires the matter of succession in the same form as that “lost” by the predecessor State. Put differently, the matter is transferred to the successor State unchanged. Thus, for example, in the absence of a specific agreement, the successor State succeeds to a treaty as it was on the date of succession (i.e., signature, ratification, reservations), like property and debts are succeeded to in their form (interest, maturity) on the date of succession. This also follows logically from the fact that succession, as a legal concept, cannot have an impact on the objectively existing factual situation. Just as a change of ownership does not affect the very existence of the immovable property to which the rights in rem relate, succession does not affect the existence of the injury caused by the wrongful act; it continues to exist after the date of succession.

The immutability of the matter of succession is usually followed by the immutability of the object. The invariability of the debt and treaties succeeded to also derives from the *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt* principles, and that of the property from *nemo plus iuris ad alium transferre potest, quam ipse habet*. All are general principles of international law.

Even an injury in relation to which the predecessor State had rights and obligations on the date of succession is not changed simply because of the succession. Succession may have an impact on the rights and obligations relating to that injury or their extent as they may be extinguished or succeeded to by the successor State. Nonetheless, this does not affect the matter of succession itself, namely, the injury as such.

the International Monetary Fund (14 January 1993) Official Gazette of the Republic of Slovenia No 2/1993.

14.2.3.3.4 *Partial Conclusions*

A comparison of the rules on the matter and object of succession treating the consequence of the breach (injury) as the matter of succession shows that this premise does not deviate from the rules on the other matters of succession. “Succession in relation to injury” can legitimately be applied to secondary rights and obligations pertaining to the remedying of the consequences of a breach.

A link grounded in the relationship of secondary rights and obligations related to the remedying of the consequences of a breach with injury is perfectly acceptable for the IDI and the ILC as well.¹⁰³ However, the present book places succession to this matter within the framework of the rules of succession to all other matters, which the IDI and the ILC have not done.

The conclusions of this book conceptualize succession to these rights and obligations (i.e., the object of succession) in relation to injury as the matter of succession and apply it to the other rules confirmed in the final section of Part 2 on State succession. The conclusions thus deal primarily with succession to the rights and obligations related to the remedying of the consequences of the wrongful act.

¹⁰³ See 14.2.1. *Special part of the matter of succession to international responsibility.*

Conclusions

The conclusions synthesize the findings of the previous chapters and present four rules based on situating international responsibility within the framework of State succession. The four rules follow the basic rules of international responsibility but are built on those of State succession.

1. There is succession to international responsibility if the wrongful act (or its commencement) of a State occurs before the date of succession but the legal consequences are not confirmed until after the date of succession.¹ Both fictitious and real succession meet this condition. Fictitious succession occurs when, applying the rules of the law of international responsibility, the successor State is internationally responsible for a wrongful act committed before the date of succession. Real succession occurs when the predecessor State is internationally responsible based on these rules and the successor State succeeds to secondary rights and obligations following the law of succession of States. Thus, in the case of real succession, the internationally responsible State (if it exists after the date of succession) and a successor State that has succeeded to the secondary rights and obligations might exist simultaneously.² Fictitious succession is not succession in the true sense of the word because the successor State, as the internationally responsible State, is the holder of the secondary rights and obligations from the very moment when the wrongful act was attributed to it; therefore, it has not succeeded to them. In light of this, the following conclusions refer only to real succession to international responsibility.

1 ILC, 'First report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 69th session' (2017) UN Doc A/CN.4/708 para 38, 12; Institut du Droit International, 'Succession of States in Matters of International Responsibility, Resolution' (2015) 76 *Annuaire de l'Institut de droit international* 703 (IDI Resolution on State Succession to International Responsibility) art 4 and 5. See 13. *Time frames for succession to international responsibility*.

2 Marcelo G Kohen and Patrick Dumberry, *The Institute of International Law's resolution on state succession and state responsibility: introduction, text and commentaries* (Cambridge University Press 2019) 62; ILC, 'Second report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 70th session' (2018) UN Doc A/CN.4/719 para 48, 12–13.

2. Concerning the secondary rights and obligations related to the reparation of the consequences of the breach committed by the predecessor State (hereinafter, secondary rights and obligations of reparation), the author proposes treating the injury as a *matter* of succession (like property, archives, debts, and treaties) and the secondary rights and obligations as an *object* of succession. The previous chapters demonstrated that this premise corresponds to the rules of succession to other matters.
3. Succession to secondary rights and obligations of reparation is inextricably linked to the existence of an injury since their purpose is to remedy said injury. *A contrario*, in the theoretical case of a breach that did not cause injury, there would also be no secondary consequences in terms of reparations. Nevertheless, it should be reiterated that an injury occurs with each breach of a primary obligation,³ which means that this group of rights and obligations also arises with every breach.
4. Succession to the rights and obligations related to the continued observance of the primary norm is of lesser practical importance because the majority of these rights and obligations can only be succeeded to through simultaneous succession to the primary norm, which itself obliges the successor State to respect it based on the principle of *pacta sunt servanda*. If the successor State does not succeed to the primary norm, succession to these rights and obligations is not even theoretically possible. Only succession to the obligation of assurances and guarantees of non-repetition is somewhat relevant in practice, and it makes sense that it should follow succession to the secondary rights and obligations of reparation.
5. Since injury meets the criteria of other matters of succession, the laws of succession of States applicable to other matters may also be applied to it. Moreover, State succession to international responsibility does not conflict with the law of international responsibility, which, as a basic rule, provides that secondary obligations are owned by the internationally responsible State. At the same time, the law of international responsibility allows the possibility that these obligations may be assumed

3 Dionisio Anzilotti, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale* (F. Lumachi Libraio-Editore 1902) 89; ILC, 'Second report on State responsibility (The origin of international responsibility) by Roberto Ago, Special Rapporteur' (1970) UN Doc A/CN.4/233, 195; Christian Tomuschat, 'International law: Ensuring the survival of mankind on the eve of a new century: general course on public international law' (1999) 281 *Recueil des Cours*, *Collected Courses of the Hague Academy of International Law* 2, para 40, 299.

by a State that is not internationally responsible (e.g., via consent).⁴ It also provides for an obligation to remedy the consequences of acts for which the State cannot be held internationally responsible. This is possible through a reasonable application of the rules on circumstances precluding wrongfulness⁵ and the rules on indirect responsibility for the wrongful acts of another State.⁶ Therefore, succession to secondary rights and obligations does not in itself contradict the principles of the law of international responsibility of States.

6. General rule: *The rights and obligations arising from international responsibility remain with the internationally responsible State after the date of succession if it continues to exist, unless they are succeeded to by a successor State in accordance with special rules.* Thus, as a general rule, succession does not affect the secondary rights and obligations of the internationally responsible State. Two additional elements are highlighted: a) the continued existence of the internationally responsible State beyond the date of succession and b) the subordinate possibility of succession under the special rules. In the context of real succession, the internationally responsible State can only be a State that continues the legal personality of the predecessor after the date of succession, namely, the continuator State. Emphasis is placed on the word “remain” as there can be no (real) succession in relation to the continuator State; that is to say, this State does not succeed to the secondary rights and obligations, but they remain with it. In the absence of a continuator State, special rules apply. Additionally, the existence of a continuator State is relevant to succession to the general part of the matter but has no bearing on succession to its special part.⁷
7. First special rule: *A successor State that has a special link to the matter of succession (i.e., injury) shall fully succeed to the secondary rights and obligations of reparations relating to that matter, followed by conditional succession to other secondary rights and obligations.* This rule refers to the special part of the succession matter and applies to all types of succession and independently of the existence of a continuator State. As the book demonstrates, all succession matters (property, archives,

4 See 13.3.1. *Consent of a State to assume international responsibility and acknowledge or accept an act as its own.*

5 See 13.3.2.1. *Circumstances precluding wrongfulness.*

6 See 13.3.2.2 *Indirect responsibility.*

7 See 6.2. *Confirmed rules, especially 6.2.2.4. Importance of the division of the succession matter into special and general parts.*

debts, and treaties) are divided into a general and a special part.⁸ The latter has a specific link to a constitutive element of one of the successor States and therefore belongs to it in its entirety (e.g., immovable property in the territory, archives of treaties relating only to one successor State, boundary and territorial regimes, and allocated debts) according to the *principle of special connection*.⁹ The remainder of the matter constitutes the general part. In the context of real succession to responsibility, the special part of the matter relates, as concerns the secondary rights and obligations, to the link between the injury and the territory or population of the successor State and, as regards the obligations, additionally, to the structural continuity between the organs of the predecessor State and those of the successor State.¹⁰ The relevance of structural continuity is based on the relation of these organs to the matter of the succession.¹¹ Succession to secondary rights and obligations of *reparation* is followed by succession to secondary rights and obligations related to the *observance of the primary norm*, under the condition of simultaneous succession to the primary norm violated by the internationally responsible predecessor State.¹² Per this rule, the successor State succeeds only to secondary rights and obligations arising from a special part of the matter. The general part of the matter usually remains entirely with the continuator State, which is generally true with regard to succession to property, debts, and archives.¹³ Succession to treaties partly derogates from this rule since all successor States can succeed to a treaty in theory, but the continuator State's situation is specific even in this case because it is bound by the treaty *ex tunc* from the date on which it became a party, whereas the other successor States are bound *ex nunc* from the date of succession.¹⁴ Therefore, even in succession to international responsibility, it is reasonable to conclude that the general part of the succession matter remains with the internationally

8 See 6.2.2.1 *Existence of a special part of the succession matter* and 6.2.2.2. *Establishment of the rules of succession of a special part of the matter*.

9 See 6.1.1. *Principle of special connection*.

10 See the articles of the IDI and the ILC in 14.2.1. *Special part of the matter of succession to international responsibility*.

11 See 14.2.1. *Special part of the matter of succession to international responsibility*.

12 See 14.2.2. *Succession to rights and obligations linked to continued compliance with the primary norm*.

13 See 6.2.2.4. *The importance of the division of the succession matter into special and general parts*.

14 See 6.2.2.3. *Rules of succession of the general part*.

responsible State (the continuator), understanding that the general part covers everything that is not succeeded to by the other successor States by reason of a special link.

8. Second special rule: *In the case of incorporation and unification, the successor State succeeds to all the secondary rights and obligations arising from the international responsibility of the predecessor State(s).* The distinction between special and general parts is not relevant here as the succession concerns the whole matter.¹⁵ In the case of succession to secondary rights and obligations of reparation, it is also possible to follow the logic of the other succession matters. Given that the matter of succession continues to exist beyond the date of succession, a successor State that acquires territory and property without the attendant obligations would be unjustly enriched. An additional argument for succession to responsibility in the case of unification is that unification can only occur by agreement through the conclusion of a treaty. Therefore, the predecessor States already do (or should do) their due diligence before the unification and understand that the secondary rights and obligations arising from international responsibility are also objects of succession.¹⁶ The same is true in the case of incorporation, which today is only possible on a consensual basis as the use of force is prohibited by peremptory norms of international law. As with other matters, it is understandable that succession to international responsibility concerns the whole of the matter—that is, the general and special parts.
9. Third special rule: *In the event of the dissolution of the predecessor State, the secondary rights and obligations involving no specific link between the individual successor States and the matter of succession (i.e., the general part of the matter) shall be succeeded to in equitable shares by all successor States.* In the absence of a specific link between the successor State and the matter of succession, only succession in proportional shares is possible under the *principle of equity*. Although some theories have denied the possibility of succession to debts based on the sovereignty

15 See 6.2.3.2. *Succession in incorporation and unification.*

16 ILC, 'Provisional summary record of the 3434th meeting of the 70th Session of the ILC (second part)' (2018) UN Doc A/CN.4/SR.3434, 8–9. In his last report, Special Rapporteur Šturma suggested that in cases of unification, successor State and injured State should reach an agreement on how to address an injury. In case of incorporation such agreement should be reached between incorporating and injured states, if wrongful act was committed before date of succession by a State that was later incorporated. ILC, 'Fifth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 73rd session' (2022) UN Doc A/CN.4/751, 28.

of States and the personal nature of the debt relationship,¹⁷ the successor States, after the dissolution, also assumed the debts of the predecessor State that had dissolved. The same consequences follow from succession to property abroad, which does not become *res nullius* either after the dissolution of the predecessor State but is succeeded to by the successor States. Accordingly, given that the predecessor State was the holder of rights and obligations pertaining to an injury arising from its internationally wrongful act at the date of succession, it can be concluded by applying the rules applicable to all other matters of succession that those rights and obligations pass to the successor State. This is all the truer considering that, as an objectively existing fact, the injury continues to exist in an identical form after the date of succession, unaffected by the succession, which is a legal phenomenon. In the presence of a specific link, the *first special rule* would already apply, according to which the successor State fully succeeds to all secondary rights and obligations arising from its specific link to the matter of succession.

10. Based on a comprehensive presentation of the field of State succession and the resulting rules that apply to all established areas of succession, it is not reasonable to interpret succession to international responsibility differently from other matters. It is therefore appropriate to apply the rules applicable to succession in general to succession to the rights and obligations arising from international responsibility.
11. The following four rules, which must be applied successively, can be used in processes of succession to international responsibility for all forms of succession:

The rights and obligations arising from international responsibility remain with the internationally responsible State after the date of succession if it continues to exist, unless they are succeeded to by a successor State in accordance with special rules.

A successor State that has a special link to the matter of succession (i.e., injury) shall fully succeed to the secondary rights and obligations of reparations relating to that matter, followed by conditional succession to other secondary rights and obligations.

¹⁷ PK Menon, 'The succession of states and the problem of state debts' (1986) 6(2) Boston College Third World Law Journal 111, 13 and 124–126; Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 1, 8–35.

In the case of incorporation and unification, the successor State succeeds to all the secondary rights and obligations arising from the international responsibility of the predecessor State(s)

In the event of the dissolution of the predecessor State, the secondary rights and obligations involving no specific link between the individual successor States and the matter of succession (i.e., the general part of the matter) shall be succeeded to in equitable shares by all successor States.

Literature

Monographs

1. Anzilotti D, *Teoria Generale della Responsabilità dello Stato nel Diritto Internazionale* (F. Lumachi Libraio-Editore 1902).
2. Aust HP, *Complicity and the law of state responsibility* (Cambridge University Press 2011).
3. Baburin SN, *Мир империи: Территория государства и мировой порядок* [*The World of Empires: The Territory of the State and the World Order*] (Издательство Юридический центр 2005).
4. Brownlie I, *System of the law of nations, State Responsibility, Part 1* (Clanderon Press 1983).
5. Buergenthal T and Murphy SD, *Public international law in a nutshell* (6th edn, West Academic Publishing 2019).
6. Chernichenko SV, *Контуры международного права: Общие вопросы* [*Outlines of international law: General issues*] (Издательство Научная книга 2014).
7. Crawford JR, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012).
8. Crawford JR, Pellet A and Olleson S, *The law of international responsibility* (Oxford University Press 2010).
9. Crawford JR, *State responsibility: The general part (Cambridge studies in international and comparative law)* (Cambridge University Press 2013).
10. Crawford JR, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007).
11. Damrosch LF and Murphy SD, *International law, cases and materials* (7th edn, West Academic Publishing 2019).
12. Degan V-D, *L'Équité et le droit international* (Martinus Nijhoff Publishers 1970).
13. Dumberry P, *State succession to international responsibility* (Martinus Nijhoff Publishers 2007).
14. Eisemann PM and Koskeniemi M (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000).
15. Feilchenfeld EH, *Public debt and state succession* (The Macmillan Company 1931).
16. Gleason SE (ed), *Foreign Relations of the United States* (United States Government Printing Office 1970) vol IV.
17. Grant TD, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger Publishers 1999).
18. Hackworth GH, *Digest of international law* (United States Government Printing Office 1943) vol 5 ch XVI–XVIII.

19. Jakubowski A, *State succession in cultural property* (Oxford University Press 2015).
20. Jennings R and Watts A, *Oppenheim's International Law* (9th edn, Oxford University Press 1992) vol 1.
21. Keith AK, *Theory of State Succession with special reference to English and Colonial law* (Waterlow and Sons Limited 1907).
22. Klabbers J and others (eds), *State Practice Regarding State Succession and Issues of Recognition/Pratique des États concernant la succession d'États et les questions de reconnaissance* (Kluwer Law International 1999).
23. Kohen MG (ed), *Secession, International Law Perspectives* (Cambridge University Press 2006).
24. Kohen MG and Dumberry P, *The Institute of International Law's resolution on state succession and state responsibility: introduction, text and commentaries* (Cambridge University Press 2019).
25. Kolb R, *The international law of state responsibility: an introduction* (Edward Elgar Publishing 2017).
26. Kremnev PP, *Распад СССР и правопреемство государств [The break-up of the USSR and the succession of states]* (Юрлитинформ 2012).
27. Lauterpacht E, Greenwood CJ and Oppenheimer AG (eds), *International Law Reports* (Cambridge University Press 1998) vol 109.
28. Lauterpacht H (ed), *International Law Reports* (Butterworth & Co 1956) vol 21.
29. Marboe I, *Calculation of compensation and damages in international investment law* (2nd ed, Oxford University Press 2017).
30. Marek K, *Identity and continuity of states in public international law* (Librairie Droz 1968).
31. Menon PK, *The succession of states in respect to treaties, state property, archives and debt* (The Edwin Mellen Press 1991).
32. Moore JB, *A Digest of International Law* (Government Printing Office 1906) vol 1.
33. Moore MS, *Causation and responsibility: An essay in law, morals, and metaphysics* (Oxford University Press 2009).
34. Mrak M (ed), *Succession of states* (Kluwer Law International 1999).
35. Mrak M, Rojec M and Silva-Jáuregui C (eds), *Slovenia: from Yugoslavia to the European Union* (World Bank Publications 2004).
36. Murphy SD, *Principles of international law* (2nd ed, Thomson/West 2012).
37. O'Connell DP, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 1.
38. O'Connell DP, *State Succession in Municipal Law and International Law* (Cambridge University Press 1967) vol 2.
39. O'Connell DP, *The Law of State Succession* (Cambridge University Press 1956).
40. Oppenheim LFL, *International law: A treatise* (Longmans, Green and Co 1912) vol 1.

41. Pajnkihar G (ed), *Sporazum o vprašanih nasledstva—15 let pozneje / Agreement on Succession Issues—15 Years Later* (Ministry of Foreign Affairs of Slovenia 2016).
42. Pastuhova NB, *Государственный суверенитет: история и современность [State sovereignty: history and modernity]* (Издательство Аспект Пресс 2013).
43. Peters R (ed), *Public statutes at large of the United States of America from the organization of the government in 1789, to March 3, 1845* (Little, Brown & Co 1856) vol 5.
44. Polak Petrič A, 'Nasledstvo držav v mednarodnem pravu s posebnim poudarkom na članstvu Zvezne republike Jugoslavije v Organizaciji združenih narodov' (thesis, University of Ljubljana 2002).
45. Rossi CR, *Equity and international law: a legal realist approach to the international decision making* (Transnational Publishers 1993).
46. Sancin V, Švarc D and Ambrož M, *Mednarodno pravo oboroženih spopadov* (Poveljstvo za doktrino, razvoj, izobraževanje in usposabljanje 2009).
47. Sanger CP and Norton HTJ, *England's Guarantee to Belgium and Luxemburg, with the Full Text of the Treaties* (Charles Scribner's Sons 1915).
48. Shaw MN, *International Law* (7th edn, Cambridge University Press 2014).
49. Shaw MN, *International Law* (8th edn, Cambridge University Press 2017).
50. Stern B (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff Publishers 1998).
51. Türk D, *Temelji mednarodnega prava* (2nd edn, GV Založba 2015).
52. Wellens K (ed), *International law: Theory and practice. Essays in honour of Eric Suy* (Martinus Nijhoff Publishers 1998).

Book Chapters

53. Barbier S, 'Assurances and guarantees of non-repetition' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
54. Barker J, 'The different forms of reparation: Compensation' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
55. Brigitte Stern, 'Responsabilité internationale et succession d'états' in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *L'ordre juridique international, un système en quête d'équité et d'universalité [The International Legal System in Quest of Equity and Universality]* (Martinus Nijhoff Publishers 2001).
56. Cahin G, 'Attribution of conduct to the state: Insurrectional movements' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).

57. Christenson GA, 'The doctrine of attribution in state responsibility' in Lillich RB (ed), *International law of state responsibility for injuries to aliens* (University Press of Virginia 1983).
58. Corten O, 'The obligation of cessation' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
59. Dominicé C, 'Attribution of conduct to multiple states and the implication of a state in the act of another state' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
60. Dronova NV, 'The division of state property in the case of state succession in the former Soviet Union' in Eisemann PE and Koskenniemi M (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000).
61. Dugard J and Raič D, 'The role of recognition in the law and practice of secession' in Kohen MG (ed), *Secession, International Law Perspectives* (Cambridge University Press 2006).
62. Gamarra Y, 'Current questions of state succession relating to multilateral treaties' in Eisemann PM and Koskenniemi M (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000).
63. Gioia A, 'State succession and international financial organizations' in Eisemann PE and Koskenniemi M (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000).
64. Grašek M, 'Nasledstvo Republike Slovenije glede mednarodnih pogodb nekdanje SFRJ' in Petrič AP, Agius AJ and Zidar A (eds), *Pravo mednarodnih pogodb: priložnik, strokovni prispevki in dokumenti* (FDV Založba 2013).
65. Gray C, 'The different forms of reparation: restitution' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
66. Higgins R, 'Overview of Part Two of the Articles on State Responsibility' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
67. Kerbrat Y, 'Interaction between the forms of reparation' in James R Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010).
68. Klabbers J and Koskenniemi M, 'Succession in respect of state property, archives and debts, and nationality' in Klabbers J and others (eds), *State Practice Regarding State Succession and Issues of Recognition / Pratique des États concernant la succession d'États et les questions de reconnaissance* (Kluwer Law International 1999).

69. Kohen MG, 'Succession of states in the field of international responsibility: The case for codification' in Kohen MG, Kolb R and Tehindrazanarivelo D (eds), *Perspectives of International Law in the 21st century / Perspectives du droit international au 21^e siècle* (Martinus Nijhoff Publishers 2012).
70. Koskenniemi M, 'Report of the Director of Studies of the English-speaking Section of the Centre' in Eisemann PM and Koskenniemi M (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000).
71. Mrak M and Arhar F, 'Succession issues in allocating the external debt of SFR Yugoslavia and achieving Slovenia's financial independence' in Mrak M, Rojec M and Silva-Jáuregui C (eds), *Slovenia: from Yugoslavia to the European Union* (World Bank Publications 2004).
72. Mrak M, 'Succession to the former Yugoslavia's external debts: The case of Slovenia' in Mrak M (ed), *Succession of states* (Kluwer Law International 1999).
73. Müllerson R, 'Law and politics in succession of states: International law on succession of states' in Stern B (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff Publishers 1998).
74. Poupart I, 'Succession aux traités et droits de l'homme: vers la reconnaissance d'une protection ininterrompue des individus' in Eisemann PM and Koskenniemi M (eds), *La succession d'États: la codification à l'épreuve des faits / State succession: codification tested against the facts* (Martinus Nijhoff Publishers 2000).
75. Ribbelink O, 'State succession and the recognition of states and governments' in Klabbers J and others (eds), *State Practice Regarding State Succession and Issues of Recognition/Pratique des États concernant la succession d'États et les questions de reconnaissance* (Kluwer Law International 1999).
76. Stern B, 'The obligation to make reparation' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
77. Szurek S, 'Circumstances precluding wrongfulness in the ILC Articles on state responsibility: Distress' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
78. Szurek S, 'Circumstances precluding wrongfulness in the ILC Articles on state responsibility: Force Majeure' in Crawford JR, Pellet A and Olleson S (eds), *The Law of International Responsibility* (Oxford University Press 2010).
79. Thio L-A, 'International law and secession in the Asia and Pacific regions' in Kohen MG (ed), *Secession, International Law Perspectives* (Cambridge University Press 2006).
80. Tomuschat C, 'International crimes by states: an endangered species?' in Wellens K (ed), *International law: Theory and practice. Essays in honour of Eric Suy* (Martinus Nijhoff Publishers 1998).

81. Wittich S, 'Compensation' in Wolfrum R (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) vol 1.

Articles

82. Anderson KH, 'International Law and State Succession: A Solution to the Iraqi Debt Crisis?' (2005) 2005(2) *Utah Law Review* 401.
83. Anzilotti D, 'La responsabilité de l'État à raison des dommages soufferts par des étrangers' (1906) 13 *Revue générale de droit international public* 5.
84. Aufricht H, 'State succession under the law and practice of the International Monetary Fund' (1962) 11(1) *International and Comparative Law Quarterly* 154.
85. Banks W, 'State responsibility and attribution of cyber intrusions after Tallinn 2.0' (2017) 95(7) *Texas Law Review* 1487.
86. Barić Punda V and Filipović V, 'Protokol o privremenom režimu uz južnu granicu (2002.) s posebnim osvrtom na odluke vlada Republike Hrvatske i Crne Gore o istraživanju i eksploataciji ugljikovodika u Jadranu' (2015) 54(169) *Poredbeno pomorsko pravo* 73.
87. Barnidge RP, Jr, 'The due diligence principle under international law' (2006) 8(1) *International Community Law Review* 81.
88. Bederman DJ, 'Contributory fault and state responsibility' (1990) 30(2) *Virginia Journal of International Law* 335.
89. Bederman DJ, 'Counterintuiting countermeasures' (2002) 96(4) *American Journal of International Law* 817.
90. Beemelmans H, 'State Succession in international law: Remarks on recent theory and state praxis' (1997) 15 *Boston University International Law Journal* 71.
91. Binder C, 'Stability and change in times of fragmentation: The limits of pacta sunt servanda revisited' (2012) 25(4) *Leiden Journal of International Law* 909.
92. Bird A, 'Third state responsibility for human rights violations' (2011) 21(4) *European Journal of International Law* 883.
93. Blum YZ, 'Russia takes over the Soviet Union's seat at the United Nations' (1992) 3 *European Journal of International Law* 354.
94. Bohte B and Škrk M, 'Pomen Avstrijske državne pogodbe za Slovenijo in mednarodnopravni vidiki njenega nasledstva' (1997) 52(11–12) *Pravnik* 601.
95. Bohte B, 'Mednarodnopravni vidiki nasledovanja držav v luči novejših primerov nasledovanja držav' (1999) 54(11–12) *Pravnik* 671.
96. Bohte B, 'Status ZRJ v OZN' (2000) 55(11–12) *Pravnik* 801.
97. Boon KE, 'Are control tests fit for the future: The slippage problem in attribution doctrines' (2014) 15(2) *Melbourne Journal of International Law* 330.
98. Booyesen H, 'Succession to tort liability: A Namibian precedent' (1991) 24(2) *Comparative and International Law Journal of Southern Africa* 204.

99. Boutin B, 'Attribution of Conduct in International Military Operations: A Causal Analysis of Effective Control' (2017) 17 *Melbourne Journal of International Law* 154.
100. Boyle AE, 'State responsibility and international liability for injuries consequences of acts not prohibited by international law: A necessary distinction' (1990) 39(1) *International and Comparative Law Quarterly* 1.
101. Braun TR, 'Globalization-driven innovation: The investor as a partial subject in public international law; An inquiry into the nature and limits of investor rights' (2014) 15(1-2) *Journal of World Investment & Trade* 73.
102. Briggs HW, 'Community interest in the emergence of new states: The problem of recognition' (1950) 44 *American Society of International Law Proceedings* 169.
103. Brown JJ, 'The jurisprudence of the Foreign Claims Settlement Commission: the Vietnam claims' (1986) 27(1) *Virginia Journal of International Law* 99.
104. Brown Weiss E, 'Invoking state responsibility in the twenty-first century' (2002) 96(4) *American Journal of International Law* 798.
105. Buchheit LC and Gulati MG, 'Responsible sovereign lending and borrowing' (2010) 73(4) *Law and Contemporary Problems* 63.
106. Buchheit LC, Gulati MG and Thompson RB, 'The dilemma of odious debts' (2007) 56(5) *Duke Law Journal* 1201.
107. Buxbaum RM, 'Sovereign debtors before Greece: The Case of Germany' (2016) 65(1) *University of Kansas Law Review* 59.
108. Cahn H, 'The responsibility of the Successor State for war debts' (1950) 44(3) *American Journal of International Law* 477.
109. Cannizzaro E, 'The law of proportionality in the law of international countermeasures' (2001) 12(5) *European Journal of International Law* 889.
110. Cassese A, 'The Nicaragua and Tadic tests revisited in light of the ICJ judgment on genocide in Bosnia' (2007) 18(4) *European Journal of International Law* 649.
111. Cheng T-H, 'Why New States Accept Old Obligations' (2011) 2011(1) *University of Illinois Law Review* 1.
112. Christenson GA, 'Attributing acts of omission to the state' (1991) 12(2) *Michigan Journal of International Law* 312.
113. Clapham A, 'Human rights obligations of non-State actors in conflict situations' (2006) 88(863) *International Review of the Red Cross* 491.
114. Cohen R, 'Legal Problems Arising from the Dissolution of the Mali Federation' (1960) 36 *British Yearbook of International Law* 375.
115. Costelloe D, 'Treaty succession in annexed territory' (2016) 65(2) *International and Comparative Law Quarterly* 343.
116. Craven MCR, 'The Problem of State Succession and the Identity of States Under International Law' (1998) 9(1) *European Journal of International Law* 142.

117. Crawford JR and Olleson S, 'The exception of non-performance: Links between the law of treaties and the law of state responsibility' (2000) 21 *Australian Yearbook of International Law* 55.
118. Crawford JR, 'Counter-measures as interim measures' (1994) 5(1) *European Journal of International Law* 65.
119. Crawford JR, 'Responsibility to the international community as a whole' (2001) 8(2) *Indiana Journal of Global Legal Studies* 303.
120. Crawford JR, 'Revising the Draft Articles on State Responsibility' (1999) 10(2) *European Journal of International Law* 435.
121. Cullen A and Wheatley S, 'The human rights of individuals in de facto regimes under the European Convention on Human Rights' (2013) 13(4) *Human Rights Law Review* 691.
122. Czaplinski W, 'La continuité, l'identité et la succession d'États—évaluation de cas récents' (1993) 2 *Revue Belge de Droit International* 374.
123. Czaplinski W, 'State Succession and State Responsibility' (1990) 28 *Canadian Yearbook of International Law* 339.
124. D'Aspremont J, 'Rebellion and state responsibility: Wrongdoing by democratically elected insurgents' (2009) 58(2) *International and Comparative Law Quarterly* 427.
125. D'Aspremont J, 'Responsibility for coups d'etat in international law' (2010) 18(2) *Tulane Journal of International and Comparative Law* 451.
126. D'Aspremont J, 'The International Law of Statehood: Craftsmanship for the elucidation and regulation of births and deaths in the international society' (2013) 29(2) *Connecticut Journal of International Law* 201.
127. Damrosch LF, 'The legitimacy of economic sanctions as countermeasures for wrongful acts' (2019) 46(1) *Ecology Law Quarterly* 95.
128. Danilenko GM, 'International jus cogens: Issues of law-making' (1991) 2(1) *European Journal of International Law* 42.
129. Dannenbaum T, 'Translating the standard of effective control into a system of effective accountability: How liability should be apportioned for violations of human rights by member state troop contingents serving as United Nations peacekeepers' (2010) 51(1) *Harvard International Law Journal* 113.
130. Degan V-D, 'State succession, especially in respect of state property and debts' (1993) 4 *Finnish Yearbook of International Law* 130.
131. Diggelmann O, 'Fault in the law of state responsibility—Pragmatism ad infinitum' (2006) 49 *German Yearbook of International Law* 293.
132. Dörr O, 'Codifying and developing Meta-Rules: the ILC and the Law of Treaties' (2006) 49 *German Yearbook of International Law* 129.
133. Dumberry P and Turp D, 'State succession with respect to multilateral treaties in the context of secession: From the principle of tabula rasa to the emergence of a

- presumption of continuity of treaties' (2013) 13 *Baltic Yearbook of International Law* 27.
134. Dumberry P, 'Compensation for moral damages in investor-state arbitration disputes' (2010) 27(3) *Journal of International Arbitration* 247.
 135. Dumberry P, 'Is a new state responsible for obligations arising from internationally wrongful acts committed before its independence in the context of secession?' (2005) 43 *Canadian Yearbook of International Law* 419.
 136. Dumberry P, 'New state responsibility for internationally wrongful acts by an insurrectional movement' (2006) 17(3) *European Journal of International Law* 605.
 137. Dumberry P, 'Turkey's International Responsibility for Internationally Wrongful Acts Committed by the Ottoman Empire' (2012) 42(2) *Revue générale de droit* 561.
 138. Dupuy P-M, 'Back to the future of a multilateral dimension of the law of state responsibility for breaches of "obligations owed to the international community as a whole"' (2012) 23(4) *European Journal of International Law* 1059.
 139. Ebenroth CT and Kemner MJ, 'The enduring political nature of questions of state succession and secession and the quest for objective standards' (1996) 17(3) *University of Pennsylvania Journal of International Economic Law* 753.
 140. Ederington BL, 'Property as a natural institution: The separation of property from sovereignty in international law' (1997) 13(2) *American University International Law Review* 263.
 141. Fawcett JES, 'Security Council Resolutions on Rhodesia' (1965–1966) 41 *British Yearbook of International Law* 103.
 142. Fitzmaurice M, 'Material breach of treaty: Some legal issues' (2001) 6 *Austrian Review of International and European Law* 3.
 143. Fitzmaurice M, 'Third parties and the law of treaties' (2002) 6 *Max Planck Yearbook of United Nations Law* 37.
 144. Foorman JL and Jehle ME, 'Effects of state and government succession on commercial bank loans to foreign sovereign borrowers' (1982) 1982(1) *University of Illinois Law Review* 9.
 145. Foster CE, 'Compensation for material and moral damage to small island states' reputations and economies due to an incident during the shipment of radioactive material' (2006) 37(1) *Ocean Development and International Law* 55.
 146. Fry JD, 'Coercion, causation, and the fictional elements of indirect state responsibility' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611.
 147. Garner JW, 'Questions of state succession raised by the German annexation of Austria' (1938) 32(3) *American Journal of International Law* 421.
 148. Gelpert A, 'What Iraq and Argentina might learn from each other' (2005) 6(1) *Chicago Journal of International Law* 391.

149. Goldstone RJ and Hamilton RJ, 'Bosnia v. Serbia: Lessons from the encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 *Leiden Journal of International Law* 95.
150. Grant TD, 'Regulating the creation of states from decolonization to secession' (2009) 5(2) *Journal of International Law and International Relations* 11.
151. Gray C, 'The choice between restitution and compensation' (1999) 10 *European Journal of International Law* 413.
152. Green JA, 'Questioning the peremptory status of the prohibition of the use of force' (2011) 32(2) *Michigan Journal of International Law* 215.
153. Green LC, 'Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity' (1966) 3 *Canadian Yearbook of International Law* 3.
154. Griebel J and Plücken M, 'New developments regarding the rules of attribution? The International Court of Justice's decision in Bosnia v. Serbia' (2008) 21(3) *Leiden Journal of International Law* 601.
155. Hafner G and Kornfeind E, 'The recent Austrian practice of state succession: Does the clean slate rule still exist' (1996) 1(1) *Austrian Review of International and European Law* 1.
156. Handl G, 'Territorial sovereignty and the problem of transnational pollution' (1975) 69(1) *American Journal of International Law* 50.
157. Hathaway OH and others, 'Ensuring responsibility: Common Article 1 and state responsibility for non-state actors' (2017) 95(3) *Texas Law Review* 539.
158. Hessbruegge JA, 'Human rights violations arising from conduct of non-state actors' (2005) 11 *Buffalo Human Rights Law Review* 21.
159. Hurst CJB, 'State succession in matters of tort' (1924) 5 *British Yearbook of International Law* 163.
160. Jakubowski A, 'Territoriality and state succession in cultural heritage' (2014) 21(4) *International Journal of Cultural Property* 375.
161. Jayakumar S, 'Singapore and state succession: International relations and internal law' (1970) 19(3) *International and Comparative Law Quarterly* 398.
162. Jenks WC, 'State succession in respect of law-making treaties' (1952) 29 *British Yearbook of International Law* 105.
163. Jones MJ, 'State succession in the matter of treaties' (1947) 24 *British Yearbook of International Law* 360.
164. Kamminga MT, 'State Succession in Respect of Human Rights Treaties' (1996) 7(4) *European Journal of International Law* 469.
165. Kastelec A and Sancin V, 'Srbija in Kosovo znova za pogajalsko mizo: prispevek Meddržavnega sodišča' (2011) 30(15–16) *Pravna praksa* 2.
166. Kelson JM, 'State responsibility and the abnormally dangerous activity' (1972) 13(2) *Harvard International Law Journal* 197.
167. King JA, 'Odious debt: The terms of the debate' (2007) 32(4) *North Carolina Journal of International Law and Commercial Regulation* 605.

168. Klaw BW, 'State responsibility for bribe solicitation and extortion: Obligations, obstacles, and opportunities' (2015) 33(1) *Berkeley Journal of International Law* 60.
169. Kuijper PJ, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or direct responsibility or both?' (2010) 7(1) *International Organizations Law Review* 9.
170. Laursen A, 'The use of force and (the state of) necessity' (2004) 37(2) *Vanderbilt Journal of Transnational Law* 485.
171. Lewis BN, 'Restructuring the odious debt exception' (2007) 25(2) *Boston University International Law Journal* 297.
172. Linhartova L, 'Ločitev arhivskega in dokumentarnega gradiva v zvezi z razpadom Češke in slovaške zvezne republike (ČSZR)' (2018) 37(35) *Pravna praksa* 5.
173. Lloyd DO, 'Succession, secession, and state membership in the United Nations' (1994) 26 *New York Journal of International Law & Politics* 761.
174. Ludington S and Gulati MG, 'A convenient untruth: Fact and fantasy in the doctrine of odious debts' (2008) 48(3) *Virginia Journal of International Law* 595.
175. Macková D, 'Some legal aspects of the dissolution of former Czechoslovakia' (2003) 53 *Zborník pravnog fakulteta u Zagrebu* 375.
176. Mälksoo L, 'State identity: Deconstruction and functional splitting: The case of illegal annexations' (2002) 7 *Austrian Review of International and European Law* 91.
177. Margulies P, 'Sovereignty and cyber attacks: Technology's challenge to the law of state responsibility' (2013) 14(2) *Melbourne Journal of International Law* 496.
178. Matijević Z, 'The National Council of Slovenes, Croats and Serbs in Zagreb (1918/1919)' (2008) 1 *Review of Croatian History* 49.
179. Matsui Y, 'Problems of divided state and the right to self-determination in the case of Vietnam' (1976) 20 *Japanese Annual of International Law* 17.
180. Mayer B, 'Climate change reparations and the law and practice of state responsibility' (2017) 7(1) *Asian Journal of International Law* 185.
181. Menon PK, 'The succession of states and the problem of state debts' (1986) 6(2) *Boston College Third World Law Journal* 111.
182. Milano E, 'Territorial disputes, wrongful occupations and state responsibility: Should the International Court of Justice go the extra mile' (2004) 3(3) *Law and Practice of International Courts and Tribunals* 509.
183. Milano E, 'The investment arbitration between Italy and Cuba: The application of customary international law under scrutiny' (2012) 11(3) *Law and Practice of International Courts and Tribunals* 499.
184. Milanović M, 'State responsibility for acts of non-state actors: A comment on Griebel and Plücker' (2009) 22(2) *Leiden Journal of International Law* 307.
185. Milanović M, 'State responsibility for genocide' (2006) 17(3) *European Journal of International Law* 553.

186. Monnier J-P, 'La succession d'États en matière de responsabilité internationale' (1962) 8 *Annuaire français de droit international* 65.
187. Müllerson R, 'Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) 42(3) *International and Comparative Law Quarterly* 473.
188. Müllerson R, 'New developments in the former USSR and Yugoslavia' (1993) 33(2) *Virginia Journal of International Law* 299.
189. Nevill P, 'Awards of interest by international courts and tribunals' (2008) 78(1) *British Yearbook of International Law* 255.
190. Nollkaemper A and Jacobs D, 'Shared responsibility in international law: A conceptual framework' (2013) 34(2) *Michigan Journal of International Law* 359.
191. Nollkaemper A, 'Concurrence between individual responsibility and state responsibility in international law' (2003) 52(3) *International and Comparative Law Quarterly* 615.
192. Nollkaemper A, 'Constitutionalization and the unity of the law of international responsibility' (2009) 16(2) *Indiana Journal of Global Legal Studies* 535.
193. Nolte G and Aust HP, 'Equivocal helpers—Complicit states, mixed messages and international law' (2009) 58(1) *International and Comparative Law Quarterly* 1.
194. Noyes JE and Smith BD, 'State responsibility and the principle of joint and several liability' (1988) 13(2) *Yale Journal of International Law* 225.
195. O'Connell DP, 'Independence and succession to treaties' (1962) 38 *British Yearbook of International Law* 84.
196. O'Connell DP, 'Recent problems of state succession in relation to new states' (1970) 130 *Recueil des Cours, Collected Courses of the Hague Academy of International Law* 95.
197. O'Connell DP, 'Secured and unsecured debts in the law of state succession' (1951) 28 *British Yearbook of International Law* 204.
198. Ochoa C, 'From odious debt to odious finance: Avoiding the externalities of a function odious debt doctrine' (2008) 49(1) *Harvard International Law Journal* 109.
199. Oeter S, 'State succession and the struggle over equity: Some observations on the laws of state succession with respect to state property and debts in cases of separation and dissolution of states' (1995) 38 *German Yearbook of International Law* 73.
200. Orakhelashvili A, 'European Convention on Human Rights and international public order' (2002–2003) 5 *Cambridge Yearbook of European Legal Studies* 237.
201. Orakhelashvili A, 'Peremptory norms and reparation for internationally wrongful acts' (2003) 3 *Baltic Yearbook of International Law* 19.
202. Paddeu FI, 'Use of force against non-state actors and the circumstance precluding wrongfulness of self-defence' (2017) 30(1) *Leiden Journal of International Law* 93.

203. Padelford NJ and Andersson GA, 'The Aaland Islands Question' (1939) 33(3) *American Journal of International Law* 465.
204. Pajnikihar G, 'Uporabnost izkušnje nasledstva po nekdanji čSZR' (2018) 37(3) *Pravna praksa* 6.
205. Papefuß D, 'The fate of the international treaties of the GDR within the framework of German unification' (1998) 92 *American Journal of International Law* 469.
206. Parlavantzias PB, 'L'Application de la succession d'États à l'établissement, la modification et la dissolution des liens fédératifs (Les traites et les dettes publiques)' (1963) 16 *Revue Hellenique de Droit International* 53.
207. Pazartzis P, 'State succession to multilateral treaties: recent developments' (1998) 3 *Austrian Review of International & European Law* 397.
208. Peel J, 'New state responsibility rules and compliance with multilateral environmental obligations: Some case studies of how the new rules might apply in the international environmental context' (2001) 10(1) *Review of European, Comparative & International Environmental Law* 82.
209. Peritch J, 'Principaux traits caractéristiques de la constitution du Royaume des Serbes, Croates et Slovènes (Yougoslavie) du 28 janvier 1921' (1928) 80(1) *Bulletin de la Société de Législation Comparée* 518.
210. Perritt HH, Jr, 'Resolving claims when countries disintegrate: The challenge of Kosovo' (2005) 80(1) *Chicago-Kent Law Review* 119.
211. Pisillo-Mazzeschi R, 'The due diligence rule and the nature of the international responsibility of states' (1992) 35 *German Yearbook of International Law* 9.
212. Reinisch A and Bachmayer P, 'The Identification of Customary International Law by Austrian Courts' (2012) 17 *Austrian Review of International and European Law* 1.
213. Reinisch A, 'Aid or assistance and direction on control between states and international organizations in the commission of internationally wrongful acts' (2010) 7(1) *International Organizations Law Review* 63.
214. Reinisch A, 'Necessity in international investment arbitration—An unnecessary split of opinions in recent ICSID cases—Comments on CMS v. Argentina and LG&E v. Argentina' (2007) 8(2) *Journal of World Investment Trade* 191.
215. Repousis OG, 'Why Russian investment treaties could apply to Crimea and what would this mean for the ongoing Russo-Ukrainian territorial conflict' (2016) 32(3) *Arbitration International* 459.
216. Ronen Y, 'Avoid or compensate—Liability for injury to civilians inflicted during armed conflict' (2009) 42(1) *Vanderbilt Journal of Transnational Law* 181.
217. Roscini M, 'Threats of armed force and contemporary international law' (2007) 54 *Netherlands International Law Review* 229.
218. Rosenne S, 'Decolonisation in the International Court of Justice' (1996) 8(1) *African Journal of International and Comparative Law* 564.

219. Ruys T and Verhoeven S, 'Attacks by private actors and the right of self-defence' (2005) 10(3) *Journal of Conflict and Security Law* 289.
220. Ryngaert C and Sobrie S, 'Recognition of states: International law or realpolitik: The practice of recognition in the wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24(2) *Leiden Journal of International Law* 467.
221. Ryngaert C, 'Apportioning responsibility between the UN and member states in UN Peace-Support Operations: An inquiry into the application of the effective control standard after Behrami' (2012) 45(1) *Israel Law Review* 151.
222. Ryngaert C, 'Human rights obligations of armed groups' (2008) 41(1–2) *Revue Belge de Droit International* 355.
223. Sancin V, 'Uporaba mednarodnega humanitarnega prava v internacionaliziranih notranjih oboroženih spopadih' (2005) 65 *Zbornik znanstvenih razprav* 301.
224. Schachte WL, Jr and Bernhardt JPA, 'International Straits and Navigational Freedoms' (1993) 33(3) *Virginia Journal of International Law* 527.
225. Schachter O, 'State succession: The once and future law' (1992–1993) 33 *Virginia Journal of International Law* 253.
226. Scharf MP, 'Musical chairs: The dissolution of states and membership in the United Nations' (1995) 28(1) *Cornell International Law Journal* 29.
227. Schmitt MN and Pitts C, 'Cyber countermeasures and effects on third parties' (2014) 14 *Baltic Yearbook of International Law* 1.
228. Schoiswohl M, 'De facto regimes and human rights obligations—The twilight zone of public international law' (2001) 6 *Austrian Review of International and European Law* 45.
229. Scobbie I, 'The invocation of responsibility for the breach of "Obligations under peremptory norms of general international law"' (2002) 13(5) *European Journal of International Law* 1201.
230. Shaw MN, 'State succession revisited' (1994) 5 *Finnish Yearbook of International Law* 35.
231. Simma B, 'The work of the International Law Commission at its fifty-second session' (2000) 70(1–2) *Nordic Journal of International Law* 183.
232. Škrk M, 'Date of the succession of states' (2003) 53(2) *Zbornik Pravnog fakulteta u Zagrebu* 347.
233. Škrk M, 'Odnos med mednarodnim pravom in notranjim pravom v praksi Ustavnega sodišča' (2007) 62(6–8) *Pravnik* 275.
234. Škrk M, 'Slovenski pogledi na nasledstvo držav' (1996) 51(1–3) *Pravnik* 45.
235. Škrk M, 'Varstvo okolja pred onesnaževanjem v mednarodnih odnosih' (1988) 48 *Zbornik znanstvenih razprav* 157.
236. Škrk M, Polak Petrič A and Rakovec M, 'The Agreement on Succession Issues and some dilemmas regarding its implementation' (2015) 75 *Zbornik znanstvenih razprav* 213.

237. Sloane RD, 'On the use and abuse of necessity in the law of state responsibility' (2012) 106(3) *American Journal of International Law* 447.
238. Stahn C, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002) 96(2) *American Journal of International Law* 379.
239. Stanić A, 'Financial aspects of state succession: The case of Yugoslavia' (2001) 12(4) *European Journal of International Law* 751.
240. Stern B, 'La succession d'états' (1996) 262 *Recueil des Cours, Collected Courses of the Hague Academy of International Law* 9.
241. Streinz R, 'Succession of States in assets and liabilities—a New Regime: The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts' (1983) 26 *German Yearbook of International Law* 198.
242. Šturma P, 'State succession in respect of international responsibility' (2015–2016) 48 *George Washington International Law Review* 653.
243. Tams CJ, 'Do serious breaches give rise to any specific obligations of the responsible state?' (2002) 13(5) *European Journal of International Law* 1161.
244. Tomuschat C, 'International law: Ensuring the survival of mankind on the eve of a new century: general course on public international law' (1999) 281 *Recueil des Cours, Collected Courses of the Hague Academy of International Law* 2.
245. Tomuschat C, 'Reparation in cases of genocide' (2007) 5(4) *Journal of International Criminal Justice* 905.
246. Tsagourias N, 'The Nicaragua case and the use of force: The theoretical construction of the decision and its deconstruction' (1996) 1(1) *Journal of Armed Conflict Law* 81.
247. Vagts DF, 'State succession: The Codifiers' view' (1993) 33 *Virginia Journal of International Law* 275.
248. Vidmar J, 'Explaining the legal effects of recognition' (2012) 61(2) *International and Comparative Law Quarterly* 361.
249. Vidmar J, 'South Sudan and the international legal framework governing the emergence and delimitation of new states' (2012) 47 *Texas International Law Journal* 541.
250. Voigt C, 'State responsibility for climate change damages' (2008) 77(1–2) *Nordic Journal of International Law* 1.
251. Volkovitsch MJ, 'Righting wrongs: Towards a new theory of state succession to responsibility for international torts' (1992) 92(8) *Columbia Law Review* 2162.
252. Walker GK, 'Integration and disintegration in Europe: Reordering the treaty map of the continent' (1993) 6 *The Transnational Lawyer* 1.
253. Williams PR and Harris J, 'State succession to debts and assets: The modern law and policy' (2001) 42(2) *Harvard International Law Journal* 355.

254. Williams PR, 'State succession and the international financial institutions: Political criteria v. protection of outstanding financial obligations' (1994) 43 *International & Comparative Law Quarterly* 776.
255. Williams PR, 'The Treaty obligation of the Successor States of the former Soviet Union, Yugoslavia and Czechoslovakia: Do they continue in force?' (1997) 23(1) *Denver Journal of International Law and Policy* 1.
256. Wittich S, 'Awe of the gods and fear of the priests: Punitive damages and the law of state responsibility' (1998) 3(1) *Austrian Review of International and European Law* 101.
257. Wittich S, 'Non-material damage and monetary reparation in international law' (2004) 15 *Finnish Yearbook of International Law* 321.
258. Wittich S, 'The International Law Commission's articles on the responsibility of states for internationally wrongful acts adopted on second reading' (2002) 15(4) *Leiden Journal of International Law* 891.
259. Wood MC, 'Participation of former Yugoslav states in the United Nations and multilateral treaties' (1997) 1 *Max Planck Yearbook of United Nations Law* 231.
260. Wouters J and Verhoeven S, 'The prohibition of genocide as a norm of *ius cogens* and its implications for the enforcement of the law of genocide' (2005) 5(3) *International Criminal Law Review* 401.
261. Wun R, 'Beyond traditional statehood criteria: the law and contemporary politics of state creation' (2013) 26 *Hague Yearbook of International Law* 316.
262. Ziemele I, 'Is the Distinction between state continuity and state succession reality or fiction—The Russian Federation, the Federal Republic of Yugoslavia and Germany' (2001) 1 *Baltic Yearbook of International Law* 191.
263. Ziemele I, 'State continuity, succession and responsibility: reparations to the Baltic states and their peoples?' (2003) 3 *Baltic Yearbook of International Law* 165.
264. Zwanenburg M, 'The Van Boven/Bassiouni Principle: An appraisal' (2006) 24(4) *Netherlands Quarterly of Human Rights* 641.

International Treaties

265. Agreement between the Federal Republic of Germany and the German Democratic Republic on the establishment of a united Germany (adopted 31 August 1990) *Bundesgesetzblatt Vol 1990 Part II No 35* (Agreement on the unification of Germany).
266. Agreement between the FRG and France on the settlement of the Saar issue (adopted 22 December 1995) *Bundesgesetzblatt Part II No 36*.

267. Agreement between the FRG and Poland on the Confirmation of the Common Border (adopted 14 November 1990) 1708 UNTS 382.
268. Agreement between the Government of the Czech Republic and the Government of the Slovak Republic on the Status of the Commission for the Regularization of the Property of the Czechoslovak Socialist Republic after the dissolution of the Czechoslovak Socialist Republic (adopted 16 April 1999) Official Gazette of Slovak Republic No 55/1999.
269. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Yemen Arab Republic for the Promotion and Protection of Investments (signed 25 February 1982) OJ C198/1.
270. Agreement between the Governments of the USA and the Federal People's Republic of Yugoslavia (FPRY) on monetary claims of the USA and its citizens (adopted 19 July 1948) Official Gazette of the Presidium of the People's Assembly of the FPRY No 25/1951.
271. Agreement between the Republic of Serbia and the Republic of Montenegro on the regulation of membership of international financial organizations and the sharing of financial rights and obligations (adopted 10 July 2006) Official Gazette of Serbia No 64/2006.
272. Agreement between the Republic of the Sudan and the Republic of South Sudan on Certain Economic Matters <<https://peacemaker.un.org/node/1617>> accessed 26 February 2023.
273. Agreement between the SFRY and the Republic of Italy on the definitive settlement of all mutual obligations arising from Article 4 of the Treaty signed at Osimo on 10 November 1975 (adopted 18 February 1983) Official Gazette of the SFRY—MP, No 7/85.
274. Agreement between Ukraine and the Russian Federation on the presence of the Black Sea Fleet of the Russian Federation on the territory of Ukraine (signed 21 April 2010) Official Gazette of Ukraine No 39 (2010) act code 51175/2010.
275. Agreement between Ukraine and the Russian Federation on the status and conditions of stay of the Black Sea Fleet of the Russian Federation on the territory of Ukraine (signed 28 May 1997), Official Gazette of Ukraine No 17 (1999) act code 7164/1999.
276. Agreement between Ukraine and the Russian Federation regarding the Black Sea Fleet (signed 9 June 1995) Official Gazette of Ukraine No 25 (2007) act code 39351/2007.
277. Agreement Concerning the Demarcation of the Established and the Existing Polish-German State Frontier (adopted 6 July 1950) 319 UNTS 93.
278. Agreement concerning the promotion and protection of investments (adopted 27 April 1984) 1668 UNTS 235.

279. Agreement Establishing a Union between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen (adopted 22 April 1990) 30 ILM 822 (Agreement on the Unification of the Yemeni).
280. Agreement establishing the African Development Bank done at Khartoum (adopted 4 August 1963) as amended by resolution 05-79 adopted by the Board of Governors (adopted 17 May 1979) 1276 UNTS 3.
281. Agreement establishing the Commonwealth of Independent States (adopted 8 December 1991) (1992) 31 International Legal Materials 138.
282. Agreement establishing the International Fund for Agricultural Development (13 June 1976) 1059 UNTS 191.
283. Agreement in the form of an Exchange of Letters amending the Cooperation Agreement between the European Economic Community and the Yemen Arab Republic [1995] OJEC L57/78.
284. Agreement on cultural and technical cooperation between the Government of the French Republic and the Government of the Arab Republic of Yemen (adopted 16 February 1977) 1306 UNTS 205.
285. Agreement on mutual recognition of rights and regulation of ownership relations (adopted 15 January 1993) Bulletin of international treaties No 4.
286. Agreement on Succession in respect of External State Debt and Assets of the USSR (adopted 4 December 1991) 2380 UNTS 95.
287. Agreement on Succession Issues (adopted 29 June 2001) Official Gazette of the Republic of Slovenia No 71/2002.
288. Agreement on the Establishment of the Commonwealth of Independent States (adopted 8 December 1991) 31 ILM 143.
289. Agreement on the Return of Objects of Cultural and Historical Heritage to States of Origin (adopted 14 February 1992) Bulletin of International Treaties No 7.
290. Agreement on the Succession of the Archives of the Former USSR (adopted 6 July 1992) Bulletin of International Treaties No 8.
291. Agreement relating to Malaysia (with annexes, including the Constitutions of the States of Sabah, Sarawak and Singapore, the Malaysia Immigration Bill and the Agreement between the Governments of the Federation of Malaya and Singapore on common market and financial arrangements) (adopted 9 July 1963) 750 UNTS 2.
292. Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State (adopted 7 August 1965) 563 UNTS 89.
293. Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI.
294. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85.
295. Convention for the establishment of a European Organization for Nuclear Research (adopted 1 July 1953) 200 UNTS 149.

296. Convention limiting the hours of work in industrial undertakings to eight in the day and forty-eight in the week (adopted 28 November 1919) as modified by the Final Articles Revision Convention (1946) 38 UNTS 17.
297. Convention on Biological Diversity (adopted 5 June 1992) 1760 UNTS 79.
298. Convention on Certain Questions relating to the Conflict of Nationality Laws (adopted 1 July 1937) 179 LNTS 89.
299. Convention on Rights and Duties of States (International Conference of American States) (adopted 26 December 1933) 165 LNTS 19 (Montevideo Convention).
300. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979) 1249 UNTS 13.
301. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277.
302. Convention on the Rights of the Child (adopted 20 November 1989) 1577 UNTS 3.
303. Convention relating to the Status of Refugees (adopted 28 July 1951) 189 UNTS 137.
304. Decision of the Council of Heads of State of the Commonwealth of Independent States (adopted 21 December 1991) UN Doc A/47/60, annex v.
305. Declaration of the Heads of State of the Member States of the Commonwealth of Independent States on International Obligations in the Field of Human Rights and Fundamental Freedoms (adopted 23 September 1993) Bulletin of International Treaties No 9.
306. European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950) 5 CETS.
307. Exchange of Letters Constituting an Agreement between the United Kingdom of Great Britain and Northern Ireland and India extending the Financial Agreement of 14 August 1947 (adopted 15 February 1948) 134 UNTS 70.
308. Financial Agreement between the United Kingdom and India (adopted 14 August 1947) 147 British and Foreign State Papers.
309. Framework Agreement on cultural, scientific and technical cooperation between the Government of the French Republic and the Government of the People's Democratic Republic of Yemen (adopted 29 May 1977) 1106 UNTS 165.
310. General Act of Arbitration (Pacific Settlement of International Dispute) (adopted 26 September 1928) 93 LNTS 343.
311. Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field (adopted 27 July 1929) 118 LNTS 303.
312. Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287.
313. International Agreement for the Suppression of White Slave Traffic signed in Paris on May 18, 1904 (as amended by the Protocol signed at Lake Success, New York on May 4, 1949) 92 UNTS 19.

314. International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921) 9 LNTS 415.
315. International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973) UN Doc A/RES/3068(XXVIII).
316. International Convention relating to the Simplification of Customs Formalities (adopted 3 March 1923) 30 LNTS 371.
317. International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (adopted 7 December 1952) 221 UNTS 255.
318. International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171.
319. Memorandum of Agreed Points relating to Independence for South Arabia (the People's Republic of Southern Yemen) (with Financial Note and Final Communique) (29 November 1967) UK Treaties Online <<https://www.gov.uk/guidance/uk-treaties>> accessed 26 February 2023.
320. Memorandum of Understanding on the Debt to Foreign Creditors of the USSR and its Successors (adopted 28 October 1991) (1991) 260 Известия.
321. Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987) 1522 UNTS 3.
322. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000) 2171 UNTS 227.
323. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000) 2173 UNTS 222.
324. Preliminary Treaty of Peace between Russia and Turkey (adopted 9 February/3 March 1878) (1908) 2 AJIL 387 (Treaty of San Stefano).
325. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609.
326. Protocol relating to the Status of Refugees (adopted 31 January 1967) 606 UNTS 267.
327. Protocol to the Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine (adopted 29 June 1946) 504 UNTS 302.
328. Protocol to the Agreement Establishing the Commonwealth of Independent States (adopted 21 December 1991) UN Doc A/47/60, annex I.
329. Slavery Convention amended by the Protocol (adopted 25 September 1926) 212 UNTS 17.
330. Treaty between Great Britain, Austria, France, Prussia, and Russia, on the one part, and Belgium, on the other (with Annex) (adopted 19 April 1839) in Charles P Sanger and Henry TJ Norton, *England's Guarantee to Belgium and Luxemburg, with the Full Text of the Treaties* (Charles Scribner's Sons 1915) 127.

331. Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East (adopted 13 July 1878) (1908) 2 AJIL 401 (Treaty of Berlin).
332. Treaty between Poland and the Federal Republic of Germany Concerning the Basis for Normalization of Their Mutual Relations (adopted 7 December 1970) 830 UNTS 327.
333. Treaty concerning the cession of the Russian possessions in North America by His Majesty the emperor of all the Russias to the United States of America (adopted 30 March 1867) 15 Stat 539 (Agreement on the Cession of Alaska).
334. Treaty of Amity between the French Republic and the Kingdom of Yemen (adopted 25 April 1936) RGTF Serie 1 Vol 3, 115.
335. Treaty on the Final Settlement with Respect to Germany (adopted 12 September 1990) 1696 UNTS 115.
336. United Nations Convention against Corruption (adopted 30 October 2003) 2349 UNTS 41.
337. United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 200) UN Doc A/RS/59/38.
338. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (adopted 14 October 1994) 1954 UNTS 3.
339. United Nations Framework Convention on Climate Change (adopted 19 May 1992) 1771 UNTS 107.
340. Universal Copyright Convention (adopted 6 September 1952) 216 UNTS 132.
341. Vienna Convention for the Protection of the Ozone Layer (22 March 1985) 1513 UNTS 293.
342. Vienna Convention on Diplomatic Relations (adopted 18 April 1961) 500 UNTS 95.
343. Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted 7 April 1983) UN Doc A/CONF/117/14.
344. Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978) 1946 UNTS 3.
345. Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331.

Peace and Other International Treaties

Related to the First World War

346. Treaty between Italy and the Kingdom of Serbs, Croats and Slovenes (adopted 12 November 1920) 15 AJIL 173 (Treaty of Rapallo).
347. Treaty between the Principal Allied and Associated Powers and Czecho-Slovakia (adopted 10 September 1919) 14 AJIL 311.

348. Treaty between the Principal Allied and Associated Powers and Poland (adopted 28 June 1919) 6 Int'l Conciliation 924.
349. Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State (adopted 10 September 1919) 14 AJIL 333.
350. Treaty of Peace between Finland and Russia (adopted 14 October 1920) 3(1) LNTS 5 (Treaty of Dorpat).
351. Treaty of Peace between Latvia and Russia (adopted 11 August 1920) 2(3) LNTS 196 (Treaty of Riga [Latvia]).
352. Treaty of Peace between Lithuania and Russia (adopted 12 July 1920) 3(2) LNTS 105 (Treaty of Moscow).
353. Treaty of Peace between the Allied and Associated Powers and Austria (with amendments) and other treaty engagements (adopted 10 September 1919) (1921) His Majesty's Stationery Office 1 (Treaty of Saint-Germain-en-Laye).
354. Treaty of Peace between the Allied and Associated Powers and Germany (with amendments) and other treaty engagement (adopted 28 June 1919) (1925) His Majesty's Stationery Office 1 (Treaty of Versailles).
355. Treaty of Peace Between the Allied and Associated Powers and Hungary and Protocol and Declaration (adopted 4 June 1920) 15 AJIL 1 (Treaty of Trianon).
356. Treaty of Peace between the Allied Powers and Bulgaria and Protocol (adopted 27 November 1919) 14 AJIL 185 (Treaty of Neuilly-sur-Seine).
357. Treaty of Peace between the Allied Powers and Turkey (adopted 10 August 1910) 15 AJIL 179 (Treaty of Sèvres).
358. Treaty of Peace between the Soviet republics of Russia and Ukraine on the one hand and Poland on the other (adopted 18 March 1921) 6 LNTS 51 (Treaty of Riga [Poland]).
359. Treaty of Peace between Turkey and the Balkan Allies (Bulgaria, Greece, Montenegro, Serbia) (adopted 30 May 1913) 8 AJIL 12.
360. Treaty of peace with Turkey, and other instruments (adopted 24 July 1923) together with Agreements between Greece and Turkey (adopted 30 January 1923) and subsidiary documents forming part of the Turkish Peace Settlement (1923) His Majesty's Stationery Office 1 (Treaty of Lausanne).
361. Treaty of Tartu between Estonia and Russia (adopted 2 February 1920) 11 LNTS 30 (Treaty of Tartu).

*Peace and Other International Treaties
Related to the Second World War*

362. Agreement between the Czechoslovak Republic and the USSR on Trans-Carpathian Ukraine (adopted 29 June 1946) 504 UNTS 299.
363. Potsdam Agreement (adopted 1 August 1945) in Charles I Bevans (ed), *Treaties and Other International Agreements of the United States of America, 1776-1949* (US Department of State 1969) vol III 1207.

- 364. Treaty of Peace with Finland (adopted 10 February 1947) 48 UNTS 203.
- 365. Treaty of Peace with Bulgaria (adopted 10 February 1947) 41 UNTS 21.
- 366. Treaty of Peace with Italy (adopted 10 February 1947) 49 UNTS 50.
- 367. Treaty of Peace with Hungary (adopted 10 February 1947) 41 UNTS 135.
- 368. Treaty of Peace with Romania (adopted 10 February 1947) 42 UNTS 3.
- 369. Treaty of Peace with Japan (adopted 8 September 1951) 136 UNTS 45.

UN Documents

ILC Documents

- 370. ILC, 'Articles on Nationality of Natural Persons in relation to the Succession of States UN Doc A/RES/55/153.
- 371. ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/49(Vol. 1)/Corr.4.
- 372. ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2(2) Yearbook of the International Law Commission.
- 373. ILC, 'Draft articles on Succession of States in respect of State Property, Archives and Debts with commentaries' (1981) UN Doc A/36/10.
- 374. ILC, 'Draft Articles on Succession of States in respect of Treaties with commentaries' (1974) UN Doc A/9610/Rev.1.
- 375. ILC, 'Eighth Report on State responsibility by Mr. Roberto Ago, Special Rapporteur' (1979) UN Doc A/CN.4/318.
- 376. ILC, 'Eighth report on succession of States in respect of matters other than treaties by Mohammed Bedjaoui, Special Rapporteur' (1976) UN Doc A/CN.4/292.
- 377. ILC, 'Fifth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 73rd session' (2022) UN Doc A/CN.4/751.
- 378. ILC, 'First report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 69th session' (2017) UN Doc A/CN.4/708.
- 379. ILC, 'Fourth report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 72nd session' (2021) UN Doc A/CN.4/743.
- 380. ILC, 'Materials on Succession of States, United Nations Legislative Series' (1967) UN Doc ST/LEG/SER.B/14.
- 381. ILC, 'Ninth report on succession of States in respect of matters other than treaties by Mohammed Bedjaoui, Special Rapporteur' (1977) UN Doc A/CN.4/301.
- 382. ILC, 'Peremptory norms of general international law (jus cogens), Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, International Law Commission, 71st session' (2019) UN Doc A/CN.4/L.936.
- 383. ILC, 'Proceedings of the 2681st meeting of the 53rd session of the ILC (first part)' (2001) UN Doc A/CN.4/SR.2681.

384. ILC, 'Proceedings of the 26th Session' (1974) UN Doc A/9610/Rev.1.
385. ILC, 'Proceedings of the 48th session' (1996) UN Doc A/CN.4/SER.A/1996/Add.I (Part 2).
386. ILC, 'Proceedings of the 52nd session' (2000) UN Doc A/CN.4/SER.A/2000/Add.I (Part 2).
387. ILC, 'Provisional summary record of the 3374th meeting of the 69th session of the ILC (second part)' (2017) UN Doc A/CN.4/SR.3374.
388. ILC, 'Provisional summary record of the 3431st meeting of the ILC' (2018) UN Doc A/CN.4/SR.3431.
389. ILC, 'Provisional summary record of the 3434th meeting of the 70th Session of the ILC (second part)' (2018) UN Doc A/CN.4/SR.3434.
390. ILC, 'Provisional summary record of the 3476th meeting of the 71st session of the ILC (second part)' (2019) UN Doc A/CN.4/SR.3476.
391. ILC, 'Provisional summary record of the 3479th meeting of the 71st session (second part)' (2019) UN Doc A/CN.4/SR.3479.
392. ILC, 'Provisional summary record of the 3480th meeting of the 71st session of the ILC (second part)' (2019) UN Doc A/CN.4/SR.3480.
393. ILC, 'Second report on State responsibility (The origin of international responsibility) by Roberto Ago, Special Rapporteur' (1970) UN Doc A/CN.4/233.
394. ILC, 'Second report on succession of states in respect of state responsibility by Pavel Šturma, Special Rapporteur, ILC, 70th session' (2018) UN Doc A/CN.4/719.
395. ILC, 'Succession of States in relation to general multilateral Treaties of which the Secretary-General is the Depositary—Memorandum prepared by the Secretariat' (1962) UN Doc A/CN.4/150.
396. ILC, 'Succession of States in respect of bilateral treaties: Second and third studies prepared by the Secretariat (Air transport agreements and Trade agreements)' (1971) UN Doc A/CN.4/243.
397. ILC, 'Succession of States in respect of bilateral treaties: Study prepared by the Secretariat' (1970) UN Doc A/CN.4/229.
398. ILC, 'Succession of States to multilateral treaties: Seventh study prepared by the Secretariat' (1970) UN Doc A/CN.4/150.
399. ILC, 'Survey of International Law and other documents' (1971) 2(2) UN Doc A/CN.4/SER.A/1971/Add.I (Part 2).
400. ILC, 'Third report on State responsibility by James Crawford, Special Rapporteur, ILC, 52nd session' (2000) UN Doc A/CN.4/507.
401. ILC, 'Third report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, ILC, 71st session' (2019) UN Doc A/CN.4/731.

UN General Assembly Documents

402. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 26/25 (XXV) (24 October 1970).
403. UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314 (XXIX).
404. UNGA Res 3366 (XXX) (19 September 1975) UN Doc A/RES/3366 (XXX).
405. UNGA Res 47/1 (22 September 1992) UN Doc A/RES/47/1.
406. UNGA Res 63/249 (24 December 2008) UN Doc A/RES/63/249.
407. UNGA, 'Annex VII (General Comment under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights) to the Report of the Human Rights Committee' (1998) UN Doc A/53/40.
408. UNGA, 'Financial report and audited financial statements for the year ended 31 December 2021 and Report of the Board of Auditors' UN Doc A/77/5.

UN Security Council Documents

409. UNSC Res 138 (23 June 1960) UN Doc S/4349.
410. UNSC Res 1990 (27 June 2011) UN Doc S/RES/1990.
411. UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996.
412. UNSC Res 777 (19 September 1992) UN Doc S/RES/777.
413. UNSC Res 821 (28 April 1993) UN Doc S/RES/821.

Other UN Documents

414. 'Selected Legal Opinions of the Secretariats of the United Nations and Related Intergovernmental Organizations' (2011) UN Juridical Yearbook.
415. 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations (1949) 38 UNTS 1.
416. 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nation' (1953) 171 UNTS 1.
417. 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations' (1967) 564 UNTS 1.
418. 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations' (1978) 823 UNTS 1.
419. 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations (1987) 1066 UNTS 1.
420. 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations' (1993) 1720 UNTS 1.
421. 'Unpaid assessed contributions of the former Yugoslavia, Report of the Secretary-General' (16 September 2005) UN Doc A/60/140.

Documents of other International Organizations

422. International Monetary Fund, 'Annual Report of the executive directors for the fiscal year ended April 30, 1965' (1965).
423. International Monetary Fund, 'Republic of South Sudan, Staff Report for 2016 Article IV Consultation—Debt Sustainability Analysis' (23 March 2017) IMF Country Report No 2017/073.
424. International Monetary Fund, 'Republic of Yemen: Selected Issues' (20 April 2001) IMF Staff Country Report No 01/61.
425. International Monetary Fund, 'Sudan, Enhanced Heavily Indebted Poor Countries (HIPC) Initiative—Decision Point Document' (1 July 2021) IMF Country Report No 21/144.
426. World Bank and International Bank for Reconstruction and Development, 'Report and recommendation of the president to the executive directors on a proposed loan to Malaysia for the Johore Land Settlement Project' (23 January 1974) WB Report No P1371MA.
427. World Bank, 'Agreement between Malaysia, Singapore and IBRD for Amending Guarantee Agreement' (9 November 1977), Doc Name Malaysia—Johore River Water Project, Loan 0405—Amending Guarantee Agreement—Conformed.
428. World Bank, 'Bangladesh: Proposed consolidation loan and credit' (24 January 1975) WB Report No P7736.
429. World Bank, 'Eritrea: Options and strategies for growth' (10 November 1994) WB Report No 12930.
430. World Bank, 'Kosovo: Consolidation Loan C Project: restructuring' (29 June 2009) WB Report No 49182.
431. World Bank, 'Loan Agreement between IBRD and Public Utilities Board for the Johore River Water Project' (26 February 1965) Doc Name: Malaysia—Johore River Water Project: Loan 0405—Loan Agreement—Conformed.
432. World Bank, 'Loan Agreement between IBRD and Suez Canal Authority' (22 December 1959) Doc Name: Arab Republic—Suez Canal Development Project: Loan 0243—Loan Agreement—Confirmed.
433. World Bank, 'Malaysia-IBRD Guarantee Agreement for the Johore River Water Project' (26 February 1965, Doc Name Malaysia—Johore River Water Project: Loan 0405—Guarantee Agreement—Conformed.
434. World Bank, 'Republic of Serbia, Republic of Montenegro: Legal Amendments and Assumption of Responsibilities: second order restructuring (Project paper)' (18 January 2008) WB Report No 49933.
435. World Bank, 'Serbia, Country Partnership Strategy for the Republic of Serbia for the Period FY08-FY11' (13 November 2007) WB Report No 41310YF.

436. World Bank, 'Tanzania at the turn of the century' (28 February 2002) WB Report No 23738.
437. World Bank, 'Tanzania: Prospects for economic development in Tanzania' (31 August 1967) WB Report No AF58B.

Judicial Practice

Permanent Court of International Justice and International Court of Justice

438. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.
439. *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation: Judgment) [2012] ICJ Rep 324.
440. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Crime of Genocide [Bosnia v Serbia and Montenegro]* [Judgment]).
441. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections: Judgment) [1996] ICJ Rep 595 (*Crime of Genocide [Bosnia v Serbia and Montenegro]* [Preliminary Objections]).
442. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections: Judgment) [2015] ICJ Rep 412 (*Crime of Genocide [Croatia v Serbia]* [Preliminary Objections]).
443. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Judgment) [2015] ICJ 3 (*Crime of Genocide [Croatia v. Serbia]* [Judgment]).
444. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 (*Armed Activities* [Judgment]).
445. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction of the Court and Admissibility of the Application: Judgment) [2006] ICJ Rep 6 (*Armed Activities* [Jurisdiction and Admissibility]).
446. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 (*Arrest Warrant*).
447. *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12.
448. *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3.

449. *Case concerning the North Cameroons (Cameroon v United Kingdom)* (Preliminary Objections: Judgment) [1963] ICJ Rep 15.
450. *Case concerning the payment of various Serbian loans issued in France* (Judgment No 14) [1929] PCIJ Rep Series A No 20/21.
451. *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits: Judgment) [1962] ICJ Rep 6.
452. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177.
453. *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) [1923] PCIJ Rep Series B No 6.
454. *Corfu Channel Case* (Judgment) [1949] ICJ Rep 4.
455. *Customs Regime between Germany and Austria* (Advisory Opinion) [1931] PCIJ Rep Series A/B No 41.
456. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] ICJ Rep 213.
457. *Factory at Chorzów* (Jurisdiction: Judgment No 8) [1927] PCIJ Rep Series A No 9.
458. *Factory at Chorzów* (Merits: Judgment No 13) [1928] PCIJ Rep Series A No 17.
459. *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction: Judgment) [1998] ICJ Rep 432.
460. *Free Zones of Upper Savoy and the District of Gex (second phase)* (Order) [1930] PCIJ Rep Series A No 24.
461. *Frontier Dispute* (Judgment) [1986] ICJ Rep 554.
462. *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.
463. *Haya de la Torre* (Judgment) [1951] ICJ Rep 71.
464. *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466.
465. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303.
466. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Construction of a Wall*).
467. *Lighthouses Case between France and Greece (France v Greece)* [1934] PCIJ Rep Series A/B No 62.
468. *Lighthouses in Crete and Samos (France v Greece)* [1937] PCIJ Rep Series A/B No 71.
469. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits: Judgment) [1986] ICJ Rep 14.
470. *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3.
471. *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14.
472. *S.S. Wimbledon (UK v Japan)* [1929] PCIJ Series A No 1.
473. *United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep 3 (*US Diplomatic and Consular Staff in Tehran*).

European Court of Human Rights

474. *A and others v UK* App No 3455/05 ECtHR, 19 February 2009.
475. *Al Nashiri v Poland* App No 28761/11 ECtHR, 24 July 2014.
476. *Al Nashiri v Romania* App No 33234/12 ECtHR, 31 May 2018.
477. *Bijelić v Montenegro and Serbia* App No 11890/05 ECtHR, 28 April 2009.
478. *Bodrožić v Serbia* App No 32550/05 ECtHR, 23 June 2009.
479. *Case of X. and Y. v Switzerland* App No 7289/75 and 7349/76 ECtHR, 14 July 1977.
480. *Filipović v Serbia* App No 27935/05 ECtHR, 20 November 2007.
481. *Husayn (Abu Zubaydah) v Poland* App No 7511/13 ECtHR, 24 July 2014.
482. *Ilaşcu and others v Moldova and Russia* App No 48787/99 ECtHR, 8 July 2004.
483. *Jevremović v Serbia* App No 3150/05 ECtHR, 17 July 2007.
484. *Kin-Stib and Majkić v Serbia* App No 12312/05 ECtHR, 20 April 2010.
485. *Konečný v the Czech Republic* App No 47269/99, 64656/01 and 65002/01 ECtHR, 26 October 2004.
486. *Kostić v Serbia* App No 41760/04 ECtHR, 25 November 2008.
487. *Lakićević and Others v Montenegro and Serbia* App No 27458/06, 37205/06, 37207/06 and 33604/07 ECtHR, 13 December 2011.
488. *Lepojić v Serbia* App No 13909/05) ECtHR, 6 November 2007.
489. *Loizidou v Turkey* App No 15318/89 ECtHR, 23 March 1995.
490. *Marčić and 16 Others v Serbia* App No 17556/05) ECtHR, 30 October 2007.
491. *Matijašević v Serbia* App No 23037/04 ECtHR, 31 March 2008.
492. *Milić v Montenegro and Serbia* App No 28359/05 ECtHR, 11 December 2012.
493. *Milošević v Serbia* App No 31320/05) ECtHR, 28 April 2009.
494. *Molnar Gabor v Serbia* App No 22762/05) ECtHR, 8 December 2009.
495. *Momčilo Mandić v Montenegro, Serbia and Bosnia and Herzegovina* App No 32557/05 ECtHR, 12 June 2012.
496. *Papamichalopoulos and Others v Greece* App No 14556/89 ECtHR, 31 October 1995.
497. *Phocas v France* App No 17869/91 ECtHR, 26 March 1996.
498. *Posti and Rahko v Finland* App No 27824/95 ECtHR, 21 May 2003.
499. *Rantsev v Cyprus and Russia* App No 25965/04 ECtHR, 7 January 2010.
500. *Salontaji-Drobnjak v Serbia* App No 36500/05 ECtHR, 13 October 2009.
501. *Stojanović v Serbia* App No 34425/04 ECtHR, 19 May 2009.
502. *Tričković v Slovenia* App No 39914/98 ECtHR, 12 June 2001.
503. *V.A.M. v Serbia* App No 39177/05 ECtHR, 13 March 2007.
504. *Vrenčev v Serbia* App No 2361/05 ECtHR, 23 September 2008.
505. *Zaklan v. Croatia* App No 57239/13 ECtHR, 16 December 2021.

Other Tribunals and Courts

506. *Affaire de la Société Radio-Orient (États du Levant sous mandat français contre Égypte)* 3 UNRIAA 1871 (2 April 1940).

507. *Affaire relative à la concession des phares de l'Empire ottoman (Grèce contre France)*, 12 UNRIAA 155 (24/27 July 1956).
508. *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* (Award: Merits) Ad Hoc Arbitration, Gunnar Lagergren (10 October 1973).
509. CACJ *El Salvador v Nicaragua* (1917) 11(3) American Journal of International Law 674.
510. *Cargill, Incorporated v United Mexican States* ICSID Case No ARB(AF)/05/2 (18 September 2009).
511. *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* 20 UNRIAA 215 (1990).
512. *Case of Suárez-Rosero v Ecuador* (Judgment: Reparations and Costs) 35 IACHR (20 January 1999).
513. *Category C Claims* in Elihu Lauterpacht, Christopher J Greenwood and Andrew G Oppenheimer (eds), *International Law Reports* (Cambridge University Press 1998) vol 109, 205.
514. *CMS Gas Transmission Company v The Argentine Republic* (Award) ICSID Case No ARB/01/8 (12 May 2005).
515. *Desert Line project L.L.C. v Yemen* (Award) ICSID Case No ARB/05/17 (6 February 2008).
516. *Eritrea-Ethiopia Claims Commission* (Final Award: Eritrea's Damages Claims) 27 UNRIAA 505 (17 August 2009).
517. *Estate of Jean-Baptiste Caire v Mexico (France/Mexico)* 5 RIAA 516 (1929).
518. *F.H. Redward and Others (Great Britain) v United States (Hawaiian Claims), US-Great Britain Arbitral Commission Award* (1925) 6 RIAA 157 (1955).
519. *Forests of Central Rhodopis* (Sentence) 3 UNRIAA 1389 (4 November 1931).
520. *Ivanecvic v Artukovic* US Court of Appeals 9th Circuit 211 F.2d 565 (1954).
521. *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic* (Award) ICSID Case No ARB/02/1 (25 July 2007).
522. *M/V "Saiga" (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) ITLOS Rep 1999.
523. *Martini (Italy v Venezuela)* (Sentence) 2 UNRIAA 1975 (3 May 1930).
524. Mexican-US Claims Commission *Thomas H. Youmans (USA) v United Mexican States* (1926) 4 UNRIAA 110 (2006).
525. *Opinion in the Lusitania Cases* 7 UNRIAA 32 (1 November 1923).
526. *Prosecutor v Aleksovski* (Judgment on Appeal) ICTY-95-14/1-A (24 March 2000).
527. *Prosecutor v Duško Tadić* (Judgment on Appeal) ICTY-94-1-A (15 July 1999).
528. *Prosecutor v Kordic and Cerkez* (Judgment on Appeal) ICTY-95-14/2-A (17 December 2004).
529. *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo* (Judgment on Appeal) ICTY-96-21-A (20 February 2001).

530. *Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996 (Secession of Quebec)* Canada Supreme Court Reports vol 2 (1998) 217.
531. *Robert E. Brown (United State) v Great Britain, US-Great Britain Arbitral Commission Award (1923)* 6 RIAA 120 (1955).
532. *S.S. 'Im Alone' (Canada, United States) (Award)* 3 UNRIAA 1609 (30 June 1933 and 5 January 1935).
533. *SD Myers Inc. v Government of Canada (Partial Award)* UNCITRAL Doc No 742416:01 (13 November 2000).
534. *Socony Vacuum Oil Company (1948)* US International Claims Commission in Elihu Lauterpacht (ed) *International Law Reports* (Butterworth & Co. 1956) vol 23 55.
535. *Tippetts, Abbett, McCarthy, Stratton v TAMSAFFA Consulting Engineers of Iran (1984)* Iran-US Claims Tribunal Reports vol 6.
536. *Velásquez Rodríguez v Honduras case (1988)* IACHR Series C No 4.
537. *Well Blowout Control Claim* in Elihu Lauterpacht, Christopher J Greenwood and Andrew G Oppenheimer (eds), *International Law Reports* (Cambridge University Press 1998) vol 109 479.

Other Sources

538. 'Diplomatic note from the Chargé d'Affaires of the Kingdom of SHS Simitch to the US Foreign Office' (6 January 1919) in Green H Hackworth, *Digest of international law* (United States Government Printing Office 1943) vol 5 220.
539. 'Montenegro's response to the Questionnaire on the code of conduct on politico-military aspects of security by the OSCE Forum for Security Cooperation' FSC.EMI/124/12 (20 April 2012).
540. Act of Notification of the Succession of the Agreements of the former Yugoslavia with the Kingdom of Thailand (4 December 1992) Official Gazette of the Republic of Slovenia No 58/1992.
541. Act of Notification of the Succession of the Agreements of the former Yugoslavia with the Republic of Finland (14 August 1992) Official Gazette of the Republic of Slovenia No 40/1992.
542. Act of Notification of the Succession of the Agreements of the former Yugoslavia with the Republic of Italy (14 August 1992) Official Gazette of the Republic of Slovenia No 40/1992.
543. Act on the Membership of the Republic of Slovenia in the International Monetary Fund (14 January 1993) Official Gazette of the Republic of Slovenia No 2/1993.
544. Act on the ratification of the Agreement between the Government of the Republic of Slovenia and the Government of the Kingdom of Norway on the

- consolidation of the debt of the Republic of Slovenia (BNOKD) (9 July 2001) Official Gazette of the Republic of Slovenia No 57/2001.
545. Announcement by the Federal Chancellor of Austria on bilateral agreements between Austria and Kosovo (30 December 2010) Official Gazette of the Republic of Austria No 147/2010 Part III.
546. Association of the Bar of the City of New York & Center for Human Rights and Global Justice, 'Torture by proxy: International and domestic law applicable to extraordinary renditions' in *Record of the Association of the Bar of the City of New York* (2005) vol 60(1) 13.
547. Constitution of the Swiss Confederation (18 April 1999) Amtliche Sammlung des Bundesrechts AS 1999 2556.
548. Constitutional Charter of the State Union of Serbia and Montenegro (4 February 2003) Official Gazette of Serbia and Montenegro No 01/2003.
549. Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia (25 June 1991) Official Gazette of Croatia No 31/1991.
550. Constitutional Law for the Implementation of the Constitution of Montenegro (19 October 2007) Official Gazette of the Republic of Montenegro No 01/07, 9/08 and 4/09.
551. Constitutional Law for the Implementation of the Constitution of the Republic of Macedonia (22 November 1991) Official Gazette of the Republic of Macedonia No 52/1991.
552. Constitutional Law of the CSFR No 541/1992 on the division of the property of the Czech and Slovak Federative Republic between the Czech Republic and the Slovak Republic and its passage to the Czech Republic and the Slovak Republic (8 February 1992) Collection of Laws of the CSFR No 110.
553. Constitutional Law of the CSFR No 542/1992 on the dissolution of the Czechoslovak Federative Republic (8 February 1992) Collection of Laws of the CSFR No 110.
554. Decision on publication of the list of bilateral international agreements to which the Republic of Croatia is a party on the basis of succession (19 September 1997) Official Gazette of the Republic of Croatia No 13/1997.
555. Decision on the declaration of independence of the Republic of Montenegro (5 June 2006) Official Gazette of the Republic of Montenegro No 36/2006.
556. Decision on the Publication of the Agreement between Montenegro and the Czech Republic on the Regulation of Bilateral Contractual Relations (19 November 2018) Official Gazette of the Republic of Montenegro (international agreements) No 11/2018.
557. Decision on the publication of the Agreement between Montenegro and the Kingdom of Norway on the regulation of bilateral contractual relations (28 December 2011) Official Gazette of the Republic of Montenegro (international agreements) No 17/2011.

558. Decision on the publication of the Agreement between Montenegro and the Republic of Greece on the regulation of bilateral contractual relations (28 December 2011) Official Gazette of the Republic of Montenegro (international agreements) No 17/2011.
559. Declaration of the Independent Republic of Montenegro (5 June 2006) Official Gazette of the Republic of Montenegro No 36/2006.
560. Declaration on the Suez Canal and the Arrangements for its operation (24 April 1957) UN Doc A/3576-S/3818.
561. Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (1992) 31 ILM 1486.
562. Indian Independence (International Arrangements) Order 1947 (promulgated 4 August 1947) UN Doc A/C.6/161.
563. Indian Independence (Rights, Property and Liabilities) Order (promulgated 14 August 1947) The Gazette of India (14 August 1947).
564. Indian Independence Act (promulgated 14 July 1947) His Majesty's Stationery Office.
565. Institut du Droit International, 'State Succession in Matters of Property and Debts, Resolution' (2000–2001) 69 *Annuaire de l'Institut de Droit international* 712.
566. Institut du Droit International, 'Succession of States in Matters of International Responsibility, Resolution' (2015) 76 *Annuaire de l'Institut de droit international* 703.
567. Institut du Droit International, 'Succession of States in Matters of International Responsibility, Provisional Report by Rapporteur Marcelo Kohen' (2015) 75 *Annuaire de l'Institut de droit international* 123.
568. International Law Association, 'Aspects of the law of state succession, Final Report—Part I, Report of the Seventy-Third Conference held in Rio de Janeiro in 2008' (ILA 2008) 250.
569. International Law Association, 'Aspects of the law of state succession, Final report of Economic Aspects of State Succession, Toronto Conference in 2006' (ILA 2006).
570. International Law Association, 'Succession of new states to the treaties and certain other obligations of their predecessor, Report of the Fifty-fourth Conference held in The Hague, 1970' (ILA 1971).
571. Joint Resolution for annexing Texas to the United States (1 March 1845) in Richard Peters (ed), *Public statutes at large of the United States of America from the organization of the government in 1789, to March 3, 1845* (Little, Brown & Co 1856) vol 5, 797–798.
572. Law for the Implementation of the Constitutional Charter of the State Union of Serbia and Montenegro (11 February 2003) Official Gazette of Serbia and Montenegro No 01/2003.

573. Law No 04/L-052 on International Relations (16 December 2011) Official Gazette of the Republic of Kosovo No 28/2011.
574. Letter from the UN Secretary-General to the President of the UN Security Council (18 February 2019) UN Doc S/2019/154.
575. List of Bilateral Investment Agreements in force OJEU C 198/1.
576. Minutes of the proceedings of the Partition Council held on 1st December, 1947 (Case No PC/218/20/47) (1948) 2 Reserve Bank of India Bulletin.
577. Opinion of the Venice Commission in the case of *Bijelić v. Montenegro and Serbia*: European Commission for Democracy through Law (Venice Commission) No 495/2008 CDL-AD(2008)021 (20 October 2008).
578. Opinions of the Arbitration Commission of the Conference on Yugoslavia (1992) 31 ILM 1494 (Badinter Commission).
579. Provisional Constitution of the United Arab Republic (5 March 1958) 163 British and Foreign State Papers 976.
580. Record of succession of the Czech Republic and Slovakia to the Universal Copyright Convention (done 31 March 1993) 1720 UNTS 290.
581. Report of the 484th Meeting of the Committee of Ministers' Deputies of the Council of Europe (Conclusions of the 484th Meeting of the Ministers' Deputies) CM/Del/Concl(93)484ter (8 January 1993).
582. Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question (1920) League of Nations Official Journal.
583. Singapore: Note on succession on International Convention for the Suppression of the Traffic in Women and Children (30 September 1922) 564 UNTS 349.
584. The Fundamental Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (25 June 1991) Official Gazette of the Republic of Slovenia No 1/91-I and 19/91.
585. Third Restatement of Foreign Relations Law of the United States (revised) vol 1 (American Law Institute Publishers 1987).
586. US Constitution <<https://www.archives.gov/founding-docs/constitution-transcript>> accessed 26 February 2023.

Online Resources

587. 'Srbija vraća stari klirinški dug Češkoj uplatom 9,8 miliona dolara' *Danas* (10 December 2018) <<https://www.danas.rs/ekonomija/srbija-vraca-stari-klirinški-dug-ceskoj-uplatom-98-miliona-dolara/>> accessed 26 February 2023.
588. Council of Europe, 'Montenegro' <<https://www.coe.int/en/web/portal/montenegro>> accessed 26 February 2023.

589. Council of Europe, 'Serbia' <<https://www.coe.int/en/web/portal/serbia>> accessed 26 February 2023.
590. EEAS, Treaties Office Database <<https://ec.europa.eu/world/agreements/>> accessed 26 February 2023.
591. Hague Conference on Private International Law, 'Status Table 12: Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents' <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>> accessed 26 February 2023.
592. ILO, 'Ratifications of ILO Conventions by country' <<https://www.ilo.org/dyn/normlex/en/>> accessed 26 February 2023.
593. IMF, 'Press Release: IMF Offers Membership to Republic of Kosovo (8 May 2009) No.09/158.' <<https://www.imf.org/en/News/Articles/2015/09/14/01/49/prog158>> accessed 7 January 2023.
594. IMF, 'Press Release: IMF Statement on South Sudan (25 July 2011) No 11/292.' <<https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr11292>> accessed 7 January 2023.
595. Joint Letter of the Foreign Ministers of the two Yemeni to the Secretary-General of the United Nations (19 May 1990) UNTC, Status of treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2023.
596. Letter from the Government of FRY to the UN Secretary-General (8 March 2001) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.
597. Letter from the Government of the Republic of Croatia to the Secretary-General of the United Nations (27 July 1992) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.
598. Letter from the Government of the Republic of Montenegro to the Secretary-General of the United Nations (10 October 2006) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.
599. Letter from the Government of the Republic of Slovenia to the Secretary-General of the United Nations (1 July 1992) UNTC, Status of Treaties: Historical Information <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2026.
600. Ministry of Finance of Montenegro, 'National debt—31 December 2007' <<https://wapi.gov.me/download/b690e39f-e5c7-45cd-988b-8af6f5ff2e33?version=1.0>> accessed 26 February 2023.

601. Ministry of Finance of Montenegro, 'Report on the General Government Debt of Montenegro as of 31 December 2021' <<https://www.gov.me/en/article/report-on-the-general-government-debt-of-montenegro-as-of-december-31-2021>> accessed 26 February 2023.
602. Ministry of Finance of Montenegro, 'Report on the State Debt of Montenegro as of 31 December 2009' <<https://www.gov.me/en/documents/4d3aid15-4abc-4e20-85f3-fd858b9482a2>> accessed 26 February 2023.
603. Ministry of Foreign Affairs of France, 'Traités et accords de la France' <https://basedoc.diplomatie.gouv.fr/exl-php/recherche/mae_internet___traites> accessed 26 February 2023.
604. Ministry of Foreign and European Affairs of the Republic of Croatia <<https://mvep.gov.hr/>> accessed 26 February 2023.
605. Ministry of Foreign and European Affairs of the Republic of Croatia, 'Overview of bilateral international objections of the Republic of Croatia by country' <<https://mvep.gov.hr/foreign-policy/bilateral-relations/overview-of-bilateral-treaties-of-the-republic-of-croatia-by-country/22801>> accessed 26 February 2023.
606. Ministry of Justice of Bosnia and Herzegovina <<http://www.mpr.gov.ba/>> accessed 26 February 2023.
607. Ministry of Justice of North Macedonia, 'International Legal Assistance Agreements' <<http://www.pravda.gov.mk/mpd-bilateral5>> accessed 26 February 2023.
608. United Kingdom Treaties Online, 'UK Compendium of International Treaties' <<https://treaties.fco.gov.uk/>> accessed 26 February 2023.
609. United Nations, 'Decolonization' <<https://www.un.org/dppa/decolonization/en/nsqt>> accessed 26 February 2023.
610. United Nations, 'Member States' <<http://www.un.org/en/member-states/>> accessed 26 February 2023.
611. United Nations, United Nations Digital Library <<https://digitallibrary.un.org/>> accessed 26 February 2023.
612. United Nations, United Nations Treaty Collection <<https://treaties.un.org/>> accessed 26 February 2023.
613. United Nations, United Nations Treaty Collection, 'Historical Information' <<https://treaties.un.org/Pages/HistoricalInfo.aspx>> accessed 26 February 2023.
614. US National Archives <<https://www.archives.gov/>> accessed 26 February 2023.
615. World Bank, 'Member Countries' <<http://www.worldbank.org/en/about/leadership/members>> accessed 26 February 2023.

Author Queries

- AQ1: Note that no closing single quote for the opening single quote has been provided in the phrase “Articles on Nationality of Natural”. Please check and amend necessary. 11
- AQ2: Note that no closing round bracket for the opening round bracket has been provided in the phrase “(Martinus Nijhoff Publishers 1970;”. Please check and amend necessary. 32
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- AQ11: Note that no closing round bracket for the opening round bracket has been provided in the phrase “(the four Geneva Conventions of”. Please check and amend necessary. 173