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A Comment on State Succession to International Responsibility

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I. Introduction

The end of the Cold War found an international legal community relieved and exuberant, but reliant on an outdated model of state succession incapable of dealing with the consequences of the changes in state identity that typified the final decade of the 20th and continued into the 21st century.1 As a result, the doctrine of succession has recently received a substantial amount of scholarly attention, and major treatises reconsidering conventional norms associated with state succession to treaties, commercial obligations and international organizations have appeared.2 Adding to this wave, Patrick Dumberry's State Succession to International Responsibility is an ambitious work that attempts a comprehensive analysis of a critical though frequently overlooked aspect of the law on state succession; whether the commission of an ‘internationally wrongful act’ before a date of succession gives rise to rights and obligations on the part of successor states.3

Dumberry’s exposition is a significant contribution to the field, and as an articulate and descriptive work it is likely to establish itself as the primary source to which practitioners will turn when confronted with a state succession question implicating international responsibilities. Only two problems mar this otherwise excellent book, and Section II of this review focuses on correcting these deficits. First, State Succession leaves it unclear how a continuator state identity ought to be determined for the purpose of assuming obligations or rights in light of the the “organic substitution” theory, on which Dumberry relies in order to rebuff the arguments of non-succession theorists. Second, Dumberry takes a narrow view of which events qualify as 'state successions', in the process excluding from consideration events that bolster his conclusion that state practice supports the transfer of responsibilities. In Section III I take Dumberry’s analysis one step further, and conclude that the general principle of unjust enrichment, as well as the doctrine of abuse of rights and other values associated with international law, justify an assumption of a presumptive transfer of rights following a state succession event.

II. Responding to Key Concepts in State Succession

Dumberry adopts a narrow scope for his study, considering only those situations “where the identity of the State is fundamentally altered as a result of losses of sovereignty over (part or the entirety) of its territory”\(^4\) and explicitly rejecting consideration of the law of state succession as it applies to successive governments.\(^5\) He conducts his examination “in light of the essential distinction between different types of succession of States”\(^6\) and researches this thesis with an eye towards understanding the significance of unification, dissolution, incorporation, secession,

\(^4\) DUMBERRY, supra note 3, at 14 (emphasis removed).
\(^5\) Id.
\(^6\) Id. at 13.
territorial enlargement (cession) and post-colonial independence on state succession to international responsibility.7

State Succession is best conceptualized as being comprised of three distinct parts. In Part I Dumberry responds to the “dominant doctrine of non-succession”8 by articulating a framework justifying and explaining the ‘transfer’ of responsibilities to successor states. Parts II and III respectively comprise a systematic and long overdue compendium of state practice concerning the transfer of the obligation to repair and right to reparation.

A. Determinations of Shared Identity

Dumberry considers the sources from whence support for the doctrine of non-succession is found, ultimately directing his response to the arguments of scholars and jurists who endorse the theory of actio personalis moritur cum persona.9 Looking towards modern notions of statehood in an effort to justify his pro-succession stance, he concludes that the mere termination of a state is not an adequate theoretical bar to the transfer of responsibilities. His argument is based on the theory of “organic substitution”,10 which holds that even after a state succession

7 See id. at 22 (noting that “[d]octrine is…rich with a great variety of [alternative] typologies [classifying modes of state succession.”).
8 Id. at 35.
9 Actio personalis has found expression in international law both in the context of the succession to obligations and and rights. See e.g., Hawaiian Claims (Great Britain v. United States), Award of 10 November 1925, U.N.R.I.A.A., vol 6, p. 158 (concluding that when the “legal unit which did the wrong no longer exists. . .legal liability has been extinguished with it.”); Thomas Baty, The Obligations of Extinct States, 35 Yale L.J. 434 (1926) (asserting that “new States are no more bound by the obligations of their predecessor. . .than an incoming tenant is bound by those of his predecessor who has been evicted, or a son by the obligations of his parent.”). See also Dumberry, supra note 3, at 310-11 citing The Text of the Draft Articles on State Responsibility Adopted by the Commission on First Reading, 1196, Report of the I.L.C. on the Work of its Forty-Eighth Session, 6 May-26 July 1996, General Assembly Official Records, U.N. Doc. A/51/10 (noting at Article 42(a) that an injured state is entitled to invoke state responsibility when an obligation owed to that state individually was breached.). Although support for the doctrine of non-succession has also been found in the general principles of state independence and equality, Dumberry does not respond to authors who argue for the primacy of these values in his book. DUMBERY, supra note 3, at 43, 46 citing Michel Waelbroeck, “Arret no. 8169. Du Consiel d’Etat Belge, note d’observations”, R.I.D.A., 1961, no. 1, at p. 35; Louis Cavare, Le droit international positif, vol. I, 2nd ed., Paris, Pedone, 1961, pp. 415-416.).
10 See Matthew C.R. Craven, The Problem of State Succession and the Identity of States under International Law,
occurs a (former) states “‘organic forces’ or ‘constitutive elements” (its territory and its population) survive such disintegration” and provide the successor state with an identity similar to that held by the former state.\footnote{Id. at 49.} It is this shared identity, he posits, that justifies the transfer of any legal responsibilities that existed at the time of the succession.

Dumberry’s reformulation of the relationship between former states, successor states and their responsibilities in terms of state identity is a boon to practitioners dealing with state succession events. Prior to the publication of this treatise, scholars dissatisfied with the non-succession doctrine had asserted mere “general statements of dissatisfaction. . .or attack[ed . . .] its application in a limited number of special cases”\footnote{Michael John Volkovitsch, Note, Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts, 92 COLUM. L. REV. 2162, 2173-74 (1992) citing O’CONNELL, supra note 2, at 482-86 (concluding that “the net is too widely cast if it is proposed that there can be no succession to international delicts” but since “there is no universal criterion for distinguishing claims which may be made against the successor State from those which may not” an alternative model to non-succession is unattainable.); JAN HENDRIK VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 219-20 (1974); Wladyslaw Czapliński, State Succession and State Responsibility, 1990 CAN. Y.B. INT’L L. 339, 356-57; Restatement (Third) of the Foreign Relations Law of the United States § 209 reporter’s note 7.} without setting forth an alternative model justifying transferability.\footnote{Even Volkovitsch, who before the publication of State Responsibility arguably provided the most thorough contemporary treatment of the doctrine of state succession to international responsibility, did not directly assert the applicability of an ‘organic state’ or any other concept justifying transfer in his effort to break away from the predominant non-succession view. See generally Volkovitsch, supra note 12.} Unfortunately, while Dumberry relies on the language of ‘identity’ to justify transferability, he does not engage the concomitant and necessary question of what type of shared identity between (former and successor) states is a prerequisite for the transfer of an obligation or right, and in fact leaves it unclear whether he believes that even a \textit{de minimus}
amount of similarity between states is *at all* necessary.\textsuperscript{14} Although this is undoubtedly part of a
calculated effort not to make “the very stringent and structured nature of solutions proscribed by
law [un]amenable to the idiosyncratic needs of all players in situations following state
succession”,\textsuperscript{15} it is precisely the fact that these lacunae exist that has led some scholars to
conclude that “[a]pproaching successor state liability at the political and diplomatic levels offers
a better solution to potential disputes than invoking international law.”\textsuperscript{16}

The mistake is not critical though, in the sense that the proposed framework may be
fleshed out through reference to the law of state succession as it applies in two other legal
contexts; the law as applied in determining membership in international organizations and
succession to treaty obligations. While an ardent realist would assert that this sort of
comparative inquiry highlights the imbalances created by the application of conflicting doctrinal
rubrics – the reality that under international law, a state may be a successor to treaty obligations
but not membership in international organizations – which in turn emphasizes the limited role
that international law should be assigned in dealing with successions,\textsuperscript{17} most scholars have not
taken this approach and continue to consider the law of state succession as it has been developed
in a variety of circumstances in order to advance their own rubrics and opinions.\textsuperscript{18}

In other contexts, succession has been determined by reference to 'objective' factors, such

\textsuperscript{14}See infra p. 5-6.
\textsuperscript{15}Volinka Reina, *Iraq’s Delictical And Contractual Liabilities; Would Politics or International Law Provide for a
\textsuperscript{16}Id. at 584.
\textsuperscript{17}See e.g., Stephen M. Walt, *The Enduring Relevance of the Realist Tradition* in IRA KATZNELSON AND HELEN V.
\textsuperscript{18}BOHLER, *supra* note 2, at 19 (2001) (asserting that “succession to [a] treaty, *prima facie* a matter of the law of
succession to treaties, necessarily encroaches upon the question of acquisition of membership, belonging to the law
of international organizations.”).
as shared territoriality and demographics with a predecessor state, and 'subjective' factors, such as a state's self-identity. Because Dumberry asserts that only when “the consequences of the internationally wrongful act will continue even after the date of succession”19 responsibility is justifiably transferred, and whether ‘consequences’ of an international wrong continue may be determined by reference to subjective and objective factors, it is necessary to consider whether 'objective' or 'subjective' elements are the most useful in the context of state succession to rights and obligations.

The law of state succession to membership in international organizations determines whether states are successors to a prior states arrangements by reference to 'objective' factors, characterized as the “degree of change in the identity of the subject.”20 The fact that India, a successor state, incorporated eighty percent of the population and sixty percent of the territory of its former incarnation was a critical factor in the success of India’s claim to succession of UN membership.21 Similarly, Russia’s assertions of continued identity justifying its continued participation in the Security Council reserved for the USSR were well received for comparable reasons.22 Conversely, the UN General Assembly and Security Council considered that the FRY (comprised of Serbia and Montenegro) absorbed less than half of the SFRY’s population and contained only forty percent of the territory of its predecessor state, and concluded that the

19 Dumberry, supra note 3, at 314 (emphasis removed).
20 Craven, supra note 12, at 94.
successor states membership in the UN could only be (re)established through application to the international organ.  

Alternatively, succession to international treaties is typically resolved by reference to a successor states self-identity as a ‘continuator’ and its domestic legal actions.  

Indeed, the FRY was treated as having a shared identity with the SFRY for the purposes of treaty accession to the Genocide Convention, the Vienna Convention on Diplomatic Relations and the International Covenant on Civil and Political Rights, based on its mere expression of intent to honor the treaties of the former Yugoslavia, and in P.S. v. Slovak Republic the European Commission on 

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24 Rein Mullerson, The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia, 42 INT’L & COMP. L.Q. 473, 476 (1993) (discussing these factors, as well as a third; “the international recognition of, or acquiescence in, this claim by third states.”).

25 Akbar Rasulov, Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?, 14 EUR. J. INT’L L. 141, 146 (2003) citing [sic] 500 UNTS 95; 78 UNTS 277 (“Despite the non-recognition of the FRY’s claim by the international community, depositories’ records consistently kept listing ‘Yugoslavia’ as a party to the respective multilateral treaties, with the dates in the respective entries corresponding to those of the SFRY, thus de facto treating the FRY as a continuing state” and noting that, even in 2003 “the depository records for the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage...continue to list the SFRY as a party to the treaties in their custody.”).

26 Meno T. Kamminga, State Succession in Respect of Human Rights Treaties, 7 EUR. J. INT’L L. 469 (1996) citing UN Docs. CCPR/SP/40 and CERD/SP/51 and 52 (noting that “[t]he Human Rights Committee, for example, in its reports lists ‘Yugoslavia’ as a party to the [ICCPR] and it indicates when ‘Yugoslavia’s’ next report is due. However, when in 1993 the representatives of the FRY came to present their country’s report to the Committee, they were listed as representing the Federal Republic of Yugoslavia (Serbia and Montenegro).”).

27 The FRY in April 1992 submitted to the UN it “shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslav), Preliminary Objections, I.C.J.
Human Rights determined that the dissolution of Czechoslovakia did not terminate the Slovak Republic’s obligations under the ECHR as a result of “Slovak domestic legislation and the letter sent by the Slovak government to the COE Secretary-General, in which Slovakia confirmed its successor status to COE treaties.”

The 'objective' criteria of continuing identity are better suited for application in the context of succession to international responsibility than the 'subjective' criteria embraced by the law of succession as applied to treaty obligations. First, while membership in international organizations is an all-or-nothing proposition, obligations and rights typically may be divided proportionally amongst successors, and an inquiry into the amount of land and population shared with a prior state is the most convenient, quickest and objectively fair method of apportioning succession to responsibilities. Second, this arrangement acknowledges the reality that “states always conserve some elements of their predecessor states,” and thus “avoids, or at least minimizes, the methodological problems raised by the apparent lack of 'consent' on the part of successor states.” If the flow of 'consequences' were to be determined by reference to a states own notions of self-identity, notions of 'consent', which are so important to an international legal order still contingent on the existence of states perceptions of their own sovereignty, become muddled. Third, ‘subjective’ concepts such as self-identity lead to issues of infinite

29 Id.
30 REIN MULLERSON, INTERNATIONAL LAW, RIGHTS AND POLITICS 139 (1994) (“There is necessarily a certain de facto continuity in cases of state succession. A predecessor state simply cannot completely disappear, except in cases like that of the legendary Atlantis. Of the three elements of statehood—population, territory and authority—parts of the population and territory remain the same in cases of the emergence of new states resulting from the secession or dissolution of existing states.”).
31 Craven, supra note 10, at 94.
recursiveness, in which successor states may claim to share an identity with a former because (as opposed to merely in light of the fact that) they have assumed the rights and obligations of the former.32 While accession to international human rights treaties is regarded as so vital to the values embodied by international law that turning a blind eye to this problem is justified,33 the same concerns are not implicated by the commission of most international wrongs, which do not necessarily implicate human rights concerns34 and result in obligations or rights that may be assigned to states, not individuals.

Finally, application of a ‘proportionality’ inquiry contributes to answering questions of allocation of responsibilities even in situations involving a non-divisible property. For example, if one state illegally seized a military jet or art piece from another state, and the victim state then dissolves in two successor third states, only the state with the ‘most similar’ identity, in terms of territory and population, to the predecessor victim state should be able to receive the right to the return of property. This is fair inasmuch as the majority of the individuals damaged will be able to share in the sense of security or national pride that follows the return of a real-world asset, and equitable in that a wrong has not transpired with impunity.

32 For a general discussion of some of the theoretical aspects of this sort of problem, read Jens Bartelson, Second Natures: Is the State Identical with Itself?, 4 EUR. J. INT’L. REL. 295 (1998). See also Krystyna Marek, Identity and Continuity of States in Public International Law 5 (1954) (defining the legal identity of a state as the “sum total of its rights and obligations under both customary and conventional international law.”).
34 Volkovitsch, supra note 12, at 2169 (“The range of possible international delicts is as wide as that of international obligations, including everything from breach of contract to genocide.”).
B. The Examination of State Practice

Dumberry’s analysis of state practice is comprehensive within the self-constructed confines of his study, but his refusal to more fully consider the relationship between state identity and government succession\(^{35}\) results in a work that comes off at times as somewhat strained. It is somewhat surprising that Dumberry chose such a narrow scope for his inquiry into state practice, especially in light of more expansive contemporary theories which adopt a liberal definition of state succession in order to increase the potential universe of events from which conclusions may be drawn. Tai-Heng Cheng, for example, in *State Succession to Commercial Obligations* considered any event “occur[ing] when a state fundamentally changes its structure of power and authority, and an authoritative international response is needed to manage disruptions to international arrangements that may result from that change”\(^{36}\) to be a case of state succession fairly within the ambit of consideration, and other authors have adopted a similar approach.\(^{37}\)

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\(^{35}\) Dumberry, supra note 3, at 14.

\(^{36}\) Cheng, supra note 2, at 3.

\(^{37}\) See e.g., Bowman, supra note 1 (endorsing Cheng’s view and analyzing the transfer of power in Iraq in light of Cheng’s prescriptions.); Reina, supra note 15 (concluding that a successor “new” Iraq emerged after the U.S. takeover of that country); Roda Muskat, One Country, Two Legal Personalities; The Case of Hong Kong 1 (1997) (asserting that “[t]he validity of traditional notions of ‘statehood’ and ‘sovereignty’ is increasingly questioned in light of fundamental continuing changes in the structure of international relations.”); Robert J. Delahunty & John Yoo, Statehood and the Third Geneva Convention, 46 Va. J. Int’l L. 131, 160-61 (2005) (considering “alternative accounts of determining statehood”, some of which require reference to changes of government, in considering the question of Afghanistan’s obligations under the Third Geneva Convention during the period of Taliban Rule); Johannes Chan, State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political Rights, 45 Int’l & Comp. L.Q. 928 (1996) (treating the handover of Hong Kong to the PRC as a state succession event). Other authors have asserted more generally that concepts of territoriality and population are increasingly irrelevant to the idea of ‘statehood,’ which in turn implies that such ideas are also immaterial to notions of state succession. See generally Guido Acquaviva, Subjects of International Law: A Power Based Analysis, 38 Vand. J. Transnat’l L. 345 (2005); Louis Henkin, International Law: Politics and Values 8-13 (1995); Paul Schiff Berman, The Globalization of Jurisdiction, 151 U. Pa. L. Rev. 311 (2002). But see Jerry Everard, Virtual States: The Internet and the Boundaries of the Nation-State 13 (2000) (discussing why traditional notions of state identity are “stronger than ever.”).
By following a narrow approach Dumberry stretches a limited amount of state practice a little too thin in order to reach his general conclusion that “there is a clear tendency in modern state practice towards the recognition that successor states should take over the obligations [and rights] arising from the commission of internationally wrongful acts.” On the subject of whether states succeeded to a right to claim reparations, for example, Dumberry had comparatively few examples on which to base his argument. However, had he adopted a broader view of state succession, he would have been able to ‘reach’ Burma’s (known as Myanmar since 1989) succession from colonial domination, an instance of quasi-government succession that parallels the state succession/creation experiences of Indonesia, Malaysia and Singapore and supports the transferability of rights.

In November 1885 the entire territory of Burma, formerly an independent entity, was annexed as a province of British India. The British would not leave until 1942, when Japan invaded and temporarily succeed in removing British presence from the region. Although the British returned in 1945 and “liberated” the province from the Japanese, Britain had come to realize that “one of the strongest forces in Burma is the intense desire of its people for the control of its own affairs,” and in 1948 it granted the province, with boundaries matching those of the region at the time of succession, complete independence from British rule.

Britain expressly waived any (remaining) claims for wartime reparations in the 1951 San

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38 Dumberry, supra note 3, at 203.
39 Id. at 327. Neither Indonesia, Malaysia nor Singapore existed as states before 1946.
40 The 1885 official annexation appears to have been a bit of a formality. Since 1826 and the first Anglo-Burmese war ended with the Treaty of Yandabo, Burma had been required to cede various coastal strips to British India. Sheelby Tucker, Burma: The Curse of Independence 29-30 (2001).
41 Id. at 32.
Francisco Peace Treaty, but in 1954 Japan signed an additional treaty with Burma under which Japan agreed to pay reparations (totaling $200 million) and provide economic assistance over a ten year period (totaling $5 million a year), in return for which Burma waived any unsettled claims against Japan.

Britain's attitude towards Burma during its period of colonial domination was rather lax, and as a result Burma maintained an ostensible capacity to enter into relations with other states, as well as a permanent population and a defined territory (the requirements for statehood under Article 1 of the Montevideo Convention on Rights and Duties of States) prior to 1948. However, it seems ridiculous to consider Burma's eventual separation from Britain a mere government succession, as the gaining of complete independence seems to implicate issues of state creation as well. The transfer of Japan's obligation to pay for “damage and suffering” caused during a period when Britain, not Burma, would have been regarded as having had the right to request reparations marks at least one instance of succession to responsibility that, had Dumberry been a bit less rigid in his conception of ‘state succession', could have supported his general conclusion as regards state practice.

47 See Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19 (defining a state as possessing "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.")
48 See James Crawford, The Creation of States in International Law 52 (1979) (asserting that stateship requires independence in the directing of one's own actions, subject only to the international law.)
49 Another instance of the transfer of responsibilities surviving what is clearly government succession, but violent and significant succession that altered the political personality and demographics of a state, is the payment of reparations to the USA by Chile for its assassination of Orlando Letelier, former Chilean Ambassador to Washington. The claims of the USA against the military government of Pinochet, who seized power in 1973, survived 17 years without acknowledgment, until the 1990 election of President Patricio Aylwin, at which time Chile's debt was repaid. Robert Pear, Chile Agrees to Pay Reparations to U.S. In Slaying of Envoy, N.Y. Times, May 13, 1990, available at
III. Beyond State Succession; A Presumption of Succession to Responsibility

Dumberry declines to “build a strict and self-contained general theory either in favor of or against the automatic transfer of the right to reparation and the obligation to repair [. . .].”\textsuperscript{50} but devotes one sub-chapter to exploration of the idea that the principle of unjust enrichment exists as an alternative ground upon which successor state liability ought to rest in cases where the law of state succession would otherwise not prescribe transfer\textsuperscript{51} and that the principle of unjust enrichment should be taken into account when evaluating the 'factual situation' associated with a particular succession event.\textsuperscript{52} The remainder of this paper will consider the role of unjust enrichment within, as opposed to adjacent to, the law of state succession, and conclude that the principle, in conjunction with the doctrine of abuse of rights and the larger policy framework in which international law functions, affirms the notion that a rebuttable presumption of transferred responsibility ought to be created after a state succession event with state responsibility implications occurs.

A. The Principle of Unjust Enrichment in International Law

The line between equity and law is less rigid than Dumberry conceives, and the equitable value of unjust enrichment informs international law as a general principle underlying the formation and execution of legal rules. The ICJ, upon consideration of the principle noted that;
Thus the justice of which equity is an emanation, is not an abstract justice, but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.53

Moreover, the principle of unjust enrichment is the cornerstone of what codified law on state succession exists54 and it is widely regarded as “the juridical justification for the obligation to pay compensation”55 after state successions.

The most unambiguous articulation of the principle of unjust enrichment has probably come from the Iran-U.S. Claims Tribunal in Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.:

There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.56

Although the principle found its earliest expression in Roman times,57 in the 19th century it became inexorably linked to the concept of restitution58 and found expression in the domestic

53 Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), ICJ Judgment of 3 June 1985, para. 45.
55 O’CONNELL, supra note 2, at 103 (emphasis added).
legal systems of common and civil law countries all over the world. In the international context
the principle has been applied in cases involving the expropriation of foreign assets, to settle
contractual claims between former business partners whose businesses relationship ended as a
result of the Versailles Treaty and to solve contractual disputes between states and foreign
nationals who have performed work at its request.59

As a generally recognized principle of international law, the concept of unjust enrichment
serves as a source of positive obligations for states and a limitation on state discretion.60 In the
context of the law of responsibility for commission of an international wrong, the principle
requires that whichever party gained a benefit from the commission of a wrongful act must
compensate the damaged state. By extension, the principle also requires that the obligation to
repair presumptively transfers from a predecessor to a successor state(s) when the benefit of the
wrong has also transferred.61 Any other result would be a priori incompatible with
contemporary notions of unjust enrichment, since “[t]o accept the benefits of [an illegal] action,
be they the generation of power or the gain of resources otherwise committed in an international
agreement, without accepting responsibility for the concomitant delictual obligations, is to be
unjustly enriched.”62

B. The 'Abuse of Rights' Doctrine in International Law

The doctrine of abuse of rights prohibits a state from “exercising a right either in a way

59 JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951) (providing a comprehensive review of the
development of the principle). See also THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 50-54
61 While this paper lacks the space to consider the limitations under which this presumption would function in
depth, the reader should assume that the presumption is rebuttable and would only operate when the former and
successor states share a high degree of identity.
62 See Volkovitsch, supra note 12, at 2210-11.
which impedes the enjoyment by other States of their own rights or for an end different from that
for which the right was created, to the injury of another State.”

Although scholars have not
been unanimous in their embrace of abuse of rights as a general principle informing international
law, most of the literature treats the doctrine as such and the value has found expression in the
municipal law of civil and common law countries, as well as international law.

The right of a state “to exercise jurisdiction within its borders and to take its own
decisions regarding its internal and external affairs. . . .is quite often referred to as the right of
sovereignty,” and is frequently regarded as the most fundamental right that a predecessor or
successor state may possess. But utilizing the right of sovereignty in a manner that interferes
with a victimized states rights to “invoke state responsibility” and request “full reparation for

66 Byers, supra note 65, at 392.
67 The Appellate Body of the WTO Dispute Resolution Mechanism described the Chapeau of Article XX as:

[. . .] but one expression of the principle of good faith. This principle, at once a general
principle of law and a general principle of international law, controls the exercise of rights
by states. One application of this general principle, the application widely known as the
doctrine of abus de droit, prohibits the abusive exercise of a state’s rights and enjoins that
whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it
must be exercised bona fide, that is to say, reasonably’. An abusive exercise by a Member
of its own treaty right thus results in a breach of the treaty rights of the other Members
and, as well, a violation of the treaty obligation of the Member so acting.

United States-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by the United States) (1998),
69 Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law
an injury” it has suffered at the hands of another state may conflict with the doctrine of abuse of rights. A state that shares a high degree of identity with a predecessor state guilty of an international wrong, but which uses its sovereignty to disclaim liability for the actions of its predecessor, has effectively left the wronged state without recourse to assert its rights. Although circumstances may exist that substantiate a refusal to assume liability in a particular case, a presumption of transfer ensures that the onus is on the successor state to provide a rational justification for its interference with the right to obtain compensation.

C. Additional Values Embodied by International Law

"[T]he purpose of the law of State succession is to make the process of the change of sovereignty over a territory and its residents as smooth as possible." In other words, international law ought to embody an approach that places international peace, security and respect for human rights at a premium is the approach that ought to be adopted.

Political instability tends to accompany state succession, and human rights violations

70 Id. at art. 34.
71 See F.V. García-Amador, “International responsibility”, 5th report (UN Doc. A/CN.4/125) in Yearbook of the International Law Commission 1960, vol. 2 (New York: United Nations, 1961) 41 at paras.60 (asserting that “it is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of ‘unregulated matters’, that is, matters which ‘are essentially within the domestic jurisdiction’ of States.”).
72 S. K. Agrawala, The Doctrine of Act of State and the Law of State Succession in India (Based on Promod Chandra Deb v. The State of Orissa), 12(4) Int’l Comp. L. Quart. 1399, 1400 (1963); Hersh Lauterpacht, Succession of States with Respect to Private Law Obligations’, in E. Lauterpacht (ed.), 3 International Law; Being the Collected Papers of Hersh Lauterpacht 126 (1977) (arguing that the purpose of the law of state succession is “to maintain the continuity of law, independent of the physical or legal death of the natural or juridical person concerned”); Andrew M. Beato, Note, Newly Independent and Separating States ’Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union, 9 AM. U. INT’L L. & POL’Y 525, 542-43 (1994) (noting that “[t]he tendency of newly independent states is to reject the rigidity of absolute treaty discontinuity in an effort to minimize disruptions in international relations.”).
frequently occur as a consequence.\textsuperscript{74} These in turn tend to lead to the mass displacement of peoples, which are frequently regarded as a threat to national security and a destabilizing force to global order.\textsuperscript{75} Presuming the transfer of state responsibilities postpones the legal questions associated with state succession and reduces the burden on states damaged by a predecessor states commission of an international wrong. The practical upshot of this is that more resources – in the form of bureaucratic energies and intellectual capital - may be marshaled to act in a way that maintains the peace and security of the affected region, since fewer resources must go to immediately assuming or asserting another's or ones own succession.

Moreover, it must be borne in mind that peace and security are the result of collaborative efforts, and the role that a presumptive transfer of obligations plays in the maintenance of interstate trust is not small.\textsuperscript{76} As Vagts explains, “[t]here are always costs to an unscheduled and unpredicted termination of commitments solemnly made and the sum total of satisfied reliance plays a role in the general trust and confidence of states in the international legal system.”\textsuperscript{77} A presumption of succession to responsibility preserves state expectations, which in turn

\textsuperscript{74} See Krystyna Marek, Identity and Continuity of States in Public International Law 31-40 (1968).
\textsuperscript{76} Detlev F. Vagts, State Succession: The Codifiers’ View, 33 Va. J. INT’L L. 275, 281 (1993) (asserting that “States in their relations with each other are entitled to rely on each other’s commitments.”); Note, Taking Reichs Seriously: German Unification and the Law of State Succession, 104 Harv. L. Rev. 588, 601-02 (1990) (noting that “[i]nternational society exists when states are conscious of shared interests and values, consider themselves bound by common rules, and participate in common institutions[. . .]. The conflict between continuity and autonomy is bounded by international society’s requirement that promises, once made, are performed. Although international society does not disintegrate with every violation of an agreement, it cannot exist without at least a presumption that agreements will be honored.”); Megan L. Wagner, Comment, Jurisdiction by Estoppel in the International Court of Justice, 74 CAL. L. REV. 1777, 1779 (1986) quoting Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20) (noting that the ICJ has held that “‘[t]rust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.’ Before one nation will rely on the pronouncements of another, it must believe that what is said today will not be denied tomorrow.” ).
\textsuperscript{77} See also Vagts, supra note 76 (discussing the principle of continuity of obligations in the context of succession to treaties.)
encourages confidence and independence, and reduces the costs of cooperation in joint efforts to
maintain international stability and avoid human rights tragedies.\(^78\)

Finally, a presumption of succession to responsibility comports with the notion that
international law ought to be perceived as distributively fair.\(^79\) The alternative to a rebuttable
presumption would be a legal rubric that offers much weaker assurances that wrongs will not go
unredressed,\(^80\) a state of affairs that will neither be perceived as fair nor inspire the orderly
relations and voluntary compliance critical to the development and execution of international
law.

**IV. Conclusion**

State successions are very much a matter of contemporary concern for the international
community, and the discussions between international actors that occur as a prelude and
consequence of state succession events continue to be among the most virulent and divisive in

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\(^{78}\) Oscar Schachter, *State Succession: The Once and Future Law*, 33 Va. J. Int’l L. 253, 259 (1993) (asserting that “[a]s a matter of policy, the case for presuming continuity makes sense today when the state system is increasingly
fluid” since “[i]n the absence of that presumption, [states] may forego their rights and be heedless of obligations that
call for action. For this reason, among others, it makes good sense for states to accept *prima facie* continuity as a
basic premise, leaving room for adjustment or exceptions when they appear necessary or desirable in a particular
case.”).

\(^{79}\) Paul G. Harris, *International Distributive Justice: Getting at a Definition in the Context of Environmental
Change*, London Guildhall University (Draft Work in Progress), March 26, 1999, available at
www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/mannheim/w6/harris.pdf (beginning its analysis with the
following general definition; “International distributive justice and fairness will be defined here as a fair and just
sharing among countries of benefits, burdens and decision making authority associated with international
relations.”). For an excellent overview of the theories arguing that concepts of distributive justice inform
ternational law, read William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the
Developing World*, 40 U.C. Davis L. Rev. 581, 654-666 (2007) (asserting that “[t]wo theorists, Charles Beitz and
Thomas Pogge, have developed what we find to be compelling responses to Rawls’s stance that “considerations of
distributive justice only arise in the context of a scheme of social cooperation that involves reciprocal benefits and
burdens or mutual coercion, and no such scheme currently exists at the international level.”). See also Frank, supra
note 59, at 74 (describing the United Nations Convention on the Law of the Sea as an effort “to provide for
distribution of scarce resources through the application of broadly conceived equity.”).

\(^{80}\) See Schachter, supra note 78. See generally Robert Kolb, *Principles as Sources of International Law (With
which the international community engages.\textsuperscript{81} As a treatise with few shortcomings, *State Succession to International Responsibility* is a welcome contribution to a generally neglected subject of international law that can hopefully ease some of the tension associated with state transitions by clarifying the framework underlying the law governing the transfer of responsibilities and contextualizing current events in light of state practice. The few problems that are apparent within the work – its limited consideration of the role of 'identity' in the transfer of responsibilities and the narrow definition by which state succession is defined and thus state practice was examined - could be corrected with the publication of a brief companion work, perhaps ultimately adopting an approach similar to and expanding on the ideas outlined in this paper.

As the international community continues to confront difficult questions associated with state successions, it must be acknowledged that a presumption of the transfer of responsibility would help smooth the transition from former to new state and old to new international community. Although the idea of a presumptive transfer has been explicitly endorsed by only one other scholar, the fact that a presumption would be consistent with the values and doctrines that comprise existing international law justifies its acceptance.