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Turkey's International Responsibility for Internationally Wrongful Acts Committed by the Ottoman Empire

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ABSTRACT

This paper examines the legal consequences of the commission by the Ottoman Empire of internationally wrongful acts, including acts of genocide, against the Armenian population during World War I. Specifically, the present paper examines the following question : can the modern State of Turkey (which was only officially proclaimed in 1923) be held responsible, under international law, for internationally wrongful acts committed by the Ottoman Empire before its disintegration? This paper first briefly examines whether Turkey should be considered, under international law, as the "continuing" State of the Ottoman Empire or whether it should instead be deemed as a "new" State. We will show that Turkey is, in legal terms, "identical" to the Ottoman Empire and is

RÉSUMÉ

Cet article traite de la question des conséquences juridiques découlant de la commission d'actes internationalement illicites par l'Empire ottoman à l'encontre de la population arménienne au cours de la Première Guerre mondiale. En effet, la république de Turquie (qui fut officiellement créée en 1923) peut-elle être tenue responsable en droit international des actes internationalement illicites commis par l'Empire ottoman avant sa désintégration? La première question abordée est celle de savoir si la Turquie doit être considérée en droit international comme l'État continuateur de l'Empire ottoman ou, plutôt, comme un nouvel État. Nous démontrerons que la personnalité juridique de la Turquie est, en droit international, « identique » à celle de l'Empire ottoman.

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therefore "continuing" the international legal personality of the Empire. This paper will then focus on the legal consequences arising from this conclusion of continuity. Our analysis of past case law and State practice shows that both in the context of secession and of cession of territory, the continuing State continues to be held responsible for its own internationally wrongful acts committed before the date of succession. Accordingly, Turkey should be held responsible for all internationally wrongful acts committed by the Ottoman Empire.

Nous allons analyser, par la suite, les conséquences juridiques qui découlent d'une telle conclusion. Notre examen de la pratique des États et de la jurisprudence des tribunaux internationaux et nationaux montre que, tant dans un contexte de sécession que de cession de territoires, l'État continuateur va être tenu responsable pour ses propres actes internationalement illicites ayant été commis avant la date de succession. Dès lors, la Turquie doit être tenue responsable de tous les actes internationalement illicites ayant été commis par l'Empire ottoman.

Key-words: *Armenian genocide, international law, Ottoman Empire, Turkey, State succession, State continuity, State responsibility, internationally wrongful act.*

Mots-clés: *Génocide arménien, droit international public, Empire ottoman, Turquie, succession d'États, continuité d'État, responsabilité internationale, fait internationalement illicite.*

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INTRODUCTION

1. It is now well documented that the Ottoman Empire committed massacres against the Armenian population during and shortly after World War I (the "War"). There is abundant literature discussing whether or not these acts can in fact be considered as acts of "genocide" under international law.[1] While some historians have contested the qualification of these events as genocide,[2] the vast majority of writers believe that genocide has indeed taken place.[3] At any rate,

1. See *inter alia*: Shavarsh TORIGUIAN, *The Armenian Question and International Law*, 2nd ed., La Verne (California), Univ. La Verne Press, 1988; Vahakn N. DADRIAN, "The Armenian Genocide as a Dual Problem of National and International Law," (2009-2010) 4 *U. St. Thomas J.L. & Pub. Pol'y* 60; M. BIBLIOWICKSZ, "The Armenian Genocide: Legacies and Challenges of a Silenced Past," (2004) 16 *Sri Lanka JIL* 27; Joe VERHOEVEN, "The Armenian People and International Law," in Gerard LIBARIDIAN (ed.), *A Crime of Silence, The Armenian Genocide: Permanent Peoples' Tribunal*, London, Zed Books Ltd., 1985; Alfred DE ZAYAS, "The Twentieth Century's First Genocide: International Law, Impunity, the Right to Reparations, and the Ethnic Cleansing Against the Armenians, 1915-16," in Steven Bela VARDY and T. Hunt TOOLEY (eds.), *Ethnic Cleansing in Twentieth Century Europe*, Boulder, Colombia Univ. Press, 2003, p. 97; Aram KUYUMJIAN, "The Armenian Genocide: International Legal and Political Avenues for Turkey's Responsibility," (2011) 41 *R.D.U.S.* 247.

2. Guenter LEWY, *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide*, Salt Lake City, Univ. Utah Press, 2005; Stanford J. SHAW, *History of the Ottoman Empire and Modern Turkey: Vol. 1 & 2*, Cambridge (U.K), Cambridge Univ. Press, 1976.

3. Vahakn N. DADRIAN, *The History of the Armenian Genocide: Ethnic Conflict*, 4th ed., New York, Berghahn Books, 2003; Richard G. HOVANNISIAN (ed.), *The Armenian Genocide Cultural and Ethical Legacies*, New Brunswick (N.J.), Transaction Publishers, 2007; Donald BLOXHAM, *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians*, Oxford, Oxford Univ. Press, 2005; Peter BALAKIAN, *The Burning Tigris: The Armenian Genocide and America's Response*, New York, Harper Perennial, 2004.

these acts were certainly illegal at the time they were committed.[4] These actions must (at the very least) be considered as "internationally wrongful acts" under international law. According to Article 1 of the International Law Commission (I.L.C.)'s *Articles on Responsibility of States for Internationally Wrongful Acts*, the commission of an internationally wrongful act by a State entails its international responsibility.[5] The responsible State must make full reparation for the injury caused by the internationally wrongful act.[6]

2. While there is no doubt that the Ottoman Empire committed internationally wrongful acts against the Armenian population during World War I, a problem arises from the fact that the Ottoman Empire ceased to exist as a State in 1923. Who should then be responsible for these wrongful acts? Can it be the "Republic of Turkey," which was only officially proclaimed on 29 October 1923 (*i.e.* only *after* the wrongful acts were committed)? That is precisely the question that the present paper examines : can the modern State of Turkey be held responsible under international law for internationally wrongful acts (including acts of genocide) which were committed by the Ottoman Empire before its disintegration?

3. This paper is divided into two chapters. The first chapter briefly examines whether Turkey should be considered under international law as the "continuing" State (or "continuator" State) of the Ottoman Empire or whether it should, instead, be categorized as a "new" State. Our position is that Turkey is, in legal terms, "identical" to the Ottoman Empire and is therefore "continuing" the international legal personality of the Empire. Since Turkey is not considered as a new State,

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4. Suffice it to note that during the War, the Allies (United Kingdom, France and Russia) denounced in a joint declaration (dated 24 May 1915) that the Ottoman Government's massacre of Armenian populations constituted "crimes against humanity and civilization for which all the members of the Turkish Government would be held responsible together with its agents implicated in the massacres." (FO/371/2488/51010; cited in Robert CRYER, *Prosecuting International Crimes; Selectivity and the International Criminal Law Regime*, Cambridge, Cambridge University Press, 2005, p. 31). See : Jean-Baptiste RACINE, *Le génocide des Arméniens : origine et permanence du crime contre l'humanité*, Paris, Dalloz-Sirey, 2006.

5. *State responsibility — Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading*, U.N. Doc. A/CN.4/L.602/Rev.1 (26 July 2001).

6. *Id.*, art. 31.

the controversial question of State succession to international responsibility simply does not arise.[7] The second chapter will examine the legal consequences of considering Turkey as the "continuing" State of the Ottoman Empire.

I. TURKEY IS THE CONTINUING STATE OF THE OTTOMAN EMPIRE

4. The decline of the Ottoman Empire took place in the 19th and early 20th centuries and is a case of "partial" succession where the Empire continued to exist despite important losses of territories. The Ottoman Empire's decline was thus marked by a series of "secessions" (where new States were created)[8] and by a number of "cessions" of territories (where territories formally part of the Empire were ceded to other, already existing States).[9] These events eventually led to the official proclamation of the "Republic of Turkey" in 1923. This section examines the question of whether or not the Republic of Turkey that emerged in 1923 should be considered a "new" State under international law.[10]

5. When assessing any question related to State identity, one must examine the characteristics of an entity at two different moments in time: *before* and *after* the events that led

7. On this issue, see: Patrick DUMBERRY, *State Succession to International Responsibility*, Leiden, Martinus Nijhoff, 2007.

8. See, for instance, secessions by Greece (1832), Serbia (1878), Romania (1878), Montenegro (1878), Bulgaria (1908) and Albania (1913). Several new States were also created in the Arabian Peninsula after the War: Hejaz, Idrisi Emirate of Asir, and Yemen.

9. See, for instance, the territories of Bessarabia (ceded to Russia in 1878), Bosnia and Herzegovina (ceded to the Austria-Hungary Empire in 1908), the Island of Crete (ceded to Greece in 1913), Macedonia (ceded to Greece in 1913), and the Island of Cyprus (which was leased to the United Kingdom in 1878, and later became a British Protectorate in 1914). Several other territories were also ceded to the Allies after the War that established protectorates over them: the United Kingdom in Mesopotamia (now Iraq) and Palestine; France in Syria and Lebanon.

10. These questions are further examined in Patrick DUMBERRY, "Is Turkey the 'Continuing' State of the Ottoman Empire under International Law?," (2012) 59 *Netherland International Law Review* 236; Patrick DUMBERRY, "The Consequences of Turkey Being the 'Continuing' State of the Ottoman Empire in Terms of International Responsibility for Internationally Wrongful Acts", in *The Armenian Genocide: From Recognition to Compensation*, Martinus Nijhoff Publ., 2012 (to be published).

to the territorial transformation.[11] When the two entities, examined at two different moments, are considered as being "identical," this means that there is a "continuing" international legal personality.[12] This is, of course, a legal fiction insofar as the State that exists *now* is not necessarily perfectly "identical" to the one that existed *back then*.[13] In fact, the relevant question to be asked is whether two entities have the same international legal personality *despite* substantial changes to its territory, name, and government.[14] There is a presumption in favour of continuity under international law. According to this presumption, a State will continue to exist unless sufficient evidence demonstrates its extinction.[15]

6. There are no "formal" criteria under international law that help to categorically distinguish cases of continuity from those of discontinuity.[16] Some criteria have nevertheless been identified in doctrine to determine concretely whether there is State identity. The first such criterion is territory. A State does not necessarily lose its international legal personality as a result of a change to its territory.[17] By some accounts, between 1878 and 1918 the Ottoman Empire lost some 85% of its territory.[18] But even such a substantial diminution of territory does not in itself affect the legal personality of a State.[19] This is the

11. Wladyslaw CZAPLINSKI, "La continuité, l'identité et la succession d'États — évaluation de cas récents," (1993) 26 *R.B.D.I.* 374.

12. Krystyna MAREK, *Identity and Continuity of States in Public International Law*, 2nd ed., Geneva, Librairie Droz, 1968, p. 6 ("there can obviously be no continuity without identity").

13. Brigitte STERN, "La succession d'États," (1996) 262 *R.C.A.D.I.* 40.

14. *Id.*

15. James CRAWFORD, "The Criteria for Statehood in International Law," (1976) 48 *British Yearbook I.L.* 93, 139; W. CZAPLINSKI, *supra*, note 11, 375, 379.

16. B. STERN, *supra*, note 13, 52; W. CZAPLINSKI, *supra*, note 11, 379; K. MAREK, *supra*, note 12, p. 7 and 9.

17. Josef L. KUNZ, "Identity of States Under International Law," (1955) 49 *A.J.I.L.* 68, 72; James CRAWFORD, *The Creation of States in International Law*, 2nd ed., Oxford, Clarendon Press, 2006, p. 673; Wilfred FIEDLER, "Continuity", in Rudolf BERNHARDT (ed.), *Encyclopaedia of Public International Law*, Vol. 1, North Holland, Max Planck Institute, 1984, p. 807.

18. Taner AKCAM, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, New York, Metropolitan Books, 2006, p. 11.

19. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, 1996 *ICJ Rep.* 762-763, Judge Kreca, Dissenting Opinion, at para. 87; J. L. KUNZ, *supra*, note 17, 72.

conclusion reached in 1925 by sole arbitrator Borel in the *Ottoman Public Debt* case which recognised that "in international law, the Turkish Republic was deemed to continue the international personality of the former Turkish Empire" despite important territorial losses.[20]

7. Similarly, a change of government does not, in itself, amount to the creation of a new State.[21] The identity of a State is not affected by a change of government even when it arises as a result of a revolution or a *coup d'État*.[22] It is not disputed that Turkey went through fundamental changes in the 1920s. The changes were not limited to the replacement of the Monarchy by a Republic—far-reaching changes also affected the society more globally. Despite these changes, it cannot be concluded that Turkey is a *new* State under international law.[23]

8. It is also clear that changes in population do not affect the identity of a State.[24] By some accounts, the Ottoman Empire lost some 75% of its population between 1878 and 1918.[25] While this is no doubt a significant loss of population, it is not in itself proof of discontinuity. Similarly, it simply cannot be automatically deduced from the fact that in 1923 the country's name was changed from the "Ottoman Empire" to the "Republic of Turkey," that the latter is a *new* State.[26] In fact, the two terms had long been used interchangeably in treaties in the 19th century.[27]

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20. *Affaire de la dette publique ottomane*, 18 April 1925, in 1948, Vol. 1 *U.N. R.I.A.A.* 529, 573.

21. K. MAREK, *supra*, note 12, p. 24; B. STERN, *supra*, note 13, 71; J. CRAWFORD, *supra*, note 17, p. 678.

22. J. L. KUNZ, *supra*, note 17, 73.

23. K. MAREK, *supra*, note 12, p. 40. *Contra*: Enrico ZAMUNER, "Le rapport entre l'Empire ottoman et République turque face au droit international," (2004) 6 *J. Hist. Int'l L.* 209, 230 and 231.

24. J. L. KUNZ, *supra*, note 17, 71; W. CZAPLINSKI, *supra*, note 11, 378.

25. T. AKCAM, *supra*, note 18, p. 11.

26. B. STERN, *supra*, note 13, 74; W. CZAPLINSKI, *supra*, note 11, 377.

27. Emre OKTEM, "Turkey: Successor or Continuing State of the Ottoman Empire?," (2011) 24 *Leiden Journal of International Law* 561, 577. See, *inter alia*, the *Treaty of Sèvres* (1920), which although signed by the Ottoman Empire in 1920, nevertheless contains a reference to "Turkey" (the preamble mentions that "on the request of the Imperial Ottoman Government an Armistice was granted to Turkey on October 30, 1918").

9. There is one important criterion that has been used by some writers to decide issues of identity in the context of considerable losses of territory. Indeed, writers have looked at whether what is left of a State's territory following a significant reduction in its size is the "essential portion" (the core or the nucleus) of the State that existed before its disintegration.[28] For others, there is also identity of State when the dismembered State is still populated by its "core" ethnic/national group, which was the largest, the most dominant and the most powerful in the "old" State.[29]

10. It can be argued that after centuries of territorial expansion of the Empire, which was then followed by slow disintegration, modern Turkey was reduced in 1923 to its nucleus, its "essential" part, *i.e.* the "historical homeland" of the Turkish nation.[30] Thus, the dominant ethnic group in the Ottoman Government was the Turks and the official language of the Empire was indeed Turkish.[31] The territories that the Empire gradually lost in the 20th century were essentially non-Turkish (they were populated mainly by Arabs, Jews, and Kurds). The criterion of the core or the nucleus of the State strongly supports the proposition that there is an identity of State between the Ottoman Empire and the Republic of Turkey.[32]

11. Any assessment of continuity will have to be made by other States.[33] Recognition will, therefore, ultimately be the decisive factor to determine issues of identity in cases where substantial territorial changes occurred and where a claim of continuity is controversial or has been contested by other States.[34] This is illustrated by recent State practice of the

28. B. STERN, *supra*, note 13, 80.

29. Giorgio CANSACCHI, "Identité et continuité des sujets de droit international," (1970) 130(I) *R.C.A.D.I.* 31.

30. E. ZAMUNER, *supra*, note 23, 210; E. OKTEM, *supra*, note 27, 575 and 576; A. KUYUMJIAN, *supra*, note 1, 283.

31. E. OKTEM, *supra*, note 27, 577.

32. G. CANSACCHI, *supra*, note 29, 32.

33. W. CZAPLINSKI, *supra*, note 11, 379.

34. B. STERN, *supra*, note 13, 60, 66, 67 and 85.

"Federal Republic of Yugoslavia" (claiming to be the "continuator" of the former S.F.R.Y.) and that of Russia (claiming to be the "continuator" of the U.S.S.R.).

12. Post-1923 Turkey is a prime illustration of a situation involving a substantial modification of territory coupled with a controversial claim of discontinuity. Turkey claimed to be a new State in 1923. One of the many reasons explaining why Turkey took this position has to do with the fate of the Ottoman Empire's financial obligations. Turkey argued that because it was a new State, it should not be held responsible for the entire debt of the defunct Ottoman Empire; but rather, only for a portion of it, just like all the other new States. This position was clearly taken during negotiations at the Lausanne Conference leading to the signing of the *Treaty of Lausanne*.[35] Other States rejected Turkey's claim of discontinuity; it was never recognized as a "new" State by third parties.[36] One of the reasons why other States rejected Turkey's claim of discontinuity was to ensure that its responsibility for the Ottoman Empire's financial obligations would remain intact.[37]

13. Other States' refusal to recognise Turkey's claim of discontinuity ultimately prevented it from having any effectiveness. Thus, several provisions of the *Lausanne Treaty* show that the Turkish Republic was considered at the time as the continuator of the Ottoman Empire.[38] The same conclusion was also reached by the arbitral tribunal in the *Ottoman Public Debt* case (1925)[39] and by the District Court of Amsterdam in

35. Declaration by Hassan BEY, *Recueil des Actes de la Conférence de Lausanne*, Série I, tome 3, Paris, 1923, p. 130 (quoted in E. ZAMUNER, *supra*, note 23, 227) : "Le gouvernement d'Angora prendra à sa charge une part équitable de la dette au même titre que les autres États détachés de l'ancien Empire ottoman, étant donné qu'il n'est que l'un des États successeurs de cet Empire."

36. E. OKTEM, *supra*, note 27, 577; G. CANSACCHI, *supra*, note 29, 32; Manlio UDINA, "La succession des États quant aux obligations internationales autres que les dettes publiques," (1933) 44 *R.C.A.D.I.* 665, 688.

37. Vladimir-Djuro DEGAN, "Création et disparition de l'État (à la lumière du démembrement de trois fédérations multiethniques en Europe)," (1999) 279 *R.C.A.D.I.* 195, 304; G. CANSACCHI, *supra*, note 29, 35; E. ZAMUNER, *supra*, note 23, 225.

38. E. ZAMUNER, *supra*, note 23, 224-227; G. CANSACCHI, *supra*, note 29, 32. See : *inter alia* : articles 1, 15, 16, 17, 18, 20, 30, 46, 58, 60, 65, 99, 240 and 241.

39. *Affaire de la dette publique ottomane*, *supra*, note 20.

the 1925 case of *Roselius*.[40] The *Lighthouse Arbitration* case (further discussed below) decided in 1956 by the French-Greek Arbitral Tribunal also explicitly recognised that Turkey was the continuing State of the Ottoman Empire.[41] The overwhelming majority of scholars also believe that despite Turkey's considerable losses of territory and population, as well as radical changes to its government (and its society), it continues the international personality of the Ottoman Empire.[42]

II. Rules of International Law on International Responsibility for Continuing States

14. Essentially, despite important territorial changes, Turkey should nevertheless be considered as the "continuing" State of the Ottoman Empire. This chapter examines the rules of international law in respect to rights and obligations in such situations of continuity (section A). Specifically, we will

40. *Roselius and Company of Bremen in Germany (plaintiff)* v. *(1) Dr. Ch. F. Karsten, Advocate of Huizen in Holland (defendant); (2) The Turkish Republic at Angora (intervener)*, District Court of Amsterdam, 1925, in (1925-26) 26 *Annual Digest* 35 : "Although Turkey was no longer an Empire but a Republic and its size had been considerably curtailed after the Great War by loss of territory, yet it could not be considered that the Republic was not the successor of the Empire. The remaining part, which was the main portion of the country, was the continuation of the State which, under another form of government and larger in size, had formed Turkey, and it had retained all its rights and duties except such as were attached to the lost territories."

41. *Lighthouse Arbitration* case, Award of 24/27 July 1956, in (1956) 23 *I.L.R.* 81, 91, 93.

42. E. OKTEM, *supra*, note 27, 575; Antoine SOTTILE, "Eugène Borel : son rôle dans la jurisprudence internationale, sa sentence arbitrale sur la répartition de la dette ottomane," (1926) 4 *Revue de droit international, de sciences diplomatiques et politiques* 88, 106; J. L KUNZ, *supra*, note 17, 68, 72; G. CANSACCHI, *supra*, note 29, 29, 32; W. CZAPLINSKI, *supra*, note 11, 376; Pekka T. TALARI, "State Succession in Respect to Debts : The Effect of State Succession in the 1990's on the Rule of Law," (1996) 7 *Finnish Yearbook of International Law* 134, 150; A. KUYUMJIAN, *supra*, note 1, 283; V. N. DADRIAN, *supra*, note 1, 75; M. BIBLIOWICKSZ, *supra*, note 1, 41; S. TORIGUIAN, *supra*, note 1, p. 109-112; J. VERHOEVEN, *supra*, note 1, p. 206 and 207; Ineta ZIEMELE, "Is the Distinction Between State Continuity and State Succession Reality or Fiction? The Russian Federation, the Federal Republic of Yugoslavia and Germany," (2001) 1 *Baltic Yearbook of International Law* 191, 215; Manlio UDINA, *L'estinzione dell'Impero austro-ungarico nel diritto internazionale,* 2nd ed., Padova, CEDAM, 1933, p. 12. *Contra* : E. ZAMUNER, *supra*, note 23, 230 and 231.

enquire what happens to international wrongful acts committed *before* any territorial changes. First, we examine case law and State practice in the context of *cession of territories* (section B). This is relevant because as mentioned above, after the War, several territories that used to belong to the Ottoman Empire were ceded to members of the Allies: French mandate for Syria and Lebanon, and British mandate over Palestine (and Transjordan) and Mesopotamia (Iraq). Second, we will examine case law and State practice in the context of secession (section C). Again, this is pertinent since several new States in the Arabian Peninsula (Hejaz, Idrisi Emirate of Asir, and Yemen) were created after the War in territories that previously belonged to the Empire. Finally, we will apply these findings of case law and State practice to the case of Turkey (section D).

A. CONTINUITY OF RIGHTS AND OBLIGATIONS

15. The logical consequence of an identity of State is the *continuity of rights and obligations* between the two entities. This principle is well explained by Kelsen:

> Whether a State retains its identity in spite of certain changes in the content and sphere of validity of the national legal order, is of importance in international law in the first place with respect to the question whether the international obligations, responsibilities, and rights of a State remain the same, in spite of these changes. If the State remains the same, no change in its obligations, responsibilities, and rights takes place.[43]

16. This is also the position of Marek, who defines the legal identity of a State as "the identity of the sum total of its rights and obligations under both customary and conventional international law."[44] Authors have rightly contested Marek's suggestion that these are in fact the "same" rights

43. Hans KELSEN, *Principles of International Law*, 2nd ed. (rev. and ed. by Robert W. TUCKER), New York, Holt, Rinehart and Winston Inc., 1966, p. 383. See also: Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, Oxford University Press, 2003, p. 80 ("if there is continuity, the legal personality and the particular rights and duties of the state remain unaltered").

44. K. MAREK, *supra*, note 12, p. 5.

and obligations.[45] Similarly, one can also criticize Marek's view based on the fact that if there is an identity of rights and obligations, it should be concluded that there is an identity of State.[46] A better view is that "the continued existence of all legal relationships is a consequence of a State's identity, not *vice versa*".[47] In other words, it is because there is an identity of State that rights and obligations are unchanged, and not the other way around.

17. What is clear is the undeniable fact that if one concludes that entity A (at one point in time) is, in legal terms, identical to entity B (at another point in time), it must logically follow that the rights and obligations which were those of entity A will remain those of entity B. Thus, because entities A and B have the same international personality, it follows that there is a continuity of rights and obligations.[48]

18. The next two sections examine whether the same principle applies to obligations arising from international wrongful acts that were committed *before* any territorial changes took place. In other words, does the continuing State also remain responsible for such wrongful acts?

B. CASE LAW AND STATE PRACTICE IN THE CONTEXT OF CESSION OF TERRITORY

19. The event affecting the territorial integrity of the predecessor State may sometimes result not in the creation of a *new* State (like in situations of secession) but rather in the *enlargement* of the territory of an *existing* State. This is the case of a "cession" (or transfer) of territory from one existing State to another.[49] This type of territorial transformation is

45. J. CRAWFORD, *supra*, note 17, p. 670.

46. *Id.*

47. Lucius C. CAFLISCH, "The Law of State Succession Theoretical Observations," (1963) X *Netherlands I.L.R.* 337, 340. See also : W. CZAPLINSKI, *supra*, note 11, 379.

48. B. STERN, *supra*, note 13, 41 ("S'il y a continuation — et donc fiction d'identité — les conséquences juridiques non controversées sont le *maintien* des droits et obligations de l'État 'initial'") (emphasis in the original).

49. The term "cession" is confined to cases where the territorial change is made pursuant to a treaty to which the predecessor State is a party, while the expression "transfer" applies only to situations where there is no agreement between the predecessor State and the successor State.

somewhat different compared to other mechanisms of State succession, insofar as it results neither in the extinction of a State nor in the creation of a new State.[50] In the context of cession of territory, case law and State practice show that the State which continues to exist (the continuing State) after the cession of part of its territory to another State (the successor State), will continue to be held responsible for *its own* internationally wrongful acts committed before the date of succession (*i.e.* the date when the cession of territory took place).[51] This principle is also supported in doctrine.[52] We will now examine case law of municipal courts and mixed arbitral tribunals (section a) and focus specifically on one important case involving Turkey: the *Lighthouse Arbitration* case (section b).

a) Municipal Courts and Mixed Arbitral Tribunals

20. Several municipal courts of the successor State to which the ceded territory was now attached applied the principle of continuity of responsibility.[53] This is, for instance, the position adopted by Romanian courts in the context of the transfer of the territory of Bessarabia from Soviet Russia to

50. There is one main difference between cases of "cession" of territory and cases of "incorporation." Cases of cession of territory only deal with *part of a territory* of a State which passes to another State, while cases of incorporation involve the *whole territory* of the State which is integrated into another State. Another difference is that in cases of cession of territory, the predecessor State is not extinguished as a result of the loss of part of its territory.

51. Case law and State practice is examined in detail in P. DUMBERRY, *supra*, note 7, p. 124.

52. Robert JENNING and Arthur WATTS, *Oppenheim's International Law*, Vol. I (Peace: Introduction and Part 1), 9th ed., London, Longman, 1996, p. 227; I. BROWNLIE, *supra*, note 43, p. 632; Philippe DRAKIDIS, "Succession d'États et enrichissements sans cause des biens publics du Dodécanèse," (1973) 24 *R.H.D.I.* 72.

53. In fact, in my study (P. DUMBERRY, *supra*, note 7, p. 133 and 134), I have found only one significant case decided by a municipal court where the principle that the continuing State should remain responsible for the commission of *its own* internationally wrongful acts before the date of succession was *not applied*: *Personal Injuries (Upper Silesia)* case, Court of Appeal of Cologne, Federal Republic of Germany, 10 December 1951, in (1952) 5 *NJW* 1300, in (1951) 18 *I.L.R.* 67, case No. 29.

Romania in April 1918.[54] These courts all concluded that this transfer did not result in a succession by Romania to the obligations of Soviet Russia regarding the territory of Bessarabia. Thus, it was held that the continuing State (in the present case, Russia) should remain responsible for the internationally wrongful acts it committed in the territory of Bessarabia before the transfer of territory. The same solution was also adopted by French courts in the context of the cession of the territory of Alsace-Lorraine from Germany to France in 1919,[55] wherein Germany remained responsible for any wrongful acts which took place before the cession of territory. The principle was also adopted by one municipal court of a continuing State (from which the ceded territory was detached). This is the case of Hungarian courts in the context of the cession of Transylvania from Hungary to Romania in 1920.[56]

21. The application of the principle that the continuing State should remain, in theory, responsible for *its own* internationally wrongful acts committed before the date of succession has not been limited only to decisions of municipal courts. It was also affirmed by the French-German Mixed Arbitral Tribunal in the context of the cession of Alsace-Lorraine to France after the War.[57] Finally, the same principle was also applied in State practice. Under the 1947 *Paris Peace Treaty* signed by, *inter alia*, Greece and Italy, the Dodecanesian

54. *Mordcovici* v. *P.T.T.*, Romania, Court of Cassation, 29 October 1929, in (1929) LXVI, Part 2 *Buletinul deciziunilor Inaltei Curti de Casatie* 150, in (1929-30) *Annual Digest* 62, case No. 38; *Sechter* v. *Ministry of the Interior*, Romania, Court of Cassation, 1929, in (1930) Vol. XVII, No. 4 *Jurisprudenta Românâ a Inaltei Curti de Casatie si Justitie* 58, in (1929-30) *Annual Digest* 61, case No. 37; *Vozneac* v. *Autonomous Administration of Posts and Telegraphs*, Romania, Court of Cassation, 22 June 1931, in 1932 *Jurisprudenta Românâ a Inaltei Curti de Casatie si Justitie* 36-38, in (1931-32) *Annual Digest* 60, case No. 30.

55. *Alsace-Lorraine Railway* v. *Ducreux es-qualité*, French Court of Cassation, Civil Chamber, 30 March 1927, in (1928) 55 *J.D.I.* 1034; 1928, Part I, *Sirey* 300; (1927-28) *Annual Digest* 85; *Kern* v. *Chemin de fer d'Alsace-Lorraine*, Cour de Colmar (Première Ch. civile), 16 May 1927, in (1929) 56 *J.D.I.* 446.

56. *Kalmar* v. *Hungarian Treasury*, Supreme Court of Hungary, 24 March 1929, case No. P.VI.5473/1928, in Maganjog Tara, X, No. 75, in (1929-30) *Annual Digest* 61, case No. 36.

57. *Levy* v. *German State*, French-German Mixed Arbitral Tribunal, Award of 10 July 1924, in Vol. IV *Recueil des décisions des tribunaux arbitraux mixtes* 726, in (1923-24) *Annual Digest* 57, case No. 27.

Islands (which had been under Ottoman Empire sovereignty until 1912) were ceded to Greece by Italy.[58] The Treaty provided for Italy (the continuing State) to compensate the victims of expropriations committed during the period of Italian occupation and sovereignty over the Dodecanesian Islands.[59]

b) *Lighthouse Arbitration* Case

22. The *Lighthouse Arbitration* case was decided in 1956 by the French-Greek Arbitral Tribunal, which had been set up under the rules of the Permanent Court of Arbitration in The Hague.[60] It involved concession rights obtained in 1860 by a French company from the Ottoman Empire for maintaining lighthouses in Crete, a Greek territory then under Ottoman sovereignty.[61] After Greece gained sovereignty over the territory in 1913, the French owner of the concession (*la Société Collas et Michel*) brought several claims (contractual and delictual) against Greece and decided to expropriate the

58. *Paris Peace Treaty*, signed on 10 February 1947 at Paris, entered into force on 15 September 1947; see art. 14, in 49 *U.N.T.S.* 126; (1948) 50 *U.K.T.S.* (Cmd. 7481). The Dodecanesian Islands were under Ottoman Empire sovereignty until 1912, when they became under Italian military occupation (from 1912 to 1924). In 1924, the Islands were ceded to Italy. In 1947, the Islands were ceded to Greece.

59. *Id.*, art. 38.

60. *Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d'arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce*, (1956) 12 *U.N. R.I.A.A.* 155. The Award (in French) can also be found in (1956) 9 *R.H.D.I.* 176. This case is better known as the *Lighthouse Arbitration* case, *supra*, note 41. An unofficial English version of the Award is reported in (1956) 23 *I.L.R.* 81. The most complete review of the case can be found in : Charles ROUSSEAU, "L'affaire franco-hellénique des phares et la sentence arbitrale du 24 juillet 1956," (1959) 63 *R.G.D.I.P.* 248.

61. The Greek-speaking region of Crete was under Ottoman occupation since the 17th century. A series of revolts against the Turks in the 19th century reached its climax in the insurrection of 1896-1897 that led to war (in 1897) between Greece and the Ottoman Empire. The European powers intervened in the war, forcing the Ottoman Empire to evacuate Crete in 1898. An autonomous Cretan State was formed under nominal Ottoman rule but was in fact governed by a high commission of the occupying powers (England, France, Russia and Italy). Crete was in favour of uniting with Greece but the occupying powers rejected its demand. The Young Turks revolution of 1908, however, enabled the Cretans to proclaim their union with Greece and in 1909 foreign occupation troops were withdrawn. In 1913, as a result of the Balkan Wars, Crete was officially incorporated into Greece by article 4 of the *Treaty of London*, 17-30 May 1913; G. Fr. DE MARTENS, *Nouveau recueil général de traités*, Gr. VII, t. 8, p. 16.

concession during the First World War. France had no less than 27 claims and Greece 10 counter-claims. We will briefly examine two of the claims submitted by France : one for acts allegedly entirely committed by the Ottoman Empire (Claim No. 12-a); the other for acts for which the Cretan autonomous authorities were allegedly partially responsible along with the Ottoman Empire (Claim No. 11).

23. In Claim No. 12-a, France was seeking damages against Greece (as successor State) for acts committed by the authorities of the Ottoman Empire on the Island of Crete. The alleged internationally wrongful act was the unauthorised removal by the Ottoman Empire of a buoy belonging to the French company. The Arbitral Tribunal ruled that the Ottoman authorities had not committed any internationally wrongful act and that the acts were legitimate for reasons of security.

24. In an *obiter dictum*, the Arbitral Tribunal nevertheless indicated that even if the Ottoman Empire had committed an internationally wrongful act, Greece could not be held liable for it. It is Turkey, the continuing State of the Ottoman Empire, which would be liable for its "own" acts committed before the loss of a substantial portion of its territory. For the Arbitral Tribunal, the "critical date" to determine which State should be responsible for which internationally wrongful acts was the date at which the Peace Treaty established that the territory lost by the Ottoman Empire would be transferred to the different successor States.[62] The Arbitral Tribunal added that this solution was not only dictated by the terms of the *Lausanne Peace Treaty* but also that it was in conformity with rules of State succession :

> One can only admit that within the scope of this conventional sharing of responsibilities according to time, some other autonomous and complementary principle, borrowed from the general doctrines of State succession, may be invoked to upset

62. *Lighthouse Arbitration* case, *supra*, note 41, 108 : "The critical date evidently serves as the termination of Turkish responsibility and the commencement of Greek responsibility in the sense that everything which happened before the critical date and which can have given rise to charges against the concessionary firm continues to involve the responsibility of the Turkish State."

> the juridical effects of the said sharing of responsibilities according to the Protocol.[63]

25. Some in doctrine have interpreted the reasoning of the Tribunal as an expression of a principle according to which the successor State should not take over the obligations arising from internationally wrongful acts committed by the predecessor State.[64] In fact, the Arbitral Tribunal's *obiter dictum* supports *another* rule : in cases of cession of territory, the continuing State should remain responsible for *its own* internationally wrongful acts committed before the date of succession.[65]

26. In Claim No. 11, France was seeking compensation against Greece (as the successor State) relating to expenditures incurred by the French owner of the concession in the course of the construction of two new lighthouses from 1903 to 1908.[66] The Arbitral Tribunal found that the responsibility for the damage suffered by the French concessionaire was divided between the French company itself and both the Cretan authorities and the Ottoman Empire. It decided that Greece should not be held accountable for the commission of these internationally wrongful acts. The reasoning of the Arbitral Tribunal is as follows :

> [T]he Tribunal sees no real reason to saddle, after the event, Greece, who had absolutely nothing to do with the dealings between those parties, with this responsibility, in whole or in part. Not even the part of the general responsibility for the events of 1903 to 1908 to be imputed to the autonomous State of Crete can be regarded as having devolved upon Greece. Such a transmission of responsibility is not justified in the present case either from the particular point of view of the final succession of Greece to the rights and obligations of

63. *Id.*

64. C. ROUSSEAU, *supra*, note 60, 274.

65. Hazem M. ATLAM, *Succession d'États et continuité en matière de responsabilité internationale*, doctoral thesis, Université de droit, d'économie et des sciences d'Aix-Marseille (France), 1986, p. 242.

66. *Lighthouse Arbitration* case, *supra*, note 41, 81.

> the concession in 1923/1924—if only for the reason that the said events took place outside the scope of the concession—or from the more general point of view of its succession in 1913 to the territorial sovereignty over Crete.[67]

27. The Arbitral Tribunal decided that Greece (as the successor State) should *not* be held accountable for the portion of responsibility related to acts committed *directly by the Ottoman Empire*. It also came to the same conclusion with respect to the portion of these acts for which the *autonomous Government of Crete* was responsible. This claim illustrates that the continuing State (Turkey) should continue its previous responsibility for internationally wrongful acts committed before the transformation affecting its territory.

C. CASE LAW AND STATE PRACTICE IN THE CONTEXT OF SECESSION

28. The term "secession" defines situations where a *new State* emerges from the break-up of an already existing State which nevertheless continues its existence after the loss of part of its territory. Case law and State practice show that in the context of secession the continuing State remains responsible for any international wrongful acts committed before changes affecting its territory.[68] This is also the position that has been adopted by scholars.[69]

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67. *Id.*, 89.

68. See the analysis in P. DUMBERRY, *supra*, note 7, p. 142.

69. B. STERN, *supra*, note 13, 335-336 ("[e]n vertu des principes très clairs gouvernant l'imputation de l'acte illicite à un État [...] on peut affirmer que l'État continuateur continue bien entendu à être responsable des actes qu'il a commis, même s'il subit certaines transformations"); Wladyslaw CZAPLINSKI, "State Succession and State Responsibility," (1990) 28 *Canadian Y.B.I.L.* 339, 357; Jean-Philippe MONNIER, "La succession d'États en matière de responsabilité internationale," (1962) 8 *A.F.D.I.* 65, 67; K. MAREK, *supra*, note 12, p. 11; Michael John VOLKOVITSCH, "Righting Wrongs : Toward a New Theory of State Succession to Responsibility for International Delicts," (1992) 92 *Colum. L. Rev.* 2162, 2200; Miriam PETERSCHMITT, *La succession d'États et la responsabilité internationale pour fait illicite*, mémoire de DES, Université de Genève/Institut universitaire de hautes études internationales (Switzerland), 2001, p. 54; H. M. ATLAM, *supra*, note 65, p. 258; R. JENNING and A. WATTS, *supra*, note 52, p. 224.

29. For instance, this is the situation which prevailed in the context of the break-up of the Austria-Hungary Dual Monarchy after World War I. Some consider this disintegration as an example of the dissolution of a State with the emergence of five new States (Poland, Czechoslovakia, Yugoslavia, Austria, and Hungary).[70] The prevailing view, however, has been to consider it as a case of a series of secessions by Poland, Czechoslovakia and Yugoslavia (which all became new States); and both Austria and Hungary being considered as the continuing States of the Monarchy. This is indeed the position that was adopted by the "Allied and Associated Powers" after the War.[71] The Allied insisted on both States being considered as continuing States precisely to ensure that they would be held responsible for internationally wrongful acts committed by the Dual Monarchy during the War.[72] On the contrary, Austria took the position that it was a *new* State in 1918 precisely with the view to avoid assuming any obligations arising out of the War.[73]

30. The *Peace Treaty of Saint-Germain* (entered into by the Allied Powers and Austria) clearly considers the break-up of Austria-Hungary as a case of secession with Austria as the continuing State. The Treaty contains a provision indicating

70. This is the position of the majority of authors in doctrine. See: Oskar LEHNER, "The Identity of Austria 1918/19 as a Problem of State Succession," (1992) 44 *Ö.Z.ö.R.V.* 63, 81.

71. See the discussion in K. MAREK, *supra*, note 12, p. 220.

72. Jan Hendrick Willem VERZIJL, *International Law in Historical Perspective*, t. VII (*State Succession*), Leiden, Martinus Nijhoff Publ., 1974, p. 126.

73. K. MAREK, *supra*, note 12, p. 218 and 219. This claim of non-continuity was approved by the Austrian Constitutional Court in several cases dealing with issues of State succession: *Military Pensions (Austria)* case, Austrian Constitutional Court, 7 May 1919, case No. 126, in (1919) Vol. I, No. 9 *Sammlung der Erkenntniss des österreichischen Verfassungsgerichtshofes* 17, in (1919-1922) *Annual Digest* 66. See also: Case No. 253-254, Austrian Constitutional Court, 20 October 1919, in (1919) Vol. I, No. 18-19 *Sammlung* (...) 36-37, referred to in (1919-1922) *Annual Digest* 67; *Austrian Empire (Succession)* case, Austrian Constitutional Court, 11 March 1919, case No. 18, in (1919) Vol. I, No. 2 *Sammlung* (...) 5, in (1919-1922) *Annual Digest* 67; *Case Relating to the Revalorization of Annuity Awarded against Austrian Railways before World War I (1923)*, Austria, Supreme Court, in (1923) Vol. 5, No. 271 *Entsheidungen des Obersten Gerichtshofs in rechtssachen* 666, in (1923-24) *Annual Digest*, case No. 34.

Austria's responsibility for the War.[74] Similar provisions can be found in separate peace treaties entered into by the United States with both Austria and Hungary in 1921.[75] In *Administrative Decision No. 1*, the Tripartite Claims Commission held that compensation for damage suffered by U.S. nationals during the War would be borne by Austria in the percentage of 63.6% and by Hungary for 36.4%.[76] It also concluded that the other new States (*i.e.* Poland, Czechoslovakia and Yugoslavia) which had seceded from the Monarchy should bear no responsibility for such damage : "All of the Successor States other than Austria and Hungary are classed as 'Allied or Associated Powers' and under the Treaties it is entirely clear that none of them is held liable for any damage suffered by American nationals resulting from acts of the Austro-Hungarian Government or its agents during either the period of American neutrality or American belligerency."[77]

31. In the context of the break-up of the Austria-Hungary Dual Monarchy, many other municipal courts have adopted the principle that the continuing State remains responsible for any international wrongful acts committed before changes affecting its territory. This is, for instance, the position taken

74. *Treaty of Peace Between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, Saint-Germain-en-Laye, 10 September 1919, entered into force on 16 July 1920, see at article 177, in (1919) No. 11 *U.K.T.S* (Cmd. 400). Article 177 reads as follows : "The Allied and Associated Governments affirm and Austria accepts the responsibility of Austria and her Allies for causing the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Austria-Hungary and her Allies."

75. *Treaty Between the United States and Austria, signed on August 24, 1921, to Establish Securely Friendly Relations Between the Two Nations*, Article 1, in (1922) 16 *A.J.I.L.*, Suppl. 13-16; *Treaty Establishing Friendly Relations Between the United States of America and Hungary*, signed in Budapest on 29 August 1921, in No. 660 *U.S.T.S*; in (1922) 16 *A.J.I.L.*, Suppl. 13-16.

76. *Administrative Decision No. 1*, 25 May 1927, Tripartite Claims Commission, Vol. VI *U.N. R.I.A.A*, 203, 207, 210, The United States ratified a treaty on 26 November 1924 (in Vol. 48 *L.N.T.S.* 70; Vol. VI *U.N. R.I.A.A.* 199) with Hungary and Austria dealing with the "determination of the amounts to be paid" by these two States as a result of the previous treaties it had entered into with them in 1921.

77. *Id.*, 210.

by both Polish courts[78] and German courts[79] in the context of the secession of Poland (1918) from the Monarchy.

32. The review of State practice also overwhelmingly supports the principle that whenever a State continues to exist after the secession of part of its territory, it should remain responsible for the commission of its own internationally wrongful acts.[80]

33. One example is the break-up of the U.S.S.R., where the former Republics of the U.S.S.R. (with the exception of the three Baltic States and Georgia) agreed that Russia would be considered as the "continuator" of the international legal personality of the U.S.S.R. in international organisations and in particular, at the United Nations Security Council.[81] Other States in the international community largely accepted this decision.[82] The affirmation that Russia is the "continuator"

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78. *Niemiec and Niemiec* v. *Bialobrodziec and Polish State Treasury*, decided by the Supreme Court of Poland, Third Division, 20 February 1923, O.S.P. II, No. 201, in (1923-24) 2 *Annual Digest* 64, case No. 33; *Olpinski* v. *Polish Treasury (Railway Division)*, Supreme Court of Poland, Third Division, 16 April 1921, in No. 14 *O.S.P.* I., in (1919-1922) *Annual Digest* 63, case No. 36; *Dzierzbicki* v. *District Electric Association of Czestochowa*, Supreme Court of Poland, First Division, 21 December 1933, in 1934 *O.S.P.*, No. 288, in (1933-34) *Annual Digest* 89, case No. 38.

79. *Baron A.* v. *Prussian Treasury*, Germany, Reichsgericht in Civil Matters, 19 December 1923, in Vol. 107 *E.R.Z.* 382, in (1923-24) 2 *Annual Digest* 60, case No. 30.

80. I have found only one *significant* example of State practice where the principle that the continuing State should remain responsible for its own internationally wrongful acts committed before the date of succession was *not* applied; see: P. DUMBERRY, *supra*, note 7, p. 161-168. This example arises in the context of the secession of Belgium from the Kingdom of the Netherlands (1830).

81. *Declaration of Alma Ata*, 21 December 1991, U.N. Doc. A/46/60, 30 December 1991, in (1992) 31 *I.L.M.* 148. See also the *Decision by the Council of Heads of State of the Commonwealth of Independent States*, 21 December 1991, in (1992) 31 *I.L.M.* 151, and Letter of Russia's President Mr. Yeltsin to the U.N. Secretary General, 24 December 1991, in (1992) 31 *I.L.M.* 138 ("the membership of the USSR in the United Nations, including the Security Council [...] is being *continued* by the Russian Federation (RSFSR), with the support of the countries of the CIS"). On this question, see: Yehuda Z. BLUM, "Russia Takes over the Soviet Union's Seat at the United Nations," (1992) 3 *E.J.I.L.* 354.

82. See, for instance, the position of the European Union examined by Pieter Jan KUYPER, "The Community and State Succession in Respect of Treaties," in D. CURTIN and T. HEUKELS (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Vol. II, Dordrecht, Martinus Nijhoff Publ., 1994, p. 619, at p. 633-635. On the position of the United States Government, see: Edwin D. WILLIAMSON and John E. OSBORN, "A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Break-Up of the U.S.S.R. and Yugoslavia,"

State of the U.S.S.R. is clearly based on a legal fiction.[83] Thus, the U.S.S.R. did in fact cease to exist as a result of both the *Declaration of Alma Ata* and the *Minsk Agreement*.[84] Logically, Russia could not continue the existence of a State which had ceased to exist : there is no "resurrection" of States in international law.[85] From a logical point of view, the break-up of the U.S.S.R. should be regarded as a case of State dissolution and Russia as a *new* State.[86] However "illogical" it may seem, the fact of the matter is that all States concerned have recognised Russia's claim to be the continuing State of the U.S.S.R. This is ultimately the solution that prevailed as Russia took over U.S.S.R.'s seat at the UN Security Council. The next paragraphs briefly examine two relevant examples of State practice in the context of the break-up of the U.S.S.R.

34. During the Second World War, German troops seized numerous works of art in each of the occupied territories and brought them to Germany. The pillage, as well as the destruction, was particularly important in the territory of

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(1993) 33 *Virginia J. Int'l L.* 261, 264; Lucinda LOVE, "International Agreement Obligations After the Soviet Union's Break-Up : Current United States Practice and Its Consistency with International Law," (1993) 26 *Vanderbilt J. Transnat'l L.* 373. State practice is analysed in Konrad G. BÜHLER, "State Succession, Identity/Continuity and Membership in the United Nations," in Pierre Michel EISEMANN and Martti KOSKENNIEMI (dir.), *La succession d'États : la codification à l'épreuve des faits / State Succession : Codification Tested Against the Facts*, The Hague, Hague Academy of International Law, Martinus Nijhoff Publ., 2000, p. 187, at p. 258-263.

83. Pierre Michel EISEMANN, "Rapport du directeur de la section de langue française du Centre," in P. M. EISEMANN and M. KOSKENNIEMI, *id.*, p. 40; B. STERN, *supra*, note 13, 44.

84. The Preamble to the *Minsk Agreement (The Agreement Establishing the Commonwealth of Independent States)*, U.N. Doc. A/46/771 (13 December 1991), in (1992) 31 *I.L.M.* 138) clearly states that the U.S.S.R. "as a subject of international law and geopolitical reality no longer exists." The *Alma Ata Declaration* (21 December 1991, U.N. Doc. A/46/60, 30 December 1991, in (1992) 31 *I.L.M.* 148) also mentions that "with the establishment of the C.I.S., the U.S.S.R. ceases to exist."

85. K. MAREK, *supra*, note 12, p. 6 : "There is no legal resurrection in international law. Once a State has become extinct, it cannot resume a continued existence."

86. On this point see : Patrick DUMBERRY and Daniel TURP, "La succession d'États en matière de traités et le cas de la sécession : du principe de la table rase à l'émergence d'une présomption de continuité des traités," (2003) 36 *R.B.D.I.* 377, 401. See also : Yehuda BLUM, "Law and Politics in Succession of States : International Law on Succession of States," 1992 *E.J.I.L.* 361; W. CZAPLINSKI, *supra*, note 11, 385, 388.

the U.S.S.R. The victory of the Red Army in 1945 was also followed by the pillage of works of art and cultural property in Germany. It is thus estimated that more than 2.5 million works of art were transferred from Germany to the Soviet Union at the time.[87] Some of these works of art were returned to the German Democratic Republic in the 1950s and 1960s. Up until recently, the content and the location of these treasures remained largely unknown. Before the break-up of the U.S.S.R., two treaties were entered into on 9 November 1990 between the U.S.S.R. and the Federal Republic of Germany.[88] The substance of Article 16 of the *1990 German-Soviet Union Good-Neighbourliness Treaty*[89] was later reaffirmed in a *Cultural Agreement* entered into in 1992 (*i.e.* after the break-up of the Soviet Union) between Germany and Russia, where the parties committed to the restitution of cultural property which was "lost" or "unlawfully brought into the territory" of Russia.[90] This provision thus contains the commitment by Russia (as the continuing State of the U.S.S.R.) to provide reparation to Germany (in the form of the restitution of German cultural property) as a result of internationally wrongful acts committed by the Soviet Union (*i.e.* the cultural property "unlawfully brought"

87. An official 1958 statement of the Central Committee of the Communist Party of the Soviet Union makes reference to some "2,614,874 objects of art and culture located in the U.S.S.R." During the 1994 negotiations between Russia and Germany, the latter listed some two hundred thousand works of art, two million books as well as three kilometres of archives to be restituted to museums, libraries, archives and collections in Germany (see para. 4 of the *Bonn Protocol* of 30 June 1994).

88. *Treaty Between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good-Neighbourliness Partnership and Cooperation*, 9 November 1990, in (1991) 30 *I.L.M.* 505; 1991 *R.G.D.I.P.* 214; *Treaty on the Development of Comprehensive Cooperation in the Field of Trade, Industry, Science and Technology*, 9 November 1990, in (1991) Vol. II *BGBl.* 700.

89. Article 16 of the Treaty reads as follows: "The Federal Republic of Germany and the Union of Soviet Socialist Republics will seek to ensure the preservation of cultural treasures of the other side in their territory. They agree that missing or unlawfully removed art treasures which are located in their territory will be returned to the owners or their legal successors."

90. *Abkommen Zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über kulturelle Zusammenarbeit*, 16 December 1992, in (1993) Vol. II *BGBl.* 1256; see at article 15.

into its territory).[91] It should be noted that negotiations between the two States to secure the restitution of cultural property have so far remained unfruitful.[92]

35. Private and public pre-revolutionary Russian bonds issued in France were nationalised as a result of the Russian Revolution of 1917. Since then, the U.S.S.R. (the continuing State of the Russian State which emerged from the 1917 Revolution) had always refused to compensate the hundreds of thousands of private owners of bonds on the ground that the revolutionary Soviet Government was not bound by the debts contracted by the previous Tsarist Government. The Federation of Russia and France signed a final settlement of reciprocal financial and property demands on 27 May 1997.[93] The agreement provided that Russia pay France US$400 million in exchange for both signatories giving up financial and

91. The legal issues on the question of the restitution of cultural property between Russia and Germany are discussed in : Wilfried FIEDLER, "Legal Issues Bearing on the Restitution of German Cultural Property in Russia," in Elizabeth SIMPSON (ed.), *The Spoils of War — World War II and its Aftermath : The Loss, Reappearance, and Recovery of Cultural Property,* New York, Harry N. Abrams, 1997, p. 175; Armin HILLER, "The German-Russian Negotiation over the Content of the Russian Repositories," in E. SIMPSON (ed.), *id.*, p. 179; Andrea GATTINI, "Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War," (1996) 7 *E.J.I.L.* 67; Stephan WILSKE, "International Law and the Spoils of War : To the Victor the Right of Spoils? The Claims for Repatriation of Art Removed from Germany by the Soviet Army During or as a Result of World War II," (1998) 3 *U.C.L.A. J. Int'l L.& For. Aff.* 223.

92. A dispute arose between the two States concerning the interpretation to be given to Article 15 of the 1992 Treaty. In 1997, a Russian law was passed stating that all cultural properties brought to Russia as a result of the Second World War were now properties of the Russian Federation and that, consequently, no restitution (with some exceptions) would be made to Germany : *Federal Law on Cultural Values Removed to the USSR as a Result of World War II and Located in the Territory of the Russian Federation*, 5 February 1997, in *Spoils of War, International Newsletter,* No. 4, August 1997, p. 10-19. The law is discussed in detail in : Pierre D'ARGENT, "La loi russe sur les biens culturels transférés : Beutekunst, agression, réparations et contre-mesures," (1998) 44 *A.F.D.I.* 114.

93. *Accord du 27 mai 1997 entre le gouvernement de la République française et le gouvernement de la Fédération de Russie sur le règlement définitif des créances réciproques financières et réelles apparues antérieurement au 9 mai 1945.* The Agreement and the Memorandum of 26 November 1996 for mutual understanding were approved by the French National Assembly on 19 December 1997 (Bill No. 97-1160, in *J.O.R.F.*, 15 May 1998). In doctrine : Sandra SZUREK, "Épilogue d'un contentieux historique. L'accord sur le règlement des créances réciproques entre la France et la Russie," (1998) 44 *A.F.D.I.* 144; Patrick JUILLARD and Brigitte STERN (dir.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, Paris, Pedone, CEDIN Paris I, Cahiers internationaux n° 16, 2002.

property claims (which arose before May 1945) on their own behalf or on behalf of their national corporations and individuals. The settlement reached between the parties is, however, clearly *ex gratia* in the sense that Russia does not recognise any legal responsibility for the acts committed after the 1917 Revolution. In this agreement, the Federation of Russia provided reparation to France because it viewed itself as the continuing State of the Soviet Union, which was itself the "continuator" of the Russian State existing between 1917 and 1922.[94]

D. APPLICATION OF THESE PRINCIPLES TO THE CASE OF TURKEY

36. Since the Turkish Republic is the same State as the Ottoman Empire, there is a continuity of rights and obligations between the two entities.[95] Case law and State practice in both contexts of cession of territories and secession show that the continuing State remains responsible for any international wrongful acts committed before changes affecting its territory. As a result, under international law, the Turkish Republic is responsible for any internationally wrongful acts, including acts of genocide, that took place before 1923. This is the position adopted by a number of writers.[96] Oktem reached the same conclusion in his recent study:

> The legal continuity thesis [...] operates like a double-edged sword. The continuing State is *ipso jure* entitled to the predecessor's rights, but is also bound by the predecessor's obligations. The Ottoman legacy is a Pandora's box that may unveil

94. Pierre Michel EISEMANN, "Emprunts russes et problèmes de succession d'États," in P. JUILLARD and B. STERN (dir.), *Les emprunts russes et le règlement du contentieux financier franco-russe, id.*, p. 53, at p. 76 and 77.

95. Daniel Patrick O'CONNELL, *State Succession in Municipal Law and International Law,* Vol. I, Cambridge, Cambridge Univ. Press, 1967, p. 39; Maurice MENDELSEN and Susan HULTON, "La revendication par l'Irak de la souveraineté sur le Koweit," (1990) 36 *A.F.D.I.* 195, 210.

96. V. DADRIAN, *supra*, note 1, 75 and 76 ("Even though the Ottoman Empire collapsed at the end of World War I and the Sultan's reign had ended, the Turkish Republic, as successor state [*sic*], assumed sovereignty over the former Ottoman lands. Not being a new state [*sic*], the Republic of Turkey was not free of the legal obligations incurred by her predecessor, the Ottoman Empire"); M. BIBLIOWICKSZ, *supra*, note 1, 41.

> all kinds of surprises. [...] As for an eventual delictual responsibility, not only the continuing State, but also the successor States may be held responsible for the acts of the predecessor State on the basis of customary law. The analysis of State practice indicates that the continuing State "remains responsible for the commission of *its own* internationally wrongful acts before the date of succession."[97]

37. In my book, one issue raised was whether the principle of continuous responsibility for the continuing State should apply uniformly in *all cases*. In other words, I examined whether there were any circumstances where the successor State (*i.e.* the new secessionist State or the already-existing State to which territory was ceded) should be held accountable for internationally wrongful acts committed before the date of succession. The position adopted in my book is that there are, indeed, some situations where this should be the case.[98] One such circumstance would be whenever the secessionist State would have unjustly enriched itself as a result of such acts.[99] Another circumstance is when the internationally wrongful act is committed (before the date of succession) by an autonomous political entity with which the successor State has a structural continuity.[100] Another possibility is when an insurrectional movement commits an internationally wrongful act during its struggle to establish a new State.[101] These exceptions simply do not apply to the situation of the Armenian genocide. These crimes were clearly *not* committed by any autonomous entity of a province within the Empire. Similarly, no insurrectional movement fighting for independence from the Empire committed any of these crimes.

38. Another relevant question concerns the actual location where the internationally wrongful acts were committed. The vast majority of these acts took place in the territory of what is now modern Turkey. It is true that some massacres were

97. E. OKTEM, *supra*, note 27, 581 (footnotes omitted).

98. P. DUMBERRY, *supra*, note 7, p. 135, 144.

99. *Id.*, p. 264; Patrick DUMBERRY, "The Use of the Concept of Unjust Enrichment to Resolve Issues of State Succession to International Responsibility," (2006) 39 *R.B.D.I.* 507.

100. P. DUMBERRY, *supra*, note 7, p. 135, 259.

101. *Id.*, p. 224.

committed in territories that were later ceded to France after World War I. For instance, large-scale massacres took place in the region of Der ez-Zor, in today's Syria. Does that mean that the successor State (at the time France, and now Syria) should consequently be responsible for these acts simply because they took place on what is now its territory?[102] Our analysis of State practice shows that there is no principle under positive international law whereby the successor State is responsible for obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession *solely based* on the fact that such acts took place on what is now its territory.[103] It is submitted that there is especially no legal basis for any such transfer of responsibility in the present context. Thus, neither France (the successor State) nor the Arab populations had anything to do with any of the crimes committed by the Ottoman Empire against the Armenian population. It would be clearly unjust to hold the new State of Syria accountable for crimes solely based on the ground that these acts were committed on what is now its territory. This is *a fortiori* the case considering that this territory was under Ottoman rule when the crimes were committed.

39. For all these reasons, Turkey is responsible for *any* internationally wrongful acts committed by the Ottoman Empire before its disintegration. This conclusion applies to all wrongful acts, including acts of genocide. Thus, there is no specific regime that applies to these acts. Under the rules of State succession of international law, the situation of the consequences of violations of *jus cogens* norms should not be treated differently from other "ordinary" norms of international law when it comes to continuity of responsibility.[104]

CONCLUSION

40. The basic question put forth at the outset of this chapter was as follows: can the modern State of Turkey, which was

102. See the analysis, in *id.*, p. 285.
103. *Id.*, p. 287. See also: J.-P. MONNIER, *supra*, note 69, 88 and 89.
104. P. DUMBERRY, *supra*, note 7, p. 294-298.

officially "created" in 1923, be held responsible under international law for internationally wrongful acts (including genocide) which were committed by the Ottoman Empire before its disintegration? Our conclusion is that Turkey should be considered under international law as the "continuing" State of the Ottoman Empire. The fact that Turkey is, in legal terms, "identical" to the Ottoman Empire has some important consequences in terms of responsibility for internationally wrongful acts. Case law and State practice in the context of secession and cession of territory are clear : the continuing State remains responsible for *its own* internationally wrongful acts committed before the date of succession. Turkey should be held responsible for all internationally wrongful acts committed by the Ottoman Empire (including acts of genocide), which were committed before, during, and after World War I.

41. This being said, many different hurdles must be addressed before Turkey is *actually* held responsible for any acts committed by the Ottoman Empire.[105] Thus, which international court would have jurisdiction over such claim? The other possibility to submit a claim before a municipal court against Turkey seems remote considering State's jurisdictional immunity. Also in a post-War agreement between Turkey and the United States, the latter waived its rights (as well as that of its nationals) to claim any reparation against Turkey for acts that took place during the War.[106] Similarly, under Article 58 of the *Lausanne Treaty*, the Contracting Powers have renounced to "all pecuniary claims for the loss

105. E. OKTEM, *supra*, note 27, 581, acknowledging that his conclusion of continuity between the Ottoman Empire and Turkey "may have a bearing on the debate on the legal consequences of 1915 events concerning Ottoman Armenians," but adding that "it should not be expected that such a determination would necessarily bring about actual practical consequences."

106. *Agreement Regarding the Settlement of the Claims Embraced by the Agreement*, 24 December 1923, signed at Ankara, 25 October 1934, in 1935 *League of Nations : Treaty Series* 391, 392. It provides for a final settlement of the claims of American citizens for acts committed during the First World War in return for a lump-sum payment by Turkey of US$1,3 million. Under the Agreement, Turkey is effectively released from any liability with respect to all such claims by US nationals. The Agreement was recently enforced in the context of court proceedings in US Courts : *Deirmenjian* v. *Deutsche Bank, A.G.*, 526 F. Supp. 2nd 1068 (C.D. Cal, 14 December 2007). See : "California District Court Finds Post-World War I Agreements with Turkey Trump California Armenian Genocide Statute," (2008) 102 *AJIL* 348.

and damage" suffered by them (and their nationals) as a result of "acts of war or measures of requisition sequestration, disposal or confiscation" committed by Turkey during the War in exchange for Turkey's reciprocal renunciation to any damage claims against Contracting Powers.

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