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DOCTRINA

State Succession in Regard to State Responsibility: Succession to Obligations Where the Predecessor State Ceases to Exist

La sucesión de Estados en relación con la responsabilidad del Estado: Sucesión a las obligaciones cuando el Estado predecesor deja de existir

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ABSTRACT The present work addresses the topic of State succession in regard to State responsibility. This paper will focus on the question of whether, under international law, the possibility of succession to the obligations arising from the international responsibility of a predecessor State is feasible when this liable predecessor State ceases to exist. The importance of this topic has led the International Law Commission to include it in its programme of work carried during its sixty-ninth session, whereby the Commission has prepared draft articles and adopted a position that will also be critically analysed. In doing so, this paper incurs into a relevant review of part of the scarce and diverse state practice on this matter as well as relevant literature and legal instruments. Furthermore, the ILC, the Institute of International Law and part of the doctrine have proposed exceptions to the traditional general rule of non-succession. It has been argued, however, that these do not in themselves constitute exceptions to non-succession, but rather solutions given by international law found in areas different than that of State succession. Therefore, an examination of these 'departures' of the general rule will take place to be able to determine their nature.

KEYWORDS International responsibility, International Law Commission, international law, international obligations, legal personality.

RESUMEN Este artículo aborda el tema de la sucesión de Estados en materia de responsabilidad internacional estatal. Este artículo se centrará en la cuestión de si, en virtud del derecho internacional, la posibilidad de sucesión de las obligaciones derivadas de la responsabilidad estatal del Estado predecesor es factible cuando dicho Estado, res-

ponsable internacionalmente, deja de existir. La importancia de este tema ha llevado a la Comisión de Derecho Internacional a incluirlo en su programa de trabajo realizado durante su sexagésima novena sesión: la Comisión ha elaborado proyectos de artículos y adoptado una posición que también será analizada. Al hacerlo, este trabajo incurre en una revisión de parte de la escasa y diversa práctica estatal en esta materia, así como de la literatura y los instrumentos legales relevantes. Además, la Comisión de Derecho Internacional, el Instituto de Derecho Internacional y parte de la doctrina han propuesto excepciones a la tradicional regla general de no sucesión. Sin embargo, se ha argumentado que estas propuestas no constituyen en sí mismas excepciones, sino más bien soluciones dadas por diferentes áreas del derecho internacional a la de la sucesión de Estados. Por tanto, se examinarán estas excepciones a modo de poder determinar su real naturaleza.

PALABRAS CLAVE Responsabilidad internacional, Comisión de Derecho Internacional, derecho internacional, obligaciones internacionales, personalidad legal.

Introduction

The present topic, as it has been recognized by the International Law Commission (ILC), refers to two areas of international law that, although having been traditionally considered separately as distinct areas of studies, they had not yet been dealt with jointly to address the relevant topic of succession to State responsibility and the rights and obligations arising therefrom (International Law Commission, 2018). These are the areas of State succession as such, and that of international responsibility of States.

Succession of States has been traditionally dealt with within the broader framework of the topic of the creation of States in international law. Amos Hershey (1911: 285) expressed that 'when one state takes the place of another and undertakes a permanent exercise of its sovereign territorial rights or powers, there is said to be a succession of state'. The definition goes nicely in favour of the succeeding State by enshrining that this 'new' State acquires the sovereign territorial rights and powers of its predecessor. However, the definition fails to explain what occurs with the obligations, particularly the international ones that the predecessor is required to comply with (e.g., treaties or international responsibility). It is precisely this omission as well as the lack of customary law on the matter that two Vienna Conventions on State Succession in 1978 and 1983 came into existence as a way to clarify what happens with certain rights and duties of States regarding treaties and regarding property, archives and debts respectively.[1] Nevertheless, nothing has yet come into existence so as to

1. The Vienna Convention on succession of States in respect of Treaties recognizes in its preamble "the need for the codification and progressive development of the rules relating to succession of States in respect of treaties as a means for ensuring greater juridical security in international relations".

regulate the topic of succession to international responsibility, which has resulted in this topic's relevance and its incorporation into the ILC programme of work.

Regarding the concept of state responsibility, Article 1 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), reflecting international customary law (Crawford, 2002: 890), states that 'every internationally wrongful act of a State entails the international responsibility of that State'. From this provision, it can be concluded that international liability is exclusive of the State that committed the internationally wrongful act—the so-called *intuitu personae* character of international responsibility (Kohen & Dumberry, 2019: 9) and that, therefore, the succession to this responsibility would require the 'new' State to continue the same legal personality of the predecessor State responsible for the internationally wrongful act. The question that precisely arises is then whether the successor State enjoys the same legal personality than that enjoyed by the internationally liable predecessor State that ceased to exist or, on the contrary, whether this personality is thereby extinguished.

For the assessment of this essential question, four main points are going to be considered Firstly, an analysis of the very notion of "international legal personality" and what it requires from States to be enjoyed. Secondly, how State practice has dealt with this notion in cases of succession and an examination of the treaty law on this matter, particularly how the two Vienna Conventions regarding State Successions have approached the issue of State succession to some international rights and duties. Thirdly, by considering the ILC proposal for draft articles on succession to State responsibility as well as the analysed State practice, the existence or not of a general rule on succession to State responsibility will also be analysed. Finally, the proposed exceptions by the doctrine regarding to non-succession will be addressed to be able to determine their nature as exceptions to non-succession or as other types of solutions.

Legal Personality of States

As already mentioned, from Article 1 of ARSIWA, it can be derived the fact that succession to State responsibility and the obligations thereof would require the 'new' State, to continue the legal personality of the predecessor State that committed the internationally wrongful act (Kohen & Dumberry, 2019: 9). This matter is not a modern discovery and has been largely discussed throughout history.

Amos Hershey (1911: 296) recognized that already Grotius addressed this topic and introduced it to international law when he stated that 'it is undoubted law that the person of the heir, in respect to the continuation of public as well as private ownership, is to be conceived as the same with the person deceased'. Grotius' view was, therefore, that new-born States or nations were to be considered the same as the 'deceased' States or nations.

Grotius approach has been, however, largely rejected, from Coccejii who claimed that the principles of Roman private law on succession, transposed by Grotius to the law of nations were not applicable in this international legal system (Hershey, 1911: 296), to modern international jurists like James Crawford, who held that the disappearance of State and its ceasing of existence constitutes the extinction of that State when the process of succession of States described by Hershey (1911: 296) has taken place in a legal manner (Crawford, 2006: 701). The extinction of the State that Crawford refers to means that the elements necessary for statehood are no longer present, and therefore, that no legal personality of the predecessor State is longer existent, that could eventually be continued by the successor State.

The fact, as described by Crawford, that a State becomes extinct and no legal personality thus, longer exists, is supported by the 1933 Montevideo Convention on the Rights and Duties of States. This convention, reflecting customary international law (Vidmar, 2013: 39), expresses in its Article 1 that international legal personality requires among other elements, a permanent territory and a government.[2] And, a natural consequence of the disappearance of a State by the emergence of a 'new' one presupposes the disappearance of that previous State's permanent population and government, leading thereby to the preclusion of that previous State's legal personality.

Exceptions to the general rule described by Crawford do exist, but these are highly dependent on the attitude taken by the 'new' State (Crawford, 2006: 705). The Russian Federation's claim to continue the legal personality of the former Soviet Union has been widely accepted. Strictly speaking, the international community has recognized and accepted that Russia holds the rights and obligations previously held by the Soviet Union rather than considering that Russia retained the legal personality of the former Soviet Union. Either way, the consequence of this acceptance by the international community was the continuity of the former USSR's personality by the Russian Federation, and therefore, no extinction of that personality has occurred (Crawford, 2006: 705).

Therefore, it can be seen that though the natural consequence of the extinction of a State is also the extinction of its legal personality, the highly consensual character of international law has allowed, in the case of the Russian Federation, to continue the exact same legal personality of its predecessor, the Soviet Union. Hence, in addition to the willingness of the 'new' State to continue the exact same legal personality of its predecessor, the general acceptance of the international community seems also to be an important consideration to confirm such continuity.

2. The Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) expresses in its first Article that "The state as a person of international law should possess the following qualifications: a. a permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with the other states.

Consequently, the important question is not whether the 'new' State can or not be held internationally responsible for the wrongful acts committed by another State.[3] Rather, the matter relates to whether the requirement of "*intuitu personae*" of the international responsibility enshrined in Article 1 ARSIWA is met in situations of succession where the predecessor ceases to exist.

An analysis of case law and State practice will further show different considerations regarding the continuity or discontinuity of the legal personality and whether these considerations preclude the succession of a 'new' State to the obligations that arose from an internationally wrongful act of the predecessor State, which is now extinct.

State practice and case-law on State succession where predecessor state ceases to exist and treaty law on State succession

State practice

As it has been mentioned and recognized by the ILC, the state practice on this matter is scarce (International Law Commission, 2018).[4] Nevertheless, from them, important considerations can be withdrawn. Following the ILC in this aspect, only modern relevant case-law and State practice will be analysed (International Law Commission, 2018).

United Arab Republic

In 1958, the by-then newly created United Arab Republic took over the international responsibility of one of its predecessor States, namely, Egypt, which had committed internationally wrongful acts that took part during an illegal process of nationalisation of companies previously held by foreign investors in the Suez Canal. The unification of Egypt and Syria to form the United Arab Republic meant the disappearance of the governments of these two countries to make way to the formation of the new government of the new United Arab Republic.

Accordingly, as required in Article 1, this led, at that moment, to the extinction of statehood and the international legal personality of both Egypt and Syria. The United Arab Republic enjoyed, thus, a different legal personality than that of its predecessors. The question that arises, is how then, did the United Arab Republic become internationally liable for the acts committed by its predecessor. As demonstrated, this

3. As it shall be seen, in some cases this has already happened whereby a successor fulfils the obligations arising from the international responsibility of its predecessor.

4. International Law Commission, 'Second report on succession of States in respect of State responsibility' (6 April 2018) UN Doc A/CN.4/719. https://undocs.org/pdf?symbol=en/A/CN.4/719

could have not happened by means of an 'automatic succession' due to the discontinuity of the predecessors. However, the United Arab Republic agreed with, among other injured States, France the restoration of the property previously taken by Egypt as well as the payment of compensation (International Law Commission, 2018).

The preamble of the referred agreement expresses that 'French Government has noted (…) [that] the settlements made in this connexion shall constitute the release and full and final settlement for the Government of the United Arab Republic in respect of all claims of French holders of the shares and interests in question'.[5] These claims in questions were precisely the claims regarding the actions taken by Egypt nationalising French property without compensation before the appearance of the United Arab Republic.

The wording of the agreement presupposes that these claims, without any agreement, were to be brought against the United Arab Republic. However, the agreement, in the end, precluded international jurists from knowing what would have happened if a claim were to be brought against the United Arab Republic for the acts of Egypt.

Nonetheless, the case of the United Arab Republic as presented, shows that there is not such a thing as an 'absolute' rule impeding in all cases the 'taking over' of the international responsibility and the obligations arising thereof from a wrongful act of a predecessor State. But at the same time, rejects the idea of an automatic succession to the international responsibility of the previous State. Moreover, it remarks the importance of the consent of the successor State that is willing to assume the obligations and responsibility from a wrongful act of the extinct predecessor State.

The inapplicability of an automatic succession of State to international responsibility seen in the case of the United Arab Republic has been further recognized as a rule of international law by the Supreme Court of Austria, where it held in the S. v Austria case of 2002, that 'According to the rules of international law, there is no legal succession to personal rights and obligations in the area of state responsibility. With the collapse of a sovereign state, its responsibility under international law for the injustice it has committed extinguishes'.[6]

5. France and United Arab Republic: Exchange of letters constituting an agreement concerning the compensation of French holders of shares and interests in Egyptian companies, 1964 (adopted 5 November 1964) 760 United Nations Treaty Series 10897).

6. Austrian Supreme Court, Mag Kurt S. gegen Republik Österreich, 2002/9/30 1Ob149/02x, 1Ob299/04h, 30 September 2002, para. 2.1. "Nach den Regeln des Völkerrechts findet in die höchstpersönlichen Rechte und Pflichten im Bereich der Staatenverantwortlichkeit keine Rechtsnachfolge statt. Mit dem Untergang eines souveränen Staats erlischt daher auch dessen völkerrechtliche Verantwortlichkeit für das von ihm begangene Unrecht".

Gabčíkovo-Nagymaros

The topic of succession of States to international responsibility has also been touched upon by the International Court of Justice (ICJ) in the Gabčíkovo-Nagymaros case of 1997 between Hungary and the by-then 'new' State of Slovakia related to a construction project over the Danube River. However, although not entering in detail into what the state of general international law on succession of State regarding international responsibility was, the ICJ ruled that the State of the Republic of Slovakia was responsible for the internationally wrongful acts committed by the previous and extinct Czechoslovakian Federal Republic (Hungary v. Slovakia, 1997). Nonetheless, the succession of the obligation arising from the internationally wrongful act committed by Czechoslovakia did not occur by means of the rules of general international law, but instead, the Court based its decision solely on the intention of the parties to be so (Hungary v. Slovakia, 1997).

Such intention was explicitly given in a Special Agreement concluded between Hungary and Slovakia in 1993, where it was recognized that 'the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project'.[7] The ICJ decision remarks again the importance of the consent and willingness of the parties to assume the responsibilities of the predecessor State, and also the fact that the general rule of non-succession to international responsibility in cases where the predecessor State ceases to exist due to its extinction and discontinuity does not preclude the possibility of the successor State to accept the international responsibility and the obligations arising thereof of its predecessor, avoiding thereby the simple extinction of those obligations.

But what happens when no such agreement exists between the successor State and the injured State according to which a successor State agrees to assume the responsibility of its predecessor? Though State practice is highly scarce, the Bosnia v Serbia case regarding Genocide exemplifies this situation.

Bosnia and Herzegovina v. Serbia and Montenegro (ICJ Genocide Case)

In 1993, Bosnia and Herzegovina initiated proceedings against the former Federal Republic of Yugoslavia (composed then by Serbia and Montenegro) for violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention) during the so-called Srebrenica massacre.

By the time the ICJ rendered its final decision in 2007,[8] the Federal Republic of

7. Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia). Judgement of 25 September 1997. ICJ Reports 1997.

8. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bos-

Yugoslavia had already been dissolved resulting in the independence of two States, namely, Serbia and Montenegro. The question that arose then was which of both States was to be held responsible for the internationally wrongful acts committed by the former Federal Republic of Yugoslavia. To solve this, the ICJ had to determine which State was the respondent in the case at hand. The Court acknowledged that after the dissolution of the former Federal Republic of Yugoslavia, Serbia had recognized in the Constitutional Charter of the State Union of Serbia and Montenegro (2003)[9] to be the continuity of the dissolved Yugoslavian State including the rights and obligations in question contained in the Genocide Convention.[10]

The express consent given by Serbia to be the sole successor regarding the obligations from international treaties of the Federal Republic of Yugoslavia allowed the Court to held Serbia internationally responsible for the acts of its predecessor.

From this case, it can be concluded that where no agreement exists, a successor State can unilaterally bound itself to assume the international responsibilities and rights of its predecessor. It is unclear, however, whether this constitutes in itself a matter of succession in the strict sense of its definition (See Hershey, 1911: 285 for definition). It is also arguable whether by claiming continuity of its predecessor, Serbia enjoyed the exact same legal personality, and in such case, whether the requirements met by the Federal Republic of Yugoslavia to acquire its legal personality in the first place –mentioned in the 1933 Montevideo Convention— correspond to the same elements allowing Serbia to enjoy the same legal personality as its predecessor.

What is clear is that the ICJ's interpretation of the Constitutional Charter of Serbia and Montenegro can be read as an allowance, at least by the Court, to Serbia to continue the exact same legal personality than that previously enjoyed by the Federal Republic of Yugoslavia, and therefore, allowing the succession of Serbia to the international responsibility of its predecessor. In such a case, the continuity of the legal personality permits to hold the 'new' State responsible. However, such cases are questionably cases of succession, since the legal personality of the predecessor State did not become extinct and was merely continued subsisting upon a State considered

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nia and Herzegovina v. Serbia and Montenegro. Judgement of 26 February 2007. ICJ Reports 2007.

9. Art. 60 of the Constitutional Charter of the State Union of Serbia and Montenegro stated that "Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor".

10. In Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro, 2007: para. 75. "The Court notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia" (paragraph 70 above), and has assumed responsibility for "its commitments deriving from international treaties concluded by Serbia and Montenegro" (paragraph 68 above), thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro".

the same as its predecessor, as it was the case of the Soviet Union and the Russian Federation (Crawford, 2006: 705).[11]

Treaty law on State succession

The non-existence yet of a treaty on the matter of State succession to international responsibility allows a search for comparative rules in other treaties related to the matter of State succession in respect to certain rights and obligations. In this regard, two important conventions have been drafted, namely the 1978 Vienna Convention on Succession of States in Respect of Treaties (hereinafter VCSST) and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (hereinafter VCSSPAD).

Understanding that these two conventions have their own scope of applications,[12] and that, consequently, no automatic transposition of their rules can be done to succession to State responsibility, important considerations for the topic at hand can still be drawn.

Both conventions define State succession as 'the replacement of one State by another in the responsibility for the international relations of territory'.[13] The concern of some countries regarding the wording "responsibility" (International Law Commission, 1974), led to the inclusion of a statement of clarification in the *travoix preparatoires* to affirm that the word "responsibility" should be read in conjunction with and not separately from the phrase 'for the international relations of territory' (International Law Commission, 1972), rejecting thereby the idea that the concept of State succession would imply an automatic succession to the responsibility from internationally wrongful acts.

From the very limited scope of these conventions, another important aspect is found in Article 9 of the VCSSPAD that follows an approach by which the previous rights to property (and the obligations thereof) held by the predecessor State do not have a sort of 'continuity' directly passing to the successor State. Rather, this provision has adopted a natural conclusion, namely, that the extinction of the predecessor State leads also to the extinction of the rights and obligations of that State.[14] There-

11. Crawford (2006: 705), in this regard, expresses that "The better view, and certainly the view that prevailed, is that the legal process was one of devolution resulting in the establishment of a number of new States with the 'core' State, Russia, retaining the identity of the former Union".

12. See for example Article 1 of the Vienna Convention on succession of States in respect of Treaties, which states that "The present Convention applies to the effects of a succession of States in respect of treaties between States".

13. See for example Article 2(a) of the. Vienna Convention on succession of States in respect of State Property, Archives and Debts

14. Article 9 of the Vienna Convention on succession of States in respect of State Property, Archives

fore, in the case of the VCSSPAD, in order for the Successor State to obtain the rights to the property previously held by the predecessor, these rights arise and are, after their extinction, 'created' again upon the successor State.

Hence, in addition to Article 1 of ARSIWA stating that the international responsibility is exclusive of the State that committed the wrongful act (International Law Commission, 2001), this idea supports the non-succession doctrine to international responsibility.

Is there then State succession to State responsibility where the predecessor State ceases to exist?

From the case law that the International Law Commission analysed during its programme of work, it concluded that State practice permits to infer the existence of a presumption by which, the internationally wrongful act from a predecessor passes to the successor State (International Law Commission, 2018). The ILC has enshrined this presumption in many of the proposed draft Articles on the matter. For example, draft Article 10(1) regarding the uniting of States holds that 'when two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State' (International Law Commission, 2018).

Although the ILC rightly assess that most of the cases have resulted in the passing of the obligations arising from the internationally wrongful act of the predecessor that ceases to exist to the successor States, this paper concludes that the ILC has mixed different concepts,[15] particularly because, as already mentioned, the case law does not show an automatic succession to international responsibility. State practice mostly manifests the willingness of successor States to assume the international obligations that, at first, are not held by them, but that they make their own by means of their consent to it.

Accordingly, the ICL took a more suitable approach in cases of the dissolution of a State, in which situation, draft Article 11 proposes that the obligations arising from an internationally wrongful act of the dissolved predecessor State pass to the succes-

and Debts expresses that "The passing of State property of the predecessor State entails the extinction of the rights of that State and the arising of the rights of the successor State to the State property which passes to the successor State, subject to the provisions of the articles in the present Part".

15. This means that the case-law has shown that the fact that successor States have been held responsible for internationally wrongful acts of their predecessor does not come from a presumption or rule within the field of State succession. Instead, this result comes mainly from the consent of these successors to assume their predecessor's previously extinct obligations arising from the wrongful act. See, for example the France and United Arab Republic: Exchange of letters constituting an agreement concerning the compensation of French holders of shares and interests in Egyptian companies.

sor State. The passing of the obligations will be, however, subject to an agreement concluded in good faith, which includes the injured party and the successor State (International Law Commission, 2018), to permit that international law corrects the unwanted consequences of non-succession.

Thus, the ILC here recognizes the non-automatic passing of the obligations to the successor State, as the matter will depend upon an agreement between all parties concerned in good faith as a way to remedy the undesirable result of the mere extinction of the obligations caused by the extinction of the predecessor State

From the State practice as well as from the treaty law on State succession it can, therefore, be concluded the existence of a general, though not absolute rule of non-automatic succession to State responsibility in cases where the predecessor State ceases to exist. By 'not absolute', this paper does not intend to establish itself the existence of exceptions to this rule –as will be analysed in the next item—but simply points out that the mere extinction of international responsibility and the obligations arising thereof by the disappearance of the predecessor State produces effects that go against the nature of international law (Dumberry, 2007: 104). And as it shall be seen, the international legal system provides solutions to this problem. These solutions are, however, arguably found in the very topic of succession to international responsibility where the predecessor State ceases to exist. They, instead, seem emerge from rules and principles of international law in other areas.[16]

The non-absolutism, accordingly, does not relate to the succession itself, but rather to the consequences produced by the non-succession, that, as correctly described by Dumberry (2007: 104), results in the fact that '(…) the injured third State would be found to be left with no debtor to provide compensation for the damage it suffered as a result of the commission of the internationally wrongful act. The successor State(s) would also benefit from the consequences of the commission of the acts of the predecessor State'. The international legal system contains different solutions to the consequences described by Dumberry (2007: 104), making them not-absolute or immutable in nature. Whether these solutions found in international law are considered indeed exceptions to the general rule of non-succession is a matter that will be next analysed.

Regardless of the critics towards the work of the ILC, it is indeed desirable that the draft articles proposed are adopted and reflect, eventually, customary international law. These Articles pose a straightforward answer, particularly, regarding the 'destiny' of the obligations arising from an internationally wrongful act committed by a State that ceased to exist, that have been traditionally understood to be extinguished with this liable State's disappearance as the Austrian Supreme Court remarked.[17]

16. For the proposed solutions, see item "Exceptions to the Traditional General Rule of Non-Succession?"

17. Austrian Supreme Court, Mag Kurt S. gegen Republik Österreich, 2002/9/30 1Ob149/02x,

Exceptions to the traditional general tule of non-succession?

Although part of the doctrine adheres to the general rule of non-succession to international responsibility, it is clear that the mere extinction of an obligation to repair an internationally wrongful act goes against the very nature of international law (Dumberry, 2007: 104). This is precisely why the ILC, the International Law Institute as well as many scholars have proposed the existence of 'exceptions' to this rule resulting in a deviation to non-succession (International Law Commission, 2018; Dumberry, 2007: 263).

Thus, scholars have argued that this general rule of non-succession is also subject to certain exceptions. Among the most important are the exceptions of (1) unjust enrichment; (2) the consent of the parties, including the injured party, expressed in an agreement or the unilateral declaration of the successor state; (3) internationally wrongful acts committed by an autonomous entity of the predecessor State; and (4) the link between the territory and the wrongful act committed (Dumberry, 2007: 263). The last-mentioned proposed exception refers, according to the Institute of International Law, to situations where a direct link exists between the consequences of an internationally wrongful act committed against —and not by— a predecessor State and the territory or population of the successor State (Kohen & Dumberry, 2019: 98-99). Accordingly, this last solution refers only to situations of succession to rights –and not to obligations— arising from an internationally wrongful act, falling thus, outside the scope of this paper.

It is also important to address whether these proposed 'exceptions' are indeed exceptions to the general rule or, instead, they present solutions to the extinction of the obligation to compensate an injured State due to the disappearance of the predecessor State.

Unjust Enrichment

Regarding the first exception proposed, academics have not totally agreed as to whether the principle of unjust enrichment can be properly used to allow succession of States to obligations arising from international responsibility. The ambiguity of this concept has made it difficult to find a proper definition. However, some core elements are required for a claim of unjust enrichment to succeed,[18] namely, the presence of enrichment by a State; that this enrichment is unjust; that the unjust enrichment is detrimental to another State (Dumberry, 2007: 264); and that there is no cause for such enrichment (Manga Fombad, 1997: 126).

1Ob299/04h, 30 September 2002.

18. Sea-Land Service, Inc. v. The Islamic Republic of Iran (1984) 6 Iran-USCTR 115.

Take, for example, the already-mentioned case of the extinction of Egypt by the 'new' State of the United Arab Republic. Although the wrongful act committed previously by Egypt (i.e., nationalisation of French interests without compensation) were not inherited by way of succession to the United Arab Republic, the parties did, in good faith arrange a fair solution, when the United Arab Republic agreed to return the property as well as to pay compensation to France. But what would have happened if the United Arab Republic would have never returned the property or paid compensation? In such cases, the principle of unjust enrichment could remedy the detriment caused to France as the unjust enrichment is based on the moral idea of justice (Manga Fombad, 1997: 126), provided of course, that elements required by it are present.

Accordingly, the principle of unjust enrichment corrects a situation that, though legal, is considered against the nature of international law. But, this solution does not stem from the topic of State succession to international responsibility; rather this solution encompasses a broader context due to the particularity that, as Gil Carlos Rodrigues Iglesias remarks, whereas the obligations arising as a consequence of an internationally wrongful act emanate from an illegal act the, the obligations arising from unjust enrichment, have their origin in an act that could be either legal or illegal (Rodríguez Iglesias, 1982: 389).[19] It is, therefore, that in the example proposed, the United Arab Republic, though not being internationally liable for the acts committed by Egypt as a result of the rule of non-succession, it could have been obligated to return the property by means of its unjust enrichment.

Agreement between the Parties and Unilateral Declaration

Regarding the proposed 'exception' by which an agreement is made between the injured party and the successor State, the general rule of non-succession still applies. What happens is that the successor State assumes obligations of its predecessor, but this does not mean that the obligations that the successor assumes have always been legally its own. These obligations arising from the internationally wrongful act become extinct with the disappearance of the wrongdoer predecessor State (Moscoso de la Cuba, 2011: 165), and 'new obligations' or the 'same previously existing obligations' are re-created and imposed upon the successor State.

Such extinctions of the obligations arising from an internationally wrongful act committed by the predecessor State can be explained by, as already mentioned the "*intuitu personae*" character of the international responsibility in international law enshrined in Article 1 of ARSIWA (Kohen & Dumberry, 2019: 9). Moreover, and by

19. Rodríguez Iglesias (1982: 389) further remarks that unjust enrichment constitutes a source of obligation distinct from that of an illegal act.

way of comparison, the already-mentioned Article 9 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts states that 'the passing of State property of the predecessor State entails the extinction of the rights of that State and the arising of the rights of the successor State to the State property which passes to the successor State'. This provision encompasses the same idea but with regard to succession to State property, namely, the extinction of, in this case, the right of the predecessor State and the emergence of new rights for the successor State.

Internationally Wrongful Act Committed by Autonomous entity of the Predecessor State

Although this 'exception' has been added in cases of secession where the predecessor State continues to exist,[20] the underlying idea is that the autonomous entity of a predecessor State becomes at the time of the appearance of a 'new' successor State, an organ of the latter. In such a case the requirement of attributability enshrined in Article 2 ARSIWA would still be met (International Law Commission, 2001), given the fact that Article 4 of ARSIWA expresses 'The conduct of any State organ shall be considered an act of that State under international law, (…) whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State' (International Law Commission, 2001).

Therefore, this situation poses again a case where succession plays no role, it rather relates to the continuity of the responsibility given by what Dumberry (2007: 260) calls 'structural continuity'[21] of an autonomous entity that continues to exist, but now as part of the successor State. Therefore, the responsibility starts from being only held by the autonomous entity before its independence, to be 'jointly' held once it becomes part of the successor State (Dumberry, 2007: 260). The situation has been equated and solved by analogy via Article 10(2) ARSIWA that allows the attribution of internationally wrongful acts committed by insurrectional movements leading to the creation of a 'new' State, to that State (Dumberry, 2007: 260).[22]

20. See For example Draft Article 12(3) of the Institute of International Law or Draft Article in: Kohen & Dumberry, 2019

21. By structural continuity, Dumberry refers to the process of organic unification between the "new" State and the autonomous entity. The autonomous entity, as the responsible for the commission of the internationally wrongful act, thus, never ceases to exist, impeding thereby, the extinction of the international responsibility.

22. Thus, the basic proposition that the new State should take over responsibility for acts committed by the insurrectional movement because there is a structural continuity between the new State and the actual wrongdoer is certainly fit to apply to other cases where there is also a structural continuity between a new State and an autonomous political entity which committed an internationally wrongful act

It can be concluded that the situations described as 'exceptions' of the general rule of non-succession are wrongly mixed with the very notion of succession. They can be considered solutions to the unfair consequences of non-succession, but not an exception to non-succession itself. This is because, as already mentioned, the solutions do not produce a 'succession' in the strict sense to the obligations of the predecessor State, rather, they permit States to make their own some international legal obligations that are not initially legally correspondent to them (e.g. in the case of an agreement) or it creates new obligations upon the successor State not stemming directly from the international responsibility of that State from the wrongful act (e.g. as in the case of unjust enrichment, whereby the liability arises from the enrichment of a country, which is unlawful). In this regard, Dumberry (2007: 275) argues that, for example, the principle of unjust enrichment constitutes a subsidiary tool solving the unfair issue of non-succession particularly because the areas of State responsibility and State succession pose no other solution.

Concluding remarks

The inclusion of the present topic into the ILC programme of work elucidates its importance and relevance for the international community, particularly, given the existence of a traditional general rule of non-succession in cases of international responsibility. This situation poses a threat to the nature of international law as it provokes unpleasant and clearly unfair circumstances whereby international obligations arising from an internationally wrongful act are extinct by the mere disappearance of the liable predecessor State.

Even though, in theory, the matter seems unfair and presents an undesirable scenario, most of State practice and case-law on the matter have resulted in quite an opposite course of events. Most successor States have been held responsible for the acts committed by their predecessor when the latter ceases to exist.

Nevertheless, it must be remarked that this desirable results of State practice and case-law have not been resolved by asserting to international law of succession of States to international responsibility. Rather, the solutions make clear that these results stem from the willingness of the involved parties to take over international obligations that were, in principle, not legally their own or by the acceptance of the 'new' State to continue the legal personality of its predecessor, in which case the predecessor State's legal personality is, thus, not deemed to have been extinct.

It is, therefore, hard to confirm that a conclusive shift from a general rule of non-

before independence. With this, the author proposes that the autonomous entity committing an internationally wrongful act holds its liability even after its independence, and thus, when becoming part of the successor State, it brings it international liability along.

succession to a rule of automatic succession exists as that seems a too far-reached conclusion. Nonetheless, the ILC correctly points out and goes to the right direction when stating that such positive results from the State practice and case-law may result in the elaboration of a factual presumption to State succession to international responsibility. Therefore, the ILC is also heading the right way by encompassing in the Draft Articles the possibility of an automatic succession in certain cases, or at least, to subject it to agreements between the involved parties concluded in good faith.

Until these Draft Articles are not approved by the international community, and they do not become customary international law, States will still have to resort to other areas of international law, to be able to remedy the undesirable consequences of the mere extinction of the obligations due to the disappearance of a State and the general rule of non-succession.

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