Miskolc Journal of International Law
MISKOLCI NEMZETKÖZI JOGI KÖZLEMÉNYEK

VOLUME 4. (2007) NO. 2. PP. 12-37.

Enver Hasani*

The Evolution of the Succession Process in Former Yugoslavia

INTRODUCTION

This Article analyzes the nature of political developments in Serbia, following the October 2000 fall of the late, former President, Slobodan Milosevic. Space limitations prevent a historical review of this matter. Instead, this Article focuses on the consequences for all former Yugoslavs of the June 2001 signing of the Succession Agreement (SA)[1] between the five sovereign and independent States that emerged from the dissolution of former Yugoslavia. This issue remains open in public discourse about Kosovo.[2] This Article sheds light on the nature of the SA and its eventual consequences for the rights and duties of all Kosovars, vis-à-vis the succession of former Yugoslavia.

The conclusion of the SA closed, once and for all, the problem of State succession to the

* Dr. Enver Hasani is Rector and Professor of International Law and International Relations, University of Pristina (Kosovo), and Foreign Policy Adviser to all Governments of Kosovo since 1992. The author is indebted to the Fulbright Program, as well as to all others who helped with and commented on this work. These include especially Dr. Andrew Wachtel, Director of the Center for International and Comparative Studies at Northwestern University (Chicago), and Professor William Slomanson of Thomas Jefferson School of Law (San Diego). This article was first published in the Thomas Jefferson Law Review, volume 29, number 1.

1. Agreement on Succession Issues Between the Five Successors of the Former State of Yugoslavia, June 29, 2001, 41 I.L.M. 1 (2002) [hereinafter SA]. The agreement was between Bosnia and Herzegovina, Croatia, Macedonia, Slovenia, and the Federal Republic of Yugoslavia (FRY). Kosovo is within the FRY, now "the State Union of Serbia and Montenegro" (SUSM). S.C. Res. 1244 U.N. Doc. S/RES/1244 (June 10, 1999). According to Article 12 (1), the SA entered into force on June 2, 2004, and has been ratified by all five successor States to the former Yugoslavia. The dates of ratification are as follows: Bosnia-Herzegovina, May 15, 2002; Croatia, May 3, 2004; FRY/SUSM, October 10, 2002; Slovenia, August 21, 2002; Macedonia, March 6, 2002. E-mail from Mr. Andrej Rode, Officer in Charge for Public Relations, Ministry of Foreign Affairs of Slovenia, to author (Dec. 9, 2005) (on file with the author). According to Mr. Rode, so far a number of activities have been conducted in compliance with and in further execution of the SA, such as regular meetings between representatives of the successor States, members of various interested international bodies, and mechanisms established by the SA and Annexes B and C. Mr. Rode said that no problems whatsoever have been recorded thus far during the implementation of the SA. *Id.*

2. The author, during the years after the end of the Kosovo conflict and war in June 1999, has given many pronouncements regarding the succession of former Yugoslavia and the place of Kosovo in it. Specifically, the author has commented on the exclusion of Kosovo from this process because it was not a State under international law entitled to the right of succession. The author's last statement was in 2001 on the occasion of the signing of an agreement between FRY/SUSM and Macedonia, affecting the borders of Macedonia with Kosovo (*see infra* note 135). The author did not have an opportunity to conduct any serious research as to the state of affairs at the time. Being a Fulbright Scholar at the Northwestern University in Chicago facilitated extensive research on the matter during the Fall Semester of 2005. The very idea and inspiration for the structure of this Article came from the detailed work of Carsten Stahn, *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 AM. J. INT'L L. 379 (2002), which inspired further pursuit of the matter and an in-depth follow up on scholarly results in the field of succession in cases of State dissolution.

former Yugoslavia that had been unresolved since 1992. The view of the Badinter Commission's 1992 opinion, as discussed below, declared that the State known as the "Socialist Federal Republic of Yugoslavia" (SFRY) or former Yugoslavia had ceased to exist. As a result, there was a need to discuss the issues surrounding the SFRY's succession.

The Yugoslav succession issue was officially discussed for the first time in the Working Group on Succession in 1992. But the underlying issues were actively pursued within the Conference on the Former Yugoslavia, held in Geneva and London from 1992 to 1995. Following the conclusion of the 1995 Dayton Peace Accords, the only remaining division from the Conference was the group charged with addressing the succession issues of former Yugoslavia. The Dayton-established Peace Implementation Council transferred the authority to deal with the former Yugoslavia succession issues to the High Representative for Bosnia and Herzegovina.[3]

As we shall see, the Serb position on the work of this new body poses a serious obstacle to progress and prevents any agreement on succession issues among the Yugoslav successors. Against the rule of international law on State succession,[4] Serbs have continuously considered the Federal Republic of Yugoslavia (FRY)—renamed State Union of Serbia and Montenegro (SUSM) in 2001—as sole successor to the former Yugoslavia. Until 2001, Serbs believed that by insisting on their claim to continuity with the former Yugoslavia they could decide (whimsically) the modalities used to divide the assets and property of the former Yugoslavia.[5] According to this official position of the Serbs, the former Yugoslavia did not dissolve in 1992. Rather, the Serbs contend that in 1992 there was a succession of parts of former Yugoslavia, whereby the FRY/SUSM managed to preserve its State continuity with former Yugoslavia. This was the supposed result of other Yugoslav republics seceding without consensus. As such, these republics have no rights to equal succession to the assets, property, or other rights and duties of their predecessor State.

This Article is divided into eight parts and tracks the structure of the SA.[6] Part I covers the general issues regarding State succession. Part II focuses on the legal framework of the SA. Part III addresses the most contentious issue among Yugoslavs: State continuity of the former Yugoslavia. These first three parts will enable the reader to follow the details of the Yugoslav succession, in comparison with other cases. Part IV discusses an institutional framework for cooperation. Part V addresses the concrete problems faced by the Yugoslav successor States regarding State property. Part VI is devoted to the succession of Yugoslav financial assets and liabilities spawned by the Yugoslav succession. Part VII explains the division of Yugoslav archives.[7] Finally, Part VIII discusses private property and acquired rights; it is also reserved

3. PEACE IMPLEMENTATION COUNCIL, CONCLUSIONS OF THE 1995 LONDON MEETING, *available at* http://www.ohr.int/pic/default.asp?content_id=5168 (last visited October 26, 2006).

4. The international law on State succession recognizes first and foremost the principle of agreement between successors. *See infra*, pp. 116-17.

5. *See* Vladimir-Djuror Degan, *Disagreements over the Definition of State Property in the Process of State Succession to the Former Yugoslavia, in* SUCCESSION OF STATES 33 (Mojmir Mrak ed., 1999).

6. SA, *supra* note 1. The tracking of the SA in this Article is patterned after another author's eloquent work, from which one may draw inspiration. Stahn, *supra* note 2.

7. Although the State archives are considered State property, their division is based on different international rules on State succession. This path has been pursued by the SA as well. For this reason, we devote Part VII to the division of the Yugoslav archives. In the international arena, there are two documents that regulate State succession: Vienna Convention on Succession of States in Respect of Treaties, August 23, 1978, U.N. Doc.

for general observations on the subject.

Kosovo has been effectively excluded from the process of succession to the former Yugoslavia due to its official disregard by the Badinter Commission in 1991. Consequently, the SA did not deal with the right of Kosovo to succession either. Kosovo is disregarded because it did not become an independent sovereign State—as occurred with the other former Yugoslav republics. Therefore, this Article devotes less space to Kosovo and draws conclusions about it only at the end because none of the provisions of the SA or its earlier drafts discuss the possibility of Kosovo as a successor State to the former Yugoslavia. The Article seeks to trigger scholarly and other related debate about the exclusion of Kosovo from the Yugoslav succession process and the political and legal possibilities for Kosovo reasserting itself as a successor to the former Yugoslavia (in this case only in regard to the Republic of Serbia), taking into account the ongoing talks on the future status of the country.

I. STATE SUCCESSION AND ITS BASIC PRINCIPLES

Succession of States in international law consists of a set of express rules and related principles that define the legal consequences of changes in the territorial sovereignty of States.[8] This regime governs the rights and duties of the predecessor State. These rights and duties involve international treaties, citizenship, State property, foreign debt, archives, private property, and acquired rights under the laws of the predecessor State. As such, the succession of States represents a huge legal vacuum, largely because it has not been codified.[9] The international arena's minimal experience with State succession, prior to the process of decolonization, did not transform into clear legal rules. The first and second Vienna Conventions (VC I and VC II) did nothing other than sanction the rules of succession of States within the prior colonial context. Outside this context, the rules on State succession remained applicable only at the level of legal principles. This state of affairs emerged from the "clean slate" doctrine. This doctrine provides that of all dimensions of State succession, former colonies inherit only the rules and principles concerning border regimes and membership in certain international organizations created by their former masters. Based on the "clean slate" doctrine, former colonies refused to accept most of the rights and duties of their predecessor States, especially when it came to foreign debt and the acquired rights of private persons (individuals and legal entities alike). VC I and VC II, as well as States' practices based on them, bluntly denied the doctrine of universal succession that had firmly been entrenched in traditional international law. The opposite of the "clean slate" doctrine (universal succession) stresses that every change in territorial sovereignty should result in an

A/CONF.80/31, 17 I.L.M. 1488 [hereinafter VC I] and Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, April 8, 1983, U.N. Doc. A/CONF.117/14, 22 I.L.M. 306 [hereinafter VC II].

8. *See* 1 DANIEL P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 3 (Cambridge University Press 1967).

9. The International Law Commission started its work on the codification of this subject in 1963. However, after a decade it concluded such work was too difficult (if not impossible) to successfully pursue because "the task of codification was particularly difficult in a field where there was no general doctrine and State practice and custom had not yet produced well established and consistent precedents." Sir Francis Vallat, *First Report on Succession of States in Respect of Treaties*, [1974] 15 Y.B. Int'l L. Comm'n, Vol. II, 22, U.N. DOC. A/CN.4/278 AND ADD. 1-6. *See generally* Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275, 279-80 & 294-97 (1993) (commenting on the history of codification of State succession in general).

activation of the historical rules and principles on State succession.

Rules and principles on State succession address the legal consequences of the changes in territorial sovereignty of States.[10] Changes in political regime effectuated through illegal means do not result in the activation of the rules and principles on State succession.[11] Taking into account that the succession of States has to do with the legal consequences of changes in sovereignty, no matter the scope and extent of this change, it does not matter whether the predecessor State preserves its legal identity and continuity following a change in territorial sovereignty.

Examples of what might happen in such cases are as follows: the State affected by such changes in territorial sovereignty may lose its membership in some international treaties; some of its citizens may become citizens of another State; the State's rights and duties may pass onto others; and acquired rights under its old laws may fall under the scrutiny of the new sovereign.

Such a State preserves its identity and subjectivity on the international plane because the issues of State identity and continuity are separate from the matter of the succession of States in international law. Whether a State has lost its identity and continuity is a matter decided by the international community, no matter the scope or extent of the changes in territorial sovereignty. Such a determination is a matter of convention and agreement among the members of the international community. It is not dependent upon the size of the lost territory, or the form of transformation in the predecessor State. A State could totally dissolve. But for the purposes of international law, the predecessor State has preserved its identity and continuity despite its dissolution.[12]

Such was the case with Austria. It had been considered as an identical State with, and continuation of, the Austro-Hungarian Empire. It is also the case with Turkey (in regard to the Ottoman Empire) and the Russian Federation (in regard to the former USSR).

Neither VC I nor VC II represent reliable legislative solutions for other succession situations

10. VC I & VC II define State succession as "the replacement of one State by another in the responsibility for the international relations of territory." VC 1, art. 2.1.b, *supra* note 7; VC II, art. 2.1.b, *supra* note 7. Neither VC I or VC II discusses the legal consequences of the changes in the field of international rights and duties of States affected by such changes, which is the very essence of State succession. The absence of such a provision remains to be explained by scholars or State practice in future cases. *See* Eli Nathan, *The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, *in* INTERNATIONAL LAW IN TIME OF PERPLEXITY 498 (Yoram Dinstein ed., 1989).

11. The International Law Commission says changes in territorial sovereignty of States should be in conformity with international law. *See Report of the International Law Commission on the Work of its Thirty-Third Session* [1981] 21 Y.B. Int'l L. Comm'n, Vol. II Part 2, 23, U.N. Doc. A/36/10; *See* SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW (1997). *But see* Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 759-63 (1996).

12. For this difference, see generally KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW (Library E. Droz 1954); STEVAN DJORDJEVIC, O KONTINUITETU DRAZAVA S POSEBNIM OSVRTOM NA MEDJUNARODNO-PRAVNI KONTINUITET KRALJEVINE JUGOSLAVIJE I FNRJ 13-36 (Naucna Knjiga 1967). For the cases of former Communist federations, see generally Rein Mullerson, *The Continuity of States by Reference to the Former USSR and Yugoslavia*, 42 INT'L & COMP. L.Q. 473 (1993); Matthew C. R. Craven, *The Problem of State Succession and Identity Under International Law*, 9 EUR. J. INT'L L. 142 (1998); Hanna Bokor-Szegõ, *Questions of State Identity and State Succession in Eastern and Central Europe*, *in* SUCCESSION OF STATES 95 (Mojmir Mrak ed., 1999).

outside the colonial context. Their provisions remain at the level of principles confirmed by previous State practice. Among the principles enshrined in these two documents, the principle of "agreement" stands out as the most important. Agreement, in this context, means all succession issues should be settled first through a consensus and agreement among interested parties; and only if that fails should the legal norms apply. This was the case when the legal consequences of the dissolution of the former Communist federations were addressed (such as with Yugoslavia, the USSR, and Czechoslovakia). This principle of agreement was confirmed by the decisions of the European Community (now the European Union) Pace Conference for Yugoslavia (1991-1992). The decisions were applicable to all three of the former communist federations,[13] the opinions of the Badinter Commission,[14] the decisions of the International Conference for Former Yugoslavia (1992-1995),[15] and the decisions of the United Nations Security Council.[16] The SA also reflects the principle of agreement—the principle finds an important place among its provisions.[17]

The principle of equity is another major principle applicable to the legal consequences of the changes in territorial sovereignty. Its application represents a crucial factor during State succession. It has been accepted by State practice. In addition to the succession of States, its application relates to other fields of international law.[18] Taking into account equity's very contextual nature—rendering the term very difficult to define precisely and for all purposes—it essentially means "finding the truth."[19]

Practical exigencies, more than rigid legal norms requiring a disciplined application, have provided the solutions in cases of State succession—both in the distant past as well as with the former Communist federations of Yugoslavia, the USSR, and Czechoslovakia. Before

13. The European Community affirmed a need for "a commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes." European Community: Declaration on Yugoslavia and on the Recognition of New States, Brussels, Dec. 16, 1991, 31 I.L.M 1485, 1487.

14. In the Yugoslav context this means "the successor States to the SFRY must together settle all aspects of the succession by agreement." Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 9, 4 July 1992, 31 I.L.M. 1523, 1524.

15. *See* International Conference on the Former Yugoslavia, Statement of Principles, Aug. 26, 1992, 31 I.L.M. 1533, 1534. (Principle (ix) supports the principle that all succession issues of former Yugoslavia should be settled by agreement or through an arbitration procedure.)

16. S.C. Res. 1022, ¶ 6, UN Doc. S/RES/1022 (Nov 22, 1995).

17. The last paragraph of the Preamble of the SA states "Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia, being in sovereign equality of the five successor States to the former Socialist Federal Republic of Yugoslavia, [have demonstrated] their readiness to co-operate in resolving outstanding succession issues in accordance with international law." In Article 9, the SA widens further the concept of the legal basis for the succession process to the former Yugoslavia by stressing the importance of the UN Charter and international law, in addition to the respect for the principle of good faith (*bona fide*), despite the fact that the UN Charter has nothing to do with the succession of States. SA, *supra* note 1.

18. Equity finds wider application in general international law because international law represents a primitive and incomplete legal system not applicable in practice like domestic legal systems. This nature allows for the application of general principles of law. For a detailed elaboration of the application of "equity" in general international law see VLADIMIR-DJURO DEGAN, L' ÉQUITÉ ET LE DROIT INTERNATIONAL (Martinus Nijhoff, 1970); Vladimir-Djuro Degan, *Equity in Matters of State Succession*, *in* ESSAYS IN HONOR OF WANG TIEYA 201 (Ronald St. John MacDonald ed., 1993); CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISION MAKING (Transnational Publishers 1993); Stefan Oeter, *State Succession and the Struggle Over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States*, 38 GERMAN Y.B. INT'L L. 73 (1995).

19. W. Jenks, as quoted in Nathan, *supra* note 10, at 498.

discussing these cases, one must acknowledge the possibility of equity's liberal interpretation and a certain degree of insecurity and unreliability within the rules on State succession. A detailed legal regulation of this field of positive international law would be very difficult.[20]

The VC II principle of equity is found in the provisions of Articles 37 (1) and 40 (2), which require a balance between the division of assets and debts undertaken by successors. This approach dictates a formula that in the opinions of the Badinter Commission appears as the requirement that "the overall succession be equitable."[21] The Badinter Commission has expanded upon this broad principle by providing more elaborate rules of procedure. Nevertheless, the violent break-up of the former Yugoslavia prevented their implementation.[22] Badinter's rules of procedure and other guarantees for the implementation of the rule of equity in the Yugoslav context have had to wait for several years to be put into effect. The delay was partially necessitated by the need to conclude the SA after the fall of Milosevic from power in October 2000. Equity in the Yugoslav scenario means taking the following three factors into account: the economic sustainability of the successor States to former Yugoslavia; their population numbers; and the size of their territories.

At the outset, application of these factors was not clear for the Badinter Commission itself. The SA reflects these factors by discussing the division of State property and the division of the former Yugoslavia's financial assets and its foreign debts.[23] The SA, like the VC II, does not contain provisions regarding the countermeasures other successors and creditors can use against States that eventually act in bad faith. The SA, after many years of hardships and failed debates regarding Yugoslav succession, is actually based on the premise of parties acting in good faith. This premise was real: Milosevic's fall from power removed the main factor obstructing the Yugoslav succession process since 1992. Throughout the time of Milosevic, acting in bad faith was a constant feature of the Serb delegation within the Working Group on Succession of Former Yugoslavia.[24]

---

20. *Id.* at 496-98.

21. The Badinter Commission has also provided procedural rules so an "overall equitable outcome" may be achieved, stressing the duty of cooperation in good faith among the parties and the methods for punishing those acting in violation of this duty. International Conference on the Former Yugoslavia, Opinion No. 13, July 16, 1993, 32 I.L.M. 1591, 1592.

22. Robert Badinter, *L' Europe du droit*, 4 EUR. J. INT'L L. 15, 23 (1993).

23. SA, *supra* note 1, at Annex C, art. 5(2) & Annex C, art. 5(2). By comparing these two Annexes and the "key" used for the division of assets and liabilities by the International Monetary Fund (IMF) and the World Bank (WB), one can clearly see the relevance of the economic sustainability of the new successor States as a basis for division of assets and liabilities of the former Yugoslavia. *See* Mojmir Mrak, *Apportionment and Succession of External Debts: The Case of the SFR Yugoslavia*, RESEARCH REPORT NO. 259, 5-20 (Vienna Institute for International Economic Studies 1999), *available at* http://miha.ef.uni-lj.si/english/research/wp.asp [hereinafter *Apportionment and Succession*]; JOSIP METELKO, SUKCESIJA DRZAVA S POSEBNIM OSVRTOM NA RASPAD BIVSE SFRJ 267-288 (1999); Ibrahim F. I. Shihata, *Matters of State Succession in the World Bank's Practice*, *in* SUCCESSION OF STATES 75 (Mojmir Mrak ed., 1999); Mojmir Mrak, *Succession to the Former Yugoslavia's External Debt: The Case of Slovenia*, *in* SUCCESSION OF STATES 159 (Mojmir Mrak ed., 1999) [hereinafter *External Debt*].

24. The Badinter Commission made it clear at the outset they would apply this principle. However, later it turned to the principle's practical ramifications providing for guarantees and other procedural rules. *See* Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 9, July 4, 1992, 31 I.L.M. 1522, 1523; International Conference on Former Yugoslavia, Arbitration Commission, Opinion No. 12, 32 I.L.M. (1993) 1589, 1589-91. For comments, see generally Hubert Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Praxis*, 15 B.U. INT'L L.J. 71, 115-18 (1997); Marco Martins, *An Alternative Approach to the International Law of State Succession: Lex Naturae and the Dissolution of Yugoslavia,* 44 SYRACUSE L. REV. 1019, 1049-58 (1993). This dispersed approach is due to the fact that the succession of the former Yugoslavia was accompanied by violence, armed conflict, and general chaos. This resulted in each party seeing equity as an opportunity for gains to the detriment of others. Therefore, only the intervention of the international community, in particular the

Things were far different in the case of succession of two other former Communist federations—the USSR and Czechoslovakia. That is because their dissolution was not chaotic, violent, and bloody. In fact, for Czechoslovakia, the rule of equity meant the consensual application of the proportion "two to one" for all succession items. In other words, the ratio of two for Czechs and one for Slovaks applied.[25] For the USSR, the succession context equity rule consisted of total acceptance of its foreign debt by Russia, as well as all property, financial assets, and other succession features.[26] In both cases, the insistence of the international community has meant the acceptance of an agreement freely reached among successor States and full respect for its provisions. This was absent in the case of the former Yugoslavia until 2001 when the parties concluded the agreement on succession issues (the SA).

The rule *rebus sic stantibus* is equally applicable in cases of State succession. This principle means parties should pay full respect for norms unless factual circumstances change or alter

---

intervention of the international financial community, forced the Badinter Commission to be more concrete in its opinions regarding the measures and procedures for practical implementation of the rule of equity. *See* Mrak, *External Debt*, *supra* note 23, at 159-69; Ana Stanic, *Financial Aspects of State Succession: The Case of Yugoslavia*, 12 EUR. J. INT'L L. 751, 754-55 (2001); Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. 355, 386-87. In contrast to the Badinter Commission, the SA contains no rules about countermeasures or other procedural guarantees on behalf of the successor States and other creditors since it relies on the premise that parties cooperate in good faith (*bona fide*).

25. In the case of the former Czechoslovakia, the application of international law and the rule of equity was clearer, international creditors accepted an internal agreement reached between two nations, Czech and Slovak. More importantly, this internal agreement had the character of constitutional law with regard to the division of property, assets, and liabilities. In this law, as well as in other agreements entered into prior to the completion of the succession process in 1993, three principles stand out for the elaboration of the equity rule: population, effectivity, and the principle of relevance. Their application resembles the classic rules regarding division, according to which property and inherited debts should be balanced. In this case, equity served as a guiding and corrective rule for the application of international law, which enabled the parties to enforce the "two to one" ratio without serious problems. *See generally* Williams & Harris, *supra* note 24, at 400-07; Beemelmans, *supra* note 24, at 111-13; Paul R. Williams, *State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations*, 43 INT'L & COMP. L.Q. 776, 783, 804-06 (1994).

26. This option has been called the "zero option agreement" and came out as a result of three failed attempts for the division of assets and liabilities of the former Soviet Union. In the first attempt, successor States agreed on a Memorandum of Understanding in Moscow on October 28, 1991, when they admitted joint and several liability for the foreign debt of the former Soviet Union and authorized the Bank for Foreign Economic Activity ("the Vnescheconombank") to service this Soviet debt. This agreement resulted in the deferral of the former Soviet Union's foreign debt by its foreign creditors for the year 1992. Memorandum of Understanding on the Debt to Foreign Creditors of the Union of Soviet Socialist Republics and its Successors, Oct. 28, 1991, *in* Agreement on the Deferral of the Debt of the Union of Soviet Socialist Republics and its Successors to Foreign Official Creditors, Jan. 4, 1992, app. In the second attempt, fifteen successor States of the former Soviet Union reached an agreement, The Agreement of Minsk, dated December 4, 1991, on the proportional division of the foreign debt and assets of the former Soviet Union, using very similar wording to the SA. The parties to the Minsk Agreement were "conscious of the fact that to guarantee and to pay the foreign debt of the Soviet Union is a precondition to future access to the world market" and considered "the principles of international law and the rules of the Vienna Convention of 1983." Beemelmans, *supra* note 24, at 112. The Minsk Agreement served as the basis for similar wording used in the Alma Ata Declaration on the Formation of Commonwealth of Independent States, dated December 21, 1991. For the full text of The Agreement of Minsk and the Alma Ata Declaration, see Minsk Declaration and Agreement of December 8, 1991, U.N. DOC. NO. A/46/771, *reprinted in* 31 I.L.M. 138 (1992). However, these two documents were not met with the acceptance and understanding of all successor States. Thus, in the final attempt, the Russian Federation commenced a process of concluding bilateral agreements with foreign creditors, taking over full responsibility for the payment of the foreign Soviet debt, as well as its property and other assets—"the zero option agreement." Beemelmans, *supra* note 24, at 113. For the genesis and comments of these documents, see generally Lech Antonowitcz, *The Disintegration of the USSR from the Point of View of International Law*, 19 POLISH Y.B. INT'L L. 7 (1991-1992); Williams & Harris, *supra* note 24, at 366-83; Mullerson, *supra* note 12, at 475-80; Natalia V. Dronova, *The Division of State Property in the Case of State Succession in the Former Soviet Union*, *in* LA SUCCESSION D' ETATS: LA CODIFICATION A L'EPREUVE DES FAITS/STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 781, 787-821 (Pierre Michel Eiseman and Martti Koskenniemi eds., 2000).

their practical meaning and importance. It thus serves as a useful instrument for applying the provisions of the VC I and VC II, as well as other provisions of traditional international law applicable in cases of State succession.[27] The SA failed to include provisions incorporating this rule. This omission occurred because the rights and duties of the successor States to the former Yugoslavia stemming from international agreements have not been contentious issues since 1992.

II. THE STRUCTURE OF THE SA: THE MAIN PART AND ITS ANNEXES

The SA has two separate parts. Together, they form a unified and single document. The first basic text is entitled, "Agreement on Succession Issues." It forms the umbrella, or framework, of the SA. In its basic text, the SA addresses key issues of the Yugoslav succession—the most contentious ones since 1992. These include the legal status of the former Yugoslav republics vis-à-vis their predecessor State; the role of the VC I and VC II; the role of the principle of equity; the scope and extent of the mutual rights and obligations of the successor States; and finally, the issues of institutional cooperation among equal subjects of succession to the former Yugoslavia.

The second part of the SA consists of seven annexes. They cover the related segments of succession and the rights and duties as follows:

1. Annex "A" – Movable and Immovable Property;
2. Annex "B" – Diplomatic and Consular Properties;
3. Annex "C" – Financial Assets and Liabilities;
4. Annex "D" – Archives;
5. Annex "E" – Pensions;
6. Annex "F" – Other Rights, Interests, and Liabilities; and
7. Annex "G" – Private Property and Acquired Rights.

As one can see, the SA does not regulate all dimensions or aspects of State succession. By this is meant, first and foremost, the dimension and various aspects of succession to citizenship and membership in international organizations. This is an approach also found in the VC I and VC II. Since the SA does not deal with these dimensions and aspects, there have not been controversies among the Yugoslav successors as to their scope and content. They are therefore not discussed in this Article.[28]

27. Guido Acquaviva, *The Dissolution of Yugoslavia and the Fate of Its Financial Obligations*, 30 DENV. J. INT'L L. & POL'Y 173 *passim* (2001-2002).

28. This is a result of citizenship existing as a domain reserved for States, an exclusive authority of theirs, limited only by their duty to produce as few as possible cases of statelessness. Thus, States themselves require other criteria, in addition to permanent residence, for the acquisition of citizenship—meaning that international law does not recognize the automatic acquisition of citizenship. The traditional rule on this matter has been that permanent residence serves as a reference point in cases of State succession, and as such it appears in all peace treaties concluded after both World Wars. In the case of the former Yugoslavia, too, permanent residence served as a reference point. However, its application was combined with the second citizenship (the citizenship of a Republic) existing in all former Yugoslav republics. This position is reflected in not only the laws on citizenship

III. FINAL REFUSAL OF THE FRY/SUSM CLAIM TO STATE CONTINUITY WITH FORMER YUGOSLAVIA

The Badinter Commission's first opinion was issued on November 29, 1991.[29] It paved the way for a final solution of the legal status of the former Yugoslavia under international law applicable to the cases of State dissolution.[30] In this opinion, Badinter stated, *inter alia*, that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution."[31] Despite open negative Serb reactions to it, the opinion received the unreserved support of the international community.[32] Support was provided by the UN Security Council, the UN General Assembly,[33] and other international bodies.[34] Furthermore, the national courts of various States, when faced with the issue of Yugoslav succession, supported the above opinions of the Badinter Commission and authoritative decisions of the UN Security Council and the UN General Assembly.[35]

The practical results of these endorsements meant that the FRY would not be considered as sole successor to the former Yugoslavia and, consequently, would not inherit State continuity under international law. The SA unambiguously sanctioned this position of the international community in its preamble, where it enumerates all five new successor States as equals on all

---

of the former Yugoslav republics enacted after 1991, which speak of the second (Republican) citizenship as a reference point, but also in the proposed documents on the matter within the Working Group on the Succession of Former Yugoslavia (1993–1996). *See* Todor Dzunov, *Succession of States in Respect of Citizenship: The Case of Former SFRY*, *in* SUCCESSION OF STATES 143 (Mojmir Mrak ed., 1999).

29. Conference on Yugoslavia Arbitration Commission, Opinion No. 1, Jan. 11, 1991, 31 I.L.M 1494. In another opinion, dated July 4, 1992, the Badinter Commission said the process that started in November 1991 had reached its end, thus finding that "SFRY does not exist." Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, July 4, 1992, 31 I.L.M. 1521-23. *See generally* Alain Pellet, *The Opinions of the Badinter Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178 (1992); Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUR. J. INT'L L. 36 (1993); Danilo Turk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66 (1993); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992); Vladislav Jovanovic, *The Status of the Federal Republic of Yugoslavia in the United Nations*, 21 FORDHAM INT'L L.J. 1719 (1997-1998). For a neutral stance to the work of the Badinter Commission, see generally Michael C. Wood, *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties*, 1 Max Planck Y.B U.N. L. 231 (1997).

30. There were three Yugoslav States: one known as the "Kingdom of Yugoslavia" (set up in 1918 as "the Serb-Croat-Slovene Kingdom"); the second was the "Socialist Federative Republic of Yugoslavia"; and finally there was the "Federal Republic of Yugoslavia," set up by Milosevic in 1992 and which, following his fall from power in October 2000, changed its name to "State Union of Serbia and Montenegro" (SUSM). This last name change was not possible while Milosevic was in power because he believed preservation of the old name of Yugoslavia represented a symbol of continuity with former Yugoslavia.

31. Conference on Yugoslavia Arbitration Commission, Opinion No. 1, *supra* note 29.

32. *See* Weller, *supra* note 29, at 589-90. Official Serb comments appear at Jovanovic, *supra* note 29, at 1719-36. For a neutral position on this matter, see generally Wood, *supra* note 29. For other commentary on this Serb refusal and its history, see JOSIP METELKO, SUKCESIJA DRZAVA S POSEBNIM OSVRTOM NA RASPAD BIVSE SFRJ 262-89 (Zagreb 1999).

33. S.C. Res. 752, U.N. Doc. S/RES/572 (May 15, 1992) and S.C. Res. 757, U.N. Doc. S/RES/577 (May 30, 1992). For similar positions taken by the UN General Assembly, see G.A. Res. 47/1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992).

34. The European Bank for Reconstruction and Development (EBRD) was the first international organization to declare that former Yugoslavia had ceased to exist. *See* EBRD, Resolution of the Board of Governors No. 30, Membership of Countries Previously Forming Part of Yugoslavia, Oct. 9, 1992. Following this were statements by the IMF, December 14, 1992, and WB, February 25, 1993. *See* Mrak, *Apportionment and Succession*, *supra* note 23, at 11. *See generally* Williams, *supra* note 25, at 794-804; Shihata, *supra* note 23, at 81-85.

35. Oberster Gerichtshof [OGH] [Supreme Court], Dec. 17, 1996, 4 Ob 2304/96v, Republic of Croatia et al. v Girocredit Bank A.G. Der Sparkassen, *in* 36 I.L.M. 1522 (1997) (Austria). In this decision, the Supreme Court of Austria professionally elaborated on the issue of State continuity of the former Yugoslavia, giving valid arguments against Serbian claims.

issues of State succession to the former Yugoslavia.[36]

The Serbian claim of the FRY to State continuity with former Yugoslavia existed from the first days of Yugoslavia's creation in 1918. Following its establishment, Serbs have insisted that the new State—the Serb-Croat-Slovene Kingdom (later renamed "the Kingdom of Yugoslavia" in 1929)—represents the same State as the pre-1918 Kingdom of Serbia.[37] The activation of this Serbian claim to continuity with the former Yugoslavia after 1991 continues a long-term debate, despite the fact that during the Communist control of Yugoslavia the problem was frozen for various reasons.[38] Among Serb scholars, it has been correctly noticed that this claim to continuity with the former Yugoslavia formed the very essence of the Greater Serbia Project, pursuant to questionable international legal norms.[39]

While in power, President Milosevic pursued this State continuity claim, but without tangible success. He first remained at the level of verbal statements, firmly insisting on it in an apparent hope this insistence would bring him more rights and privileges in the process of the Yugoslav State succession vis-à-vis other republics.[40] Only at a later stage did he undertake practical steps, advising his lawyers and diplomats not to seriously enter the negotiations on succession, leading practically to a deadlock until his downfall from power in October 2000.

In this context, he concluded some agreements[41] and made joint statements[42] with other former Yugoslav republics, all of which followed the 1995 Dayton Peace Accords. He obviously believed these documents would suffice to convince the international community to reverse its decision denying the Serbian continuity claim regarding the former Yugoslavia. In all these documents there appears a clause recognizing State continuity between the former Yugoslavia (regarded as the FRY) and former para-statal political organizations existing in other republics before 1991 (Macedonia, Croatia, and Bosnia-Herzegovina). It is understandable these attempts failed because no one from the international community recognized the State continuity of the FRY with former Yugoslavia.[43]

---

36. "Bosnia-Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia, and the Federal Republic of Yugoslavia, being in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia." SA, *supra* note 1, at 3. It is of little importance that the SA does not use the standard terminology describing the demise of former Yugoslavia, using "break up" instead of "dissolution." SA, *supra* note 1, at 3.

37. For an official and scholarly Serbian position, see generally MAREK, *supra* note 12, at 237-62; MARK ALMOND, EUROPE'S BACKYARD WAR: THE WAR IN THE BALKANS 116-17 (Heinemann 1994).

38. DJORDJEVIC, *supra* note 12, at 97-114.

39. *See* Milan Bartos, *Krystyna Marek: Identity and Continuity of States in Public International Law (Geneve 1954)*, 1 JUGOSLOVENSKA REVIJA ZA MEDJUNARODNO PRAVO 290, 92 (1954). Milan Bartos was a renowned Serb scholar of the 1960s and 1970s. A similar position has been expressed by another Serb author: *See* DJORDJEVIC, *supra* note 12.

40. In international law there is no rule privileging successor States when dividing State property regardless of whether they represent continuity with the predecessor State. *See* Degan, *supra* note 5; Rein Mullerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42 INT'L & COMP. L.Q. 473 (1993); Bokor-Szegõ, *supra* note 12.

41. Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia, Yugo.-Croat., Aug. 23, 1996, *reprinted in* UN Doc. A/51/318-S/1996/706, annex (Aug. 29, 1996). For commentary, see generally Saskia Hille, *Mutual Recognition of Croatia and Serbia (+ Montenegro)*, 6 EUR. J. INT'L L. 598 (1995).

42. Joint Declaration, Yugo.-Bosn. & Herz., Oct. 3, 1996, *reprinted in* UN Doc. A/51/461-S/1996/830, annex (Oct. 7, 1996).

43. For a similar argument, see Mirjam Skrk, *Recognition of States and Its (Non-) Implications on State Succession: The Case of Successor States to the Former Yugoslavia*, *in* SUCCESSION OF STATES 1, 23-30 (Mojmir Mrak ed., 1999).

The question now is why Serbs under Milosevic have so fervently insisted on this claim to continuity with former Yugoslavia? Scholars studying the succession of Yugoslavia have found that this continuity claim is explained by the nourished illusions regarding the division of property, assets, and foreign debts of the former Yugoslavia. Milosevic obviously hoped that if he managed to receive the recognition of FRY's continuity with former Yugoslavia, then by definition, other republics would be considered secessionists and thus have no rights to the property or assets of their predecessor. This would further mean the foreign debt of former Yugoslavia could be divided at whim, according to the rules dictated by the FRY as a continuing State and the sole successor to former Yugoslavia. These attempts proved futile because the resulting diplomatic effort, represented by the SA, conveniently purported to finalize this chapter on the supposed settlement of all succession issues of the former Yugoslavia.

IV. INSTITUTIONAL FRAMEWORK FOR COOPERATION

Work on the succession of the former Yugoslavia—under the auspices of the international mediator Sir Arthur Watts— abruptly halted on the eve of the Kosovo war.[44] It continued after the fall of Milosevic from power in October 2000. Before the SA was concluded in June 2001, there were two meetings held between the successor States. One was in Brussels (December 2000).[45] The other was in Ljubljana (February 2001). Earlier than this (1992-1999), there had not been institutional contacts. That is, only the SA established a proper institutional framework for cooperation among successors to the former Yugoslavia.

The SA foresees not only permanent institutions for cooperation during the implementation phase, but also other mechanisms for the solution of controversies over the interpretation of the SA itself. Among such institutions, the Standing Joint Committee (SJC) is the most important. It is composed of the high representatives of each contracting party.[46] The main task of the SJC is to oversee the effective implementation of the SA. The SJC also serves as forum for the solution of any disagreement between the parties.[47] Its decisions are not binding, which is a serious drawback of this body.[48] In a sense, the SJC acts as a co-owner, taking into account only those rights and duties of the successor States that constitute, as the authors of the SA put it, a common good administered by themselves under the auspices of the SJC.[49]

The SJC functions by overseeing the implementation of certain parts of the SA, especially

44. The last session of the meeting of the Working Group on Succession of the former Yugoslavia under the auspices of Arthur Watts was held in November 1997. See generally Stanic, *supra* note 24, at 753, and Watts, *supra* note 1, at 2, for comments and the history of this matter.

45. Stanic, *supra* note 24, at 778.

46. SA, art. 4(1), *supra* note 1.

47. *Id.* at art. 5(2)(b).

48. The SJC may make "appropriate recommendations to the Governments of the successor States." *Id.* at art. 4(2).

49. According to the SA, they include all rights and interests of the former Yugoslavia, even those not specifically mentioned (including, but not limited to, patents, trade marks, copyrights, royalties, and claims of and debts due to the SFRY). *Id.* at Annex F, art. 1. Annex F, article 2 states "[a]ll claims against SFRY which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement."

those parts that are contentious between the successor States. These committees often establish other mechanisms for dividing movable and immovable State property, the property of diplomatic and consular premises, and financial assets and obligations. The main characteristic of the committees is that their work starts before the SA enters into force. As a result, they are quite important in solving controversial aspects of the succession of the former Yugoslavia that commenced in 1991.[50] Successor States have thereby established the Joint Committee on Succession to Movable and Immovable Property (JCSMIP). This mechanism manages "the proper implementation of the provisions of this Annex applicable to tangible movable and immovable property (other than military property) and the resolution of any problems which might arise in the course of their application."[51] The SA further allows for the formation of other joint committees that determine the value of various SA-related features, including financial assets and liabilities, disposition of diplomatic and consular premises, and dividing assets and liabilities, based on the proportions provided for by the SA.[52]

The differences over the implementation and interpretation of the SA shall "be resolved in discussion among the States concerned."[53] Should such discussions not lead to a reasonable result, the parties may then lodge the issue before an independent person of their choosing, who makes a binding decision.[54] Alternatively, the parties may send the issue before the SJC. It has the right to make an advisory opinion, which is not binding upon the parties. Based on an initiative by either party, disagreements over the interpretation of the SA can be submitted for a binding decision to an independent expert, "to be appointed by agreement between the parties in dispute or, in the absence of agreement, by the President of the Court of Conciliation and Arbitration within the OSCE [Organization for Security and Cooperation in Europe]."[55]

This dispute resolution process prevents potential hindrances in the process of timely solving succession issues regarding the former Yugoslavia. Due to its heavy involvement in the former Yugoslav crisis, the OSCE has been chosen by the successor States to the SA to play this role. The five Yugoslav successors have apparently considered this regional organization as a neutral actor, able to deal with succession issues as well as its traditional political role.[56] Compared with VC II, the SA does not expressly mention the possibility of resorting to the International Court of Justice. This does not mean, however, that the SA necessarily excludes that possibility, because "nothing in the preceding paragraph of this Article shall affect the rights or obligations of the Parties to the present Agreement under any provision in force binding them

50. *Id.* at Annex A, art. 5(2) ("The Joint Committee shall commence its work within 3 months of the signature of this Agreement."); Annex B, art. 6 ("The Joint Committee shall commence its work on a provisional basis within 3 months of the date of signature of this Agreement."); Annex C, art. 6 ("Each successor State shall appoint a representative of the Central bank or another authorized representative to form a Committee, which shall meet within 30 days of the signature of this Agreement to arrange the modalities for the initial distributions identified in Article 5 of this Annex."). *See also id.* at art. 12(2) (stating that these provisions "shall be provisionally applied after the date of signature of this Agreement, in accordance with their terms.").

51. *Id.* at Annex A, art. 5(1).

52. *Id.* at Annex B, art. 5; Annex C, art. 6.

53. *Id.* at art. 5(1).

54. Article 5(2)(a) of the SA talks about "a speedy and authoritative determination of the matter which shall be respected and which may, as appropriate, indicate specific time-limits for action to be taken." *Id.* at art. 5(2)(a)

55. *Id.* at art. 5(3).

56. In fact, the very idea for the formation of this judicial branch of the OSCE stems from Robert Badinter, head of the Arbitration Commission for former Yugoslavia. *Cf.* Robert Badinter, *L' Europe du droit*, 4 EUR. J. INT'L L. 15 (1993).

with regard to the settlement of disputes."[57]

The SA and the Yugoslav succession case represent a novel precedent that can be utilized in future succession cases. Both offer very original paths (one binding and the other not) toward the solution of other State succession problems.

V. IMMOVABLES, MOVABLES, AND THE PROPERTY OF DIPLOMATIC AND CONSULAR PREMISES

As for the division of immovables, the SA provides different solutions from those foreseen by the VC II. These novel provisions of the SA deal with the definition of immovable State property, the determination of the date of succession to this property, eventual compensation for this property, and applicable law.

The SA set the date on which successor States proclaimed their independence as the moment of succession. The parties asked for this type of declaration, thus ignoring the provisions of the VC II.[58] As a result, "[i]mmovable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property is situated,"[59] while "its title to and rights in respect of that property shall be treated as having arisen on the date on which it proclaimed independence, and any other successor State's title to and rights in respect of that property shall be treated as extinguished from that date."[60]

According to the VC II, immovable property belongs to the successor States in whose territory that property is located. This rule foresees possible compensation in those cases where succession produces inequitable results for other successors.[61] Such compensation, which is to be based on VC II principles, has been demanded by other Yugoslav republics—apart from the Serbs, who did not ask for it since they possessed the majority of the former Yugoslavia's immovables. This repeats the scenario played out in former Soviet Republics and the Czech and Slovak Republics,[62] but without success.

While the Yugoslavian SA does not exclude the possibility for compensation, all five Yugoslav successor States must agree, based on a previous recommendation of the appropriate bodies functioning within the SA.[63] In practice, it is difficult for such compensation to be obtained for the benefit of any of the successor States because it requires consent of all five Yugoslav successors.

57. SA, *supra* note 1, at art. 5(5).
58. The VC II accepts as a moment of succession "the date upon which the successor State replaced the predecessor State in responsibility for the international relations of the territory to which the succession of States relates." VC II, *supra* note 7, at art. 2(d).
59. SA, *supra* note 1, at art. 2(1).
60. *Id.* at Annex A, art. 7.
61. *See* VC II, *supra* note 7, at art. 11, 17(1), 17(3), 18(1), and 18(2).
62. *See* Williams & Harris, *supra* note 24, at 400-07; Beemelmans, *supra* note 24, at 110-13.
63. *See* SA, *supra* note 1, at Annex A, art. 5 and art. 8.

The parties inserted provisions that yield a different approach for the identification of the property of the former Yugoslavia. This approach differs from the solutions proposed in the VC II, which defines State property as "property, rights and interests which, at the date of the succession of States were, according to the internal law of the predecessor State, owned by that State."[64] The SA, however, does the opposite. It says the successor State, not its predecessor, in whose territory immovable and tangible movable property is situated, is to "determine, for the purposes of this Annex, whether that property was State property of the SFRY in accordance with international law."[65] Property of the former Yugoslavia is "the movable and immovable State property of the federation constituted as the SFRY."[66] This approach initially appears to have a logical inconsistency. Upon closer observation, however, the opposite is true. That is because the Government of Serbia under Milosevic from 1992 to 2001 opposed the results of the Badinter Commission, as well as the application of the VC II, regarding division of State property, while having in the meantime possession over the majority of former Yugoslav property.

The division of the movable State property of the former Yugoslavia has also been accomplished in a different manner than provided by the VC II.[67] There, the "functional principle" was pursued, which holds that movable State property belongs to those successor States with whose activity that property is connected.[68] The SA accepts a territorial approach to the succession of movable State property because the Republic of Serbia notoriously held in its possession the major part of that property. The Serbian government used it to pursue its war efforts. For this reason, the SA itself excludes from the succession arrangement the military property of the former Yugoslav Army.[69] It separates the issue of war damages from succession, as proposed by the Badinter Commission at an earlier stage.[70]

According to Article 3(1) of Annex A of the SA, **"**tangible movable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property was situated on the date on which it proclaimed independence." The following paragraph of the same Article excludes from this category property having cultural and historical importance for the peoples of the former Yugoslavia. This provision was inserted because wars in the former Yugoslavia devastated so much of the cultural and historical property of the Yugoslav peoples. This exclusion covers the movables located, on the day of the successor States' independence, within the territory of the former Yugoslavia. It also applies to the immovables that, based on Article 4(5) of Annex B, were held outside the country as part of the Yugoslav diplomatic and consular premises. This provision is a novel one compared with the VC II, which offers such protection only to archived materials and not

64. This means that when determining what constitutes State property, parties should rely on the internal laws of the predecessor State in force at the time of succession. VC II, *supra* note 7, at art. 8.

65. SA, *supra* note 1, Annex A, art. 6.

66. *Id.* at Annex A, art. 1(1).

67. The above rule applies as well in the case of identifying movable property, a successor State within whose territory that property is located determines whether the property was SFRY State property based on international law, not on the internal laws of the predecessor State as required by the VC II. *Id.* at Annex A, art. 6.

68. *See* VC II, *supra* note 7, at arts. 14(2)(b), 15(1)(d), 17(1)(b), and 18(1)(c).

69. Military property comprised over 75 percent of the property of former Yugoslavia. Degan, *supra* note 5, at 50; Stanic, *supra* note 24, at 755. Military property of the former Yugoslav Army is excluded from succession. Its division can be undertaken only if there is a separate and special agreement between the interested parties to that effect. SA, *supra* note 1, at Annex A, art. 4(1).

70. International Conference on the Former Yugoslavia, Opinion No. 13, *supra* note 21, at 1591-92.

to the movables of the predecessor State.[71]

The SA has in practice adopted the opinions of the Badinter Commission on the separation of war damages from the succession issues of former Yugoslavia. The SA does not address war damages. However, the formulation of Article 3(3) of Annex A addresses the possibility for return of the movable property removed without authorization. Such property must have been located within the territory of a successor State on the day of independence. If return is not feasible, the successor State in possession of such property should compensate the predecessor State for the value of the property, provided it does not fall within the category of military property.[72] As a result, in cases of movable property (other than military property, which is excluded from this share) the return takes precedence over compensation. This is only true when this kind of State property was removed without authorization from its original location.

Diplomatic and consular property composes only one percent of the overall property of the former Yugoslavia.[73] On the issue of its division, the successor States have more clearly respected the provisions of the VC II and customary international practice.[74] To achieve an equitable solution, the SA provides three methods for its division.

First, the SA foresees a division based on the selection of diplomatic and consular premises for allocation to each of the successor States (Article 1 of the Annex B). This selection, however, is an interim and partial distribution of the SFRY's diplomatic and consular properties.

The second method of division is regulated by Article 3 of the SA. This method requires the total and final distribution of diplomatic and consular properties (including those acquired in accordance with Article 1) reflect as closely as possible the proportions by value of each State: Bosnia and Herzegovina, 15 percent; Croatia, 23.5 percent; Macedonia, 8 percent; Slovenia, 14 percent; and the FRY, 39.5 percent. These proportions, as it can be seen, are different from those applied by the International Monetary Fund (IMF); and they are more favorable for Bosnia, Herzegovina, and Macedonia.[75] They also include the property of diplomatic and consular property from Article 1 of Annex B. These are cases where the parties themselves have made their choice: Bosnia and Herzegovina (former Yugoslav Embassy in London); Croatia (former Yugoslav Embassy in Paris); Macedonia (former Yugoslav General Consulate in Paris); Slovenia (former Yugoslav Embassy in Washington); and the FRY/SUSM (former Yugoslav Residence in Paris).

71. *See* VC II, *supra* note 7, at art. 30(3).

72. In fact, military property of the former Yugoslav Army used for civilian purposes has the same status as the other movable property covered by Annex A, Article 3(1) of the SA. Thus, the property passed to the successor States within whose territory it was located on the day of the declaration of independence.

73. *See* Degan, *supra* note 5, at 50.

74. The VC II, Art. 18(1)(b) states "immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions." VC II, *supra* note 7. *See generally* P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES AND DEBTS 111 (Edwin Mellen Press 1991). Serbian insistence on State continuity with the former Yugoslavia is best reflected in their position vis-à-vis diplomatic and consular property. Serbs behaved at all times since 1991 as if such property belonged solely to them, treating other successors as secessionist States, which according to international practice usually do not enjoy the succession rights over diplomatic and consular property of the predecessor State. *See* MALCOLM SHAW, INTERNATIONAL LAW 689 (4th ed. 1997). *But see* Stanic, *supra* note 24, at 769, n.91.

75. SA, *supra* note 1, at Annex B, art. 2(2).

The third method of division foreseen by the SA requires "[m]ovable State property of the SFRY that forms part of the contents of the diplomatic and consular properties [be passed] to whichever successor State acquires the diplomatic or consular properties in question,"[76] with the exception of movable State property that "is of great importance to the cultural heritage of one of the successor States."[77] This means other property shall be divided proportionally, to achieve the above percentages. These proportions can be achieved through an agreement between the five successor States or special procedures for such a division. Article 4(1) of the Annex B states that "each successor State shall, within the geographical region, be entitled to its proportionate share as set out in Article 3."[78]

The SA asked the parties to act in good faith and as good neighbors when it required successor States in possession of diplomatic and consular property "to maintain and keep under repair any diplomatic or consular properties of the SFRY." The SA also asked the parties to:

> take the necessary steps to that end, bearing in mind in particular: (a) the principle that it must at all times take the necessary measures to prevent loss or damage to or destruction of such properties; and (b) the requirement to pay compensation for any loss, damage or destruction resulting from failure to take such action.[79]

VI. FINANCIAL ASSETS AND LIABILITIES

Financial assets and liabilities are the most unregulated part of the VC II. This is not surprising, given that State practice prior to 1991 related mainly to the colonial context.[80] Both the VC II and its then contemporary State practice had very serious drawbacks regarding, first, the definition of State debt, and second, the principles according to which assets and liabilities of the predecessor State should be divided. The VC II recognizes as State debt "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."[81] As for its division, the VC II states that "the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account, in particular, the property rights and interests which pass to the successor States in relation to that State debt."[82]

The VC II takes into account only the interests of the successor State(s); that is, the interests of those entities taking over State debt (the debtor), but not the interests of those to whom the

76. *Id.* at Annex B, art. 4(4).
77. *Id.* at Annex B, art. 4(5).
78. *Id.* at Annex B, art. 4(1).
79. *Id.* at Annex B, art. 7.
80. *See* Acquaviva, *supra* note 27, at 178-84; Williams & Harris, *supra* note 24, at 356-66; Pierre-Michel Eisemann, *Rapport du directeur d'etudes de la section de langue française du Centre*, *in* LA SUCCESSION D' ETATS: LA CODIFICATION A L'EPREUVE DES FAITS/STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 3 (Pierre Michel Eisemann and Martti Koskenniemi eds., 2000); Martti Koskenniemi, *Report of the Director of the Studies of the English – Speaking Section of the Centre*, *in* LA SUCCESSION D' ETATS: LA CODIFICATION A L'EPREUVE DES FAITS/STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 65, 65-69, 90-96 (Pierre Michel Eisemann and Martti Koskenniemi eds., 2000).
81. VC II, *supra* note 7, at art. 33.
82. *Id.* at art. 41.

debt is owed (the creditor).[83] The interests of the private creditors not "subject of international law" would be heavily affected if this practice had been pursued. To evade its practical implementation, international governmental organizations,[84] creditor countries (the "Paris Club"), and private creditors (the "London Club") have decisively intervened in the process of dividing assets and foreign debts of the former Communist federations—Yugoslavia, the USSR, and Czechoslovakia.[85] This intervention has benefited these international actors. It has further aided successor States, due to their paramount need to be integrated into capital markets and global trade, so they can foster their economic development.

This situation was quite the opposite in the colonial period. The actions of Slovenia and other Yugoslav successor States undertaken between 1993-1996 should be seen in a different light from colonial times. Namely, they each entered into bilateral agreements with the countries of the "Paris Club" and the creditors of the "London Club" for the payment of their part of the foreign debt quotas assigned by the IMF.[86] That left the rest of the unallocated debt and assets for retention by the FRY/SUSM.[87] The SA recognizes the key assigned by international financial institutions ("IMF key") as a criterion for the division of assets and foreign debt of the former Yugoslavia. This tactic left untouched the individual agreements successor States bilaterally achieved with creditor countries, commercial banks, and other international financial organizations during 1993–1996. Only in this manner could the equitable result be achieved in the former Yugoslav context, not through the implementation of the provisions of the VC II or the State practice of the colonial times.

The intervention of international financial institutions has been decisive in the conclusion of the agreements between the successor States. This was obvious in both the former USSR and Czechoslovakia. It provided for the precise and clear criteria of an equitable division and a disciplined and ordered succession process.

The SA recognizes the application of the IMF's formula (or "key") when dividing the assets

83. *See* Oeter, *supra* note 18, at 83-84; AUGUST REINISCH, STATE RESPONSIBILITY FOR DEBTS: INTERNATIONAL LAW ASPECTS OF EXTERNAL DEBT RESTRUCTURING 4-6, 23 (Böhlau Verlag 1995).

84. International governmental organizations include the IMF, WB, EBRD, African Development Bank, Inter-American Development Bank, and Bank for International Settlements. Among them, the Bank for International Settlements enjoys special treatment since its agreement with Yugoslav successor States is a special Annex of the SA. *See* SA, *supra* note 1, at *Appendix to Agreement on Succession Issues: BIS Assets* (June 29, 2001).

85. *See* Mrak, *Apportionment and Succession*, *supra* note 23, at 11-20.

86. Proportions of IMF debt have been assigned as follows: Bosnia and Herzegovina, 13.20%; Croatia, 28.49%; Macedonia, 5.40%; Slovenia, 16.39%; and FRY, 36.52%. The IMF key has also been accepted by other institutions, international and commercial, including the WB. However, the SA itself expressly says in Annex C, Article 3(3), that "[t]he distributions referred to in paragraph (1) of this Article are final and shall not be reopened by any of the successor States in the context of succession issues." *See generally* Williams, *supra* note 25, at 793-95, 779 n.14; Shihata, *supra* note 23, at 75, 87; Mrak*, External Debt*, *supra* note 23; Mrak, *Apportionment and Succession*, *supra* note 23, at 11-20.

87. The first sign that a separate path for the division of assets and financial liabilities of the former Yugoslavia would be followed were given by the Badinter Commission. It stated that refusal by one or more successor States to cooperate in no way alters the principles applicable to State succession and that other States concerned may conclude one or more agreements conforming to those principles. International Conference on Former Yugoslavia, *Arbitration Commission Opinion No. 12*, *supra* note 24, at 1589-91. The Commission's approach and the practices followed thereupon by the other successor States to the former Yugoslavia exerted a pressure on the FRY/SUSM, which in the end had to conform to the bilateral agreements arrived at by other successor States with international financial institutions, private creditors, and foreign creditor countries. *See generally* Williams, *supra* note 25, at pp. 793-804 (analyzing the history of these bilateral arrangements and the pressure exercised by the international actors toward the successor States of the former Yugoslavia).

and liabilities of the former Yugoslavia. This application of the IMF formula did not mean parties were left without any choice to make some minor changes. The IMF formula is based on several pillars, such as the contribution of the former Yugoslav republics into the gross domestic product and Yugoslav exports, as well as their economic power compared to each other.[88]

The modifications of the IMF formula have been sanctioned in Annex C, Article 5 (2) of the SA.[89] Now they appear as follows: Bosnia and Herzegovina, 15.5 percent; Croatia, 23 percent; Macedonia, 7.5 percent; Slovenia, 16 percent; and RFY/SUSM, 38 percent. This division of assets and liabilities is applicable to the following assets in particular: 27 percent of the capital of the former Yugoslav Bank for International Economic Cooperation;[90] the net sum of the claims of the National Bank of Former Yugoslavia towards other countries;[91] foreign financial assets, such as money, gold, and other precious metals; deposits and direct guaranties held in the former Yugoslavia or the National Bank of Yugoslavia or held jointly with other foreign banks;[92] and finally, foreign financial assets currently unknown for the successor States.[93]

The manner in which the former Yugoslav foreign debt has been divided is novel for many reasons. First, parties to the SA accepted the IMF formula for the division of the Yugoslav State debts.[94] Second, this division in the SA does not follow the instructions of the VC II, according to which there should be a balance between the property, rights, and interests that pass to the successor States in relation to their State debt. The implementation of this formula was attempted in the context of the former USSR[95] and Czechoslovakia,[96] but without success. Foreign creditors did not accept such an approach, insisting on a "joint and several liability" formula instead. This "joint and several liability" clause was taken out only when foreign creditors realized successor States of these former Communist federations were being serious about taking over their part of the unallocated federal debt.[97] This approach proved to be both long and difficult. In standard State practice, this prior debt does not include either local debt (contracted by regional authorities, former Communist republics, and autonomous provinces) or localized debt (contracted by former Communist federations on behalf of the regional authorities, former Communist republics, and autonomous provinces).[98] These two

88. *See* sources cited, *supra* note 24, and accompanying text. Many facts affected the division of assets and financial liabilities among the successor States to the former Soviet Union, while in the case of Czechoslovakia only one factor was used: the size of the population of the successor States. *See generally* Williams & Harris, *supra* note 24, at 372, 383, 402-03, 406; Beemelmans, *supra* note 24, at 110-13 (elaborating on the cases of the former Soviet Union and Czechoslovakia).

89. For the IMF key, see *supra*, text accompanying note 85.

90. SA, *supra* note 1, at Annex C, art. 4(a).

91. *Id.* at Annex C, art. 4(b).

92. *Id.* at Annex C, art. 5(1).

93. *Id.* at Annex C, art. 5(3).

94. *Id.* at Annex C, art. 3.

95. *See supra* note 26.

96. *See supra* note 25.

97. For the case of the former Yugoslavia, see generally SA, *supra* note 1, at Annex C, art. 2. For comments regarding the joint and several liability and the take-over of the unallocated foreign debt in the cases of three Communist federations, see generally Oeter, *supra* note 18, at 76-83; Andrea Gioia, *State Succession and International Financial Organizations*, *in* LA SUCCESSION D' ETATS: LA CODIFICATION A L' EPREUVE DES FAITS/STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 355-83 (Pierre-Michel Eismann and Martti Koskenniemi eds., 2000); Mrak, *Apportionment and Succession*, *supra* note 23, at 12-20; Vladimir–Djuro Degan, *State Succession Especially in Respect of State Property and Debts*, 4 FINNISH Y.B. INT'L L. 130, 143-46 (1993); Beemelmans, *supra* note 24, at 110-18; Williams & Harris, *supra* note 24, at 368-83, 396-407.

98. Public foreign debt in international law is divided into three categories: national debt, local debt, and

kinds of debt automatically pass onto the successor States, based on the "final beneficiary rule," which is based on who benefitted in the past from the contracted debt.[99]

This method of dividing the unallocated debt of the former Yugoslavia represents the permanent solution—according to the IMF formula and the completed bilateral activities with the IMF, World Bank (WB) and the countries of the "Paris Club" and the commercial banks of the "London Club." This solution was opted for to assure all international creditors, especially the country members of the "Paris Club" and the commercial banks of the "London Club," that eventual disagreements between the parties would not impact the bilateral arrangements and activities so concluded with the above-mentioned actors. The absence of such a clause would have triggered the return of the system of "joint and several liability" of the former Yugoslav republics. In other words, these decision-makers wished to make sure the unallocated debt of the former Yugoslavia would be paid under all circumstances, regardless of any internal rifts between successor States to the former Yugoslavia.

VII. ARCHIVES

The provisions of the VC II regarding the division of archives have been generally respected. This does not mean, however, that the SA did not include relevant solutions.[100] The provisions of the SA apply mainly to the application of the territorial principle, functional (or organic) principle,[101] and the principle of integrity of the archives.[102]

The key principle of the VC II is that documents necessary for the normal functioning of the administration of the successor country should be an object of State succession.[103] This

localized debt. National debt is a debt for which the responsibility rests exclusively with the State. In cases of former Communist federations, this debt is called "federal debt." *See* Oeter, *supra* note 18, at 87. *See also* Int'l L. Comm'n, *Ninth Report on Succession of States in Respect of Matters Other Than Treaties*, ¶¶ 2, 3, 6, 14, 16, 18-19, 22-24, 29, 32-33, 40, 63, and 118 (April 13 & 20, 1977) (*prepared by* Mohammed Bedjaoui), *reprinted in* [1977] 2 Y.B. Int'l L. Comm'n 45, U.N. Doc. A/CN.4/301 and Add. 1; Int'l L. Comm'n, *Thirteenth Report on Succession of States in Respect of Matters Other Than Treaties*, ¶¶ 127, 129, 132 & 157 (May 29, 1977) (*prepared by* Mohammed Bedjaoui), *reprinted in* [1981] 2 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/345 and Add. 1-3. In addition to this division, debts are sometimes divided into so-called odious debts (debts taken for the purpose of carrying out military and police operations in order to suppress uprisings within the State, or some other imperialistic purpose), which cannot be an object of succession, and the debts of public enterprises whose succession has been a very debatable and contentious issue in the practice of States. *See* MENON, *supra* note 73, at 57-170.

99. SA, supra note 1, at Annex C, art. 2(b).

100. State archives of the former Yugoslavia were the subject of discussion among successor States to former Yugoslavia since 1992, but with no tangible result. Problems emerged at the outset and related to the very definition of the term "State archives." *See* Degan, *supra* note 96, at 149. For the history of this matter, proposals of the international mediators, and the opposite views of the parties, see Marija Oblak–Carni & Born Bohte, *Succession to the Archives of the Former SFR Yugoslavia*, *in* SUCCESSION OF STATES 178-85 (Mojmir Mrak ed., 1999).

101. Use of the term "organical link" to characterize the relationship of archives and territory was coined by P. K. Menon. *See* MENON, *supra* note 73, at 136.

102. *See* MENON, *supra* note 73, at 119-49 (commenting on the principles of territotiality, functionality, and integrity with regard to archives).

103. VC II, *supra* note 7, at art. 31(1)(a). In Annex D, Article 3 of the SA, in line with the territorial principle, it is said that: "[t]he part of the SFRY State archives (administrative, current and archival records) necessary for the normal administration of the territory of one or more of the States shall, in accordance with the principle of functional pertinence, pass to these States, irrespective of where those archives are actually located." SA, *supra* note 1.

provision covers both administrative archives and those of cultural and historical importance for the successor State. Political archives are not an object of succession.[104] The VC II does not address what materials should make up the archives.[105] This ambiguity was cleared up by the SA. Article 1(a) of Annex D considers the following as State archives:

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

In Annex D, Article 1(b), the SA discusses documents that compose archival material that should be the object of succession between the five successor States. This does not mean it is possible to create a definitive list of all documents and the archival materials that are subject to succession. The above formulation leaves enough room for brushing aside the responsibility regarding the archives succeeded to from June 1991 to July 1992 because there was no predecessor State in charge of them. In fact, the predecessor State did not exist from June 1991 to July 1992.

> Concerning the organic principle, the VC II gives a formulation according to which
> State archives of the predecessor State means all documents of whatever date and kind, produced or received by the predecessor State in the exercise of its functions which, at the date of succession of States, belonged to the predecessor State according to its internal law and were preserved by it directly or under its control as archives for whatever purpose.

The VC II gives no criteria for interpreting, and no definition of, the meaning of "preserved by it directly or under its control" for the documents that qualify as State archives. The SA is more specific, however. In addition to the documents related directly to the territory of one or more of the successor States, the SA considers as State archives documents "produced or received in the territory of one or more of the States" in the past.[106]

According to the principle of integrity of archives, successor States—on the occasion of their division—should ensure the data and other information contained therein is not damaged. It must also be preserved in its entirety. In the SA, this principle is expressed in the following words:

> The agreement referred to in paragraph (a) shall take account of all relevant circumstances which include the observance as far as possible of the principle of respect for the integrity of groups of SFRY State archives . . . without prejudice to the question of where any particular group of archives should be preserved.[107]

104. *See* MENON, *supra* note 73, at 142-44.
105. This drawback has been criticized in scholarly work. *See id.* at 123.
106. SA, *supra* note 1, at Annex D, art. 4(a)(ii).
107. *Id.* at Annex D, art. 6(b).

Article 6 of Annex D provides for the possibility of a "joint succession" to the State archives of the former Yugoslavia.[108] The successor States should "identify, and circulate to each other, within 24 months of the date on which this Agreement enters into force, lists of archives to which Article 3 and 4 apply."[109] The same function of the preservation of the archival integrity, in addition to the "joint succession" archives, is anticipated by Article 5 of Annex D of the SA. This Article allows for the parties to reach an agreement as to which of them shall keep the originals, so as to enable the others to make copies when "archives are to pass to more than one State."[110] It should be noted, however, that the principle of integrity of archives, or of the preservation of the collections of the archives, should not be detrimental to the need for implementation of the other principles of territoriality and functionality.[111]

VIII. PRIVATE PROPERTY AND ACQUIRED RIGHTS

Acquired rights are "any rights, corporeal or incorporeal, properly vested under municipal law in a natural or juristic person and of an assessable monetary value."[112] These rights were born in the context of protecting foreign concessions from nationalization by new territorial sovereigns. They have been closely connected with the diplomatic protection of foreign nationals. In fact, the first cases before national courts speak of this latter protection of the acquired rights.[113]

The principle of acquired rights in international law limits the arbitrariness of State power involving territorial changes in sovereignty. These principles are not limitations on sovereignty. Instead, they protect private relationships of natural persons and legal entities in the aftermath of a change in territorial sovereignty.[114] Their post-Cold War application has clearly established that acquired rights are an important part of customary international law.[115] During the decolonization process, new territorial sovereignties, based on the "clean slate" doctrine, seriously questioned the validity of norms and principles on acquired rights.[116]

---

108. "In relation to SFRY State archives other than those referred to in Article 3 and 4, the States shall, by agreement to be reached within 6 months of the entry into force of this Agreement, determine their equitable distribution among themselves or their retention as common heritage of the States which shall have free and unhindered access to them. If no such agreement is reached, the archives shall become common heritage." *Id.* at Annex D, art. 6(a).

109. *Id.* at Annex D, art. 6(b).

110. For the methods used to determine who shall bear the costs of copying and transporting archives, see the standard solutions in Annex D, Article 11 of the SA. *Id.*

111. *See* Nathan, *supra* note 10, at 504.

112. D. P. O'CONNELL, INTERNATIONAL LAW 838 (Stevens & Sons Limited 1965).

113. *See* REINISCH, *supra* note 82, at 12-17. The acquired rights doctrine includes pure financial claims, as opposed to the old view denial of such claims. As such, they are protected by customary international law in much the same way as other material rights. Economic concessions and their protection as pure financial rights of private persons (individuals and legal entities) have produced the concept of diplomatic protection in the context of acquired rights. *See* Daniel P. O'Connell, *Economic Concessions in the Law of States Succession*, 27 BRITISH Y.B. INT'L L. 93 (1950).

114. Georges Kaeckenbeeck, *La Protection Internationale Des Droits Acquis*, ACADEMIE DE DROIT INTERNATIONAL: RECUEIL DES COURS 321 (1937); O'CONNELL, *supra* note 8, at 266; REINISCH, *supra* note 82, at 86, 88-89.

115. *See* Stahn, *supra* note 2, at 395.

116. This does not mean there have not been international documents aimed at relaxing this brutal imposition

Before the decolonization, acquired rights found support in national[117] and international courts.[118] They were also the object of multilateral[119] and bilateral legal regulations between sovereign States.[120] Even when they were violated, the perpetrator State has offered "just and immediate" compensation to the damaged party.[121]

During the dissolution of the former communist federations, these rights were respected to the greatest possible extent. No hesitation or refusal to apply them ever surfaced, due to the lack of ideological conflict regarding forms of property and an overall liberal orientation in the former Communist world toward democracy, free trade, and respect for private property and free competition. The application of acquired rights is connected to respect for universal human rights values, which had been incorporated in the national legislation of the former Communist countries.[122] Provisions of the SA reflect this universal trend. It contains concrete resolutions against discrimination and compensation in cases where the restoration of the acquired rights is not feasible for whatever reason.

In addition to so-called acquired rights of an administrative nature—such as pensions[123] and

---

on the new territorial sovereignties. However, their impact was very marginal. For the practice of States during this period of time, see Int'l L. Comm'n, *Succession of States in Respect of State Property, Archives and Debts*, ¶ 50 *et seq*., U.N. Doc. A/CN.4/L.328, *reprinted in* [1981] 1 Y.B. Int'l L Comm'n 266, U.N. Doc. A/CN.4/SR.1692. For scholarly comments in support of protection of the acquired, including the rules on human rights as a factor in support of this protection, see generally Ebenroth & Kemner, *supra* note 11; Eisemann, *supra* note 79, at 60-61; Sandrine Maljean–Dubois, *La role de l'equite dans le droit de la succession d'Etats*, *in* LA SUCCESSION D' ETATS: LA CODIFICATION A L'EPREUVE DES FAITS/STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 137, 151 (Pierre–Michel Eisemann and Martti Koskenniemi eds., 2000); Isabele Poupart, *Succession aux traite et droit de l'home: vers la reconnaissance d'une protection ininterrompe des individus*, *in* LA SUCCESSION D' ETATS: LA CODIFICATION A L'EPREUVE DES FAITS/STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 465, 467-68, 475 (Pierre–Michel Eisemann and Martti Koskenniemi eds., 2000); Maria Isabel Torres Cazorla, *Rights of Private Persons on State Succession: An Approach to the Most Recent Cases*, *in* LA SUCCESSION D' ETATS: LA CODIFICATION A L'EPREUVE DES FAITS/STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 663, 667-79, 686-712 (Pierre–Michel Eisemann and Martti Koskenniemi eds., 2000).

117. The principle, according to which rights acquired based on old law should be preserved and respected, has been widely accepted in practice. In *United States v. Percheman*, Chief Justice Marshall gave an eloquent elaboration of this principle: "the modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world, would be outraged if private property should be generally confiscated, and private rights annulled on a change in the sovereignty of the country." United States v. Percheman, 32 U.S. (7 Peters) 51, 51 (1833). For scholarly comments, see SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 319-320 (photo. reprint 1982) (1958).

118. *See* Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 36 (Sept. 10).

119. *See* General Act of the Conference of Berlin Art. 35 (1885), *reprinted in* ARTHUR BERRIEDALE KEITH, THE BELGIAN CONGO AND THE BERLIN ACT app. (Clarendon Press 1919). For comments, see Daniel de Leon, *The Conference at Berlin on the West-African Question*, 1 POLITICAL SCIENCE QUARTERLY 103 (March 1886).

120. One deals here with the Drago-Porter Doctrine, enshrined in the 1907 Hague Convention Restricting the Use of Force to Recover Contract Claims. *See* George Winfield Scott, *Hague Convention Restricting the Use of Force to Recover Contract Claims*, 2 AM. J. INT'L L 78 (1908); REINISCH, *supra* note 82, at 13-14.

121. Nathan, *supra* note 10, at 513; J.E.S. Fawcett, *Some Foreign Effects of Nationalization of Property*, 27 BRITISH Y.B. INT'L L. 355 (1950); N. R. Doman, *Post War Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125 (1948); PATRICK DAILLIER ET ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 518 (5th ed., 1994).

122. *See* Stahn, *supra* note 2, at 396; Koskenniemi, *supra* note 79, at 106; Cazorla, *supra* note 115, at 671-77, 714-17.

123. Annex E of the SA deals with pensions and has three Articles. Article 1 regulates the responsibility of each State to pay legally grounded pensions founded by that State in its capacity as a constituent Republic of the SFRY, without any discrimination. Article 2 discusses the federal pensions of the former Yugoslav citizens who were civil or military servants of the SFRY. Article 3 foresees the possibility for bilateral agreements between successor States for ensuring the payment of pensions pursuant to Articles 1 and 3. SA, *supra* note 1.

other rights—interests and liabilities are not covered by the SA.[124] Annex G of the SA speaks of "private property and acquired rights." Articles 1 to 8, which are divided into material rights (Article 2: "the rights to movable and immovable property") and rights not having material nature (Article 3: "rights to intellectual property, including patents, trade marks, copyrights, and other allied rights [*e.g.*, royalties]"). The principle of non-discrimination appears in no uncertain terms in Article 2 (1) (a):

> the rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognized, and protected and restored by that State in accordance with established standards and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons. This shall include persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a State other than a successor State.

Similar protection is also found in Article 6 of Annex G of the SA on the protection of "dwelling rights," coupled with additional guarantees offered by the successor States regarding non-discrimination.[125] As a result of these protections, every contract concluded under duress is considered null and void.[126] Such provisions seek to prevent illegal acts against acquired rights, in much the same manner as was done with the Dayton Peace Accords of December 1995.[127] The formulation of Article 7 of the same Annex aims at facilitating free and unhindered access to the national courts of successor States, by private persons and legal entities hoping to realize their acquired rights derived from the old Yugoslav laws.

The rule on compensation in the SA, when acquired rights over movables and immovables cannot be realized in practice, ensures that private persons and legal entities "unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms."[128]

Finally, the provisions of the Annex G of the SA offer generalized solutions that should take the form of legal principles. For this reason, Article 4 of the Annex G expressly foresees the duty of the parties to **"**take such action as may be required by general principles of law and otherwise appropriate to ensure the effective application of the principles set out in this Annex, such as concluding bilateral agreements and notifying their courts and other competent

124. In Annex F, Article 2 of the SA, the possibility that new claims may emerge that are not covered by the SA is foreseen. No matter their nature, be they private or public claims, they shall be considered by the Standing Joint Committee established under Article 4 of the SA. In order for this to be achieved, the parties have a duty to inform one another of all such future claims against the SFRY. *Id.*

125. *Id.* at Annex G, art. 8.

126. *Id.* at Annex G, art. 2(1)(b).

127. Article 1(1) of Annex 7 of the Dayton Agreement provides for the return of property taken away without authorization, or its compensation if such a return is not possible, and refers clearly to the events following the outbreak of violence and war after 1991. *See* General Framework Agreement for Peace in Bosnia and Herzegovina, Bos.-Herz., Annex 7 Art. 1, Dec. 14, 1995, *reprinted in* [1996] 35 I.L.M. 89, 137. However, it should be noted that in practice there has been very little success recorded in the matter. The respect for human rights in Bosnia and Herzegovina in general has been a very slow process following the 1995 Dayton Accords and the return of property to persons deprived of their possessions seems more dramatic than anything else. *See* Christopher Harland, *Making Effective the Use of Human Rights and Freedoms in Bosnia-Herzegovina*, *in* CITANKA LJUDSKIH PRAVA 259 (Jasna Baksic-Muftic & Liljana Mijovic eds., 2001).

128. SA, *supra* note 1, at Annex G, art. 2(1)(a).

authorities."[129]

IN LIEU OF A CONCLUSION

This article has pursued the path set by the Badinter Commission. The succession of States is a contextual issue, in which legal rules have a role to play only at the level of general principles. The principle of cooperation in good faith among the succession parties and *rebus sic stantibus* are key topics for analysis of State succession issues. Despite the rational and scholarly critiques leveled against the Badinter Commission,[130] the unreserved acceptance of its opinions,[131] and accusations against it for conspiracy during the drafting process of its opinions,[132] the overall work of the Commission has been professional and has had a substantial impact on the framing of the solution to the Yugoslav crisis.

The process of succession to the former Yugoslavia started in 1991. It was closed between sovereign and independent States in 2001, with the successful conclusion of the SA.

This does not mean the resolution in the former Yugoslavia did not yield any fruitful results. In fact, it established some useful precedents for the future of any remaining Balkan succession issues. The novelties can be summarized as follows: for the first time, it has been shown that universal succession, not the "clean slate" doctrine, should be a rule of customary international law on State succession. In principle, States are successors to all kinds of rights and duties held by their predecessors, including private property and acquired rights.

Yet another novelty involves the role of the international community, specifically the role of foreign creditors. They played a crucial role in shaping the modalities of the succession of matters including property, financial assets, and liabilities of the predecessor State. This was unimaginable in the not too distant past. The intervention by international financial institutions, especially the IMF, WB, creditor countries, and private commercial banks, all proved indispensable to the process of resolving the succession issue in former Communist countries. Without them, the succession process would have failed.

But this was a mixed blessing. For example, Kosovo received nothing. This was the unfortunate anomaly associated with Kosovo not being an independent sovereign State, a universal precondition for succession under international law. Sovereigns routinely confer citizenship,[133] contract to undertake foreign debt, and enter into international treaties. They

129. *Id.* at Annex G, art. 4.

130. Michla Pomerance, *The Badinter Commision: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31 (1998-1999); Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRITISH Y.B. INT'L LAW 333 (1995).

131. Pellet, *supra* note 29.

132. Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 749-50 (1995).

133. The people of Kosovo are considered residents with temporary citizenship of the FRY/SUSM until the current international administration is in place. This current status is determined by the UN Security Council resolution 1244, adopted at the 4011 Session of this body, June 10, 1999. S.C. Res. 1244 ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999). According to this document, the status of Kosovo is as of yet an open issue pending solution through a political process among the parties, Kosovar Albanians and the Republic of Serbia, with the help and mediation of the international community. The process for determining the status of Kosovo started on November 4, 2005 by a decision of the Contact Group, fully endorsed by the UN Security Council

manage the international border regime and enjoy the benefits of membership in the UN and other international organizations.[134] Thus far, Kosovo has been Europe's black hole, and unable to attract critical foreign investment because it lacks sovereignty and independence under auspices of what some have characterized as a new form of colonial control.

The State property and assets of the former Yugoslavia would otherwise have been inherited by the FRY/SUSM with a just legal title, on behalf of Kosovo and its citizens. Based on the criteria applied by the IMF, WB, and parties to the SA, Kosovo—as part of the former Yugoslav federation—has contributed to the size and value of the property and assets of former Yugoslavia. One may witness its contribution to the Yugoslav federal budget, gross domestic product, exports, and population (larger than the number of some former Yugoslav republics). One must not discount Kosovo's contribution to the economic impact of the former Yugoslavia, which is equal to, if not stronger than, some of the successor States.

The same criteria should apply to the State archives. Kosovo should be given back the archives taken from it after the 1999 Kosovo conflict ended. This plea is rationally based on the principle of functionality, the organic and integral principle, as it was done with the other successor States.

For this state of events to change, Kosovar institutions must demand the further negotiation of these simmering, if not boiling, issues in the political agenda for the final status talks for Kosovo (which started in November 2005). Thus, there is a need for Kosovar academics and the political elite to abandon their naïve discourse on Kosovo, whereby they hope to justify their claims, based on the last Yugoslav Constitution of 1974. The Constitution allegedly treated Kosovo as one of its eight constituent units of that State, alongside of Vojvodina and the five other successor States. The former Yugoslavia is now dissolved and the story has effectively ended, in terms of the most important succession issues. Serbia has essentially inherited Kosovo and its citizens. The SA appears to be an irreversibly foregone conclusion. The property of Kosovo has been taken over by Serbia. It should be returned.

International legal science can play an important role in the return of Kosovo's right to succession. It did so in the post-1991 period. It offered new modalities for succession over certain rights and duties of the predecessor FRY/SUSM. The border regimes around Kosovo (established after 1991) included changes made through the Border Agreement with Macedonia and the FRY/SUSM.[135] These remain in place, and can be changed only via the civilized diplomatic and judicial methods accepted under international law. Specifically, a new precedent—a *sui generis* succession—should be implemented, so new opportunities may open for Kosovo and its citizens for the application of the same principles as those applied and proclaimed by the Badinter Commission a decade earlier.[136] Should this *sui generis* proposal not

---

which remains the principal body responsible for Kosovo and its citizens according to the mandate derived from Resolution 1244. *See Kosovo: A Way Forward?: Hearing before the Senate Committee on Foreign Relations*, 109th Congress (2005) (Statement of R. Nicholas Burns, Under Secretary for Political Affairs, Department of State).

134. In this matter, too, Kosovo could be given some concessions and advantages, such as membership (or observer status) in some international organizations of a regional character (i.e., European Union, Council of Europe, OSCE, and the like).

135. Agreement on Delineation and Description of the State Border, Serb. & Mont.-Maced., Feb. 23, 2001, *reprinted in Official Gazette of the* FRY, *Annex Medjunarodni Ugovori* 16.1/01.

136. For a similar position, see generally Acquaviva, *supra* note 27, at 213-14.

be implemented, Kosovo's citizens will continue to feel the brunt of the Milosevic regime (1989 – 1999), long after his death.

There are two impossible tasks the UN mission in Kosovo is currently facing: maintaining Kosovo within the FRY/SUSM, *versus* the presently unworkable Kosovar Albanian claim for an independent Kosovo. There is a third solution. It would include the following elements: less involvement of the international community in the administration of the country; more Euro-Atlantic integration; and the reconsideration of Kosovo's being an immediate successor to those dimensions of State succession (vis-à-vis FRY/SUSM), but without affecting the rights and interests of third parties. All steps should be undertaken in a way that rationally accommodates the rights of the Republic of Serbia—the entity that has spoken as the successor State for Kosovo from 1992 through the conclusion of the 2001 SA.