| Chapter 2 |

State Succession

Rodoljub ETINSKI

ABSTRACT

State succession has a variety of aspects. Some general rules on State succession exist but these are colored by specific circumstances and there are international customary rules also. All relevant documents define the term "succession" identically as "the replacement of one State by another in the responsibility for the international relations of territory." Replacement regarding responsibility for the international relations of a territory occurs between a predecessor State and a successor State. Succession has different types or categories such as the cession, decolonization, unification, secession, and dissolution of a State. The rules on succession of States to treaties reconcile freedom of contracting with the general interests of continuity and certainty of treaty relations. One basic principle is the freedom of contracting. In this context it means that new successor States choose the treaties of the predecessor State to which they will enter. The 1978 Convention governs succession by two basic rules (the automatic succession and clean slate rules), and it also governs the case of transfer of a part of territory and the case of unification. The State property, debts, archives, and private rights and the effect of State succession to nationality are fundamental issues.

KEYWORDS

succession, conventions, freedom of contracting, property, debts and archives

1. Introduction

Successions of States are not an everyday event. They have occurred occasionally, from time to time. However, about 130 sovereign States emerged after the Second World War, most of which were former colonies. Decolonization was the dominant form of successions, but there were also cases of unification, dissolution, and separation.[1]

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1 An extensive review of the practice of State succession was prepared by the UN Secretariat and published in Materials on Succession of States in Matters other than Treaties, UN Legislative Series 1978 ST/LEG/SER.B/17 https://legal.un.org/legislativeseries/pdfs/volumes/book17.pdf. For a brief history of State successions, see Vagts, 1993, pp. 277–280. For recent cases of the USSR, CSFR, and SFRY, see Oeter, 1995, pp. 76–89; Beemelmans, 1997, pp. 71–124; Williams, 1997, pp. 3–7.

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Political elements have played an important and sometimes dominant role in successions. The occasionality of State practice, the specifics of each case, and the prominent role of political factors have slowed the development of the general law of State succession[2] but have not diminished the importance of the general law. Successions affect nations and a large number of individuals, sometimes over long periods, and the development of the general law may mitigate their detrimental effects. Development of the general law may also facilitate normalization of relations among States, which are frequently painfully disturbed in the circumstances of succession. Neither relatively small frequency of successions nor their powerful political connotations exclude the possibility of the development of general rules. Certain commonalities in State practices, the jurisprudence of international courts, and the legal literature do exist and open the door for general legal guidelines. International human rights law and international human rights bodies and courts have breathed new force into the law of State succession. Specifics of human rights are present almost everywhere in the law of State succession and are visible in the succession to treaties, to State debts, and to obligations arising from international delicts and, certainly, in matters regarding effects of succession to nationality. Besides, there are fundamental legal principles that govern State succession, which may substitute missing customary rules and may lead to new customary rules.

Some general rules on State succession exist and they are very important. On the other hand, the implementation of the general rules has usually been colored by the specific circumstances of each case of succession. The specific circumstances of the dissolution of the USSR,[3] the CSFR,[4] and the SFRY[5] entailed differences in the successions. The global position of Russia,[6] as a great power and its economic capacity had a certain influence on succession issues. The dissolution of Czechoslovakia[7] was an agreed dissolution. Contrariwise, the dissolution of Yugoslavia was a contested dissolution, occurring through the unilateral acts of the successor States and connected with tragic armed conflicts. These differences had some bearing on the implementation of the law of succession. It is amazing how much the ECtHR[8] was involved in resolving human rights issues emerging from the succession of Yugoslavia. The Court was addressed not only by individuals, but also by one successor State.

The available space does not allow all the subject matters of State succession to be covered. The succession of States to international organizations or regarding State responsibility will not be considered under separate subheadings. The main principle concerning succession to the membership of international organizations is that a State that continues the personality of the predecessor State also continues

2 Kreća, 2007, p. 271.
3 The Union of Soviet Socialistic Republics.
4 The Czech and Slovak Federal Republic.
5 The Socialistic Federal Republic of Yugoslavia.
6 The Republic of Russian Federation.
7 The Czechoslovak Socialist Republic.
8 The European Court of Human Rights.

its membership in international organizations. New successor States have to apply for membership.[9] That does not mean that there is no succession at all. In the case of dissolution, for example, the successor States succeed to financial debts to an international organization of the predecessor State. General rules on State succession regarding State responsibility are in *statu nascendi*. The old practice and literature denied the succession of a State in the field of State responsibility. The ILC[10] has been working on this matter. Due to the scarcity of State practice, it is not clear whether the ILC has worked on progressive development or codification.[11] New literature[12] and new practices[13] presage a change, and the IIL[14] adopted a Resolution on the matter in 2015.

The allotted space does not allow us either to discuss all questions related to the chosen subject matters, but only the most important ones. The chapter will be therefore limited to the succession to treaties, State property, debts, and archives. The effects of State succession to nationality and private rights will also be considered. Bearing in mind that this book explores international law from the Central European perspective, the focus will be on recent cases of succession in the Central and Eastern Europe. Due to shortage of space, abbreviations will be used extensively.

2. Sources

The customary law and general principles of law were the main sources of the general law of State succession until the adoption of the two universal conventions.[15] The Vienna Convention on Succession of States in respect of Treaties was adopted at the UN Conference in Vienna on August 22, 1978. It was open for signature on August 23, 1978, and entered into force on November 6, 1996. At the time this text was written, October 2021, 23 States have become parties to the Convention.[16] The Vienna Convention on Succession of States in respect of State Property, Archives and Debts was adopted at the UN Conference in Vienna on April 7, 1983. The Convention was opened for signature on April 8, 1983, but it has not yet entered into force. Only seven

9 Jennings and Watts, 1992, p. 223.
10 The International Law Commission.
11 Šturma, 2019, para. 7.
12 Brownlie, 1979, p. 664; Volkovitsch, 1992, pp. 2162–2214; Dumberry, 2005, pp. 419–453; Dumberry, 2006, pp. 413–448; Dumberry, 2007; Kohen, 2015, pp. 511–555; Pajnkihar and Sancin, 2020, pp. 331–356.
13 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment,* International Court of Justice (ICJR), 1997, p. 81, para. 151; *Bijelić v. Montenegro and Serbia* (app. no. 11890/05), April 28, 2009, Judgment; Lakićević *and Others v. Montenegro and Serbia* (app. nos. 27458/06 and 3 others) December 13, 2011; *Milić v. Montenegro and Serbia* (app. no. 28359/05), December 11, 2012; *Mandić v. Montenegro, Serbia and Bosnia and Herzegovina* (app. no. 32557/05), June 12, 2012.
14 The Institute of International Law.
15 Castren, 1954, p. 56.
16 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en.

States have accepted the Convention;[17] eight ratifications or accessions are missing for entering the Convention into force. The two Conventions reflect, but only in part, international customary law. Some provisions are result of progressive development, rather than codification.

The effects of State succession to nationality have been regulated by two European conventions. The European Convention on Nationality, whose Chapter VI is dedicated to the issue of State succession and nationality, was adopted in Strasbourg on November 11, 1996, and entered into force on March 1, 2000.[18] To date, 21 States have ratified the Convention.[19] The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession was adopted in Strasbourg on May 19, 2006, and entered into force on May 1, 2009.[20] As of October 2021, seven States had ratified the Convention.[21] The number of States that have accepted two universal conventions and two regional conventions is relatively small. That is not a peculiarity of treaties regarding succession only, but it rather reflects a general trend of reluctance of State to bind themselves by treaties in the last decades. There is a number of multilateral or bilateral treaties that govern some specific issues of succession.[22]

The number of international customary rules confirmed by international courts and tribunals is not large.[23] Whether State practice in matters of succession has been sufficiently widespread and uniform is the most problematic issue of identification of international customary rules in this field.[24] The law of State succession has been shaped by general legal principles, in particular by the principle of territoriality, the principle of equity, and the principle of human rights protection. The fact that State succession occurs by the transfer of sovereignty over a territory and that it results in a division of goods and debts implies the importance of the principles of territoriality and equity. Since succession may affect human rights, the principle of protection of human rights is of particular importance. Other principles, such as proportionality or reasonability, are also important.

In spite of the fact that the law of State succession might be seen as of peripheral significance in the system of international law, it has been on the agenda of the ILC almost continuously over a very long period.[25] The ILC selected State succession as one of topics for future codification in 1949. The UN Secretariat prepared memorandums

17 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-12&chapter=3&clang=_en.
18 The Council of Europe Treaty Series (CETS) No. 166.
19 See https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=166.
20 CETS No. 200.
21 See https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=200.
22 See Information on treaties which may be relevant for the work of the ILC on succession of States in respect of State responsibility, March 29, 2019, A/CN.4/730.
23 Mullerson, 1993, p. 474.
24 Jennings and Watts, 1992, p. 236; Kreća, 2007, p. 270.
25 All materials are available at: https://legal.un.org/ilc/guide/gfra.shtml.

on the succession of States in relation to membership in the UN[26] and to general multilateral treaties deposited with the Secretary General[27] as well as two digests of decisions of international courts[28] and national courts[29] in 1962 and 1963, respectively. The first special rapporteur of the ILC on succession of States and governments was Manfred Lachs, who submitted the first report in 1963.[30] He suggested division of the topic into more branches and, as he was elected as a judge to the ICJ,[31] the ILC appointed Sir Humphrey Waldock as a special rapporteur for succession regarding treaties and Mohammed Bedjaoui as a special rapporteur for succession in respect of State property, debts, and archives. The ILC gave priority to succession to treaties. When Sir Waldock was elected as a judge to the ICJ, Sir Francis Vallat replaced him. The ILC adopted the final draft with comments in 1974,[32] and the UN Conference adopted the final draft, inserting small changes. Bedjaoui submitted 13 reports on succession regarding State property, debts, and archives from 1968 to 1981. The ILC adopted the final draft with comments in 1981.[33] The UN Conference accepted the draft two years later in Vienna. The ILC decided to codify rules regarding effects of State succession to nationality in 1993. The Secretariat prepared a memorandum on practice of States regarding the topic in 1999.[34] The Special Rapporteur Václav Mikulka submitted four reports between 1995 and 1998. The ILC adopted the final draft and comments in 1999. The General Assembly took note on the draft in 2000[35] and since 2004 it has periodically invited governments to accept legal instruments on effects of succession to nationality at regional and subregional levels.[36] The Council of Europe adopted the 2006 Convention on the Avoidance of Statelessness. Having decided to codify rules on succession of States in respect of State responsibility in 2017, the ILC appointed Pavel Šturma as a special rapporteur. The Secretariat prepared a memorandum on corresponding material in 2019.[37] In the period from 2017 to 2021 Šturma submitted four reports on State succession regarding State responsibility. Three of the six special rapporteurs on succession matters in the ILC were distinguished lawyers from countries of the Central Europe.

The work of the ILC on the codification of rules regarding different succession matters and materials prepared by the Secretariat are precious source of information

26 A/CN.4/149 and Add.1.
27 A/CN.4/150. The memorandum was supplemented in 1968 by document A/CN.4/200 & Corr.1 and Add.1 & 2 and in 1969 by document A/CN.4/210, and in 1970 by document A/CN.4/225. The Secretariat prepared also material on succession of States in bilateral treaties in document A/CN.4/229. The supplement was made in 1971 by document A/CN.4/243 and Add.1.
28 A/CN.4/151. The digest was supplemented in 1970 by document A/CN.4/232.
29 A/CN.4/157.
30 A/CN.4/160 and Corr.1.
31 The International Court of Justice.
32 A/CN.4/L.223 and Corr.1 and Add.1.
33 A/CN.4/L.328/Add.2.
34 A/CN.4/497.
35 Res. 55/153 of December 12, 2000.
36 Res. 59/34 of December 2, 2004; 63/118 of December 11, 2008; 66/92 of December 9, 2011.
37 A/CN.4/730.

on State succession. Some drafts have been transformed into universal treaties. The draft, which has not been transposed in a treaty has, also, legal significance. The ECtHR thus referred to the Draft Articles on Nationality of Natural Persons in relation to the Succession of States.[38]

By their doctrinal codifications, the IIL and the ILA[39] contributed greatly to development of the law of State succession. The IIL adopted resolutions on State succession in matters of property and debts[40] and on State succession in matters of State responsibility.[41] The ILA accepted Resolution no. 3/2008 "Aspects of the law of State succession" addressing succession in treatise, property, debts, and archives.

3. The basic notions and categories

All relevant conventions, drafts of the ILC, and doctrinal codifications define the term "succession" identically as "the replacement of one State by another in the responsibility for the international relations of territory." The ILC explains that replacement means complete replacement.[42] The definition does not mean partial transfer or conferral of powers, and the replacement should be permanent. Temporal replacement, such as a belligerent occupation, is excluded.[43] Nor does it denote the succession of governments or other subjects of international law.[44] The term "responsibility" has not been used here in the sense of State responsibility for internationally wrongful act, but in the sense of competence of international representation. The syntagma "responsibility for the international relations of territory" is more appropriate than the expression "replacement in the sovereignty in respect of territory" since it covers all varieties of possible status of territory, such as national territory, trusteeship, mandate, protectorate, and depending territory.[45]

The replacement in the responsibility for the international relations of territory occurs between a predecessor State and a successor State, where the successor State replaces the predecessor State. The 1978 and 1983 Conventions, the 1999 and 2021 ILC Drafts, and the 2015 IIL Resolution[46] also determine identically the meaning of the term "date of succession." The date of the succession denotes the date of the replacement of the predecessor State by the successor State. There may be several successor States and several dates of succession, as happened in the

38 *Kurić and others v. Slovenia* (app. no. 26828/06) Judgment, June 26, 2012, para. 226.
39 The International Law Association.
40 The 2001 IIL Resolution.
41 The 2015 IIL Resolution.
42 Report of the International Law Commission on the work of its twenty-sixth session, p. 171, para. 69.
43 Brownlie, 1979, p. 651.
44 Report of the International Law Commission on the work of its twenty-sixth session, p. 175.
45 Ibid., pp. 175, 176.
46 The 2015 Resolution of the Institute of International law on State succession in matters of State responsibility. See Kohen, 2015.

case of Yugoslavia. The quoted documents do not define a State that continues the international legal personality of the predecessor State, which is commonly named "a continuator."

There are a few categories or types of succession: a) transfer of a part of territory of a State to another State (cession); b) a dependent territory becomes a newly independent State (a case of decolonization); c) two or more States merge into a new State or a State is incorporated into another State (unification); d) separation of part or parts of the territory of a State (secession); and e) dissolution of a State.[47] The predecessor State remains in all enumerated types of succession, except in cases of dissolution and unification in a union. The CSFR and the SFRY dissolved and ceased to exist. Czechia,[48] Slovakia,[49] BH,[50] Croatia,[51] Slovenia,[52] Macedonia,[53] and the FRY[54] appeared as new successor States. Egypt and Syria merged in the UAR[55] in 1958. Tanganyika and Zanzibar united in the Republic of Tanzania in 1964. North Viet Nam and South Viet Nam merged in the Socialist Republic of Viet Nam in 1975. South Yemen and North Yemen united in the Republic of Yemen in 1990. The unification in the form of incorporation does not affect the personality of an incorporating State, but an incorporated State ceases to exist. The incorporating State thus becomes a State continuator and successor at the same time. The German Democratic Republic was incorporated into the Federal Republic of Germany in 1990. The former ceased to exist as a State and the later has continued its international legal personality and thus become a State continuator, but also a State successor. The successor States are usually new States, but not always. In the cases of cession and incorporation, the successor State is not a new State.

The two Conventions and the two ILC Drafts do not define various categories of succession except "newly independent State." The newly independent State is defined as "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible." This definition denotes a State that has been born in the process of decolonization. The materials of the ILC and State practice indicate the meanings of other terms. Working on the draft on succession regarding treaties, the ILC connected, for example, the term "dissolution" with a union of States, whose component parts "retained a measure of individual identity during the existence of the union."[56] However, the determination of some types of

47 Older literature also enumerates annexation or conquest as types of succession. See Keith, 1907, p. 9.
48 The Czech Republic.
49 The Republic of Slovakia.
50 Bosnia and Herzegovina.
51 The Republic of Croatia.
52 The Republic of Slovenia.
53 The Former Yugoslav Republic of Macedonia, since 2019 the Republic of North Macedonia.
54 The Federal Republic of Yugoslavia.
55 The United Arab Republic.
56 Report of the International Law Commission on the work of its twenty-sixth session, p. 265.

succession is not clear cut in theory and the issue is not without political impact in practice. Qualifying an event as one or another category of succession has been a source of disagreement and confusion in some cases. Austria and the Allied Powers did not agree about character of the break-up of Austro-Hungarian Monarchy after the First World War. Austria qualified the break-up as a dissolution, while the Allied Powers considered it secession and treated Austria and Hungary as continuing the legal personality of the Monarchy. Thus, the Peace Treaty of St. Germain-en-Laye proclaimed Austria, as a State continuator, responsible for the First World War and for war damage.[57] The FRY and the former Yugoslav Republics disputed for over a decade the character of the break-up of the SFRY.[58] Croatia and Slovenia first, and then, successively, Macedonia and BH declared their independence and were successively admitted to the membership of the UN. The FRY saw the succession as a series of secessions, but the former Yugoslav republics viewed it as a dissolution. After certain controversial decisions of the Security Council and the General Assembly regarding the position of the FRY in the UN,[59] the dispute was settled by the application of the FRY for membership in the UN in 2000, which implied a dissolution. Some doctrinal definitions of continuity and discontinuity of States may be found in Arts. 2–5 of 2001 IIL Resolution.[60]

The identification of the changes that affected the USSR is not easy and has provoked discussion.[61] Šturma discussed whether the break-up of the USSR was a case of dissolution or a series of secessions.[62] He noted that the three Baltic States declared independence and left the USSR in 1990 and 1991.[63] The remaining 11 Soviet Republics declared that the USSR had ceased to exist and formed the Commonwealth of Independent States in Alma-Ata in December 1991.[64] Nonetheless, Russia has been treated as a continuator of the USSR in the UN and in international treaties. Russia was not admitted as a new State to the membership of the UN.[65] The Secretary General of the UN, as the depositary of international treaties, treated Russia as continuing the USSR in treaties. The parties to treaties did not object. Most successor States of the USSR and international community recognized Russia also as a continuator of the USSR regarding State debts and State property. It is not easy to see how this practice can

57 Šturma, 2018, para. 82.
58 See polemic between Blum and his opponents Degan, Bring, and Malone. Blum, 1992b, pp. 830–833; Degan, Bring, and Malone, 1993, pp. 240–251.
59 See Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment, ICJ Reports, 2003, paras. 33–48. See, also, Šturma, 2018, para. 176.
60 The 2001 Resolution of the Institute of International Law on State Succession in Matters of Property and Debts. See, Ress, 2000–2001b.
61 Mullerson, 1993, pp. 475–483.
62 Šturma, 2018, para. 84.
63 Ibid., para. 85.
64 Ibid., para. 86.
65 Blum, 1992a, pp. 354–361.

be accommodated to the concept of dissolution as it is defined in the general law of State succession. An attempt of the analogous treatment of the FRY by the Secretary General regarding international treaties faced the objections of some UN Members, leading the Secretary General to change its position.[66] Article 60 of the Constitutional Charter of the SUSM[67] from 2003 provided each member of the Union with the right to decide after three years to leave the Union. Para. 5 of Art. 60 reads: "The Member State which ... [breaks away] ... shall not inherit the right to international legal personality, and any disputable issues shall be regulated separately between the successor State and the newly independent State."[68] The provision is a little clumsy. "The successor State" denotes here a State continuing the Union. "The newly independent State" is not the best translation of the expression "osamostaljena država" used in the original text. In the context of the law on State succession, "the newly independent State" means a State that acquired its independence in the process of decolonization. Montenegro[69] acquired its independence by separation. A better translation of "osamostaljena država" would be "a State that acquired independence." In the case of the separation of Montenegro, what really occurred, as the Constitutional Charter envisaged, is in fact that Serbia[70] has continued the international personality of the SUSM.[71] Serbia, as a continuator of the SUSM, has been confirmed by the Agreement between the Republic of Serbia and the Republic of Montenegro on the Regulation of Membership in International Financial Organizations and Division of Financial Rights and Obligation, signed in Belgrade on July 10, 2006.[72] The quoted Para. 5 of Art. 60 of the Constitutional Charter speaks on the successor State and the State that acquired independence. Serbia was named a successor State and Montenegro a State that acquired independence. The chosen terms do not correspond with their meaning, as determined in the two Conventions and the two ILC Drafts. Montenegro has been, in fact, a successor State and Serbia has become a continuator of the SUSM.

4. Dubious validity of the condition of legality of succession

Common to the two Conventions and the two ILC Drafts is that they limit applicability of their provisions only to "lawful successions." The 1978 Convention,[73] the 1983

66 Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), op. cit., paras. 38, 39.
67 The Constitutional Charter transformed the FRY to the SUSM.
68 *Bijelić v. Montenegro and Serbia*, (app. no. 11890/05), April 28, 2009, para. 37.
69 The Republic of Montenegro.
70 The Republic of Serbia.
71 The State Union of Serbia and Montenegro.
72 Službeni glasnik Republike Srbije (Official Journal of the Republic of Serbia) No. 64/2006.
73 The Vienna Convention on Succession of States in respect of Treaties, Vienna, August 22, 1978.

Convention,[74] the 1999 ILC Draft,[75] and 2021 ILC Draft[76] stipulate that they may be applied "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."

The *ratio* of the provision is that an illegal territorial change cannot be legitimized by application of the rules on succession. The provision was initiated in the ILC during preparation of the draft on succession of States in respect to treaties in 1972 and later was generally accepted.[77] That may have sense in the context of the 1978 Convention. A transfer of sovereignty that would be contrary to international law and the UN Charter should not open treaties for illegal territorial changes. The question is whether it may have sense in the context of the other three documents, in particular whether nonapplication of the rules on effects of State succession regarding nationality is a proper choice. The issue was not widely elaborated by the special rapporteur. He referred to the previous work of the ILC concerning Art. 6 of the Draft on succession to treaties and Art. 3 of 1983 Convention. Thus, he concluded that "the current study should not deal with questions of nationality which might arise, for example, in cases of annexation by force of the territory of a State."[78] Does this mean that the fate of individuals who have their habitual residence on the illegally annexed territory is not relevant for international law? Can the annexing State legally impose its nationality on the individuals in the annexed territory contrary to their will? It might be that nonapplication of the rules on nationality has not reached a fair balance, a term borrowed from the ECtHR, between general interest of international community and interest of individuals.[79]

The propriety of the conditions of the legality of a territorial change for application of the 1983 Convention is also questionable, in particular if the situation of illegality lasts a long time. The division of State property or foreign debts or regulation of archives would not necessarily transform an illegal situation into a legal one. Šturma observed that precise rules of international law on the creation and termination of States are missing,[80] which means that the condition of legality might create uncertainty in the application of the rules of succession. The purpose of the provision—not to legitimize an illegal territorial change—may be achieved in another way. Instead of nonapplication, the provision might read as stipulating that the application shall not prejudice legality of the territorial change. A parallel approach has been used

74 The Vienna Convention on Succession of States in respect of State Property, Archives and Debts, Vienna, April 7, 1983.
75 The Draft articles on nationality of natural persons in relation to succession of States adopted by the ILC in 1999.
76 The Draft articles on nationality of natural persons in relation to succession of States adopted by the ILC in 2021.
77 The history of the provision and the reason underlying may be seen at Šturma, 2018, paras. 22–41.
78 Mikulka, 1995, para. 95.
79 See the solutions that have been applied in practice at Grossman, 2001, p. 861.
80 Šturma, 2018, para. 37.

regarding international humanitarian law. The application of humanitarian law does not prejudice the legality of the use of force. The US has never recognized the Confederation as a sovereign State, but the US Supreme Court invoked the doctrine on State succession to attribute the property of the Confederation to the Federation.[81] In the literature there is a strain of thought that does not exclude certain types of succession even in cases of illegally acquired territory.[82]

5. Succession of States to treaties

The rules on the succession of States to treaties reconcile the freedom of contracting and general interests of continuity and certainty of treaty relations. The freedom of contracting is one of the basic principles of the law on treaties. In the context of succession, it means that new successor States choose the treaties of predecessor State into which they will enter. The interest of continuity and certainty of treaty relations requires the automatic succession of new successor States to all the treaties of a predecessor State. The 1978 Convention and international practice do not, however, reconcile these two matters in the same manner. The 1978 Convention governs succession by two basic rules: a) automatic succession for the cases of secession and dissolution, and b) a clean slate rule for newly independent States. Automatic succession means the continuity of the treaties of a predecessor State in respect of a successor State automatically without any notification of succession. The clean slate rules mean that treaties of a predecessor State do not automatically bind a successor State, and instead the successor State is free to choose the treaties of a predecessor State into which it will enter by a notification of succession. Practice has preferred the clean slate rule in the cases of separation and dissolution, where automatic succession has appeared as an exception. In fact, States have traditionally chosen the clean slate approach, but international bodies and courts have recently established an exception regarding human rights treaties. The interaction between the freedom of contracting and continuity of treaties has been informed by the principle of territoriality and the principle of protection of human rights. The two principles restrict the freedom of contracting regarding treaties on frontiers, territorial regimes, and human rights. The freedom of contracting does not exist either in respect of customary international law and general legal principles. The customary international law and general legal principles oblige new successor States regardless their will.

The 1978 Convention distinguishes boundary treaties and treaties of other territorial regimes. Art. 11 states that a succession of States does not affect a boundary established by a treaty or the obligations and rights established by a treaty relating to the regime of a boundary. Art. 12 relates to other territorial regimes and declares that the succession a State does not affect the obligations and rights established by a

81 Hahn, 1994, pp. 266–277.
82 Castren, 1954, p. 56.

treaty and relating to use of any territory or restriction upon its use for the benefit of any territory of a foreign State, or a group of States or all States. The ILC has referred in particular to rights of transit, the use of international rivers, demilitarization of particular localities, etc.[83] The ICJ confirmed that the rule in Art. 12 has acquired the status of an international customary rule.[84] The political geography of the Danube region was changed in the last wave of successions in Europe. Croatia, Moldova, Serbia, and Slovakia have become new parties to the Convention regarding Navigation on the Danube, signed in Belgrade in 1948, but the regime of navigation remains as it was established in 1948 unchanged. The effect of Art. 12 is that succession does not affect the rights and obligations of third parties and that successor State cannot change the established regime by their reservations. Having in view the general practice of States and jurisprudence of the ICJ, it is beyond doubt that the rule in Art. 11 also has the character of an international customary rule.[85] The ICJ was invited to confirm that the key provision of the Convention in Art. 34 on automatic succession has become the rule of international customary rule, but the Court declined to do so.[86]

5.1. Clean slate rule

The substance of the clean slate (*tabula rasa*) rule is that a newly independent State emerging through the process of decolonization is not obliged to remain bound by treaties of a predecessor State, except for treaties referred to in Arts. 11 and 12 of the 1978 Convention, and that it may succeed to multilateral treaties of the predecessor State by the notification of succession. According to Art. 23 Para. 1 of the 1978 Convention, a successor State that has notified succession to a treaty has become the party to the treaty from the date of succession. The provision secures the continuity of the chosen treaties. That entails, however, some uncertainty about the status of a newly independent State in the period between the date of succession and the date of notification. The parties to the treaty remain uncertain regarding the status of successor State in that period. Art. 23 Para. 2 avoids this uncertainty by suspending operation of a treaty until the date of notification. The treaty may be applied provisionally, if a newly independent State notifies such intention. Suspension is probably the only possible solution, but this issue is not quite clear. BH entered the 1948 Convention on the Prohibition and Punishment of the Crime of Genocide by notification succession to the Convention on December 29, 1992, with effect from the date of succession of March 6, 1992. The Secretary-General communicated a depositary notification on succession on March 18, 1993. The moment from which the Genocide Convention was effective regarding BH was uncertain and was discussed in the Genocide case between BH and the FRY. The ICJ was in a position to establish its jurisdiction without

83 Report of the International Law Commission on the work of its twenty-sixth session, p. 197.
84 *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJR, 1997, para. 123.
85 Degan, 2006, p. 196.
86 *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), para. 123.

specifying the moment and it avoided resolving the disputed issue.[87] The ECtHR considered successors States to be bound by the European Convention on Human Rights from the date of succession.[88]

The rule of clean slate was, thus, foreseen for States emerging in the process of decolonization as an equitable solution remedying the subordinate position of the former colonies. Art. 34 of the 1978 Convention foresees automatic succession for the cases of separation or dissolution. Any treaty of a predecessor State in force at the date of succession continues to be in force for all successor States. The rule was supported by the previous practice of the dismemberment of a union of States, but does not reflect a customary rule regarding separation.[89] Members of the unions enjoyed autonomy regarding entering into treaties and they participated in the conclusion of treaties of the union. The rule on automatic succession rests, thus, on the presumption that successor States have already accepted a treaty as the members of a union. Originally, the ILC drafted two articles, one for dissolutions and another for separation. Automatic succession was foreseen for the case of dissolution and the clean slate rule for the cases of separations.[90] Having in view the comments of various governments, the ILC considered whether there was a clear distinction between dissolution and separation and, if there were, whether it should have any bearing on succession regarding treaties. The ILC merged the two articles into one, but preserved the clean slate rule for the cases of separation, which were comparable with newly independent States.[91] This was consonant with the logic that a new State cannot be bound by a treaty if, while being a part of the predecessor State, it did not participate in its treaty-making powers. The last paragraph on the clean slate rule disappeared, however, in the text of Art. 34 of the 1978 Convention.

The website of the Secretary-General of the UN,[92] as a depositary of international treaties, gives information on the practice in succession to multilateral treaties. The practice of State succession to treaties in the last waves of succession was not quite uniform, but the prevailing principle was the principle of clean slate. The commonality of the practice was that the successor States chose the treaties to which they succeeded. BH and Macedonia used notifications of succession to succeed to particular treaties. Croatia, the FRY, and Montenegro informed the Secretary-General of their decisions to succeed to the treaties of the former SFRY, respectively the SUSM, as they were enumerated on the lists annexed to the letters. Similarly, Czechia, Slovakia, and Slovenia informed the Secretary-General that they considered themselves bound by the multilateral treaties of the CSFR and the SFRY, respectively. They informed that they had examined the treaties that they entered in the lists attached to their

87 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Preliminary Objections, Judgment, I. C. J. Reports, 1996, paras. 18–26.
88 See the practice of the ECtHR in f. 6.
89 Cassese, 2005, p. 78.
90 Report of the International Law Commission on the work of its twenty-sixth session, p. 264.
91 Ibid., p. 265.
92 See https://treaties.un.org/Pages/HistoricalInfo.aspx?clang=_en.

letters. The common feature of all enumerated modes of successions is that successor States choose the treaties in which they succeeded and that they accepted the effects of the chosen treaties from the date of succession. These practices were not absolutely consistent. Slovenia acceded, for example, to the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, in spite of the fact that the SFRY was a party. Russia and Serbia informed the Secretary-General that they continued the treaties of the USSR and of the SUSM, respectively, and requested a change in the names of the parties in the register of treaties. The continuity of treaties was secured in all these cases. The exceptions are the successor States of the USSR that acceded to the treaties. They also chose the treaties to which they acceded, but the treaties entered into force after accession.

The continuity of a bilateral treaty is subject to an explicit or implicit agreement of a successor State and another party. Usually, a new successor State negotiate with a State regarding which bilateral treaties between the State and the predecessor State will remain in force and confirm the reached agreement by an exchange of notes.[93]

The 1978 Convention provides for the application of the Convention to the treaties that are constituent instruments of international organizations, but without prejudice to the rules on admission to an organization. If a decision of an organization on admission to its membership is necessary, succession to the constituent instrument is not possible without such a decision. The object and purpose of a treaty may determine a circle of new successor States that can enter the treaty. The object and purpose of the 1948 Convention Regarding Navigation on Danube has determined that only successor States that are riparian States on the Danube might have become parties to the Convention and Members of the Danube Convention. They become the parties by the Protocol, signed in Budapest on March 28, 1998. Something of the principle of *rebus sic stantibus* may be of relevance for succession of States to treaties. The 1978 Convention excludes succession when it is incompatible with the object and purpose of a treaty or when it radically changes the conditions for its operation.[94]

The rule of clean slate leaves the freedom to a successor State to choose the treaties into which it wishes to enter, but are the counterparties of these treaties obliged to enter treaty relations with a successor State? If the parties have recognized the successor State as a new State, and if the treaty is open for unilateral accession, the presumption should be that the parties consented to accept the successor State as a new party. If a party to a treaty to which a successor State entered has not recognized the successor State as a new State, have the treaty relations been established between two States? The ICJ avoided answering this question in the above-mentioned Genocide

93 Beemelmans, 1997, pp. 92–96. The US conditioned recognition of successor States of the USSR, the CSFR, and the SFRY on their acceptance of the treaties of their predecessors. Williams, 1997, pp. 23–31.

94 See about succession to "closed" treaties at Beemelmans, 1997, pp. 85–87.

case. BH entered the Genocide Convention in time when it was note recognized by the FRY. The FRY recognized BH by the Dayton Peace Agreement in 1995, and as the ICJ decided on its jurisdiction in 1996, the previous non-recognition of BH had become irrelevant for the decision on jurisdiction.[95] The practice has been established by declarations deposited with the Secretary General that accession of a State to a treaty does not automatically mean its recognition by a party to the treaty and does not mean automatic establishment of treaty relations among them. A similar logic might be valid regarding succession.

5.2. Automatic succession

Automatic succession would be a natural solution regarding codifying treaties, that is, treaties that codify or reflect international customary rules.[96] Unfortunately, the rule has not been accepted as a general rule.[97] States have preferred the freedom of contracting over legal certainty. This freedom includes the capacity to dispose of the declarations and reservation of a predecessor State, withdrawing or changing them or depositing new declarations and reservations regarding a treaty. Nevertheless, the issue of automatic succession has been considered in international jurisprudence and literature. Having in view the specific nature of the Genocide Convention, the question whether the Convention provides for automatic succession was raised in the Genocide case (BH v. the FRY). In 1996 the ICJ underlined the importance of the particular nature of the Convention but avoided answering.[98] The next year the Human Rights Committee adopted its General Comment No. 26, in which it treated human rights as acquired rights. The Committee recalled its long-standing practice that "once the people are accorded the protection of the rights under the Covenant, such protection devolves with the territory and continues to belong to them, notwithstanding ... State succession..."[99] This has been the long-standing practice of the Committee, but the responses of successor States have not been homogeneous. They reacted differently to invitations of the Committee to submit their periodic reports. BH submitted the report before the notification of succession to the Covenant. The successor States of the USSR and Macedonia did not do that.[100] Invoking the quoted position of the HRC, four judges of the ECtHR advocated automatic succession of treaties of international humanitarian law and war crimes.[101] Evolution of the law in that direction has been

95 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* op. cit., paras. 25 and 26.
96 Jenks, 1952, p. 107.
97 See contrary view at Beemelmans, 1997, pp. 89, 90.
98 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* op. cit, paras. 21, 22.
99 Compilation of general comments and general recommendations adopted by human rights treaty bodies, HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, p. 223.
100 Verbatim record of public sitting of the ICJ of 30 April 1996, p. 49. See further on the practice of the ECtHR and the HRC at Kamminga, 2005.
101 *Janowiec and others v. Russia*, (app. nos. 55508/07 and 2952/09) Judgment, October 21, 2013, Joint partly dissenting opinion of judges Ziemele, De Gaetano, Laffranque, and Keller, para. 27.

noted in the literature.[102] The issue of the automatic succession of States to investment treaties has also been considered in the literature.[103]

5.3. The moving frontier rule

All that discussed above relates to newly independent states born in the process of decolonization and to cases of dissolution or separation. The 1978 Convention governs, also, the case of transfer of a part of territory (cession) and the case of unification. In the case of transfer of a part of territory, it provides for the "moving frontier rule." The treaties of a predecessor State on the transferred territory cease and the treaties of a successor State, which is not a new State in this case, extend to the transferred territory.[104] In the case of unification, the 1978 Convention foresees continuity of treaties of predecessor States in respect of a new successor State. It does not, however, make a distinction between the unification of two or more states in a union of States and the incorporation or adhesion of a State by another State. The continuity of all treaties of predecessor States may have sense in the case of a union, but not in the case of incorporation.[105] In the German case, a case of incorporation, the moving frontier rule was applied.[106] The same rule was applied to the Kingdom of Serbs, Croats, and Slovenes in 1919. The treaties of Serbia, concluded before 1914, were extended to the whole territory of the Kingdom by the St. Germain-en-Laye Treaty.

6. State succession regarding State property, debts, archives, and private rights

The 1983 Convention governs State succession to property, debts, and archives. The ECtHR indicated that the provision of the Convention might reflect international customary law.[107] The IIL adopted the 2001 IIL Resolution to refresh the 1983 Convention by new practice, in particular, by the practice of disintegration of the USSR, the SFRY, and the CSFR.[108] The Resolution does not depart substantially from the Convention, but expands the scope of application to private law aspects and specifies certain rules. It has thus become a proper legal source for the ECtHR.[109] The rules, contained in the 1983 Convention and in the 2001 IIL Resolution, are of a subsidiary nature. The Convention and the Resolution inform that they will be applied in absence of an agreement between concerned States.

102 Cassese, 2005, p. 78.
103 Dumberry, 2015, pp. 74–96; Repousis and Fry, 2016, pp. 421–450.
104 Jennings and Watts, 1992, p. 225.
105 Ibid., pp. 211, 212.
106 Beemelmans, 1997, pp. 98–108.
107 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (App. no. 60642/08) Judgment, Grand Chamber, July 16, 2014, para. 59.
108 Ress, 2000–2001b, p. 712.
109 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (App. no. 60642/08) Judgment, Grand Chamber, July 16, 2014, para. 59.

6.1. State property

The 1983 Convention defined the State property of a predecessor State as the property, rights, and interests that were owned by that State according to the internal law. The 2001 IIL Resolution adds the property of public institutions of a predecessor State.[110] Having in view the specifics of the Yugoslav socialist self-managing political and economic system, determination of the property of the SFRY was one of most disputed issues in the succession negotiation.[111] The problem was resolved by a compromise leaving each successor State to determine, in accordance with international law, whether the property located in its territory was State property of the SFRY.

The principle of territoriality and the principle of equity are the main principles underlying the transfer of property from a predecessor State to a successor State. The immovable State property of a predecessor State follows the fate of the territory where it is located. If it is located on the territory of the predecessor State that has become territory of the successor State, the immovable property passes to the successor State, in principle, without compensation. The movable property of a predecessor State connected with the activity of the predecessor State on territory that has become the territory of a successor State passes to the successor State. According to the 1983 Convention, the rule is applied in all categories of succession. Additional rules are provided for specific categories. In the cases of separation and dissolution, the movable property of the predecessor State that does not relate to its activity on the specific territory shall pass to a successor State in an equitable proportion. In the case of dissolution, the immovable property of a predecessor State that is situated outside its territory passes to successor States in equitable proportions. The 2001 IIL Resolution follows the exposed rules of the 1983 Convention and adds some new ones. The provision in Art. 19 Para. 4, however, is not quite clear. It states that immovable property of the predecessor State situated outside its territory remains "in principle" the property of the predecessor State in the case of cession and separation (secession). Art. 19 Para. 4 adds, however, that nonetheless, successor States have the right to equitable apportion of the property of the predecessor State situated outside its territory. It might look contradictory, but the Rapporteur explained that the provisions were innovative and opened a possibility for apportionment of immovable property abroad in the cases of cession and secession.[112] He referred to the practice of the SFRY and USSR. The referred practice offers, however, little support for the innovation. The SFRY case was a case of dissolution, and the immovable property of the USSR abroad belonged to Russia. The principle of equity requires, however, that the value of immovable property abroad should be account as a part of State property as a whole in searching equitable apportionment in the case of secession. The 2001 IIL

110 Older literature referred to State property in the public and private domains. See Chen, 1923, pp. 180, 181. Alternatively, property of public character and fiscal property. See Castren, 1954, p. 70.
111 Škrk, Polak Petrič, and Rakovec, 2015, p. 224.
112 Ress, 2000–2001a, p. 419.

Resolution distinguishes property of major importance to the cultural heritage of a successor State from whose territory it originates.[113] The provision requires identification of such property within a reasonable time and its passage to be regulated by the concerned States. Annex A to the 2001 Agreement on Succession Issues[114] contains such provision.

6.2. State debts

The rule of equitable proportion was employed by the 1983 Convention to regulate the passing of debts in the cases of transfer of part of territory, separation of a part of territory, and dissolution.[115] The Convention and the 2001 IIL Resolution differ regarding the definition of State debt. The Convention defines State debt as "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law." The Resolution accepts this definition, but expands it to "any financial obligation of a predecessor State towards any natural or legal person under domestic law." In accordance with this expansion, it obliges successor States to recognize in their domestic legal orders the rights and obligations of creditors established in the legal order of a predecessor State. Private creditors are obliged to participate in negotiations between concerned States on apportionment of private debts. The rules on State succession in respect of debts formulated in the Resolution has become thus relevant, as it will be presented later, for the ECtHR. The 2001 IIL Resolution makes a distinction between "national debts," "localized debts," and "local debts." "National debts" are the debts of a predecessor State or public institution or State-owned enterprises that were operating nationally for the benefit of the State as a whole. "Localized debts" are debts contracted by the mentioned subjects for a particular project or object in a specific region. "Local debts" are debts contracted by local public institutions, such as federal unities, regions, or communes. The principle of territoriality regulates only local debts. The local institutions remain debtors. The principle of equitable proportion governs the passing of national and localized debts to successor States. The successor States of the SFRY, however, entered into interim agreements with the World Bank in 1992, agreeing to repay loans for projects on their territories.[116] These were debts of the SFRY. The practice of the IMF[117] and the World Bank in other cases of secession and dissolution was that successor States assume debts regarding projects on their territories.[118]

113 See on the tension between the principle of territoriality and the concept of cultural heritage of a society at Jakubowski, 2014, pp. 375–396.
114 The Agreement on Succession Issues, adopted at the Conference on Succession Issues of the SFR of Yugoslavia in Vienna on June 29, 2001.
115 See Chen, 1923, pp. 169–174.
116 Paul, 1994, p. 794.
117 The International Monetary Fund.
118 Paul, 1994, p. 792; Williams, 1994, pp. 788–793.

6.3. Criteria of equitable division of State property and debts

The 2001 IIL Resolution enumerates some criteria for the equitable apportionment of property and debts, such as a territorial link or connection between property, rights, and interests on the one hand, and debts on the other hand, based on the participation of the concerned States in the GDP[119] and a formula adopted by the IMF. The formula of the IMF is complex and includes more factors including GDP, foreign currency reserves, and foreign exchange inflows and outflows.[120] The IMF has applied the formula to the succession of States and does not consider itself bound by the agreements of successor States. Czechia and Slovakia agreed in 1992 that the property and liabilities of the predecessor State passed over the successor States in conformity with the population *ratio*, that is in a proportion of two to one.[121] They notified the agreement to the IMF. The IMF applied, however, its formula and allocated to Czechia a bit more than two-thirds of the Czechoslovakia obligation and to Slovakia a bit less than one-third.[122]

The redistribution of property and debts of the USSR has been an evolving process. At the time of dissolution, the eight successor States, all the former Soviet Republics except the three Baltic Republics, agreed on December 4, 1991, on their shares of property and debts on the principle that the percentage shares of property and of debts have to be same. The participation of Russia in property and debts was 61.34%, Ukraine 16.37%, etc.[123] It seems that the implementation of the Agreement was unsuccessful. The idea of joint and several liability emerged as a substitute. On the basis of bilateral agreements with most other successor States concluded during 1992 and 1993, Russia took over all international liabilities of the USSR and its property located abroad, including gold reserves and diplomatic property. Russia accepted shares of debts of smaller successor States and they renounced their shares of the property of the USSR beyond their respective territories.[124] Ukraine concluded with Russia, however, a protocol that preserved participation of Ukraine in debts and assets in accordance with the agreement from December 4, 1991. The implementation of the protocol did not proceed without difficulties, in particular regarding the division of the Black Sea Fleet.[125]

The successor States of the former SFRY agreed in 2001 on the percentages of their participation in property and debts of the predecessor States. The percentage of share for each successor State is almost identical with the percentages as determined by the IMF,[126] although the percentage of participation of a successor State is not identical to its participation in other subject matters. BH participated, for example, in assets in the Bank for International Settlement with 13.20%, in diplomatic property with 15%, and in other foreign financial assets with 15.50%. Similarly, the share of Croatia

119 Gross Domestic Product.
120 See https://www.imf.org/en/About/Factsheets/Sheets/2016/07/14/12/21/IMF-Quotas.
121 Oeter, 1995, p. 76.
122 Ibid.
123 Ibid., p. 80.
124 Ibid., p. 82.
125 Ibid., p. 83.
126 Williams, 1994, p. 802, f. 168.

in assets in the Bank was 28.49%, in diplomatic property 23.5%, and other foreign financial assets 23%. Probably following the principle of equity, the parties tuned their percentages in the division of different goods.

6.4. Archives

The archivistic principle of the preservation of the integral character of archives, the principle of territoriality, and the fact that archives are reproducible underlie the rules on archives as set forth in the 1983 Convention. The archives for normal administration of the territory and archives that relate directly to the territory follow the destiny of the territory in the cases of cession, separation, and dissolution. These archives pass to a successor State to which the territory belongs. All archives, that is, the archives that remain in a predecessor State and archives transferred to a successor State will be at the disposal of each for reproduction at the expense of the State that requires reproduction. In addition, the peoples of these States have the right of access to the archives as necessary for their development and information about their history and their cultural heritage. These provisions establish a fair balance between the principle of the preservation of the integral character of archives and the legitimate needs of successor States and concerned peoples. Art. 31 Para. 2 of the 1983 Convention relates to dissolution and encodes a certain tension between the principle of the integral character of archives and succession. It provides that the archives of a predecessor State will pass in an equitable manner to successor States. Such a total division of archives would be contrary to the principle of their integral character. It was an inappropriate effectuation of legal fact that a predecessor State has ceased to exist.

The issue of the fate of archives was a matter of disagreement between the FRY and other successor States. The compromise in Annex D to the 2001 Agreement on Succession Issues respects the principle of territoriality. Regarding archives that have no territorial link, Art. 6 of the Annex D provides that the successor States will determine their equitable distribution or their retention as a common heritage of States by an agreement that should be reached within six months after entering the Agreement into force. If no agreement is reached, the archives become the common heritage of the successor States. Obviously, this compromise paid tribute to Art. 31 Para. 2. of the 1983 Convention and preserved the integrity of archives. No agreement was reached and the archives have become a common heritage. The Archive of Yugoslavia in Belgrade has survived succession and it is now open to all the successor States. The process of digitalization has begun and the archive will become accessible to everyone.

6.5. Rights and obligations of natural and juridical persons

The general principle is that State Succession does not touch the acquired rights of individuals or private bodies.[127] The general rules of international law that protect acquired rights are valid as well in the circumstances of succession.[128] The principle of

127 Chen, 1923, pp. 177–180; Jennings and Watts, 1992, p. 216.
128 See on concessions at O'Connell, 1950, pp. 93–124.

equity may attribute a certain importance to the historical circumstances of acquired rights, in particular in cases of decolonization.[129] The 1983 Vienna Convention does not prejudice in any respect any question concerning the rights and obligations of natural or juridical persons. The 2001 IIL Resolution declares that successor States will insofar as possible respect the rights of private persons acquired in the legal order of a predecessor State.

The rights of private persons are endangered, in particular, in a contested succession, as the Yugoslav case was. Deeply disturbed inter-ethnic relations and the low level of the rule of law in the successor States aggravated the situation. Two annexes to the 2001 Agreement on Succession Issues are dedicated to acquired rights. Annex E addresses the pensions and Annex G private property and acquired rights. The SFRY was a highly decentralized Federation. Besides the federal pension fund, which paid pensions to employees of the Federation, each Republic as a federal unit had its own pension fund. Annex E obliges the successor States to continue to pay pensions that they have already paid from their funds irrespective to nationality, citizenship, residence, or domicile of pensioners. It provides that each successor State will pay pensions to federal pensioners who have its citizenship. If a pensioner is a citizen of two successor States, the successor State in which the pensioner has domicile will pay the pension. As the successor States entered bilateral treaties on mutually paying pensions to their pensioners, the issue of pensions has been largely settled. Annex G contains a provision on protection of private property and acquired rights of citizens and other legal persons of the SFRY. Art. 2 Para. 1 of Annex G holds key importance. The successor States are obliged to recognize, restore, and protect the rights to movable and immovable property of citizens or other legal persons of the SFRY as they existed on December 31, 1990, in accordance with international law and irrespective of the nationality, citizenship, residence, and domicile of these persons. Any transfer of rights made after December 31, 1990, under duress is null and void. The implementation of Annex G has been only partly successful. Not a few persons have not succeeded in restoring their right.

6.6. Relevant practice of the European Court of Human Rights

When successor States are not capable of resolving certain succession issues that affect human rights, the ECtHR may help. A number of nationals of the former SFRY, who became nationals of successor States, after the dissolution of the SFRY, faced the problem of recovering "old" or "frozen" foreign-currency savings. Due to restrictions imposed by the Yugoslav Government in the late eighties, all depositors of foreign-currency deposits in banks were unable to withdraw the greater parts of their deposits before the dissolution. Since the dissolution the successor States have recognized the debts of the banks established on their territories toward their nationals. The foreigners, now nationals of a successor State, who had deposits in banks established on the territory of another successor State faced the problem of recovery of their deposits.

129 Brownlie, 1979, pp. 654, 655.

Several nationals of BH who had foreign-currency savings in branches of the Serbian bank and the Slovenian bank on the territory on the Republic of BH before the dissolution and who did not succeed in recovering them, instituted proceedings before the ECtHR against all five successor States, alleging breaches of the right to property, the right to effective remedy, and the prohibition of discrimination.[130] During the negotiation on succession issues over 10 years, the five successor States were unable to agree whether the issue of "old" foreign currency savings had to be treated as an issue of liability of the predecessor State or as a private law issue and who would be responsible for recovery—a successor State on whose territory a bank had its seat or a successor State on whose territory the deposit was made.[131] They agreed, however, by the 2001 Agreement on Succession Issues to negotiate later about the guarantees of the SFRY of hard currency savings, which they did but without success. The ECtHR did not base its judgment on succession but on attribution of acts to a State. Having in view the position of socially-owned or state-owned banks in legal systems of successor States and the competences of the successor States regarding the management of these banks, the Court found that the debts of the banks had become the debts of the successor State on whose territory the bank had its seat. The Court attributed the debts of the branch of the Serbian bank in BH to Serbia and debts of the branch of the Slovenian bank to Slovenia.[132] In spite of that, the Court touched *obiter dictum* certain issues of succession. The Grand Chamber disagreed with Serbia and Slovenia that the territorial principle should be applied in this case. It did not qualify the debts in this case as local debts to which the territorial principle is applicable. The Court decided that the equitable proportion principle would be appropriate.[133] It observed, however, that the equitable distribution of the debts in this case would require a global assessment of the property and debts of the predecessor State, which was far beyond its competence.[134] Thus, the Grand Chamber did not apply the equitable proportion principle. It observed, however, that the gains of branches of a bank were transferred to the successor State on whose territory the bank had its seat, which might indicate that the principle of equity played a certain role in the reasoning of the Court. The Grand Chamber relied on its reasoning about succession on the 2001 IIL Resolution.

Another side of the problem emerged in the dispute between Slovenia and Croatia before the ECtHR in 2020.[135] Croatian debtors had not repaid their debts to the Ljubljana

130 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (App. no. 60642/08) Judgment of Grand Chamber, July 16, 2014.
131 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, para. 62.
132 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, 116, 117.
133 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* , para. 121.
134 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* , para. 122.
135 *Slovenia against Croatia*, (app. no. 54155/16), Decision of the Grand Chamber of 16 December 2020.

Bank and civil proceedings of the Bank before Croatian courts remained unsuccessful. Slovenia alleged that Croatia was responsible for breaches of the right to a fair trial, the right to effective remedy, and the prohibition of discrimination. Having in view the status of the Ljubljana Bank as a State-owned bank under control of the Slovenian State, the ECtHR denied the status of nongovernmental organization and rejected the application. Unfortunately, the ECtHR was not also helpful regarding the rights protected by Annex G, taking the position that Annex G was not directly applicable.[136]

7. Effects of State succession to nationality

The guiding principle, emerging from long-standing practice, is that the nationality of the population on a territory follows the destiny of the territory.[137] The principle has been qualified by the right of option, and in addition the matter has to be considered in light of general international principles regarding nationality. The right of option was used extensively in successions.[138] Double nationality and policies of extraterritorial naturalization have also been used in circumstances of succession.[139] The successor States of the SFRY have been tolerant concerning double nationality. Many Serbs refugees from Croatia who acquired Serbian nationality in Serbia also took Croatian nationality to afford themselves freedom of movement in the EU.[140] Also, Croats living in Serbia before and after the dissolution of Yugoslavia, but who were born in Croatia, and their descendants who acquired Serbian nationality may also take Croatian nationality.

The effects of succession to nationality are regulated by Chapter VI of the 1997 European Convention on Nationality. One of the issues—avoidances of statelessness in the circumstances of succession—has been further regulated by the 2006 Convention on the Avoidance of Statelessness.[141] The 1961 UN Convention on the Reduction of Statelessness[142] does not contain specific provisions that address State succession, but as a general convention it may be relevant for interpretation the two European Conventions.

There are several general international principles on nationality that should lead the discussion of the effects of State succession to nationality. The basic principle is that everyone has the right to a nationality. The 1948 Universal Declaration of Human Rights declares this right. The right to nationality of persons who had the nationality of the predecessor State in the circumstances of succession has been confirmed in the

136 *Mladost Turist a.d. v. Croatia* (app. no. 73035/14) Decision. 30 January 2018. *Vegrad DD v. Serbia* (app. no. 6234/08) Decision, June 27, 2019.
137 Brownlie, 1979, pp. 658–664.
138 Chen, 1923, pp. 181–184; Gettys, 1927, pp. 271, 272; Van Ert, 1998, pp. 157–159.
139 Peters, 2010, pp. 628, 632–635.
140 See the principles applied by Croatia at Zgombic, 2011, pp. 846–848.
141 The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, Strasbourg, May 19, 2006.
142 The United Nations Treaty Series (UNTS), vol. 989, p. 175. Entered into force in 1975. There are 55 parties. https://www.unhcr.org/protection/statelessness/3bbb24d54/states-parties-1961-convention-reduction-statelessness.html.

2006 Convention on the Avoidance of Statelessness and the 1999 ILC Draft.[143] Avoidance of statelessness is one of the principles upon which the 1997 European Convention on Nationality is based. The Explanatory Report to the 1997 European Convention speaks about "a positive formulation of the duty to avoid statelessness."[144] Accordingly, States are obliged to enact legislation on nationality in such a way as to avoid statelessness. The 2006 Convention on Avoidance of Statelessness explicates this duty as a positive obligation—the State shall take all appropriate measures to prevent statelessness.

The right to nationality, avoidance of statelessness, and prohibition of arbitrary deprivation of nationality are three basic guidelines in regulating the effects of State succession to nationality. Moreover, the 1997 European Convention obliges the State to respect the rule of law and human rights in matters of nationality in cases of State succession. That is a general duty of a State in all State affairs. Distinguishing that duty here is, however, fully justified. The rule of law and human rights are usually badly affected in contested successions.

The 1997 European Convention on Nationality enumerates factors that a State Party will consider by deciding on granting or retention of nationality in occasions of State succession:

> "*a) the genuine and effective link of the person concerned with the State; b) the habitual residence of the person concerned at the time of State succession; c) the will of the person concerned; d) the territorial origin of the person concerned*."

The enumeration is exemplary, but the text underlines the importance of the numbered factors, stating that they will be particularly taken into account. The factors are further developed in the 2006 Convention on Avoidance of Statelessness.

The habitual residence of a person at the time of State succession is certainly a general basic factor. It does not mean a "lawful residence" but a "stable factual residence." The ILC noted that habitual residence has most often been used in practice for acquiring nationality of a successor State.[145] The principle of habitual residence is applicable in all categories of State succession, including dissolution and unification. A specific variant of habitual residence—"the rights of citizens in the commune"—was used regarding the succession of the Austro-Hungarian Monarchy.[146] The genuine and effective link is a supplementary criterion of importance, in particular, for individuals who do not have habitual residence in any of successor States. It may denote a link established by birth, by predecessors (the *ius soli* and *ius sanguinis* principles), by marriage, etc. The 1997 European Convention requires that successor States take into

143 Draft Articles on nationality of natural persons in relation to the succession of States, annexed to Resolution 55/153 UNGA of 12 December 2000.
144 Explanatory Report to the European Convention on Nationality, p. 6, para. 23. https://rm.coe.int/16800ccde7.
145 Draft Articles on Nationality of Natural Persons in relation to the succession of States, p. 23.
146 Ganczer, 2017, pp. 100–107.

account the will of concerned individuals. It may be realized by granting the right of option or by avoiding the imposition of nationality against the will of a person.

Art. 20 of the European Convention on Nationality is of particular importance for individuals who have nationality of a predecessor State and habitual residence in successor State, but not nationality of successor State. Para. 1 (a) of Art. 20 proclaims the right of these individual to remain in the successor State. Sub-para. (b) guaranties the equality of treatment of these individuals with nationals regarding social and economic rights. Para. 2 of Art. 20 leaves the State Parties the possibility of excluding these individuals from employment in public services involving the exercise of sovereign powers. The *Kurić and others v. Slovenia* case[147] reflects the importance of Art. 20. More than 18,000 individuals who had Yugoslav nationality and the nationality of any Yugoslav Republic except Slovenia, but who had habitual residence in Slovenia at the time of succession and who did not apply for Slovenian nationality after the succession, became foreigners or stateless persons. They resided in Slovenia illegally and faced difficulties in keeping their jobs, renewing driving licenses, or obtaining retirement pensions.[148] They were unable to leave the country since they could not re-enter without valid documents.[149] In the period between 2005 and 2011, more international bodies addressed the problems of these "erased" people, such as the Advisory Committee on the Framework Convention on the Protection of National Minorities, the Council of Europe Commissioner for Human Rights, and the UN Committee against Racial Discrimination.[150] The Constitutional Court of Slovenia tried to ameliorate the position of the "erased" people. Finally, the Grand Chamber of the ECtHR decided that Slovenia was breaching the right to private and family life and the right to effective remedy and prohibition of discrimination. It noted that the "erased people" were deprived of any legal status and/or "the right to have rights," and observed that that was "a serious encroachment on human dignity."[151] The Grand Chamber concluded that the "erasure" irremediably affected their private and family life.[152] The Court invoked Art. 18 of the European Convention on Nationality and Arts. 5 and 11 of the 2006 Convention on the Avoidance of Statelessness as relevant sources for the interpretation of the European Convention on Human Rights, in spite of the fact that Slovenia was not a Party to these Conventions.[153] That reflects the conviction of the European Court that the two Conventions are relevant for the interpretation of the European Convention of Human Rights even regarding Contracting Parties to the European Convention that are not the Parties to the two Conventions. This is very important since it extends the effects of the two Conventions to all Contracting Parties of the European Convention.

147 *Kurić and others v. Slovenia* (app. no. 26828/06) Judgment of June 26, 2012.
148 *Kurić and others v. Slovenia*, para. 33.
149 *Kurić and others v. Slovenia.*
150 *Kurić and others v. Slovenia*, paras. 220–224.
151 *Kurić and others v. Slovenia*, para. 319.
152 See also *Slivenko v. Latvia* (app. no. 48321/99) Judgment of October 9, 2003.
153 *Kurić and others v. Slovenia*, para. 319.

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