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YUGOSLAVIA DISSOLUTION BEFORE THE ICJ: THE NEED FOR A NEW APPROACH TO STATE SUCCESSION

PAOLA PUOTI*

1. THE JUDGMENT IN THE *LEGALITY OF USE OF FORCE* CASES: GENERAL FEATURES[1]

The decisions of the International Court of Justice (ICJ) on the preliminary objections of 15 December 2004[2] close the cases concerning the *Legality of Use of Force* filed by the Federal Republic of Yugoslavia – Serbia and Montenegro (now Serbia) – against eight (originally ten) NATO Member States accused of having acted in violation of fundamental principles of international law, by resorting to armed intervention – allegedly for humanitarian reasons – against the territory of Yugoslavia.[3]

With these decisions the International Court, whilst accepting the substance of the submissions of the Respondents aimed at ending the proceedings, refused to accept their requests to reject the cases *in limine litis* by removing them from the General List. Instead, the Court agreed to the Yugoslav request to decide the issue of its jurisdiction, whatever the outcome.

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* Associate Professor of International Law, University of Chieti and Pescara "Gabriele d'Annunzio".

[1] *The Federal Republic of Yugoslavia (Serbia and Montenegro)*, so named from 1992, on 3 February 2003 adopted a new federal Constitution and changed its name into *Republic of Serbia and Montenegro*. After a referendum held on 21 May 2006, Montenegro chose the independence and since 2 June 2006 there are two new subjects: *Republic of Serbia* and *Republic of Montenegro*. Here we will refer to FRY for this is the name which figures in the proceedings.

[2] Cases concerning the *Legality of Use of Force* (*Yugoslavia v. Belgium*; *Yugoslavia v. Canada*; *Yugoslavia v. France*; *Yugoslavia v. Germany*; *Yugoslavia v. Italy*; *Yugoslavia v. Netherlands*; *Yugoslavia v. Portugal*; *Yugoslavia v. United Kingdom*) Preliminary Objections, Judgment of 15 December 2004, available at: <http://www.icj.cij.org/>. They are reported by VIRZO, "Rassegna delle sentenze e dei pareri consultivi della Corte Internazionale di Giustizia (2004)", CI, 2005, p. 19 ff.; MÜLLER, "Procedural Developments at the ICJ", The Law and Practice of International Courts and Tribunals, 2005, p. 144 ff.; GRAY, "Current Developments", ICLQ, 2005, p. 787 ff. On these judgments see: OLLESON, "'Killing Three Birds with One Stone'? The Preliminary Objections Judgments of the International Court of Justice in the *Legality of Use of Force* Cases", Leiden JIL, 2005, p. 237 ff.; DE FROUVILLE, "Une harmonie dissonante de la justice internationale: les arrêts de la Cour Internationale de Justice sur les exceptions préliminaires dans l'affaire relative à la Licéité de l'emploi de la force", AFDI, 2004, p. 337 ff.

[3] Case concerning the *Legality of Use of Force – Application* (*Yugoslavia v. Belgium*; *Yugoslavia v. Canada*; *Yugoslavia v. France*; *Yugoslavia v. Germany*; *Yugoslavia v. Italy*; *Yugoslavia v. Netherlands*; *Yugoslavia v. Portugal*; *Yugoslavia v. Spain*; *Yugoslavia v. United Kingdom*; *Yugoslavia v. USA*), available at: <http://www.icj.cij.org/>.

These judgments are worth revisiting after the recent ICJ decision on the *Genocide* case (*Bosnia v. Serbia and Montenegro*)[4] because of some inconsistencies with both the decisions taken in earlier phases of the same proceedings, and with the other decisions taken by the ICJ, either as provisional orders or judgments, on the complex Yugoslav question. This article aims at showing that the source of inconsistency of the ICJ case-law on the Yugoslav question is the flawed approach taken by the Court to decide on the issue of State succession.

In paragraph 3 I will argue that the unsatisfactory experience with the Court's case-law leads to the need to reconsider critically the rules of general international law on State succession in respect of treaties, and to question whether these rules are the most suitable to resolve the legal issues originating from complex territorial changes, as in the case of those occurred in Yugoslavia from 1991 until now.

In the final paragraphs 4 and 5 I will advocate the need of rethinking the law of State succession in the light of the law of treaties, and I will propose an approach based on this body of law, more precisely, on the construction of a general principle that would entail the automatic suspension of treaty obligations when a territorial change occurs in one of the relevant treaty parties.

2. General Inconsistency of the Court's Case-Law on the Yugoslav Question as a Consequence of the Unresolved Issues of State Succession

All the cases on the Yugoslav question brought before the International Court[5] share a common feature: all the titles of jurisdiction invoked by the different Applicants – i.e. the *Genocide Convention*, the *Statute of the ICJ* and two treaties concluded by the former Kingdom of Serbia-Croatia-Slovenia in 1930 – had to deal with the unresolved question of the succession of Serbia and Montenegro in treaties concluded by the former Federal Socialist Republic of Yugoslavia (FSRY).

It is well known that between 1992 and 2000 the *status* of Serbia and Montenegro, both in the international and in the UN legal orders, remained confused and ambiguous, and that this situation was due to the opposite views that divided not only the members of the international community, but also the different organs of the United Nations when dealing with the consideration of the Yugoslav territorial changes as dismemberment or secession. Serbia and Montenegro qualified this

[4] Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Merits, Judgment of 26 February 2007, available at: <http://www.icj.cij.org/>.

[5] The *Genocide* cases filed by Bosnia in 1993 and Croatia in 1999 against Serbia and Montenegro, and the *Legality of Use of Force* cases filed by this latter State against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom and United States of America.

situation as secession, therefore it considered itself as continuing the international legal personality of the original State, with all its treaty obligations – including the *status* of UN founding Member State.[6]

Conversely, most States were of the opinion that Serbia-Montenegro was only one of the new five successor States (together with Croatia, Slovenia, Bosnia and Herzegovina and Macedonia) that took the place of the dismembered former FSRY and that, with the consequence that it would have to apply *ex novo* for UN membership and would have to succeed in, or to renegotiate, all the conventional obligations of the predecessor State in the light of the rules on State succession in respect of treaties codified in the 1978 Vienna Convention. On their part, the various organs of the UN each took a different position on the problem of the Yugoslav *status* in the Organization.[7]

The uncertainty of the Yugoslav *status* in the international community, as a survivor or a new State, produced uncertainty, which lasted from 1992 to 2000, about its *status* in the UN; it determined also doubts about its participation, in the same period, to the Statute of the Court and to the Genocide Convention, in light of the rules of the international law of State succession.

The International Court did not help to resolve the fundamental (for its jurisdiction) issue of the FRY membership in the UN in any of the cases brought to its attention in which Serbia and Montenegro figures either as Applicant or Respondent. This is the source of the discordance in the series of judgments on the Yugoslav question, which we can now briefly address.

Let us begin with the Judgments dated 15 December 2004 in relation to the Order of 8 April 1993 given in the *Genocide* case.

In the 1993 Provisional Order rendered in the *Genocide* case, the ICJ acknowledged the confusing *status* of the FRY in relation to its membership in the UN and its participation to the ICJ Statute, a confusion directly depending on the disputed question of State succession. This confusion led the Court to conclude that it was impossible to base the participation of Serbia and Montenegro in the proceedings on its status as a contracting Party to the ICJ Statute pursuant to Article 93 of the UN Charter and Article 35, para. 1, of the Statute. Therefore the Court declared its *prima facie* competence *ratione personae vis-à-vis* the FRY under Article 35, para. 2, of the Statute. The Court interpreted this provision of the Statute as permitting it to declare its jurisdiction in the *Genocide* case on the basis of Article IX of the Genocide Convention.

[6] See the unilateral declaration of 27 April 1992, when it was proclaimed the birth of the Federal Republic of Yugoslavia (Serbia and Montenegro), reported in the case concerning *Interpretation and Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment of 11 July 1996, ICJ Reports, 1996, para. 17.

[7] See *infra* section 4, pp. 8-9.

In contrast, in its 2004 judgments on the *Legality of Use of Force* cases (*LUF* cases), the Court, completely reversing its 1993 decision, interpreted Article 35, para. 2, of the Statute as referring only to the "treaties in force" at the time of the adoption of the Statute, i.e. when the Statute took effect on 24 October 1945. In this way the ICJ denied its *prima facie* jurisdiction in the *LUF* cases under Article IX of the Genocide Convention: it could not have been a title under which a State not being Party of the UN and of the Statute could validly institute a proceeding before the ICJ, as its adoption was subsequent (1951) to 1945.

Further inconsistency exists between the above mentioned judgments of 2004 with the one dated 11 July 1996 recognising the Court's jurisdiction in the *Genocide* case, where Serbia and Montenegro figures as Respondent and Bosnia and Herzegovina as the Applicant.

In the Judgment of 1996 the Court recognised its jurisdiction under the Genocide Convention *vis-à-vis* Bosnia Herzegovina and FRY, rejecting all the preliminary objections presented by the Respondent, but it did not rely anymore on Article 35, para. 2, of the Statute, as it had done in its previous Order of 8 April 1993 delivered in the same case. We should recall the fact that in the *Genocide* case the Respondent State has always considered itself bound by the Genocide Convention, even though it was invoked against it. It did not use the argument that it was not a contracting party of the Convention in any of its preliminary objections, but, on the contrary, it objected to Bosnia Herzegovina as the Applicant State in so far as it did not hold the quality of contracting Party to that Convention.

The ICJ affirmed its jurisdiction both over Bosnia-Herzegovina and Yugoslavia under the Genocide Convention. In relation to Serbia and Montenegro it relied, on one side, on the official declaration of continuity adopted by the FRY's government on 27 April 1992, already mentioned above.[8] On the other side, the Court noted the absence of contestations by the Applicant State – Bosnia – as to the intention of the Respondent to continue to observe the Genocide Convention expressed in that declaration.[9]

One can wonder why the Court did not address the issue of the access to the Convention by the Respondents in 1996, raising this issue only in the judgments of 2004. The answer could be for reasons of judicial policy: the *Genocide* case has to be viewed in the more general political framework of that period. In 1996 it would have been hardly conceivable that an organ of the UN would take any step leading to a sort of forgiveness of the FRY's responsibilities in the Bosnian tragedy. This outcome would have occurred had the ICJ denied access of the parties to the Court in the *Genocide* case. The same reasoning could apply to the Court's decision not

[8] *Cit. supra* note 6

[9] Case concerning the *Interpretation and Application of the Genocide Convention*, *cit. supra* note 6.

to deal at all with the issue of FRY's membership in the UN in the *Application for Revision* case.[10]

It is also possible that the Court deliberately chose not to deal with the question of the FRY's *status* in the UN because there was a political dispute over its continuing personality among the members of the international community. One can infer, therefore, that the Court felt unable to resolve this problem itself, in the absence of a solution by the subjects directly involved, even though it constituted, from a judicial point of view, a preliminary issue to determine its jurisdiction. This explanation seems preferable and it is consistent with a trend in the ICJ's case-law not to deal with succession issues when political disputes over statehood of the international subjects interested by territorial changes are involved.

In an earlier work, we have argued that the 1996 Judgment affirming the Court's jurisdiction under the Genocide Convention *vis-à-vis* the FRY could be considered correct only if seen as a temporary agreement on the application of a treaty by two States which have not yet been able to resolve their statehood disputes.[11]

As far as the *Application for Revision* case is concerned, it is well known that the case was brought before Court by Serbia and Montenegro on 23 April 2001, after its admission to the UN dated 1 November 2000, in order to obtain a review of the 1996 judgment in the *Genocide* case affirming the competence of the Court under the Genocide Convention *vis-à-vis* the former State.

In a letter dated 8 March 2001, the FRY communicated to the Depositary a list of treaties to which it had decided to succeed by notification of succession: the Genocide Convention did not figure in this list and was instead considered as a treaty to which the FRY intended to accede *ex novo* in 2001, with a reservation concerning the jurisdictional clause contained in its Article IX.

It is also a matter of fact that in the 2003 judgment on this case, although the dispute about the FRY's membership in the UN had been resolved, and therefore it might be possible for the Court to decide the issue of the FRY's participation to the Genocide Convention, the Court preferred not to deal with this problem, choosing instead to reject the admissibility of the application on different and preliminary grounds: there were no "new facts" in the meaning of Article 61, para. 1, to be taken under consideration by the Court.[12]

This Judgment, confirming in the substance the jurisdiction of the Court under the Genocide Convention *vis-à-vis* the FRY, does not fit well with those of 2004 adopted in the *LUF* cases, where the issue of the FRY's membership in the UN between 1992 and 2000 was decided in the negative sense, with the effect that the

[10] See *infra* section 3.

[11] PUOTI, *La questione Iugoslava davanti alla Corte internazionale di giustizia*, Napoli, 2004, Chapter III, p. 95 ff.

[12] *Application for Revision of the Judgment of 11 July 1996*, Judgment of 3 February 2003, available at: <www.icj-cij.org>.

Court denied its jurisdiction under the Genocide Convention in relation to those particular cases.

So the question remains: why the ICJ in 2003 – once the dispute about the FRY's *status* in the UN had been clarified by its admission – insisted in refusing to address the issue of the FRY's *status* in the UN in the period between 1992 and 2000 and consequently avoided once more a decision concerning whether in that period the FRY was or was not bound by the Statute and the Genocide Convention?

On 26 February 2007, while this article was being completed, the Court decided the merits of the *Genocide* case, still leaving this problem unresolved because the organ did not reconsider the issue of its jurisdiction, as the Serbian government had asked.[13] It has been easy for the ICJ to confirm the 1996 Judgment as *res judicata* in the part which affirms that it was not contested that the FRY was bound by the Genocide Convention.[14]

Without denying the high value of this judgment as a precedent for the enforcement of the Genocide Convention and the punishment of this crime, it is remarkable that in so far as it implies the acknowledgment that the FRY could have access to the Court between 1992 and 2000 on the basis of the Genocide Convention, the Judgments of 2004 in the *LUF* cases say exactly the opposite.

It is our opinion that the root of the problem in these incongruent decisions is the common opinion which considers necessary to resolve the succession issues starting from the preliminary resolution of the statehood question: hence of the Court's reluctance to address this question in relation to the FRY's *status*.

Instead we believe that the issue must be considered from a different perspective, i.e. the perspective of the law of treaties, which is independent of any consideration relating to statehood. In this way the judgment of 1996 can be considered as based on an *interim* application of the Genocide Convention, to which both the FRY and Bosnia agreed, at least temporarily, to rely on as the basis of the Court's jurisdiction.

The 1996 judgment cannot be considered in contrast with the judgment of 2007, as this latter simply did not reconsider the issue of the FRY's participation to the Genocide Convention between 1992 and 2000. In this case one can refer to the general principle of procedural law according to which the jurisdiction of a tribunal is that existing at the time of the request and lasts until the final judgment. The Genocide Convention can well be considered as the basis of the Court's jurisdiction since 1993 and until 2007 as a treaty *temporarily applicable* to the FRY and Bosnia, as it was not contested by either of them, both at that time, and later on.

As far as the judgments of 2004 in the *LUF* cases are concerned, they cannot be considered incongruent with the one of 2007 rendered in the *Genocide* case insofar as the issue of the FRY's definitive participation to the Genocide Convention cannot be considered as conclusively decided either in 1996 or in 2007, as there was in both phases of the proceedings simply an *interim* application lasting until 2007 of this treaty.

[13] "*Initiative to Reconsider ex officio Jurisdiction over Yugoslavia*" filed by the Respondent in 2001.

[14] Paras. 80-141 of the 2007 Judgment: the Court rejected the objections about its jurisdiction submitted by the Respondent by ten votes to five and affirmed its jurisdiction under the Genocide Convention. The judges Ranjeva, Shi, Koroma, Skotnikov, and Kreća voted against this decision, explaining their reasons in a separate opinion (Judge *ad hoc* Kreća), a joint dissenting opinion (Judges Ranjeva, Shi, Koroma), and a declaration (Judge Skotnikov) appended to the judgment.

3. The ICJ's Practice in Matters of State Succession: The Need for a Fresh Approach in Light of the Yugoslav Precedent

When we examine the case-law of the Court, it is easy to realize that whenever there has been a dispute over succession issues, the Court has always preferred to apply other principles of international law, avoiding decisions under the succession rules. Leaving aside the oldest cases of State succession on boundaries delimitation, which do not properly belong to the issue of State succession but to territorial sovereignty,[15] the Court has always preferred to rely on different rules of international law other than those on State succession.[16] The Yugoslav case-law before the ICJ clearly demonstrates this point.[17]

In the Order of 8 April 1993 in the *Genocide* case the Court did not deal with the issue of FRY's membership in the UN, involving a succession issue.

In the 1996 judgment on preliminary objections rendered in the same case the Court did not even discuss the issue of the FRY's *status* in the UN, and affirmed its competence under the Genocide Convention avoiding a decision on the applicability of a succession rule, that of the automatic continuity of the FRY in the Genocide Convention. Instead, it simply recorded the positions of the two Parties

[15] Conforti, *Diritto internazionale*, VII ed., 2006, pp. 116-117; Treves, "La continuità dei trattati e i nuovi Stati indipendenti", CS, 1969, p. 333 ff., pp. 437-438. It's important to note that the Vienna Convention of 1978, in its Article 11, expressly excludes the applicability of the succession rules to the legal regime of boundaries.

[16] This is the opinion of Treves (*ibidem*, pp. 441-442) who recalls the case of the *Right of Passage over Indian Territory (Portugal v. India)*, where the Court avoided resolving a succession issue relating to the application to India of the Treaty of Poona of 1779, concluded between Portugal and the United Kingdom, the former sovereign, and preferred to decide the controversy by invoking a local custom: see the merits judgment of 12 April 1960. More recently one can remember the *Gabcikovo-Nagymaros* case, originally between the Czechoslovakia and Hungary and then, after the dismemberment of the former State, between the Slovakian Republic and Hungary, where the Court applied Article 12 of the Vienna Convention of 1978, which is not a succession rule, as it aims to exclude the territorial regimes from the codified succession rules: see Craven, "The Genocide Case, the Law of Treaties and State Succession", BYIL, 1997, p. 127 ff., p. 160 ff.

[17] As we have already seen *supra* section 2.

to the dispute as to the FRY's participation to this treaty that in the Court's words was "not contested".

In the Orders of 2 June 1999 in the *LUF* cases, the Court decided not to deal with the issue of the FRY's *status* in the UN and with the one of its competence *ratione personae* under the Statute and the Genocide Convention, by denying its *prima facie* jurisdiction on different legal arguments not involving succession issues.[18]

In the 2003 decision in the *Application for Revision* case the issue of the FRY's access to the Court was raised but without any result as it preferred not to make any statement on the FRY's *status* in the UN between 1992 and 2000. It avoided once more stating its position on succession issues, recalling the FRY's "*sui generis*" position during that time, and rejecting the admissibility of the claim on the procedural argument drawn from Article 61 of the Statute.

The result was that all the decisions taken in the *Genocide* case (the *Application for Revision* being a different but strictly interlinked case to the latter) led the Court to the affirmation of its competence on the basis of the Genocide Convention, without addressing any succession issue: the FRY's access to the Court by the FRY in reason of its *status* as a UN Member or as a party to the Genocide Convention had never been resolved.

In the 2004 judgments the issue of the FRY's access to the Court had been dealt with for the first time, but the International Court did not come to consider whether the FRY was or was not a party by succession to the Genocide Convention in the relevant period 1992-2000.

This question remains unresolved, as the 1996 judgement affirming the ICJ's jurisdiction under the Genocide Convention was based, in our opinion, on the different principle of the consent of the Parties: the Court affirmed its jurisdiction *ratione personae vis-à-vis* the FRY by invoking the absence of contestations of the Applicant State.[19] In our opinion this statement amounts to the constructive finding by the Court of an *interim* agreement on the application of a treaty between two States which had not yet managed to resolve their statehood disputes.[20]

The Court's approach is now clear: it entails leaving to the interested States the determination of the legal effects on treaties of interlinked politically sensitive statehood issues arising from territorial changes.[21]

This trend has negative effects on the exercise of judicial powers, since the Court seems to avoid any decision on statehood even though necessary to determine its jurisdiction, as a decision that enables it to apply or not to apply a certain treaty.

[18] In these Orders the Court, applying the general rule that it is free to determine which jurisdictional ground to examine first, excluded its jurisdiction by referring to *ratione materiae* (*vis-à-vis* the Genocide Convention) and *ratione temporis* (*vis-à-vis* its Statute) arguments.

[19] See *supra* section 2.

[20] *Ibidem*, *in fine*.

[21] See PUOTI, *cit. supra* note 11, p. 124 ff., p. 128, where we try to show how the case-law of the Court on the Yugoslav question conforms to this interpretation.

The same trend reveals, instead, a positive effect as it enlightens the limits of the traditional opinion which considers statehood and the legal effects on treaties of territorial changes as closely interlinked issues.

In the next section we intend to challenge this traditional opinion and to question whether it is really useful to resolve in advance any question related to statehood when a territorial change occurs, before examining the legal effects of the latter on the application of treaties concluded by the old sovereign of the territory concerned.

A different approach is possible. It would entail leaving to the interested States any decision about the destiny of the treaties relating to a territory when geo-political changes take place, and, at the same time, ascertaining if there exists any rule of customary law within the law of treaties that could be applicable to this case, other than the law of State succession.

4. STATEHOOD AND THE LAW OF STATE SUCCESSION

To test this approach, it is first necessary to discuss the relevance of some of the succession rules codified in the Vienna Convention of 1978. First, we must observe that, when a territorial change occurs, no relationship exists between the issue concerning statehood and the problem of the application of treaties concluded by a State. Second, it is necessary to assess the relevance of two major applicable rules of succession law: the continuity rule and the *tabula rasa* rule. Third, we intend to show the evidence of the existence of a customary rule of treaty law which applies to situations of territorial change, independently of abstract rules on State succession.

Following the traditional opinion, State succession has a double meaning: on one side, it refers to the happening of a territorial change; on the other side, it deals with the legal substitution of a State in the legal rights and obligations of another State. If the original subject survives, all the legal relations survive with it. In the opposite case, there are different opinions as to the legal effects on treaties concluded by the predecessor: following some authors, the *continuity* rule would apply to new subjects born from territorial changes not due to decolonization, while in this latter case the *tabula rasa* rule would be applicable.[22] Some scholars affirm the application of the continuity rule in any event;[23] others limit the continuity

[22] This is the double regime established in Articles 17 and 34 of the Vienna Convention on State Succession of 1978.

[23] GONÇALVES PEREIRA, *Da successão de estados quanto aos tratados*, Lisboa, 1968, p. 192 ff.; BALLADORE PALLIERI, "L'applicabilità ai nuovi Stati africani delle convenzioni anteriori", Diritto internazionale, 1963, I, p. 269 ff.; O'CONNELL, "Recent Problems of State Succession in

rule to the so called "law-making treaties" and/or treaties concerning human rights ad humanitarian law of war.[24] There are many authors convinced that there exists only a trend in respect of the application of the continuity rule.[25] Finally there are opinions completely favourable to the *tabula rasa* rule in every case of territorial change,[26] and express views which admit some exceptions to the latter.[27] It needs to be stressed, however, following the majority of the scholars and regardless which opinion they belong to (i.e. negativists as well as those favourable to the continuity rule), that automatic continuity is always excluded in relation to the succession of a new subject into bilateral treaties, closed multilaterals and the membership of an international organization (IO).[28]

The 1978 Vienna Convention on Succession of States in respect of Treaties lays down two sets of rules, depending on the form of the territorial change that has taken place: in cases of decolonization the *tabula rasa* rule applies (Article 17); all the other cases succession falls into the continuity rule (Article 34). A special

relation to New States", RCADI, 1970-II, pp. 95-206; DEGAN, "Création et disparition de l'État (à la lumière du démembrement de trois fédérations multiethniques en Europe)", RCADI, Vol. 279, 1999, pp. 195-375, p. 326 ff.; STERN, "La succession d'États", RCADI, 1996, pp. 9-438, *passim*; SCISO, who speaks of a presumption *ipso jure* of continuity, both in "Spunti in tema di successione degli Stati nei trattati", CI, 1994, p. 783 ff., pp. 820 and 831, and in "Modalità e tecniche del subentro negli obblighi da trattato", in DEL VECCHIO (ed.), *La successione degli Stati nel diritto internazionale*, Milano, 1999, p. 80 ff.; see also, for a presumption of continuity, WILLIAMSON and OSBORN, "A US Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia", Virginia Journal of International Law, 1992-1993, p. 260 ff.

[24] LAUTERPACHT (ed.), "Oppenheim's International Law – A Treatise", Vol. I, Peace, 8th ed., London, 1967, pp. 167-168; JENKS, "State Succession in Respect of Law-Making Treaties", BYIL, 1952, p. 105 ff.; LATTANZI, "Brevi osservazioni sulla successione fra Stati e accordi internazionali in materia di diritti dell'uomo", in DEL VECCHIO (ed.), *ibidem*, p. 60 ff, p. 69; KAMMINGA, "State Succession in Respect of Human Rights Treaties", EJIL, 1996, p. 469 ff., p. 482.

[25] SHAW, *International Law*, 4th ed., Cambridge, 1997, p. 698. The trend is considered in relation to the human rights and law-making treaties by: MÜLLERSON, "The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia", ICLQ, 1993, p. 493 ff.; and ID., "New developments in the Former USSR and Yugoslavia", Virginia Journal of International Law, 1992-1993, p. 317 ff., p. 321; SCHACHTER, "State Succession: The Once and the Future Law", Virginia Journal of International Law, 1992-1993, p. 253 ff., p. 258 ff.; SIMMA, "From Bilateralism to Community Interest in International Law", RCADI, 1994, p. 353 ff., p. 354; PAZARTZIS, "State Succession to Multilateral Treaties: Recent Developments", Austrian Review of International and European Law, 1998, p. 397 ff., p. 413; CRAVEN, *cit. supra* note 16, p. 151.

[26] TREVES, *cit. supra* note 15, p. 440 ff.

[27] CONFORTI, *cit. supra* note 15, p. 105, in relation to non localized treaties; RONZITTI, *La successione internazionale tra Stati*, Milano, 1970, p. 202; ID., "Successione tra Stati e trattamento delle minoranze nei rapporti italo-croati-sloveni", in DEL VECCHIO (ed.), *cit. supra* note 23, p. 45 ff., p. 56 ff.; ID., *Introduzione al diritto internazionale*, 2004, p. 80.

[28] GIOIA, "Successione internazionale tra Stati", Enciclopedia del diritto, Vol. XLIII, 1990, p. 1407 ff., p. 1407; STERN, *cit. supra* note 23, p. 268 ff.; RONZITTI, *Introduzione*, *ibidem*, pp. 79-81.

rule applies, as an exception, to the succession into the membership of IOs and into treaties concluded by them: following Article 4, the automatic continuity rule is excluded in favour of the application of the specific rules set out in the IO's founding treaty.

In order to determine legal effects on treaties, a common feature shared by the different opinions on State succession law is that they always deem it necessary to decide over statehood issues.[29] Those who support the continuity rule need to find the exact legal basis of continuity in the survival of the old subject; while continuity will be limited only to localized treaties and to open multilateral treaties in the case a new subject is born. Those who deny the automatic continuity of the new subject in the treaties of the old one, and favour instead the *tabula rasa* rule, will always rest their argument on the birth of a new subject, for in this case there will not be any obligation for it to abide by the treaties concluded by the previous sovereign and no international responsibility will be invoked for their breach.

The question if there has been the survival or the extinction of the former State and if a new subject is born depends on the qualification to be given to the factual phenomenon of the territorial change, such as secession, fusion, dismemberment, incorporation, cession. An incorrect qualification of the factual phenomenon means an incorrect determination of its legal effects on treaties concluded in relation to the territory involved in the change.[30]

A major obstacle against a correct qualification over the statehood, as the preliminary condition to resolve the problems concerning the legal effects on treaties of a territorial change, is the absence of customary rules of international law concerning the birth, survival or death of a State as an international legal subject.[31]

The FRY's situation between 1992 and 2000 clearly demonstrates this point, as it was the result of the opposite qualifications of the facts which occurred in the early 1990s to the former socialist State, considered as secession by the FRY, and as dismemberment by the rest of the international community of States. One can also remember the extremely confused position of the various organs of the United Nations as regards the Yugoslav question and particularly as for the *status* of the new FRY (Serbia and Montenegro) in the Organization. While the General Assembly stated in Resolution 47/1 that the FRY could not automatically continue the membership of the FSRY in the UN and consequently had to ask for a new admission into the UN, the Legal Counsel and the Secretary General affirmed that the

[29] CRAVEN, *cit. supra* note 16, pp. 127-163, and ID., "The Problem of State Succession and the Identity of States under International Law", EJIL, 1998, p. 156 ff.

[30] RONZITTI, *La successione*, *cit. supra* note 27, p. 13.

[31] See MORELLI, *Nozioni di diritto internazionale*, VII ed., Padova, 1967, p. 128 ff., who refers to the opinion of the majority of international law scholars denying the existence of customary rules concerning the formation of a State as a subject in the international legal order. *Contra* KELSEN, "Recognition in International Law: Theoretical Observations", AJIL, 1941, p. 225 ff., p. 227, who considers the legal recognition (an institute different from the political recognition) as a proceeding able to ascertain the birth of a State as an international legal subject.

situation created by the Resolution 47/1 did not terminate or suspend Yugoslavia's membership in the UN. It is useful to quote the position of the Legal Counsel of the UN, in relation to this confused situation, as concerns the Secretary General:

> "[…] [T]he Secretary-General was not in a position, as depositary, either to reject or to disregard the claim of Yugoslavia that it continued the legal personality of the former Yugoslavia, absent any decision to the contrary either by a competent organ of the United Nations directing him in the exercise of his depositary functions, or by a competent treaty organ created by a treaty, or by the contracting States to a treaty directing him in the exercise of his depositary functions with regard to that particular treaty, or by a competent organ representative of the international community of States as a whole on the general issue of continuity and discontinuity of statehood to which the claim of Yugoslavia gave rise […]".[32]

The International Court, in the *Application for Revision* case qualified as "*sui generis*" the *status* of the FRY between 1992 and 2000. Moreover, we should recall the general incoherence of the different judgments of the ICJ in the *LUF* and in the *Genocide* cases. The International Court considered the FRY at the same time bound and not bound by the Genocide Convention and its Statute, without having ever resolved the issue of the membership of this State in the UN, and despite the fact that this membership should have been a prerequisite to be a contracting party of the two above mentioned treaties.

The result is that the FRY has been considered, during the said period, at the same time as the survivor to the old State and as a new entity, depending on the treaty invoked as binding the State. If considered under the statehood point of view, this practice is incongruent as far as multiple personalities have been attributed to the FRY. Instead the Yugoslav practice can be easily understood if considered from the treaty law point of view: statehood controversies concerning the birth, survival or death of entities involved in territorial changes are only means in order to affirm or to deny the application of the conventional obligations to the controversial entity.

It is important to note that different qualifications of the events which occur to an international subject, to which follows an incoherent solution as to the application of treaties, can take place also in the absence of any dispute on the nature and form of the territorial change. The Soviet Union territorial change during the 1990s was unanimously considered by the international community and by an official document adopted by three of its successors States (Russia, Ukraine and

[32] *Multilateral Treaties Deposited with the Secretary General – Historical Information*, available at: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp> (last visited 2 January 2007).

Byelorussia) as dismemberment with the extinction of the former State. Despite this agreement on the qualification of facts, the territorial change was treated, in relation to the issue of the application of treaties concluded by the USSR, as a case of survival of the old State by the Russian new State itself, as it affirmed the continuity into all its international rights and obligations, including the right to occupy the Soviet permanent seat of the Security Council and the Soviet seat of the UN.[33]

As we have already seen above, there is a general agreement, among authors and in the State practice, on excluding from the continuity rule the succession of new subjects into the founding treaties of international organizations. This means that the seat of the former USSR in the UN and the permanent seat in the Security Council could not automatically pass to the Russian successor, taking also into account Article 23 of the UN Charter which lists, among the permanent Members of the Security Council, the Union of Socialist Soviet Republics.

This case has been considered, like the Yugoslav one, as "*sui generis*", and the continuity of Russia in the permanent seat of the SC has been justified as a case of acquiescence by almost all the other member States of the UN.[34]

The State practice concerning Russia shows the same incoherence: Austria treated Russia as the survived Soviet Union in relation to certain treaties and as a new State with respect to others.[35]

The Secretary General of the UN, acting as a Depositary of the multilateral treaties to which USSR was a party, stated in an official document that:

> "[…] [A]fter the separation of parts of the territory of the Union of the Socialist Soviet republics (which became independent States), the Union of Soviet Socialist Republics (as the Russian Federation) continued to exist as a predecessor State, and all its treaties rights and obligations continued in force in respect of its territory […]".[36]

Many authors, as well as the most recent international practice, try to overcome the problems concerning the application of treaties arising out of the different views on the qualification of a territorial change (i.e. dismemberment or secession?) by revitalizing the old institute of recognition. They affirm the right of the co-contracting Parties to qualify the events occurred on a State's territory as extinction, survival or

[33] See the Alma Ata Declaration held by Russia, Ukraine and Byelorussia on 21 December 1991, ILM, 1992, p. 138 ff.

[34] CONFORTI, *cit. supra* note 15, p. 112.

[35] On this practice, see TICHY, "Two Recent Cases of State Succession – An Austrian Perspective", Österreichische Zeitschrift fur öffentliches Recht und Völkerrecht, 1992, p. 117 ff., p. 131.

[36] *United Nations Treaty Collection – Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties – Prepared by the Treaty Section of the Office of Legal Affairs-Year 1995*, Chapter XII titled "*State Succession on Treaties*", Section 297. This document is yearly updated. See: <http://untreaty.un.org>.

birth of the sovereign entity, in order to determine their legal effects on the application of the treaties concerning that territory.[37] A trend like this would necessarily lead to the admission of constitutive/extinctive effects (from the statehood point of view) of the recognition, at least in controversial situations. We have elsewhere showed the difficulties encountered in revitalizing recognition as a device capable of solving controversial statehood issues in cases of territorial changes.[38]

What needs to be stressed here is that the revival of the constitutive/extinctive effects of recognition reveals the difficulties encountered by the States and by many scholars when trying to resolve succession legal issues from the starting point of statehood. This problem can be easily resolved only interpreting the State practice from the different point of view of the will of the States concerned to apply or to consider suspended or extinct treaties concerning a territory subject to a change of sovereignty.

State practice demonstrates that every State Party to a treaty considers itself able to qualify the situation created by a territorial change occurred within one of the other State Parties, as well as in its own territory. As to the subject directly involved in the territorial change, it is quite clear the belief of almost all the States concerned to take position on their own *status* concerning their survival or extinction in the international legal order, by means of unilateral declarations[39] or the preparation of lists of treaties to be re-negotiated. It is also useful to recall State practice regarding communications – often upon a specific request – to depositaries of multilateral treaties about their intention to adhere or succeed by notification of succession.

The practice also evidences that any self-qualification is not enough in order to assess the statehood and its legal consequences, being necessary to take into account the opinion of the third co-interested States and IOs in relation to the effects on the application of treaties in force between these subjects. But the two sets of qualifications may differ and lead to inconsistencies in relation to the succession rules invoked as applicable in a specific case, if they are considered from the starting point of the assessment of the extinction or survival of a State.

Indeed the application or non application of treaties seems to be the only underlying reason of the different qualifications of the same facts. Therefore there is a need to re-interpret correctly State practice under treaty law, considering all the

[37] DEGAN, *cit. supra* note 23, pp. 254-257, and p. 296 ff.; STERN, *cit. supra* note 23, pp. 82-83. See, for the State practice, "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991", ILM, 1992, p. 1485 ff.; KLABBERS, KOSKENNIEMI, RIBBELINK and ZIMMERMANN (eds.), *State Practice Regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe*, The Hague, Boston, London, 1999.

[38] PUOTI, *cit. supra* note 11, Part One, Chapter Fourth, para. 4, p. 158 ff.

[39] See the Alma Ata Declaration as concerns Russia and the 27 April 1992 unilateral FRY's Declaration *cit. supra* note 6.

declarations concerning recognition and statehood aimed only at assessing the application, suspension or extinction of treaties in cases of territorial changes.

It is possible to say that State practice concerning statements about statehood must be re-interpreted as instrumental to the need to decide if a treaty is still applicable or not, leaving intact the uncertainty arising from the different opinions about the extinction, survival or birth of one or more of its contracting parties.

Some authors consider unarguable the link between statehood and succession on treaties issues, for under this opinion different sets of rules are applicable to a certain subject, depending on its qualification as survivor or successor.[40] Following this opinion, the continuity in the whole of the international legal relations of a State would apply only if it is considered survived to a territorial change. In the opposite case the automatic continuity rule would apply although limited to certain conventional obligations; its application is generally excluded in relation to the succession in the founding treaties of IOs.

There is no practice confirming this opinion, for in the Russian case, as well as in the older Chinese case, Russia and the Popular Republic of China automatically succeeded into all the relations of their predecessor, including the seats into any International Organizations, notwithstanding their international *status* as survivor or successor, and with the acquiescence of the others Member States of the International Organizations.

The conclusion we can draw from State practice is that the issue of statehood has nothing to do with the only question that arises for all the States and International Organizations involved in cases of territorial change, that is: what treaties are still applicable and what are to be considered suspended or extinct?

Few scholars share this view, considering that the abovementioned difficulties show the uselessness to link statehood issues to their effects on the application of treaties in the event of a territorial change. Therefore they exclude any link between statehood issues and legal effects on treaties of territorial changes, limiting their reflections to the application of the *tabula rasa* and/or the continuity rule.[41]

5. SUCCESSION LAW *VERSUS* TREATY LAW: APPLYING THE SUSPENSION RULE WHEN DEALING WITH THE LEGAL EFFECTS OF TERRITORIAL CHANGES ON TREATIES

We already referred in the preceding paragraph to the different opinions about the existence of the two main succession rules: *tabula rasa* and continuity. The Yugoslav situation has shown how the uncertainty about the choice to apply one or

[40] CRAVEN, *cit. supra* note 29, p. 142 ff., p. 150.

[41] O'CONNELL, *cit. supra* note 23, pp. 95-206; SCISO, *cit. supra* note 23, p. 783 ff.

the other succession rule in relation to a certain subject when a territorial change occurs, adds confusion to the difficulties concerning statehood controversies.

One can wonder why the International Court did not ever make any statement on the application of the Genocide Convention to the FRY in the *LUF* cases, while at the same time it recognised since 1996 that the FRY was bound by this treaty in the *Genocide* case.

It is also difficult to understand why, although the Yugoslavia's and USSR's territorial changes have been both considered almost unanimously as dismemberment cases, each one of them has been treated in a different way as far as their legal effects on treaties are concerned. The automatic continuity rule has been applied to Russia while the *tabula rasa* rule has been invoked in order to dispute the succession of the FRY in the FSRY seat in the UN and other IOs.

It needs to be stressed, moreover, the different use of the two succession rules in relation to the succession of Russia into the treaties concluded by the USSR, and the one of the other Soviet Republics.

The automatic continuity rule governed only the succession of Russia, while the *tabula rasa* rule has been often applied in relation to the succession of the other Soviet Republics and their co-contracting parties to bilateral and multilateral treaties. This happened mainly by means of the adhesion or the notification of succession mechanism of the new States into the multilateral treaties which bound the USSR.[42] The same approach, as we will see below, has been adopted in relation to succession to military treaties such as TNP, START, ABM, etc.[43]

The only conclusion that can be drawn from this practice is the right of every subject involved in (former sovereign and successors) and/or interested (co-contracting States of treaties which were in force in the territory concerned) by a territorial change, to clarify to the other contracting parties their position about their conventional obligations.

A careful analysis of the whole State practice seems to confirm the impossibility to draw from it any conclusion as to the existence either of the *tabula rasa* or the continuity rule. This can be easily demonstrated by the widespread practice to present lists regarding the bilateral and multilateral treaties to be maintained in force, to be suspended or terminated. There would not be any need to act in this way in cases if the survival of the subject was assumed.

The practice of the UN Secretary General acting as Depositary of Multilateral treaties confirms this conclusion. He regularly sends a letter to the States directly involved in a territorial change asking them to clarify their position about treaties that were in force in the territory concerned.

[42] The notification of succession mechanism, used at the time of decolonization and codified by the Vienna Convention at its Article 17, is generally considered to afford its roots in the *tabula rasa* rule.

[43] See *infra* note 48.

The freedom of choice in order to continue or to extinguish a treaty, together with the need to take into account the different positions of all the interested subjects, presupposes the suspension of the treaty and not its automatic extinction. If a treaty – belonging to a territory where a change of sovereignty occurs – can be "maintained in force" it cannot necessarily be considered extinct but only suspended.

An extinct treaty could not be automatically binding until a choice has been made: only an *interim* agreement would apply. The judgment of 1996 in the *Genocide* case, recognising that "[…] it was not contested that the FRY was bound by the Genocide Convention […]", may be considered an example of *interim* agreement between Bosnia and FRY to continue to be bound by the Convention, until a decision on the Serbia and Montenegro controversial *status* as a survivor or a successor of FRSY had been reached.

It is also impossible to affirm a customary rule of automatic succession starting from the declarations of continuity issued by the new independent States during the decolonization: the practice demonstrates the need for the co-contracting parties to the multilateral treaties to accept or to deny the continuity of the new State to be bound by the conventional obligations of the predecessor. Meanwhile, *interim* agreements make it possible to continue to apply the treaties concerned, until all the parties reach a definitive agreement about the treaties' destiny.[44]

The same can be said about the notification of succession practice: it is only one of the alternatives left to the States when a territorial change occurs. They can also decide to adhere without retroactive effects, or they can simply declare their will not to be bound by a multilateral treaty. All these alternatives presuppose the suspension of the treaty concerned.

As far as the *tabula rasa* rule is concerned, the most recent State practice of excluding retroactive effects in case bilateral treaties are declared extinct, clearly shows that they do not end automatically together with the extinction of one of the contracting parties.[45] Until the end of the negotiations conducted on the basis of lists prepared by the interested States, they can be considered only suspended, or at least provisionally in force if they are applied: therefore it is difficult to admit that a treaty ends together with the extinction of one of the contracting parties to it.

Recent practice regarding the treaties of now defunct German Democratic Republic (GDR) shows this point: Article 12 of the German Unification Treaty provides the survival of some conventions previously binding the GDR until an

[44] One can speak of a presumption of continuity until the respective positions of the contracting States have been clarified. The internal case law seems to follow this approach: see the cases cited by PUSTORINO, "La successione di Croazia, Serbia-Montenegro e Slovenia nei trattati bilaterali conclusi tra Italia e Repubblica Socialista Federativa di Iugoslavia", in RONZITTI (ed.), *I rapporti di vicinato dell'Italia con Croazia, Serbia-Montenegro e Slovenia*, Roma-Milano, 2005, p. 11 ff.

[45] *Ibidem*, pp. 26-27.

agreement among all the contracting parties on their end, continuity or revision will be reached. Moreover two bilateral agreements concluded by the GDR with Russia and USA have been maintained in force after the incorporation of the GDR into the German Federal Republic (GFR).[46] In the past we can find other examples regarding treaties survived to the (controversial) extinction of one of the contracting parties: the Baltic State practice is enlightening for this purpose. After their incorporation in the USSR, all the multilateral treaties concluded in the 1920s by Estonia, Latvia and Lithuania remained suspended until the 1990s, when they were revitalized, regardless their presumed extinction sustained by many States and scholars.[47]

The non automatic extinction of multilateral treaties might also be affirmed. An example could be the 1996 judgment in the *Genocide* case, in considering the Court's jurisdiction based on an *interim* agreement between Bosnia and Yugoslavia (Serbia and Montenegro) about the application of the Genocide Convention. Despite any dispute regarding the *status* of the FRY as a survivor or a new subject, the interim application of the above mentioned Convention excludes its extinction both at the time when the territorial change occurred (1991-1992), and during the time in which the controversy about the FRY's *status* in the UN lasted (1992-2000).

Moreover, the Yugoslav question proves the ineffectiveness of the *tabula rasa* rule in controversial territorial situations, until a clarification between all the contracting parties has been reached. This latter rule was considered applicable only after its admission in the UN, dated November 2000, and resulted into the FRY's adhesion to the Genocide Convention, dated 2001. It is to be stressed here that between 1992 and 1996 the UN Secretary General considered the FRY as having survived to the old FSRY and bound by all the multilateral treaties of the former FSRY.

In conclusion we are convinced that neither the automatic continuity, nor the *tabula rasa* rules are clearly established in the customary international law as rules which govern States succession.

Any territorial change must therefore be considered solely from the treaty law point of view, as producing the automatic suspension of all the conventional obligations regarding that territory as the consequence of a situation of political and economic uncertainty which it determines. The former sovereign, if survived, can be considered in a different way in relation to its political-economic capacity: think about the United Kingdom or France during and after decolonization. None

[46] See on this issue LUPONE, "L'unificazione tedesca", in SACERDOTI (ed.), *Diritto e istituzioni della nuova Europa*, Milano, p. 160 ff., p. 177; ZIMMERMANN, "Succession d'États en matière de traités", in KLABBERS, KOSKENNIEMI, RIBBELINK, and ZIMMERMANN (eds.), *cit. supra* note 37, p. 93 and note 209.

[47] On this practice see MÄLKSOO, "Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in International Law", Nordic Journal of International Law, 2000, p. 289 ff.; BOKOR SZEGŐ, "Questions of State Identity and State Succession in Eastern and Central Europe", in MRAK (ed.), *Succession of States*, The Hague/Boston/London, 1999, pp. 95-107, p. 100 ff.

of these States has been, either politically or economically, considered unable to manage all the conventional relations as it did before the territorial change by the other contracting parties.

Equally, different consideration can be attributed to the other entities involved in the change: think about the Yugoslav situation as regards the FRY's capacity to continue the FRSY conventional obligations. The different views about this capacity rooted in different political evaluations of the other contracting parties. They blamed the involvement of the FRY in the Bosnian civil war.

Another striking example is offered by the ex USSR practice regarding succession in military treaties: we can remember the different political evaluation of the Russian capacity and of the other Republics holding nuclear assets, i.e. Belarus, Ukraine and Kazakhstan incapacity to continue the TNP, ABM and START treaties. This different approach conducted to adapt to the new circumstances the old ones, instead of renegotiating and concluding a new treaty which would have taken too much time.[48] This way of resolving the issue clearly demonstrates that the old treaties, even though not automatically continuing, were not extinct: they were only suspended.

The only consequence that can be drawn from a careful examination of the whole State practice seem to be the existence of a customary rule concerning treaty law which determines an automatic suspension of the whole conventional obligations applicable to the territory in which a change has occurred.[49] The automatic suspension is the result of a situation of uncertainty determined by the territorial change.

The uncertainty may last for a long time, as the Baltic States practice demonstrates, and it will end only when all the contracting States will reach an agreement in relation to the continuity, extinction or revision of the conventional obligations which bound them before the territorial change has occurred. In fact, this uncertain situation arising once the suspension of the conventional obligations has taken place, may be clarified only by an action of the interested States.

[48] See the *Lisbon Protocol to the Treaty between US and USSR Concerning the Reduction and Limitation of Offensive Strategic Weapons Concerning the Reduction and Limitation of Offensive Strategic Armaments* (START Treaty), of 23 May 1992, by which Russia, Belarus, Ukraine and Kazakhstan became contracting parties to START (published also in RGDIP 1992, pp. 1030-1031); the *Memorandum of Understanding in relation to the Treaty between US and USSR Concerning Limitations to the Anti-balistic Missiles Systems* (ABM Treaty), of 26 September 1997, and by which the same States became contracting parties to the ABM Treaty; the *Final Document of the Oslo Extraordinary Conference* of 5 June 1992 adopted by the States Parties to the *Conventional Armed Forces Treaty* (FCE), which allowed Russia, Belarus, Ukraine and Kazakhstan to become parties to the FCE Treaty. On this practice and on related succession issues see: HAMANT, "La succession d'États de l'URSS en matière militaire", AFDI, 2004, p. 212 ff., p. 224.

[49] The thesis of the Author is better illustrated in her monographic work, PUOTI, *cit. supra* note 11, Part One, Chapter Fifth, p. 183 ff.

6. Which Effects Can Be Attributed to Bilateral and Multilateral Treaties During the Suspension Period?

State practice is very homogeneous in showing the need that every interested State expresses its opinion on the destiny of each single treaty, both multilateral and bilateral.

One can wonder which effect can be attributed to the treaties during the suspension period.

Past practice used means like devolution agreements or general unilateral declarations of continuity: both these means are to be considered, in our opinion, nothing but a proposal of the author State to continue provisionally, until the end of negotiations, or definitively, the application of treaties contained in those instruments.[50] They therefore need always a reply by the other contracting States in order to consider a singular treaty as definitively extinct, or as provisionally applicable or definitively applicable. This means that *an explicit or tacit agreement between all the interested States is always needed in order to clarify the situation of each treaty either during the suspension period*, and to put an end to the uncertainty deriving from the suspension.[51]

[50] Treves (*cit. supra* note 15, p. 333 ff.) recalls the fact that notwithstanding the conclusion of devolution agreements in the decolonization period, newly independent States used to conclude agreements with third co-contracting parties aimed at maintaining in force specific treaties (p. 370). He seems favourable to consider devolution agreements as *de facto* proposals to be taken into account as a starting point in dealing with treaties' effects *vis-à-vis* third contracting parties and depositaries: "[…] Anche se è difficile configurarli come vere e proprie proposte, è innegabile che gli accordi di devoluzione possano costituire ed effettivamente costituiscano dei punti di riferimento per i terzi Stati e per i depositari di accordi multilaterali […]".

As far as unilateral declarations of continuity are concerned, this author recalls the past practice of the decolonization period, whereby one can find two different kinds of declarations of continuity: those with a fixed term at the end of which the destiny of the treaties will be clarified throughout negotiations, and those without any term (see pp. 377-386). The first kind amounts, in the author's opinion, to a *tacit agreement* on the provisional application of treaties each time that a treaty is applied on a reciprocal basis during the period envisaged (In Tanganica declaration: two years from the date of independence). On this point see also Gioia, *cit. supra* note 28, p. 1426. The maintenance in force of these treaties is realized only through a new agreement between the contracting parties (p. 382). In the absence of a final agreement is the author's opinion that the silence amounts to a denunciation (p. 384).

As for the second kind of declarations, without any term fixed until a final agreement on the treaties' destiny is reached, Treves considers the presumption of continuity thereby included as a sort of proposal of provisional application without reciprocity, until a final decision is reached between parties. It is therefore important to ascertain the behaviour of the other contracting States: they can *acquiesce* to the provisional application or not: in any case *an act of will, implicit or explicit, is needed*. This second kind of declarations, if meet the will of the other contracting States may lead both to a *tacit agreement* on the provisional application, or to a final agreement on the maintenance in force of the treaties. See Gioia, *cit. supra* note 28, p. 1426.

[51] *Ibidem*.

Recent State practice also shows clearly that the interested States use always to conclude agreements after a more or less long reflection period of negotiation, as regards the destiny of the treaties concerned by a territorial change.[52]

It is therefore very difficult to draw from silence a general rule of presumption of continuity during the suspension period.

The whole State practice, both past and recent, seems homogeneous and clear in requesting always an express or implicit but clear position about the provisional or definitive destiny of each single treaty.

As far as bilateral treaties are concerned, the recent practice of 1990s is different from State to State. Generally, they conclude preliminary agreements in form of exchange of notes accompanied by lists of bilateral treaties to be maintained in force, to be ended or to consider provisionally applicable until the end of the negotiations. Then they proceed to consultations in order to clarify definitively the contractual situation.[53]

Sometimes, States initiate negotiations without saying anything about the *interim* application of treaties during the suspension period. In this case it is difficult to consider the silence of the other contracting State as a presumption of continuity; a better explanation is that the treaties are provisionally be applied.[54]

In our opinion, and coherent with our thesis of automatic suspension of the whole contractual obligations in case of a territorial change, during the suspension period the uncertainty lasts until an express or implicit but clear (by *facta concludentia*) position is taken by all the interested subjects as regards the non

[52] A deep analysis of the State practice regarding bilateral and multilateral treaties can be found in ILA, New Delhi Conference 2002, Committee on Aspects of the Law of State Succession (ILA Report), available at: < www.ila-hq.org/html/layout_committee.htm>.

[53] See the ILA Report, *ibidem*, and, also, Klabbers, Koskenniemi, Ribbelink and Zimmermann, *cit. supra* note 37; Eisemann and Koskenniemi (eds.), *State Succession: Codification Tested against the Facts*, The Hague/Boston/London, 2000.

[54] Austrian practice until 1996 reported by the ILA Report seems to go into this direction with a pragmatic application approach, following which a treaty cannot be considered as continuing if it is not expressly so provided by an agreement: see, for references to the Austrian practice *vis-à-vis* States born from *ex* Yugoslavia and from the Czechoslovak Republic (ILA Report, *cit. supra* note 52, p. 19). After 1996 this State seems to follow a different attitude, favourable to the presumption of continuity (*ibidem*).

France also follows an approach case-by-case. As regards the *ex* Yugoslav States, there have been established different lists of treaties to be maintained in force or to be provisionally applicable until the end of negotiations. The Report states: "Il semble que la France adopte l'idée selon laquelle une négociation est absolument nécessaire avant que le sort du traité ne soit fixé; il se peut donc qu'un accord soit rétroactivement considéré comme terminé par ces négociations. Il semble, en outre, que la France ne considère pas que les traités s'appliquent dans la période intermédiaire, avant les négociations […]. Il n'y a dons là pas application provisoire, mais non application provisoire, jusqu'à le sort du traité soit fixé par accord […]" (ILA Report, *cit. supra* note 52, p. 20).

application or the provisional application or the definitive application of each treaty.[55]

Our thesis seems confirmed by recent works regarding State succession: the ILA Final Report of the New Delhi Conference of 2002 on State succession clearly speaks, in case of bilateral treaties, of a general rule of negotiations case by case. The ILA Report refers that almost all the contracting States have followed the negotiations rule, preparing lists of treaties to be maintained in force (definitively), to be renegotiated, or to be terminated.[56]

As for treaties to be terminated, often the extinction of the treaty is provided only for the future: the ILA Report draws from this evidence of the customary existence and application of the automatic continuity principle.[57] In fact this opinion cannot be shared, because the termination *ex nunc* of a treaty can be considered much more easily consistent with a situation of suspension rather than with a customary rule admitting automatic continuity. Moreover, if a similar rule would apply, we cannot see why the whole State practice shows the absolute need of negotiations case by case, treaty by treaty, State by State, *even for those which are to be definitively maintained in force*. Indeed, State practice shows that whenever successor States wish to continue all the conventional obligations of the predecessor an agreement is always needed between the contracting parties in order to definitively continue the conventional relations. The Czech Republic's practice shows this point.[58]

In cases of treaties to be renegotiated, States often insert a provisional application or a presumption or continuity clause: this does not mean that the automatic continuity rule has been applied.

Clauses of presumption of continuity are nothing but mechanisms, amounting to a consensual will of provisional application of a treaty until a definitive action in its respect will be taken.

An interesting and quite convincing doctrinal opinion considers that after a territorial change there is a need to maintain the whole contractual obligations of the predecessor as the starting point in order to achieve a new contractual equilibrium.[59]

[55] The Netherlands, for example, did conclude agreements regarding succession in bilateral treaties with Slovenia, Croatia and Macedonia, but it did not with Bosnia Herzegovina. Despite the absence of an agreement with this latter State, The Netherlands agreed to apply *vis-à-vis* Bosnia an extradition treaty which it concluded with the *ex* Yugoslavia: a consent to the application in a concrete case may well be considered an implicit but clear fact favourable to the continuity of that treaty, but only provisionally in our opinion (ILA Report, *cit. supra* note 52, p. 21).

[56] ILA Report, *ibidem*.

[57] "[…] Il peut être déduit de l'utilisation de cette procédure de terminaison, pour le futur, que l'accord a été considéré comme continuant ipso facto, après la succession […]".

[58] See the agreements concluded between the Czech Republic and, respectively, France, Finland, Poland, the Netherlands, Chine, Denmark, Israel, Japan, Republic of Korea, Norway, Portugal, Greece, Singapore, Spain, Sweden, Bosnia-Herzegovina (ILA Report, *cit. supra* note 52, pp. 20-21).

[59] RONZITTI, "Successione tra Stati", *cit. supra* note 27, p. 45 ff., p. 50.

This opinion is not at odds with our thesis, for it can be illustrated as follows: after a territorial change treaties do not end nor continue automatically, but simply remain automatically suspended and the entire contractual obligations can be used as a basis of negotiations in order to achieve clarity.

Whenever the silence from the contracting parties during the suspension period does not permit to interpret the situation, it is necessary to evaluate case by case the position of all the contracting parties in order to consider if there is a clear, even though implicit, will to consider provisionally applicable some or all of these treaties, or to consider them just suspended and not applicable.

We are convinced that in the absence of clauses of provisional application or of presumption of continuity until the end of negotiations, the silence of States cannot amount to continuity during the suspension period.

France is a good example of this way of behaviour. It is sure that this State applies the suspension rule without any presumption of continuity during the suspension period: in the recent succession issues the France's position was the absolute necessity to negotiate case by case the destiny of each treaty and, in the meanwhile, no provisional application of them has been envisaged.[60] This amounts, in our mind, to a situation of simple suspension until an agreement has been reached.

As far as the Italian practice is concerned, one can refer to a recent work regarding the succession of Croatia, Serbia-Montenegro and Slovenia into bilateral treaties concluded between Italy and the former FSRY.[61] It results that a list of treaties has been prepared by Slovenia, aimed at clarify its position in respect of their application and then officially presented to the other contracting State (in this case Italy by means of verbal notes). In this communication Slovenia declares its wish to continue some of them, eventually asking their up-dating or new meetings in order to better define the modalities of their application. The Italian reaction has been to take note of the communication without contesting the exclusion or the inclusion in the list of any single treaty, and to invite Slovenia to negotiate in order to review those of them for which the contracting parties showed different views about their integral maintenance in force or their revision. Other treaties included in the list have been later modified by agreement of the parties.[62]

A succession agreement regarding bilateral treaties has also been concluded between Italy and Croatia on 22 January 1993, but it has only served as a basis for negotiations lasted until 13 January 1999, when the two States agreed about which treaties were to be maintained and which needed further negotiations.[63]

Until a formal position is taken by the State receiving the list, it is difficult to say that the silence of the other contracting party (Italy) amounts to a tacit agreement about the provisional application of the treaties included during the suspen-

[60] See *supra* note 54.

[61] PUSTORINO, *cit. supra* note 44, *ibidem*.

[62] *Ibidem*.

[63] *Ibidem*, p. 17.

sion period and until a definitive agreement has been reached. The Italian case-law is not clear, for one can find decisions applying a sort of presumption of continuity *vis-à-vis* Croatia of an old extradition treaty concluded between the Italian Kingdom and the Serb-Croat-Slovenian Kingdom in 1922,[64] and others excluding the application of the same treaty.[65]

As regards the treaties not included in a list, silence of the parties during the suspension period has been interpreted by the Italian judge as excluding the provisional application of these treaties. This has been the case of the extradition convention of 1922 whose application has been excluded by the Italian Court of Cassation until the Serbia-Montenegro would take an express position about its succession on treaties concluded by the former FSRY in the *Glicic* case.[66]

The issue of the effects of multilateral treaties during the suspension period will now be addressed.

In order to admit the existence of the automatic continuity rule, in past times authors referred to the practice of the devolution agreements, which the new independent States born from decolonization concluded with their predecessors to continue all the conventional obligations of the latter. It is a well established data that the other contracting parties have always felt themselves entitled to discuss the participation of the new State to each single treaty, either bilateral or multilateral.[67]

Recent practice of the new States born from the former USSR and former Yugoslavia, as well as the one concerning former Czechoslovakia, shows the difficulties of drawing a general presumption of continuity, at least provisionally, during the suspension period, for States have demonstrated different positions.

It is true that, examining the practice of depositaries of multilateral treaties, especially that of the Secretary-General of the UN, a general trend to continue multilateral obligations can be found, but it is also important to remember the following circumstances.

[64] *Jadranko* case, Corte di Cassazione, judgment No. 2828 of 6 July 1995. See Cassazione penale, 1996, p. 3022, and PUSTORINO, *cit. supra* note 44, p. 17.

[65] Appeal Court of Torino, judgment of 2 July 1993, RDI, 1994, p. 197, also reported by PUSTORINO, *cit. supra* note 44, p. 17.

[66] Corte di Cassazione, judgment of 17 August 1995, Cassazione penale, 1996, p. 2629, also reported by PUSTORINO, *cit. supra* note 44, pp. 18-19.

[67] TREVES, *cit. supra* note 15, p. 359 ff. Following this author, the practice regarding the devolution agreements cannot assure continuity and stable relations, being always necessary the consent of the third contracting parties to their application. He remembers that the position of the Secretary General of the UN acting as depositary of multilateral treaties was only to take into account devolution agreements without considering them as assuring continuity (p. 365). Moreover, he recalls the position of the British Commonwealth Office, stating that a devolution agreement cannot bind a third contracting State without its explicit consent (p. 368), and the diffused practice of many States which concluded devolution agreement, to proceed after that to conclude specific agreements aimed at maintaining in force some treaties, quoting, in this respect, the practice of Jamaica, Trinidad and Tobago, Nigeria with Germany; Ghana with Switzerland, Italy with Malta (p. 370).

First of all, some States have preferred not to succeed into multilateral treaties,[68] including important law-making conventions, as human rights treaties, choosing, instead, to adhere *ex nunc* to them.[69]

What about the effects of these conventions in the period from the date of independence and the date of accession? Can they be considered provisionally applicable, or, as someone affirms, continuing definitively,[70] or continuing independently from territorial change,[71] in order not to interrupt the protection over the individuals?

As far as multilateral conventions on human rights are concerned, one needs to recall the statement of 29 October 1997 of the Human Rights Committee of the UN, addressed to the former Yugoslavia successor States, stating the necessity to continue to guarantee protection assured by the ICCPR; the statement of 28 May 1993 by which it informed the successor States to the USSR that they were bound by the Covenants on Human Rights retroactively from the date of their independence, even though some of them preferred to adhere *ex nunc* and not to succeed into these Covenants.[72]

This practice may only amount, in absence of objections by the new States, and provided that the request of the Committee to report violations of the Covenants occurred in the period between the independence and the date of accession, to a presumption of continuity during that period.

Those States who wished to continue multilateral treaties used – instead of adhesion *ex nunc* – the notification of succession, that is, nothing but an express will to take a position over the destiny of a specific treaty, considering it applicable with a retroactive effect from the date of the birth of the new State.

It is well known that the notification of succession is a unilateral act that does not require any reaction by the other contracting parties of the multilateral treaty. This means that it is not necessary to evaluate the silence of the other States during the suspension period as acquiescence, for the final continuation with retroactive effects of a certain treaty to the successor flows directly from its unilateral act.

In our opinion, the choice left to States between adhesion and notification of succession, and the extension of the recourse to the notification of succession to events different from decolonization, both demonstrate the freedom of States to take a clear position not only as regards the issue whether to continue or not, but also as regards the exact date of the application of a multilateral treaty.

[68] GAMARRA, "Current Questions of State Succession relating to Multilateral Treaties", in EISEMANN and KOSKENNIEMI (eds.), *cit. supra* note 53, p. 388 ff., pp. 414-419. The author considers the practice followed by States of the Commonwealth of Independent States, which is against continuity and largely favourable to accession *ex nunc*, as an exception (p. 419).

[69] Armenia, Georgia and Moldova, for example, preferred to accede, among others, to the Genocide Convention: see GAMARRA, *cit. supra* note 6, p. 416, note 106.

[70] DEGAN, *cit. supra* note 23, p. 326 ff.; STERN, *cit. supra* note 23, *passim*.

[71] JENKS, *cit. supra* note 24, p. 105; RONZITTI, *Introduzione*, *cit. supra* note 28, p. 80.

[72] GAMARRA, *cit. supra* note 68, pp. 416-417.

It is instead difficult to presume continuity of multilateral treaties during the suspension period even though provisionally, absent an express consent, or acquiescence by *facta concludentia* of the other contracting Parties as regards the position expressed by a successor.

Let us remember the different practice relating to Russia and FRY. The former State declared its continuation in all the conventional obligations of ex USSR, included continuity in IOs and treaties concluded by them, first of all in UN and the permanent seat of Security Council. Only acquiescence by all the other Member States consisting in the non opposition to the Russian occupation of the ex USSR seat in the UN and in the Security Council, has permitted to consider Russia as continuing without interruptions the obligations of the *ex* USSR.[73]

On the other hand, the same did not happen for FRY, who wished the same thing as Russia but to whom the majority of the States denied expressly this possibility.

What about the effects of multilateral treaties during the suspension period *vis-à-vis* FRY? It is our opinion that the situation can be considered uncertain, with the only suspension of the whole conventional obligations binding the former FSRY.

A similar approach can be illustrated by the non recognition of the FRY in the International Organizations of which the former FSRY was a member. The non participation of the FRY to the work of the organs of these International Organizations shows that *vis-à-vis* this State its *status* in the IO is at least suspended.

In respect of succession in treaties concluded by IOs, this is demonstrated by the Genocide Convention destiny: its application *vis-à-vis* FRY in the *Genocide* case in the 2007 judgment of the ICJ can be considered nothing but a confirmation of the 1996 Judgment which, as we have already tried to demonstrate,[74] could only affirm the provisional application of the Convention. In fact, in 1996 it could not be possible to arrive to a definitive clarification about the application of the Convention to FRY, because there was uncertainty about the legal basis on which participation of FRY to this Convention could be possible: its status of Member State of the UN.

Another evidence of the uncertainty surrounding FRY's succession into multilateral obligations during the suspension period can be drawn from the fact of its adhesion to the Genocide Convention, without retroactive effects, from 2001, adhesion regularly recorded by the Secretary General of the UN acting as Depositary.

The adhesion is not inconsistent with the affirmed application of the Convention to the FRY and Bosnia in the *Genocide* case, because a specific application of a multilateral treaty by means of the provisional will of two of the Contracting Parties has effects exclusively in the concrete case, and leaves space for a later definitive and different will expressed formally by an act of adhesion.

[73] ZIMMERMANN, *cit. supra* note 46, p. 99, recalls the practice of general acceptance of Russia's continuity in the whole conventional obligations of the *ex* USSR.

[74] See *supra* section 2.

As regards multilateral treaties to which the former Yugoslavia was bound, is interesting to record the position of the executive organ of the Convention on Long-Range Transboundary Air Pollution of 2 December 1993 made in the name of the European Union, whereby the organ stressed the fact that the non participation of the FRY to its works was without prejudice of any succession issue.[75]

In our opinion this statement can be better understood in the light of our thesis about the suspension without any presumption of continuity of conventional obligations of FRY after the territorial change occurred in ex Yugoslavia.

Finally, it is not possible to presume continuity during the suspension period in case of succession of States in IO founding treaties, being always requested the admission *ex nunc*.

In the case of succession in some important multilateral treaties concluded by IOs, continuity cannot be presumed, insofar as the previous admission to the IO is required before a State becomes a contracting party of that treaty. However, States may make general declarations considering themselves bound by the conventions during the period between the independence and the admission to IOs,[76] or simply present notifications of succession to this effect.

[75] GAMARRA, *cit. supra* note 68, p. 388 ff., p. 433.

[76] See the National Report of Slovakia of January 1997, in KLABBERS, KOSKENNIEMI, RIBBELINK and ZIMMERMANN (eds.), *cit. supra* note 37, p. 479 ff.