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STATE SUCCESSION IN RESPECT OF INTERNATIONAL RESPONSIBILITY

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INTRODUCTION

The recent decision of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, released February 3, 2015, contained no surprises regarding the decision on the merits. The judgment serves as an important pronouncement in favor of the argument that the responsibility of a State for wrongful acts might be triggered by succession, for example, the replacement of one State by another in its responsibility for the international relations of territory, in cases such as secession, dissolution, or unification of States. It also incurred debate on State succession in areas other than those codified in the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, in particular, succession as it relates to State responsibility.

The responsibility of States for internationally wrongful acts and the succession of States are two important areas of general international law. Some of the governing rules, which are largely customary in nature, have been codified by the U.N. International Law Commission (ILC). To date, however, State responsibility and State succession have not been studied as a unified topic by the ILC.

The ILC adopted the Articles on Responsibility of States for Internationally Wrongful Acts in 2001. However, the Commission did not address the situation where a State's succession occurs following the commission of a wrongful act.[1] This succession may occur by a responsible State or by an injured State. In other words,

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1. *See* Vienna Convention art. 39, Aug. 23, 1978, 1946 U.N.T.S. 3, 24 ("The provisions of the present Convention shall not prejudge any question that may arise in regard to

either the State that committed an internationally wrongful act, or the State that is victim of that act, which has been replaced by a successor State, could pursue succession.[2] In both cases, succession gives rise to complex legal relationships. In this regard, it is worth noting that in the 1998 Report on State Responsibility by the Special Rapporteur, James Crawford, said that widely accepted opinion held that a new State generally does not succeed to any State responsibility of a predecessor State.[3] However, the Commission's commentary to the 2001 Articles reads differently.[4] It says that "[i]n the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory."[5] This difference seems to reflect that the traditional theory of non-succession to State responsibility is not always applicable.

The ILC also touched on the issue of responsibility in the context of its work on State succession during the 1960s. In 1963, Professor Manfred Lachs, then-Chairman of the ILC Sub-Committee on Succession of States and Governments, proposed inclusion of succession with respect to responsibility for torts as a sub-topic to be examined in relation to the discussion of succession of States.[6] The inclusion of this issue inspired disagreement, which led the Commission to exclude the problem from the scope of the sub-topic.[7] Since that time, however, State practice and doctrinal views have developed further.

Traditionally, neither State practice nor doctrine provided a single answer to whether and under what circumstances a successor State may be responsible for an internationally wrongful act of its predecessor. In some cases of State practice, however, it has been possible to identify division or allocation of responsibility between successor States. This trend has been highlighted in recent prac-

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the effects of a succession of States in respect of a treaty from the international responsibility of a State . . . .").

2. *See* PATRICK DUMBERRY, STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY 4–5 (2007).

3. Int'l Law Comm'n, First Rep. on State Responsibility, 50th Sess., ¶ 282, U.N. Doc. A/CN.4/490/Add.5, ¶ 282 (July 22, 1998).

4. *See generally* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter ILC Commentaries].

5. *Id.* at 52, ¶ 3.

6. *See Rep. by Manfred Lachs, Chairman of the Sub-comm. on Succession of States and Gov'ts to the GAOR*, [1963] 2 Y.B. Int'l L. Comm'n 260–261, U.N. Doc. A/CN.4/160.

7. *Id.* at 298.

tice beginning in the 1990s, and may be reflected in decisions of the International Court of Justice from that period.[8]

This Article aims to demonstrate that the traditional view, according to which there is no succession in the field of State responsibility for internationally wrongful acts, no longer corresponds to the current status of international law. Beginning with a survey of the doctrinal views in Part I, this Article focuses on two main questions. First, addressed in Part II, whether there is a rule of international law in cases of State succession that excludes any transfer of responsibility (i.e. secondary obligation) to a successor State. Second, addressed in Part III, whether a successor State can present a claim of reparation on behalf of its nationals for damage suffered by their current nationals when they held the nationality of a predecessor State. Part IV offers perspectives on the codification of rules on State succession with respect to international responsibility.

I. Divergent Views of International Legal Scholarship

In the past, the doctrine of State succession generally denied the possibility of the transfer of responsibility to a successor State.[9] As a result, it is unsurprising that most international law textbooks do not address succession of international responsibility.[10] Where it has been included, the topic is usually only mentioned briefly and in passing.[11] Additionally, some authors only address cases of singular succession of States with respect to treaties and with respect

8. Gabcíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 68, ¶ 151 (Feb. 5).

9. *See, e.g.*, Pierre M. Eisemann & Martti Koskenniemi, State Succession: Codification Tested Against the Facts 193–94 (8th ed. 2000); Lauri Mälksoo, Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR 257 (2003); Krystyna Marek, Identity and Continuity of States in Public International Law 11, 189 (2d ed. 1968); D.P. O'Connell, State Succession in Municipal law and International Law 482 (1967); Arrigo Cavaglieri, *Règles Générales du Droit de la Paix*, 26 Recueil de l'Académie de droit international [RCADI] 340, 374, 378, 416 (1929) (Fr.); Mathew C.R. Craven, *The Problem of State Succession and the Identity of States Under International Law*, 9 Eur. J. Int'l L. 142, 149–50 (1998); Jiri Malenovský, *Problèmes Juridiques Liés à la Partition de la Tchécoslovaquie*, 39 Annuaire Français de Droit International [AFDI] 305, 334 (1993); Jean-Philippe Monnier, *La Sucession d'Etats en Matière de Responsabilité Internationale*, 8 AFDI 65, 68–69 (1962).

10. *See, e.g.*, Jean Combacau & Serge Sur, Droit International Public 430–42 (6th ed. 2004); International Law Anthology 189–96 (Anthony D'Amato ed., 1994) (including a section on state succession responsibilities); Oppenheim's International Law 208–18 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (including a few lines on state succession in relation to torts, in contrast to international responsibility).

11. *See, e.g.*, James Crawford, Brownlie's Principles of Public International Law 442 (8th ed. 2012); Patrick Daillier & Alain Pellet, Droit International Public

to State property, archives, and debts.[12] These subjects were codified in the Vienna Convention on Succession of States in Respect of Treaties (1978) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983).[13] This lack of inclusion or discussion demonstrates that the relationship between the succession of States and international responsibility remains largely neglected in international legal scholarship.

When addressing issues of State succession, most authors assert that there is no transfer of obligations arising from international responsibility to a successor State—the theory of non-succession.[14] Support for the theory of non-succession stems from various theoretical arguments.[15] One theory is based on an analogy of internal law—the theory of universal succession in private law—which has origins in Roman law.[16] It follows that there is an important exception for responsibility *ex delicto,* which is not transferable from a wrongdoer to a successor.[17] Other arguments point out that a State is generally only responsible for its own international wrongful acts and not for acts of other States.[18] Therefore, a successor State should not be held responsible for wrongful acts of its predecessor, which have different international legal personalities.[19] A final argument against the transfer of State responsibility draws from the "highly personal nature" of claims and obligations that arise for a State towards another State as a result of a breach of international law.[20]

None of these theories or private law analogies is a perfect fit, because they cannot discard a possible transfer of at least some obligations of States arising from international responsibility. As a

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555–56 (7th ed. 2002); PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 61 (8th ed. 2006).

12. *See, e.g.*, VÁCLAV MIKULKA, SUKCESE STÁTU [STATE SUCCESSION] (1987).

13. *See* Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 8, 1983, U.N. Doc. A/CONF.117/14 (1983), 22 I.L.M. 306.

14. *See, e.g.*, Cavaglieri, *supra* note 9; MAREK, *supra* note 9; EISEMANN & KOSKENNIEMI, *supra* note 9; Craven, *supra* note 9; Malenovský, *supra* note 9; MÄLKSOO, *supra* note 9; Monnier, *supra* note 9; O'CONNELL, *supra* note 9.

15. *See* DUMBERRY, *supra* note 2, at 38–40.

16. *See* Cavaglieri, *supra* note 9, at 374.

17. *See* H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 131–32, 283 (1927).

18. *See, e.g.*, CHARLES DE VISSCHER, THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC 210 (1953); DALLIER & PELLET, *supra* note 11, at 555.

19. Monnier, *supra* note 9, at 89.

20. *See* IGNAZ SEIDL HOHENVELDERN, MEZINÁRODNÍ PRÁVO VEREJNÉ [PUBLIC INTERNATIONAL LAW] 246–47 (9th ed. 1999).

rule, these theories and analogies do not take into consideration new developments and changes of the concept of State responsibility.[21] Nevertheless, the theory of non-succession has not been questioned for most of the 20th century.[22] Professor O'Connell wrote in 1967 that it has "been taken for granted that a successor State is not liable for the delicts of its predecessor."[23] However, in the past 20 years, the view has evolved and has become more nuanced and critical regarding the theory of non-succession, to the extent that they admit a possibility of succession at least in certain cases.[24] Some authors, who accept as a general principle the theory of non-succession to State responsibility, admit an exception exists in cases where a State has declared an intention to succeed the rights and obligations of its predecessor State.[25] In these cases, the State would be liable to provide reparations for damages caused by its predecessor.[26]

However, not all scholars who question the strict theory of non-succession assert the existence of a general rule on State succession.[27] They deny that current international law includes a norm excluding a possibility of any transfer of obligations arising from State responsibility.[28] In fact, they admit that responsibility under modern international law is not based on fault but rather on a more objective concept of an internationally wrongful act.[29] It is conceivable, therefore, that certain obligations, including legal

21. *See* Brigitte Stern, *La succession d'Etats*, 262 RECUEIL DE L'ACADÉMIE DE DROIT INTERNATIONAL [RCADI] 35, 174 (1996).

22. *See* O'CONNELL, *supra* note 9, at 482.

23. *Id.*

24. *See, e.g.*, DUMBERRY, *supra* note 2; Wladyslaw Czaplinshi, *State Succession and State Responsibility*, 28 CAN. Y.B. INT'L L. 339, 346, 356 (1990); Menno T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EUR. J. INT'L. L. 469, 483 (1996); Václav Mikulka, *State Succession and Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 291 (James Crawford et al. eds., 2010); D.P. O'Connell, *Recent Problems of State Succession in Relation to New States*, 130 RECUEIL DE L'ACADÉMIE DE DROIT INTERNATIONAL [RCADI] 95, 162 (1970); Brigitte Stern, *Responsabilité Internationale et Succession d'Etats*, *in* THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY 336 (Laurence Boisson de Chazournes & Vera Gowland-Debbas eds., 2001).

25. *See* PIERRE D'ARGENT, LES RÉPARATIONS DE GUERRE EN DROIT INTERNATIONAL PUBLIC 814 (2002); Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253, 256 (1993); Ineta Ziemele, *State Continuity, Succession and Responsibility: Reparations to the Baltic States and their Peoples?*, 3 BALTIC Y.B. INT'L L. 165, 176 (2003).

26. DUPUY, *supra* note 11, at 59.

27. *Id.*

28. *See* DUMBERRY, *supra* note 2, at 58.

29. Stern, *supra* note 24, at 335.

consequences of responsibility, such as reparation, would transfer to a successor State.[30]

This issue was addressed by a report of the International Law Association in 2008[31] and the Institute of International Law (Institut de Droit International, IDI) in 2013.[32] The Institute of International Law established a thematic commission, one of its sub-bodies, to deal with the State Succession in Matters of State Responsibility.[33] At the Tokyo Session in 2013, the IDI had before it the Provisional Report of the Special Rapporteur, Professor Marcelo G. Kohen, and a draft resolution on State Succession in Matters of State Responsibility, consisting of a Preamble and 14 Articles, which provide for the transfer of responsibility under certain circumstances.[34] The final resolution of the IDI, adopted at the Tallinn Session in 2015, was slightly amended to include a Preamble and 16 Articles.[35] The final resolution stressed the need for codification and further progressive development in this area.[36] One idea, which could provide useful guidance for possible codification by the International Law Commission, calls for flexibility to allow for the tailoring of different solutions to different situations.[37]

II. Developments in State Practice and Case Law

As explained above, both State practice and doctrine have been divided in an answer whether and in what circumstances a successor State may incur responsibility for an internationally wrongful act of its predecessor. However, some cases allow identification of allocation of responsibility between successor States.

30. *Id.* at 338.

31. Report of the 73rd Conference of the International Law Association, Aug. 17–21, 2008, Rio de Janeiro, Braz., *Aspects of the Law on State Succession,* Res. No. 3/2008.

32. *See* Report of the 14th Comm. Of the Institut de Droit International, 2013, Provisional Report of the Special Rapporteur, *State Succession in Matters of State Responsibility* [hereinafter Provisional Report].

33. Resolution of the 14th Comm. of the Institut de Droit International, Aug. 28, 2015, *State Succession in Matters of State Responsibility.*

34. *See* Provisional Report, *supra* note 32.

35. Resolution of the 14th Comm. of the Institut de Droit International, Aug. 28, 2015, *State Succession in Matters of State Responsibility* (final text).

36. *Id.* at 1 ("Convinced of the need for the codification and progressive development of the rules relating to succession of States in matters of international responsibility of States, as a means to ensure greater legal security in international relations.").

37. *Id.* ("Taking into account that different categories of succession of States and their particular circumstances may lead to different solutions.").

A. *Early Cases*

Unsurprisingly, early decisions of arbitral tribunals adopted a theory of non-succession, holding that a successor State had no responsibility for the international delicts of its predecessor.[38] In *Robert E. Brown Claim*, the claimant sought compensation for the refusal of local officials of the Boer Republics to issue licenses to mine a goldfield.[39] The arbitral tribunal held that Brown had acquired a property right and had been injured by a denial of justice, but that this delict responsibility did not succeed, or pass on, to Great Britain.[40] Similarly, in *Frederick Henry Redward Claim*, the Government of the Hawaiian Republic, which was subsequently annexed by the United States, had wrongfully imprisoned the claimants.[41] The tribunal held that "legal liability for the wrong ha[d] been extinguished" with the disappearance of the Hawaiian Republic, and thus it did not carry over to the United States.[42] However, if the claim had been a monetary judgment, which may be considered a debt, or interest on the part of the claimant in assets of fixed value, there would be an acquired right in the claimant, and an obligation to which the successor State had succeeded.[43]

With respect to the *Brown* and *Redward* decisions, it was observed that:

> [t]hose cases date from the age of colonialism when colonial powers resisted any rule that would make them responsible for delicts of states which they regarded as uncivilized. The authority of those cases a century later is doubtful. At least in some cases, it would be unfair to deny the claim of an injured party because the state that committed the wrong was absorbed by another state.[44]

These early cases, which supported the rule of non-succession, are not considered accurate reflections of current international law.[45] Further, even when they were initially decided, there existed cer-

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38. *See* DUMBERRY, *supra* note 2, at 59.

39. Robert E. Brown (U.S. v. U.K.), 6 R.I.A.A. 120, 120 (Gr. Brit.-U.S. Arb. Trib. 1923).

40. *Id.* at 129.

41. F. H. Redward (U.K. v. U.S.), 6 R.I.A.A. 157, 158 (Gr. Brit.-U.S. Arb. Trib. 1925).

42. *Id.*

43. *See* O'CONNELL, *supra* note 9, at 485–86.

44. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209, Reporters' Note 7 (1987).

45. *Cf.* DUMBERRY, *supra* note 2, at 201–03 ("There is . . . a clear tendency in *modern* State practice towards the recognition that successor States should take over the obligations arising from the commission of internationally wrongful acts.") (emphasis in original).

tain situations in which liability transferred to the successor State, contrary to the general non-succession theory.[46]

The early cases also included the dissolution of the Union of Colombia (1829–1831) after which the United States invoked the responsibility of the three successor States—Colombia, Ecuador and Venezuela—leading to agreements regarding compensation for illegal acquisition of American ships.[47] The matter was settled through a negotiation, rather than litigation.[48] After Indian and Pakistani independence, prior rights and liabilities, including liabilities relating to actionable wrongs (both contractual and tortious claims) that were associated with Great Britain, were allocated to the State in which the cause of action arose.[49] Many devolution agreements executed by former dependent territories of the United Kingdom provided for the assumption of the delictual responsibilities by the new States.[50]

In addition, decisions of arbitral tribunals are not uniform. In *Lighthouses Arbitration*, the tribunal found Greece liable, as the successor State to the Ottoman Empire, for breaching a concession contract between the Ottoman Empire and a French company by maintaining lighthouses in Crete and ensuring ship connections between the island and the mainland after the union of Crete with Greece in 1913.[51] According to the award, "the Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract."[52] Some scholars, however, argue that Greece was liable because the wrongful acts began before, and continued after, the union of Crete with Greece.[53]

This view, based on the circumstances in *Lighthouses*, where the tribunal based part of its decision on Greece's endorsement of the breach, was shared by Special Rapporteur Crawford in his 1998

46. *See, e.g.*, the dissolution of the Union of Colombia (1829–1831) discussed *infra*.

47. *See* Protocol between the United States of America and Venezuela, May 1, 1852, S. Treaty Doc. No. 357 (1910); Dumberry, *supra* note 2, at 106.

48. *See* Protocol between the United States of America and Venezuela, *supra* note 47; Dumberry, *supra* note 2, at 106.

49. *See generally* Marjorie M. Whiteman, *Torts*, 2 Digest Int'l L. 873 (1963).

50. *See* Materials on Succession of States, U.N. Doc. ST/LEG/SER.B/14 (1967).

51. *See generally* Lighthouses Arb. (Fr. v. Greece) 12 R.I.A.A. 155 (Perm. Ct. Arb. 1956).

52. *Id.*

53. *Cf. e.g.*, Monnier, *supra* note 9, at 84–85 (finding Greece liable for Crete's illegal conduct because of Greece's passiveness during Crete's regime).

Report on State Responsibility to the U.N. International Law Commission.[54]

There are additional cases concerning State responsibility in situations of unification, dissolution, and secession of States. One example involves the United Arab Republic (UAR), which was created as result of the unification of Egypt and Syria in 1958.[55] There are three instances where the UAR, as the successor State, assumed responsibility for obligations arising from internationally wrongful acts committed by the predecessor States.[56] All these instances involved actions taken by Egypt against properties owned by Western individuals during the nationalization of the Suez Canal in 1956 and the nationalization of other foreign-owned properties.[57] The first, the nationalization of the *Société Financière de Suez* by Egypt, was settled by agreement between the UAR and Société Financière de Suez (1958).[58] In the aftermath, the UAR compensated the shareholders for the nationalization committed by Egypt.[59] The second, dealing with goods and property of French nationals taken by Egypt, was settled by agreement between the UAR and France, resulting in the resumption of cultural, economic, and financial relations between the two States (1958).[60] The agreement provided that the UAR, as the successor State, would restore the goods and property and compensate the individuals for any goods and property not restituted.[61] A final similar agreement, dealing with property of British nationals, was signed in 1959 between the UAR and the United Kingdom.[62]

The UAR only lasted until 1961 when Syria left the UAR.[63] After the dissolution, Egypt, as one of the two successor States, entered

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54. Int'l Law Comm'n, First Rep. on State Responsibility, *supra* note 3, ¶ 282.

55. *See* DUMBERRY, *supra* note 2, at 95–98.

56. *Id.* at 96.

57. *Id.* at 96–97.

58. *See generally* Lazar Foscaneanu, *L'Accord Ayant pour Objet l'Indemnisation de la Compagnie de Suez Nationalisée par l'Egypte*, 5 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [AFDI] 161 (1959).

59. *See id.* at 202.

60. *See generally United Arab Republic—France Financial Agreements*, 54 AM. J. INT'L L. 506 (1960). *Cf.* Charles Rousseau, *Chronique des Faits Internationaux*, 62 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [RGDIP] 65, 681–82 (1958).

61. *United Arab Republic—France Financial Agreements*, *supra* note 60.

62. Agreement Between the Government of the United Kingdom and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt, 343 U.N.T.S. 159; Eugene Cotran, *Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States*, 8 INT'L & COMP. L.Q. 346, 366 (1959).

63. DUMBERRY, *supra* note 2, at 107.

into agreements with other States (such as Italy, Sweden, the United Kingdom, the United States) on compensation to foreign nationals whose property had been nationalized by the UAR (the predecessor State) during the period of 1958–1961.[64]

In cases of secession, i.e. separation of one part of the territory from a parent country that continues to exist, more complicated situations arise when it comes to succession. When Panama seceded from Colombia in 1903, Panama refused to be held responsible for damage caused to U.S. nationals during a fire that occurred in the city of Colon in 1855.[65] However, in 1926, the United States and Panama signed the Claims Convention.[66] The Claims Convention envisaged future arbitration proceedings on the 1855 fire in Colon, including whether it should be found that "there [wa]s an original liability on the part of Colombia, to what extent, if any, the Republic of Panama has succeeded Colombia in such liability on account of her separation from Colombia on November 3, 1903."[67] Although no subsequent arbitration occurred, this example shows, at least implicitly, that both the United States and Panama recognized the possibility of succession with respect to State responsibility.[68]

Another key example comes from the era of India's independence. India and Pakistan became independent States—separated from the former British Dominion of India—on August 15, 1947.[69] The 1947 Indian Independence (Rights, Property and Liabilities) Order dealt with issues of State succession.[70] Section 10 of the Order provided for the "transfer of liabilities for an actionable wrong other than breach of contract" from the British Dominion of India to the new independent State of India.[71] In many cases since, Indian courts have interpreted Section 10[72] to mean that India is responsible for internationally wrongful acts committed by the British Dominion of India before the date of succession.[73]

64. *See* BURNS H. WESTON ET AL., INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 1975–1995 139, 179, 185, 235 (1999); DUMBERRY, *supra* note 2, at 108–10.

65. DUMBERRY, *supra* note 2, at 164.

66. Claims Convention between United States of America and Panama, 6 R.I.A.A. 293, 301 (Perm. Ct. Arb. 1926).

67. *Id.* at 302.

68. DUMBERRY, *supra* note 2, at 165.

69. *Id.* at 172.

70. Whiteman, *supra* note 49, at 873.

71. *Id.*

72. *See, e.g.*, Kishangarh Electric Supply Co. Ltd. v. United States of Rajasthan, 1960 AIR 40 (Raj.) 900–01 (India); O'CONNELL, *supra* note 9, at 493.

73. *See* DUMBERRY, *supra* note 2, at 173.

B. *Cases of Succession in Central and Eastern Europe in the 1990s*

More recent cases concerning situations of State succession are from Central and Eastern Europe in the 1990s, such as the dissolution of the Czechoslovakia, Yugoslavia, and the Soviet Union, as well as the unification of Germany. Issues from the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) were addressed by the Arbitration Commission of the EC Peace Conference on Yugoslavia (Badinter Commission).[74] The Badinter Commission issued a number of opinions. In its Opinion No. 9, it requires the successor States of the SFRY to settle by agreement all issues relating to their succession and find equitable outcomes based on principles inspired by the Vienna Conventions of 1978 and 1983 and the relevant rules of customary international law.[75]

Another important decision of the ICJ stems from the *Gabcíkovo-Nagymaros* case (Hungary/Slovakia).[76] This case arose following the dissolution of Czechoslovakia, which dissolved under an agreement in conformity with its constitution.[77] Both Czech and Slovak national parliaments declared their willingness to assume the rights and obligations arising from the international treaties of the predecessor State before the dissolution.[78] Article 5 of the Constitutional Act No. 4/1993 provides that:

> The Czech Republic assumes those rights and obligations not referred to in Art. 4 which, on the day it was dissolved, arose for the Czech and Slovak Federal Republic from international law, with the exception of those . . . obligations tied to the territory to which the sovereignty of the Czech and Slovak Federal Republic related, but to which to the sovereignty of the Czech Republic does not relate.[79]

Concerning the international responsibility of Slovakia, the ICJ said that:

> Slovakia . . . may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it

74. *See id.* at 117–18.

75. The EC Arbitration Commission for the Settlement of Disputes, Opinion No. 9, July 4, 1992, *reprinted in* 4 EUR. J. INT'L L. 66, 88–90 (1993).

76. Gabcíkovo-Nagymaros, *supra* note 8.

77. *See* Permanent Rep. of Czechoslovakia to the U.N., Letter dated Dec. 31, 1992 from the Permanent Rep. of Czechoslovakia to the Secretary-General, U.N. Doc. A/47/848 (Dec. 31, 1992); Proclamation of the National Council of the Slovak Republic to Parliaments and Peoples of the World (Dec. 3, 1992); Proclamation of the National Council of the Czech Republic to all Parliaments and Nations of the World (Dec. 17, 1992).

78. *Id.*

79. O opatøeních souvisejících se zánikem Èeské a Slovenské Federativní Republiky [On Measures Relating to the Dissolution of the Czech and Slovak Federal Republic], Ústavní zákon 4/1993 Sb.

> is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct by Hungary.[80]

The ICJ thus recognized succession with respect to secondary responsibility obligations and secondary rights resulting from wrongful acts.

Issues of State succession following the collapse of the former Yugoslavia were more complex than in Czechoslovakia.[81] One reason was the 1992 declaration by the Federal Republic of Yugoslavia (FRY), comprised of Serbia and Montenegro, that it would be a continuator—continuing the international personality of the SFRY.[82] However, the other former Yugoslav republics did not agree with this declaration.[83] The U.N. Security Council and General Assembly refused to recognize the FRY as the continuing State by resolution.[84] The Badinter Commission (the Arbitration Commission) held the same view.[85] Finally, the FRY changed its position in 2000 by applying for admission to the United Nations as a new State.[86]

On the basis of recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues of State succession by agreement.[87] The Agreement on Succession Issues was concluded on June 29, 2001.[88] According to its Preamble, the Agreement was reached after negotiations "with a view to identifying and determining the equitable distribution

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80. Gabcíkovo-Nagymaros, *supra* note 8, ¶ 151.

81. *Cf.* DUMBERRY, *supra* note 2, at 117–19 (noting the U.N. Security Council, U.N. General Assembly, and Badinter's refusal to recognize the Federal Republic of Yugoslavia as the "continuator" of the Socialist Federal Republic of Yugoslavia, among other complications).

82. Declaration on the Formation of the Federal Republic of Yugoslavia, April 27, 1992, *annexed to* Permanent Rep. of Yugoslavia, Letter dated May 5, 1992 from the Permanent Mission of Yugoslavia to the President of the Security Council, U.N. Doc. S/23877 (May 5, 1992).

83. *See* Minister for Foreign Affairs of the Republic of Slovenia, Letter dated May 28, 1992 from the Minister for Foreign Affairs of the Republic of Slovenia to the Secretary-General, U.N. Doc. A/47/234, S/24028 (1992); Permanent Rep. of Bosnia-Herzegovina and Croatia to the U.N., Letter dated Sept. 27, 1997 from the Permanent Rep. of Bosnia-Herzegovina and Croatia to the Secretary-General, U.N. Doc. A/47/474 (Sept. 27, 1992); Permanent Mission of Croatia to the U.N., Letter dated Aug. 7, 1995 from the Permanent Mission of Croatia to the Secretary-General, U.N. Doc. A/50/333 (Aug. 7, 1995); *see also* DUMBERRY, *supra* note 2, at 118.

84. S.C. Res. 777 (Sept. 19, 1992); G.A. Res. 47/1 (Sept. 22, 1992).

85. The EC Arbitration Commission for the Settlement of Disputes, Opinion No. 10, July 4, 1992, *reprinted in* 4 EUR. J. INT'L L. 66, 90–91 (1993).

86. G.A. Res. 55/12 (Nov. 10, 2000).

87. *See* Agreement on Succession Issues, June 29, 2001, 2262 U.N.T.S. 251.

88. *Id.*

amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia."[89] Article 2 of Annex F of the Agreement dealt with the issues of international wrongful acts against third States before the date of succession, saying that:

> [a]ll claims against the SFRY which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement. The successor States shall inform one another of all such claims against the SFRY.[90]

It can be assumed from this passage, which sets up a special mechanism for outstanding claims against the SFRY, that the obligations of the predecessor State do not disappear.[91] In addition, Article 1 of Annex F refers to the transfer of claims from the predecessor State to a successor State.[92]

The first "Yugoslav" case in which the ICJ addressed succession with respect to responsibility, though via an indirect mechanism, is the *Genocide* case (*Bosnia and Herzegovina v. Serbia and Montenegro*).[93] The International Court of Justice, which was not called upon to resolve the question of succession but rather to identify the Respondent Party, provided the following:

> The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State. . . . The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. . . . That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.[94]

The same conclusion, that Serbia would be the sole respondent, was adopted by the ICJ in the parallel *Genocide* dispute between

89. *Id.* pmbl.

90. *Id.* art. 2.

91. DUMBERRY, *supra* note 2, at 121.

92. "All rights and interests which belonged to the SFRY and which are not otherwise covered by this Agreement (including, but not limited to, patents, trade marks, copyrights, royalties, and claims of and debts due to the SFRY) shall be shared among the successor States, taking into account the proportion for division of SFRY financial assets in Annex C of this Agreement." *Agreement on Succession Issues for the Former Yugoslavia*, 41 I.L.M. 1, 34 (2002).

93. Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

94. *Id.* ¶¶ 74–78.

Croatia and Serbia in 2008.[95] The recent final judgment in *Croatia v. Serbia* deals more in details with the issues of succession to State responsibility.[96] In spite of the fact that the Court rejected Croatia's claim and Serbia's counter-claim on the basis that the intentional element of genocide (*dolus specialis*) was lacking, the judgment seems to be a pronouncement in favor of the argument that the responsibility of a State might be engaged by way of succession.[97]

The ICJ recalled that, in its November 18, 2008 decision, it found that it had jurisdiction to rule on Croatia's claim with respect to acts committed as from April 27, 1992, the date when the Federal Republic of Yugoslavia (FRY) came into existence as a separate State and became party, by succession, to the Genocide Convention, but reserved its decision on its jurisdiction with respect to breaches of the Convention alleged to have been committed before that date.[98] In its 2015 decision, the Court stated that the FRY could not have been bound by the Genocide Convention before April 27, 1992—even as a State *in statu nascendi*.[99]

The Court takes note, however, of an alternative argument that the FRY (and subsequently Serbia) could have succeeded to the responsibility of the SFRY for breaches of the Convention prior to that date.[100] "Croatia advance[d] two separate grounds on which it claim[ed] the FRY [had] succeeded to the responsibility of the SFRY.[101] First, it claim[ed] that this succession came about as a result of the application of the principles of general international law regarding State succession."[102] Croatia made this argument in reliance upon the award of the arbitration tribunal in the *Lighthouses Arbitration* (1956), which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make the successor State responsible for the former's wrongdoing.[103] Second, Croatia argued that the FRY, by declaration of

95. Application of the Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb. & Montenegro), Preliminary Objections, 2008 I.C.J. Rep. 412, ¶¶ 23–34 (Nov. 18).

96. *See generally* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 1 (Feb. 3).

97. *Id.* ¶ 106.

98. Croat. v. Serb., 2008 I.C.J. at 466–67, ¶ 146.

99. Croat. v. Serb., 2015 I.C.J. at 47, ¶¶ 103–04.

100. *Id.* at 48, ¶ 106.

101. *Id.* ¶ 107.

102. *Id.*

103. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Verbatim Record, ¶¶ 41–42 (Mar. 21, 2014, 10:00

April 27, 1992, had indicated "not only that it was succeeding to the treaty obligations of the SFRY, but also that it succeeded to the responsibility incurred by the SFRY for the violation of those treaty obligations."[104]

In contrast, Serbia maintained, in addition to its other arguments relating to jurisdiction and admissibility, that there was no principle of succession to responsibility in general international law; refuting Croatia's argument based on the *Lighthouses Arbitration* tribunal award.[105] Serbia also maintained that all issues of succession to the rights and obligations of the SFRY were governed by the Agreement on Succession Issues (2001), which established a procedure for considering outstanding claims against the SFRY.[106] It may also be interpreted as an implicit acceptance of succession—but only on the basis of treaty obligations (*lex specialis*). However, the Court was not asked to look into this Agreement, which would be outside its jurisdiction.[107]

The Court accepted the alternative argument of Croatia as to its jurisdiction over acts prior to April 27, 1992.[108] The ICJ stated that to determine whether Serbia was responsible for violations of the Convention:

> the Court would need to decide:
> (1) whether the acts relied on by Croatia took place; and if they did, whether they were contrary to the Convention;
> (2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and
> (3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.[109]

Here, the Court asserted that the rules on succession that may come into play in *Croatia v. Serbia,* fall into the same category as those on treaty interpretation and responsibility of States.[110] How-

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a.m.) (Prof. James Crawford, advocate for Croatia, argued the following: "We say the rule of succession can occur in particular circumstances if it is justified. There is no general rule of succession to responsibility but there is no general rule against it either.").

104. Croat. v. Serb., 2015 I.C.J. at 48, ¶ 107.

105. *Id.* at 48–49, ¶ 108.

106. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Verbatim Record, ¶¶ 52–53 (Mar. 27, 2014, 3:00 p.m.) (Prof. Andreas Zimmermann, advocate for Serbia, referred to Article 2 of Annex F of the Agreement, which provides for the settlement of disputes by the Standing Joint Committee.).

107. Croat. v. Serb., 2015 I.C.J. at 42–43, 47, ¶¶ 88, 103.

108. *Id.* ¶ 117.

109. *Id.* at 50, ¶ 112.

110. *Id.* at 51, ¶ 115.

ever, not all of the ICJ Judges shared the majority view.[111] As Judge Xue said in her declaration, "[t]o date, in none of the codified rules of general international law on treaty succession and State responsibility, State succession to responsibility was ever contemplated. . . . Rules of State responsibility in the event of succession remain to be developed."[112]

Another example of responsibility issues with respect to States emerging from the former Yugoslavia is the investment arbitration concluded in *Mytilineos Holdings SA*.[113] Here the arbitral tribunal noted that after the commencement of the dispute, Montenegro declared its independence.[114] Although not asked to decide the issue of State succession, the tribunal noted that the Republic of Serbia would continue in the same international legal status as Serbia and Montenegro.[115]

Germany's unification provides an additional example of State succession.[116] Following re-unification, the Federal Republic of Germany (FRG) assumed the liabilities arising from the delictual responsibility of the German Democratic Republic (GDR).[117] One of the issues at the time of unification concerned compensation for possessions expropriated from German nationals and foreigners in the territory of the former GDR.[118] Except for a few lump sum agreements prior to unification,[119] the GDR refused to compensate the victims.[120] It was not until June 29, 1990—immediately prior to unification—that the GDR adopted an act settling these property issues.[121] The FRG and GDR adopted a joint declaration on the settlement of outstanding issues of property rights on June 15,

111. *Id.* at 145, ¶ 524.

112. *Id.* at 5, ¶ 23 (declaration of Xue, J.).

113. Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia, Partial Award on Jurisdiction (UNCITRAL, Sept. 8, 2006).

114. *Id.* ¶ 158.

115. *Id.*

116. DUMBERRY, *supra* note 2, at 84–93.

117. Treaty on the Establishment of German Unity art. 24, Aug. 31, 1990, 30 I.L.M. 463 (1991).

118. The GDR concluded such agreements with Austria, Denmark, Finland, Sweden and Yugoslavia. ENTEIGNUNG UND OFFENE VERMÖGENSFRAGEN IN DER EHEMALIGEN DDR (Gerghard Fieberg & Harald Reichenbach eds., 1991).

119. *See id.*

120. *See* DUMBERRY, *supra* note 2, at 87.

121. *See* Gesetz zur Regelung offener Vermögensfragen [Law for the Settlement of Open Property Questions], Sept. 28, 1990, BUNDESGESETZBLATT [BGBL II], at 1159 (Ger.).

1990.[122] Under Section 3 of the joint declaration, property confiscated after 1949 would be returned to the original owners.[123]

The legislative, executive, and judicial branches have addressed the issue of the unified German state and have addressed the issue of claims arising from wrongful acts of the former GDR. In 1999, the FRG Federal Administrative Court dealt with the issue of State succession in the context of a private claim for restitution.[124] Although the Court, in its decision on July 1, 1999, refused to accept responsibility of the FRG for the internationally wrongful act of expropriation committed by the GDR against a Dutch citizen, it recognized that the obligations of the former GDR to pay compensation transferred to the successor State.[125]

Another example of the transfer of responsibility of the predecessor State to the successor State is the agreement between the FRG and the United States concerning the Settlement of Certain Property Claims, executed in 1992.[126] This agreement, based on a lump sum compensation, covers claims of U.S. nationals resulting from nationalization, expropriation, and other measures taken by the GDR between 1949 and 1976.[127]

These examples from Germany demonstrate that a successor State can agree to take over the obligations arising from internationally wrongful acts of a predecessor State towards a third State, or possibly towards other actors or individuals. Even scholars, who are generally skeptical of State succession regarding responsibility, tend to support the view that the principle of non-succession does not apply in cases of voluntary unification.[128]

III. Right to Reparation in Case of State Succession

One of the principal reasons to question the theory of non-succession to State responsibility is the "humanization" of international law, which places an emphasis, *inter alia*, on reparation of damages suffered by individuals—whether by diplomatic protection or other mechanisms. Therefore, the right to reparation on

122. *Id.* at 1237.

123. *Id.*

124. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] July 1, 1999, Neue Juristische Wochenschrift [NJW] 3354, 1999 (Ger.).

125. Dumberry, *supra* note 2, at 90.

126. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Settlement of Certain Property Claims, Ger.-U.S., May 13, 1992, T.I.A.S. No. 11959, 1911 U.N.T.S. 27.

127. Weston et al., *supra* note 64, at 333.

128. Crawford, *supra* note 11, at 703

behalf of individuals should not disappear in the case of cession, dissolution, or unification, but instead should transfer to the successor State.

Here claims to reparations are transferred for individuals to the successor State is more common than the transfer of State obligations arising from the commission of an internationally wrongful act.[129] In cases of damages suffered by individuals, the responsibility of a State may not be invoked if "the claim is not brought in accordance with any applicable rule relating to the nationality of claims."[130] This reflects the traditional rule that a State can only present claims with respect to damage to the persons of its nationality.

This rule arises from the *Mavrommatis* case, a landmark decision on diplomatic protection related to concessions in the British Mandate of Palestine, granted under the rule of the Ottoman Empire.[131] The decision made clear that the nationality of claims rule[132] is a general condition for invoking responsibility in applicable cases.

The rules on diplomatic protection traditionally include the condition of "continuous nationality," which requires that the protected person was a national of the given State at the time of the commission of the internationally wrongful act and at the time of presentation of the claim.[133] This rule was upheld by the Permanent Court of International Justice (PCIJ) in the *Panevezys-Saldutiskis Railway* case in 1939.[134] Even at the time of the decision, this rule lacked unanimous support.[135] As Judge van Eysinga said in his dissenting opinion, this rule, if applied in its absolute form, would lead to inequitable results.[136] He argued that such rule "cannot resist the normal operation of the law of State succession."[137]

129. DUMBERRY, *supra* note 2, at 409–11.

130. G.A. Res. 56/83, annex, U.N. Doc. A/56/49 (Vol. I), Responsibility of States for Internationally Wrongful Acts, art. 44(a) (Dec. 12, 2001).

131. Mavrommatis Palestine Concessions, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

132. The rule relating to the nationality of claims means that a State is entitled to protect its subjects. Therefore only the State of nationality may invoke the responsibility of a wrongdoing State. *See* ILC Commentaries, *supra* note 4, art. 44, ¶ 2.

133. *See* DUMBERRY, *supra* note 2, at 338.

134. Panevezys-Saldutiskis Railway, Judgment, 1939 P.C.I.J. (ser. A/B) No. 76 (Feb. 28).

135. *See* DUMBERRY, *supra* note 2, at 344.

136. 1939 P.C.I.J. (ser. A/B) No. 76, at 35.

137. *Id.*

This rule was criticized by scholars due to the inequitable results that it produced under strict application.[138] Scholars argued that this rule should not apply in cases of involuntary changes of nationality or changes affected by territorial changes.[139] The application of this rule in the context of State succession, where the change of nationality of individuals is not of their own free choice but instead the consequence of succession, is not appropriate.[140] The reason is that such strict application would result in the inability of both the continuing State and the successor to exercise diplomatic protection on behalf of an individual injured as a result of an internationally wrongful act committed before the date of succession.[141] Some authors even suggested that the traditional rule of continuous nationality should be abandoned altogether.[142]

As a result, when codifying the Articles on Diplomatic Protection in 2006, the ILC adopted an exception to the rule of continuing nationality in cases where a natural person has the nationality of a predecessor State.[143] Similarly, a modified rule of continuing nationality of corporations was adopted in Article 10, making it possible for a State to protect corporations by holding its nationality or the nationality of its predecessor.[144] This exception to the rule of continuing nationality has been confirmed in cases of State succession for the protection of both natural and legal persons.

Some decisions show a more nuanced approach. In *Loewen*, the ICSID investment arbitration tribunal established under NAFTA,

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138. *See, e.g.*, CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 119 (1983).

139. *See* D.P. O'CONNELL, INTERNATIONAL LAW 1035–36 (1970); Paul de Visscher, *Cours Général de Droit International Public*, 136 RECUEIL DE L'ACADÉMIE DE DROIT INTERNATIONAL [RCADI] 1, 166 (1972).

140. *See* DUMBERRY, *supra* note 2, at 342.

141. *Id.*

142. *See* Francisco Orrego Vicuña, *Interim Report on "The Changing Law of Nationality of Claims"*, *in* INT'L LAW ASS'N, REPORT OF THE SIXTY-NINTH CONFERENCE 37 (2000); ERIC WYLER, LA RÈGLE DITE DE LA CONTINUITÉ DE LA NATIONALITÉ DANS LE CONTENTIEUX INTERNATIONAL 133–34 (1990).

143. *See* Int'l Law Comm'n, Report on its Fifty-Eighth Session, U.N. Doc. A/61/10, art. 5, ¶ 2 (2006) ("Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.").

144. *Id.* art. 10, ¶ 1 (A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State . . . .").

Chapter 11 focused on the rule of continuing nationality.[145] On the one hand, the award confirmed that when claims were:

> negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. . . . This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality.[146]

On the other hand, the award highlighted relaxation of the standard that emerged in the language of the treaties.[147] It pointed out that "there is no such language in the NAFTA document and there are substantial reasons why the Tribunal should not stretch the existing language to affect such a change."[148] For this reason, the tribunal decided that it lacked jurisdiction to determine claims of the Loewen Group Inc. (TLGI) under the North American Free Trade Agreement (NAFTA), because TLGI assigned the claims to a Canadian subsidy of a United States corporation.[149] Nevertheless, the jurisdictional decision based on the terms of NAFTA should not call into question the exception for continuing nationality in cases of involuntary change of nationality related to State succession.

A. *Cases of Reparation in the Context of Succession After World War I*

International case law includes several decisions where the rule of continuing nationality did not apply to the claim presented by a successor State.[150] The first cases date back to the 1920s.[151]

In *Pablo Nájera*, the France-Mexico Claims Commission ruled in favor of the admissibility of diplomatic protection exercised by France with respect to a French national, born in Lebanon, who suffered injury in Mexico during the Mexican Revolution of 1916 when the French national was a national of the Ottoman Empire.[152] The Tribunal supported the decision with two argu-

145. The Loewen Group, Inc. & Raymond L. Loewen v. U.S., ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 225–29 (June 26, 2003).
146. *Id.* ¶ 229.
147. *Id.* ¶ 230.
148. *Id.*
149. *See id.* ¶ 240.
150. DUMBERRY, *supra* note 2, at 367.
151. *Id.*
152. Pablo Nájera (Fr. v. Mex.), 5 R.I.A.A. 466, 467 (French-Mexican Claims Comm'n 1928).

ments.[153] First, the President of the Tribunal noted that the rule of continuing nationality did not apply when the circumstances of the case (in particular the term "French protégés" in the *Compromis*) show that the parties had the contrary intention.[154] Second, it held that the rule of continuing nationality should apply in a much less strict manner in cases of involuntary change of nationality as a result of State succession.[155]

Another case, which confirms the protection of individuals is admissible in the context of State succession, is *Finnish Shipowners*, submitted by Finland against Great Britain.[156] In this arbitration case, at the time of the commission of internationally wrongful act (before 1917), Finland was not yet an independent State and as such the victims held Russian nationality.[157] In spite of this, Great Britain did not invoke the rule of continuing nationality.[158] The arbitrator implicitly endorsed the notion that a new State may be entitled to claim reparations for damage, which occurred when the national (or corporation) did not hold the claiming State's nationality at the time of injury.[159]

Similar issues appeared before the Mixed Arbitration Tribunals established on the basis of Versailles Peace Treaty between Germany and the Allied and Associated Powers.[160] Other peace treaties, which governed similar issues, were signed between the Allies and other Central Powers, including Austria, Hungary, Bulgaria, and Turkey.[161]

The Mixed tribunals were similar in that all had jurisdiction over three different types of claims for material damage suffered by individuals: (a) claims between individuals originating from their pre-war relations, including contract-related debts; (b) claims by nationals of the Allies against Germany and other Central Powers for damage resulting from exceptional war measures with respect to the property, rights, and interests of individuals; and (c) claims by nationals of the Central Powers for measures, including expro-

153. *See id.* at 487–88.
154. *Id.*
155. *Id.* at 488.
156. Claim of Finnish Shipowners (Fin. v. U.K.), 3 R.I.A.A. 1479, 1481 (1932).
157. *See* DUMBERRY, *supra* note 2, at 370.
158. *Id.*
159. *Id.*
160. *See* LAWRENCE MARTIN, THE TREATIES OF PEACE 1919–1923, 199 (1924).
161. Saint-Germain-en-Laye Treaty, Sept. 10, 1919, 14 Supp. to AM. J. INT'L L. 344 (1920) (Austria); Neuilly-sur-Seine Treaty, Nov. 27, 1919, 14 Supp. to AM. J. INT'L L. 185 (1920) (Bulg.); Trianon Treaty, June 4, 1920, 15 Supp. to AM. J. INT'L L. 1 (1921) (Hung.); Lausanne Treaty, July 24, 1923, 28 L.N.T.S. 11 (Turk.).

priation, taken by the newly formed States, which emerged as a result of dissolution of multinational empires.[162]

Given that a number of new States emerged after World War I, including Czechoslovakia, Poland, Kingdom of Serbs, Croats, Slovenia, Finland, Lithuania, Latvia, and Estonia, as well as Armenia, Azerbaijan, and Georgia (which soon became part of the USSR), the strict application of the continuing nationality rule would have deprived nationals of those States of any possibility to present claims for reparation, as they were not nationals of the predecessor States at the time the damage was incurred.[163] Therefore, the Mixed tribunals interpreted Article 304(b) of the Versailles Treaty in a manner that would make it possible for nationals of the Allied and Associated Powers[164] to submit claims, even though they did not possess the nationality of those States when the damage occurred.[165]

The rule of the Mixed Arbitration Tribunals established that a person would be considered a national of the Allied and Associated Powers, if at the time the Versailles Treaty was entered into force, he or she had acquired that nationality.[166]

B. *Modern Praxis of Reparation of Individuals in Cases of State Succession*

One of the most important bodies for the adjudication of claims presented by States on behalf of the injured nationals and corporations has been the United Nations Compensation Commission (UNCC).[167] The commission was established to settle claims arising out of the Iraq's invasion and occupation of Kuwait in 1990.[168]

The UNCC released Decision No. 10 in 1992, indicating that "[i]n the case of Governments existing in the territory of a former federal state, one such Government may submit claims on behalf of nationals, corporations or other entities of another such Govern-

162. *See* Martin, *supra* note 160, arts. 296, 297e, 297h.

163. *See* Dumberry, *supra* note 2, at 373.

164. The Allies in the WWI, i.e. the Great Britain, France, Italy, Japan, the United States, as well some smaller States, including newly established States, such as Czechoslovakia.

165. Dumberry, *supra* note 2, at 373–74.

166. National Bank of Egypt v. German Government and Bank für Handel und Industrie (Dec. 14, 1923 & May 31, 1924), *in* 4 Recueil des décisions des tribunaux arbitraux mixtes 233 (2006).

167. The responsibility of Iraq was declared in the Security Council Resolution 687 (Apr. 8, 1991) and the United Nations Compensation Commission (UNCC) was set up as a subsidiary body of the Security Council by Resolution 692 (May 20, 1991).

168. *Id.*

ment, if both Governments agree."[169] This was decided just as the Soviet Union and Yugoslavia began to dissolve and a few months before the dissolution of Czechoslovakia.[170] Interestingly, the provision was adopted at the suggestion of the Russian delegation in order to "protect the interests of claimants in the former Soviet Union."[171]

The subsequent case law of the UNCC shows it has not enforced the rule of continuing nationality, but rather allows successor States to submit claims for compensation on behalf of their new nationals.[172] This was true when Czechoslovakia submitted several claims prior to its dissolution on December 31, 1992.[173] In one case the UNCC Governing Council stated that the claims were initially submitted by the Czech and Slovak Federal Republic, but the award of compensation was to be paid to the Government of the Slovak Republic, which was the State where the injured nationals then lived.[174] In another decision, the Governing Council said that the claims were "submitted before the Czech and Slovak Federal Republic ceased to exist. Awards of compensation are to be paid to the Government of the Czech Republic and Slovak Republic, respectively."[175]

Other examples relate to compensation of victims of the Nazi regime for injuries suffered during World War II.[176] In the postwar period the Federal Republic of Germany started to compensate victims. The first example was the 1952 Agreement Between the State of Israel and the Federal Republic of Germany on Compensation, where the State of Israel only came into existence in 1948,

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169. *See* United Nations Comp. Comm'n, Decision by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session, U.N. Doc. S/AC.26/1992/10, at 5 (1992); John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144, 151–52 (1993).

170. David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1, 31 (1994).

171. *See id.*

172. *See* DUMBERRY, *supra* note 2, at 380.

173. *Id.* at 381.

174. United Nations Comp. Comm'n, Decision Concerning the First Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 43rd meeting, UN Doc. S/AC.26/Dec.20 (1994).

175. United Nations Comp. Comm'n, Decision Concerning the First Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims) taken by the Governing Council of the United Nations Compensation Commission at its 46th meeting, U.N. Doc. S/AC.26/Dec.22 (1994).

176. *See* DUMBERRY, *supra* note 2, at 382.

concerning the victims who were, at the time of persecution, nationals of Germany or other European States (e.g. Poland).[177]

Thereafter, Germany adopted several national laws that established funds for indemnification of the victims of Nazi persecution and later for the victims of slave or forced labor. The first was the Federal Law for the Compensation of the Victims of National Socialist Persecution (BEG) in 1953.[178] Subsequently, a number of other measures were instituted, including the "Hardship Fund" in 1980, which provided compensation for Nazi victims who suffered severe health damage and were facing hardship,[179] and the Fund under Article 2 of the Agreement on the Enactment and Interpretation of the Unification Treaty in 1990, which provided pensions for the victims of persecution after the re-unification of the former GDR into the FRG,[180] and the Central and Eastern European Fund (1998).[181]

The process led to the adoption of the Law on the Creation of the "Remembrance, Responsibility and Future" Foundation in 2000.[182] Under such the German government and German companies provided assets to the Foundation to compensate individuals who had performed forced labor in concentration camps or other areas.[183] During the Final Plenary Meeting, which created the Foundation, a Joint Statement was signed by Germany, the United States, Belarus, the Czech Republic, Ukraine, Israel, Poland, Russian, the Foundation Initiative of German Enterprises, the Claims Conference, and the Jewish organization Claims Con-

177. Agreement between the State of Israel and the Federal Republic of Germany, Sept. 10, 1952, 162 U.N.T.S. 205.

178. Bundesergänzungsgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung [The Federal Law for the Compensation of the Victims of National Socialist Persecution], Oct. 1, 1953, BUNDESGESETZBLATT I [BGBL I] at 559, as amended June 29, 1956 (Ger.).

179. *See Hardship Fund*, CLAIMS CONFERENCE: THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, http://www.claimscon.org/what-we-do/compensation/background/hardship.

180. *See Article 2 Fund*, CLAIMS CONFERENCE: THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, http://www.claimscon.org/what-we-do/compensation/background/article2.

181. *See* DUMBERRY, *supra* note 2, at 387–88.

182. Gesetz zur Errichtung Einer Stiftung "Erinnerung, Verantwortung und Zukunft" [Law on the Creation of the "Rememberance, Responsibility and Future" Foundation], Aug. 2, 2000, BUNDESGESETZBLATT I [BGBL I] at 1263; STIFTUNG ERINNERGUNG VERANTWORTUNG ZUKUNFT, http://www.stiftung-evz.de; *see also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 681, 692–95 (2003).

183. Murphy, *supra* note 182, at 692.

ference.[184] Many of the signatory States represented victims who were not nationals of those countries at the time of the injury.[185] Even though some signatory States did not exist at the time of the wrongful acts, they were not precluded from presenting claims on behalf of individuals who did not have this nationality at the time of injury.[186]

An identical solution was accepted by Austria, when it adopted the 2000 Reconciliation Fund Act[187] and signed agreements with six Central and Eastern European countries (Belarus, the Czech Republic, Hungary, Poland, the Russian Federation and Ukraine).[188] Half of whom were new States that had emerged from the dissolution of the Soviet Union and Czechoslovakia.[189]

The above cases further support the conclusion that the rule of continuing nationality does not apply in situations of State succession. Therefore, a successor State is able to submit responsibility claims on behalf of the individuals who did not have its nationality.

Conclusion

The Article has shown that the traditional theory of non-succession in the field of State responsibility for internationally wrongful acts no longer corresponds to the current state of international law. Starting with a survey of doctrinal views, the Article addressed two main questions. First, whether there is a rule of international law excluding, in cases of State succession, any transfer of responsibility to a successor State. The analysis of State practice and international case law shows that no such general rule exists. In many cases, there was a succession relating to responsibility, in particular in connection with State succession regarding treaties and State debts. However, the practice is not uniform and State succession does not occur in all cases. Second, whether a successor State can present a claim to reparation on behalf of its nationals for damage

184. Gemeinsame Erklärung anlässlich des abschlieâenden Plenums zur Beendigung der internationalen Gespräche über die Vorbereitung der Stiftung "Erinnerung, Verantwortung und Zukunft", [The Joint Statement], July 17, 2000, BUNDESGESETZBLATT II [BGBL II] at 1383 (Ger.).

185. *Id.*

186. *See* DUMBERRY, *supra* note 2, at 389.

187. Bundesgesetz über den Fonds für freiwillige Leistungen der Republik Österreich an ehemalige Sklaven und Zwangsarbeiter des nationalsozialistischen Regimes [Versöhnungsfonds-Gesetz] [Federal Act on the Fund for Voluntary Benefits of the Republic of Austria for Former Slave and Forced Laborers of the National Socialist Regime], Aug. 8, 2000, BUNDESGESETZBLATT I [BGBL I] at 775 (Austria).

188. DUMBERRY, *supra* note 2, at 386–87.

189. *Id.* at 387.

suffered at the time when they had the nationality of a predecessor State. This Article demonstrates that these successor States could assert such claims. In these cases, it is possible to assert a new rule of international law, confirmed—as an exception from the rule of continuous nationality—in Articles on diplomatic protection, adopted by the U.N. International Law Commission in 2006.