

CURRENT DEVELOPMENTS

DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

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- I. European Court of Human Rights *Bijelic v Montenegro and Serbia* (Application No 19890/05) Judgment of 11 June 2009**
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I. EUROPEAN COURT OF HUMAN RIGHTS *BIJELIC V MONTENEGRO AND SERBIA* (APPLICATION NO 19890/05) JUDGMENT OF 11 JUNE 2009

A. Introduction

What happens when a European State breaches its international obligations and then ceases to exist? Does its obligation to repair the harm caused by the breach devolve to a new state that occupies part of the territory of an old state? When will a new European State be held accountable for violations that took place before the entry into force of a human rights treaty? This comment examines the European Court of Human Rights' (hereinafter 'the Court' or 'the ECtHR') encounter with the law of state succession, specifically succession to treaty obligations and succession to responsibility for the wrongful acts of a predecessor state. In *Bijelic v Montenegro and Serbia*¹ the Court held that Montenegro was to be automatically regarded as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention'), as well as Protocol No 1 thereto, from the date of its declaration of independence from the State Union of Serbia and Montenegro (hereinafter 'the State Union'), and that Montenegro alone could be held responsible for violations of these instruments occurring in the territory of the State Union that began before March 2004 (the date of ratification of the Convention and Protocol 1 by the State Union) but continuing through 2009. *Bijelic* is not the first time the Court has been called upon to decide a question of succession to treaty obligations or responsibility, but the judgment is noteworthy for the unique approach the Court adopted to deciding both of these issues. This comment will place the decision in the larger context of Court practice with respect to both of the implicated succession issues, identify the aspects the Trial Chamber's analysis that distinguish it from its predecessors and discuss the decision of the Court in light of general and emerging trends in international law. In the process, this comment will provide a uniquely thorough examination of ECtHR practice with respect to succession to responsibility and identify the trends, to the extent that such trends exist, that characterize the Court's approach to this area of law.

¹ *Bijelic v Montenegro and Serbia* (App no 19890/05) ECHR 11 June 2009 (hereinafter *Bijelic*).

B. Background Information

Until 1992 Serbia, Montenegro, Bosnia-Herzegovina, Croatia, Slovenia, and Macedonia were constituent republics of the SFRY. When Bosnia-Herzegovina, Croatia, Slovenia, and Macedonia declared their independence and seceded from the SFRY, Serbia and Montenegro declared themselves the Federal Republic of Yugoslavia. In 2003 the FRY was reconstituted as a confederacy,² officially changing its name to the State Union of Serbia and Montenegro. On 3 June 2006 Montenegro formally brought an end to the existence of the State Union and adopted a Declaration of Independence.³ Serbia followed suit and declared its independence two days later.

The State Union ratified the Convention on 26 December 2003 and the ratification took effect within the territories of Serbia and Montenegro on 3 January 2004.⁴ After Montenegro's declaration of independence, the Committee of Ministers of the Council of Europe decided, in a resolution dated 9 May 2007, that the Republic of Montenegro was to be regarded as a party to the Convention and related Protocols with effect from 6 June 2006.⁵

² Strictly speaking, it may not be fair to refer to the State Union as a confederacy. As Vojislav Koštunica, the last President of the Federal Republic of Yugoslavia, noted:

When it comes to the State Union of Serbia and Montenegro, it does contain Confederal elements, but not solely confederal. The state union of Serbia and Montenegro is not based on a contract, but rather on constitutional act (charter), which is why it is not a mere union. The laws to be endorsed by the parliament refer to its citizens, not the member states, so it is not a confederation either. The first sentence of the Belgrade Agreement reading 'the Agreement on principles of relations between Serbia and Montenegro within the state union,' makes this perfectly clear. This is not a union of independent states [...].

Raoul Blindenbacher and Arnold Koller (eds), *Federalism in a Changing World: Learning from each other* (McGill-Queen's University Press 2003) 565 (plenary speech delivered in 2003). Nevertheless, the overwhelming tendency among scholars is to regard the State Union as an example 'of the most extensive form of self government, establishing in effect merely a loose union of two states, each of which is already essentially a sovereign entity.' Marc Weller and Stefan Wolff (eds), *Autonomy, Self Governance and Conflict Resolution: Innovative approaches to Institutional Design in Divided Societies* (Routledge 2005) 68. In either case, the question of the precise nature of the State Union is irrelevant; for purposes of a discussion of succession issues, it is only important to note that, prior to the secession of Montenegro, only the State Union itself, not its constituent republics, could be held responsible for violations of the Convention at the ECHR.

³ For more on the events leading up to Montenegro's 21 May 2006 referendum on independence see Office for Democratic Institutions and Human Rights, 'OSCE/OHIDR Needs Assessment Report' (7–9 March 2006) <http://194.8.63.155/documents/odhr/2006/03/18369_en.pdf>

⁴ European Commission for Democracy through Law, 'Amicus Curiae Brief in the case of *Bijelic v. Montenegro and Serbia* (Application N°11890/05)', adopted 17–18 October 2008, CDL-AD(2008)021 para 5 <[http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)021-e.asp#_ftnref15](http://www.venice.coe.int/docs/2008/CDL-AD(2008)021-e.asp#_ftnref15)> (hereinafter 'Venice Commission Amicus Brief').

⁵ Council of Europe Committee of Ministers, Resolution CM/Res(2007)7 inviting the Republic of Montenegro to become a member of the Council of Europe, Adopted by the Committee of Ministers on 9 May 2007 at the 994bis meeting of the Ministers' Deputies <<https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Res%282007%297&language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>> (hereinafter 'Res(2007)7').

C. Proceedings before the ECtHR

The application was brought by three Serbian nationals, Ms Nadezda Bijelić ('the first applicant'), Ms Svetlana Bijelić ('the second applicant') and Ms Ljiljana Bijelić ('the third applicant'). In 1989 the first applicant and her husband divorced. She was granted custody of the two other applicants. In 1994 the first applicant obtained a decision from the Court of First Instance declaring her the sole holder of the tenancy on the family's flat in Podgorica, Montenegro. Her former husband ('the respondent') was ordered to vacate the flat within 15 days from the date when the decision became final. On 27 April 1994 the decision of the Court of First Instance was upheld by the High Court and became final, but the respondent refused to comply with the order to vacate.⁶

On 31 May 1994 the first applicant was issued a formal enforcement order by the Court of First Instance. Between July 1994 and February 2006 bailiffs and police attempted over a dozen times to evict the respondent. In light of repeated threats made by the first applicant's ex-husband to blow up the building these attempts were unsuccessful. In the meantime the first applicant purchased and gifted the property to the second and third applicants.⁷

On 3 June 2006 Montenegro declared its independence from the State Union of Serbia and Montenegro. Subsequent to the dissolution of the State Union the enforcement judge repeatedly contacted Montenegrin authorities seeking assistance in securing respondents eviction.⁸ As of April 2009 the flat had not been vacated and no additional eviction attempts had been made.

The three applicants lodged complaints against the State Union with the ECtHR on 24 March 2005 and 31 January 2006 respectively, arguing that the non-enforcement of the final decision issued by the Court of First Instance on 26 January 1994, as well as their consequent inability to live in the flat at issue, was a violation of articles 6(1) and 8 of the Convention, and a violation of article 1 of Protocol No 1.⁹ Subsequent to Montenegro's declaration of independence and pursuant to the applicants' stated wish to proceed against both Serbia and Montenegro, on 10 April 2008 the President of the Second Section re-communicated the application to both Governments, putting to them the question of '[w]hich State, Montenegro or Serbia, could be held responsible for the impugned inaction of the authorities between 2 March 2004 and 5 June 2006?'¹⁰ The President also decided that the admissibility and the merits of the application would be considered at the same time.¹¹

In its decision, the Court unanimously held that the claims of the second and third applicant were admissible with respect to Montenegro, declared that there had been a violation of article 1 of Protocol No. 1, and by 6 votes to 1 ordered the government of Montenegro to enforce the 1994 Court of First Instance judgment order within three months of the decision becoming final.¹² The Court also ordered the Government of Montenegro to pay the second and third applicants €4,500 (plus chargeable tax) in non-pecuniary damage and €700 (plus tax) for costs and expenses. In December 2009

⁶ *Bijelic* (n 1) para 10–15.

⁹ *ibid* para 60.

¹² *ibid* paras 70, 85, 92–99.

⁷ *ibid* paras 16–23.

¹⁰ *ibid* para 61.

⁸ *ibid* paras 30–33.

¹¹ *ibid* para 9.

the Grand Chamber rejected a request for referral and confirmed the Second Section's judgment as final.¹³

1. Admissibility and responsibility for breaches of the applicants' Convention rights

In response to the President's April 2008 request, all three applicants affirmed that they wished to hold both Serbia and Montenegro responsible for the non-enforcement of the 1994 judgment. The applicants sought damages from the former as the sole successor state to the State Union,¹⁴ which was accused of failing to meet its obligation to constitute certain state authorities that would have allowed for the protection of human rights to function 'as prescribed by laws existing at that time' (a deficiency for which Serbia should bear 'joint responsibility' along with Montenegro)¹⁵ and the 'lack of legal actions' taken to enforce the Court of First Instance decision on the part of competent State Union authorities.¹⁶ The applicants also sought damages from the latter for its failure to enforce the relevant judgment and its '[direct liability] for [the] execution of court decisions on its territory.'¹⁷

The Serbian Government argued that it could not be held responsible for any violation of the human rights of the applicants on the grounds that (1) each Member State of the State Union had a high degree of autonomy with respect to the protection human rights;¹⁸ (2) the enforcement proceedings were at all times within the jurisdiction of Montenegrin authorities, and the exercise of jurisdiction over applicants is a precondition for responsibility under the Convention;¹⁹ (3) the State Union ceased to be in operation de facto even before June 2006;²⁰ (4) Montenegro is as much a successor

¹³ Press release issued by the Registrar, 'Requests for Referral to the Grand Chamber 2009' (12 December 2009) <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=859915&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>.

¹⁴ *Bijelic* (n 1) para 64.

¹⁵ Written Observations of 10 October 2008 concerning the Written Observations of the Government of the Republic of Serbia, Milan Savatovic to S Dollee, Section Registrar, Answer to letters ECHR-LE4.3aR of 5 September 2008, para. 1.1. The applicants also sought to hold Serbia accountable on the basis of the fact 'the State Union Agent practically accepted responsibility [sic] in this case by offering a compensation of 5,000 euros.' Written Observations of 20 November 2008 concerning the Written Observations of the Government of the Republic of Serbia, Milan Savatovic to S. Dollee, Section Registrar, Answer to letters ECHR-LE14.9bR, ECHR-LE4.6R and ECHR-LE4.5aR of 5 November 2008, sec 1.

¹⁶ Written Observations of 10 October 2008 (n 15) para. 1.2.1.

¹⁷ Written Observations of 10 October 2008 concerning the Written Observations of the Government of Montenegro, Milan Savatovic to S Dollee, Section Registrar, Answer to letters ECHR-LE4.3aR of 5 September 2008, para 1.1. The Observations of the Applicants do not make it clear whether the Applicants sought damages from Montenegro solely for its role in failing to enforce the judgement after independence was declared in 2006, or for actions that, but for the declaration of independence, would have been attributed to the State Union. Section 1.1.1 of both sets of aforementioned Written Observations submitted by Applicants on 10 October 2008 would seem to support the latter view, however, the Applicants emphasis of the circumstance that Serbia is the sole successor state to the State Union would seem to preclude Montenegro's liability for actions attributable to the State Union.

¹⁸ Additional Observations of the Government of the Republic of Serbia, Concerning the Application No. 11890/05, November 2008, para 4.

¹⁹ *ibid* para 6.

²⁰ Written Observations of the Republic of Serbia (pursuant to Rule 38), concerning the Application No. 11890/05, August 2008, para 21.

state to the State Union as the Republic of Serbia;²¹ (5) the applicants had failed to exhaust domestic remedies,²² and; (6) it ‘cannot be imagined in what way the Republic of Serbia would be obliged to implement individual and general measures . . . in the territory of another state [. . .].’²³ The Montenegrin government supported ‘the remarks presented to the Court . . . relating to the issue of legitimacy of legal successor in the enforcement of the judgment and the issue if domestic legal remedies have been exhausted’.²⁴

The Court began by considering the compatibility of the complaints with the *ratione personae* requirements of the Convention. First, the Court considered the applicability of the Convention to Montenegro. It noted that its practice has been to regard the operative date of the Convention in cases of continuing violations following a state succession event as being the date the Convention entered into force with respect to a given territory, as well as ‘the practical requirements of Article 46 of the Convention [concerning the Binding Force and Execution of Judgments]’.²⁵ Thus persuaded, the Court declared that the Convention and Protocol No. 1 thereto had remained continuously in force with respect to Montenegro since 3 March 2004.²⁶

Finally, expressing the opinion that ‘the impugned proceedings have been solely within the competence of the Montenegrin authorities’, the Court determined that only the complaints against Montenegro were compatible *ratione personae* with the Convention and Protocol 1, and thus dismissed the claims of all three applicants against Serbia.²⁷

2. Alleged violation of article 1 of Protocol No 1 (Protection of Property)

The Court of its own motion examined the compatibility of the first, second and third applicants’ complaints *ratione personae*. The Chamber determined that the first applicant’s complaint was incompatible with the *ratione personae* prerequisites of article 1 of Protocol No 1 since she had transferred ownership of the flat in question to the second and third applicants in 1995.²⁸ The Court further noted that although the second and third applicants could not be said to have exhausted all domestic remedies, a requirement imposed on applicants by article 35 (1) of the Convention, in light of the length of time enforcement proceedings had been pending it would be ‘disproportionate’ to require the second and third applicants to lodge an appeal with the Constitutional Court of Montenegro.²⁹

Turning to the merits of the complaint, the Court reaffirmed the positive obligations of Contracting Parties to ‘make use of all available legal means at its disposal in order

²¹ Additional Observations (n 18) para 13.

²³ Written Observations (n 20).

²⁴ Reply by Montenegro, 3 September 2008, Sec 2.

²⁵ *Bijelic* (n 1) para 69.

²⁷ *ibid* para 70. The ECtHR has determined that for a complaint to be compatible with the Convention’s *ratione personae* requirements and applicant must come within the jurisdiction of one or more of the accused contracting states and that an alleged violation be attributable to one or more of those states. European Court of Human Rights, ‘Key Case-Law Issues – Compatibility *Ratione Loci* and *Ratione Personae*’ (30 July 2006) <http://www.echr.coe.int/NR/rdonlyres/C95BA3E4-BEF1-4E5F-9FFA-3F4586CFE07C/0/COURT_n1729701_v3_Key_caselaw_issues_Compatibility_Ratione_loci_and_personae3.pdf>.

²⁸ *Bijelic* (n 1) para 71.

²² *ibid* para 24–27.

²⁶ *ibid*.

²⁹ *ibid* para 76.

to enforce a final court decision . . . as well as to make sure that all relevant domestic procedures are duly complied with.³⁰ Applying this standard to the facts of *Bijelic* the Court declared that the Montenegrin authorities had failed to fulfil their positive obligations to enforce the judgment of 31 May 1994.³¹ In addition to noting that ‘the police themselves [had] conceded that they were unable to fulfil their duties under the law’ the Court observed that Protocol 1 had entered into force for Montenegro in March 2004 and that the impugned non-enforcement had been within the Court’s competence *ratione temporis* for a period of almost five years, ‘another ten years have already elapsed before that date.’³²

3. *Alleged violations of article 6(1) (Right to a fair trial) and article 8 (Right to respect for public and family life)*

The Court dismissed the remaining complaints of all three applicants. With respect to article 6 (1) the ECtHR dismissed the complaints of the first applicant as incompatible *ratione personae* with the Convention and determined that, although the complaints of the second and third applicants were admissible, in light of the foregoing findings in relation to article 1 Protocol No 1 it was not necessary to examine their assertion that there had been an additional violation of article 6 (1).³³ The article 8 complaints of all three applicants were dismissed as incompatible with the Convention’s *ratione materiae* requirements, since all three applicants had moved to Belgrade and evinced an intent no longer to live in the flat in question.³⁴

D. The Bijelic decision and ECtHR practice

Based on the brevity of the Court’s opinion one might be misled into thinking that *Bijelic* was a rather unimportant case. However, in its decision Court actually pronounced on two very complicated and controversial areas of international law; succession to a human rights treaty (the Convention) and succession to the consequences of responsibility for the commission of an act that violated that treaty.³⁵ In light of the

³⁰ *ibid* para 83 (citing *Oneryildiz v. Turkey* [GC], no. 48939/00, § 134, ECHR 2004-XII).

³¹ *ibid* para 85. ³² *ibid* para 84. ³³ *ibid* para 88. ³⁴ *ibid* para 90.

³⁵ State succession is defined as ‘the replacement of one state by another in the responsibility for the international relations of territory.’ Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978) 1946 UNTS 3 art 2; M Craven, ‘The Problem of State Succession and the Identity of States under International Law’ (1998) 9 EJIL 142, 145. At the highest level of abstraction the law of state succession is typically conceptualized as having four aspects: (1) succession to treaties, (2) succession to State property, State debt and State archives, (3) succession to membership in international organizations, and (4) succession and its impact on the nationality of natural and legal persons. A Sozen and K Oersay, ‘The Annan Plan; State Succession or Continuity’ (2007) 43 Middle Eastern Studies 1, 125, 131; H Beemelmans, ‘State Succession in International Law: Remarks on Recent Theory and State Praxis’ (1997) 15 BUIJL 71, 73–74. Recently however, increased attention has been paid to a fifth category, the effects of succession on state responsibility for an act that violated an international obligation. P Dumberry, *State Succession to International Responsibility* (Martinus Nijhoff Publishers, Leiden, 2007) 11. State succession is an aspect of international law almost universally regarded as frustratingly indeterminate and is plagued by polarized thinking concerning the suitability of codification of this area of law. K Marek, *Identity and continuity of States in Public International Law*, (2nd edn, Librare Droze, 1968) 10; MN Shaw, *International Law* (CUP, Cambridge, 2003) 863; S Oeter,

death of State and institutional practice that exists with respect to these issues, it is probable that *Bijelic* will, in future, come to be regarded as an important decision as succession events continue to occur and the global network of human rights treaties continues to grow in coverage and complexity.

In this Comment I will not attempt to provide a general analysis of the state of the law with respect to either of these aspects of State succession. I will however, provide a general overview of the state of the law with respect to each aspect of succession before identifying the qualities of the *Bijelic* decision that distinguish it from its predecessors at the ECtHR. With respect to the issue of succession to responsibility, this process will necessitate a thorough and unprecedented examination of ECtHR case-law covering this issue, the first examination of its kind to be undertaken, since ECtHR practice in this area has thus far been neglected by the scholarly community. I will also identify the strengths and weaknesses of the Court's approach to the issue of succession to responsibility, and conclude by situating the case in the context of precedents derived from general international law and reflecting on the complementary relationship between human rights law and general international law.³⁶

1. Succession to the Convention

One of the questions the Court faced in *Bijelic* was the effect of Montenegro's separation from the State Union on its status as a signatory to the Convention. Under traditional international law a successor State may decline to become a party to treaties that were binding on the predecessor State, with the exception of those treaties related to territorial regimes. The 1978 Vienna Convention on Succession of States in Respect of Treaties challenged this 'clean slate' rule and confined its application to 'newly independent states', defined as 'a successor State the territory of which immediately before the succession of States was a dependent territory for the international relations of which the predecessor was responsible.'³⁷ Most States, however, continue to favour the traditional 'clean slate' approach³⁸ and many scholars reject the 1978 Convention

'German Unification and State Succession' (1991) 51 ZaöRV 349, 352 (describing the status of the law of state succession as 'chaotic'); DP O'Connell, 'Reflections on the State Succession Convention', 39 ZaöRV (1979) 725, 726 ('State succession is a subject altogether unsuited to the process of codification.');

K Bühler, *State Succession and Membership in International Organizations—Legal theories versus political pragmatism* (Kluwer Law, The Hague, 2001) 309 (Stating that 'in several respects the traditional theoretical categories of state identity, continuity and succession appear to be too rigid, outdated and no longer in line with reality, as they have failed to offer adequate explanations for numerous phenomena in practice').

³⁶ Defined as the 'rules and principles of a general nature that are binding on a large number of states either because they are part of customary international law, general principles of law and judicial decisions or because they are contained in widely ratified multilateral treaties' MT Kamminga, 'Final Report on the Impact of Human Rights Law on General International Law' [2008] Final Report of the 73d Conference of the International Law Association, 1 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150664.

³⁷ Vienna Convention (n 35) art 2 para ff. cf Venice Commission Amicus Brief (n 4) para 35 ('The discussion surrounding the adoption of both treaties indicates that many states were sceptical of the idea that a 'newly independent state' should start its life with a totally 'clean slate.'')

³⁸ H Tichy, 'Two Recent Cases of State Succession—An Austrian Perspective' (1929) 4 AJPIIL 117, 123–124; Restatement (Third) of the Foreign Relations Law of the United States (1987), § 210(3), Reporters' note 4; A Cassese, *International Law* (2nd edn, OUP, Oxford, 2005) 78; M Craven, 'The Genocide Case, the Law of Treaties and State Succession' 68 BYIL (1997)

as an embodiment of a customary norm, viewing it instead as a progressive document that may or may not be of contemporary relevance.³⁹ In unsurprising contrast, international human rights supervisory mechanisms, including the Human Rights Committee and the European Court of Human Rights, have adopted the view that human rights treaties are exempt from the prevailing rule providing for the non-continuity of obligations, and that the protections afforded by human rights treaties devolve with territory and are unaffected by changes in a State's identity or territory.⁴⁰ According to this view, which is also supported in doctrine,⁴¹ once a predecessor State

127, 147–151; A Zimmermann, 'Secession and the Law of State Succession', in M Kohen, *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 214–25; Shaw, *International Law* (5th edn, CUP, Cambridge, 2003) 875. cf DM Ong, 'The Legal Status of the Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor' (2000) 31 Neth YBIL 67, 94 (noting that '[h]aving submitted the Convention for consent by the Dutch Parliament in March 1990, by December 1994 the Dutch government withdrew its bill of approval, arguing that the Convention had lost its value as codification of international law, inter alia because State practice was not in accordance with the Convention rules.')

³⁹ A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge, 2000) 306; E Bello, 'Reflections on Succession of states in the Light of the Vienna Convention on the Succession of States in Respect of Treaties' 23 GYIL (1989) 309 ('No newly independent state can exist entirely on its own in the limbo of the clean slate in respect of treaties. The situation has never arisen, and it is unthinkable that it ever will arise in the community of nations.');

I Sinclair, 'Some Reflections on the Vienna Convention on Succession of States in Respect of Treaties', in *Essays in Honour of Erik Castrén* (1979) 149, 153 (acknowledging that the Treaty might be subject to criticism).

⁴⁰ Statement by the Chairperson on behalf of the Human Rights Committee, 20 October 1995, UN Doc. CCPR/C/79/Add.57, at 6; Human Rights Committee, General Comment No 26: Continuity of obligations, 8 September 1997. See also statements made at the 1994 the 5th meeting of chairpersons of human rights treaty bodies, where it was declared that '... successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.' UN Doc E/CN.4/1995/80 at 4.

⁴¹ MT Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 EJIL 469; R. Higgins, 'The International Court of Justice and Human Rights' in K Wellens (ed), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, (Martinus Nijhoff, The Hague, 1998) 691, 696–697; MN Shaw, 'State Succession Revisited' 5 Finn YIL (1994) 34, 84 (noting that 'one is on the verge of widespread international acceptance of the principle that international human rights treaties continue to apply within the territory of a predecessor State irrespective of a succession'); JF Flauss, 'Convention européenne des droits de l'homme et succession d'Etats aux traités: une curiosité, la décision du Comité des Ministres du Conseil de l'Europe en date du 30 juin 1993 concernant la République tchèque et la Slovaquie,' 6 RUDH (1994) 1–5; B Stern, 'La succession d'Etats' (1996) 262 Recueil des cours 297–306; N Jayawickrama, 'Human Rights in Hong Kong: The Continued Applicability of the International Covenants,' 25 Hong Kong L J (1995) 171, 178. Not all scholars are in agreement however. cf A Rasulov, 'State Succession to Humanitarian Treaties; is there a case for Automaticity?' (2003) 14 EJIL 141 (noting that '[t]he opinio juris currently held by the successor states strongly disfavors any automaticity of succession'); A Bos, 'Statenopvolging in het bijzonder met betrekking tot verdragen' [State Succession: Particularly with Regard to Treaties], 111 Mededelingen van de Nederlandse Vereniging voor Internationaal Recht (1995) 18. H Beemelmens 'State Succession in International Law; Some Remarks on Recent Theory and Praxis' (1997) 15 Boston UILJ 71, 91 (while commenting on the Council of Europe's supposed exception to the otherwise prevailing rule of depository neutrality, noting that 'the Council of Europe's position is controversial within the Council itself. The Austrian delegation resolutely defended the *tabula rasa* doctrine as it traditionally does in its bilateral relationships.');

M Kamminga specifically responded to the issues raised by A Rasulov through a 2005 Venice Commission outcome

has ratified a human rights treaty it applies to any successor States encompassing the territory of the predecessor automatically and without interruption from the date of independence.

Bijelic is the first decision of the ECtHR to confirm that Montenegro was bound as a signatory to the Convention and Protocol No 1 by virtue of its status as a former constituent the State Union, which was itself bound by those instruments from 2004 onwards.⁴² In and of itself this determination is unremarkable. Though the Court has only rarely been called upon to rule on the continued applicability of the Convention after a succession event has taken place, when making the determination it has consistently held that Convention obligations apply to a successor State from the time a predecessor State encompassing the territory of a successor State ratified the Convention.⁴³ For example, in a series of cases following the 1993 break-up of Czechoslovakia, the Court would deploy a ‘standard formula’—‘[t]he period to be taken into consideration began on 18 March 1992, when the recognition by the former Czech and Slovak Federal Republic, to which Slovakia [or the Czech Republic] is one of the successor States, of the right of individual petition took effect’⁴⁴—whenever it needed to apply the Convention to actions that would otherwise have been attributable to the predecessor State of Czechoslovakia. In the same vein but more recently the Court has repeatedly stated that the Republic of Serbia has ‘remained a party to a number of Council of Europe conventions signed and ratified by the former State Union of Serbia and Montenegro, including the Convention for the Protection of Human Rights and Fundamental Freedoms’⁴⁵ whenever it needs to consider actions attributable to the State Union.

What distinguishes *Bijelic* from these previous decisions was the Court’s willingness to incorporate an international standard of *automatic* succession to human rights instruments into its decision. In Paragraph 58 of its decision the Court explained that the Human Rights Committee, in the context of obligations arising from the ICCPR, considered that the fundamental rights protected by international treaties ‘belong to the people living in the territory of the State Party’, and noted in particular the HRC’s statement that ‘once the people are accorded the protection of the rights . . . such

document, in which he highlighted the issues raised by the latter but nevertheless concluded ‘In sum, there are ample reasons to conclude that international practice with regard to state succession in respect of human rights treaties both at the European and the worldwide level supports the view that human rights treaties are a special category of treaties.’ European Commission for Democracy through Law, ‘Preliminary Report ‘Human Rights Treaties and State Succession’’ (October 2005) <[http://www.venice.coe.int/docs/2005/CDL-UD\(2005\)013rep-e.asp#_ftnref14](http://www.venice.coe.int/docs/2005/CDL-UD(2005)013rep-e.asp#_ftnref14)> (hereinafter ‘Venice Commission Preliminary Report’).’

⁴² *Bijelic* (n 1) para 68(iii), 69.

⁴³ *ibid*; Venice Commission Preliminary Report (n 41).

⁴⁴ *Konecny v Czech Republic* (App nos. 47269/99; 64656/01; 65002/01) ECHR 26 October 2004 para 62, 26; *Brezny and Brezny v Slovak Republic* (App no 23131/93) EComHR 4 March 1996, 3–4; Venice Commission Preliminary Report (n 41).

⁴⁵ *Matijasevic v Serbia* (App no 23037/04) ECHR 19 September 2006 para 25 (‘In its decision of 14 June 2006 the Committee of Ministers of the Council of Europe noted inter alia: (i) that ‘Serbia . . . [had continued] . . . membership of [the State Union of] Serbia and Montenegro in the Council of Europe with effect from 3 June 2006’, and (ii) that it had remained a party to a number of Council of Europe conventions signed and ratified by the former State Union of Serbia and Montenegro, including the Convention for the Protection of Human Rights and Fundamental Freedoms.’).

protection devolves with territory.⁴⁶ While there is some evidence that Council of Europe has adopted this approach,⁴⁷ in no other case has the Court expressly confirmed the automatic *ipso jure* nature of succession to the Convention on the basis of its status as a human rights treaty and 'special status' under international law.

It is important to point out that this determination was far from inevitable. The Court could have relied on the May 2007 Committee of Ministers decision (which explicitly noted Montenegro's intention to be bound retroactively to the Convention from the date of its independence) to invite the Republic of Montenegro to become a member of the Council of Europe,⁴⁸ as it has done in the past when considering applications lodged against Serbia and the successor States to Czechoslovakia, to justify holding Montenegro accountable for Convention violations subsequent to June 2006, an approach that would have left its decision on the merits completely unaffected. But by taking the leap and incorporating the HRC declaration into its decision the Court has effectively ended the debate over the *ipso jure* nature of succession to the Convention,⁴⁹ affirmed its forward-looking approach to closing potential gaps in the enforcement of Convention rights whenever possible by closing one of the doors through which a future European successor States might have sought to avoid liability for Convention violations,⁵⁰ and pre-emptively disavowed the 'confirmative' and non-automatic approach to succession that the May 2007 Council of Europe decision to invite Montenegro to become a member might otherwise have implied.⁵¹ The Court

⁴⁶ *Bijelic* (n 1) para 58 (citing General Comment No 26; Continuity of Obligations: 08/12/97/CCPR/C/21/Rev.1/Add.8/Rev.1) 69.

⁴⁷ With respect to the breakup of Czechoslovakia, M Kamminga believes that the Committee of Ministers has the automatic succession approach, noting that 'The unorthodox procedure followed in [the case of this dissolution] apparently reflected the strong desire on the part of both the existing members of the Council of Europe and its two new members to ensure seamless continuity of obligations under the Convention' and that the Court has adopted an attitude 'consistent with' that of the Committee of Ministers. Venice Commission Preliminary Report (n 41) citing COE Doc. H/INF (94)1, at 1. Read also Kamminga (n 41) 465. A Rasulov however, is careful to note that the decision to list the Czech and Slovak Republics as parties to the Convention was at the express behest of both states (which implies that there was nothing automatic about the succession at all) and that it was in fact the European Commission on Human Rights that 'forced' the successor states to succeed to the Convention through a series of decisions that conflicted with the approach of the Council of Europe. Rasulov (n 41) 167.

⁴⁸ Resolution CM/Res(2007)7 inviting the Republic of Montenegro to become a member of the Council of Europe (Adopted by the Committee of Ministers on 9 May 2007 at the 994bis meeting of the Ministers' Deputies) <<https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Res%282007%297&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>>.

⁴⁹ See (n 47).
⁵⁰ E Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008) 57 ICLQ 75.

⁵¹ The significant time that had elapsed between Montenegro's succession announcement in June 2006 and the Council of Ministers decision to invite Montenegro to become a member, as well as the wording of the invitation itself, which takes note of Montenegro's specific intention to be bound by the Convention agreed to by the State Union, implies that the automatic succession to the Convention was not contemplated by the Council, even though continuity of obligations was. Letters dated 6 and 12 June 2006 from Mr Miodrag Vlahovic, Minister of Foreign Affairs of the Republic of Montenegro, to Mr Terry Davis, Secretary General of the Council of Europe, concerning a request for accession from the Republic of Montenegro to the Council of Europe. CM(2006)106 14 June 2006 <<https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282006%29106&language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>> ('The Government of the Republic of Montenegro

has also boldly advanced the principle of automatic succession to human rights treaties within the framework of international law more generally, since the issue is one that has been deliberately sidestepped by the International Court of Justice,⁵² ignored by the International Law Commission, and advanced haphazardly and spiritlessly, if at all, by States. In light of this state of affairs, *Bijelic* will no doubt come to be viewed as one of many high water marks for the development of human rights law, much as Human Rights Committee Comment No 26 has itself come to be regarded.⁵³

2. Succession to responsibility

By establishing that the Convention applied to Montenegro retroactively from the date of its declaration of independence, the Court merely confirmed that Montenegro could be held accountable for violations of the Convention arising after June 2006. Because Convention obligations had been breached before that time though, the Court also faced the question of which State, Serbia or Montenegro, bore the burden of making reparations to the Applicants for violations of the Convention preceding Montenegro's secession from the Union. This is a profound question that touches upon a controversial area of law with even fewer settled rules than those associated with succession to treaties.⁵⁴

Traditionally, the consequences and obligations that arise as the result of the commission of a wrongful act of a State have been regarded as 'too personal' to transfer to a

accepts in their entirety the commitments and Responsibilities included in those documents [the Conventions and Protocols of Council of Europe that the State Union of Serbia and Montenegro has signed and ratified so far], and affirms its determination to act in accordance with these provisions.'); Res(2007)7 (n 7) ('Having regard to the declaration of succession of the Republic of Montenegro, by the letter of 6 June 2006, in respect of the conventions to which the State Union of Serbia and Montenegro had been a Party or Signatory, confirmed by the letter of 23 March 2007, and to the decision by the Committee of Ministers according to which the Republic of Montenegro is, with retroactive effect from 6 June 2006, the date of the declaration of succession, Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols No. 1, 4, 6, 7, 12, 13 and 14 thereto and to the European Convention on the Suppression of Terrorism') Compare Montenegro's nearly year-long wait to the one week Serbia waited for an invitation to accession to membership in the Council, and the much more vague wording of that decision by the Deputies of the Council of Europe with respect to the issue of automatic succession to the Convention. To some extent these facts imply that, unlike Montenegro, automatic succession in to the Convention was assumed by the COE in the case of Serbia. Council of Europe' Continuation of the Republic of Serbia as a Member State in the Council of Europe' CM/Del/Dec(2006)967 16 June 2006. <<https://wcd.coe.int/ViewDoc.jsp?id=1010947&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>> Sec 2.3(a) (The Deputies of the Council of Europe declared that Serbia 'will assume the attendant obligations and commitments' associated with membership in the Council of Europe and 'noted that the Republic of Serbia was either a signatory or a party to the Council of Europe conventions.')

⁵² Kamminga (n 36) 13 ('In the Bosnian Genocide case, the Court decided not to respond to an argument in favour of automatic succession in respect of human rights treaties made by Bosnia-Herzegovina. Among the separate opinions to this judgment, only Judge Weeramantry expressed the view that there was indeed a rule of automatic succession with regard to the Genocide Convention. President Higgins has expressed sympathy for the idea in an academic article.')

⁵³ P Capps, MD Evans and SV Konstadinidis, *Asserting jurisdiction: International and European Legal Perspectives* (Hart Publishing, Oxford, 2003) 237.

⁵⁴ W Czaplinski, 'State Succession and State Responsibility' (1990) 28 Canadian YIL 339.

successor State.⁵⁵ An examination of contemporary practice however reveals that a variety of legal principles and policy justifications⁵⁶ have been relied on in international, regional, bilateral and municipal fora to justify a more nuanced approach that results in a transfer of the obligation to repair that arises from a breach of responsibility between predecessor and successor States.⁵⁷ The most recent scholarship to take up this question concludes that the type of succession event at issue matters a great deal in an individual Court's decision whether or not to transfer the consequences of a breach of an obligation.⁵⁸ To grossly oversimplify a very complex area of international law, as a general practice judicial authorities are less likely to transfer responsibility to a new successor State in instances where 'the predecessor state continues to exist as a result of the events affecting its territorial integrity',⁵⁹ including in instances of cession and secession, whereas when one State is incorporated, dissolved or unified the emerging trend is to transfer an obligation to repair to the (or one of the) successor State(s).⁶⁰

Montenegro's separation from the State Union constituted a secession—the creation of a new State arising from the breakup of a predecessor State—with Serbia regarded as the 'continuator' State that retained the legal identity of the State Union and Montenegro.⁶¹ While space constraints prohibit further reflection on the interplay between notions of successor and continuator States, State identity and State responsibility, and the values of legal certainty and equity, it will be helpful for the reader to consider these issues as we move on to consider the practice of the ECtHR generally and the *Bijelic* decision specifically.

a) Did the Court transfer responsibility to the Republic of Montenegro?

There is no question that Montenegro was held accountable for its wrongful conduct committed after the 3 June 2006 dissolution of the State Union. However, it is somewhat ambiguous as to whether the Court held Montenegro accountable for acts

⁵⁵ Dumberry (n 35) 40–47; MJ Volkovitsch, 'Righting Wrongs: Towards a New Theory of Delictual Responsibility for International Delicts' (1992) 92 Columbia LR 2162, 2173.

⁵⁶ M Milanovic, 'Territorial Application of the Genocide Convention and State Succession' 19 in P Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP, Oxford, 2009).

⁵⁷ See generally Dumberry (n 35); Volkovitsch (n 55) 2177, 2187, 2193–2195.

⁵⁸ Dumberry (n 35) 13, 222; Volkovitsch (n 55) 2200; P Dumberry, 'Is a New State Responsible for Obligations Arising from Internationally Wrongful Acts Committed before its Independence in the Context of Secession?', 43 Canadian YIL (2005) 419, 422.

⁵⁹ Dumberry (n 35) 202. For an important exception to this trend in general international law, see Sec 2(d) below. ⁶⁰ *ibid* 200–203.

⁶¹ The label 'continuator' is used to denote a state that continues the legal personality of a predecessor state, whereas the term 'successor', for purposes of this paper, is used to broadly to denote a state with a new legal personality. For an excellent summary of the debate over whether or not the Republic of Serbia is a 'continuator' or 'successor' state to the State Union, as well as justification for why it continues the legal personality of the State Union, read the arbitration decisions of *Republic of Serbia v ImageSat International NV* [2009] EWHC 2853 (Comm) para 22–37. See also *Mytilineos v (1) State Union of Serbia and Montenegro (2) Republic of Serbia* (8 September 2006) Partial Award on Jurisdiction para. 158 ('The Tribunal has taken note that in June 2006, well after the filing of Claimant's Statement of Claim in April 2005, Montenegro, a constituent unit of the State Union of Serbia and Montenegro, declared its independence. While the Tribunal has not been requested to rule on any ensuing State succession issues, it takes note that it appears uncontroversial that the Republic of Serbia will continue the legal identity of the State Union of Serbia and Montenegro on the international level.')

committed before that date. There is some evidence to support the proposition that the Second Section transferred responsibility from the predecessor State Union to the independent Republic. First, the plain language of the decision implies that Montenegro was held responsible for the impugned acts of the State Union occurring between 2004 and June 2006:

[T]he Court considers that both the Convention and Protocol No. 1 should be deemed as having *continuously been in force in respect of the territory of Montenegro as of 3 March 2004*, between 3 March 2004 and 5 June 2006 as well as thereafter [...].

Lastly, *given the fact that the impugned proceedings have been solely within the competence of the Montenegrin authorities*, the Court, without prejudging the merits of the case, finds the applicants' complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto.⁶²

Additionally, the fact that the Court was willing to hold the Republic of Montenegro liable for nearly the full amount of pecuniary damages requested by the applicants (unless the State enforced the eviction order within three months) suggests that the Court was not apportioning responsibility between predecessor and successor States. That the amicus briefs filed by the Venice Commission and Human Rights Action both urge the Court to transfer responsibility for acts that occurred between 2004 and 2006 in Montenegro to the independent Republic of Montenegro also supports this interpretation.⁶³

On the other hand, when the Court held the Republic of Montenegro responsible for a violation of article 1 of Protocol 1 it did not explicitly acknowledge its responsibility for acts preceding its independence. The Court *did* take note of the extreme length of time over which the applicants had attempted to enforce the Court order, but it is typical for a court to examine actions outside its jurisdiction *ratione temporis* when the alleged Convention violations are of a 'continuous' nature so of itself this should not be construed to imply that a transfer of responsibility took place.⁶⁴ Additionally, the Court noted that the primary cause of the delay of the enforcement order (and the most important factor justifying the finding that a violation of article 1 of Protocol No. 1 had occurred) was the fact that the police 'themselves had conceded that they were unable to fulfil [sic] their duties under the law.'⁶⁵ The police only conceded this in 2007, well after Montenegro had seceded from the Union, but had in fact been unable to enforce the order for the preceding five years.⁶⁶ A literal, though admittedly implausible, reading of the decision would suggest that the Court imposed the financial requirements that it did on Montenegro on the basis of an admission made after the date of succession, as opposed to the events and circumstances that themselves led up to the admission and the registering of the Application and occurring before 2006.

Between these two interpretations, it is the former that is favoured by the Secretary General to the Council of Europe, who in September 2009 reported to the Parliamentary Assembly that Montenegro had 'partially fulfilled its obligation to

⁶² *Bijelic* (n 1) paras 69–70 (emphasis added).

⁶³ Venice Commission Amicus Brief (n 4) paras 26–31; Human Rights Action, Third Party Intervention, 7 August 2008, para 11. The Court noted the opinions of these third party interveners in paras 65 and 66 of its opinion. *Bijelic* (n 1).

⁶⁴ A Buyse, 'A Lifeline in Time—Non-Retroactivity and Continuing Violations at the ECHR' (2006) 75 *Nordic JIL* 63, 86–87 (noting that 'when procedures are formally separate, but closely connected in content, the Court views them as a continuous situation.').

⁶⁵ *Bijelic* (n 1) para 84.

⁶⁶ *ibid* para 32.

ensure that its Constitution would include ‘transitional provisions for the retroactive applicability of human rights protection to past events’ through the Court’s decision in *Bijelic*.⁶⁷ Assuming that it is this narrative account of *Bijelic* that will ultimately prevail, it is important to understand the broader implications of the case on the practice of the ECHR specifically and public international law generally.

b) The continuity of accountability at the ECHR

To date no scholar has undertaken a comprehensive survey of Court practice concerning the continuity of accountability. Patrick Dumberry’s otherwise thorough examination of international practice concerning this issue, *State Succession to International Responsibility*, primarily focuses on internationally wrongful acts committed by one State against another State (or national and corporation of another State), and when it does consider the issue of human rights abuses committed by a State against its own nationals it is solely in the context of municipal court decisions.⁶⁸ Thus the examination undertaken in this section represents the most comprehensive examination of ECtHR case-law covering this issue to date. While there is insufficient space in this comment to examine all of the questions raised by these cases, a brief opinion regarding the general principles enshrined through the Court’s practice (to the extent that there are any) will be offered at the end of this section, and the question of the relationship of *Bijelic* to these general principles will be taken up in the following section.

The wave of succession events that began in Europe in the early 90s and continued through the new millennium have provided the judicial organs of the EU with over a dozen opportunities to decide when and under what circumstances one State may be held liable for the breaches of a predecessor.⁶⁹ The earliest decision in which a responsibility issue was framed in succession terms was *Jasinskij v Lithuania*.⁷⁰ *Jasinskij* pitted applicants who had purchased USSR State bonds against the newly independent State of Lithuania. The case concerned the redemption of State bonds purchased before the collapse of the Soviet Union in 1991 in the territory of Lithuania, and the subsequent refusal of the governmental and financial institutions of either the Republic of Lithuania and Russian Federation to redeem the debt.⁷¹ After attempting (and failing) to compel the government of Lithuania to purchase the bonds through domestic courts the applicants brought their complaints before the Commission. The Commission questioned ‘whether Lithuania has any responsibility for these debts of the former

⁶⁷ Secretary General of the Council of Europe ‘Montenegro: Compliance with obligations and commitments contained in PACE Opinion 261—Addendum to the Third Report (May 2008–August 2009)’ SG/Inf (2009) 13 Addendum final 28 September 2009 < www.coe.co.me/REPOSITORY/1612_mn_third_report_addendum.doc > sec. 19.2.1.6. Read also the Venice Commission’s Interim Opinion on the Draft Constitution of Montenegro, adopted on 1 June 2007, which in paragraph 98 endorsed the idea of transitional constitutional provisions covering the retroactive applicability of the Convention, presciently adding that ‘[u]nless clear provision is made for this, it is probable that past infringements of human rights, however serious, will remain without a remedy under the new Constitution’.

⁶⁸ Dumberry (n 35) 29–30.

⁶⁹ The phrase ‘judicial institutions’ is used here to include the Court as well as the European Commission of Human Rights (hereinafter EComHR or ‘the Commission’).

⁷⁰ *Jasinskij and Others v Lithuania* (App no 38985/97) EComHR 9 September 1998.

⁷¹ *ibid* s 1.

Soviet Union' and concluded that Lithuania could not 'be seen as a successor of the Soviet Union in respect of these debts.'⁷² Although this case could accurately be viewed as implicating a questions of succession to debt, not responsibility, it is notable as one of the first cases where a Convention instrument considered the issue of succession, phrased its answer in terms of 'responsibility' and declined to transfer the obligation at issue.

Jasinskij foreshadowed the succession issues the Court and Commission would face after the 1 January 1993 dissolution of Czechoslovakia into the Czech and Slovak Republics. An examination of the decisions that came about as a consequence of this event reveals the difficulties faced by both review mechanisms as each body struggled to balance accountability with fairness. Among the earliest cases against the successor States to come before the Commission were *JA v Republique Tceque* and *Szmora and Hlavsova v Republique Tcheque*. The Commission in *JA* accepted its competence *ratione personae* to review acts arising before January 1993 in the territory of the former Czechoslovakia,⁷³ but was much less forthcoming in *Szmora and Hlavsova*⁷⁴ (despite the latter being decided on the same day and by the same individuals as the former!). A similarly schizophrenic pattern emerged with respect to Slovak Republic; in *Brezny and Brezny v Slovak Republic* the Commission accepted its jurisdiction over events arising after 18 March 1992⁷⁵—the date the Convention entered into force with respect to Czechoslovakia—but in the earlier cases of *Gasperetz v Slovak Republic* and *Sulko v Slovak Republic* the Commission acknowledged 1 January 1993 as the limit to its temporal jurisdiction with respect to claims brought against that country.⁷⁶

In most cases to reach the Court the individual Slovak and Czech Republics were each held accountable for acts predating their independence without objection from either respondent government.⁷⁷ Rather quickly the Court developed a 'standard formula' for dealing with the succession issues implicated in the applications brought before it; 'The period to be taken into consideration began on 18 March 1992, when the recognition by the former Czech and Slovak Federal Republic, to which Slovakia [or the Czech Republic] is one of the successor States, of the right of individual petition took effect.'⁷⁸ Only one case from this period is particularly noteworthy as having forced the Court to deviate from its standard line. In *Jiri Kuchar & Petr Stis v. Republique Tcheque* the Czech Republic argued that the impugned acts were incompatible *ratione temporis*, insofar 'as the Convention only came into force in respect of the Czech Republic on 1 January 1993.'⁷⁹ The Court re-characterized the objection as

⁷² *ibid* s 2.

⁷³ *JA v Repulique Tcheque* (App no 22926/93) EComHR 7 April 1994.

⁷⁴ *Szmora and Hlavsova v Republique Tcheque* (App no 23122/93) EComHR 7 April 1994.

⁷⁵ *Brezny* (n) p 15.

⁷⁶ *Gasperetz v. Slovak Republic* (App no 245056/94) EComHR 28 June 1995; *Sulko v Slovak Republic* 26962/95, EComHR 6 September 1995. For an discussion of a few additional Commission decisions implicating the breakup of Czechoslovakia, read *Rasulov* (n 41) 166–167.

⁷⁷ For example, *Konecny* (n 44); *Skodakova v Czech Republic* (App no 71551/01) ECHR 21 December 2004, para 30; *Chovancik v. Slovakia* (App no 54996/00) ECHR 17 June 2003 para 18.

⁷⁸ See (n 44).

⁷⁹ *Jiri Kuchar & Petr Stis v Republique Tcheque* (App no 37527/97) ECHR 23 May 2000 (judgment available in French only). Note that this contradicts Kamminga's assertion that the application of the 'standard formula' 'allowing for accountability of conduct by the predecessor state apparently has not prompted any objections by the Czech Republic or Slovakia.' Venice Commission Preliminary Report (n 41).

one of *ratione personae* jurisdiction but declined to adopt the approach advanced by the respondent State on the ground that ‘the Government of the Czech Republic had tacitly confirmed its responsibility as one of the successor States to the facts relating to the period from March 18 to December 31, 1992.’⁸⁰

Just as the dissolution of Czechoslovakia resulted in a string of Court decisions that implicated succession issues, so too did Montenegro’s separation from the State Union embroil the Court in a series of decisions with a succession component, particularly in relation to Serbia. Over the last three years the Court has issued a number of opinions in which the responsibility of Serbia for acts imputed to the State Union was affirmed without objection on the part of the respondent government. The first of these cases was *Matijašević v Serbia*, which originated in an application against the State Union of Serbia and Montenegro and concerned a string of Serbian Court decisions, all promulgated before the separation of Montenegro from the State Union.⁸¹ In what has become the new ‘standard formula’ to be deployed in cases lodged against the now independent Serbia, the Court took note of the Committee of Ministers’ declaration to the effect that Serbia ‘remained a party to a number of Council of Europe conventions signed and ratified by the former State Union of Serbia and Montenegro, including the Convention for the Protection of Human Rights and Fundamental Freedoms’⁸² and, without any further discussion, concluded that Serbia was responsible for the acts of the State Union. In general, the Court has regarded Serbia’s succession to responsibility for acts otherwise attributable to the State Union as uncontroversial.⁸³ However in a strongly worded dissent one judge has rejected the succession framework established in *Matijasevic*. In *Lepojić v Serbia* Judge Kreca argued that ‘the legal reasoning of the Court in the part of the *Matijašević* judgment . . . seem[s] legally dubious and self-contradicting in the light of the relevant rules of international law and common sense respectively.’⁸⁴ Judge Kreca maintained that Serbia was a continuator, not a successor State, and that it was due only to this important distinction that an issue of *locus standi* did not arise in the current proceedings.⁸⁵

In the joined cases of *Wolf-Ulrich von Maltzan and Others, Margarete von Zitzewitz and Others, and Man Ferrostall and Alfred Topfer Stiftung v Germany*⁸⁶ the Grand Chamber considered the issue of succession to responsibility in an instance where one State incorporated another. The case concerned claims of compensation for property that had been expropriated in the territory of East Germany between 1945 and 1949 in the Soviet Occupied Zone of Germany and after 1949 (after which the area officially broke away and become the German Democratic Republic (GDR)). In a 2005 admissibility decision the Court determined that the reunification of the GDR with the

⁸⁰ *Kuchar* (n 70).

⁸¹ *Matijašević v Serbia* (App no 23037/04) ECHR 19 September 2006 paras 22–25.

⁸² *ibid* para 25.

⁸³ *EVT Company v Serbia* (App no 3102/05) ECHR 21 September 2007 para 32; *Vrencev v Serbia* (App no 2361/05) ECHR 23 Sept 2008 para 35; *Jevremovic v Serbia* (App no 3150/05) 17 July 2007 para 63; *V.A.M. v Serbia* (App no 39177/05) ECHR 13 March 2007 para 76; *Lepojic v. Serbia* (App no 13909/05) ECHR 31 March 2009 para 24.

⁸⁴ *Lepojić* (n 74) Dissent para 11.

⁸⁵ *ibid*.

⁸⁶ *Wolf-Ulrich von Maltzan and Others, Margarete von Zitzewitz and Others, and Man Ferrostall and Alfred Topfer Stiftung v Germany* (Applications nos. 71916/01, 71917/01 and 10260/02) ECHR 2 March 2005.

Federal Republic of Germany (FRG) on 3 October 1990 did not, in fact, provide the Court with jurisdiction to hear the applicants' claims, despite the Convention having been in effect with respect to the FRG since its entry into force in 1953.⁸⁷ The Court determined that it lacked jurisdiction *ratione temporis* and *ratione personae* to examine the circumstances under which the expropriations were carried out and held that the applications were inadmissible⁸⁸ on the basis that '[t]he FRG does not have any responsibility for acts committed at the instigation of the Soviet occupying forces or for those perpetrated by another State against its own nationals, even though the GDR was subsequently succeeded by the FRG, for it is 'political' obligations that are at issue in the present case.'⁸⁹ It was also careful to note that the case raised 'no question of a continuing violation of the Convention which could be imputable to the FRG and which could have effects as to the temporal limitations of the competence of the Court.'⁹⁰

Wolf-Ulrich provides an interesting counter-point to the Grand Chamber's February 2009 decision in *Andrejeva v Latvia*.⁹¹ *Anrejeva*, the most recent decision of the Court dealing with succession issues before the Second Section's pronouncement in *Bijelic*, centred on claims of discrimination made by a non-citizen of Latvia who had received a lower pension than Latvian citizens. In *Andrejeva* the Latvian government relied on article 1 of the Convention to raise an objection that the impugned acts fell outside Latvia's jurisdiction.⁹² The Respondent government:

... argued that responsibility for the situation complained of lay not with one single State but with two different States, namely the Soviet Union and the Republic of Latvia. [...] Although the applicant might have had some hope of receiving the portion of her pension corresponding to the part of her career spent working in the territory of the former Soviet Union, that hope had been valid only in the context of a single State, the USSR, and could not exist, or have existed, in relation to Latvia. On the contrary, 'existing praxis' showed that it was rather the Russian Federation that was the defunct State's successor, both domestically and at international level.

Secondly ... [t]he Government ... inferred that ... Latvia was not required to assume a responsibility incumbent on another State and to pay pensions in respect of periods during which the beneficiaries had been employed in that State; if the applicant wished to claim her pension entitlements, she would be better advised to apply to the Russian or Ukrainian authorities.⁹³

The Court sidestepped the issues raised by the respondent by noting that the applicant had attributed the impugned acts solely to Latvian public authorities—the State Social Insurance Agency and three levels of Latvian courts—thereby bringing the claims within the jurisdiction of the Court. The Court did, however, make a few detailed pronouncements with respect to succession as an admissibility and substantive

⁸⁷ Council of Europe, European Convention for the Protection of Human Rights and fundamental Freedoms, Chart of Signatories and Ratifications (updated 14 March 2010) <<http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=14/03/2010&CL=ENG>>.

⁸⁸ *ibid* para 82. Specifically, the Court noted that it 'lacks competence *ratione temporis* and *ratione personae* to examine the circumstances in which the expropriations were carried out or the continuing effects produced by them up to the present date.'

⁸⁹ *ibid* para 81.

⁹⁰ *ibid* para 83.

⁹¹ *Andrejeva v Latvia* (App no 55707/00) ECHR 18 February 2009.

⁹² *ibid* para 51.

⁹³ *ibid* para 52–53.

consideration. First, the Court provided its most detailed analysis of succession and jurisdiction to date. The Court noted;

[...] that the concept of 'jurisdiction' for the purposes of Article 1 of the Convention reflects the term's meaning in public international law and is closely linked to that of the international responsibility of the State concerned. Such responsibility may arise for the acts of all State organs, whether they belong to the legislature, the executive or the judiciary. Furthermore, the fact that the factual or legal situation complained of by the applicant is partly attributable to another State is not in itself decisive for the determination of the respondent State's 'jurisdiction'. The argument advanced by the Government equates the determination of whether an individual falls 'within the jurisdiction' of a Contracting State with the question whether the individual can be considered to be the victim of a violation by that State of a right guaranteed by the Convention. These are, however, separate and distinct admissibility conditions.⁹⁴

The Court also examined succession to responsibility issues in the merits section of its judgment. Responding to Latvia's claim that it had not inherited the rights and obligations of a predecessor State and was not liable under article 14 of the Convention, the Court left the door open to precisely that claim and wrote that:

Even assuming that the Government were correct on this point, the conclusion that has to be drawn in this case would be unaffected: where a State decides of its own accord to pay pensions to individuals in respect of periods of employment outside its territory, thereby creating a sufficiently clear legal basis in its domestic law, the presumed entitlement to such benefits falls within the scope of Article 1 of Protocol No. 1 [and under Article 14 of the Convention applicable].⁹⁵

This language prompted a vigorous and lengthy dissent by Judge Ziemele, who regarded the central issue posed by the case as a controversy over 'whether Latvia is responsible for additional pension seniority accrued outside the Latvian Soviet Socialist Republic (Latvian SSR) during the days of the Soviet Union.'⁹⁶ Pursuant to this, she argued that the issue should have been properly and clearly dealt with in the merits as opposed to the admissibility phase.⁹⁷ She also explained that:

[...] the phrase 'even assuming that the Government were correct' is incomprehensible. Are the majority suggesting that Latvia is a new successor State to the ex-USSR? The adoption of such a position by the Court would go against its own approach in several other cases (for example, *Ždanoka v Latvia* [GC] no. 58278/00, ECHR 2006-IV) and in a more relevant pronouncement of the Commission in the *Jasinskij and Others* case [...]. It would also go against the position of the majority of international-law actors.⁹⁸

She also identified additional shortcomings in the majority analysis, including her observation that;

It is curious that the text of the judgment does not seem to draw a distinction between the different legal entities concerned over the relevant period of time. Surely there is a difference for the purposes of law between the Latvian SSR, the USSR and the Republic of

⁹⁴ *ibid* para 56. ⁹⁵ *ibid* para 78 (emphasis added). ⁹⁶ *ibid* Dissent para 2.

⁹⁷ Judge Ziemele argues 'The judgment treats the submissions concerning the 'jurisdiction' of Latvia for the acts complained of by the applicant as a question relating to the Government's objections to the admissibility of the case. [...] Of course, this is not a question of jurisdiction strictly speaking, as the Court demonstrates to the Government in this part of the judgment, but it is one of responsibility for events that took place in the USSR. It is clearly an argument on the merits, the conclusion at which the majority finally arrive two paragraphs later, only to dismiss it without any elaboration as irrelevant in paragraph 78. *ibid* Dissent para 14 (citations removed).

⁹⁸ *ibid* Dissent para 17 (citations removed).

Latvia. One is left puzzled by the exact meaning of the use of terms ‘Latvia’ in the context of the year 1954 or ‘Ukraine’ in the context of the 1970s and 1980s (see paragraphs 10–11 of the judgment). Suggesting that the Republic of Latvia, as a subject of international law and thus a Party to the Convention, is a successor to the USSR, in terms of international law, does not make sense and goes against well-established State practice [...].⁹⁹

What characterizes the ECtHR’s approach to the difficult issue of succession to responsibility? In general, the Court has evinced a willingness to transfer obligations between predecessor and successor States without reflection on the interplay between general international law and human rights law at issue in the cases or reference to a typology that distinguishes between types of successor States or succession events.¹⁰⁰ While in most instances where succession is an issue it is simply accepted without objection by the applicant or respondent parties that the Court can (and will) transfer responsibility, in the rare case when a State has objected to being held responsible for acts of a predecessor, the Court has tended to either reject those arguments in the vaguest terms possible (*Andrejeva*) or dismiss them for reasons that are patently ridiculous (*Jiri Kuchar*); whichever option it chooses, the Court has made it clear that it will do what is necessary to effectively preserve its ability to hold any future State accountable for acts of any predecessor arising on a territory and in a time from covered by the Convention.¹⁰¹ The outlying circumstance is when the ‘underlying complaint’ involves an act of a non-continuing nature undertaken in a territory not covered by the Convention at the relevant time (*eg Wolf-Ulrich von Maltzan and Others*), in which case the Court will regard the questions of responsibility raised as ‘political’ in nature and beyond its remit. Finally, although the Court has vacillated between treating the issue of succession to responsibility as a jurisdictional issue—both *ratione temporis* and *ratione personae*—or a question to be dealt with in the merits phase, most recently the Court has favored treating questions raised by complicated succession events as issues to be dealt with at the admissibility phase under the aegis of a *ratione personae* inquiry.

⁹⁹ *ibid* Dissent para 28 (citations removed).

¹⁰⁰ Based on the dissents in *Andrejeva* and *Lepojic*, it is also fair to say that there is, if not a trend, at least a some amount of increased pressure being placed on the majority of ECHR justices to incorporate the ‘language’ of general international law on state succession into its decisions.

¹⁰¹ As an aside it is interesting to contrast the ECHR’s willingness to hold states accountable for acts of predecessor states with the practice of its peers. The Human Rights Committee has been confronted with questions to succession to responsibility fewer times than even the ECHR, but it has sent a more mixed message about what it will do when facing such facts. The HRC has twice dismissed complaints raising succession issues with a tortured assertion that the petitioner had failed to exhaust domestic remedies (*Dusan Soltes v the Czech Republic and the Slovak Republic*, CCPR-OP-5-2-b/CCPR-OP-2, inadmissibility decision of 28 October 2005, para 7.5; *Wan Kuok Koi v Portugal*, CCPR-OP-3/CCPR-OP-2/CCPR-OP-5-2-b, inadmissibility decision of 22 October 2001), but has also implied, through one case and one comment adopted during a review of a periodic report of Portugal, that an obligation to repair arising out of a breach of an international obligation will be transferred to a successor state when the impugned acts arose on a territory covered by the relevant treaty provision at the relevant time (HRC, CCPR/C/70/Add.9, 10 April 1997; *Alina Simunek et al v Czech Republic*, CCPR/C/54/D/516/1992, decision on the merits 31 July 1995, para 11.7–11.8).

c) *Bijelic* and ECtHR case-law

Several features of *Bijelic* distinguish it from its predecessors. It is the first case where the Court was called upon by applicants as opposed to respondents to apportion responsibility between a successor and continuator State, and by denying the request the Court confirms that its preference is to hold a single State responsible for continuing violations, even when the attempt to split liability cannot be perceived as an attempt by a respondent State to avoid responsibility entirely. The decision also confirms that the Court will continue to treat questions of succession to responsibility primarily as jurisdictional questions, and adds weight to the view that succession issues will be dealt with as *ratione personae* problems in particular.

Most importantly, *Bijelic* is the first time the Court has transferred responsibility on a basis other than the mere fact that an impugned act (or continuing act) occurred on a particular territory during a time when the Convention happened to apply (e.g. *Konecny* and *Matijasevic*). In *Bijelic* the Court explicitly held that the transfer from predecessor to successor was justified because (i) the predecessor State was comprised of at least one largely autonomous sub-unit (ii) to which the impugned acts could be attributed and (iii) the formerly largely autonomous region evolved to become new State to which responsibility could attach. In other words, *Bijelic* is the first decision of the ECHR to confirm the importance of attributing the impugned situations to a (previously) sub-national authority that shares an identity with a successor respondent State. In addition to adding a degree of legal sophistication to the Court's interpretation that was lacking in prior decisions, the Court also closed a potential gap in enforcement of the Convention. One can envision an extra-territorial action by a relatively autonomous unit within a predecessor State that violates the Convention obligations of the Contracting Party to the Convention, followed by the dissolution of that State. Under *Konecny* and its brethren an applicant would have difficulty demonstrating that jurisdiction *ratione personae* existed since the impugned acts did not take place on the territory of the predecessor entity, but under *Bijelic* the applicant has only to demonstrate that the impugned situation is attributable to a fairly autonomous government within the predecessor State.

Bijelic, perhaps inevitably but also unfortunately, suffers from the many of the same shortcomings as other ECtHR decisions in which the continuity of accountability has been contended. Similar to its predecessors, the decision is vague and creates an indeterminate standard that does little to advance legal certainty.¹⁰² How much continuity must exist between autonomous organs in a predecessor State and a new State for responsibility to transfer? How many of the wrongful acts must be attributable to the organs of an autonomous government for a new State with a shared identity to be the sole, or even a partial, successor to responsibility? Moreover, the legal shortcomings of the case are undeniable, inasmuch as the *Bijelic* Court utterly failed to address the argument of the applicants that the State Union had violated its positive obligation to constitute the domestic human rights supervisory mechanisms that could have 'functioned by laws existing at that time' to address the impugned situation.¹⁰³ There is no

¹⁰² P Eisemann and M Koskeniemi, *State Succession: Codification Tested Against the Facts* (Springer, London, 2000) 487.

¹⁰³ Written Observations of 10 October 2008, Answer to letters ECHR-LE4.3aR of 5 September 2008 (n 15) para. 1.1. In fact, the ECHR had already found that the Court of Serbia and Montenegro constituted by the State Union had failed as an institutional mechanism for

question that, had the Court dealt squarely with this issue (and found the State Union liable for a breach of its positive obligations under Protocol 1 of article 1) it would have been forced to apportion responsibility between the two former members of the State Union, a step that would have complicated things for the Court. However, the legal fiction crafted by the Court in order to sidestep the issue—the affirmation that the impugned acts were at all relevant times solely ‘within the competence of the Montenegrin authorities’—is as transparent as it is unsatisfying; a reality that forces future applicants and respondent States, as well as scholars, to confront the very questions of fairness and equity the Court so obviously hoped to avoid in its decision.

Nevertheless, it may be said that the Court, having made the decision to sacrifice legal rigor, at least did so at the altar of common sense and pragmatism. *Bijelic* balances the obvious interest of the applicants in obtaining enforcement or restitution with the need to avoid creating tension between the successor and continuing States, accomplishing both while remaining firmly within the realm of judicial plausibility (the idea that responsibility can be transferred based on continuity between a predecessor autonomous government and successor independent State is not a new one, and has found support in international practice and scholarship).¹⁰⁴ Moreover, while it is an important milestone in the development of the Court’s treatment of succession issues, *Bijelic* was not intended by the Court to be the final word on any of the matters within its purview. Bearing this in mind, while it is hoped that the Court will offer a more substantive legal analysis in its future decisions concerning the transfer of responsibility, on its own merits *Bijelic*—with its (slightly) more nuanced and rigorous legal justification than its predecessors—stands out as a step forward for the Court and individual rights the Convention is intended to safeguard.

E. Concluding Thoughts—*Bijelic* and General International Law

Because ECHR jurisprudence is increasingly incorporated into the decisions and analyses of other international supervisory mechanisms, including the Inter-American Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia, particular attention must be paid to *Bijelic* as a potential influence on general international law.¹⁰⁵

redressing human rights claims. *Matijasevic* (n) paras 34–37. In fact, the entirety of the Court’s decision in *Bijelic* is difficult to square with the Court precedents that ‘require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation.’ *Broniowski v Poland* (App no 31443/96) ECHR 22 June 2004 para 184. Read also *Sovtransavto Holding v Ukraine* (App no 48553/99) ECHR 25 July 2002 para 96 (stating that ‘The obligation to secure the effective exercise of the rights defined in that instrument may result in positive obligations for the State. [...] As regards the right guaranteed by Article 1 of Protocol No. 1... States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees [...].) Why shouldn’t Serbia, as the continuator of the State Union, share responsibility with Montenegro for failing to constitute an effective adjudicatory mechanism? In light of the clarity of the precedents and the fact that this issue was specifically raised by the applicants, it’s clear that the Court simply did not want to deal with the issue of joint responsibility, preferring instead to pursue the easier but equitably and legally more suspect route of ignoring the issue entirely. ¹⁰⁴ Section E below.

¹⁰⁵ AM Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004) 80–82; Judge Patrick Robinson (President of the ICTY) ‘Fifty Years of the European Court of Human

Although there is no definitive account of the international rules applicable in succession situations involving issues of responsibility, there is strong support for the idea that the 'clean slate' approach should not prevail in most cases of succession where responsibility for an act of a predecessor is at issue.¹⁰⁶ Patrick Dumberry in particular has endorsed the notion that a successor 'state should be held responsible for obligations arising from internationally wrongful acts committed before its independence insofar as the acts were committed by an autonomous government . . . with which the new State has an organic and structural continuity' in cases of cession, secession and dissolution.¹⁰⁷ As an expression of general international law this principle has only been applied three times, once by a municipal court and twice by an international tribunal. In the *Samos (Liability for Torts)* case a Greek Court decided that Greece, as a successor State absorbing the territory of the Island of Samos, could be held responsible for acts of that autonomous province that had been undertaken while the island was still part of the Ottoman Empire.¹⁰⁸ In the subsequent *Lighthouse Arbitration* case, the French-Greek Arbitral Tribunal concluded that Greece was responsible as a successor for acts of the autonomous government of Crete.¹⁰⁹ Finally, in the *Case Concerning the Gabčíkovo-Nagymaros Project*, the ICJ acknowledged that Slovakia, as a constituent of Czechoslovakia, had played a 'prominent part' in the predecessor's breach of an international law.¹¹⁰ There is scholarly support for the proposition that the Court was particularly influenced in its conclusion that Slovakia was under an obligation to compensate Hungary by the degree of autonomy Slovakia had experienced as a federated republic within Czechoslovakia.¹¹¹

General international law is increasingly influenced by *lex specialis* legal regimes, specifically international human rights norms.¹¹² As this process accelerates and mechanisms of general international law (such as the ICJ) are increasingly called upon

Rights Viewed by its Fellow International Courts' address delivered 30 January 2009 <http://www.echr.coe.int/NR/rdonlyres/851247E2-0E9A-4CB3-B81B-F72482E26E3B/0/30012009PresidentRobinsonSeminar_eng_.pdf>; A M Slaughter 'Judicial Globalisation' (2000) 40 Virginia JIL 1103, 1104–11 (2000); JB Attanasio 'Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts' (1996) 28 NYU JILP 1.

¹⁰⁶ Milanovic (n 56) 18.

¹⁰⁷ Dumberry (n 35) 260; MCR Craven 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 EJIL 142, 160.

¹⁰⁸ Dumberry (n 35) 261 citing *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, N 27, in Themes, vol 35, 294, in Annual Digest, 1923–1924, 70.

¹⁰⁹ *ibid* citing *Lighthouse Arbitration case*, Award of 24/27 July 1956, in: 23 ILR, 1956, 81. See also Volkovitsch (n 55) p 2190 ('Although the decision stops short of declaring a rule of succession to liability, one must note that it *did* hold Greece liable for its predecessor's acts in the one case the tribunal was able to describe as truly delictual and which was not complicated by issues approximating those implicated by the municipal law concepts of laches and contributory negligence.')

¹¹⁰ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovenia), Judgement of 25 September 1997, <<http://www.icj-cij.org/docket/files/92/7375.pdf>> para 124.

¹¹¹ Dumberry (n 35) 262 fn 221.

¹¹² Final Report (n 36) p 1, 18–19; M Koskeniemi & P Leino 'Fragmentation of International Law? Postmodern Anxieties' 15 Leiden JIL 553, 567–570 (2002); AN Pronto, 'Human-Rightism and the Development of General International Law' 20 Leiden JIL 753 (2007) (asserting that international human rights norms are increasingly 'mainstreamed' into general international law); B Simma, 'International Human Rights and General International Law: A Comparative Analysis' in *Collected Courses of the Academy of European Law* (Dordrecht: Kluwer, 1993) vol IV–2, 153–256.

to interpret human rights instruments,¹¹³ it is probable that the reasoning and interpretive analysis of the Court in *Bijelic* will take on increased importance as an authority supportive of a trend in general international law to take into account the relative autonomy of sub-State government units in existence before a succession event to which impugned conduct may be attributed.

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II. EUROPEAN COURT OF HUMAN RIGHTS *MEDVEDYEV ET AL V FRANCE* (GRAND CHAMBER, APPLICATION NO 3394/03) JUDGMENT OF 29 MARCH 2010

A. Introduction

On 29 March 2010, the European Court of Human Rights (ECtHR), sitting as a Grand Chamber, delivered its Judgment in the *Medvedyev v France* case, which involved the interdiction and the exercise of enforcement jurisdiction over a drug smuggling vessel on the high seas.¹ The case was referred by both the applicants and the Respondent State to the Grand Chamber, following the Judgment of a Chamber of the Fifth Section of the Court, on 10 July 2008.² The Grand Chamber accepted this referral and the public hearing took place on 6 May 2009.³ This decision is of considerable importance as one of the very few decisions of the Strasbourg Court which has touched upon issues pertaining to the law of the sea, let alone to interdiction of vessels on the high seas, and the only case to have found a violation of the Convention on the part of the interdicting State, namely France.

In general, maritime interdiction is a very common practice⁴ in the fight against the illicit traffic of narcotic drugs, which is one of the most worrisome facets of

¹¹³ JB Quigley, *The Genocide Convention: an International Law Analysis* (Ashgate Publishing, Kent, 2006) 77. Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice, at the Conference Honouring Professor John Dugard, Leiden University Law Faculty, 20 April 2007 in 20 Leiden JIL (2007) 745–775.

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¹ See *Medvedyev et al v France*, Judgment of 29 March 2010 (Grand Chamber, Application No 3394/03); available at <www.echr.coe.int>; (accessed 19 April 2010).

² See *Medvedyev et al v France*, Judgment of 10 July 2008 (Fifth Section) (hereinafter 2008 Judgment). A short comment at the day of the hearing of the case was provided by T Thienel, *Oral Argument in Medvedyev v France*; available at <<http://invisiblecollege weblog.leidenuniv.nl/2008/05/13/oral-argument-in-medvedyev-v-france>> (accessed 20 December 2008).

³ For the web cast of hearing see at <http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20090506-1/en/> (accessed 19 April 2010).

⁴ The terms ‘interception’ or ‘interdiction’ are used interchangeably to connote the physical interference with foreign-flagged or stateless vessels on the high seas. However, as a matter of international law, neither of these terms has any legal significance *eo nomine*. Rather, the only case of interference acknowledged by international law on the high seas is the right to visit enshrined in art 110 of the of the United Nations Convention on the Law of the Sea, 1833 UNTS 397 (hereinafter: LOSC).