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Keywords

Obligations, States, Crimes, War, War Crimes

THE DISSOLUTION OF YUGOSLAVIA AND THE FATE OF ITS FINANCIAL OBLIGATIONS[†]

GUIDO ACQUAVIVA*

INTRODUCTION

- I. THE CRISIS OF YUGOSLAVIA
- II. THE LAW OF STATE SUCCESSION
- III. THE DIFFICULT RELATION BETWEEN STATE SUCCESSION AND ITS CONSEQUENCES
- IV. THE DISSOLUTION OF YUGOSLAVIA AND THE FATE OF ITS FINANCIAL OBLIGATIONS

CONCLUSIONS

INTRODUCTION

The law of state succession is one of the most complicated issues in public international law.¹ Although it has been dealt with since the beginning of human interest in the field of relations among different political entities,² scholars, economists and politicians have seldom

[†] This work is dedicated to my wife, Ludovica.

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1. See, ROBERT YEWDALL JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 7 (1963); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 654 (4th ed. 1990).

2. The definition of international relations - implying states as major subjects in the international arena - demands a definition of international community (see, e.g., Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 *RECUEIL DES COURS* 195, 232-236 (1993), discussing the theoretical foundations of the international community) and *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* (Mohammed Bedjaoui ed., 1991), especially the general introduction by the editor, at 1, and the article by Luigi Condorelli, *Custom*, at 179. Notwithstanding this caveat, and the fact that most scholars regard modern international community a product of the Westphalia Peace (1648), early descriptions of succession among political entities are provided by Grotius (see GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, Vol. II, Ch. IX, § XII (Aalen 1993) (1625).

reached an agreement on what the real legal rules are on how to treat this phenomenon. This note will analyze the case of the succession of Yugoslavia and some of the problems raised by the disintegration of that country into separate republics, paying special regards to the fate of its financial obligations.

In order to address these concerns, the *First Section* will “set the stage”, providing some relevant facts that occurred before the Yugoslav Federation broke up. The *Second Section* is an attempt to summarize the present “state of the law” regarding state succession and financial obligations (public debts). The *Third Section* will focus on the specific problem of the distinction between succession as a phenomenon of fact, on one side, and its consequences on the other, taking into account historical cases as well as more recent events in Central and Eastern Europe. Finally, the *Fourth Section* will deal with the fate of Yugoslav public debts in the aftermath of its dissolution: the many options that were proposed and various theoretical and practical problems faced by the successor states. It will also try and assess the policy of Yugoslavia (Serbia and Montenegro)³ as regarding the apportionment of the former Yugoslavia’s public debt and the seemingly viable solution envisaged in recent agreements.⁴

I. THE CRISIS OF YUGOSLAVIA

In 1989, the tide was definitively turning against planned economies and socialist parties all over Eastern Europe. In particular, because of the deadly mixture of bad planning and populist promises, the Yugoslav federation was suffering a terrible financial crisis.⁵ The federal government launched a ‘shock therapy’ to curb inflation and boost foreign investment. One year later, in Bosnia-Herzegovina, Croatia and Slovenia political pluralism developed: new nationalistic parties – clearly anti-communist and, thus, anti-federation – were quickly formed and won elections throughout the year.⁶ On the other side, in Belgrade, the Serbian Assembly suspended Kosovo’s government and parliament after Milosevic was elected Serbian president with 65% of the popular vote. The election of Milosevic was a signal that Serbia was in the field of the republics supporting

3. The denomination of the Yugoslav Federation (FRY) after April 27th, 1992.

4. Before its dissolution, Yugoslavia was known as the Federal Socialist Republic of Yugoslavia (FSRY). This denomination, as well as those of ‘former federation’, ‘former Yugoslavia’, or simply ‘Yugoslavia’ will be used throughout this note.

5. On the economical situation of Yugoslavia, see Valerie Bunce, *The Elusive Peace in the Former Yugoslavia*, 28 CORNELL INT’L L. J. 709, 712 (1995) and cited references.

6. See Konrad G. Bühler, *State Succession, Identity/Continuity and Membership in the United Nations*, in LA SUCCESSION D’ETATS: LA CODIFICATION À L’ÉPREUVE DES FAITS – STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 274-78 (Pierre Michel Eisemann & Martti Koskenniemi eds., 2000) [hereinafter Eisemann & Koskenniemi].

nationalism and rejecting a decentralization of the political and economic system.⁷

From that moment on, the struggle to keep the federation united – at least as a confederation of sovereign states – interfered with the struggle of Serbia to ‘protect’ its nationals who happened to be living in other republics; also, Milosevic was advocating a ‘strong Serbia’ as the leading force to promote a ‘strong Yugoslavia’. The fact that the army was seen as mostly Serbian in its higher cadres, and strongly pro-federation, created a potentially powerful tool in the hands of its leadership, but, even more, a reason for strong suspicion about the role of the military within the republics.⁸ Moreover, this attempt for a centralizing policy on the part of the Serbian leadership caught the federal institutions in a moment of particular crisis; in fact, the economic package launched in 1990 under an IMF Stand-by Agreement (SBA) and a World Bank Structural Adjustment Loan (SAL II) required large budget cuts and redirection of federal revenues towards debt servicing. This led to the suspension of transfer payments by the center to the governments of the Republics and autonomous provinces, thereby creating even more discomfort towards the federal authorities, in a moment of great distress.⁹

This internal situation also found the international community unwilling, at least in part, to deal with the task of relieving the situation.¹⁰ In 1991, while the eyes of the world were focused on the Gulf War, Tudjman and Milosević were secretly meeting at Karadjordje to discuss territorial partition of Bosnia-Herzegovina, the first military outbreaks took place in Croatia, and Serbs of Krajina in a local referendum declared their willingness to remain part of Yugoslavia. Slovenia and Croatia declared their own sovereignty at the end of

7. Bühler, *supra* note 6, at 274-78.

8. An interesting analysis of the path from one Yugoslav nationalism to the multitude of ‘post-Yugoslav’ nationalisms is provided in OLIVIER LADISLAV KUBLI, *DU NATIONALISME YUGOSLAVE AUX NATIONALISMES POST-YOUGOSLAVES*, (1998). *See also* LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION*, (1996) (especially Part One).

9. MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY – IMPACTS OF IMF AND WORLD BANK REFORMS* 246 (1997). *See also* SUSAN WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 40 (1995) and Ann Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 *HARV. INT’L L.J.* 443, 452 (1997).

10. There seemed to be strong support for maintaining the territorial integrity of the federation on part of the United States, the European Community and its members, the Conference on Security and Cooperation in Europe, as well as Russia. Such a position undoubtedly strengthened the perception in the Yugoslav and in the Serbian leaderships that flexibility was not required in negotiations, since independence for Slovenia and Croatia was not supported internationally. *See* Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 *AM. J. INT’L L.* 569, 570 (1992).

June;¹¹ it is true that, at this very moment, the EC began an arms embargo, freezing all economic aid to Yugoslavia in July in an effort to try and ease the situation, but then the attention was diverted to Moscow, where Gorbachev was declared "sick" and then came back – under the 'protective' wings of Yeltsin – after one of the strangest coups in history. The only action taken by the European Community was the establishment of a 'Peace Conference' on Yugoslavia; such an action, that would prove to be very important for the resolution of the *legal* problems linked to the dissolution of Yugoslavia, would be virtually useless in regards to the *conflicts* and the *political solution* to the crisis.¹² Macedonia, too, declared its independence in September,¹³ and only this triggered the first United Nations' action, when the Security Council adopted a Resolution¹⁴ for an embargo on arms sales to Yugoslavia.

11. In this context, it is interesting to note the impact of the first casualties, atrocities, and human rights violations not only on the international community, but, in the first place, on the people of former Yugoslavia itself. The alienation towards the central government on part of the general public greatly increased during the first skirmishes in Slovenia and Croatia, as well as the deep distrust towards the Federal Army (JNA).

12. At a meeting held in Brussels on August 27, 1991, the EC had actually agreed to convene a peace conference on Yugoslavia that would bring together the Federal presidency and the Federal Government of Yugoslavia, the Presidents of the six republics, the president of the EC Council and representatives of the EC Commission and EC member states. In this framework, an arbitration procedure would enhance the rule of law in the settlement of disputes. This Arbitration Commission was to be made up of three members appointed by the EC and two unanimously appointed by the collective Yugoslav Presidency. However, this body never reached an agreement, and the three members appointed by the EC chose to appoint the other two. At the first meeting, the five members decided to elect as Chairman Mr. Badinter, the President of the French *Conseil Constitutionnel*. This Commission [hereinafter, Badinter Commission, or Commission] received the full support of the United States and of the USSR; in August 1992 it was replaced by the UN/EC International Conference on Yugoslavia. For more information about the role of the Commission in the Yugoslav crisis, see Maurizio Ragazzi, *Introductory Note*, 31 I.L.M. 1488,1490 (1992). For a critique of the activity of the Commission, see Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31 (1998). As regards the Opinions rendered by the Commission, see Badinter Commission, *infra* note 17, §3.

13. Macedonia is now widely recognized, although with the name of "Former Yugoslav Republic of Macedonia" (FYROM); it was admitted to the UN in April 1993 (see Susan Woodward, *Are International Institutions Doing Their Job?*, 90 AM. SOC'Y INT'L L. PROC. 471, 473 (1996)). For the purposes of this note, the denomination of Macedonia will be adopted.

14. S. C. Res. 713, U.N. SCOR, U.N. Doc. S/RES/713 (1991), repealed after the Dayton Agreement through S. C. Res. 1021, U.N. SCOR, U.N. Doc. S/RES/1021 (1995). At the meeting in 1991, the situation was especially confused, as demonstrated by the fact that the Yugoslav representative, in an unprecedented move, requested that a complete embargo be adopted through mandatory Security Council action under Chapter VII *against the country he was representing* (U.N. Doc. S/PV.3009, at 17). For a vivid description of the meeting, see Weller, *supra* note 10, at 578-79.

If the Security Council was no longer hostage to the vetoes by the Superpowers, one of which was rapidly losing its status, it could do no more than condemn and adopt weak actions, without being able to promote any real diplomatic solution for events that were clearly developing as 'a threat to international peace and security'.¹⁵ In October, the situation appeared even more complex: Bosnia-Herzegovina, Croatia, Macedonia and Slovenia were on the verge of becoming independent countries, leaving Montenegro with Serbia as the two remaining constituent parts of the Federation; the question seemed to be only one of timing and of the legal framework to contain the more than likely outbreak of violence. At this point, the European Community finally decided to take a stand, one that looked bold to many: it would not recognize newly independent countries in Eastern Europe if they did not meet high criteria, never heard before in the field of states' recognition.¹⁶ This action could have had a 'chilling' effect on the rush towards independence that many republics were showing, and it could have also promoted a more coherent approach by other important countries – the United States, the fellow Non-aligned countries, the newly emerging independent Russia together with the other republics, all eager for international support and recognition themselves. But the European Community was not able to live up to its own set standards.

On December 23rd, 1991 Germany decided to unilaterally recognize Slovenia and Croatia as independent countries, thus defeating the substantive requirements – as well as even the timetable – previously agreed on.¹⁷ The rest of the Community followed suit on January 15th,

15. Chapter VII of the Charter of the United Nations deals with "Actions with respect to threats to the peace, breaches of the peace, and acts of aggression." In particular, the Security Council has primary responsibility to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and [to] make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (U.N. CHARTER, art. 39).

16. The *Declaration on Yugoslavia* was issued at the Extraordinary Ministerial Meeting held on December 16, 1991, in Brussels (see 31 I.L.M. 1485 (1992)). It contained the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, [hereinafter *Guidelines*] where the member States agreed to "recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations." (emphasis added). On this point, see Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 90-91 (1992). As regards the 'appropriate international obligations', the guidelines explained that the process of recognition required, *inter alia*, "commitment to settle by agreement [...] all questions regarding state succession and regional disputes". On the relevance of this specification, see Badinter Commission, Opinion n. 5, 31 I.L.M. 1488, 1503.

17. See Badinter Commission, Opinion n. 5, *supra* note 16, at § 3, suggesting Croatia was not fully 'ready' to be recognized: in fact, the Constitution of December 4, 1991, did

respecting the formal dateline, but not necessarily the standards proposed in the Guidelines. More importantly, on April 6th the European Community recognized Bosnia-Herzegovina (despite negative Badinter Commission advice)¹⁸ and refused to grant recognition of Macedonia, due to the Greek veto (despite positive Badinter Commission advice).¹⁹ On the next day, the United States, too, recognized Croatia, Slovenia, and Bosnia-Herzegovina,²⁰ while, on April 27th, Serbia and Montenegro declared the Federal Republic of Yugoslavia to be the 'continuation' of the dismantled SFRY. This happened while a surge of violence was taking place in the territory of the republics of Croatia and Bosnia-Herzegovina; especially in the latter, war crimes and terrible human rights violations occurred,²¹ creating an environment where effective negotiations among the parties was difficult to start, let alone succeed.

II. THE LAW OF STATE SUCCESSION

This note purports to shed some light on the legal principles governing the transfer of financial obligations due to the succession in the territory of the former Yugoslavia. In order to accomplish this aim, however, it is necessary to reach an agreement on the terminology that will be used, a common problem in dealing with international law theory to be applied in practice. In particular, the definitions of 'state' – and the relevance of recognition -, of debt, and of succession seem necessary hermeneutical 'tools' for our purposes.

A. *The State*

Although this might seem an academic question with no practical

not sufficiently incorporate the suggested provisions on the autonomy of minorities; written reiteration by President Tudjman of the commitments to protect the 'special status' of minorities, however, was deemed sufficient (*see* Weller, *supra*, note 10, at 593. As for Slovenia, *see* Badinter Commission, Opinion n. 7, 31 I.L.M. 1488, 1512 (declaring that Slovenia met the requirements). On the question of the legality of secession by Croatia and Slovenia, an early view was provided by Richard Iglar, *Comment: The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L.REV. 228 (1992).

18. Badinter Commission, Opinion n. 4, 31 I.L.M. 1488, 1501. On the international subjectivity of Bosnia-Herzegovina, *see* Matthew Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 333, 375 (1995).

19. Badinter Commission, Opinion n. 6, 31 I.L.M. 1488, 1507.

20. The United Nations recognized Slovenia, Croatia and Bosnia-Herzegovina on May 22, 1992, (U.N. Press Release, ORG/1156, Jan. 19, 1993).

21. *See* S.C. Res. 752, U.N. SCOR, U.N. Doc. S/RES/752 (1992), 31 I.L.M. 145 (demanding compliance with the April 12, 1992 cease-fire and urging to stop "violent deterioration" of the situation) and S.C. Res. 757, U.N. SCOR, U.N. Doc. S/RES/757 (1992), 31 I.L.M. 1453 (calling for "immediate cessation of forcible expulsions and attempts to change the ethnic composition of the populace").

consequences, many discussions have actually arisen about the legal threshold of what really constitutes a State, especially with regard to the break-up of Yugoslavia.²² The Restatement²³ clarifies that an entity must satisfy four requirements for statehood: territory,²⁴ permanent population, government and capacity to conduct international relations. Some of these elements, however, are quite loosely defined. For example, the territory requirement seems to be satisfied even though its boundaries have not been finally settled;²⁵ also, the definition of permanent population comprises situations like the one of the Vatican City – with a mere 400 citizens and a total of around 750 permanent residents.²⁶ This is one of the reasons why it is possible to affirm that the government, with its effective jurisdiction within state borders and/or on the population, and its innate capacity to enter into relation with other subjects of international law is clearly the most relevant characterizing aspects of the State.²⁷

What is important to note, however, is that scholars are generally agreed that an entity fulfilling these requirements is a State as such, and does not need any kind of recognition by the 'international community' to become a member.²⁸ But, obviously, things are not as

22. In general, "all theories of succession must be founded in some general view of the State, and on the relations between, on the one hand, the State and its internal legal order and, on the other, that legal order and the international legal order of the community of States." (O'Connell cited in James Crawford, *The Contribution of Professor D. P. O'Connell to the Discipline of International Law*, 1980 BRIT. Y.B. INT'L L. 1, 23).

23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §201 [hereinafter RESTATEMENT]; see especially Comments b to e. Although there are other, very interesting, theories on the identity of states, this definition seems very useful in describing the events in Central and Eastern Europe during the last decade of the Twentieth Century, and will be therefore used in this work as a ground basis.

24. See *Island of Palmas Case* (1928), 2 RIAA 829, 839 (Judge Huber), stating that "Territorial sovereignty [. . .] involves the exclusive right to display the activities of a State." *Id.*

25. See P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW* 34 (1994).

26. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 36-7 (1979); MENON, *supra* note 26, at 58-9.

27. See GAETANO ARANGIO-RUIZ, *L'ETAT DANS LE SENS DU DROIT DES GENS ET LA NOTION DU DROIT INTERNATIONAL* 297 (1975); see also ALBERTO MIELE, *GLI STATI* 4-5(2001).

28. In international law, the question of recognition arises when a new state emerges and "[. . .] seeks to establish relations with other existing states and also when it applies for membership of the UN and other international [. . .] organizations." SEN, *A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* 501 (3rd ed. 1988) cited in Mirjam Skrk, *Recognition of States and Its (Non-)Implications on State Succession: The Case of Successor States to the Former Yugoslavia*, SUCCESSION OF STATES 15-31 (Mojmir Mrak ed., 1998) [hereinafter Mrak]. Moreover, scholars have extensively drawn distinctions between the recognition of States and the recognition of governments, the latter being just a gesture of acceptance in the transition of governments within the constitutional – domestic – order of a State. The establishment of diplomatic relations is still a different matter, usually relating to mere political appreciation of a specific government in a given situation. See MENON, *supra*, note 26, at 61-4; see also H.

simple as that. Whether an entity satisfies the requirements for statehood is ordinarily determined by other states when they decide to treat that entity as a state.²⁹ Moreover, many believe there is actually no duty to recognize another entity as a state, although there is at least a duty not to recognize an entity not fulfilling the above-mentioned requirements.³⁰ Thus, although recognition may not be theoretically claimed to be a necessary step on the way to statehood, it may represent an important achievement for a state-to-be or, even more, for a new state.

During the last decade of the past century, however, the dissolutions of Yugoslavia and the USSR have prompted a new attitude by some countries – in particular, the European Community and its members – which tried to establish other criteria to be admitted within the international community. Specifically, the E.C. issued the now famous “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”, envisaging the standards new states are supposed to meet in order to be deemed worthy of recognition.³¹ In particular, the guidelines declare that those European countries are ready to recognize, “subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, *have accepted the appropriate international obligations* and have committed themselves in good faith to a peaceful process and to negotiations.”³² This part was clarified in the “commitment to settle by agreement [. . .] all questions concerning state succession and regional disputes.”³³

Much has been written and said regarding the ‘democratic governance’ element as one creating a new level of control in the hands of the international community.³⁴ But what is relevant for the present discussion is, rather, the requirement of the need to accept the appropriate international obligations in order to be recognized as a new subject of international law. What are these obligations? Do they comprise financial obligations of the predecessor state? Who is entitled to define them and to decide whether these entities have accepted them? Arguably, the answer to the latter question is the European

LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 88 (1947) (affirming the entitlement of validly constituted governments to recognition).

29. RESTATEMENT, *supra* note 23, at § 201, comment h.

30. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 94-95 (1979).

31. *See Guidelines, supra* note 16, at 1486.

32. *Id.* (emphasis added).

33. *Id.*

34. For the emergence of the criterion of ‘democratic governance’ even before the case of Yugoslavia, *see* Franck, *supra* note 16. For an early appraisal of this trend as regards Yugoslavia, *see* Jean Salmon, *Reconnaissance d’Etats*, 25 REVUE BELGE DE DROIT INT’L 226, 231-9 (1992).

Community and its member States, those who issued these guidelines and were thus, probably, the more interested in abiding by them.³⁵ So, in regard to the history of the swift break-up of Yugoslavia and the problem raised during its succession, it is important to take into account these political statements, as well as the way they were interpreted through subsequent practice.

B. The Debts

Regarding the definition of what is a 'state debt', different scholars have presented slightly different views, and it might be useful to focus on some of them. Jennings and Watts write: "A state debt is 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. On the passing of state debts the obligations of the predecessor state are extinguished and the obligations of the successor state in respect of the state debts which pass to it arise."³⁶

The 1983 Convention³⁷ simply described a "state debt" as all those "financial obligations undertaken by a state in conformity with international law." One conceptual problem is posed by the fact that the 1983 Convention was limited to dealing with debts contracted by sovereigns with other subjects of international law, thus excluding foreign nationals.³⁸ In any case, there appears to be no doubt that financial obligations, whether towards a foreign sovereign or a foreign national, will be protected to a certain extent.³⁹ On one hand, it is true

35. Ironically, many authors have pointed to the fact that those very European countries could not force themselves to abide by these new self-imposed standards. In fact, they promptly recognized: Bosnia-Herzegovina, whose status as a state was highly questionable at the time, and Croatia, whose standards of democratic governance hardly met any requirement especially in relation to minorities. See Weller, *supra* note 10, at 586.

36. JENNINGS & WATTS, 1 OPPENHEIMER'S INTERNATIONAL LAW 244 (9th ed. 1993).

37. Vienna Convention in Respect of State Property, Archives and Debts, April 8, 1983, 22 I.L.M. 298 [hereinafter 1983 Convention]; this convention has never entered into force, and it is largely thought *not* to reflect customary international law. It has been ratified only by Croatia, Egypt, Georgia, Macedonia and Ukraine. See *Multilateral Treaties Deposited with the Secretary-General* (Status as on Dec. 31, 2000), U.N. Doc. ST/LEG/SER/E 19 (2001). On the debate about the 1983 Convention, See Eli Nathan, *The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, INTERNATIONAL LAW AT A TIME OF PERPLEXITY (ESSAYS IN HONOUR OF SHABTAI ROSENNE) 489 (Yoram Dinstein & Mala Tabory eds., 1989).

38. Art. 33 of the 1983 Convention, *supra* note 37. This point was especially insisted upon by the countries with a planned economy. See Nathan, *supra* note 37, at 505-509. RESTATEMENT, *supra* note 23, at §209 (criticizing the lack of protection for private creditors). Although art. 6 of the 1983 Convention leaves the door open to clauses and to interpretations of customary international law. RESTATEMENT, *supra* note 23, at §201.

39. Scholars argue this point on the basis of customary international law. In particular, reference should be made to the opinion expressed by the Permanent Court of International Justice in the German Settlers Case, where it held that: "[p]rivate rights

that "foreign debt is generated in much the same way as domestic debt", in that some financial institution agrees to borrow money from a foreign source to fund a variety of projects and, in return, promises to pay creditors principal and interest at regular intervals.⁴⁰ On the other hand, the sovereign state usually guarantees the debt, or, in many cases, is the direct borrower. This fact poses a series of interesting questions: the advantage of having some or all the finances of a state as guarantee of the payment is very important, but the lending institution must take into account some set-backs – for example, the uncertainty regarding the law governing the contract and the difficulties in enforcing against a defaulting sovereign.⁴¹

The World Bank⁴² defines 'total debt stocks' as the sum of public and publicly guaranteed long-term debt,⁴³ the use of IMF credit,⁴⁴ and short-term debt.⁴⁵ What is relevant for the purposes of our discussion on the fate of financial obligations during a case of state succession is long-term external debt, and in particular all public and publicly guaranteed debt contracted by a sovereign (thus, excluding long-term private non-guaranteed debt).⁴⁶ These debts may well have been contracted towards a multilateral official creditor (IMF, World Bank, other multilateral institutions), or a public entity (a state); they might also have been borrowed from a private creditor (a commercial bank or others).

Another useful distinction is usually made, as regards international

acquired under existing law do not cease on a change of sovereignty. . . [E]ven those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of property are invalid as against a successor in sovereignty." Settlers of German Origin in the Territory Ceded by Germany to Poland, 1923 P.C.I.J. (ser. B) No. 6, at 36.

40. See Richard Schechter & Stanley Macel IV, *When a Sovereign Defaults*, LEGAL TIMES, Sept. 9, 1996, at S36.

41. On the issue of the litigation of international debt claims in US courts during the Eighties, see Jagdeep Bhandari, *International Debt Litigation in United States Courts*, 33 GERMAN Y.B. INT'L L. 383 (1990).

42. See, e.g., World Debt Tables (1994-95), External Finance for Developing Countries, vol. 2, p. xv-xx.

43. Long-term debt is an external obligation of a public debtor, including the national government, a political subdivision (or an agency of either), and autonomous public bodies.

44. Use of IMF credit denotes repurchase obligations to the IMF with respect to all uses of IMF resources.

45. Short-term external debt is defined as debt that has an original maturity of one year or less, and the World Bank does not draw any distinction between public and private non-guaranteed short-term debt for lack of adequate data.

46. This kind of debt may also pose relevant legal problems during succession of states. In fact, a new legal regime may be applicable to private agreements as a result of the replacement of one State by another and this may give rise to claims relating to contracts of a financial nature. Nonetheless, this note will only address the issue of debts contracted either by a public body, or guaranteed by such an entity.

debts, between local, localized and general debts. LOCAL DEBTS are those contracted by a local territorial authority - such as a province, or a federated republic - for its own purposes according to the powers granted to it by the constitutional 'division of powers' within the country.⁴⁷ LOCALIZED DEBTS can be negotiated both by the central government and by local authorities, but they are meant to pertain particularly to the development of a localized interest (a regional railroad development scheme, an investment to start-up a mining operation, the creation of a port...⁴⁸ Both of these cases are conceptually easy to deal with in the case of succession, as the interest at stake is fairly easily found to have a regional relevance; this means that the debt will easily be accepted by the successor state gaining authority on that territory. On the contrary, states usually negotiate mainly 'GENERAL DEBTS' ('non-allocated debt'), debts that do not have a specific territorial aim in mind, but serve the various purposes of state actions modern economies require.⁴⁹ These are the financial obligations that pose the gravest problems in terms of policy of the successor states, as well as in terms of law.

The expressions "public debt" and "state debt" are usually used as synonyms, although, technically, they describe slightly different concepts. Relying upon the conceptual distinction between 'state' and 'local' debts, it seems logical that 'state debts' are only those negotiated by the central authorities of a country, while 'public debts' also include those undertaken by regional or other minor territorial entities within their official (public) authority.⁵⁰ In regards to localized debts

47. DANIEL PATRICK O'CONNELL, 1 STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 452 (1967).

48. These are "debts raised [...] with respect to expenditure on particular projects in particular territories", I. L. A., *Report of the 54th Conference*, Aug. 23-29, 1970. A broader definition of localized debt is one that takes into account all those financial obligations linked to a specific territory; these are not only the expenditures on specific projects, but also general obligations secured on a specific territory (secured debts). O'CONNELL, *supra* note 47, at 407. For the purposes of this note, debts secured on a portion of the predecessor state and localized debts will be considered together, unless specified.

49. The history of how public debts developed together with the development of the modern state is fascinating. As a first step in this evolution, there are the personal debts of the ruling Monarchs insofar as these obligations were not contracted for personal purposes but for governing the state; then, at different moments in each state these debts started to be regarded as of the Crown, and not personal of the Monarch; finally the obligations started being regarded as of the State itself, often identified with the Nation (especially in Continental Europe after the French Revolution). See Alexandre Sack, *La Succession aux Dettes Publiques d'Etat*, 23 RECUEIL DES COURS 149 (1928).

50. This distinction seems especially relevant in the case of Yugoslavia, where the difficult relationship between the central government and the single republics - and the respective competences - is subject to a large debate. See Stephan 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).

(comprising debts secured on a specific territory), these are without any doubt part of the 'state debts,' but this does not mean that they will be treated together with the general debts (undertaken on behalf of all the country and not secured on a specific portion of territory).

C. *Succession*

Both the Vienna Convention on Succession of States in Respect of Treaties⁵¹ and the Vienna Convention in Respect of State Property, Archives and Debts⁵² provide the same definition as regards the legal phenomenon of succession of states⁵³, which is:

[. . .] "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory".

The changes in the territory – or, rather, the changes in government over a specific territory – may create different legal outcomes, regulated by rules of international law on state succession. These different outcomes can be, and usually are, labeled in order to avoid confusion among similar situations; it must be clear from the beginning that these 'labels', these categories, merely serve as useful models to describe the legal significance of these replacements in authority, and do not fully describe the whole variety of historical paths leading to such changing.⁵⁴

In the cases of universal succession – provided by dismemberment and unification – *every* continuation of the predecessor state's

51. Vienna Convention on Succession of States in Respect of Treaties, August 23, 1978, 17 I.L.M. 1488 [hereinafter 1978 Convention]. Although only 15 ratifications or accessions were needed for it to enter into force, it did so only on November 6, 1996. The 15 instruments have been deposited by: Bosnia-Herzegovina, Croatia, Dominica, Egypt, Estonia, Ethiopia, Iraq, Macedonia, Morocco, Seychelles, Slovakia, Slovenia, Tunisia, Ukraine, Yugoslavia. See *Multilateral Treaties Deposited with the Secretary-General* (Status as on Apr. 23, 1997), U.N. Doc. ST/LEG/SER.E (1997).

52. 1983 Convention, *supra* note 38. On this Convention, see Rudolf Streinz, *Succession of States in Assets and Liabilities – a New Regime? The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts*, 26 GERMAN Y.B. INT'L L. 198 (1983). For a Soviet perspective on this topic, see G.K. Efimov, *Konferentsia OON po Voprosy o Pravopremstvu'e Gosudarstv v. Otnoshenii Gosudrstv'ennoi Sobstvennosti, Gosudarstv'ennich Archivov i Gosudrstv'ennich Dolgov*, 1984 SOVIET Y.B. INT'L L. 291.

53. The fact that very few countries have ratified or accepted has led many authors to believe that they do not enshrine accepted principles of international law. For an analysis of the customary provisions as opposed to those of 'progressive development' in the 1978 Convention, see ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 305-31 (2000). On the relevance of some of the legal rules contained in the 1983 Convention, see Oeter, *supra* note 50, at 89-92.

54. International scholars have neglected the study of how these replacements took place – be it through wars, peace treaties, decolonization processes, willful unification. . . - focusing instead on the outcomes – secession, unification, dissolution. . . - and trying to create appropriate legal categories to describe them.

subjectivity ceases to exist; in this sense, identity is the antithesis of succession. When, for example, Zanzibar and Tanganyika decided to unite, at one point – on April 25th 1964 – they ceased to exist, while an altogether new subject entered the international community – Tanzania.⁵⁵ On the contrary, in all the other cases, identity persists as regards to the subjectivity of the predecessor state – Great Britain still existed as the same subject even after the secession of the Thirteen colonies;⁵⁶ neither Russia nor the United States as subjects of international law were affected in their essence by the transfer of Alaska.⁵⁷ This does not mean, however, that all of the obligations of the predecessor still continue in force as if nothing had happened: some may have been passed to the successor, some may remain in the domain of the predecessor, some may be transformed, some may just completely cease to exist. In other words, it is important to keep in mind that the modification of a subject of international law does not entail, as such, the modification of its obligations; nor does the complete disappearance of a state from the international community unavoidably entail that all of its obligations cease to exist. For, however tempting this line of thought might seem, it does not stand a careful legal analysis of state practice, especially – but not exclusively – as regards financial obligations.⁵⁸

III. THE DIFFICULT RELATION BETWEEN STATE SUCCESSION AND ITS CONSEQUENCES

After examining the various ‘succession hypotheses’, it is immediately evident that, in the cases of incorporation and unification, the successor State is deemed to be bound by the financial obligations undertaken by the predecessors.⁵⁹ As the problems arising from

55. See DANIEL PATRICK O’CONNELL, 2 STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 77 (1967); The Acts of Union of Tanganyika and Zanzibar 1964, Sec. 4, reprinted in 3 I.L.M. 763, 764.

56. O’CONNELL, *supra* note 55., at 88-91.

57. *Id.* at 39-40. In these cases, the expression « partial succession » seems fit, for succession takes place only for a portion of the territory of the state, and does not modify its identity as such.

58. See JAN H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE Part VII (STATE SUCCESSION) 3-5 (1974). In recent times, some authors have suggested that the very “idea of a State’s “identity” as some given and pre-existing social relationship looks like a rather vulnerable piece of political metaphysics”. See Martti Koskenniemi, *Report of the Director of Studies of the English-speaking Section of the Centre, Eisemann & Koskenniemi*, *supra* note 6, at 123. Nonetheless, even though there seems to be little point in discussing the chronological priority between status and relationship, this note is based on the hermeneutical tool provided by the distinction between identity of a State as such, and, on the other hand, the continuity of its rights and duties.

59. See 1983 Convention, *supra* note 37, art. 39. For a recent case, see Treaty on the Establishment of German Unity, Aug. 31, 1990, art. 23, 30 I.L.M. 457, 478 and Stefan Oeter, *German Unification and State Succession*, 36 GERMAN Y.B. INT’L L. 279-83 (1993).

succession in the territory of former Yugoslavia do not pose questions of incorporation or unification (at least until the hypotheses on the future of Kosovo and Montenegro are limited to two: (i) remaining within the Yugoslav federation or (ii) becoming an independent sovereign), this note will not deal with this subject matter. Rather, the problems of dissolution and secession play a major role in the debate about the financial obligations now existing upon the new States which have emerged from the dismemberment of the Federal Socialist Republic of Yugoslavia. It is therefore necessary to briefly examine the international practice regarding these phenomena in order to appreciate the development of normative concepts and legal practice.

There is substantial disagreement among scholars as to whether the origin of the modern international order can be traced to the Peace Congress of Westphalia. It is however somewhat interesting, for those who believe that the year 1648 can be regarded the real turning point in global relations, to note that one of the peace treaties negotiated in that occasion – the Treaty of Münster of October 24th 1648⁶⁰ – also included a debts settlement.⁶¹ The rationale for the passing of public debts from the predecessor State (France) to its territorial successor (the House of Austria) was found in the consideration that such debts are basically obligations under a sort of “droit superétatique”, “une institution de droit *sui generis*”⁶² for which the entire fortune and all sources of income of the debtor state are responsible within the limits of the *territory* as it existed at the moment when the debt was contracted; it is this whole territory that remains burdened by it. Thus, political changes of the debtor state have not the slightest influence on the debt itself.

Another explanation that has been proposed is a justification by generally recognized considerations of *aequum et bonum, bona fide*.⁶³ When a state contracts a debt, it should not be allowed subsequently to disallow it and get away with an ‘undue enrichment.’ Similarly, when a state acquires foreign territory on behalf of which – or on behalf of the good government of which – its predecessor has contracted a loan, it is right and proper that the successor should take upon itself at least a proportionate part of the loan thus contracted. The principle *res transit cum onere suo* would thus seem to provide guidance.⁶⁴

Whichever of these arguments may be regarded as more

60. The text of this treaty may be found in PARRY, *THE CONSOLIDATED TREATY SERIES*, vol. 1, 273 (in Latin) and 319 (English trans.) (1969).

61. *Id.* at arts. 85, 86, 93, 94. See VERZIJL, *supra* note 58, at 40-1.

62. ALEXANDRE SACK, *LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERES* 84, vol. I (DETTES PUBLIQUES) (1927).

63. See, e.g., Daniel Patrick O'Connell, *Secured and Unsecured Debts in the Law of State Succession*, 28 BRIT. Y.B. INT'L L. 204 (1951).

64. *Id.* at 42-3.

persuasive, it is a generally accepted rule that the successor state – especially in the case of universal succession – should not get away with a kind of unjust enrichment following the principle of *tabula rasa* (clean slate). This is obvious at least in the cases of local debts – even more so when mortgaged on specific territories. But in cases of general State debts, too, and where no agreement on the matter has been reached by the ceding and the cessionary states, the argument is persuasive that an apportionment should constitute the general rule.

This conclusion runs afoul of the only pronouncement by an international authority specifically on the question of the apportionment of public debts following a case of state succession. In fact, Arbitrator Eugène Borel, in his award of April 18, 1925 concerning the *Ottoman Public Debt* stated: “De l’avis de l’Arbitre, il n’est pas possible, malgré les précédents déjà existants, de dire que la Puissance cessionnaire d’un territoire est, en plein droit, tenue d’une part correspondante de la dette publique de l’Etat dont il faisait partie jusqu’alors⁶⁵.” However, the arbitration itself was not meant to provide a legal key to the apportionment of the Ottoman Empire Debt, but just a sort of appeal against the practical application of some previously-agreed rules; this sentence was, therefore, a mere *dictum*, with no practical purpose in the specific case, and not meant to express a general rule.

Two exceptions are usually mentioned regarding the principle of compulsory apportionment: the case of the obligations of ‘newly independent states’ arising from the process of decolonization and the case of ‘odious debts.’ In the first of these exceptions, scholars pointed out that the practice of most *former colonies* establishes a specific rule, which allows these new states to disregard the financial obligations undertaken by the colonial power.⁶⁶ Thus, in these cases, the new states were allowed to consider their ‘financial record’ as a ‘clean slate’ not subject to the partition of the whole public debt of the colonial power at the moment of their independence.⁶⁷

As regards *odious debts*, these are usually defined as those

65. Sentence Arbitrale rendue par Eugène Borel le 18 avril 1925, 1 REPS. OF INT’L ARBITRAL AWARDS 532, 572 [hereinafter Sentence Arbitrale]. Most scholars, however, think that this conclusion is acceptable only if an express treaty stipulation exempts the cessionary state from any otherwise existing obligation. See VERZIJL, *supra* note 58.

66. See YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA (1983). Such practice, following the ‘clean slate’ doctrine, was later codified in the 1983 Convention, *supra* note 38, art. 38.

67. This phenomenon started only in the second half of the Twentieth Century. Before this period, newly independent states usually regarded themselves bound by part of the obligations undertaken by the controlling power. For example, in the case of Ireland, the newly independent republic accepted *pro quota* the British debt in the Treaty between Great Britain and Ireland, Dec. 6, 1921, art. 5. See VERZIJL, *supra* note 58, at 166.

obligations contracted by a predecessor "contrary to the interests of the inhabitants" of a territory which is later taken over by a successor state.⁶⁸ The general principle – universally accepted – is that of avoiding the necessity of payment of these kind of obligations by the successor state, although the real problem usually lies in ascertaining whether a specific debt falls in this category.⁶⁹ The problem is obviously a sensitive one, and there are requests to consider 'odious' any "debt that has been incurred by a government without the informed consent of its people, and one that is not used in the legitimate interest of the State,"⁷⁰ although this is by no means the present position of positive international law.

Taking into account the fact that the end of the Federal Socialist Republic of Yugoslavia is usually described as a case of dissolution of a state, one should take into account other historical cases of apportionment of public debts in similar circumstances, so as to find the customary international law to apply in this case.⁷¹

When the UNION OF COLOMBIA was divided into its constituent states (New Granada, Ecuador and Venezuela) in 1829, the British Foreign Office took the initial position that "All three States will continue to be responsible for any Debt due from Colombia, contracted

68. P.K. MENON, *THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS* 161 (1991).

69. Three types of odious debts have been defined by different names: hostile, war, and subjugation debts. In particular, the first of these categories was first invoked as an 'odious debt', during the Spanish-American negotiations in 1898 after the Cuban war. The American Peace Commission repudiated the liability for the Cuban debt on the grounds that any obligations incurred by Cuban authorities to Spain for Spain's attempt to suppress uprisings in Cuba itself were hostile to and incurred without the consent of the inhabitants of the island; thus, they were deemed not transferable to the United States. See O'CONNELL, *supra* note 47, at 459-60. Other attempts to claim 'odious debts' were made by the Soviet Union as regards the czarist debt. See, e.g., Charles Prince, *The USSR and International Organizations*, 36 AM. J. INT'L L. 432-33 (1942). For the approach taken by U.S. courts, see *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 398-401 (2d Cir. 1927) and *United States v. National City Bank of New York*, 90 F.Supp. 448, 452 (S.D.N.Y. 1950); by the People's Republic of China as regards some of the imperial debts of the early Twentieth Century, see the case of the Hukuang Railways Sinking Fund Gold Loan of 1911 in *Jackson v. The People's Republic of China*, 550 F.Supp. 869, 871-72 (N. D. Al. 1982); by the present Iranian government as regards some financial obligations undertaken by the overthrown government see *United States v. The Islamic Republic of Iran*, Iran Award 574-B36-2; *Ina Corp. v. The Government of the Islamic Republic of Iran*, Iran Award 184-161-1, 8 Iran-U.S.C.T.R. 373, note 89 (1985). In all these cases, the claim was not accepted because the question was deemed to be one of government, not state, succession.

70. See Juliette Majot, *The Doctrine of Odious Debts*, in *FIFTY YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* 35 (1994)

71. Apart from the cited Resolutions by UN organs, many national courts have actually considered the disintegration process of Yugoslavia as a case of dismemberment. See, e.g., the Austrian Supreme Court decision in the case *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, 36 I.L.M. 1520.

during their Union. If it should be proposed to apportion this debt between the several States, and that each should be responsible only for a part, the consent of His majesty's Government, if it has any demands upon the Government of Colombia, must be obtained to such an alteration of its Security".⁷² Notwithstanding this clear statement implying joint and several responsibility for all obligations on part of all of the new subjects, in December 1834 the debt of Colombia was divided in proportions of 50% (New Grenada), 21.5% (Ecuador) and 28.5% (Venezuela); after this apportionment among the successor states, the British Ambassador asked Ecuador to pay only its 'share'.⁷³

The establishment of BELGIUM in 1830 as an independent state has usually been regarded as a dismemberment of the personality of the United Provinces of Netherlands.⁷⁴ It is interesting to note that the London Conference, relying on the many precedents in this subject-matter, passed a resolution to the effect of dividing the debts between Belgium and the Netherlands in proportion of their respective revenues. In subsequent agreements, however, Belgium was assigned half of the 'new debts' – those contracted since the union – and the overall of the old debts of the Austrian Netherlands.⁷⁵

On January 1, 1993 CZECHOSLOVAKIA ceased to exist by common agreement of both its constituent parts and successor states. The principles for the partition of both the assets and liabilities between the Czech and the Slovak republics were based on the *ratio* of two to one, resembling the proportion of the population of the two newly independent entities. This did not prevent the International Monetary Fund from reviewing this criterion as regards its credits, and 'proposing' adjustments according to its own economic – rather than demographic – standards. Moreover, the old Czechoslovak debts towards the World Bank – undertaken for well-defined projects and, thus, easy to identify territorially – were in general treated as localized debts, and apportioned on a territorial basis.⁷⁶

72. O'CONNELL, *supra* note 47, at 388. For Article 1 of the Convention of Bogota, envisaging this apportionment, see PARRY, THE CONSOLIDATED TREATY SERIES, vol. 85, 19 (1969).

73. It is not entirely clear according to which principle the debts of the dissolved state were apportioned. However, looking at the map of the region, there appears to be a relation between the territory extension and the share of debt each new state accepted. See THE ANCHOR ATLAS OF WORLD HISTORY 52 (2d ed. 1978).

74. O'CONNELL, *supra* note 47, at 157.

75. *Id.* For the text of the Treaty of Definitive Separation of Belgium from Holland (signed at London, on Nov. 15, 1831), see PARRY, THE CONSOLIDATED TREATY SERIES, vol. 82, at 255.

76. Paul Williams, *State Succession and the International Financial Institutions: Political Criteria vs. Protection of Outstanding Financial Obligations*, 1994 INT'L & COMP. L. Q. 788-93.

The dissolution of the UNION OF THE SOVIET SOCIALIST REPUBLICS,⁷⁷ however, is by far the most interesting contemporary example for the succession of states and the fate of the predecessor's financial obligations.⁷⁸ This process can be divided into two different stages.

First, following the unsuccessful coup in Moscow in August 1991, the three Baltic republics of Estonia, Latvia, and Lithuania declared their independence – which was widely internationally recognized.⁷⁹ These three states actually regard themselves as having restored their independence that existed before the Second World War, thus denying to be successors of the USSR or to be bound in any way by its financial obligations.⁸⁰

The second phase of the dismemberment of the USSR took place later in 1991. The first internationally significant act of this phase was taken in October, when nine of the republics⁸¹ signed a Memorandum of Understanding (MOU)⁸² on October 28, 1991 – well before the official dismemberment of the USSR – regarding the external debt of the Union. In this MOU the State-Parties declared themselves jointly and severally liable for the debts contracted by the Soviet Union government and by other legally authorized entities;⁸³ moreover, they authorized the *Vnesheconombank* to administer the USSR's foreign debt.⁸⁴ A press-comuniqué by the G-7, dated November 21st 1991, stated

77. On the problems arising from the dissolution of the USSR, see *inter alia*, Lech Antonowicz, *The Disintegration of the USSR from the Point of View of International Law*, 1991-2 POLISH Y.B. INT'L L. 7.

78. It should be noted at the outset that the USSR Constitution of 1977 explicitly recognized a right to secede for the republics (art. 72).

79. Actually, the three Baltic republics had declared their sovereignty in the late 1980s and early 1990, but had not taken full steps to assert independence. See Urs Saxer, *The Transformation of the Soviet Union: from a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP L. J. 581 (1992) - especially notes 4-5 and accompanying text. Given the refusal by many Western countries to recognize *de jure* the incorporation of the Baltic states within the Soviet Union in 1940, some authors have suggested that the recognition of their independence should be construed as a 'revival' of sovereignty, rather than a recognition of 'new' statehood. See REIN MULLERSON, INTERNATIONAL LAW, RIGHTS AND POLITICS 119-20 (1994).

80. See Rein Mullerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 1993 INT'L & COMP. L. Q. 473, 480.

81. Russia, Belarus, Ukraine, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan and Turkmenistan. Apart from the Baltic States, only Azerbaijan, Ukraine, and Uzbekistan had not signed the MOU.

82. It is worth noting that the MOU is drafted in English; this seems a clear sign of the relevance of this agreement for the relationship with foreign creditors.

83. "Acknowledgment of indebtedness. The Parties declare themselves jointly and severally liable for the debt, without prejudice to the original contract." See Patrick Juillard, *The External Debt of the Former Soviet Union: Succession or Continuation?*, DISSOLUTION, CONTINUATION ET SUCCESSION EN EUROPE DE L'EST 67, 75 (Burdeau & Stern eds., 1994).

84. The *Vnesheconombank* was the Bank for Foreign Economic Activity of the former Soviet Union, and it was later transformed into an 'international bank' of the CIS. See

that these republics, the USSR and the G-7 were agreed that the MOU had entered into force.

During the famous meeting in Alma Ata, on December 21, the twelve remaining republics declared that the Union had ceased to exist and eleven of them went on to establish the Commonwealth of Independent States⁸⁵ (CIS). In the protocol establishing the CIS the eleven countries stated that "with the formation of the Commonwealth of Independent States the Union of the Soviet Socialist Republics ceased to exist", but agreed, *inter alia*, that Russia should take over the Soviet permanent seat in the Security Council.⁸⁶ This feature of the agreement might suggest that the USSR had definitively ceased to exist and that all the former republics – except for the three Baltic ones – are to be considered its successors, with the only exception of the membership of Russia in the United Nations.⁸⁷

In regards to the Soviet debts, the Alma Ata agreement made reference to the Minsk Treaty⁸⁸ of December 4 - signed by all former republics with the exception of the Baltics, Georgia, and Ukraine – which attempted to distribute among the fifteen (former) republics both the foreign assets and the foreign debts according to the following percentages:⁸⁹

Oeter, *supra* note 50, at 78.

85. Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan formed the CIS - *Sodrujestvo N'esavisimych Gosudarstv* (SNG) in the Russian text of the Alma Ata declaration. The Minsk Agreement of December 8 between Russia, Byelorussia and Ukraine had already stated that "the [USSR] as a subject of international law and a geopolitical reality no longer exists" and actually seemed to foreclose Russia from assuming the international legal position of the USSR. The first hypothesis of a kind of 'loose confederation' among the republics – called *Soobshestvo Samostoyatel'nykh Gosudarstv*, Community of Independent States – had been abandoned after just a few days of discussion.

86. See Yehuda Blum, *Russia Takes over the Soviet Union's Seat at the United Nations*, 3 EUR. J. INT'L L. 354 (1992). See also the letter by President Yeltsin to the U.N. Secretary General, where he expresses the wish to assume the permanent seat in the Security Council as well as the Soviet seat at the C.S.C.E.. 31 I.L.M. 138.

87. Byelorussia and Ukraine were also members of the United Nations from its foundation as a result of political and diplomatic arrangements made at the San Francisco Conference of 1945, while actually Russia was not. In any event, as Russia was given the Soviet seat, three of the republics of the former USSR did not need to apply for new membership in the United Nations. On September 19, 1991, Byelorussia officially changed its name to Belarus. See Konrad Bühler, *State Succession, Identity/Continuity and Membership in the United Nations*, Eisemann & Koskeniemi, *supra* note 6, at 268-71.

88. See Hubert Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Praxis*, 15 B.U. INT'L L. J 71, 111-12 (1997). The overall amount of the Soviet debt was considered to be around \$46 billion; some authors suggest a total of \$60-80 billion. Oeter, *supra* note 50, at 78.

89. The amount of export for the year 1991 is provided in order to give an understanding of each republic's prospective capacity to serve its debt. GIORGIO SACERDOTI, *DIRITTO E ISTITUZIONI DELLA NUOVA EUROPA* 149 (1995).

REPUBLIC	SHARE OF DEBT	EXPORT (in \$MM)
Russia	61.34%	35.070 (78.45%)
Ukraine	16.36%	4.584 (10.25%)
Belarus	4.13%	1.601 (3.58%)
Kazakhstan	3.86%	728 (1.62%)
Uzbekistan	3.27%	582 (1.30%)
Azerbaijan	1.62%	292 (0.65%)
Georgia	1.62%	146 (0.33%)
Lithuania	1.41%	1.118 (2.50%)(*)
Moldova	1.29%	146 (0.33%)
Latvia	1.14%	
Kyrgyzstan	0.95%	73 (0.17%)
Armenia	0.86%	73 (0.17%)
Tajikistan	0.82%	73 (0.17%)
Turkmenistan	0.70%	218 (0.48%)
Estonia	0.62%	

(*) *The amount shown is for the three Baltic States as a whole*

This formula,⁹⁰ which provided for joint liability in the external relations but debt management by the *Vnesheconombank* according to this scheme within the relations of the republics, was soon abandoned. Five republics never accepted it formally, while many others just avoided payments.⁹¹

In order to try and find a solution, the heads of states of the CIS, on March 20th 1992, during a meeting in Kiev, adopted a Decision on the establishment of a Commission of representatives with full power to negotiate and prepare proposals on issues of State succession; this body, however, was never able to carry out its task.⁹² In light of these failed multilateral efforts, the Russian Federation has chosen an altogether different path. It decided to conclude a network of bilateral agreements

90. The key for apportionment of both debts and property seems to have been worked out well before the formal dissolution of the USSR, and it is thought to be based on ratios of population, imports, exports, and GNPs of the various Republics in relation to the Union. See Tatiana E. Ushakova, *Pravopreemstvo Respubliki Belarus' v. Otnoshenii Gosudarstvennoi Sobstvennosti*, 1999 BELARUSIAN JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, note 4 and accompanying text.

91. SACERDOTI, *supra* note 89, at 149.

92. Mullerson, *supra* note 80, at 479.

(*Zero Option Agreements*) to assume the sole responsibility for paying the old Soviet debt in exchange for all the Soviet assets abroad. There was a need, however, for the creditors to accept such a swap arrangement, and this basically came with the Paris Club meeting of April 1-2, 1993, at which nineteen creditor countries agreed not to bring claims against the other successor states so long as the Russian Federation paid the dues.⁹³

In the end, it seems that the Russian Federation has accepted not only the former Soviet debt, but also the old czarist obligations – the one rejected by the USSR since 1917 and, later, by the USSR. This decision, prompted also by economic opportunity, may lead scholars to reconsider the debate on the rejection of czarist debt.⁹⁴ It is likely that, in this case, the solution was suggested by the extension of the Russian Federation in relation to the dissolved Union.

These and other examples have led scholars to think that in cases of universal succession - when one state ceases to exist and is replaced by more new entities on the predecessor's territory - these entities assume a joint and several obligation regarding the predecessor's debts. Also, there seems to be a rule allowing the apportionment of the total sums in shares through an agreement among the successors; this appears to be true at least in cases where all of the new subjects are deemed to be in the position to satisfy their assigned share.⁹⁵

The aforementioned cases, however, do not suggest that a general substantive rule of this kind has already been accepted at the international level. The only true obligation, in reality, seems to be a duty of *bona fide* negotiations among the successor states in order to reach equitable criteria for a just apportionment in a specific case. This 'duty to cooperate' can be traced back to the case of the Union of Colombia and emerges as a trend in all of the 'peaceful' dissolutions of states which took place in the last decade or so. It is also emphasized in

93. Beemelmans, *supra* note 88, at 113.

94. See *Accord sur le règlement définitif des créances réciproques financières et réelles apparues antérieurement au 9 mai 1945*, 102 REV. GEN. DE DROIT INTER'L PUB. 540 (1998). On the rejection of the debt, see *supra* note 69 articles and cases.

95. As already mentioned, the 1983 Convention is generally not deemed as a codification of customary international law. See Schechter, *supra* note 39, at 259. Nonetheless, some authors have pointed out that this criticism is exaggerated, at least as regards articles 40(1) and 41 of the Convention. These articles propose a general rule applying both for cases of separation and for cases of dissolution, stating that the debts of the predecessor "shall pass to the successor State in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to that State debt." See Oeter, *supra* note 50, at 90 (stating that this rule is firmly grounded in international practice, and might well become future customary law as it also respects legitimate interests of all affected sides). For the opposite side, see RESTATEMENT, *supra* note 23, which envisages the 'clean slate' doctrine for cases of secession (§209(2)), and devolution in equitable proportion for successors in cases of dissolution (§209, Rep. No. 6).

the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* issued by the European Community in early 1992 that States aspiring to recognition should show "commitment to settle by agreement [. . .] all questions regarding state succession and regional disputes."⁹⁶

It must be noted that such an obligation does not entail the possibility, on behalf of the successor states, not to pay the debts, for example by not agreeing on the apportionment of the shares. In this respect, not only positions taken by the creditors,⁹⁷ but also declarations made by the successor states appear decisive. None of the successor states in the recent cases tried to invoke the so-called *tabula rasa* ('clean slate') doctrine denying responsibility for the debts of its predecessor;⁹⁸ in other words, all successor states arising from the break-ups of Czechoslovakia and the USSR seem convinced of the existence of a rule of international law that requires the honoring of the predecessor's financial obligations (*opinio juris*) – and have actually acted pursuant to this belief (*practice*).⁹⁹ There is still a question whether a recalcitrant successor state could actually be forced in a debt-apportioning agreement, and this is actually the case posed by the violent dismemberment of Yugoslavia.

IV. THE DISSOLUTION OF YUGOSLAVIA AND THE FATE OF ITS FINANCIAL OBLIGATIONS

A. *The Legal Questions Posed by the Dissolution of Yugoslavia*

If one is to compare the case of Yugoslavia with the one of the Soviet Union, there is an evident paradox.¹⁰⁰ In the USSR, a union was

96. See *Guidelines*, *supra* note 16, at 1487.

97. Some cases decided by Dutch courts regarding the arrest of cargo ships formerly owned by Soviet shipping lines are interesting on this point. When a number of Dutch creditors sought to enforce a State guarantee given for triangular barter agreements against these cargoes, the courts ruled, *inter alia*, that Russia was vested with the rights and obligations of the Soviet Union; thus, the creditors could enforce their claims against the vessels. See Beemelmans, *supra* note 88, at 116.

98. *Id.* at 114. 1983 Convention, *supra* note 37.

99. In the Preamble of the Treaty of Minsk, the parties expressed this concept with the following words: "conscious of the fact that *to guarantee and to pay back the foreign debt of the Soviet Union is a precondition to future access to the world market*" Beemelmans, *supra* note 88, at 112 (emphasis provided). This statement could actually be viewed as an acknowledgment of the need for a careful foreign policy in the management of the foreign debt in order to get access to future credits rather than a statement recognizing a law-based duty. But in a system such as international law where the interaction of claims and counterclaims by the very actors is a way of making the law, these statements may prove that the international community has actually reached a general consensus on a specific subject matter.

100. Michael Bothe & Christian Schmidt, *Sur Quelques Questions de Succession Posees*

formally *dissolved*, but one of the former republics (the Russian Federation) is universally considered the only state subject to most of the legal relations of the predecessor. On the other hand, in Yugoslavia, the process is described as a *secession* of most of the republics from the Federation, but the identity of the new Federal Republic of Yugoslavia with the old FSRY is unanimously denied. Surely enough, the reasons for this different treatment are political ones, and it is not the purpose of this paper to investigate whether these policy decisions are justifiable from a legal standpoint.¹⁰¹

One of the mentioned features of the dismemberment of the Yugoslav federation is provided by the conflict it provoked.¹⁰² It should be noted that, contrary to the provisions of the 1977 USSR Constitution, the 1974 Yugoslav one did not explicitly provided for a right to secede by the member republics. Nonetheless, the preamble of the latter declared that "[T]he nations of Yugoslavia, participants of the right of self-determination vested in every people, included the right to separation, have united in order to form a Federal Republic of free and equal Nations and Nationalities."¹⁰³ This provision allowed some commentators to infer a constitutional right to secession, although most scholars reached an opposite conclusion, based on the assumption that the right to self-determination had been 'used up' by willfully joining the Federation.¹⁰⁴

After the proclamation of independence by Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia, the dissolution was not immediately perceived as a fact by the international community;¹⁰⁵ nonetheless, it became accepted reality sooner than many had thought,¹⁰⁶ notwithstanding objections by Serbia, which went on claiming that such a decision amounted to "aggression against Yugoslavia."¹⁰⁷

On April 27, 1992, a joint session of what remained of the

par la Dissolution de l'URSS et Celle de la Yougoslavie, 96 REV. GEN. DE DROIT INT'L PUB. 811, 825 (1992).

101. However, see the discussion by Bothe. *Id.* For a brief chronology of facts relevant to Yugoslavia's succession, see Juan Miguel Ortega Terol, *The Bursting of Yugoslavia: An Approach to Practice Regarding State Succession*, Eisemann & Koskenniemi, *supra* note 6, at 889.

102. This is not the first time that a Yugoslav state is partitioned into more entities giving rise to a question on how to apportion the national debt. For a description of similar phenomena of dismemberment in the same geographical are, see *infra* note 184-85 and accompanying text.

103. See M. BECKMANN-PETEY, *DER JUGOSLAWISCHE FÖDERALISMUS* 129 (1990), cited in Bothe, *supra* note 100.

104. *Id.*

105. Badinter Commission, Opinion No. 1, 31 I.L.M. 1494.

106. Badinter Commission, Opinion No. 8, 31 I.L.M. 1499, 1500.

107. Weller, *supra* note 10, at 588.

Parliamentary Assembly of the former FSRY, the national Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro adopted a declaration expressing the will of their citizens to proclaim the Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the FSRY. Moreover, and more interesting for the purposes of this note, they claimed the 'succession' in the rights and obligations of the dismantled federation based on several arguments.¹⁰⁸

There has been considerable discussion on the question of whether the 'disappearance' of the SFRY was to be considered a dissolution, the sovereign state of Yugoslavia having ceased to exist, or, rather, a case of secession where Slovenia, Croatia, Bosnia-Herzegovina and Macedonia seceded, thus leaving Serbia and Montenegro as a smaller, but not new, Yugoslavia. The international community, including the United Nations and the European Community, determined that the break-up was actually a complete dissolution.¹⁰⁹ This determination appeared to most politicians and scholars a decisive step in order to assess what kind of liability each of the new republics was to be assigned for the financial obligations contracted by the defunct federation. The reality is that there was a great deal of confusion regarding the applicable law of state succession.

Part of the confusion derived from the fact that, often, the term 'succession' is used not to signify the "replacement of one State by another in the responsibility for the international relations of territory,"¹¹⁰ but the transmission of rights and obligations during, or in consequence of, a phenomenon of succession. Thus, if one is to give the proper meaning to the terms, when a state declares its willingness to be considered the same legal personality of another (*identity*), it is not by any means 'replacing it' as regards the responsibility for its international obligation – simply because it is the same state. In other words, no succession is taking place, and the claim to 'succeed' to the

108. Weller, *supra* note 10, at 596. A thorough discussion on the fact that different succession dates seem to apply to each one of the different Republics, and on the consequences of this fact, is provided by Ana Stanić, *Financial Aspects of State Succession: The Case of Yugoslavia*, 12 EUR. J. INT'L L. 751, 755-58 (2001). The fact that the Commission was made up only of constitutional lawyers probably explains why it considered the SRFY as dissolved based on the fact that its federal institutions were found incapable of functioning as originally designed by the Constitution; this is, however, a doubtful explanation according to international law.

109. On the steps undertaken by the representatives of Yugoslavia (Serbia and Montenegro) in order to be accepted by the international community as the same international subject as the FSRY, see Weller, *supra* note 10, at 595-96. For a critical analysis of the position of the international community regarding Yugoslavia, see Yehuda Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830 (1992).

110. 1983 Convention, *supra* note 37, art. 2 (1) (A). This article is identical with art. 2 (1)(B) of the 1978 Convention.

right and obligations of the predecessor (in chronological sense) is pointless. In fact, this state is not a new one, because it is identical with the 'predecessor' (in chronological sense); arguably, that same state might claim that the seceding parts of its former territory should accept part of its financial obligations, in particular the allocated debt – the part localized in the seceded territory - , and perhaps a portion of the global (unallocated) debt.

The problem of the identity of a certain state, obviously, arises in general only during periods of conflicts and sudden changes; if there are no doubts among the international community about the existence or the extinction of a state, no doubt about its identity is usually posed.¹¹¹ Scholars have pointed that there are major differences between the phenomenon of succession in domestic legal systems and in the international realm.¹¹² When the international community witnesses the substitution of a state with another (*succession*), this change is different from the phenomenon in domestic law, the latter appearing more radical than the former. In fact, the word, when used in the municipal context, means the "acquisition of rights upon the death of another,"¹¹³ while, as we have seen, in international law this expression signifies the "replacement of one State by another in the responsibility for the international relations of territory."¹¹⁴ Thus, a state identical to itself cannot be considered a successor in a technical sense, although it might be useful to designate it as such in a chronological sense (meaning the same state *after succession has occurred in relation to some parts of its former territory*).¹¹⁵

111. See G.J. Lehner, *The Identity of Austria 1918/1919 as a Problem of State Succession*, 1992 AUSTRIAN J. PUB. & INT'L L. 63.

112. See, e.g., Rein Mullerson, *Law and Politics in Succession of States: International Law on Succession of States*, DISSOLUTION, CONTINUATION, AND SUCCESSION IN EASTERN EUROPE 5 (Brigitte Stern ed., 1995).

113. See e.g., *In re Russell's Estate*, 13 Cal. App. 3d 758, 769 (1971).

114. Notwithstanding the clear definition provided by the two Conventions, it must be acknowledged that most authors do use the term 'succession' to identify not the replacement of one state with another, but the legal consequences this process entails. See KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 4-13 (1968); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 400-14 (1979). Also, and with specific regard to the issues arising in Eastern and Central Europe after 1990, compare Malcolm Shaw, *State Succession Revisited*, 1994 FINNISH Y.B. INT'L L. 34, 60-1, with Oeter, *supra* note 50, at 79-80. There is no uniform interpretation of the meaning, however, and each author suggests different qualifications for terms like 'identity' and 'continuity' – sometimes regarding them as synonyms, sometimes creating special categories. This is why, in this note, the term 'succession' will be used to describe a phenomenon *of fact* (the replacement of one governing authority by another), while the legal effects produced as a consequence of the modification will be given altogether different qualifications. On this issue, see Bühler, *supra* note 87, at 191-3.

115. In other words, the United Kingdom after the secession of the Republic of Ireland is not exactly a successor state (as it is identical to the United Kingdom existing before the Irish secession), although it might be characterized a successor in order to deal with

From this reasoning, it follows that it is arbitrary, when confronted with a phenomenon of identity, to infer the continuation of the rights and duties of that state. In fact, the history of international law offers many examples of states that, although remaining the same subject, lose some of the rights and obligations due to an historical event - secession or other. For example, the United Kingdom transferred some of its national debt to the Republic of Ireland when the latter gained its independence; this, notwithstanding the indisputable fact that the United Kingdom remained the same subject of international law *vis-à-vis* the other states.¹¹⁶ On the contrary, succession - the phenomenon contrary to identity - does not imply *per se* any discontinuity of rights and obligations as such. In fact, Turkey may not be realistically regarded the same subject as the Ottoman Empire; nonetheless, it was awarded a large share of the predecessor's debts.¹¹⁷ On the other hand, Russia is probably identical with the former USSR, and it accepted most of the obligations - as well as of the rights - of the latter.¹¹⁸ Therefore, before analyzing the situation now existing in the territory of the former Federal Socialist Republic of Yugoslavia it must be absolutely clear that *identity of the subjects does not imply persistence of the legal relations* - rights or duties -, while *succession of one state from another cannot possibly imply the necessity of freedom of the new (successor) state from the obligations of the predecessor*.¹¹⁹ The relations between the two issues (identity of a state and transfer of obligations and rights) is a far more complex issue, one that should be analyzed in the framework of the different possible modifications of a state¹²⁰ as well

the modifications of its legal rights and obligations that might occur as a consequence of the secession.

116. See VERZIJL, *supra* note 58, at 131-4.

117. See Sentence Arbitrale, *supra* note 65.

118. See *supra* notes 91-93 and accompanying text.

119. A similar theory is the one according to which "Continuation, curiously, appears thus to be a specific sort of succession". See Patrick Juillard, *The Foreign Debt of the Former Soviet Union: Succession or Continuation?* 5 in DISSOLUTION, CONTINUATION, AND SUCCESSION IN EASTERN EUROPE 5 (Brigitte Stern ed., 1995). See also Matthew Crawen, *The European Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 355, 356 (1995). Confusion still reigns, however, at the diplomatic and legal levels on this point. See Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. J. INT'L L. 355, 378 (2001); the authors seem here to imply that a subject (Russia) continuing the legal personality of another subject (USSR) 'inherits' the former's rights and responsibilities. This seems a rather confusing approach since, if one subject remains the same, it will not be able to 'inherit' rights and obligations from . . . itself. Either a subject is different from its predecessor and inherits (some of) its rights and obligations according to a rule of international law, or it is the same subject, maintaining some rights and obligations, while losing others, according to a different rule of international law. In this latter case, incidentally, it will be impossible to speak of the principle of *pacta sunt servanda*. *Id.* at 383, 408-10. In fact, the agreement of the predecessor with its creditors is *res inter alios acta* for the successor, as *pacta tertiis nec nocent nec prosunt*. A rule of continuity should be based on other, more solid, grounds.

120. Thus, a cession is to be treated differently from a dissolution, and the two are still

as the different rights and obligations.¹²¹

Thus, this note proposes a clear distinction between two categories: situations of fact (identity vs. succession) and legal consequences arising from those same situations (continuity of legal right and obligations or not). Such a distinction has been recognized by many authors, although the terminology may be different from case to case.¹²² Nothing, in the history of international relations, suggests a direct relationship between these categories, so they should be treated separately, not mixed together; this, essentially, in order to reach conclusions of law not based on a theory (*deduction*), but, after analyzing the facts, trying to figure out the patterns at the basis of state action (*induction*).

The arguments proposed by Yugoslavia (Serbia and Montenegro) actually appear in part confusing, in that it was - at the same time - arguing that there was identity (between itself and the FSRY), but stressing the need to address a problem of succession. On the other side, the position of the international community was not clear, either. The EC, followed by the United States, the UN,¹²³ and other international institutions,¹²⁴ believed that it was of utmost importance to deny the identity of Yugoslavia (Serbia and Montenegro) with that of the dissolved FSRY. As for the political reasons underlining this position, it was arguably important to force the 'new' Yugoslavia to come to terms with the requirements imposed by the international community for becoming (or being confirmed as) a 'member of the club.'¹²⁵ But if one takes into account only the legal position and

to be distinguished from a secession.

121. Thus, the transfer of obligations arising under multilateral conventions should be treated differently from the transfer of public debts, or from the rights arising under a bilateral treaty with a specific place as an object.

122. See e.g., VERZIJL, *supra* note 58, at 3. The author points that it is necessary to distinguish succession "in the sense of territorial succession, i.e. the simple historical but at the same time juridical fact [. . .] that a territory which in past belonged to State A, by some political development comes under the sovereignty of State B" and "in the sense of succession of the new sovereign(s), as a consequence of a territorial succession [. . .] in rights and obligations" of the predecessor(s). Also, "whether and to what extent there is room for admitting the principle of State succession [in the second sense] is highly controversial alike in the practice and in the doctrine of international law."

123. S. C. Res. 777, U.N. SCOR, U.N. Doc. S/RES/777 (1992) stated not only that "the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist", but it also recommended the General Assembly to decide that the new country (the 'new' Yugoslavia) should apply for membership. The General Assembly acted accordingly with U.N. GAOR 47th Sess., 7th mtg., U.N. Doc. A/RES/777 (1992).

124. The International Monetary Fund announced on December 15, 1992, that Yugoslavia "had ceased to exist and has therefore ceased to be a member of the IMF" Press Release, International Monetary Fund, (Dec. 15, 1992). The World Bank made the same determination. Press Release, World Bank (Feb. 25, 1993).

125. Nonetheless, this high-demanding standard for the acceptance of the 'new' Yugoslavia within the international community might be criticized if compared with the

obligations deriving from this stand, this kind of toughness is somewhat questionable.

If the case of the theory of secession of the republics had been accepted, thus accepting Yugoslavia (Serbia and Montenegro) as identical with the FSRY, the situation would have resembled the one occurred in the territory of the former USSR.¹²⁶ There, the Russian Federation has not only accepted since the beginning a large part of the foreign debt of the federation, but has even struggled to assert itself as guarantor of the payment by the other republics, and has ultimately 'bought up' all other republics' shares.¹²⁷ Thus, "if classified as a continuation [rather, identity] then Serbia Montenegro [*sic*] would be the only available successor to the former Yugoslavia and would succeed to the responsibilities for the debts and the rights to the assets of the former nation".¹²⁸ It is true that the situation in the territory of the former Yugoslavia was rather different, especially for the persisting conflicts featuring Serbia as one of the main actors; nonetheless, this has not stopped the international community from dealing with the Serbian leadership in resolving some of these very conflicts, notwithstanding the arguments about its lack of legitimacy.¹²⁹

ones actually used for Bosnia-Herzegovina and Croatia. For an appraisal of the different positions regarding identity or succession in the case of Yugoslavia, see Terol, *supra* note 101, at 892-900 (although, confusingly enough, the author uses the term 'continuity' as a synonym of 'identity').

126. In this case, some authors suggest that international creditors might have claimed a "presumption [. . .] that the responsibility for the general public debt of the predecessor State remains with the predecessor State after the succession" based on the Ottoman Public Debt award. See Shaw, *supra* note 114, at 93. For Yugoslavia (Serbia and Montenegro), to be accepted as identical to the former federation would have arguably meant to gain some advantage in regard of federal property to apportion. See Ortega Terol, *supra* note 101, at 926.

127. On the other side, the Russian Federation has claimed all property of the former USSR abroad, a claim that was repeated by Yugoslavia (Serbia and Montenegro) on the basis of this theory, and rejected by the other republics. Also, it should be noted that the other republics have been complaining about the apprehension of the money and gold of the former federation in Belgrade by the Yugoslavian (Serbian and Montenegrin) authorities. See Vladimir-Djuro Degan, *State Succession Especially in Respect of State Property and Debts*, 1993 FINNISH Y.B. INT'L L. 130, 150.

128. Carsten Ebenroth & Matthew 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, 799 (1996).

129. In particular, see the agreement widely known as the Dayton Peace Accord. General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, December 14, 1995, 35 I.L.M. 75. The judgments on this instrument have been very controversial. "In fact, those familiar with the region now almost unanimously agree that after five years of implementation, [the Accord] has failed to ensure a self-sustaining future for the country. Peace has been achieved, but at the expense of internal stability, economic regeneration, and democratization." Miroslav Prcce, *Revising Dayton Using European Solutions*, 25 FLETCHER F. WORLD AFF. 135 (2001). See also John Malik, *The Dayton Agreement and Elections in Bosnia: Entrenching Ethnic Cleansing through*

In the case of Yugoslavia (Serbia and Montenegro) a theory of 'dissolution' was thus accepted, and forced on Yugoslavia itself,¹³⁰ by the international community. This created an additional problem: a common ground was to be found, where discussions about succession could take place, and this proved very difficult to achieve during the conflicts that waged in the Balkans during most of the Nineties.

B. The Framework Created to Deal with the Succession

On September 7, 1991, the Conference on Yugoslavia was launched under the aegis of the European Community; this denomination lasted until the London Conference of August 26 and 27, 1992, when it was changed to International Conference on the Former Yugoslavia (ICFY), which became a joint organ of the European Union and the United Nations. The famous Arbitration Commission¹³¹ operates within the ICFY.

In April 1992, the Working Group on Succession Issues was established within the ICFY as an institutionalized framework to facilitate rapid solutions to most of the problems deriving from the dissolution of Yugoslavia.¹³² Unfortunately, because of the position taken by Yugoslavia (Serbia and Montenegro) not to participate meaningfully in this process, this body was not able to reach a satisfactory solution regarding any of the issues under analysis, among which the problem of the unallocated financial obligations undertaken by the former federation.¹³³ In fact, the official position of Yugoslavia until December 2000 was that the four former republics had unilaterally and violently seceded, and thus could not enjoy the same rights as Yugoslavia (Serbia and Montenegro) in the aftermath of

Democracy, 36 STAN. J. INT'L L. 303 (2000).

130. Yugoslavia (Serbia and Montenegro) has long remained of the opinion it represented the same subject as the former Yugoslavia in all international *fora*. See its constitutional provision cited by the ICJ in the case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 3, 15, 20-3. Later, it accepted the general view, and changed its opinion. Curiously, this development has led Yugoslavia (Serbia and Montenegro) to challenge the jurisdiction of the ICJ in the above-mentioned case. In fact, the Court's jurisdiction had been based on the assumption that Yugoslavia (Serbia and Montenegro) was party to the Genocide Convention as a member of the United Nations. If Yugoslavia (Serbia and Montenegro) was not a member of the U.N., it asserts it could also not be bound by the Genocide Convention, and, thus, by its article IX – the provision about jurisdiction. See Press Release 2001/12, Yugoslavia Requests a Revision of the Judgment of 11 July 1996 by which the Court Declared that it had Jurisdiction to Adjudicate in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), International Court of Justice (Apr. 24, 2001).

131. See *supra* note 12.

132. See Degan, *supra* note 127, at 147.

133. *Id.* at 148.

succession.¹³⁴ As a consequence of this reasoning, the 'new' federation proposed, on May 1993, its own Draft Agreement on Succession between the Federal Republic of Yugoslavia and the Successor States,¹³⁵ which has been rejected by the international community as complex and unfeasible. Just as an example, it purported to take into account all federal property and investments from the creation of the common Yugoslav state (December 1, 1918) – a difficult task itself – without considering amortization nor the present market value of buildings, equipment, and commercial enterprises.¹³⁶ Moreover, Yugoslavia (Serbia and Montenegro) has been accused of blatant bad faith for keeping in possession almost all movable and immovable property of the Federation abroad, for appropriating all monetary gold and other assets of the National Bank of Yugoslavia, and for keeping approximately two thirds of the equipment of the former Federal Army (JNA).¹³⁷ Thus, there was a general understanding of the lack of a real 'common ground' for a meaningful discussion about the general debts of the dissolved federation.

The Arbitration Commission, during the elaboration of its Opinions, has invoked several provisions of the 1983 Convention, in particular that concerning the date of succession of States,¹³⁸ and specific provisions regarding the *dissolution* of the predecessor state.¹³⁹ But there are some parts of the Opinions rendered by the Commission that, although not explicitly citing the 1983 Convention, seem to recall it. Thus, for example, the Commission writes that: "the principles and rules of international law in general [. . .] are supplemental, and [. . .] States are at liberty to resolve the difficulties that might ensue from applying them by entering into agreements that would permit an equitable outcome."¹⁴⁰ This sentence echoes the provision of Article 42 of the 1983 Convention, which expresses the duty to apportion equitably the debts of the predecessor state taking into account, in particular, the property, rights, and interests which pass to the successor States in relation to that State debt.¹⁴¹ Thus, the Commission

134. See Streinz *supra* note 52, at 229.

135. *Id.* at 149.

136. In regard to property, Yugoslavia (Serbia and Montenegro) regarded itself entitled to 49% of the whole federal property. See Koskenniemi, *supra* note 58, at 94. For a brief analysis of the Serbian proposal, see Oeter, *supra* note 50, at 92-3.

137. Degan, *supra* note 127.

138. Badinter Commission, Opinion Nos. 11-15, July 16 - Aug. 13, 1993, 32 I.L.M. 1586, 1587, 1594.

139. *Id.* at 1587, 1592. The provisions of the 1983 Convention regarding dissolution (art. 41) are substantially identical with those regarding separation (art. 40); this fact might explain in part the eagerness to rely on its provisions in relation to a controversial case as the one of the succession of Yugoslavia.

140. *Id.* at 1589

141. For a comment on the equity principle in the 1983 Convention, see Streinz *supra* note 52, at 229.

points to one of the criterion to be looked at while apportioning the debts: a balance between advantages and charges.

But the most important Opinion regarding the principles governing the apportionment of the former Yugoslavia debt is Opinion N. 9.¹⁴² The three arbiters examine the problem from the perspective of the procedure for negotiating as well as some of the rules of state succession, stating that the successor states must together settle all aspects of the succession by agreement, *trying to achieve an equitable solution* on the basis of the 1978 and 1983 Conventions as well as of customary international law.¹⁴³ Not only must Yugoslavia's assets and debts be shared equitably between successor states, but every dispute must be settled peacefully according to the principles expressed in the Charter of the United Nations.

C. *The 'equitable' solution*

Although the opposition by Yugoslavia (Serbia and Montenegro) rendered vain most of the attempts to find a workable solution for the apportionment of the federation's debts, the Arbitration Commission has clearly stated in its Opinions some of the standards it thought necessary to include in future negotiations. Some authors even suggested a hierarchical order among these standards of procedure;¹⁴⁴ apart from this, probably unnecessary, institutionalization of the Opinions' content, the fundamental rule successor states should follow in dealing with the financial obligations of the defunct Yugoslavia is the need to *consult with each other in order to achieve an equitable result*.¹⁴⁵

This might seem, at first glance, a rather 'empty' rule – a rule with no real substance - purporting just to force some kind of collaboration among successor states. Although this is partly true, several important specifications should be made. First of all, from a general point of view, this is an important shift in the questions posed by state succession. According to this view, the issue before the politicians and the scholars is not whether there is a positive specific legal rule governing debts after succession, but whether a successor state is under an 'equitable' obligation to take steps to correct the fact that it has been unjustly enriched as a consequence of that process of succession.¹⁴⁶ Thus, no

142. Badinter Commission, Opinion n. 9, 31 I.L.M. 1488, 1523-5.

143. This part of the Opinion seems to have been wrongly translated from the original French into the English by the editors of I.L.M. See Degan, *supra* note 127, at 168.

144. Degan, *supra* note 127, at 183. The author distinguishes different rules, some of which embody general principles applicable to all aspects of state succession (boundaries, treaties, debts, immovable property. . .), while others appropriate just for some, but not all, of these subject matters.

145. See Badinter Commission, Opinion n. 9, *supra* note 142. Following this theory, see Mullerson, *supra* note 81, at 493.

146. This remark is based on the early intuition by Michael Hoeflich, *Through a Glass*

question arises as to the obligation for the successor to agree on paying a share of the debt of the dissolved predecessor; the only issue at stake is constituted by what 'equitable amount' of such a share should each successor pay.

Second, and more specifically on the point, this duty to collaborate through peaceful means in order to reach a common solution is evidence of a broader general trend of customary international law that is being developed during the second half of the Twentieth Century.¹⁴⁷ It is interesting, therefore, to find such a general principle embodied in an authoritative opinion applicable to a specific problem deriving from state succession. Third, the Opinion does not limit itself to envisage a mere duty to hold consultations, but points out that the result of these consultations should be the achievement of an *equitable result*.¹⁴⁸

This necessary element was later highlighted and partly explained in Opinion N. 13,¹⁴⁹ where the Commission stated that there is no need to divide assets and liabilities in an equitable proportion, but that the *overall outcome should be a equitable division*.¹⁵⁰ Such equity element, thus, is clearly not a procedural aspect dictating how a solution should be reached,¹⁵¹ but rather an aspect of the solution that the parties

Darkly: Reflections Upon the History of the International Law of Public Debt in Connection with State Succession, 1982 U. ILL. L. REV. 39, 46. See also Sandrine Maljean-Dubois, *Le rôle de l'équité dans le droit de la succession d'Etats*, Eisemann & Koskenniemi, *supra* note 6, at 143 (according to whom "La mention de l'équité dans le contenu matériel du droit témoigne de l'impossibilité de poser des règles de fond a priori").

147. See U.N. Charter, art. 33. Commentators stress the necessity for a real effort to reach an agreed solution. See, e.g., GOODRICH ET AL., CHARTER OF THE UNITED NATIONS COMMENTARY AND DOCUMENTS 259-65 (3d ed. 1969).

148. In the last few years, some authors have reached the conclusion that even self-determination itself should be judged on the basis of an "equitable result". In other words, the way to decide whether one specific people should enjoy a right to secession under the doctrine of self-determination should be to balance a wide variety of factors in order to reach a 'just result.' These factors vary from the viability of the newly independent entity to its degree of internal democracy and the ability to honor international commitments. See, e.g., Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Secession*, 11 N.Y. INT'L L. REV. 1 (1998).

149. Badinter Commission, Opinion n. 13, 32 I.L.M. 1591, at §2.

150. This part of the Opinion seems to exclude even the existence of a rule assuming joint and several liability for all successors of a dismembered state, although this rule was actually invoked by commercial bank creditors in the case of Yugoslavia. See Oeter, *supra* note 51, at 88 stating "From the perspective of the successor State [. . .] the legal claim of joint liability must seem an affront, since it lacks any legitimacy in the eyes of the people concerned. Its legality will be strongly disputed, because it will inevitably be perceived as beyond any generally accepted idea of equity and fairness." The 'equity' principle in cases of apportionment of debts and assets of a dismembered state has been considered customary international law also by the Austrian Supreme Court in *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, *supra* note 72.

151. Such as the one provided for in art. 38(b) of the Statute of the ICJ, authorizing it to decide a case *ex aequo et bono*. This rule has been emphasized by the World Court in the case concerning the Frontier Dispute (*Burk. Faso v. Mali*), 1986 I.C.J. 567 (Dec. 22).

should be looking for.¹⁵² This, obviously, might be a difficult decision to reach in the case of the apportionment of assets and liabilities following the (violent) dismemberment of a federation. It is, thus, a decision to be made by the countries involved, keeping in mind the specific situation and the aim of a 'just result'. Nonetheless, some criteria may still help in further specifying the general rule, especially having regard of some general principles of international law,¹⁵³ for example, the principle precluding 'enrichment without cause',¹⁵⁴ the one assuring all successor states survival as viable entities (including the effective power to defend themselves),¹⁵⁵ and the protection of the interests of third parties.¹⁵⁶ Some of these principles have been spelled out in a more detailed way by other authors, but have not yet been tested by judicial bodies or other recognized authorities.¹⁵⁷

An obvious objection to this 'loose rule', at least as stated by the Commission, is that it cannot work in an international environment where mutual trust and understanding of the respective positions do not exist. In particular, a deal to apportion the debts among only some of the republics would be *res inter alios acta* for the one(s) not

152. This is in clear analogy with the ICJ ruling in the case concerning the North Sea Continental Shelf (F.R.G. v. Den. & F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); in the case concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 45-7 (June 3), in the case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12). In these cases, the Court explained that, where there are no clear rules of international law, a judge should look at various equitable criteria seeking to achieve an equitable result (and not rendering a decision *ex aequo et bono*). See ROBIN CHURCHILL & VAUGHAM LOWE, *THE LAW OF THE SEA* 184-91 (1999). Also, "[e]n l'absence de «système de normes définissable ex ante», le droit se dissout en un «ensemble ex post de solutions d'espèce [...]» Maljean-Dubois, *supra* note 146, at 183.

153. 'General principles of law recognized by civilised nations', Statute of the Int'l Court of Justice, Oct. 24, 1945, art. 38.

154. On this principle and its meaning for succession, see O'CONNELL, *supra* note 47, at 243-4, 266-77. Such a principle seems to imply that an equitable division of the assets of the dissolved federation is one of the elements to be taken into account to decide the apportionment of the liabilities (as earlier stated in Opinion No. 11, *supra* note 138). See also JENNINGS & WATTS, *supra* note 36, at 221.

155. Degan, *supra* note 127. This principle might include the projected capacity of each newly independent republic to pay its share. See Shaw, *supra* note 114, at 96. Some authors have suggested that adherence to this principle would imply that the only republic economically viable (namely, Slovenia) would be bound by all liabilities. See Oeter, *supra* note 50, at 85.

156. Shaw, *supra* note 114, at 92.

157. A rather fancy, yet interesting, analysis of the specific criteria according to which Quebec might be forced to assume part of the Canadian public debt upon secession is exposed in Daniel Blum, *The Apportionment of Public Debt and Assets During State Succession*, 29 CASE W. RES. J. INT'L L. 263 (1997). The author suggests different approaches: per capita product, gross domestic product, historical benefits, historical tax shares; although quite simplistic if taken separately, these approaches could very well serve in determining the overall 'just' result. In fact, these criteria have been taken into account by several international treaties and agreements, and cited by scholars, together with some others. See O'CONNELL, *supra* note 47, at 454-56.

participating, and international law is quite clear in requiring the consent to be bound to an international agreement.¹⁵⁸ However, the Badinter Commission held that all successor states of Yugoslavia had an obligation to cooperate actively and in good faith; a refusal to do so would entail in itself state responsibility towards other successor states for damages.¹⁵⁹ Thus, the other successor states, if damaged by bad faith inaction of one (or more) of the other successors, would actually have the opportunity to take counter-measures in accordance with international law.¹⁶⁰ Thus, an equitable result among the 'active' states could be reached – without prejudice to the rights of the 'recalcitrant' state(s) – and countermeasures could force this solution on bad faith one(s).¹⁶¹

Notwithstanding this theoretical solution, though, it seems quite unlikely that, in a case of violent and disputed break-up as the one of Yugoslavia, newly independent states could actually act against one another through the usual peaceful countermeasures without dangerously heightening the regional tensions. There seems to be the need to find a more flexible way to deal with the 'bad faith' actor, one that would force a just solution without increasing the chances of violent rejection. Thus, the solution adopted by Slovenia, and later by other republics, to start dealing with the creditors on a *bilateral* basis actually seems to be the only feasible 'countermeasure' to be taken. A bilateral agreement, excluding the other successors from the procedure, might look *prima facie* against the principles laid down by the Commission; but in cases when the 'succession route'¹⁶² is foreclosed by paralyzed negotiations, a 'direct negotiations route' with different groups of foreign creditors might be the only realistic way to balance the need of the successor to regain international credibility and the eagerness of the creditors to agree on some apportionment.¹⁶³ This

158. "[A] treaty does not create either obligations or rights for a third state without its consent." Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 341. This Convention is overwhelmingly regarded as a rule of customary international law by scholars. For cases of treaties creating regimes valid *erga omnes*, none of which applicable in this case, see MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* 24 (1997).

159. Badinter Commission, Opinion n. 12, 31 I.L.M., 1488, 1590.

160. *Id.*

161. Beemelmans, *supra* note 88, at 117-18. The approach taken by the Commission, therefore, tries not only to set up a legal framework in order to find solutions to the continuation of legal rights and duties of successors, but also to provide means of implementation for these rules. For a comment about the role international institutions may play in the elaboration and implementation of universal principles regarding state succession, see Marco Martins, *Note: 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).

162. The expression is found in Mojmir Mrak, *Succession to the Former Yugoslavia's External Debt: the Case of Slovenia*, Mrak, *supra* note 28, at 165.

163. *Id.*

means, however, that there must be a deal between the creditors and the debtor(s) not only on the necessity to apportion the debt *pro quota* to each successor (abandoning the theory of joint and several liability of all former republics), but also *pro rata* towards the different creditors.¹⁶⁴

D. The Apportionment of the Financial Obligation of Yugoslavia

The data provided by the central bank of the former Yugoslavia (NBY) show that the total long-term debt of the Federation at the end of 1991 was \$15.99 billion. Of this amount, \$3.79 billion was debt incurred for the use of the federation ('non-allocated' debt),¹⁶⁵ while \$12.2 billion had been contracted for the use of individual republics ('allocated' or 'localized' debt).¹⁶⁶ According to the Federal Constitution, in fact, the republics had important fiscal and financial authority, and, consequently, this subdivision between portions of debts is quite relevant.¹⁶⁷ For our purposes, the problems posed by allocated debts are minimal, because there is substantial agreement that this type of financial obligations is 'running with the land', and the successor state is internationally bound to respect the previous agreement.¹⁶⁸ So, Serbia alone is bound by at least \$5 billion in local debts (undertaken before dissolution by its republican government or other local entities), Croatia \$3 billion, Slovenia \$2 billion, and Bosnia-Herzegovina \$1.5 billion.¹⁶⁹

164. See Oeter, *supra* note 50, at 96-7. The author points out that, in case of apportionment of the debt in shares to be paid by one successor, the creditors gaining a portion of debt against the economically more potent successor – like Slovenia in the Yugoslav case – would be the winner, since it is the only one having a realistic possibility of seeing its share of debt paid in the long run, thus the necessity to ration any individual debt according to the procedures used in national insolvency and bankruptcy procedures. For a discussion about the 'equity' principle in this dilemma, see Koskeniemi, *supra* note 58, at 95.

165. Mrak, *supra* note 28, at 160. The author cites data from the NBY and the Bank of Slovenia.

166. It should be noted that the overall foreign currency reserves in the hands of the Central Bank of Yugoslavia in 1991 allegedly amounted to \$4 billion. This strange situation had been created by the fact that foreign currency reserves were centralized, while the use of debts was not. Oeter, *supra* note 50, at 87. Of the total debt, \$683 million was owed to the International Monetary Fund, \$2.14 billion to the World Bank, \$4.15 billion to the Paris Club (15 States), \$4.3 billion to commercial banks; the rest comprised guaranteed private debts and other multilateral debts. See Stanić, *supra* note 110, at 758-63.

167. See Mrak, *supra* note 28, at 160.

168. The only chance to avoid this conclusion would be to invoke the exceptions for newly-independent states (in cases of decolonization) or for odious debts. Neither of the options, however, was pursued by the republics of the former FSRY. In any case, the fact that the IMF conditionality severely limits the sovereign's freedom of action and autonomy has led some authors to suggest a legal argument based on the theory of odious debts. See Majot, *supra* note 71.

169. See Oeter, *supra* note 50, at 87. There is no indication of the local debts of

As for the general debt of the former federation, it is interesting to note that no successor has invoked the 'clean slate' doctrine.¹⁷⁰ This fact is usually explained with the necessity, for the newly independent republics, both to gain membership in the major international financial institutions and to please the creditors – public and private alike – in order to secure the much-needed resources.¹⁷¹ As suggested before, all republics, Slovenia *in primis*,¹⁷² started negotiating on a bilateral basis their shares of debt, based on the first apportionment imposed by the International Monetary Fund.¹⁷³ Negotiations with the World Bank,¹⁷⁴ the Paris Club member states, and with the London Club of commercial banks followed the one with the IMF.¹⁷⁵

	International Monetary Fund Key	World Bank Key
Bosnia-Herzegovina	13.20%	21.40%

Macedonia.

170. Such a theory was developed in the context of decolonization, where newly independent countries emerged, after decades or centuries of colonial oppression, sometimes without any financial viability; moreover, most of the debt incurred by the colonial power was seen as 'odious debt' raised to exploit the natural resources of the country and to suppress its revolts. On the process of decolonization and the problems posed by succession, see Karl Zemanek, *State Succession after Decolonization*, 116 RECUEIL DES COURS, 187-228 (1965).

171. One of the major causes of the crisis of the federation had been an economic and financial breakdown during the Eighties, so all of the successors of Yugoslavia were aware of the need to secure new loans and reschedule the old debts. See Mrak, *supra* note 28, at 161.

172. Slovenia even specified in its Constitutional Law of 1991 its willingness to take over the corresponding part of the [Yugoslav] national debt whose immediate beneficiary is not ascertainable. See Oeter, *supra* note 50, at 100.

173. See IMF, *Quota Calculations for the Successor Republics of Yugoslavia*, Dec. 7, 1992 cited in Mrak, *supra* note 28, at 160.

174. The World Bank apportionment was arguably the easiest one, because most of its loans are specifically targeted at financing single projects. Thus, it was relatively simple to locate these projects and request the republics to accept the relative shares. See Oeter, *supra* note 50, at 98. On the basis of *interim* agreements with the Yugoslav successor states and the physical location of World Bank projects, the World Bank apportioned the outstanding debt of the former Yugoslavia (around \$2 billions) as follows: Macedonia – 7.5% (\$ 153.98 million), Croatia – 7.6% (\$155.19 million), Slovenia – 7.8% (\$160.59 million), Bosnia-Herzegovina – 21.4% (\$ 439.24 million), Serbia-Montenegro – 55.7% (\$1,141.05 million). See World Bank, *Bank Portfolio of Loans in the Former Yugoslav Republics*, Nov. 25, 1992.

175. This debt, under the New Financial Agreement, was divided internally among the Republics in 1991, but a 'joint and several liability' clause bound each of them for the entirety of the debt; thus, during the tensions of the early Nineties, all successors stopped repaying their shares, since they were benefiting the overall debt, and not their portions. See Mrak, *supra* note 28, at 166-8, 180. For a general discussion about the solutions adopted by the different financial institutions, see also Andrea Gioia, *State Succession and International Financial Institutions*, Eisemann & Koskenniemi, *supra* note 6, at 356-75.

Croatia	28.49%	7.60%
Macedonia	5.40%	7.50%
Serbia/ Montenegro	36.52%	55.70%
Slovenia	16.39%	7.80%

Slovenia has also accepted to pay 18% of the total unallocated debt of the former Yugoslavia to commercial banks in 1995.¹⁷⁶ This shows that joint and several liability of all former republics – a rule never accepted by most international actors - has been abandoned even by private investors and lenders who would have been the ones most benefiting from its application.¹⁷⁷ According to 1998 data,¹⁷⁸ the total of Slovenia's debts amounted to \$4,488 million (\$2,212 public or publicly guaranteed and \$2,166 private non guaranteed), but the IMF still excluded a part of the non-allocated debt not yet formally assumed by the Slovenian government. The other republics, with the notable exception of Yugoslavia (Serbia and Montenegro), have also acceded to similar agreements with commercial creditors.¹⁷⁹

The general situation is still rather confused today, but the latter developments in the foreign and internal policies of Yugoslavia (Serbia and Montenegro) have boosted hopes among both creditors and the other former republics that concerted solutions to the remaining problems are possible, and an agreement has been recently signed – but not yet ratified – to this effect. The focus seems now to have shifted from the discussion on whether an apportionment should take place - a fact that is presently accepted by all republics of the former Yugoslavia – to the one on *which key should the parties follow for the apportionment*. This seems a great step towards stability in the

176. See Mrak, *supra* note 28, at 168. This apportionment has provoked a series of lawsuits in U.S. courts, because it excluded some creditors. *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 213 (S.D.N.Y. 1997). In dicta, this U.S. court also points out that the rule according to which the successor is held liable for a share of the predecessor's debts is far from established. *Id.* at 219. Such theory is also expressed in *767 Third Ave. Assoc. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 158 (2d Cir. 2000) (stating that international law did not support the landlords' claim that the successor States were automatically liable to the landlords).

177. See Oeter, *supra* note 50, at 101. Another problem was also posed: as the commercial debt was sold and bought on the world markets, Slovenia asked that Yugoslavia (Serbia and Montenegro) – as well as its entities, whether private or public – be excluded from the benefit of any agreement reached by the (other) successor States and creditors. Slovenia argued that these entities had bought shares of the debt on the secondary market at a much lower price and had actually become lenders. Thus, the 18% share of Slovenia is calculated if Yugoslavia (Serbia and Montenegro) entities are excluded. See Stanić, *supra* note 110, at 762-63.

178. IMF data available at <http://www.imf.org/external/country/index.htm>.

179. Stanić, *supra* note 108, at 762-63.

Balkans and the peaceful resolution of one aspect of the succession of former Yugoslavia; this aspect is perhaps small in comparison with the wars and violence that created so much sufferings in the region, but is still relevant for the future of investments, and economical recovery, in the region. In fact, at a meeting in Belgrade on December 12, 2000 the central bankers of Yugoslavia (Serbia and Montenegro), Slovenia, and Croatia seemed to accept the key laid down by the International Monetary Fund, whereas Bosnia and Herzegovina insisted on a key more respectful of the social product and numerical size of the population.¹⁸⁰ Notwithstanding the present difficulties, in other words, the discussion has in fact passed on to the issue of deciding how to apportion the debt, and the debates on whether to pay or not seem to have been left aside as intellectual exercises of no actual interest.

An historical remark needs to be made. The independent states now emerged after the dissolution of the federation are not new to the phenomenon of succession, and other similar events that took place during last century deserve attention, since they probably contributes in shaping the legal perceptions and expectation by local scholars and politicians. The first example is provided by the Treaty of St. Germaine-en-Laye, providing, *inter alia*, for the apportionment of the debts among the successor states of the Austro-Hungarian Empire after the First World War.¹⁸¹ According to article 203,¹⁸² each of the successor states was to assume the portion of secured debt on immovable property falling under its sovereignty,¹⁸³ as regards unsecured debt, the apportionment of the total debt existing on July 28, 1914, was to be accomplished on the basis of the ratio between the average of the three financial years 1911 to 1913 of such revenues of the distributed territories. Thus, a key was determined that took into account the likely effective possibility to pay for each and all the new independent countries; the Kingdom of the Serbs, Croats, and Slovenes (later, Yugoslavia) was deemed liable for a part of the total Austro-Hungarian debt, according to the revenues of the acquired territories.¹⁸⁴

180. See Press Release, United Press International (Dec. 12, 2000).

181. Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), and Belgium, China, Czechoslovakia, Cuba, Greece, Nicaragua, Panama, Portugal, Roumania, the Serb-Croat-Slovene State and Siam, and Austria, Sept. 20, 1919, in PARRY, *supra* note 60, at 9; see also 14 AM. J. INT'L L. SUPPL. 1 (1920). On the legal questions posed at that time by the creation of the Yugoslav state, see Paolo Fedozzi, *La situation juridique et internationale du Monténégro*, 1922 J. DU DROIT INT'L 549 and MAURIZIO UDINA, *L'ESTINZIONE DELL'IMPERO AUSTRO-UNGARICO NEL DIRITTO INTERNAZIONALE* (1933).

182. PARRY, *supra* note 61, at 81; see also 14 AM. J. INT'L L. SUPPL., *supra* note 181, at 81.

183. PARRY, *supra* note 61, at 81.

184. *Id.* at 82. For an analysis of this apportionment, see Miroslav Ploj, *La reparation de la dette publique d'avant-guerre d'apres les traites de paix de Saint-Germain et de Trianon*, 1937 ANNUAIRE DE L'ASSOC. YUGOSLAVE DE DROIT INT'L 83. A brief analysis of

In 1941, the Yugoslav kingdom was divided after the defeat against Germany and its allies. The existing debts were apportioned according to the following shares: Croatia 42%, Serbia 29%, Italy, Hungary, and Bulgaria 8% each, Germany 5%.¹⁸⁵ Such an apportionment took into consideration only the ratios of population and territorial extension, two highly questionable keys, at least if used alone. However, such a division of Yugoslavia appears in retrospective an ephemeral phenomenon, and is probably not as relevant as the case of the Austro-Hungarian Empire.

E. The Challenges Faced by the Successor States

All of the former Yugoslav republics are admittedly facing difficulties and problems related with their past within the federation and the troubles of its dissolution. Yugoslavia (Serbia and Montenegro) is, at the present moment, itself facing highly disruptive tensions – most of which can be related to its unfortunate period under the repressive regime of Milosevic.

The first of these issues facing the new government – related both to the other successor states and to international creditors – is to reschedule, and eventually to pay, all of the dues to international creditors. In order to do so, the most urgent legal problem in the past months has appeared to be to be that Yugoslavia (Serbia and Montenegro) needed to find a way to reach an effective and sustainable apportionment of the unallocated debts of the former Yugoslavia. This required to give up the claim of being the sole successor of the Federal Socialist Republic of Yugoslavia,¹⁸⁶ and to negotiate in good faith to find an agreement.¹⁸⁷ Moreover, in order to ‘please’ international investors and institutions, Yugoslavia seems ready to accept as a *fait accompli* the bilateral agreements reached by the other former republics, and perhaps even to accept some concessions.¹⁸⁸

In the light of the necessity for the FRY to find its place in the international community, and in the Balkan region in particular, it became possible to overcome these problems, according to an ‘equitable solution’ that took into account viability as well as the present situation, not differing much from previous examples, such as the partition of debts of the Austro-Hungarian Empire. Some of the choices

the formation of Yugoslavia in the 1920s as a ‘contradictory State’ is provided by Svetozar Stojanović, *The Destruction of Yugoslavia*, 19 FORDHAM INT’L L. J. 337, 337-9 (1995).

185. See O’CONNELL, *supra* note 47, at 390.

186. The new federal government headed by Mr. Kustunica seems to have given up the previous position held by Mr. Milosevic, thus paving the way to negotiations. See *IMF Approves Yugoslavia’s Membership in Fund*, AGENCE FRANCE-PRESSE, Dec. 20, 2000.

187. Such negotiations are taking place under the aegis of the International Monetary Fund and between the central bankers of the republics.

188. See *supra* note 176, for the example of Slovenia.

– the acceptance to be one of the successors of the former federation on an equal footing with the other ones and the need for *bona fide* negotiations – seem actually to have been cornerstones of President Kustunica's policy since the beginning of his term in office, in October 2000. As for the other ones – the acceptance of shares of the unallocated debt and the modes of payment of the allocated debt – these, too, look acceptable, and an important agreement to this effect has been signed in Vienna on June 30, 2001.¹⁸⁹ This agreement took into account the deals entered into by four republics – starting from Slovenia – and built upon them a consensus acceptable for the fifth one (the Federal Republic of Yugoslavia), which had seemed the 'rogue' state of the region until that moment. Apart from the technical details, which will be more clear once the ratification instruments are passed by the five countries and the implementation begins, it is interesting to describe briefly the section of the Agreement on debts.

The financial liabilities of former Yugoslavia were divided into three main categories in the Agreement on Succession Issues. ALLOCATED DEBT (external debt whose beneficiary was located in the territory of a specific successor State or a group of successor States) remains with the successor State on the territory of which the final beneficiary is located.¹⁹⁰ As for the SRFY's EXTERNAL OFFICIAL (UNALLOCATED) DEBT to members of the Paris Club (as well as commercial debt to banks of the London Club), the agreement takes into account the deals concluded by Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia, and states that Yugoslavia (Serbia and Montenegro) will assume responsibility for all of its unallocated debt and its share of the unallocated debt claims; an agreed solution shall be found by the Federal Republic of Yugoslavia and the members of the two 'Clubs.' On the other side, the successor States shall terminate any

189. During a meeting in May 2001 with the international mediator sir Arthur Watts, the central bankers of the republics agreed to apportion the assets of the Former Yugoslavia according to the IMF key with minor variations. Some of the assets are held by the Bank for International Settlements (BIS); according to this agreement, Yugoslavia (Serbia and Montenegro) received 36.52 per cent, Croatia 28.49, Slovenia 16.33, Bosnia and Herzegovina 13.26 and Macedonia 5.40. Immovable assets abroad (consular and diplomatic properties) should be divided according to a slightly different key: Yugoslavia (Serbia and Montenegro) 39.5 per cent, Croatia 23.5, Slovenia 14.0, Bosnia and Herzegovina 15.0, Macedonia 8.0. Other financial assets (including 46 tons of gold, various foreign currency deposits, and securities - totalling around \$1 billion) whether held by the SFRY or the National Bank of Yugoslavia are to be apportioned according to the following proportions: Bosnia-Herzegovina 15.5 per cent, Croatia, 23.0, Macedonia 7.5, Slovenia 16.0, FRY 38.0. Immovable property located within the territory of the SFRY shall pass to the successor State on whose territory that property is situated; exceptions are made for tangible movable property of great importance to the cultural heritage of one of the successor States and which originated from the territory of the State. See the text of the Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia in 41 I.L.M. 3 (2002) [hereinafter Agreement on Succession Issues].

190. Agreement on Succession Issues, *supra* note 189, art. 2(1)(b).

existing legal proceedings or financial claims against each other – and avoid instituting new proceedings or claims, whatever the outcome the resolution by FRY of those claims.¹⁹¹

The third group is constituted by all the claims against the SFRY not otherwise covered by the Agreement on Succession Issues; these will be notified by each successor state and subsequently considered by the Joint Committee established under the Agreement itself.¹⁹² Moreover, there are some small exceptions to the above-mentioned rules; for example, the debts of former Yugoslavia under the Agreement between SFRY and Italy on February 18, 1983 on the Final Settlement of Reciprocal Obligations are to be independently assessed under article 8 of the Agreement.

Two major problems, however, may stand in the way of normalization of the internal and international relations of Yugoslavia (Serbia and Montenegro); these are the possible secession of Montenegro from the – new – federation, and the fate of Kosovo. Apart from the economical and political roots and likely consequences of these situations, scholars should start dealing with the possible juridical problems that may arise in relation with them, in order to be prepared should the necessity arise.¹⁹³ Both these cases should be dealt with through a clear perception of the state of the law as well as the policy issue before each government in order to avoid, at least in part, the tragedies experienced in the region in the past decade.

CONCLUSIONS

The law of state succession is still in flux,¹⁹⁴ but some trends are clearly emerging, at least in regard to financial obligations. More important, these trends do not develop only from the cases of succession of the past decade; in fact, a pattern seems to govern the fate of public debts of a country which dissolves or experiences the loss of a portion of its territory, a pattern that goes back at least to the Nineteenth Century. With the two exceptions of separation in the context of decolonization – under which, probably, the future of East Timor will be assessed – and the case of ‘odious debts,’ the clear general rule is that debts ought to be paid. This seems a foregone conclusion in the contemporary world, a world where countries compete with each other

191. Agreement on Succession Issues, *supra* note 189, at art. 2(2).

192. *Id.* at Annex F.

193. Some scholars have pointed that, as a professional category, international lawyers have a task that is not understood by most: to act as a lobby in support of those very principles they have contributed to write and defend. See Susan Woodward, *Are International Institutions Doing Their Job?*, 90 AM. SOC'Y INT'L L. PROC. 471, 472 (1996). The cases of Montenegro and Kosovo would pose a clear opportunity for international lawyers to do just that.

194. See Oeter, *supra* note 50, at 73.

primarily in trustworthiness before financial institutions and private investors, and not primarily through the actual use of force anymore. The case of Yugoslavia, actually, seems to show that the international community, although still slow in some circumstances to stop the misuse of force, will foster an economical – and political – breakdown of those countries that are not able to show financial credibility.

In particular, the cases of the Soviet Union and of the FSRY testify that new states emerged from the dissolution of both federations are compelled to negotiate and find a solution in good faith, under two different sets of threats. For on the one hand, if they fail to do so, the foreign creditors – international financial institutions, foreign governments, and privates alike – will immediately stop investing and loaning; most of the times, this threat, although not expressed, is powerful enough to force compliance. On the other hand, however, *bona fide* countries that find it impossible to reach an apportionment deal because of the bad faith of other successors may lawfully negotiate bilateral agreements with creditors. Thus, the former countries are not prevented from entering in the international financial community, and some of their major concerns for future development is avoided; moreover, they enjoy a legitimate form of reprisal that might dissuade bad faith conduct on the part of other successor states. In other words, the general rule of 'succession negotiations' among successors may be superseded by direct negotiations between a debtor and its creditors, so as to avoid the problems posed by delayed solutions.

This is actually the one lesson that can be learned from the decade of conflicts in the Balkans: unless solutions can be found on a multilateral basis among interested parties, taking into account the rules of international law as expresses by the Arbitrary Commission in this case,¹⁹⁵ each party may be allowed to take what unilateral actions it deems necessary to protect its basic interests – provided at least that it does so in the least harmful way for other countries. The picture, however, is not even this simple. The role of multilateral international banks and other financial institutions appears decisive,¹⁹⁶ and a primary concern for 'new' states after a phenomenon of succession is constituted

195. It is not clear whether the Opinions delivered by the Commission, applicable to the fate of Montenegro as one of the constituent republics of the former Federal Socialist Republic of Yugoslavia, would be applicable to Kosovo too. In fact, the Arbitration Commission was meant to deal with the problems arising in connection with the secession of the republics, and Kosovo is not in such a position, together with Vojvodina. See Ragazzi, *supra* note 12, at 1491. Nonetheless, the principles set forth by such an authoritative body may well be regarded as expressing the present status of customary international law in all cases of secession based on self-determination claims.

196. See *supra* note 76 and accompanying text, for the relation between the International Monetary Fund and the new states created by the dissolution of Czechoslovakia.

by their financial necessities before the international community.¹⁹⁷ It seems, therefore, that policy decisions taken by successor states and creditor entities create a network of expectations, claims, and counterclaims shaping the normative environment in which those same actors play. In other words, the global perspectives that have led to the creation of an 'exception' for countries emerging out of the decolonization phenomenon – allowing them not to be bound by the burden of debt when becoming independent – now have radically been rejected. Newly independent states established during the last decade of the Twentieth Century have not even tried to suggest the 'clean slate' doctrine as the applicable rule to their cases; they relied, on the contrary, on centuries of past experience since the Treaty of Münster and confirmed by the cases of the Austro-Hungarian and Ottoman Empire debts after the First World War; this trend clearly suggests that the successor states should, in general, pay the debts of the predecessor.¹⁹⁸

The problem then arises as to how the debts should be divided among the successor states. In this respect the trend of compulsory negotiations is clearly emerging, and the present Yugoslav case with the recent developments clarifies some of its aspects, but it is probably too soon to be able to delineate the exact content of this rule. In any event, unilateral solutions seem still acceptable whenever a clear injury to the interests of some successor states can be shown as a consequence of bad faith conduct by other successors; they simply seem more 'just' than the opposite solution of waiting for the conflict situations to cool off. Where an agreement can actually be reached, instead, States should probably at least take into account some important factors, such as: the special connections between an area and the debts related to it; a general relation between debts and property accepted by a successor State; the share of the successor state in contributing to the wealth of the predecessor, when the former was part of the latter; the views adopted by multilateral financial institutions on the apportionment and membership.

One other remark needs to be made. The only realistic alternative to the 'unilateral' – though respectful of the rights of the others – approach as described above would be a strong effort to integrate in a larger context. This appears especially true in the present Balkan situation. In fact, such an 'integration project' could be carried on in two different ways, although both, admittedly, are rather unlikely

197. See *supra* note 93 and accompanying text, for the case of the Russian Federation in relation with the other republics of the former Soviet Union.

198. In this case, there seems to be very little difference between the consequences of secession and dismemberment; thus, however one defines the extinction of the Austro-Hungarian and Ottoman empires (dissolution or secession of some provinces), the result does not change in respect to the continuity of financial obligations.

under the present conditions. One way would be an expeditious integration of the whole region within the European Union. This approach would require - among other critical elements - the strong political will of the present and future Member countries of that entity; its advantages, however, would be the creation of a common space where freedom of movement, protection of regional identities, and an overall more democratic environment aimed at easing the present tensions, in the medium and long run.¹⁹⁹

The other way would be the one undertaken by the founding members of the European Communities themselves back at the middle of the last century: through strong political will and leadership, some of the peoples that had waged the most disruptive wars against each other in the past centuries decided to put aside the desire for endless revenge and to share some of the resources - coal, steel - that had been objects of dispute among them.²⁰⁰ Both of these approaches, however, imply that secessions and separations are acceptable only if the parties involved strive to develop a strategic vision of regional integration; in other words, small nations based on common language, culture, or religion appear to be viable in the contemporary world only through integration at a higher level.²⁰¹

199. For a similar approach, see Jacques Rupnik, *Kosovo: Dilemmas of the Protectorate*, 9 E. EUR. CONST'L REV. 48, 49 (2000). "Between the impossible task of maintaining Kosovo within Yugoslavia and the improbability of independence in the short term, a third interim option could be developed: an evolving protectorate, where international involvement would gradually be reduced to a minimum, while building up a maximum of self-government [. . .] Respect for these conditions [. . .] would open prospects for regional and European integration". *Id.* at 50.

200. Admittedly, this path, too, seems impossible - at least at the present moment; many commentators have stressed that this might have been the view in 1945 as regards the cooperative efforts among France, Germany, Italy and the Benelux. See, e.g., Daniel Dombey, *EU Ancestor to Fade Away*, FIN.TIMES, Apr. 18, 2001, at 2 (stressing the historical significance of the European Coal and Steel Community set up with the famous treaty of April 18, 1951).

201. In this sense, two examples from the Balkan region can be taken from the latest news. First, Macedonia is looking forward to closer integration with the European Union, hoping to join sooner than most neighbors, or at least to benefit from economic aids. See Judy Dempsey, *EU Deal with Macedonia Could be Model for Balkans*, FIN. TIMES, Apr. 10, 2001, at 2. Second, on April 15, 2001, Yugoslav foreign minister Goran Svilanovic announced that Yugoslavia intends to enter the Schengen visa regime (the one linking together many continental European countries party to the EU) in two years' time. Apart from the actual chance of implementing these plans, both these policy statements show the willingness of Yugoslavia and Macedonia to disenfranchise themselves from the difficulties of the present situations through a cooperative effort at the regional level.