

# INTERNATIONAL LAW ASSOCIATION

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### ASPECTS OF THE LAW OF STATE SUCCESSION

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#### **Economic Aspects of State Succession**

##### **Final Report**

The present report is devoted to economic aspects of State succession, i.e. succession with respect to State property, archives, and State debts. The scheme of the report corresponds with the previous activities of the Committee, and it should answer the question whether recent practice concerning succession has confirmed the solutions proposed in the codification convention: the Vienna Convention of 8 April 1983. The Rapporteurs concentrated upon three main issues: State practice before the conclusion of the 1983 Convention, solutions proposed in that instrument, and (the largest part) practice of successor States in recent cases of State succession. It is important to stress two important issues. First, the area of succession in respect of State property and debts has been partially covered by the report on State succession in respect of treaties, as presented at the New Delhi Conference in 2002. In any case, the regulations concerning the economic aspects of State succession constitute *lex specialis* in relation to general rules governing succession in respect of international treaties. Secondly, although the cases of succession occurred some 10 years ago or more, a number of questions concerning the economic aspects of succession have been resolved recently, or have not yet been resolved.

#### 1. State practice concerning succession with respect to State property and debts before the Vienna Convention of 1983.

The practice concerning State property was homogenous in all the cases of succession preceding the conclusion of the Convention of 1983, what is very rare. The rule which applied to all types and forms of succession (cession, dismemberment of States, unification of States) was that the property of the predecessor State became the property of the successor State directly on the basis of international law, without any compensation. There is no universally accepted definition of State property in international law, so different definitions were elaborated in specific treaties, other international instruments dealing with the succession of States<sup>1</sup>, and in the international jurisprudence. The notion of State property, rights and interests, applied in the Vienna Convention of 1983, was primarily used in the Paris Peace Treaty after the First World War. In some cases it was interpreted widely to cover so-called para-statal property,<sup>2</sup> if such a solution was justified and it was not possible to draw a distinction between the property of the State and one of the specific organizations. Examples of the transfer of property rights from the predecessor State to the successor State include: Art.256 of the Treaty of Versailles, Art.60 of the

<sup>1</sup> Cf. UNGA Resolutions 388(V) concerning Abyssinia and 530(VI) concerning Eritrea.

<sup>2</sup> The property of the German Emperor in the Treaty of Versailles or the property of the fascist party in Italy in the Peace Treaty of 1947.

Peace Treaty with Turkey of 1923, Art.208 of the Treaty of Saint Germain,<sup>3</sup> and numerous others. The authors are also unanimous on that point.

Special solutions were usually adopted in respect of State archives. The necessity of introducing specific rules governing archives – compared to the general regulations dealing with State property – is strictly connected to the content of the archives and their decisive importance for the States concerned. The general principle is that archives<sup>4</sup> exclusively concerning the territory transferred to a new sovereign should be passed to that sovereign, while those pertaining partially or incidentally to the new sovereign should be kept by the predecessor State, although access should also be guaranteed to the successor State. Such a solution conforms to the general rules concerning the status of archives, according to which the principle of provenience (origin) should be supplemented by the principle of pertinence (functional importance). The principles governing archives in cases of State succession were consistently confirmed in numerous treaties of cession beginning from the Middle Ages (e.g. Art.38 and 52 of the Treaty of Versailles, Art.274 of the Treaty of Saint Germain, Art.7 and 12 of the Peace Treaty with Italy of 1947, British-Israeli agreement of 30 March 1950 concerning the mandate archives in Palestine, and the agreement concluded on 1 December 1947 between India and Pakistan on the division of archives of the former British Indies; see also the Agreement between the Austrian Federal Government and the Government of the Kingdom of Serbs, Croats and Slovenes of 26 June 1923 concerning the implementation of the Articles 93, 191 to 196 of the State-treaty of St. Germain, Official Gazette Nr. 602/1923), and were also reflected in other international instruments, including a resolution of the 6<sup>th</sup> International Round Table Conference concerning Archives (Warsaw May 1961), and recommendations of the UNESCO of 1976-1979. It is important to emphasize two more issues. First, a distinction can be drawn between historical and administrative archives, the latter category concerning archives necessary for effective administration of the territory and therefore of utmost importance for the successor State. Secondly, the rules governing the fate of the archives in cases of State succession do not relate to libraries and works of art, the status of which is unclear under the law of State succession.

As the rules concerning succession in respect of State property and archives are relatively clear and well-established, the rules of succession in respect of State debts are disputed, the practice is extremely differentiated, and the formulation of conclusions as to the possible customary nature of various rules is very difficult. In different types of State succession we face any of a total transfer of debts to the successor State, a total rejection of the transfer, or all of the intermediate solutions. There are several rules which only seem to be generally applicable. First, a classification of State debts into general, local and localized debts (local debts are debts owed by local communities, and localized debts are debts created by the central government in the exclusive interest of local communities; those two categories of debts are usually not covered by general regulations concerning the succession of States). Secondly, there is general agreement in practice, confirmed unanimously by international legal writing, that so-called odious debts (i.e. debts of the State which do not relate to any interest of the population of the territory, or incurred in pursuit of illegal aims, like war) are not subject to succession. As to examples of State practice, the acceptance of the debts of the predecessor State can be found in Art.254 of the Treaty of Versailles, in the secession of Ireland from the United Kingdom, and in the agreement between India and Pakistan of 1 December 1947 concerning the apportionment of the debt of former British Indies; on the other hand, the rejection of the debts by the predecessor State took place in Annex X to the Peace Treaty with Italy of 1947 and in the Treaty of Saint Germain with Austria, excluding the localized debts).

## 2. The Vienna Convention of 1983 – general outline.

The Convention on the Succession of States in Respect of State Property, Archives and State Debts was opened for signature in Vienna on 8 April 1983. It was drafted on the basis of 13 reports elaborated by M. Bedjaoui. The Convention was adopted with 54 votes in favor (socialist and developing States), 11 votes against and 11 abstentions (Western States). It never entered into force, as it obtained only one ratification (Algeria).

General provisions of the Convention (Arts.1-6, concerning definitions, non-retroactivity of the Convention, requirement of conformity of succession with international law, general clause concerning guarantees of rights of third parties and individuals, etc.) correspond with the respective provisions of the Vienna Convention of 1978 on the succession of States in respect of treaties. Substantive provisions of the Convention can be divided into two groups: general provisions concerning all the types of succession, and specific regulations dealing with particular types of succession. State property is defined as all kinds of property, rights, and interests which

<sup>3</sup> The solution applied in the case of Austria was complicated. Austria and Hungary first renounced their property in relation to the successor States, and subsequently the successor States concluded among themselves bilateral agreements on the apportionment of property.

<sup>4</sup> An archive is a collection of documents classified as such by the predecessor State.

belonged to the predecessor State in accordance with its domestic law on the day of the passage of sovereignty. During the codification conference, a special provision was added in order to guarantee the integrity of the predecessor State's property before its transfer to the successor State (Art.13).<sup>5</sup> The effects of the transfer of State property are defined in Art.9 of the Convention, according to which the property rights of the predecessor State expire and are replaced by the equal (as to the scope) rights of the successor State. The transfer of the property cannot influence any possible rights and interests of third parties. The predecessor State is not entitled to any compensation. Finally, a general rule providing for the priority of an agreement between the predecessor State and successor State (a so called "devolution agreement") as to the apportionment of State property is confirmed. However, this convention was still based on the distinction between succession cases relating to newly independent States and those relating to other States.

In all types of State succession the transfer of immovable property to the successor State is confirmed. Specific regulations concern the destiny of movable property in particular types of succession. In the case of cession, the successor State acquires the part of the movable property connected with the predecessor State's activities in the ceded part of the territory. In the case of the unification of States, a clearly and manifestly logical solution provides that the successor State acquires the whole property of the predecessor States. According to Arts.17 and 18 of the Convention, in cases of secession and dismemberment of States, the successor State/States acquires/acquire the immovable property situated in its part of the territory, the movable property related to the activities of the predecessor State in the respective part of the territory, and an equitable share of the remaining movable property as well as of the property (both movable and immovable) of the predecessor State situated abroad. Finally, the special provision of Art.15 deals with the position of newly independent States (i.e. former colonies). Those States should receive not only the whole property of the former colonial power situated in the territory of the new State, but also the share of the remaining property. The provisions in favor of newly independent States in fact provoked the rejection of the Convention by the Western States.

Arts.19-31 of the Convention deal with succession in respect of State archives and constitute *leges speciales* in relation to the provisions concerning the State property. General provisions of that chapter correspond with the regulations concerning State property. Specific regulations relating to the respective types of succession provide for the primacy of the devolution agreement. If no agreement was concluded, in the case of cession, the successor State should receive the part of the archives necessary for efficient administration of the acquired territory, as well all the documents relating fully or mostly to the ceded territory. Other documents should be reproduced upon request, at the expense of the successor State. The provisions concerning secession and dismemberment provide for the apportionment of the archives of the predecessor State in accordance with the model elaborated in the case of cession. Finally, in the case of the unification of States, the successor State acquires all of the archives of the predecessor States – in most cases all of the archives are situated in its territory anyway. Special provisions also guarantee the privileged position of newly independent States, which should obtain all of the parts of the archives of the predecessor State that relate principally or exclusively to the territory of the newly independent State. This solution is contrary to Art.25 of the Convention, proclaiming the principle of the unity of archives.

Art.33 of the Convention regulates the succession of financial obligations of States towards other States, international organizations and other subjects of international law (but excluding private parties). The Convention does not refer to any classification of debts mentioned above. Another important provision of the Convention provides that the succession of States itself does not infringe any rights of the creditor. That clause is important in light of the general provision that succession cannot infringe the rights and duties of third parties. The rights of the creditor cannot be changed by a mere devolution agreement. As to the particular types of succession, in the case of the cession, the primacy of the devolution agreement is emphasized. If there is no such agreement, the successor State should pay an equitable proportion of the debt of the predecessor State. Similar solutions are applied in cases of secession and dismemberment of the predecessor State (Arts.40 and 41) – the debt should be divided proportionally (although the Convention does not indicate any criteria for equitable apportionment). In the case of unification of States, the debt should pass to the successor State. Finally, the Convention accepts the possibility of concluding an agreement between a newly independent State and the former colonial power;<sup>6</sup> if no agreement is concluded, the successor State (new postcolonial State) is under no obligation to pay any share of the debt of the predecessor State administering the territory. The solution adopted in fact releases a new State from any liability for the debts of the predecessor State, notwithstanding possible profits; it is extremely favorable to newly independent States and was rejected by the Western States.

<sup>5</sup> The issue was decided by the PCIJ in the *Chorzow factory* case, PCIJ Publ. Series A, No.7, at 30.

<sup>6</sup> Such agreement should take into account the economic situation of the new State and the principle of sovereignty over natural resources.

In summary, certain provisions of the 1983 Convention attempt to reflect the customary law (although if we look at the previous practice, only very few customary rules can be ascertained in the field covered by the Convention), but some provisions, very crucial to the possible acceptance of the Convention by the international community, constitute examples of the development of international law made in the interest of a group of States. If we take into account the fact that the Convention cannot be applied retroactively (unless the State concerned makes a special declaration in that respect, which declaration is opposable to other interested States), the reason for the failure of the Convention becomes clear and obvious.

**The role of equity and equitable principles** is another important theoretical aspect of the law on State succession as provided in the 1983 Vienna Convention. The Convention introduced some important rules mirroring the contemporary development of international law. The movable property of the predecessor State not directly connected with the activities on the territory to which the succession relates passes to the successor State(s) in equitable proportions (Arts 17.1.c and 18.1.d); in the case of the dissolution of a State, the successor States also receive equitable proportions of immovable property located outside the territory of the predecessor State. Arts. 17.3 and 18.2 provide for equitable compensation between the predecessor and successor States if the distribution of the State property does not take place. Corresponding provisions are also made in respect of State debts. The successor State(s) should acquire an equitable proportion of debts of the predecessor State (Arts. 37.2, 40.1 and 41); however, the priority of settling by agreement the problems of State property and debts of a predecessor State is reserved (Arts. 14, 17.1, 18.1, 37.1, 40.1 and 41). In fact, two agreements should be concluded: one between the predecessor State and the successor States, or between the successor States in the case of dissolution of the State, and the other between the States involved in the succession process and the creditor State. The equity addressed in this Convention has to be established by agreement among the States concerned.

### 3. International practice in recent cases of State succession as confronted with the codification Convention of 1983.

#### 3.1. Yugoslavia

##### 3.1.1. State Property.

The case of Yugoslavia confirmed the view that the regulation of issues connected with succession could be difficult if there were differing opinions as to the international legal status of the successor State/s. Particularly in the case of secession, the conclusion of the devolution agreement regulating the effects of succession can be extremely difficult.

Certain proposals concerning the apportionment of the property and debts of the former Socialist Federal Republic of Yugoslavia (SFRY) were made by the International Conference for the former Yugoslavia, and in particular by the Badinter Committee and the Working Group for the Succession of States. The property of the former Yugoslavia should be apportioned according to the principle of equity. The property situated in the territories of the respective republics should become property of the new States without any further formalities. Remaining issues should be governed by an agreement concluded between the States concerned. Until such an agreement was concluded, the successor States administering the property of the former SFRY were responsible for that property. The apportionment of the property should be made in accordance with the rules specified in the 1983 Vienna Convention.<sup>7</sup>

On the other hand, the successor States declared the taking over of the property of the former SFRY situated in their territories, and presented their claims to a proportional share of immovable and movable property situated in the territory of "new" Yugoslavia and outside the former SFRY (i.e. Yugoslav property abroad). The successor States declared simultaneously their readiness to pay corresponding parts of Yugoslav foreign debts.<sup>8</sup> In particular the claims concerned: property of Yugoslav diplomatic representations abroad, actives of the Yugoslav National Bank (including monetary reserves and gold deposits), equipment and military material of the Yugoslav Army, property of public enterprises, especially railways, telecommunications and energy sectors, as well as all of the archives, including non-state archives. The government of the FRY (Serbia-Montenegro)

<sup>7</sup> J.M. Ortega Terol, *The Bursting of Yugoslavia: An Approach to Practice regarding State Succession*, The Hague Academy of International Law Research Center [1996], at 36 ff.

<sup>8</sup> S. Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution*, Amsterdam 1994, presents at p.292 the Constitutional Law of Slovenia concerning the Implementation of the Constitutional Charter on the Independence of Slovenia. That document contains at paras 9-12 the claims against FRY. Similar claims were presented by Croatia in its Declaration of Independence.

declared that it did not recognize the new post-Yugoslav States as they had illegally seceded. Consequently, the FRY remained the owner of the property of the former SFRY, but it was ready to offer a share of the property on an *ex gratia* basis.

The FRY position was rejected by the Badinter Committee as contrary to international law. The Committee devoted four opinions to the status of the State property of the former SFRY. Opinion No.9, dated 4 July 1992, emphasized that all of the successor States should be interested in obtaining the aim – a balance between actives and passives resulting from the succession. The conclusion of the devolution agreement would be desirable to resolve all disputed issues. Opinion No.12 of 16 July 1993 stressed again that the equitable redistribution of actives and passives was the most important aim of all of the regulations connected with the succession. A State opposing the conclusion of the agreement or refusing effective cooperation committed an international delict. The refusal could not, however, constitute a basis for the use of force. Opinion No.14 of 13 August 1993 declared that the list of State property of the former SFRY prepared by the Working Group in 1993 should constitute a basis for the definition of the Yugoslav State property. The list was composed of two parts. The first contained those elements of the property, the nature and purpose of which were not disputed by the successor States. The second enumerated disputed property. Finally, Opinion No.15 of 13 August 1993 limited the rights of the National Bank of Yugoslavia to undertake any activities disposing of financial rights and obligations of the former SFRY; in particular the opinion emphasized that the major part of those rights and obligations had *de facto* been overtaken by the central banks of the new successor States.

As to State property, the FRY proposed on 4 May 1993 the conclusion of a convention between the new Yugoslavia and other successor States. The convention should cover both state and “social” property, i.e. the property belonging to so-called “associated organizations of labor” (a specific form of property in the former SFRY). The latter covered, *inter alia*, means of production (including equipment and raw materials), certain categories of State property (including the property of police and armed forces), property of diplomatic representations abroad, and natural resources including rivers, sea and seashore which normally are treated as *rebus extra commercium*.<sup>9</sup> That stance was rejected by the remaining successor States, which were of the opinion that the said approach to the notion of State property was ill-founded, as international law was limited exclusively to State property. A concurring view was expressed by the Badinter Committee in its Opinion No.14 quoted above. It stated that in accordance with the Yugoslav Constitution of 1974 many actives were transferred to the republics, so that they could not be treated as State property at the time of succession (the critical date). The property of the “associated organizations of labor” was also controlled by the respective republics. The FRY denied any cooperation in elaborating that opinion, rejected it, and subsequently decided to withdraw unilaterally from further negotiations.

The defining of State property was particularly important in the context of the draft convention on the regulation of issues resulting from the secession of the parts of the SFRY proposed by the FRY in June 1996. The draft referred, *inter alia*, to the property of the former Kingdom of Yugoslavia, without any specific historical reference. It seemed that by presenting those claims the FRY tried to avoid serious negotiations on property questions.

After the signing of the peace settlements of Dayton, the International Conference on former Yugoslavia was replaced by the Council supervising the implementation of the agreements (a decision in this respect was taken in London on 8 and 9 December 1995). The activities of certain working groups, including the group for State succession should, however, be continued. It seemed that it was unable to achieve any result, and even certain regress could be noticed. Initially the FRY rejected the possibility of concluding the agreement on the apportionment of property and debts, but it was eager to accept an arbitration. After 1995, it also rejected the possibility of arbitration.

In March 1996 the successor States (Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia) published a common declaration stating that they would initiate a judicial proceeding against every subject infringing their property rights and interests by releasing any piece of ex-Yugoslav State property from sequestration. The political changes and abolition of the Milosevic regime opened the way to a new solution to the succession issue among the post-Yugoslav States. An agreement in that respect was concluded in Vienna on 29 June 2001.<sup>10</sup> However, it does not regulate all questions still existing among the successor States to former SFRY so that certain issues still require further negotiation.

<sup>9</sup> V.D. Degan, Disagreements over the Definition of State Property in the Process of State Succession of the former Yugoslavia, DID 12(1996), No.23, at 121-122.

<sup>10</sup> ILM 43(2002), at 3ff.

### 3.1.2. Debts.

In accordance with the principle of equity, the apportionment of State property between the post-Yugoslav States should correspond with the apportionment of financial obligations. In the case of Yugoslavia, certain solutions were elaborated under the auspices of the international financial organizations.

General issues concerning membership and obligations in respect of international financial institutions were resolved in a memorandum of the IBRD of 25 March 1974,<sup>11</sup> and in a similar document of the IMF of 15 July 1992.<sup>12</sup> Both instruments adopted, as a general solution in cases of dismemberment of the State, the succession of new States to the membership, rights and debts of the predecessor State, and no succession in the cases of secession. The organization concerned can either propose the accession or the succession of the new State. In the latter case, however, all of the States concerned should conclude an agreement on the apportionment of rights and debts of the predecessor State.

The IMF declared in December 1992 that the SFRY had ceased to exist, with five States: Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, and Serbia-Montenegro, being the successor States. All of the rights, interests and debts of the former Yugoslavia were divided into shares corresponding to the relation of the economic potential of the specific republics to the SFRY as a whole (FRY 36.52%; Slovenia 16.39%; Croatia 28.49%; Bosnia and Herzegovina 13.20%; Macedonia 5.40%). On 25-27 February 1992, the World Bank concluded agreements with Slovenia, Croatia, and Yugoslavia (still composed of the remaining republics) on the payment of localized debts. Yugoslavia confirmed the payment of the loans serving the needs of the four remaining Republics and two structural loans, while Slovenia and Croatia declared their responsibility for debts connected with investments in their respective territories. In line with the continuous disintegration of Yugoslavia, on 10 August 1993, two further agreements were concluded (with Bosnia and Herzegovina, and Montenegro) corresponding to the previous agreements with Slovenia and Croatia. The difference between the agreements concluded by the IMF and those by the WB was strictly concerned with different nature of the loans granted by both institutions; the former being general, while the latter were localized.

Most of these issues were settled by the agreement that was concluded in Vienna on 29 June 2001.<sup>13</sup>

### 3.2. Germany

The legal regulation concerning succession in respect of the property and debts of the former German Democratic Republic (GDR) was relatively simple. According to Arts.21 and 22 of the Unification Treaty (*Einigungsvertrag*) the whole property of the GDR, including the property situated abroad, became federal property on the day of unification of the two German States. The said provisions covered administrative property, i.e. property directly connected with the use of State power by the agencies of the GDR.<sup>14</sup> Special provisions (Arts.26 and 27 of the Treaty) regulated the destiny of the East German railways (*Deutsche Reichsbahn*) and post (*Deutsche Reichspost*). They became State property of the Federal Republic of Germany (FRG), but were automatically incorporated into the separate property of the federal railways and post.

After the transfer of sovereignty, a reapportionment of property between the Federation and federal States (*Bundesländer*) in accordance with federal legislation took place. Special solutions were adopted in connection with the necessity to secure restitution of property illegally confiscated by the GDR. They were, however, based upon the domestic legislation of the FRG and shall not be covered by the present study.

The problem of the property of the GDR abroad did not in fact exist. The taking over of the property of the former GDR by the FRG was in no case put in question by third States. The only problem was caused by the fact that some States regulated the rights of the GDR to the property of diplomatic and consular representations on the basis of reciprocity. As the representations of those States were partially closed in connection with the disappearance of the GDR, the issue of property rights was resolved by bilateral negotiations.<sup>15</sup>

<sup>11</sup> Materials on Succession of States in Respect of Matters other than Treaties, UNLS, New York 1978, at 545.

<sup>12</sup> IMF. Secession of Territories and Dissolution of Members in the Fund. Cf. A.Gioia, State Succession and International Financial Organizations, Research Center of the Hague Academy of International Law [1996].

<sup>13</sup> *Supra*, fn. 10.

<sup>14</sup> The administrative property of the GDR was much larger than the property of the former FRG, as the administrative functions were performed not only by the state agencies, but also other organs and enterprises. Cf. G.Gornig, Staatennachfolge und die Einigung Deutschlands, Part Two: Staatsvermögen und Staatsschulden, Berlin 1992, at 52.

<sup>15</sup> H.Beemelmans, Die Staatennachfolge in Staatsvermögen in Drittstaaten, Auslandschulden, gebietsbezogene rechtliche Regelungen und Staatsangehörigkeit – eine Problemskizze, OEuR 4191995), at 81.

Problems concerning the internal and external debt of the GDR were regulated in Arts.23, 24, 26(6) and 27(1) of the Unification Treaty. The FRG took over all the assets and debts of the GDR (including debts towards private persons). Art.24 specifically empowered the Minister of Finance of the FRG to regulate the issue of the debts of the GDR existing before 1 July 1990 which were owed to the FRG and third States. In fact the scope of that regulation was limited to servicing of the debts resulting out of the foreign trade monopoly, and connected with the exercise of State power by the GDR agencies. Special regulations concerned the obligations of the GDR towards other member States of the Comecon, which were to be negotiated directly between the States concerned.<sup>16</sup> The FRG agreed also to take over the debts of the GDR railways and post.

The regulation of the foreign debt of the GDR was relatively simple, as the FRG was the most important creditor of East Germany. On the other hand, the FRG refused to accept any financial obligations resulting out of the foreign debt of the GDR. In particular, there was an interesting dispute between the FRG and the UN Secretary-General concerning the payment of overdue contributions and shares of maintenance costs of the peacekeeping operations of the United Nations (UNIFIL, UNDOF). In the former matter, there was an exchange of notes between the UN Secretary-General and the FRG (November 1990-February 1991). The Secretary-General stated that, according to international law, the incorporation of the GDR by the FRG should result in the taking over of the financial obligations of the GDR by the Federal Government. The German Government presented the opinion that the GDR ceased to exist as a subject of international law on 3 October 1990, and on that day all of its financial obligations expired. The succession did not mean that the FRG succeeded also to the debts of the GDR or that they were automatically recognized by the FRG.<sup>17</sup> Finally, the German Government agreed to pay the contributions, but it emphasized the *ex gratia* nature of the payments. In the latter matter, the FRG stated (by the note of 21 August 1992) that although it did not recognize the obligation to pay the East German share of operations, it would make a voluntary payment in the required amount.<sup>18</sup>

### 3.3. Czechoslovakia

The apportionment of the property of the former Czech and Slovak Federative Republic (C-SFR) took place even before the dismemberment of the federation, on the basis of the constitutional law of 13 November 1992 on the apportionment of property and its transfer to the Czech and Slovak Republics. The property comprised all immovable and movable property including financial rights, interests, and obligations, belonging to the State or State organizations, situated both in the territory of Czechoslovakia and abroad. The rules governing apportionment were formulated in Art.3. According to the principle of territoriality, the respective republics acquired the immovable property situated in their territories, as well as a part of the movable property connected with the activities of the State in those territories. In all questions not resolved in accordance with the territorial rule, the property was to be divided in proportion to the populations of the two republics (2:1 in favor of the Czech Republic). Most of the financial assets of the C-SFR were divided in this way, in particular the assets in the IBRD and other financial institutions. All disputes concerning the implementation of the agreement were to be resolved by a special commission consisting of the representatives nominated by both countries (Art.9 of the agreement).

The solution adopted in the federal constitutional law was confirmed by Art.4 of the Czech constitutional law of 15 December 1992. According to that provision, all rights and duties defined in the said federal law passed to the Czech Republic.

In December 1992 competent agencies of the IMF and WB accepted the agreement between the Czech Republic and Slovakia, and divided the actives and passives in the proportion of 2:1 in favor of the Czech Republic. A similar solution was applied in respect of Czechoslovak funds in the EBRD.

### 3.4. Soviet Union

The first step in resolving the issue of succession to the property and foreign debt of the USSR was conclusion of a memorandum of 28 October 1991 on the foreign debt. The signatories to the memorandum (Armenia, Belarus,

<sup>16</sup> After having calculated all the accounts, the FRG directed to all the Comecon States financial claims amounting to 27.6 Billion DM. The system of accounts was complicated, but finally the GDR proved a credit balance in relations with all partners. In principle those claims were accepted. Cf. M.Silagi, *Staatsuntergang und Staatennachfolge mit besonderer Berücksichtigung des Untergangs der DDR*, Frankfurt/M. 1996, p.313, referring to the information obtained from the German Bundestag.

<sup>17</sup> Council of Europe. Pilot Project on Succession of States, doc. D/62.

<sup>18</sup> *Ibidem*, doc. D/83.

Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan) declared themselves successors to the USSR and expressed the will to assume, *jointly and severally*, liability for the debts existing on the day of the conclusion of the memorandum and recognized by the Soviet Government or any other competent Soviet State agency. Subsequently, on 4 December 1991, an agreement on the succession of States in respect of State property and debts of the USSR was signed.<sup>19</sup> The parties to the agreement were the 15 successor States on one hand, and the USSR (still existing at that time), on the other hand. Finally, the agreement was concluded among eight States, with Ukraine and Georgia replacing Moldova and Turkmenistan as parties. The preamble referred to the Vienna Convention of 1978. Art.3 obligated the parties to pay a proportion of the foreign debt of the USSR, although a possibility to conclude further agreements concerning joint and several liability of specific debtors was not excluded. The parties guaranteed mutually respective shares in the assets of the former USSR. Art.4 established the criteria for apportionment of the property and liabilities of the USSR: based on the contributions of respective republics to the creation of GNP, participation in the export and import of goods, and population. The agreed proportions were: Russia 61.34%; Ukraine 16.37%; Belarus 4.13%; Kazakhstan 3.86%; Uzbekistan 3.27%; Azerbaijan 1.64%; Georgia 1.62%; Lithuania 1.41%; Moldova 1.29%; Latvia 1.14%; Kyrgyzstan 0.95%; Armenia 0.86%; Tajikistan 0.82%; Turkmenistan 0.70%; Estonia 0.62%. The foreign debt was to be serviced by the Soviet State Bank, *Vneshekonbank*, and all parties were to effect their payments through accounts with that bank. The agreement never became effective, as Ukraine, Georgia and the Baltic States did not adhere to it.

Several instruments concerned the apportionment of the post-Soviet property abroad. According to the presidential order of 18 December 1991, the possession and administration of that property was assumed by Russia. In the first period following the dissolution of the USSR, this decree was not questioned by any other post-Soviet State. In March 1992, the President of Ukraine, A.Kravtchuk, proposed apportionment of the property abroad in accordance with the input of the respective republics in its creation. Specific claims by Ukraine were discharged on the basis of a bilateral agreement of 23 June 1992 on the further development of bilateral relations; Russia transferred to Ukraine a part of the former Soviet property abroad.

General agreement on the apportionment of the property was concluded in Moscow on 6 July 1992. It covered all the immovable and movable assets of the USSR abroad, all foreign investments of the USSR abroad, as well as the property of the *Vneshekonbank*, the International Bank for Economic Cooperation, the International Investment Bank, Soviet banks abroad, and the Ministry of Finance. The agreement was to be implemented by a special committee for state succession. The proportions were established according to the same pattern as applied in the agreement of 4 December 1991 mentioned above.

Subsequently, the Russian Government concluded a series of bilateral agreements with the other successor States, aiming at the acquisition by Russia of the whole of the property of the former USSR. Two kinds of agreements were concluded. One type provided for a so-called Option Zero, whereby Russia a the former Soviet property owned by the respective successor States, and agreed to discharge the corresponding share of State debt. Agreements of this kind were concluded with Turkmenistan (31 July 1992), Belarus (20 July 1992), Kyrgyzstan (25 August 1992), Armenia (7 September 1993), and Ukraine (9 December 1994; however, due to the absence of ratification by Ukraine of the relevant agreement, the question of the distribution of immovable property abroad of the former USSR is still an open issue; in several countries this property is frozen in the legal sense due to the absence of agreement among the Russian Federation and all successor States to the former USSR). On the other hand, other agreements were of a temporary nature, provided for the transfer of the property concerned under Russian administration, and for the conclusion of final agreements on the transfer of property in the future. Agreements of this kind were concluded with Tajikistan, Kazakhstan, and Moldova (all on 13 November 1992). It should be stressed that Russia led a special policy towards the property of the former USSR. On 8 February 1993 the President of Russia passed a decree (i.e. unilateral domestic act) declaring the takeover of all Soviet property abroad by Russia as identical with the USSR. The decree declared also an intention to conclude bilateral agreements regulating all the matters connected with the succession.

A treaty concluded during the Summit of the CIS in Bishkek on 9 October 1992 recognized the rights of respective successor States to the assets of the former USSR situated in their respective territories. In fact, the agreement sanctioned the *status quo* existing after the August putsch in Moscow [1991]. Some of the republics, including Russia, attempted to take control of the federal property in their territory, including agencies and assets of the Soviet State Bank. Russia started to exercise control over the exportation of oil and exploitation of gold

<sup>19</sup> Unpublished. Commented by Th.Schweisfurth, *Das Recht der Staatensukzession*, *Berichte der DtGVR* 35(1995), p.147, and A.Reinisch, G.Hafner, *Staatensukzession und Schuldübernahme beim „Zerfall“ der Sowjetunion*, Wien 1995, p.8 ff.

and diamonds.<sup>20</sup> The treaty suspended the activities of the prior committee for the apportionment of State property. It was not signed by Ukraine and Turkmenistan; however, the former subsequently concluded a number of bilateral agreements with the other successor States confirming the Bishkek regulations.

The movable property was apportioned on the basis of a number of bilateral agreements concluded in the framework of the CIS. The apportionment of rolling stock and railway equipment (of general and special use) took place by an agreement of 22 January 1993 according to the established percentage, and taking into account the stocks exploited by the respective new States' railways after 1 March 1992. Aeroflot planes were passed to the new States in accordance with the place of registration. Finally, an agreement of 16 March 1994 provided for the apportionment of fishing vessels in the way of consultations and negotiations between the parties concerned; however, there is no accessible information concerning any formal agreement in that respect.

On 6 July 1992 an agreement on succession in respect to archives was concluded. The integrity and territoriality of the archives were confirmed. Some time earlier, on 14 February 1992, the CIS States signed another agreement on the return of cultural and artistic objects to their places of origin.<sup>21</sup> Although that agreement referred to the principles adopted in the 1970 UNESCO Convention on the ban on illegal importation, exportation and transfer of cultural goods, it did not accept certain important regulations, such as the requirement of conformity of return with domestic legislation of the respective States, and defining of the value of the objects (works of art) in the place of their storage. The agreement defined neither the time nor procedure of return. It established only a common committee whose task was to specify the object of the agreement.

Taking into account possible difficulties for the Russian space research project, arising out of the fact that the only Soviet space center had been constructed in Kazakhstan, the two States concerned concluded several agreements on the leasing of Baikonur. The most important and detailed one, of 28 March 1994, provided for the use by Russia of the center for 20 years with a possible option for another 10 years. Costs of exploitation were to be deducted from the Kazakh debt owed to Russia. Immovable and movable property established before 1991 was to belong to Kazakhstan, while any property constructed since that time was to belong to an investor.

There were special problems connected with the Soviet military assets. Special solutions concerning the nuclear forces were dealt with in the Report on the succession in respect of treaties. Conventional forces were divided into armed forces of the respective States, and CIS strategic forces under common command (agreement of 14 February 1992). The Declaration by the Heads of States of the CIS of the same date recognized a right of the respective States to military equipment in their territories, and also sought co-financing of the strategic forces according to shares agreed. Multilateral agreements were completed by bilateral agreements, such as the treaty of 11 January 1992 on conventional forces in Ukraine, and the treaty of 15 May 1992 on the rights of Ukraine to a portion of the tanks and combat aircrafts of the former Soviet Army. Problems of immovable military property in the respective States were resolved also by bilateral agreements (such as treaties on a withdrawal of the armed forces from Latvia and Estonia, of 30 April and 26 July 1994, respectively; and an agreement of 25 May 1993 on military cooperation between Russia and Tajikistan). In some cases Russia attempted to obtain compensation for the property left in the territory of another successor State (e.g. Georgia), but such attempts were rejected as contrary to international law.<sup>22</sup>

The dispute between Russia and Ukraine concerning the apportionment of the Black Sea Fleet is generally known.<sup>23</sup> It became important in connection with territorial issues, in particular Russian claims and separatist movements in the Crimea.<sup>24</sup> The issue in dispute was whether the Black Sea Fleet should belong to the strategic forces of the CIS, and whether it should remain the property of one State (Russia) or should be divided among several States (in that case, Russia and Ukraine). Two agreements signed at Dagomys in June 1992 and Yalta on 3 August 1992, respectively, provided for a transitional period of double jurisdiction, involving common use, recruitment of troops, and an oath taken by the State of nationality of the soldiers. A subsequent agreement of 15 April 1994 provided for the apportionment of the fleet and transfer of 15-20% of vessels and other equipment to Ukraine; it provided also for a right of Russia to maintain a military (naval) base on Ukrainian territory. Finally, on 9 June 1995, another agreement concluded in Sochi guaranteed to Ukraine the right to receive 18.3% of the

<sup>20</sup> Cf. N.Dronova, *The Division of State Property in Case of State Succession in the former Soviet Union*, a study prepared in the framework of the Research Center of the Hague Academy of International Law (1996), at 16.

<sup>21</sup> Critically on that agreement V.V.Pustogarov, *Mezhdunarodno-pravovoi status Sodruzhestva Nezavisimyykh Gosudarstv*, GPr 2/1993, p.35, and M.M.Boguslavsky, *Sovremennye voprosy vozvrashcheniya kulturnykh tsennostey v stranu ikh proiskhozhdeniya*, ibidem 11/1993, p.129.

<sup>22</sup> Cf. Th.Schweisfurth, *Das Recht ...*, p.159.

<sup>23</sup> N.Dronova, *op.cit.*, p.27; Th.Schweisfurth, *op.cit.*, p.157; K.Butterworth, *Successor States – Property Rights – Russia and Ukraine Agree to Share Control of the Former Soviet Union's Black Sea Fleet*, GaJILCL 22(1992), p.659 ff.

<sup>24</sup> R.Yakemtchouk, *Les conflits de territoire et de frontière dans les Etats de l'ex-URSS*, AFDI 39(1993), pp.398-408.

vessels and 50% of other material. Both navies (Russian and Ukrainian) were to be stationed in separate bases. The agreement was never implemented, as difficulties with the evaluation of ships by experts of both parties occurred. Beginning from 1996, Georgia also claimed a share of the Black Sea Fleet, as a part of it was stationed in Georgian harbors before 1991. Final agreement was reached in 1997. The ships were apportioned between Russia and Ukraine, and Russia retained the right to use the naval base in Sevastopol for the next 20 years.

The solutions reported concerned primarily the ex-Soviet State property. The takeover of the property was, however, followed by the transfer of liabilities for State debts of the former USSR. As that was done by an agreement between the successor States, and the Vienna Convention of 1978 provides for primacy of the devolution agreement, the solution applied could not constitute a basis for an evaluation of the form of succession (series of secessions with the identity of Russia with the USSR preserved as opposed to dissolution).<sup>25</sup>

Nowadays, the problem of a typology of the post-Soviet succession has been resolved in favor of the identity of Russia with the USSR. The steps undertaken by Russia in respect of the post-Soviet debt seem to confirm such a stance. First of all, Russia became member of the IMF as of 1 July 1992, which played an important role in consolidation of the debt. The adhesion was followed by other successor States. After having concluded first agreements on the assumption of a portion of the debt, at the meeting of the Paris Club on 2 April 1993, Russia recognized a responsibility to service the ex-Soviet State debt. It was interesting that at the beginning the Club had insisted upon Ukraine accepting joint and several responsibility for the debt; that position was, however, abandoned in the course of 1992. Subsequently the Russian declaration was acknowledged by the Club, which stated that the agreement of 4 December 1992 on the apportionment of assets and liabilities of the ex-USSR was in fact inoperative. Under those circumstances, the problem was to be resolved by concluding bilateral agreements between the States concerned. The creditors undertook not to present any claims against those successor States which concluded bilateral agreements on the transfer of debts with Russia.<sup>26</sup> The solution adopted amounted to an acceptance of the status of Russia as a unique subject of assets and liabilities of the former USSR abroad.<sup>27</sup>

Another solution was elaborated by the EBRD, the only international financial institution of which the USSR had previously been a member. The USSR had a right to obtain 60,000 shares of the Bank, payment for which was to have been made in five consecutive installments. On dissolution of the USSR, only the first installment had been paid. The governing body of the Bank recognized the right of all of the successor States to become members of the Bank. It also denied the right of Russia to the said shares, stating that the aggregate of the shares owned by Russia and the successor States should not exceed the quota allocated to the USSR. The first installment was apportioned among all the States concerned.<sup>28</sup>

Another interesting topic is the succession of the Baltic States in respect to assets and liabilities of the former USSR. In general, Lithuania, Latvia and Estonia rejected any liens with the USSR, consistent with their thesis of an illegal annexation by the USSR in 1940. Those States rejected any participation in the payment of the portion of Soviet debt.<sup>29</sup> On the other hand, they did not hesitate to take over the post-Soviet property situated in their territories. Moreover, in the agreements on the withdrawal of the Soviet armed forces, they reserved a right to retain military equipment and materials without compensation.<sup>30</sup> The Baltic States also took steps to assert property rights in respect of their pre-war assets abroad which had been taken over by the USSR after the annexation of 1940, as well as to reinstate their rights to other prewar property in third States. At least in some instances those efforts succeeded. By the decision of the Berlin court of 23 September 1991 Estonia was granted rights to a sequestered post-WWII building of the former Estonian embassy in Germany.<sup>31</sup> Similarly, the British Government issued on 10 December 1990 an executive certificate stating that the United Kingdom had never recognized the annexation of the Baltic States by the USSR, so it could not recognize any Soviet rights to the immovable property of those States situated in the territory of the United Kingdom. After the resuscitation of

<sup>25</sup> See a dilemma discussed in that context by A.Reinisch, G.Hafner, *Staatensukzession*, op.cit., at 96-99.

<sup>26</sup> H.Beemelmans, *Die Staatennachfolge* ..., p.89.

<sup>27</sup> On 18 September 1997 Russia became a member of the Paris Club, which should have enabled her to recoup debts owed to the USSR by third States.

<sup>28</sup> A.Gioia, *State Succession*, op.cit., at 35.

<sup>29</sup> Cf. R.Mullerson, *The Continuity and Succession of States. By Reference to the former USSR and Yugoslavia*, ICLQ 42(1993), at 483.

<sup>30</sup> Agreements with Latvia of 30 April 1994, and Estonia of 26 July 1994; cf. Th.Schweisfurth, *Das Recht ...* op.cit., p.159. The agreement with Latvia provided one exception: Russia retained a right to operate a Scrunda radar installation until 31 August 1998; it was subsequently dismantled and taken to Russia.

<sup>31</sup> Pilot Project, op.cit., doc. D/52.

Estonia, the pre-war property should be returned to a legitimate Estonian government.<sup>32</sup> France decided to return to Estonia between two and three tons of gold deposited between 1932 and 1936; nearly 2.5 tons of gold was returned to Lithuania. The United Kingdom and the United States also decided to return gold deposits, and Sweden agreed to pay an equivalent of the gold deposited by the Baltic States after the annexation by the USSR, and subsequently transferred to the Soviet government.

### Theoretical Issues of State Succession

Władysław Czapliński and Marcelo G Kohen

1. Notions of identity, continuity, and succession of States are of great importance for the stability and safety of international relations. In fact they are all interwoven. State succession was defined in international instruments as "the replacement of one State by another in the responsibility for the international relations of the territory".<sup>33</sup> On the contrary, the concepts of identity and continuity of States were never defined in authoritative texts. It can be asserted that the notion of identity comes into play if we compare the same entity at different moments, whereas the notion of continuity refers to the idea that the State continues to exist without any interruption over a certain period of time, irrespective of changes which have occurred with regard to its government, population or territory.<sup>34</sup>

2. A presumption of the continuity of the State seems to be of fundamental importance for the legal regime governing the international personality of States.<sup>35</sup> According to this presumption, a State continues to exist as a subject of international law as long as it has not been definitively established that it has ceased to exist. At the most, possible modifications of the structure or the regime of the State can be exclusively considered as a change of government. This presumption also reflects an orientation towards the protection of States' rights and their existence. Cases in which the continuity of the legal personality of a given State arise can exclusively involve the given State itself, or can also involve other States. The former are the situations of changes of regime within the State. The latter include cases of creation of new States through the separation of parts of the territory of an existing State and transfer of parts of the territory of one State to another State.

#### Fundamental theoretical problems of State succession

3. There is general acceptance of the definition of State succession referred to above. The reference to the succession to the "responsibility of the international relations to the territory," and not to sovereignty, can be explained by the fact that State succession includes situations in which there is no change in sovereignty. This is particularly the case in the situation of the end of protectorates. There have also been theoretical discussions whether "succession" to sovereignty is possible. On one view, sovereignty is always original. Hence, no succession is possible and what is called "succession" is in reality characterized by the extinction of rights and obligations of one subject of international law (the predecessor), and the creation of corresponding rights and obligations of another subject of international law (the successor). Another view is that there is no contradiction between the notions of sovereignty and international personality on the one hand, and the possibility of transfer of rights and obligations, on the other. The current accepted definition of State succession avoids this kind of abstract discussion.

4. The two Vienna Conventions on State succession distinguished four basic types of succession:

- 1). Cession, that is, the transfer of part of the territory of one State to another State, as a traditional form of succession;
- 2). Succession based upon separation of a part of the State's territory, i.e., cases of secession/devolution or dismemberment/disintegration of the State;
- 3). Succession based upon a unification of two or more existing States; and
- 4). Succession in the context of decolonization ("newly independent States").

<sup>32</sup> Pilot Project, op.cit., doc. UK/56.

<sup>33</sup> See Art.2 of the two Vienna Conventions on the Succession of States of 1978 and 1983, and Art. 2 of the Articles on nationality of natural persons in relation to the Succession of States adopted by the International Law Commission in 1999. This definition was also followed by the Arbitral Award in the *Guinea-Bissau/Senegal* case of 31 July 1989 (ILR 83, p. 1) and Opinion No.1 of the Badinter Commission of 29 November 1991 (ILM 1992, p. 1494). Cf. also B.Stern, Rapport préliminaire sur la succession d'Etats en matière des traités, ILA Helsinki Conference 1996.

<sup>34</sup> Cf. K. Marek, *Identity and Continuity of States in Public International Law*. 2e éd. Genève, Droz, 1968, 619 p.

<sup>35</sup> Cf. J.Crawford, *The Criteria for Statehood in International Law*, BYBIL 48(1975-1976), at 139.

5. The classification adopted by the Vienna Conferences does not fully correspond with international practice.<sup>36</sup> Moreover, the 1978 Vienna Convention does not even distinguish between separation and unification, providing for the same rules in both cases.<sup>37</sup> It also departs from what the International Law Commission had proposed in 1972, distinguishing between secession and dissolution.<sup>38</sup> Indeed, international practice draws a clear distinction between secession and dismemberment of the State, as well as between unification of States and incorporation. It seems useful, therefore, to establish the criteria governing the specific types of State succession, and in particular, to discuss the factors decisive for the evaluation of identity, continuity and succession of States.

#### Premises of termination of international legal personality

6. General rules concerning the termination of international legal personality have been elaborated through international practice and subsequently taken into account by the codification conferences of 1978 and 1983. The premises proposed concern both factual circumstances influencing the continuity of the State, and the legal effects of particular legal acts. However, even if the said premises and criteria seem clear, their application in practice, and consequently a legal evaluation of facts, is often complicated. Examples are the secession of Belgium from the Netherlands in 1830; the creation of the Kingdom of the Serbs, Croats and Slovenes after the First World War; the status of Germany between 1945 and 1949; the division of British India into India and Pakistan in 1947; and more recently, the disintegration of the USSR and Yugoslavia.

7. Amongst all types of State succession, only the transfer of part of the territory of a State, secession and the creation of a newly independent State do not result in the termination of the international legal personality of the predecessor State. They are considered cases of "partial" succession, in the sense that the situation of the predecessor State is not otherwise affected. The remaining cases of succession can be considered situations of "universal" succession, in the sense that they are connected with the disappearance of the predecessor State.

8. Dismemberment of the State involves the disappearance of the predecessor State and its replacement by two or more new States. However, it occurs in practice that certain situations are treated as dismemberment, although some successor States are treated as identical with the predecessor State. This paradox has appeared in a number of cases. After the dismemberment of the Austro-Hungarian Monarchy, Hungary was recognized as identical with the former Kingdom of Hungary. At the time of the conclusion of the State Treaty of Saint Germain, the Allied Powers considered Austria to be identical to Austria-Hungary, a view that was not shared by Austria. Consequently, this stance was subsequently modified. The other parts of the Monarchy separated and became parts of the national States of Poland, Czechoslovakia, and Yugoslavia. Similarly, the Republic of Turkey was recognized as identical with the former Ottoman Empire, notwithstanding the deep territorial changes of 1856, 1878 and 1923. It must be noted that the identity and continuity of the Colonial Powers was never questioned after decolonization. According to a position constantly followed by the international community, without regard to the solutions adopted in domestic legal systems of the Colonial Powers, "the territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it,"<sup>39</sup> and therefore a colony could not separate from the metropolis in any form of secession. Taking into account the practice followed in the cases of disintegration of the USSR and Yugoslavia, it can be said that the former has been considered to be a series of secessions resulting in the preservation of the identity of Russia with the former USSR, while the latter has been seen as a case of dissolution, in which all involved States were considered to be new, and therefore successor, States.

9. Unification of States constitutes another event breaking the continuity of the State. The contemporary example of a case of unification of States is the case of Yemen. It is clear that the creation of a supranational international organization, e.g. the European Community/European Union, does not amount to a situation of unification of States. In dubious cases, the test of the scope of international legal personality of the new subject, as well as of the entities concerned, should apply.

10. The break in State continuity will take place also in the case of incorporation of one State by another State. It must be remembered that forcible annexation is prohibited in contemporary international law, and consequently that is not the situation envisaged here. The same goes for forcible cession. Since acquisition of territory requires a valid title, in cases of the breach of State continuity as a result of the illegal use of force, the concept of "resuscitated States" has been proposed. It has been applied to Ethiopia (lack of continuity in 1936-1945),

<sup>36</sup> R.Y.Jennings, A.Watts, *Oppenheim's International Law*, vol.I, Harlow 1992, at 210; G.Dahm, J.Delbrück, R.Wolfrum, *Völkerrecht*, vol.I/1 [1989], pp.158ff; U.Fastenrath, *Das Recht der Staatsensukzession*, *Berichte DtGVR* 35(1995), at 14.

<sup>37</sup> See Art. 34 of the 1978 Vienna Convention.

<sup>38</sup> Draft articles 27 and 28. *Yearbook of the International Law Commission*, 1972, vol. II, pp. 292-298.

<sup>39</sup> UNGA Resolution 2625 (XXV), 25 October 1970.

Czechoslovakia (1938-1945), and Albania (1941-1944). The same position has recently been taken by the three Baltic States (with respect to the period of the Soviet domination 1940-1990/91). Another way to approach this situation is to refer to the "identity" of the legal personality of the State with that existing before the period of illegal disappearance. The cases of incorporation encompass inclusion of: the Ionian Islands to Greece in 1863-1864; Texas and Hawaii to the United States (1848 and 1898, respectively); and some Italian States to the Kingdom of Sardinia in the 1860s. The evaluation of some other cases is disputable, particularly the occupation of Korea by Japan in 1910. As to recent events, the "reunification" of Germany constitutes an example of incorporation. The solutions adopted in this case were not those of "unification" envisaged by the 1978 and 1983 Vienna Conventions, since the FRG continued its existence and legal personality after reunification, while the GDR disappeared.

11. There is an interesting discussion in the Polish legal writing concerning the international legal situation of Poland after the First World War. Some authors maintain that Poland, which gained independence in 1918, simply continued the statehood of the *Res Publica* suspended in 1795 by the third partition among Prussia, Russia and Austria, while others present the view that the said partition resulted in the termination of Polish statehood, so that the Polish Republic created in 1918 was a new State. Taking into account the matters stressed above, the major political changes which occurred in Poland after 1989 did not amount to the creation of a new State under international law.

12. The discussion presented above shows that the evaluation of factual situations involving the break of State continuity is extremely difficult. In practice, the position of the international community depends upon recognition, i.e. a purely political decision by third States. This analysis omits reference to two – purely hypothetical – situations resulting in the total loss of territory or population. The first concerns natural disasters (like flood or earthquake) making an island State disappear. The second concerns theoretically possible cases of epidemic disease, explosion of a powerful neutron bomb, etc. In this regard, the view was presented that the resettlement of the total population of a State did not result in a break in the continuity of the State (the case of the identity of the Boer Republic after the Big Trek in 1835).<sup>40</sup>

13. The situations presented above show a direct link between the termination of the existence of the State and the disappearance of one of the three constitutive elements of statehood under international law. H. Kelsen and J. Kunz followed such an approach.<sup>41</sup> However, some other authors<sup>42</sup> are of the view that the identity and continuity of the State is preserved if at least one of the three elements remains unchanged; the expression "unchanged" being interpreted in a flexible way. Yet another view is that reference to the so-called "constitutive elements" of the State does not assist in understanding the problem of the existence, continuity or disappearance of the legal personality of the State. To support this view, reference is made to situations in which similar changes in one or more of the "constitutive elements" have led to completely different legal results as regards the existence or disappearance of States.<sup>43</sup> Equally, the disappearance of the State government or its lack of effectiveness gives rise to other doctrinal problems, such as the notion of the "failed State" (the case of Somalia has been typical). In such situations, additional tests should be adopted in order to evaluate the international legal situation of the State in question.

#### Events that do not influence the identity and continuity of States

14. A number of uncontroversial factors which do not have any direct impact upon the position of the State under international law can be mentioned. They include the change of the location of the capital of the State or the change of the name of the State.<sup>44</sup> As stated above, changes of regime (including unconstitutional changes), partial territorial or demographical changes, illegal foreign occupation, or attempts at annexation, do not produce any change in the identity or continuity of the State.

15. Although the territorial element is crucial in the law of State succession - something which can easily be ascertained by the mere definition of State succession - there is generally universal agreement that **territorial**

<sup>40</sup> J.H.W. Verzijl, *International Law in Historical Perspective*, vol.II, Leiden 1967, at 127.

<sup>41</sup> H. Kelsen, *Principles of International Law*, New York 1952, p.262; J. Kunz, *Identity of States under International Law*, [in:] *The Changing Law of Nations*, Toledo Ohio 1964, at 288.

<sup>42</sup> Like e.g. W.Fiedler, *Staats- und völkerrechtliche Aspekte des Staatsuntergangs*, „*Zeitschrift für Politik*“ 1973, at 171.

<sup>43</sup> See M.G. Kohen, "La Création d'Etats en droit international contemporain", *Bancaja Euromediterranean Courses of International Law*, 6 (2002), pp. 543-636, particularly at 557 and 629-631.

<sup>44</sup> Although the name of the State, in certain circumstances, can be of importance for the evaluation of the position of the State concerned with regard to its own history and identity. See S. Jascheck, *Zum Namensrecht der Staaten*. Heisst es Bundesrepublik oder Deutschland?, *Vereinte Nationen* 1977, p.133ff, and H. Rumpf, *Betrachtungen über Staatsnamen*, [in:] *Miscellanea in Honour of D. Constantopoulos*, Thessaloniki 1977, p.187 ff.

**changes** themselves do not influence the State identity.<sup>45</sup> According to some authors, however, there are circumstances that could lead to the succession of States. Neither the loss of large territories by Prussia on the basis of the treaty of Tilsit and by Turkey after the peace treaty of Lausanne, nor the important increase of the territory of the Kingdom of Sardinia in the process of the unification of Italy, led to the loss of identity of the States concerned. On the other hand, no one could argue that the Free City of Cracow (Rzeczpospolita Krakowska) in 1815-1848 was identical with the former Kingdom of Poland (in fact, the latter disappeared in 1795). The loss of the nucleus by the State (i.e. the part of the State of crucial importance for its identity, politics and economy) could also put the position of the State in question. One Committee member suggested that an important loss of territory could result in the dissolution of the State, if the remaining territory were insufficient to fulfill the functions of the State. However, the international community evaluated in a different way territorial changes (combined with some other issues) relating to the disintegration of the USSR and Yugoslavia, even if the RFSRR and Serbia exhibited certain factual similarities with the respective federal States.

16. As territorial changes do not influence the identity and continuity of the State, the secession of the part of the State territory constitutes a "partial" succession. The seceding region becomes a separate State or part of another State, and the predecessor State preserves its identity within the limited territory. There is a doctrinal dispute as to the legality of secession and alleged right to secession. The classical view is that international law remains rather neutral towards secession. According to this view, the creation of the State is a matter of fact which should not be evaluated from the point of view of legality, but on the basis that the new State is effective. International law simply takes into account the existence of the State and applies its consequences, only once the State begins to exist.<sup>46</sup> Opinion N° 1 of the Badinter Commission insists that the "creation of States is a matter of fact."<sup>47</sup> Other modern perspectives insist upon the requirement that the creation of a new entity invoking statehood must comply with the condition of legality, i.e. its creation must be done respecting the fundamental principles of international law.<sup>48</sup>

17. Changes concerning the **population of the State** are not important for the identity and continuity of the State. The changes can be due to natural growth, migration (including the resettlement of the part of population on the basis of international agreements) or other means.

18. Changes involving the **structure of the State** or its authority are considered by some to be of great importance for the evaluation of the situation. One view is that they can lead to the cessation of State continuity and identity, depending on the position adopted by the other members of the international community. It can also be argued, as seen above, that the modification of the structure of State administration and authority does not influence the international position of the State concerned. The change of government can, under certain circumstances, influence the position of the State in international relations, but it does not influence its legal personality.

19. The lack of State authority could lead (although not necessarily) to the termination of the existence of the State, but it does not generate State succession *per se*. The cases of Somalia, Sierra Leone, Lebanon and Bosnia-Herzegovina confirm this approach, in conformity with the presumption of continuity. It is clear that the changes of State authority in conformity with the domestic constitution do not impact the State's identity and continuity, neither does the change of the structure of the State from unitary to federal or other forms. Problems can arise in cases of unconstitutional changes (*coup d'Etat*, social revolution). The identity of States in cases of change of governments or regime was confirmed in numerous arbitral awards, including the most important *Tinoco* case.<sup>49</sup> The majority of authors confirmed also the identity of the USSR with the former Tsarist Russian Empire, the identity of the People's Republic of China with the Republic of China, as well as the continuity of European States formerly under communist regimes, once democracy was established within them.<sup>50</sup> However, certain

<sup>45</sup> J. Crawford, *The Creation of States* op.cit., p.404; D.P. O'Connell, *The Succession of States in Municipal Law and International Law*, vol.I, Cambridge 1967, p.8; K. Marek, *Identity and Continuity of States in Public International Law*, Geneva 1968, p.15; J.H.W. Verzijl, op.cit., vol.II, p.117; G. Fitzmaurice, *The General Principles of International Law*, RCADI 92(1957), p.91; *inter alia*, different way H. Bokor-Szegö, *Naissance et disparition des Etats dans le droit international contemporain*, Acta Iuridica 1983, No.3 /4, p.364.

<sup>46</sup> This is, amongst others, the Kelsenian perspective. See H. Kelsen, "La naissance de l'Etat et la formation de sa nationalité: les principes; leur application au cas de la Tchécoslovaquie", *Revue de droit international*, 3rd year, vol. 4, 1929, pp. 613-641, reprinted in Ch. Leben (ed.), *Hans Kelsen. Ecrits français de droit international*, Paris, P.U.F., 2001, p. 28.

<sup>47</sup> Loc. cit.

<sup>48</sup> See generally, M. G. Kohen (ed.), *Secession. International Law Perspectives*. Cambridge, Cambridge University Press, 2006, 510p.

<sup>49</sup> AJIL 18(1924), p.147.

<sup>50</sup> Polish authors consequently negated any influence of the socialist revolution upon the continuity and identity of States. Cf. e.g. L. Gelberg, *Powstanie Polskiej Ludowej. Problemy prawa międzynarodowego*, Warszawa 1970, at 124; R. Szafarz,

international legal writing during the Cold War – in particular by GDR and Soviet authors<sup>51</sup> – emphasized that the socialist revolution constituted such an important event in history that it led to the creation of a new type of statehood. Among Western authors, H. Kelsen was somehow eager to accept a certain importance of the social revolution upon the structure of the State.<sup>52</sup> He stressed certain links between the revolution and modification of the *Grundnorm* constituting the basis for the existence of the State. However, even in the case of the change of the *Grundnorm*, the identity of the State could be founded upon the identity of State territory and population. The dominant view in Western international legal doctrine was, however, that revolution does not modify the identity and continuity of the State.<sup>53</sup> Even communist regimes eventually recognized in general such reality in their international relations.

20. Military occupation (*occupatio bellica*) or declared annexation cannot breach the identity and continuity of the State. The use of force against the sovereignty and territorial integrity of another State is forbidden under Art.2 (4) of the UN Charter and no territorial changes can take place as a result of the use of force or the threat of the use of force (*cf.* the requirement of the conformity of succession with international law as formulated in both Vienna conventions on State Succession).<sup>54</sup> The Hague Regulation on Land Warfare of 1907 and Geneva Conventions on Humanitarian Law of 1949 impose important limitations on the freedom of the occupier to interfere in the domestic legal order of the occupied territories. It should be emphasized that the obligation of the States not to recognize territorial changes brought about by the illegal use of force or threat of use of force was introduced into international law from the 1930s. The discussion should include the Stimson Doctrine (proposed in 1932 as a reaction to the invasion of China by Japan), although it was not applied in a coherent way (e.g. annexation of Abyssinia by Italy in 1936 and of Austria by Germany in 1938; the Munich agreement of 1938; the unclear position of some States as to the incorporation of the Baltic States into the USSR). The illegality of territorial acquisitions resulting from the use of force is nowadays unquestionable under Art.2(4) of the UN Charter; this opinion is confirmed by Principle 1 of the Declaration on Principles of International Law of 1970, Art.5 (3) of the Resolution 3314(XXIX) on the Definition of Aggression, and Principle IV of the Final Act of the CSCE of 1975. Related practice of the UN Security Council encompasses, *inter alia*, the following resolutions: 242(1967) concerning Arab territories occupied by Israel; 301(1971) on Namibia; 662(1990) on Kuwait; and 757(1992) on the situation in Bosnia-Herzegovina. The ILC's Articles on State Responsibility confirm the general international practice. International legal writing is also unanimous as to the importance of non-recognition of illegal acquisition of territory.<sup>55</sup>

21. Finally, as noted above, membership of international or supranational organizations does not lead to the rupture of the existence of the State. E.g. Art.6(3) of the Treaty on European Union emphasizes that the Union respects the identity of the member States. The sovereignty of member States is therefore preserved, and the transfer of powers encompass certain (but not all) competences of the State.

#### Conclusion: Criteria of evaluation of the identity, continuity, and succession of States.

22. Some other additional criteria for evaluation of State identity, State continuity and State succession should be considered. K. Marek proposed the test of independence as a basic criterion.<sup>56</sup> Independence, however, is rather an essential characteristic of sovereignty and so is a result, rather than a constitutive element leading to the existence of the State. J. Crawford's view that the change of the international status of the State does not necessarily lead to succession better reflects international practice.<sup>57</sup> Another possible option would be national

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Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym, Warszawa 1982, at 35; J.Tyranowski, Sukcesja rządów a identyczność państw. Zagadnienia teoretyczne, PiP 35(1980), No.4, at 68; L. Antonowicz, Tożsamość państwa polskiego w prawie międzynarodowym, PiP 48(1993), No.10, at 9ff.

<sup>51</sup> See a review by N.V. Zakharova, O mezhdunarodnoi pravnosub'ektnosti gosudarstva pri sotsyalnoi revolutsii, SEMP 1960, p.157; L.A. Modzhoryan, Identichnost', nepreryvnost' i pravopremstvo subektov mezhdunarodnogo prava, SGP 1958, No.9, p.62; J. Kirsten, Einige Probleme der Staatennachfolge, Berlin 1962, p.57; W. Poeggel a.o., Staatennachfolge im Völkerrecht, Berlin 1986, at 36.

<sup>52</sup> Principles, op.cit., at 260.

<sup>53</sup> See recently M. Geistlinger, Revolution und Völkerrecht, Wien-Köln-Graz 1991, at 411, U. Fastenrath, Das recht der Staatennachfolge, Berichte der Deutschen Gesellschaft für Völkerrecht and authors quoted therein.

<sup>54</sup> Art.6 of the 1978 Convention reads as follows: *The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.*

<sup>55</sup> See R.Y. Jennings, The Acquisition of Territory in International Law, Manchester 1963, p.52 ff; J. Crawford, The Creation, op.cit., pp.120 ff; J. Dugard, Recognition and the United Nations, Cambridge 1987, p.24 ff; J. Verhoeven, La reconnaissance internationale dans la pratique contemporaine, Paris 1975, p.279 ff.

<sup>56</sup> K. Marek, op.cit., p.84.

<sup>57</sup> J. Crawford, The Creation, op.cit., at 406.

identity.<sup>58</sup> The concept of nation is uncertain, however, and it relates to sociological-ethnic-political elements rather than to law. One nation can establish more than one State, and – on the other hand – one State can be based upon more than one nation. Factors like ethno-historical identity may only play an ancillary role.

23. There was a divergence of views amongst the members of the Committee as to the final criteria for evaluation of State succession, identity and continuity. For some members, in practice, a test of recognition remains the only decisive criterion for the evaluation of State identity and continuity.<sup>59</sup> The only exception to that rule is the case of cession, or territorial changes between two existing States (partial succession). The position of the States directly involved (usually self-evaluation by the successors, and the position of the neighboring States) will be of special importance, and will usually be taken into account by the international community. However, this is not the general rule. The Austrian Supreme Court, in its judgment of 17 December 1996, stated that the FRY claimed to be identical with former Yugoslavia, whereas the international community did not confirm this stance. Reference was made to the UNSC Resolutions: 757(1992) and 777 (1992), as well as to Opinion No.10 of the Badinter Commission.<sup>60</sup> For other members of the Committee, it is neither for the international community nor for the successful secessionist States to impose the dissolution of an existing State. If there is a dispute as to the status of a State as continuator or as successor, the matter can be resolved through an objective legal analysis of all of the elements present.

24. Recognition as a test has some important disadvantages. It is political and ideological in nature, so that it is not fully objective. It depends on political interests of the subjects of international law, so it is not always undertaken on legal premises. Finally, some States have adopted the policy of recognizing new States only, and not governments. This policy has not, however, been applied consistently, and the criteria for establishing the reasons for changing the rules are unclear.

25. States criticizing the test of recognition consider that the situations of identity, continuity and succession of States are always subject to interpretation in the light of circumstances on the ground.<sup>61</sup>

26. A form of recognition of identity of a State is difficult to define. The recognition of its government could be one of the tests, as it situates the whole case within the framework of the change of governments and not within that of State succession. The application of all the international treaties (without exception), and in particular the continued participation in the works of international organizations, should also be taken into account. The latter is even of crucial importance, as there is no succession to membership of international organizations, and this is widely accepted in the theory and practice of international law.

### **Time Element in the Law of State Succession**

27. The (inter-) temporal problems remain another important theoretical issue connected with State succession. Several provisions of both Conventions on State Succession refer to the temporal application of law on State succession. It is therefore necessary in cases of succession to specify the day on which the responsibility for the international relations of the territory by the predecessor State is replaced by that of the successor State. The critical date can be established in a precise way by an international legal instrument, or it can be presumed. In the latter case, the acts of the successor State and those of the third parties (including acts of recognition) are of particular importance.

In certain situations there is no doubt as to the critical date. So, for example, the Unification Treaty between the FRG and the GDR stipulated that the *Laender* of the GDR would accede to the FRG on 3 October 1990. The Law on the Dissolution of the Czecho-Slovak State (adopted by the federal parliament on 25 November 1992) decided that the Federation would cease to exist on 31 December 1992, and on 1 January 1993 it would be replaced by two new states: Czech Republic and Slovakia. The evaluation of other cases can be more difficult. For instance, the date of the dissolution of Yugoslavia was established by Opinion No.11 of the Badinter Commission (of 16 July 1993). According to this Opinion, the critical date was the date of adoption of Opinion No.8 of the Badinter Commission stating that Yugoslavia was replaced by a number of new States that cannot claim their identity with the former SFRY. The dates of creation of new States were established differently for

<sup>58</sup> W. Fiedler, *Das Kontinuitätsproblem im Völkerrecht*, Frankfurt/M-München 1978, pp.78-83.

<sup>59</sup> Extensively on the topic see O. Ribbelink, *State Succession and the Recognition of States and Governments*, [in:] *State Practice Regarding State Succession and Issues of Recognition*. Council of Europe Pilot Project/Kluwer Law International 1999, pp.32 ff.; M. Skrk, *Recognition of States and its (non-)implication on State Succession: the Case of Successor States to the former Yugoslavia*, [in:] M. Mrak (ed.), *Succession of States*, 1999, p.

<sup>60</sup> *Republic of Croatia et al. v. Girocredit Bank AG der Sparkassen*, case 4 Ob 2304/96v, ILM 36(1997), p.1523 ff.

<sup>61</sup> Cf. the official position of the United Kingdom presented on 5 February 1992, in: O. Ribbelink, a.a., at 36.

specific States.<sup>62</sup> Establishing the date of succession with respect to the dissolution of USSR is even more difficult. The Declaration of Alma Ata stated that the Soviet Union ceased to exist on 21 December 1991, and that it was replaced by Russia (as identical with the former USSR) and the successor States.<sup>63</sup> However, two days later the Supreme Soviet adopted a declaration stating that the USSR ceased to exist in connection with the establishing of the Commonwealth of Independent States. This is disputable, as the CIS was not a state, so there is neither legal continuity nor succession. The dates of creation of (at least certain of) the post-Soviet States precede the dissolution of the USSR and usually refer to the dates of the proclamations of sovereignty and independence by the respective republics (Georgia: 9 April 1991; Ukraine: 24 August 1991; Kazakhstan: 16 December 1991). It is suggested that the date of proclamation of the Declaration of Alma Ata should be adopted as the critical date, as that instrument reflected the intention of the former republics to leave the USSR and commence independent existence.

Establishing the critical date of succession is not merely a theoretical issue. The Polish experience is relevant. The dispute concerning the former German property in Poland constitutes a good example. The Polish-German boundary treaty of 1990 did not specify the date of transfer of sovereignty. If it took place on the basis of the Potsdam Agreement, according to the Polish view supported by the references to previous arrangements in the 1990 Treaty itself, the confiscation of the German property was lawful (at least as to the powers of the Polish State). However, if that transfer took place on the day of the entry into force of the 1990 Treaty, Polish acts of expropriation would have been illegal. The judgment of the Polish Constitutional Court of 30 April 1996 (case 18/95) is another important example. In its decision, the Court decided that the transfer of sovereignty in respect of the former Eastern territories of Poland by the temporary government established by the Communist Party in cooperation with the Soviet occupational authorities (agreement of 23 July 1944) was invalid because of the lack of competence and illegitimacy of the said body. The judgment is extremely important for the evaluation of the legal and factual situation of the Polish population in the area in question; however, the Court did not repeat these conclusions in another important decision (the *Broniowski* case) concerning the similar problem of the property rights of people of Polish origin transferred from Lithuania, Belarus, and Ukraine to Poland after 1946. The latter case found its epilogue at the Strasbourg Court.

Vienna, 1 April 2006

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<sup>62</sup> In some instances the Badinter Commission lacked consequence. For example, the “old” Yugoslavia continued to exist for ca. two months after the creation of the new Yugoslavia, and both Yugoslav States should be regarded as identical within that period. The scope of rights and obligations of the two States under international law seems to be totally unclear. This demonstrates some of the practical difficulties connected with the time impact under international law of State succession, as well as ambushes of a dogmatic approach to international law in general.

<sup>63</sup> We put aside the question of the legal status of the Baltic States.