State Succession to Water Treaties: Uncertain Streams

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20. State succession to water treaties: uncertain streams

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INTRODUCTION

State succession, the change of sovereignty over a certain territory, often creates political and legal uncertainties. Irrespective of whether this change is due to the emergence of a new State or the transfer of the territory to an existing State, people and resources located in the territory become subject to a new governing entity and new neighborhood relations are created. These aspects and the incertitude about the fate of previously established legal relationships may cause disputes.

Universally accepted rules on the legal effects of a change in sovereignty could mitigate or prevent such disputes from emerging; however, State practice is inconsistent in this area. It has been and continues to be characterized by solutions adopted on a case-by-case basis. The 1978 Vienna Convention on Succession of States in Respect to Treaties1 was an attempt to provide clarity on the legal regime of succession. Its content was drafted against the background of the experience of State practice during decolonization and, already then, much of it was progressive development classifying diverse State practice and treaties into restrictive categories.2 When the Convention entered into force in 1996, 18 years after its adoption, its rules no longer reflected the abundance of heterogeneous and new State practice that had occurred in response to the demise of the Soviet Union and the (re)emergence of numerous States in the early 1990s. While some of its rules, such as the continuity of boundaries, reflect universal practice, with only 22 parties the Convention cannot be regarded

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1 Hereinafter referred to as “1978 Vienna Convention.”

as a reliable guide to customary law. It needs to be assessed against new State practice, taking into account novel considerations emerging in the international community. The creation of South Sudan as a new, independent State on 9 July 2011 is yet another occasion for the generation of new State practice. Some of the matters that will have to be addressed in this case are of particular interest here, because they concern State succession to water treaties: South Sudan has emerged as the eleventh riparian State of the Nile River.

This chapter explores the question of State succession to water treaties as a general topic. Given the particular heterogeneity of State practice in general, and with regard to the Nile River in particular, this chapter does not have the ambition to provide an answer on how to deal with the case of South Sudan. The intention of the present analysis rather is to highlight the specific issues that need to be looked at with respect to water treaties in order to contribute to the study of the law of State succession in the context of the prevention and settlement of water disputes.

The concept of “water treaties” encompasses a variety of international agreements relating to transboundary freshwater bodies and regulating any of their uses (as boundaries and for navigational and non-navigational uses) as well as the respective management structures. These agreements contain different types of rights and obligations. Where the rights and obligations concern boundaries and navigational uses, they are generally regulating territorial issues. This also applies to some non-navigational uses such as the production of hydroelectricity. Where water agreements include rules on the protection of the environment, these are generally connected to territory as well. On the other hand, water agreements also contain obligations of information exchange and rules related to the establishment of and participation in joint river commissions that relate to the exercise of sovereign decision-making of a State.

During the 1970s, as a result of its analysis of international practice, the International Law Commission (ILC) considered international water treaties as a special class of territorial treaties that would continue to exist for the successor State. This approach is supported by the 1997 decision on the Gabčíkovo-Nagymaros Project. The case related to a water treaty

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3 Aust, supra note 2.
signed between Hungary and Czechoslovakia in 1977. The International Court of Justice (ICJ) found that the concerned treaty was binding on Slovakia as a successor State and recognized that the rule of Article 12 of the 1978 Vienna Convention reflects a rule of customary international law. The Article stipulates that rights and obligations “relating to the use of any territory . . . and considered as attaching to the territories in question” remain unaffected by succession, i.e., they continue to exist for successor States. The customary character of this rule seems to be a silver lining of legal certainty in the law of State succession. It has to be pointed out, however, that neither the ILC nor the ICJ addressed the issue of the different types of rights and obligations that may be contained in a water agreement; not all of them are attached to a territory.

This chapter suggests that a general categorization of international water treaties as territorial treaties may be inadequate. Agreements governing the management and use of transboundary waters frequently include additional rights and obligations that relate to a variety of governance issues; not all of these obligations are attached to territory. This chapter explores the territorial character of the rights and obligations that are commonly included in water treaties. It follows from State practice analyzed in the present chapter that the principle of “automatic succession” does not apply as a general rule to all rights and obligations enshrined in water treaties. At the same time, specifics included in water agreements such as environmental rules may call for the continuity of regimes on transboundary water resources.

THE INCERTITUDE OF STATE SUCCESSION TO INTERNATIONAL TREATIES

International treaties are concluded between States; they bind States beyond the lifetime of the governments who signed the treaties. Commonly, treaties prescribe certain behavior and may limit the scope of the consenting States’ freedom of action once the treaty has entered into force. By entering into these international treaties, States agree to limit their sovereignty. As stated by the Permanent Court of International Justice, conventions place “a restriction upon the exercise of sovereign rights of the State, in the sense that it requires them to be exercised in a certain way.”

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a new State “is born”—when sovereignty over a certain territory and population is transferred from one State to another—the question that emerges is that of what happens to the rights and obligations that have been established by prior treaties.

The 1978 Vienna Convention defines “succession of States” as “the replacement of one State by another in the responsibility for the international relations of territory.” In the literature, “State succession” is generally defined as consisting of any change of sovereignty over a certain territory, in which the new sovereign succeeds in the legal rights and obligations of the old sovereign. The obvious advantage of succession of the new “sovereign” into all rights and obligations that applied to the predecessor State is that it promotes stability by establishing continuity of the existing legal relationships. International rights and obligations that applied to the specific territorial space and people living there continue to exist irrespective of who governs that space. Yet, the application of such a principle of “continuity,” also referred to as “universal continuity” or “automatic succession,” limits the scope of sovereignty over that territory of any successor State: without being given the opportunity to decide on its agreement or disagreement with these rules, the successor State would be bound ab initio by the existing rights and obligations. The discretionary power of the latter to adopt its own policy position and to shape its relationships with other States would be considerably restricted. Thus, universal continuity would have substantial effects on sovereignty and the sovereign decision-making powers of the successor State.

In consideration of these effects, State practice and international rules take the different situations that give rise to a change in sovereignty into account and attach differing legal consequences accordingly. The law of State succession additionally respects the nature and the content of the rights and obligations that are affected by this transfer. These issues are analyzed in the subsequent sections.

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8 Art. 2(1)(b).
Heterogeneity of State Practice

State succession can occur as the result of various situations: the transfer of parts of a territory from one State to another State, the separation of parts of a State that lead to the formation of one or more States, and the unification of two or more States into one State. Another case that has been dealt with as a special issue in State practice is the emergence of a newly independent State.

The 1978 Vienna Convention establishes specific rules for these different situations. Where the transfer of territory takes place between two existing States, “the treaties of the predecessor State cease to be in force in respect to the territory” and the territory enters into the legal regime applicable in the successor State “unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operations.”10 For all other instances, the general principle applied in the 1978 Vienna Convention is that of universal continuity, unless the States otherwise agree,11 and with the exception of the emergence of a newly independent State under international law. With regard to these new States, the principle applied by the majority of writers and also invoked in the 1978 Vienna Convention is the clean slate doctrine, also known as the tabula rasa principle.12 It has to be pointed out that the 1978 Vienna Convention and the majority of writers understand “newly independent States” as those whose territory was a dependent territory “immediately before the date of succession.”13 The tabula rasa principle is applied in these cases because it was considered that these newly independent States should emerge as fully sovereign entities,14 an automatic obligation to assume all legal relationships entered into by their predecessor States would significantly curtail this newly gained sovereignty ab initio.

The 1978 Vienna Convention codified State practice that predated its adoption. This practice applied the clean slate doctrine with regard to new States emerging from former colonies, such as the United States of

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11 See Part IV of the Vienna Convention of 1978 on “Uniting and Separation of States.”
13 Article 2(1)(f), Vienna Convention of 1978.
14 Fiedler, supra note 9, at 643.
America, the States of Latin America and the States that emerged from the wave of decolonization in the 1960s. Yet, this clear dichotomy of the theory of *tabula rasa* for former colonies and that of automatic succession for other cases of State succession that is enshrined in the 1978 Vienna Convention does not correspond to subsequent State practice. In the case of the dissolution of Czechoslovakia on 1 January 1993, for example, the two successor States, Slovakia and the Czech Republic, both adopted constitutional acts expressing that they considered themselves bound by the rights and obligations of their predecessor State. The international response to these unilateral declarations of legal succession varied; while some States that were a party to agreements concluded with Czechoslovakia accepted universal continuity, others argued that the *tabula rasa* principle applied and demanded renegotiation or conclusion of new treaties to replace former agreements. This experience of the Czech Republic and Slovakia was not an isolated event; case-by-case solutions to State succession also happened following the dismemberment of the Soviet Union and the disintegration of Yugoslavia. The Russian Federation claimed to be the continuator State and declared that all multilateral treaties concluded by the USSR would automatically remain in force. Despite the wide agreement that Russia was continuing into all rights and obligations of the former Soviet Union, a number of States explicitly objected to the claim of continuity. The claim of the Federal Republic of Yugoslavia (FRY) to be the continuator of the Socialist Federal Republic of Yugoslavia (SFY) was almost universally rejected by other States on the basis that the FRY was just one of the successor States and not the continuator of the SFY.

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15 Draft articles on Succession, *supra* note 12, at 211, *passim*.
19 The issue of succession to treaties was dealt with by the ICJ in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Bosnia-Herzegovina and Yugoslavia. The Court held that FRY did succeed to the 1949 Genocide Convention, while explicitly pointing out that it was doing so “without prejudice as to whether or not the principle of ‘automatic succession’ applies in the case of certain types of international treaties or conventions.” *Case concerning the Application of the Convention on the*
The low number of ratifications of the 1978 Vienna Convention and inconsistency in State practice have led to a situation where significant legal uncertainty persists concerning the rules applicable in the case of a change of sovereignty over a specific territory. The identification of customary rules of State succession remains one of the most challenging tasks in this area of international law. One of the few rules that appear to have found common recognition is the rule that rights and obligations that attach to a specific territory remain unaffected by State succession. In this regard the ICJ found in the Gabčíkovo-Nagymaros case that the Treaty signed in 1977 between Czechoslovakia and Hungary providing for the construction and operation of a system of locks established a territorial regime within the meaning of Article 12 of the 1978 Vienna Convention. It concluded that this agreement “created rights and obligations ‘attaching to’ the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.”

Taking this finding into account, we will now analyze the content of this rule as well as the questions that arise with regard to the relationship between this norm and international water treaties.

Rights and Obligations Attached to a Territory

The 1978 Vienna Convention includes two provisions that outline the general rules concerning State succession to rights and obligations that are inherently linked to territory. The first, Article 11, describes the special case of boundaries, stipulating that “succession of States does not as such affect: (a) a boundary established by treaty; (b) obligations and rights established by a treaty and relating to the regime of a boundary.” Boundary lines delimit territorial space and are as such a fundamental constituent of territorial regimes. Rivers and lakes have frequently been used as natural landmarks to designate political boundaries. General acceptance in State practice that boundaries shall remain unaffected by State succession derives from a common interest in conflict prevention. In the process of decolonization of Latin America and, subsequently, Africa, the principle of uti possidetis crystallized as a general rule of international law.


For an extensive analysis of this issue, see L. Caflisch, Règles générales du droit des cours d’eau internationaux (RCADI, VII, tome 219, 1989), at 62–103.
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law with respect to decolonization.\textsuperscript{22} The principle involves the preservation of boundaries existing under colonial regimes.\textsuperscript{23} The decision to adhere to this principle was originally a political one in order to avoid fratricidal territorial conflicts between the newly independent States.\textsuperscript{24} In 1964, the African Union (formerly known as the Organization of African Unity), for example, adopted a resolution affirming the commitment of member States “to respect the frontiers existing on their achievement of national independence.”\textsuperscript{25} The principle of \textit{uti possidetis} applies to boundaries traced on land as well as to those traced along or across rivers and lakes. The principle does not prevent modification of frontiers that are mutually agreed between States.\textsuperscript{26}

Article 12 of the 1978 Vienna Convention has a much broader scope. Titled “[o]ther territorial regimes,” it provides that:

1. A succession of States does not as such affect:
   (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;
   (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States does not as such affect:
   (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;
   (b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.\textsuperscript{27}

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\textsuperscript{22} Frontier Dispute (Burkina Faso\slash Mali), 1986 I.C.J. (Dec. 22), at para.24.
\textsuperscript{25} Organization of African Unity, AHG/Res.16 (I), Cairo, French text \textit{available at} http://www.africa-union.org/Official_documents/Assemblee\%20fr/ASS64.pdf (last visited Oct. 24, 2010); translation from Frontier Dispute (Burkina Faso\slash Mali), at para.19.
\textsuperscript{27} A third paragraph deals with the establishment of military bases: “3. The
This Article regulates rights and obligations addressed in so-called “territorial treaties,” sometimes also referred to as of “dispositive,” “localized,” or “real” character. While paragraph (1) talks about rights and obligations that benefit a foreign State because of its own territorial character and territorial interlinkage with the territory to which these rights and obligations are attached, paragraph (2) refers to objective regimes. The States benefiting from an objective regime do not have to have a territorial link to the territory to which the rights and obligations they are benefitting from are attached; they derive advantage from the intention of the States that established the regime in order “to create in the general interest general obligations and rights relating to a particular . . . territory . . . .”

Treaties establishing objective regimes include, for example, treaties providing for the demilitarization of territory and—related to the use of international waters—treaties providing for freedom of navigation. Where treaties stipulate freedom of navigation for riparian States, paragraph (1) of Article 12 applies. Treaties that grant freedom of navigation also to non-riparian States, such as the Final Act of the Congress of Vienna, satisfy the general interest of access and commerce in both upstream and downstream directions. These treaties lead to the establishment of objective regimes falling under paragraph (2) of the Article. The right attaching to a particular territory is a right of passage by way of river navigation. Some authors compare this kind of territorial rights with “international servitudes” that remain untouched by a change in sovereignty over the respective territory just as servitudes survive a transfer of property in private law; others justify the continuity of the territorial rights based on the creation of an objective regime that is opposable erga omnes.

The International Court of Justice confirmed the customary character of the rules codified in Article 12 of the 1978 Vienna Convention in provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates.”

29 Draft articles on Succession, supra note 12, at 204.
its decision on the *Gabčíkovo-Nagymaros Project*, a case that involves navigation but primarily concerns the use of an international river for joint hydropower development.\(^{32}\) One of the questions submitted to the Court was whether Slovakia became a party to this Treaty as a successor to Czechoslovakia. Hungary argued that “there is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party.”\(^{33}\) On the other hand, Slovakia argued that there is a “general rule of continuity which applies in the case of dissolution [of a State]” and that the treaty was one “attaching to [the] territory” according to the meaning of Article 12 of the 1978 Vienna Convention.\(^{34}\) The Court did not pronounce whether there is a general rule of continuity in case of dissolution. It did, however, conclude that the 1977 Treaty continues to be binding upon the successor State, ensuring the continuity of the treaty regime. This results partly from the provisions of the Treaty that regulate navigation rights of a section on an international watercourse. According to Article 18 of the 1977 Treaty, the Contracting Parties “shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks.”\(^{35}\) Moreover, the aim of the 1977 Treaty is the construction and joint operation of a system of locks which are located in the territories of Hungary and Czechoslovakia along the Danube River. These territorial aspects enshrined in the 1977 Treaty created a case of application of Article 12 of the 1978 Vienna Convention. Yet the analysis of the Court seems incomplete.\(^{36}\) In this regard, it is worth quoting the following portion of the judgment regarding the 1978 Vienna Convention directly:

> The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However, the Court concludes that this formulation was devised rather to take account of the fact that, in

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\(^{33}\) *Id.* at para. 118.

\(^{34}\) *Id.* at para. 120.

\(^{35}\) That means that the navigation rights that have been agreed in the 1948 Convention concerning the regime of navigation on the Danube have to be ensured by Hungary and Slovakia *vis-à-vis* the other riparian States in the development of the Gabčíkovo-Nagymaros project.

many cases, treaties which had established boundaries or territorial régimes were no longer in force [. . .]. Those that remained in force would nonetheless bind a successor State.\(^{37}\)

The dictum does not clearly resolve the question of whether, in case of inclusion of territorial rights and obligations in a treaty’s text, the entire treaty would always remain unaffected by succession or whether merely the rights and obligations attached to the territory would remain unaffected, as provided in the text of Article 12 of the 1978 Convention. It seems that in its decision the Court goes beyond the rule established in Article 12 and considers the treaty binding as a whole.

Some authors have argued similarly that water treaties remain unaffected by State succession; their arguments appear to have been confirmed by the International Law Commission (ILC).\(^{38}\) In its commentary to the Article, the ILC states that “[t]reaties concerning water rights and navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties.”\(^{39}\) However, one should note the special wording used by the Commission: by considering water treaties “as candidates” for territorial treaties, the ILC leaves the door open for alternative interpretation and categorization.

Indeed, in practice, newly independent States have on several occasions declined to succeed to water treaties and have considered these agreements as falling under the category of treaties for which the *tabula rasa* principle may apply. The practice of the former British colonies on the Nile and their reactions to the question of succession to the 1929 Agreement concluded between Great Britain and Egypt in regard to the Use of the Waters of the River Nile for Irrigation Purposes can be cited in this respect. At the time of the treaty’s conclusion, the territories of Sudan, Kenya, Tanzania (formerly Tanganyika), and Uganda were under colonial control of Great Britain. While Egypt holds that automatic succession applies to all Nile River agreements because of their territorial nature,\(^{40}\) the other

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\(^{37}\) *Gabčíkovo-Nagymaros*, at para.123 (citations omitted).


\(^{39}\) Draft articles on Succession, *supra* note 12, at 203.

States refuted automatic continuity. The Sudan declined to be bound by the 1929 Agreement upon its independence in 1956. At the same time, however, the Sudan and Egypt negotiated a new Nile waters agreement, the 1959 Agreement on the Full Utilization of the Waters of the Nile, which expands on and makes explicit reference to the 1929 Agreement. This has been interpreted as evidence that the Sudan has in fact not renounced the continued binding force of the earlier treaty and that its line of action was thus contradictory. Tanzania adopted an approach of selective succession, also known as the “Nyerere doctrine,” named after its first president. According to this doctrine, a newly independent State has the option to review the previously existing international treaties and has the right to decide which of them it will accept, because a new State should not be bound by a treaty to which it did not agree. More particularly, Tanzania considered that the 1929 Agreement—according to which it would be required to obtain prior consent from Egypt for any future irrigation, hydropower or similar projects in its own part of the Lake Victoria Basin—would be incompatible with its sovereignty as an independent State. Kenya and Uganda, while not specifically contesting the devolution of the 1929 Agreement, both adopted declarations that follow the Nyerere doctrine. They declared those colonial treaties “which cannot be regarded as surviving according to the rules of customary international law as having terminated” after a period of two years since independence. While the binding force of the 1929 Agreement continues to be a stone of contention in the Nile basin, the specific argument brought forward by Tanzania highlights an important issue: it points to the fact that not all rights and obligations included in water treaties are necessarily attached to a particular territory.

Some rules contained in water agreements may be seen as attached to territory and would thus survive the transfer of sovereignty, as in the case of navigation rights or with regard to joint generation of hydropower or

\[\text{STATE SUCCESSION AND INTERNATIONAL TREATY COMMITMENTS: A CASE STUDY OF THE NILE WATER TREATIES (Konrad Adenauer Stiftung Occasional Papers No. 9, 2004), at 16.}\]

\[\text{Draft articles on Succession, supra note 12, at 203; Okoth-Owiro, supra note 40, at 17.}\]

\[\text{Godana, supra note 40, at 145.}\]


\[\text{Draft articles on Succession, supra note 12, at 203; Godana, supra note 40, at 148.}\]

\[\text{Godana, supra note 40, at 151; Okoth-Owiro, supra note 40, at 17.}\]
joint river regulation works. However, water treaties frequently include provisions relating to the exercise of decision-making, information and data exchange, and participation in a river commission. These elements of a river regime are linked to the sovereignty and personality of a particular State. With regard to these norms, it is doubtful that a treaty could legally bind a successor State. These rights cannot automatically be considered as attaching to territory.

In the context of the analysis of rights and obligations contained in water agreements, the qualification of these agreements as “territorial treaties” tout court appears inadequate. In the following section, we analyze the nature of the various rights and obligations that are frequently included in water treaties in more detail in order to demonstrate that water treaties should not automatically be considered as “territorial” because not all rights included therein are necessarily attached to territory.

THE QUESTION OF TERRITORIALITY OF RIGHTS AND OBLIGATIONS INCLUDED IN WATER TREATIES

The analysis has to start with recalling the definition, extent, and nature of State territory. It is the geographic space that is delimited by a State’s international boundaries and it is made up of the elements and resources that are found within this space. A State’s territory consists not only of the surface area of that space but also of the land and air column below and above it.46 Most natural resources that are located in the territory of States are closely attached to this space: minerals and soils, for example, shape the surface area, mountains, valleys and plains, and can also determine a country’s wealth. Yet other resources are not interlinked with a State’s territory: they remain only temporarily in the territory while traversing its geographic space. Air and migratory species belong to this category of “dynamic” and “shared” resources, as does water. The passage of freshwater through transboundary rivers, lakes, and aquifers is only one part of its journey through the global water cycle. Freshwater is not permanently attached to any State’s territory; it flows across it, it infiltrates and evaporates, and is carried away by winds and clouds. The question

46 J. Verzijl, International Law in Historical Perspective: Part III State Territory (A.W. Swijthoff, Leiden, 1970), at 14. The territorial sea equally forms an integrative part of a State’s territory; as it concerns salt water resources, it is of limited relevance for the present analysis.
thus arises whether water utilizations and the rights relating to them can be considered as attaching to territory.

**The Territorial Nature of Water Utilization Rights**

A distinction has to be made between the various ways of utilizing water; some of these uses are very much attached to a State’s territory, while others are less so. Navigation, for example, is cited as the utilization that best demonstrates the territorial nature of water rights not without reason. The right to navigate is the entitlement to traverse the territory of a State other than the State under whose flag the vessel is operating on a certain route by taking advantage of the specific surface texture that water gives to that part of the territory, i.e., the navigable river, channel, or lake. As a consequence, navigation rights are intimately linked to the territorial space of States and its particular surface texture.

In a similar manner, hydropower generation can be deemed attached to a State’s territory. The hydropower potential of a river is predetermined by the shape and the structure of the riverbed in which the waters flow. The gradient, the difference in head, and the width of a riverbed are key criteria for hydropower potential. In this sense, hydro-electricity production and the rights related to it are of territorial character. Yet at the same time, hydropower potential also depends on the flow volume. The territorial attachment of water volume flowing in a transboundary river can be put up to question; that part of the hydropower potential of a specific site on a river may depend on hydrologic conditions, or the rain that falls, in the territory of another riparian State upstream. The question is whether this affects the territorial character of the right to develop hydropower potential and State succession into this right. Another question which arises is whether rights and obligations of a water agreement can create an objective regime, i.e., “obligations and rights valid *erga omnes*.”\(^47\) It is true that a water treaty establishing boundaries and specific territorial situations such as navigation rights is generally applicable to third-party States.\(^48\) However, the focus of some rights and obligations, such as those regarding the development of hydropower works, whether or not jointly

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\(^{47}\) *Yearbook of the ILC 1964, Vol. II* (Document A/6309/Rev.1, Part II, Chap. II, para. 4 of the commentary to Article 34), at 231.

\(^{48}\) For example, the 1977 Treaty between Slovakia and Hungary also established the navigation regime for an important sector of the Danube. In so doing, it “created a situation in which the interests of other users of the Danube were affected.” *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia).* 1997 I.C.J. Reports (Sept. 25), at para. 123.
managed, can hardly be considered as aiming to attribute an “objective character” to certain territorial realities. In this regard, in the Gabčíkovo-Nagymaros case, Hungary strictly rejected the argument that the common will of the two Parties had been to create rights and obligations designed to establish an objective regime.\footnote{Reply of Hungary, \textit{Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)}, 1995 I.C.J., Vol. I (June 20), at 17.} The objective of these rules is to allow the construction and the operation of installations and structures on specific parts of the territories of riparian States, but not to confer rights to third States with respect to these installations.\footnote{In the case of the Gabčíkovo-Nagymaros Project, it is difficult to dissect the question of hydropower infrastructure from the territorial navigation rights, because the works provided satisfied both water utilizations at the same time.}

\textbf{Rights and Obligations Related to the Protection of the Environment and Fisheries}

Legal regimes on transboundary water resources increasingly also include environmental aspects that refer to land-water linkages. Rights and obligations often included in international water treaties concern the protection of nature and riverine ecosystems, as well as fishing resources. The issue of territoriality of fishing rights raises doubts, in particular if these rights concern migrating fish species. On the other hand, the rights and obligations regarding environmental protection seem to be closely connected to the territory. Yet these rights and obligations also relate to the exercise of sovereign decision-making of the concerned States. As an example, the 1975 Statute of the Uruguay River establishes that the Parties should agree on rules governing fishing activities in the river and on measures to ensure that the management of the soil and woodland does not cause changes that may significantly impair the regime of the river or the quality of its waters.\footnote{Article 35 and 37 of the Statute of the Uruguay River, Salto, Feb. 26, 1975.} In the Gabčíkovo-Nagymaros case, the treaty in question also contained elements concerning the protection of the environment. The Treaty signed in 1977 between Czechoslovakia and Hungary provides for the construction and operation of a system of locks as a joint investment of the Parties; more specifically, its purpose is that the Parties cooperate in the construction of an interdependent system of structures on their respective territories that is aimed at hydroelectricity production, flood prevention, and the improvement of navigation.\footnote{\textit{Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)}, Judgment, at paras. 15, 123.}
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the same time, Articles 15, 19 and 20 of the Treaty provide for the protection of water quality, the environment, and fishing interests.\textsuperscript{53}

The area of the Gabčíkovo-Nagymaros barrage system contains huge and valuable water reserves and a major wetland. The region is particularly dependent on the Danube River, including as a source of drinking water.\textsuperscript{54} In this context, Articles 15 and 19 of the 1977 Treaty assume particular importance as they require Parties to construct and operate the barrage system so as to maintain water quality and the protection of the environment.\textsuperscript{55} According to the Court, the “re-establishment of the joint regime” laid out under the 1977 Treaty would also reflect “in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses.”\textsuperscript{56} The Court also stressed that this joint regime should be implemented in an evolving manner consistent with current environmental norms and standards.\textsuperscript{57} At the time of the dispute, Slovakia and Hungary were signatories to the 1994 Convention on Cooperation for the Protection and Sustainable Use of the Danube River, which entered into force only in 1998. This Convention provides specific water protection measures for the prevention and reduction of transboundary impacts, the sustainable and equitable use of water

\textsuperscript{53} Article 15 of the Treaty deals with the protection of water quality in the following terms: “The Contracting Parties shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks.” Article 19 of the 1977 Treaty stipulates that: “The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.” Article 20 requires Parties to take appropriate measures to protect fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958. Memorial of Hungary, Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1994 I.C.J. (May 2), 118–19.


\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Gabčíkovo-Nagymaros}, Judgment, at para. 147.

\textsuperscript{57} “In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing—and thus necessarily evolving—obligation on the parties to maintain the quality of the water of the Danube and to protect nature.” \textit{Id.} at para. 140.
resources and the conservation of ecological resources.\textsuperscript{58} These commitments of the Parties under the 1994 Danube Convention have arguably played a role in the analysis of the Court regarding the environment and its dictum that “in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.”\textsuperscript{59} During the proceedings, Hungary had in fact underlined the value of the norms of the 1994 Convention for the protection of the quality of the waters of the Danube and its environment.\textsuperscript{60}

The conclusion in the judgment about the continuity of the 1977 Treaty was made, at least in part, with an eye toward safeguarding the regime established by the Parties on the use of the waters for the protection of the environment of the Danube River. Rights and obligations related to the protection of the environment can therefore be considered part of the territorial regime established by the joint hydropower project.

The Court also stressed that rights and obligations regarding environmental protection elaborated in a water agreement ultimately require cooperation between States to be effective. This dimension was underlined by the Court when it emphasized that “the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant.”\textsuperscript{61} The Court suggested that the objectives of the 1977 Treaty “must be pursued in a joint and integrated way,” taking into account the norms of international environmental law and the principles of the law of international watercourses.\textsuperscript{62}

Both in cases in which a successor State invokes the principle of continuity and where the clean slate theory is adopted, the cooperation required to effectively perform rights and obligations should be interpreted as part of the equitable rights of States over shared natural resources. In this context it is worth recalling that like the Permanent Court of International Justice

\begin{itemize}
  \item\textsuperscript{58} See Art. 6 of the 1994 Convention, \textit{available at} http://www.icpdr.org/icpdr-pages/contracting_parties.htm (last visited Feb. 18, 2012).
  \item\textsuperscript{59} \textit{Gabčíkovo-Nagymaros}, Judgment, at para. 140.
  \item\textsuperscript{60} Hungary noted that: “By signing this instrument [the 1994 Danube Convention], Hungary and Slovaki have indicated their general acceptance of the principles and rules which are to be applied for the conservation of the quality of the water of the Danube and in the aquifer connected to it and for the protection of nature.” See Counter-memorial of Hungary, \textit{Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)}, 1995 I.C.J. (June 20), at paras. 4.35, 1.56.
  \item\textsuperscript{61} \textit{Gabčíkovo-Nagymaros}, Judgment, at para. 140.
  \item\textsuperscript{62} \textit{Id.} (emphasis added).
\end{itemize}
before it, the ICJ recognized both the “community of interest” among the different watercourse States and “the perfect equality of all riparian States” in its decision on the Gabčíkovo-Nagymaros case. Taking into account the concept of the community of interest and of “a common legal right,” the Court highlighted the principle of an equitable and reasonable use of international watercourses and noted:

Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law.

The succession in respect to treaties is submitted to the principle of equality of States and must take into account the right of a watercourse State to an equitable and reasonable share of an international river. Because they are interlinked with the territory of a watercourse State, rights and obligations related to the protection of hydrologic ecosystems have a territorial nature. Environmental rights and obligations should be interpreted as part of the right to an equitable and reasonable use of an international watercourse.

**Participation in Joint Water Management Mechanisms**

Other provisions that are frequently found in water treaties are rules on the establishment of joint mechanisms to manage shared watercourses. State parties to these organizations participate in a decision-making body entrusted to perform several tasks. The issue of membership in such river commissions raises questions with regard to State succession.

It is widely accepted that the rules governing membership established by a particular agreement override any rules of succession. New States are required to apply for the membership of an international organization according to “the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.” For example, the Czech Republic and the Slovak Republic were both admitted as new

63 *Id.*

64 *Id.*


66 Article 4(a) of the 1978 Vienna Convention.
States to the United Nations through the normal admission procedure in 1993. The normal admission procedure was also followed in the case of Eritrea. After a referendum held in April 1993 under the supervision of the United Nations, Eritrea was admitted to the United Nations on 28 May 1993. The issue of the membership of Russia in the United Nations was addressed differently; Russia informed the United Nations Secretary-General in 1991 that the membership and participation “of the USSR in the UN . . . is being continued by the Russian Federation.” The emergence of new States or the dissolution of States may equally have an impact on treaties establishing river basin organizations.

Basin organizations are mechanisms that promote international cooperation on water resources. They are created by the concerned States and have a limited geographic scope. The mandates, tasks, powers, and functions differ from one water commission to another; they serve as framework for the exchange of information and for consultation between States, they disseminate relevant information to the public, or they may draw up regulations on navigation, anti-pollution, and water quality standards. Examples of international practice in this regard are the Central Commission for the Rhine, the Danube Commission, the Mekong River Commission, the Organisation pour la mise en valeur du fleuve Sénégal (OMVS) and the Administrative Commission for the River Uruguay (CARU). The ICJ has described this last institution for example as “a joint mechanism with regulatory, executive, administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource; . . . [a] mechanism [which] constitutes a very important part of that treaty regime.”

River commissions ensure coordination between States parties to water treaties. The variety of functions of these organizations reflects the exercise of rights that are not all attached to territory. The Danube Commission, established by the Convention Regarding the Regime of Navigation on the Danube signed in Belgrade in 1948 (hereinafter the 1948 Danube Convention), highlights the variety of tasks a joint management mechanism may carry out. As will be subsequently examined, it also provides a

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67 Koskenniemi, supra note 65, at 118-19.
69 Koskenniemi, supra note 65, at 114.
70 A. ZIMMERMANN, STAATENNACHFOLGE IN VÖLKERRECHTLICHE VERTRÄGE (Springer, Heidelberg, 2000), at 857.
relevant example on the issue of State succession to membership in international organizations.

During the 1990s, the dissolution of three States (the former Soviet Union, Czechoslovakia, and the SFRY) raised questions with regard to the 1948 Danube Convention and membership in the Danube Commission. Territorial changes in Europe in the 1990s redefined the relationships between the riparian States of the Danube River. As the 1948 Danube Convention is open to riparian States, successor States that are not riparian, including the Czech Republic and Russia, would be a priori excluded from membership in the Danube Commission. On the other hand, the membership of successor States that are riparian, such as Croatia, would be possible if other Parties of the Convention were to consent to it.

Regarding Czechoslovakia, the two successor States came to an agreement between themselves on the succession of the Slovak Republic to the 1948 Danube Convention. Despite not being directly adjacent to the Danube, the Czech Republic also expressed its desire to become a party to the Convention as a successor State. Its interest in becoming party to the Convention was based on a section of the Danube-Oder-Elbe canal that would pass through its territory. The project was still in the planning stages at the time of separation in 1993 and has since then only been partially completed. The Czech Republic is currently an observer State to the Commission.

The succession of the States that emerged from the USSR raised the issues of the participation of Russia, Ukraine, and Moldova in the Danube regime. The legitimacy of Russia’s succession could have been complicated by the fact that it is not riparian to the Danube. Yet the intention of Russia to be part of the 1948 Danube Convention raised no objection from the other State Parties. Ukraine succeeded to the Convention and its membership to the Commission was accepted on the basis that it is a riparian State. Moldova, emerging as a newly independent State from the dismemberment of the former Soviet Union, presented a request

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of accession to the 1948 Convention and its request was subsequently accepted by the Commission.\textsuperscript{75}

The FRY declared to be the continuator of the SFNY and Croatia declared to be a successor State of ex-Yugoslavia with regard to this Convention. In 1992, Croatia notified the Secretary of the Danube Commission of its intention to accede to the Convention as a successor State of the SFRY and asked for membership.\textsuperscript{76} In this regard, it is interesting to note that the notification of succession was addressed not to FRY, the depository of the Danube Convention,\textsuperscript{77} but to the Danube Commission. This can be explained, on the one hand, because the diplomatic relationships between Croatia and the FRY were not established until 1996 and, on the other hand, because the FRY had not been universally accepted as the successor to the SFNY.

The various questions regarding succession to the 1948 Danube Convention were ultimately solved through negotiations; this allowed taking into account the peculiarity of the situation of each individual State. A Preparatory Committee was established by the Parties charged with the revision of the Danube Convention. The Committee’s work ended with the adoption of an Additional Protocol to the Convention in March 1998 that provides for the membership in the Danube Commission of successor States and membership of other States having an interest in the Danube region.\textsuperscript{78}

What does the succession practice surrounding the 1948 Danube Convention demonstrate? According to international customary law, rights and obligations relating to territory remain unaffected by succession. Yet some rights and obligations included in water agreements—even if related to a territory—are not of a territorial character as such. On the one hand, the 1948 Danube Convention does establish a territorial regime including specific navigation rights. In this regard, the Convention provides for the freedom of navigation on the Danube for riparian and non-riparian States such as Russia. More specifically, the vessels navigating the Danube have the right to enter ports, to load and discharge, to embark

\textsuperscript{76} The accession of Croatia was subsequently approved by the Danube Commission in its session held in Budapest in 1993. ILA, Conference Report, New Delhi (2002), at 11, available at http://www.ila-hq.org/en/committees/index.cfm/cid/11.
\textsuperscript{77} See Article 47 of the Convention.
and disembark passengers, to refuel and to take on supplies. These rights are attached to the territory.

On the other hand, this Convention also establishes a basin commission. Danubian States undertake to carry out the works necessary for the maintenance and improvement of navigation conditions in consultation with the Commission. Moreover, the Commission is charged with the preparation of a general plan of the principal works called for in the interests of navigation on the basis of proposals presented by the Danubian States. These provisions of the Convention are less attached to uses of a territory and are related to the exercise of sovereign decision-making rights. In this context, automatic succession with regard to the membership in a river commission does not take place. However, if a successor State continues the legal identity of a given member State, that State may also inherit the membership conditioned on the approval by other member States, as was the case with regard to Russia.

The analysis highlights that treaties establishing joint river commissions invariably include rights and obligations that are not attached to a territory. They include rules about membership and the participation in the decision-making processes taking place in international organizations.

CONCLUSION

In the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide between Bosnia and Herzegovina and Yugoslavia, Judge Weeramanty referred to “the intricate field of State succession to treaties—a field in which there has been much difference of juristic opinion, and in which many competing theories strive for recognition,” favoring the principle of automatic succession for a limited class of treaties not centered on individual State interests. The above analysis demonstrates that in the case of treaties on transboundary water agreements, the international practice on State succession is equally heterogeneous.

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79 Article 24.
80 Article 3.
81 Article 8(b).
83 Id. at 642. See also Separate Opinion of Judge Parra-Aranguren, at 656.
A general categorization of water treaties as territorial treaties and thus the application of the principle of automatic succession are inadequate in this case, because they do not take account of the variety of rights and obligations that are usually included in these treaties. Some of these norms do have a clear territorial character, such as navigation rights, rights to construct complex multi-purpose infrastructure and obligations related to the environment. Other rights and obligations, however, are not attached to territory. They relate for instance to the exercise of sovereign decision-making and to membership issues in international organizations or technical and river commissions. It follows therefore that international water treaties cannot be categorized summa summarum as territorial treaties. Their territorial nature needs to be assessed based on a case-by-case analysis of the rights and obligations they enshrine. While territorial rights and obligations are not affected by State succession, others do not automatically bind the successor State.

Regimes on transboundary water resources frequently include environmental concerns. The environmental considerations contained in multilateral and in bilateral water treaties provide an important matter that has had some salience for the ICJ, such as in the Gabčíkovo-Nagymaros case. Additionally, the continuity of conventional regimes on transboundary water resources can be seen as contributing to an increasingly universal interest of protecting the natural environment. The environmental aspects of managing shared water resources, including land-water linkages, and the question whether these obligations could be opposable erga omnes therefore raise a novel consideration to be dealt with when addressing State succession issues. In this context, one may expect a tendency to recognize the principle of continuity in order to ensure a stable legal regime favoring the protection of river ecosystems.

The heterogeneity of State practice demonstrates that the way succession is dealt with in the case of the emergence of a new sovereign State depends largely on the decisions taken by the successor State and the other treaty parties. This situation of legal uncertainty may give rise to instability and tensions between States. Universally accepted rules on the legal effects of State succession would contribute to the prevention or mitigation of water disputes in this context. The need to prevent a legal vacuum as a risk factor for conflict in the process of succession was already pointed out at the 1977 United Nations Conference on Succession of States in Respect of Treaties, when it was stressed that a hiatus is inconvenient “both to the newly independent State and to the international community.”84 In this

84 See id. (Separate Opinion of Judge Weeramantry), at 653.
context, the approach taken by South Sudan and the response of the other State Parties to the treaties affected by State succession will provide an invaluable perspective on this evolving area of law and may contribute to the crystallization of universal rules, as well as to the prevention of water disputes on the Nile River.