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INTRODUCTION

One of the basic distinctions between international law and domestic law involves the fact that States are the primary subjects of international law.[1] According to international law, the existence of a State depends on the presence of four elements:[2]

1. A defined territory;
2. A permanent population;
3. A government;
4. The capacity to enter into relations with other States.

These elements are subject to change during the life of a State:

1. The territory of a State may increase or decrease in size over time;
2. The population of a State may increase or decrease in number;
3. The government may lose control over part of the territory of the State;
4. The capacity to enter into relations with other States may be reduced.

Changes which affect the territory of a State give rise to so-called succession of States. The transfer of the territory known in 1803 as Louisiana, by France to the United States of America, illustrates both the concept of State succession, as well as some of the issues arising from it. With time, the rules governing State succession in international law have evolved. However, the solutions which were developed two hundred years ago to deal with most of the issues arising from the Louisiana purchase seem to be in line with current rules governing the transfer of a territory from one State to another.

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1. *See* Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 180.

2. *Convention on the rights and duties of states*, 28 Am. J. Int'l. L. Supp. 75 (1934).

I. THE CONCEPT OF STATE SUCCESSION

International law defines a succession of States as "the replacement of one State by another in the responsibility for the international relations of territory."[3] More simply, State succession involves the transfer of a territory from one State (the predecessor State) to another State (the successor State).

As such, State succession may take different forms:

1. A State may break up and disappear giving way to the emergence of two or more new States (former USSR: 1991; Yugoslavia: 1991-1992; Czechoslovakia: 1993);
2. A portion of the territory of a State may secede or separate and become the seat of a new State (Pakistan from India: 1947; Bangladesh from Pakistan: 1971; Eritrea from Ethiopia: 1993);
3. A colony may become independent and give rise to a newly independent State (starting with Haiti in 1804);
4. Two or more States may merge to create a single new State (the merger of Syria and Egypt to form the United Arab Republic between 1958 and 1961);
5. A State may be taken over and assimilated by another State (absorption of the German Democratic Republic by the Federal Republic of Germany: 1990);
6. A portion of the territory of a State may be transferred from one State to another State by way of cession: such was the case in the purchase of Louisiana by the United States from France in 1803. As a form of State succession, the cession of a territory from one State to another was quite current at the time. It often accompanied the conclusion of a peace treaty between the predecessor State and the successor State.

In some cases, the predecessor State remains in existence, so that the succession is said to be partial: such was the case when France ceded Louisiana to the United States. In other cases, the predecessor State does not survive the succession, so that the succession is said to be total, as with the dissolution of the former USSR.

In any event, a change of regime, even as drastic as the shift from Tsarist Russia to the Soviet Union or from Saddam Hussein's Iraq to a democratic or a religious State, does not equate to a succession of

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3. *See* article two, common to the *Vienna Convention on the Succession of States in Respect of Treaties* (1978), 1946 U.N.T.S. 3, and to the *Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts* (1983), UN Doc. A - CONF. 117-14.

States. Indeed, international law traditionally distinguishes between changes of regime, on one hand, and succession of States, on the other. Changes of regimes do not affect the continuity of States in which they occur.[4] As a result, a change of regime will not, as a rule, affect the rights and obligations of the State in which the change takes place. So, Iraq will keep its seat at the UN and will remain bound by commitments made by the former regime.

On the other hand, regardless of the form it takes, State succession will in some way affect the rights and obligations of the States concerned (predecessor and successor States). It may also affect the rights and obligations of third parties. The extent to which the rights and obligations of States will be affected by State succession may vary with each situation since it depends on a number of factors: what is the nature of the rights and obligations at stake? (Treaty rights and obligations? Rights and obligations relating to public property and debts?); what form does the State succession take? (partial or total succession?); in what context does the succession of States occur? (colonial or non colonial case?); which legal approach should govern the issues arising from State succession?

II. THEORETICAL APPROACHES TO STATE SUCCESSION

From a theoretical standpoint, two doctrines must be distinguished:[5]

The doctrine of "universal succession" (also known as doctrine of continuity) provides that the rights and obligations of the predecessor State, relating to the territory transferred, are transmitted to the successor State. Thus, the successor State inherits the treaty rights and obligations of the predecessor State relating to the territory transferred. As well, the successor State inherits public property and debts belonging to the predecessor State relating to the territory transferred. Indeed, the "universal succession" doctrine provides that the successor State ensures the continuation of the predecessor State's sovereignty over the territory transferred.

The "clean slate" doctrine, by contrast, provides that the successor State substitutes its sovereignty over the territory transferred to that

4. For instance, see The Sapphire, 78 U.S. 164 (1871); Trans-Orient Marine Corp. v. Star Trading & Marine, 731 F. Supp. 619 (N.Y.S. 1990), *aff'd*, 925 F.2d 566 (2d Cir. 1991); Oscar Schachter, *State Succession: The Once and Future Law*, 33 Va. J. Int'l L. 253, 254-55 (1993); Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 Va. J. Int'l L. 275, 281-82 (1993).

5. *See* D.P. O'Connell, The Law of State Succession 6-9 (H.C. Gutteridge et al. eds., Cambridge University Press 1956).

of the predecessor State instead of ensuring its continuation.[6] Therefore, the successor State does not inherit the rights and obligations of the predecessor State with respect to the territory transferred.

In 1803, when Louisiana was ceded by France to the United States, the "universal succession" doctrine was believed to govern State succession. At the time, international law was still in gestation. Customs, based on the practice of States, were the main source of international law. However, the practice of States was difficult to identify because it was not recorded. Moreover, State practice was often incoherent. Only scholars, who sometimes had exercised diplomatic functions, were able to determine the existence of certain customs and to interpret them. Their interpretation was often inspired by Roman law concepts which were rediscovered during the Renaissance. Thus, the first doctrine to govern issues arising from State succession was the doctrine of universal succession. It was developed as early as the 17th century by some of the fathers of international law (Gentili, Grotius, Pufendorf) on the basis of the Roman law concept of inheritance in civil law.

The "clean slate" doctrine, on the other hand, was developed in the late 19th century under the influence of voluntarist theories which dominated international law during that period.[7] According to such theories, sovereign States can only enjoy rights and incur obligations to which they consent. Therefore, the rights and obligations of the predecessor State relating to the territory transferred cannot be considered to automatically pass to the successor State.

Both the "universal succession" and the "clean slate" doctrines have been criticized by scholars.[8] It has been argued, for instance, that neither doctrine "makes much sense with respect to cases of cession of territory"[9] (for instance the transfer of Louisiana from France to the United States). Indeed, "[i]n such cases the 'successor' ... will neither begin life with a clean slate, nor will it succeed to the full range of rights and duties of the 'predecessor.'"[10]

As such, this statement is somewhat opaque. However, we believe, it can be explained on the basis of a distinction between "real" and "personal" rights relating to the territory transferred.[11] This distinction is supported by State practice.

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6. *Id.* at 8-9.
7. *See* Mathew C.R. Craven, *The Problem of State Succession and the Identity of States under International Law*, 9 European J. Int'l L. 142, 147-48 (1998).
8. *See* O'Connell, *supra* note 5, at 10; Craven, *supra* note 7, at 148.
9. Craven, *supra* note 7, at 148.
10. *Id.*
11. *See* discussion *infra,* at 1283-84.

III. STATE PRACTICE RELATING TO THE SUCCESSION OF STATES

Examples of both the "universal succession" and the "clean slate" doctrines can be found in the practice of States. Thus, while the "universal succession" doctrine governed the emergence of Dominions, such as Canada,[12] as independent States, the "clean slate" doctrine was invoked by Israel.[13] However, State practice rarely reflects either the "universal succession" doctrine or the "clean slate" doctrine in their entirety. In most cases of State succession, some rights and obligations relating to the territory transferred are transmitted from the predecessor State to the successor State, while others are not. Thus, following the absorption of the German Democratic Republic (GDR), the Federal Republic of Germany took over the property and debts of the GDR but refused to be bound by its treaties.

State practice also reveals that cases of State succession which may, at first glance, seem quite similar are sometimes dealt with according to different models. Thus, the break up of the Soviet Union was generally analyzed using the separation model: parts of the USSR separated from its core – Russia – which continued its existence with the support of the Commonwealth of Independent States (CIS).[14] On the other hand, the break up of Yugoslavia was analyzed using the dissolution model: the former Yugoslavia had ceased to exist and Serbia-Montenegro did not continue its existence.[15]

Moreover, in many cases, practical issues arising from State succession are dealt with by devolution agreements concluded between the predecessor State and the successor State. Such was the case with respect to the Louisiana purchase.

The transfer of Louisiana was governed by a treaty and two conventions[16] concluded between France and the United States on April 30, 1803. They include a number of detailed provisions dealing with some of the traditional issues arising from State succession and

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12. *See* O'Connell, *supra* note 5, at 156; John H. Currie, Public International Law 40 (Irwin Law 2001); C. Emanuelli, *Droit international public* 200 (3d ed.) (Montreal, Wilson & Lafleur eds., 1998).

13. *See* O'Connell, *supra* note 5, at 10-11.

14. *See* Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 Va. J. Int'l L. 299, 302-08 (1993).

15. *See* Edwin D. Williamson & J.E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Break up of the USSR and Yugoslavia*, 33 Va. J. Int'l L. 261, 270-72 (1993).

16. *See* Reference Library of Diplomatic Documents, NapoleanSeries.org, *at* http://www.napoleonseries.org/reference/diplomatic/louisiana.cfm (last visited Feb. 8, 2004).

treating them in a rather traditional way.[17] However, it must be emphasized that the solutions which are embodied in devolution agreements often vary from case to case.

In sum, State practice relating to State succession lacks uniformity and fails to substantiate either the "universal succession" or the "clean slate" approach.

In order to shed some light on a somewhat confusing area of international law, efforts have recently been made under the aegis of the United Nations to codify the rules governing State succession.

IV. CODIFICATION OF THE RULES GOVERNING STATE SUCCESSION

In spite of, or maybe because of, the uncertain practice of States with respect to State succession, the International Law Commission (I.L.C.)[18] has endeavored to codify the rules governing three areas:

1. succession of States with respect to treaties;
2. succession of States with respect to public property, archives, and debts;
3. succession of States and nationality of natural persons.

A Succession of States with respect to treaties

State practice relating to this question is inconsistent.[19] In some cases, treaty obligations are transmitted from the predecessor State to the successor State(s). Such was the case in the following:

1. break up of the Greater Columbian Union into Columbia, Ecuador, and Venezuela (1829);
2. break up of the union between Norway and Sweden (1905);
3. break up of the Austro-Hungarian Empire after World War I and emergence of Austria and Hungary;
4. independence of the British dominions, including Canada, referred to in the *Statute of Westminster, 1931*;
5. dissolution of the United Arab Republic and separation of Syria from Egypt (1961);
6. break up of the USSR (1991) and continuation by Russia;
7. break up of Yugoslavia (1991-1992);
8. break up of Czechoslovakia (1993), etc.

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17. *See* discussion *infra*, at 1283-87, 1290-91.

18. The I.C.L. was established by the General Assembly of the United Nations in 1947 to encourage "the progressive development of international law and its codification." *Charter of the United Nations*, Chap. IV, art. 13(1) (1945).

19. For examples of State practice, see O'Connell, *supra* note 5, at 15-74.

In the case of the Louisiana purchase, the Treaty of 1803[20] provided that the United States would "execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon" (art. 6).

In other cases, treaty obligations are not transmitted from the predecessor State to the successor State. This was seen in the following:

1. separation of Belgium from the Netherlands (1831). However, local treaties concerning Belgium remained binding;
2. secession of Panama from Columbia (1903);
3. secession of Finland from the USSR (1917-1920);
4. separation of Poland and Czechoslovakia from the Austro-Hungarian Empire after World War I;
5. independence of Ireland (1921-1949);
6. secession of Pakistan from India (1947). However, Pakistan remained bound by some British and British-Indian treaties in view of a devolution agreement between the two States;
7. birth of Israel (1947-1948);
8. emergence of some newly independent States through decolonization, including Algeria and Upper Volta;
9. secession of Bangladesh from Pakistan (1971);
10. absorption of the German Democratic Republic by the Federal Republic of Germany (1990);
11. independence of the Baltic States (1991), etc.

The practice of States relating to succession to treaties is also informed by the distinction between "real" (or "dispositive") and "personal" treaties. "Personal" treaties are described as contracts which can only remain in force through the continued existence of the contracting parties (treaties of extradition, treaties of commerce, treaties on the reciprocal enforcement of foreign judgments, alliance treaties, etc.).[21] They are more likely to be affected by State succession than "real" treaties. "Real" treaties create real rights and obligations with respect to a territory (boundary treaties, treaties governing fishing rights in national waters, or navigation rights in national waterways, etc.).[22] They are said to attach to a territory, so that if the territory is transferred from one State to another, they are

20. *Supra* note 16.
21. *See* O'Connell, *supra* note 5, at 15.
22. *Id.* at 49.

transmitted to the successor State. State practice relating to State succession shows that the distinction between "personal" and "real" treaties is relevant. Indeed, even newly independent States which favored the clean slate approach tended to accept territorial treaties, and in particular boundary treaties, concluded on their behalf by former colonial powers. On the other hand, political treaties (treaties of friendship or alliance) are often affected by succession of States even when continuity is the rule. In the case of the Louisiana purchase, real rights and obligations created by treaties were transmitted to the United States along with the territory ceded by France. To start with, the Treaty of 1803 emphasized that the territory transferred to the United States was the territory over which France had an incontestible title in view of article 3 of the treaty of St. Ildefonso concluded with Spain in 1800.[23] Moreover, it should be recalled that under the Treaty of Paris (1763), between France and Great Britain, British subjects enjoyed freedom of navigation on the Mississippi. Following the transfer of Louisiana to the United States, the rights of British subjects were not meddled with.[24]

Furthermore, in many cases, issues relating to succession to treaties are governed by devolution agreements concluded between the predecessor State and the successor State (India and Pakistan: 1947); Ghana; Hong Kong) or between successor States (Community of Independent States). As noted above, in the case of the Louisiana purchase, the Treaty of 1803 included provisions governing the succession to treaties concluded by Spain with Indian tribes and nations.

In order to clarify some of the rules relating to succession to treaties, the International Law Commission drafted the *Vienna Convention of the Succession of States in respect of Treaties*.[25] The Convention was concluded in 1978. It entered into force in 1996.

The general solution which is embodied in this convention is based on a distinction between State succession arising out of colonial cases and State succession arising out of non colonial cases. According to this distinction, "newly independent States," i.e. States born out of the decolonization process, do not automatically inherit treaty rights and obligations previously concluded on their behalf by colonial powers (art. 16). However, they may unilaterally choose to succeed to multilateral treaties to which the predecessor State is a party (art. 17).

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23. (Art. 1). Therefore, it would seem that the cession of Louisiana to the United States was governed by the principle *uti possidetis juris*. *See* discussion *infra* at 1286.

24. *See* O'Connell, *supra* note 5, at 54.

25. *See* Mathew G. Maloney, *Succession of States in Respect of Treaties: The Vienna Convention of 1978*, 19 Va. J. Int'l L. 885, 911 (1979).

In all non-colonial cases, including those involving a cession of territory, the rule is different. As a rule, the successor State succeeds to treaty rights and obligations concluded by the predecessor State (art. 34).

This distinction between colonial and non colonial cases is informed by the evolution of State practice after World War II. Yet, it is criticized by most states which prefer a general application of the "clean slate" doctrine with respect to succession to treaties regardless of the form of State succession. Indeed, the "clean slate" doctrine seems to be more consistent with the contractual nature of treaties[26] and the rule according to which treaties do not create rights and obligations for third States.[27] Moreover, the aforementioned distinction is becoming obsolete as the decolonization process comes to an end. What remains is the rule of continuity which is not favored by States. As a result, the Convention came into force only recently. So far, it has been ratified by less than 20 States.

In any event, the application of the "clean slate" doctrine to treaties is limited by two exceptions which are included in the Vienna Convention of 1978: the first exception deals with treaties creating rights and obligations relating to the use of a territory. Such treaties are automatically transmitted from the predecessor State to the successor State (art. 12). This exception was applied by the International Court of Justice (ICJ) in the *Gabcikovo-Nagymaros* case.[28] This case dealt with a treaty concluded between Hungary and Czechoslovakia in 1977. Under the treaty, both States were responsible for the joint construction and operation of a system of locks on the Danube River. However, in 1989, Hungary, invoking environmental concerns, abandoned performance of its part of the project. Then, in 1992, Hungary notified Czechoslovakia of its termination of the 1977 treaty. For its part, Czechoslovakia broke up in 1992 giving rise to the Czech Republic on one hand and Slovakia on the other. As a result, part of the project now fell within the territory of Slovakia which decided to proceed with a modified version of the initial project. A dispute between Hungary and Slovakia ensued which was brought before the International Court of Justice by both parties. One of the issues raised before the Court was whether Czechoslovakia's rights under the 1977 treaty had been transmitted to Slovakia or whether they had been

26. *See* Currie, *supra* note 12, at 40.

27. *See* Article 34 of the *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (1969).

28. Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7.

extinguished. The ICJ decided that the 1977 treaty was territorial in nature so that it "created rights and obligations 'attaching to' the parts of the Danube to which it relates." As such, the treaty was transmittable to Slovakia which was bound by it from the day it came into existence.[29]

In considering whether the agreement between Hungary and Czechoslovakia was a territorial treaty, the Court stressed that it "also established the navigational regime for an important sector of an international waterway . . . ." In this respect, the ICJ noted that according to the International Law Commission, "treaties concerning water rights or navigation on rivers . . . [are] candidates for inclusion in the category of territorial treaties."[30] As such, those treaties "travel" with the territory transferred. In the case of the Louisiana purchase, this solution finds support in the fact that after the transfer of Louisiana to the United States, the navigation rights of British subjects on the Mississippi were maintained.[31]

The second exception to the "clean slate" rule relates to boundary treaties. Under article 11 of the Convention, such treaties are binding on the successor State(s). This exception confirms international law's concern to protect the stability of State boundaries through the principle *uti possidetis juris*[32] and the exception to the doctrine of *rebus sic stantibus*.[33] The exception found in article 11 of the Vienna Convention of 1978 is in line with case law.[34]

B. Succession of States with respect to State property, debts and public archives

The *Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts*[35] was adopted in 1983. Its rules are also based on a distinction between State succession arising out of colonial cases and State succession arising out of non colonial cases. This distinction, however, does not reflect the practice of States.

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29. *Id.* at 72.

30. *Id.*

31. *See* discussion *infra* at 1284.

32. *See* Frontier Dispute (Burkina Faso v. République du Mali), 1986 I.C.J. 554, at 565.

33. *See Vienna Convention on the Law of Treaties*, *supra* note 27, art. 62; Gabčíkovo-Nagymaros Project, *supra* note 28, at 63-64.

34. *See* Free Zones Case (Upper Savoy and the District of Gex), 1932 P.C.I.J. (ser. A/B) No. 32 (June 7); Temple of Preah Vihear Case (Cambodia v. Thaïland), 1962 I.C.J. Rep. 6; Territorial Dispute (Libyan Arab Jamahirya v. Chad), 1994 I.C.J. 6.

35. *See supra* note 3.

In practice, States usually deal with issues relating to State succession to public property, debts, and archives by way of agreements. The solutions found in these agreements vary from case to case. As a result, the rules governing State succession to public property, debts, and archives are somewhat uncertain. However, some general rules can be derived from the practice of States as well as from international cases.

First of all, in the case of total succession (when the predecessor State(s) disappear(s)), the general rule seems to favor continuity. Therefore, the successor State(s) would inherit all the property owned[36] and debts owed by the predecessor State(s). Thus, the treaty of St. Germain (1919) divided the public debt of the former Austro-Hungarian Empire between the successor States.[37] More recently, the Federal Republic of Germany took over the debts and assets of the former German Democratic Republic.[38] Also, several former Soviet republics agreed in 1991 on their respective shares in debts and assets of the USSR. Another agreement was concluded in 1992 between the heads of State of the Community of Independent States on the division of the property of the former Soviet Union abroad. Later, the solutions adopted in these multilateral agreements were renegotiated on a bilateral basis between Russia and some former Soviet republics.[39]

In the case of partial succession (where the predecessor State continues to exist), it seems that property and debts go with the territory. Therefore, public property which is located on the territory transferred or which is linked to that territory would pass to the successor State.[40] Likewise, debts incurred directly by the local government of the territory transferred or incurred by the predecessor State for the improvement of that territory would pass to the successor State.[41] Although it seems fair, this rule is not

36. *See* Haile Selassie v. Cable & Wireless Ltd. (No.2), Ch. 182 (1939); *rev'd* C.A. 194 (1939).

37. *See* O'Connell, *supra* note 5, at 164.

38. *See* Charles Rousseau, Chronique des faits internationaux, 96 Revue Générale de Droit International Public [Rev. Gen. Droit Int'l Pub.] 109, 112 (1992).

39. *See* Mullerson, *supra* note 14, at 306-07.

40. *See* Peter Pazmany University (The Peter Pazmany University v. Czech.) 1933 P.C.I.J. (ser. A/B) No.61, at 237 (Dec. 15); *Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts*, *supra* note 3, arts. 14(2), 15 (1)(a)(d), 17 (1)(a)(d), 18(1)(a)(c).

41. *See* S.A. Williams, *International Legal Effects of Secession by Quebec*, York University Constitutional Reform Project Study No. 8, North York, York University Centre for Public Law and Public Policy, 1992, 30-35; *Vienna Convention on the Succession of States in respect of State Property, Archives and Debts*, *supra* note 3, arts. 37(2), 40(1), 41.

clearly supported by State practice. In the case of the Louisiana purchase, however, the Treaty of 1803 provided the passing to the United States of "all public lots and squares, vacant lands and all public buildings, fortifications, barracks and other edifices which are not private property" (art. 2). On the other hand, the United States agreed to take over the debts due by France to American citizens stemming from the so-called Quasi War.[42]

Beyond the general rules laid down above, the solutions are uncertain.

Because of that uncertainty, the International law commission endeavored to develop new rules which are included in the Vienna Convention of 1983.[43] For instance, in colonial situations, a "newly independent State" is entitled, in whole or in part, depending on the case, to property owned by the predecessor State, wherever located, that originated in the territory transferred (art. 15 (1) (b), (c), (e), (f)). Moreover, the Convention provides that no public debt is transmitted to a "newly independent State" without its consent (art. 38 (1)).

In non-colonial situations, the Convention provides that the successor State is entitled to an equitable part of the public property of the predecessor State which is not otherwise transmitted (arts. 17 (1) (c); 18 (1) (b), (c)). The predecessor State may, in return, be entitled to some compensation (arts. 17 (3); 18 (2)). As for debts, the Vienna Convention provides that, short of an agreement to the contrary, an equitable portion of the public debt of the predecessor State passes to the successor State. To establish that portion, considerations relating to the amount of property, rights, and other interests which the successor State has acquired by succession may be taken into consideration (arts. 37 (2); 40 (1); 41).

With respect to public archives, the basic idea which is reflected by the Vienna Convention of 1983 is that the successor State is entitled to documents which are necessary to administer the territory transferred or which are directly related to that territory (arts. 27 (2) (a), (b); 28 (1) (b), (c); 30 (1) (a), (b); 31 (1) (a), (b)).[44] In the case of the Louisiana purchase, the Treaty of 1803 provided that "the archives, papers and documents relative to the domain and sovereignty of Louisiana" will be transmitted to the United States authorities (art. 2).

So far, the Vienna Convention of 1983 has been ratified by only 5 States, meaning that it has not yet come into force. The primary impediment to broader ratification is that most western States

42. *Convention between the United States of America and the French Republic*, Apr. 30, 1803, U.S.-Fr., 7 Bevans 818, art. 1.

43. *Supra* note 3.

44. *See* Claude Emanuelli, *Archives et souveraineté*, 23 Revue Générale de Droit [Rev. Gen. Droit] 603 (1992).

disagree with its distinction between colonial and non-colonial situations.[45] However, as mentioned before, the significance of this distinction is lost to the fact that the decolonization phenomenon is coming to an end.

C. Succession of States and its impact on the nationality of natural persons[46]

In 2001, the UN General Assembly adopted Resolution 55/153[47] dealing with "[n]ationality in relation to the succession of States." Annexed to the resolution is a set of 26 articles on "[n]ationality of natural persons in relation to succession of States," which were adopted on second reading by the International Law Commission in 1999.[48]

Contrary to the recommendation of the Commission, the draft articles were not adopted by the General Assembly in the form of a declaration. Instead, Resolution 55/153 describes the draft articles as "a useful guide for practice in dealing with" nationality of natural persons in relation to succession of States. It also acknowledges that "the work of the International Law Commission on this topic could contribute to the elaboration of a convention or other appropriate instrument in the future." In that respect, Resolution 55/153 invites governments to comment on the question of a convention on nationality of natural persons in relation to the succession of States. It also decides to include this topic in the provisional agenda of its fifty-ninth session.

The characterization of the draft provisions annexed to Resolution 55/153 as guidelines only may be explained by the fact that these provisions do not reflect the recent practice of States. Indeed, such practice is not uniform and does not allow for the creation of customary rules. However, it does reflect one traditional principle: each State has the sovereign right to decide who qualifies as one of its nationals (arts.

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45. *See* P.K. Menon, *The Succession of States and the Problem of State Debts*, 23 B.C. Third World L.J. 111 (1986).

46. *See* Claude Emanuelli, *L'accession du Québec à la souveraineté et la nationalité, Les attributs d'un Québec souverain*, Assemblée nationale, Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, vol. 1, Québec, 1992, 61, (1992) 23 *Rev. Gen. Droit* 519; updated in 2001: *Mises à jour des études originalement préparées pour la Commission parlementaire d'étude des questions afférentes à l'accession du Québec à la souveraineté* (1991-1992), vol. 3, Livre 1, Québec, 2002, 61.

47. Fifty-fifth session, Agenda item 160, *at* http://www.un.org/law/ilc/reports/1999/english/chap.4.htm.#E_1 (last visited Mar. 4, 2004).

48. United Nations, *Report of the International Law Commission on the work of its fifty-first session* (1999), *available at* www.un.org/law/ilc/reports/1999/english/chap4.htm (last visited Feb. 8, 2004).

6, 8 (1), 9, 10). This sovereign right is mitigated by the rule developed by the International Court of Justice in the *Nottebohm* Case:[49] it explains that the nationality of a State can only be successfully invoked as against another State provided it reflects a genuine link between an individual and its national State. However, the connecting factors which may be taken into account to establish whether such a link exists may vary from case to case. With respect to succession of States, the draft provisions annexed to Resolution 55/153 favors the habitual residence of an individual as the relevant connecting factor to determine whether he/she loses the nationality of the predecessor State and acquires that of the successor State (arts. 5, 8, 14, 20, 22, 24, 25). Yet, the practice of States born from the break up of the former USSR, Yugoslavia, and Czechoslovakia point to other directions: namely, the citizenship of the component units of the predecessor State, or the origin.[50] Also, several provisions found in the draft articles annexed to Resolution 55/153 seek to prevent statelessness as a possible consequence of succession of States (arts. 4, 9, 11 (2), 24, 25). On the other hand, the recent practice of States (Baltic States in particular) has resulted in numerous cases of statelessness.[51] Moreover, it must be noted that only a handful of States are parties to the *Convention on the Reduction of Statelessness* (1961).[52]

The draft articles further provide a right of option for individuals who are affected by a succession of States (arts. 11, 26). Again, however, these provisions do not coincide with the practice of States.[53] Indeed, in practice, the right of option is the exception rather than the rule.[54] When it is granted to the inhabitants of a territory transferred, it is usually as a result of an agreement between the predecessor State and the successor State. Indeed, issues relating to the nationality of natural persons affected by the transfer of a territory from one State to another are sometimes dealt with in a devolution agreement. Thus, the Treaty of 1803 for the cession of Louisiana provided that the inhabitants of the territory ceded would be admitted "as soon as possible" to United States citizenship (art. 3).

Finally, in view of the previous developments, the draft articles annexed to Resolution 55/153 seem to be an expression of the progressive development of international law rather than a codification of existing rules.

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49. *Nottebohm* (Liechtenstein v. Guatemala), 1955 I.C.J. 4.
50. *See* Emanuelli, *supra* note 46, at 75 *et seq.*
51. *Id.* at 81-82.
52. 989 U.N.T.S. 175.
53. *See* Emanuelli, *supra* note 46, at 81-82.
54. According to the International Criminal Tribunal for the former Yugoslavia, the right of option is not a settled rule of international law: Prosecutor v. Zejnil Delalic et al. (Celebici Camp), IT-96-21, Judgement of 20 February 2001, I.C.T.Y. (A. Ch.), para. 93, *available at* www.un.org/icty/ (last visited Feb. 8, 2004).

CONCLUSION

State succession takes different forms. The transfer of Louisiana, by France, to the United States took the form of a cession of territory.

Regardless of form, however, State succession raises similar issues. For the most part, successions involve the transmission of rights and obligations from the predecessor State to the successor State.

The rules governing such transmissions, and State successions generally, have evolved since the Louisiana purchase. Their evolution is linked to the replacement of the doctrine of continuity by the "clean" slate doctrine under the influence of voluntarist theories. This development is reflected in the practice of States which became independent through the process of decolonization. However, State practice relating to State succession is not uniform. It often embodies both the doctrine of continuity and the "clean slate" doctrine in a proportion which varies from case to case. Yet, some rules seem to be well settled, such as the rules favoring the passage to the successor State of "real" treaties, of immovables located on the territory transferred, and of archives necessary to administer that territory. These rules are usually found in devolution agreements which are often concluded between the predecessor State and the successor State. Such was the case with respect to the transfer of Louisiana from France to the United States. Questions arising from this transfer were governed by three agreements. The solutions found in these agreements are informed by the doctrine of "universal succession" which was applicable at the time. Those solutions are generally in line with the rules developed by State practice and, to a certain extent only, with those codified by the International Law Commission with respect to the cession of a territory. As a rule, the solutions developed by the Commission to govern issues arising from State succession hardly reflect the practice of States. As a result, the documents in which these solutions are embodied did not get much support from States.