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# Turkey: Successor or Continuing State of the Ottoman Empire?

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**Abstract**
This article explores whether Turkey is the continuing or a successor state of the Ottoman Empire. This is a question that attracts particular attention in the context of the contemporary political debate on 'neo-Ottomanism'. After the analysis of past debates on succession and continuity, the Ottoman Empire's legacy is considered in light of the international case law, especially the 1925 Ottoman Public Debt Arbitration. Arguments of the international doctrine in favour of and against the Ottoman continuity thesis are also explored and tested by reference to comparable cases. The peculiarity of the transitional period from the Empire to the Republic, where two governments and two constitutions coexisted, is crucial to understanding the transmission process of the legal personality. Despite the undeniable ambiguity of the issue, the conclusion tilts towards the continuity argument. Potential positive and negative, as well as legal and political, implications of continuity, including those related to delictual responsibility, are discussed at the end.

**Key words**
continuity; Ottoman Empire; responsibility; succession; Turkey

## 1. Introduction

> [A] musical tune consisting of the same notes we call a different tune if at one time it is played in the Dorian mode and at another in the Phrygian. Therefore if this is the case, it is clear that we must speak of the state as being the same state chiefly with regard to its constitution; and it is possible for it to be called by the same name or by a different designation both when its inhabitants are the same and when they are entirely different persons. But whether a state is not bound in justice to discharge its engagements when it has changed to a different constitution, is another subject.
>
> Aristotle[1]

In 1923, the Turkish Republic, a new nation-state, was born from the ashes of the old, multi-confessional, and multi-ethnic Ottoman Empire, following the Independence War (1919–22) during which Istanbul, the Ottoman capital, and Western Anatolia were under foreign occupation. The monarchy was abolished in 1922, as was the

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1 *Politics*, with an English translation by H. Rackham, (1998) III/1, at 185.

Caliphate, which had previously been conceptually separated from the Sultanate to become a kind of Muslim pontifical dignity, in 1924.

Nowadays, this is precisely the aforementioned 'interregnum' twilight period of the final years of the Empire and the early years of the Republic that provokes the surge of popular interest and unleashes a passionate debate on the legacy of those decades, with the rise of 'neo-Ottomanism'.[2] This concept was first articulated in the early 1990s, under the presidency of Turgut Özal, by emphasizing linguistic, cultural, and religious ties with newly independent states in the Caucasus and Central Asia, as well as with former Arab dominions. The rise to power of the AKP in 2002 reinvigorated neo-Ottoman doctrine through a new proactive regional policy and geostrategic thinking. The author of neo-Ottomanism's geopolitical bible,[3] the 'Strategic Depth' (*Stratejik Derinlik*), Prof. Davutoğlu, foreign-policy adviser to the prime minister (2002–09) and foreign minister (2009–), combines pan-Islamist, post-colonial, and pragmatic geostrategic rationales in order to argue that a Turkey unfettered by Eurocentrism could play a more constructive role in multiple regions and serve as a bridge between the West and those regions with which it is organically contiguous: the Balkans, the Caucasus, and the Middle East.[4] The doctrine, which certainly marks a paradigm shift from earlier foreign-policy, tends to transform Turkey from a Hobbesian into a Kantian foreign policy actor[5] for the revival of the 'Ottoman grandeur'.[6]

Historians have shed much ink discussing the political continuity from the Ottoman Empire to the Turkish Republic, just as they had done regarding the transition from Byzantium to the Empire of the Sultans.[7] In contrast to the popularity of political analyses, legal studies remained quite silent about the continuity issue, excepting an ephemeral interest subsequent to arbitration in 1925. It is therefore tempting to raise the question of whether Turkey is the continuing or a successor state of the Ottoman Empire, in the context of the contemporary debate on 'neo-Ottomanism'.

This article will proceed in four parts. The first part will summarize the main conceptual similarities and differences between state succession and continuity.

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2 It should be noted that the leading politicians of the governing party, the Justice and Development Party (AKP), make a conscious effort to avoid using the term 'neo-Ottomanism' (for the concurring position of the President of the Republic, see M. Ansaldo, 'Non c'e solo Europa: Conversazione con Abdullah Gül, presidente della Repubblica di Turchia a cura di Marco Ansaldo', (2010) 4 *Limes-Rivista italiana di geopolitica* 23, at 26). Having said this, there are several examples in which the AKP's nostalgia for the Ottoman era is publicly manifested. In a most recent instance, following the passing away of the oldest member of the Ottoman dynasty, Prime Minister Recep Tayip Erdogan, along with four other cabinet ministers, attended the funeral ceremony; see E. Dolmacı and C. Yenilmez, 'Oldest Surviving Ottoman Laid to Rest', *Today's Zaman*, 19 July 2010, at 1.

3 Editoriale, 'Pax ottomana o marcia turca?', (2010) 4 *Limes-Rivista italiana di geopolitica* 7, at 8.

4 N. Fisher Onar, *Neo-Ottomanism, Historical Legacies and Turkish Foreign Policy* (2009), EDAM Center for Economics and Foreign Policy Studies, Discussion Paper Series, at 1, 10–11.

5 See F. Türkmen, 'Turkish–American Relations: A Challenging Transition', (2009) 10/1 *Turkish Studies* 119.

6 E. Alessandri, *The New Turkish Foreign Policy and the Future of Turkey–EU Relations*, Istituto Affari Internazionali, Documenti IAI 10/03, February 2010, at 3.

7 Ortaylı argues that, after the pagan first Rome and the Christian second Rome, the last and Muslim Rome, i.e., the Ottoman Empire, 'collapsed when faced with the modern world and nationalism'; see I. Ortaylı, *Osmanlı Barışı* [*Ottoman Peace*] (2004), 21.

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This will be followed by an analysis of some major previous cases in which the international community was faced with questions regarding continuity and/or succession. The analysis of the case of the Ottoman Empire/Turkish Republic will start in section 4 with an examination of a relevant arbitral judgment. Finally, in light of the general theoretical analyses and the aforementioned arbitral judgment, the discussions on continuity between the Ottoman Empire and the Turkish Republic will be laid down in section 5.

## 2. Succession and continuity of states in international law

International law is replete with examples of anthropomorphism: the expression 'persistent objector' is 'eloquently anthropomorphic'.[8] The dualistic definition of international custom comprises the 'psychological element'. Doctrines about the vitiating effect of duress or error are premised on assuming the reality of state psychology.[9] Authors refer to international 'morality'[10] or to the 'schizophrenia' of the states prohibiting the use of force and resorting frequently to it.[11] The International Court of Justice acknowledges the fundamental right of every state to 'survival'.[12] Recognition of states is compared to baptism[13] or to child adoption.[14] Mention has been made of the 'birth',[15] the 'burial',[16] and the 'resurrection'[17] of the state.

Classical international-law doctrine identifies state succession as similar to inheritance law in domestic systems. It compares the extinction of a state to the death of a human being and the successor states to the heirs.[18] On the face of it, the analogy is tempting: both cases deal with the remaining rights and obligations of a subject of law who ceased to exist. Problems relating to the nature, the quality, and the plurality of the successors are similar. But a fundamental difference determines the gap between the two scenarios: in the case of inheritance, or private succession, a subject of law disappears as a physical entity as well as a legal being. In the case of state succession, the state disappears as a legal being, but its physical components – territory and population – do not. They simply undergo a reorganization

8 P. M. Dupuy, 'A propos de l'opposabilité de la coutume générale: Enquête brève sur l'objecteur persistant', in *Mélanges Virally* (1991), 257.
9 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with a New Epilogue* (2005), 423.
10 N. Politis, *La morale internationale* (1944); R. Aron, *Paix et guerre entre les nations* (1962), 596.
11 R. Mehdi, 'Les objectifs de la codification régionale', in Colloque d'Aix-en-Provence, *La codification du droit international* (1999), 81.
12 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, General List No. 85, para. 86.
13 J. F. Williams, 'La doctrine de la reconnaissance en droit international et ses développements récents', (1933/III) 44 RCADI 203, at 204.
14 J. Verhoeven, 'La reconnaissance internationale: Déclin ou renouveau?' (1993) XXXIX AFDI 29.
15 E. J. Castren, 'Aspects récents de la succession d'Etats', (1951/1) 78 RCADI 385, at 395.
16 See B. Stern, 'La succession d'Etats', (1996) 262 RCADI 27, at 219.
17 V.-D. Degan, 'Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiéthniques en Europe)', (1999) 279 RCADI 205, at 293.
18 P. Fauchille, *Traité de droit international* (1922), tome 1er, at 391.

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or modification.[19] Therefore, the domestic-law scenario is much simpler than the international one: a person passes away, with or without heir(s), with a testament or *ab intestat*. In international law, not only the death, but also the birth of a state may trigger the succession mechanism. There may be not only several heirs, but also a number of testators. A state may disappear in order to give birth to two or more states. Two or more states may merge to create a new, single state. The sovereignty over a portion of territory may be transferred from one state to another.[20] In each case, the legal consequences are analysed according to the changes that occur in the 'material element' of the state.[21] Therefore, international theory of state succession focuses on the territory affected by the change of sovereignty, rather than on the states affected by the succession. In fact, the 1978 and 1983 Vienna Conventions on the Succession of States define succession as 'the replacement of one State by another in the responsibility for the international relations of territory'.[22]

The primary purpose of the law on state succession, as it concerns the transfer of territory, is to minimize the effects of this change.[23] But, infinite combinations of the three foregoing scenarios,[24] as well as disagreements upon the scenario that corresponds to a given case, are hypothetically possible.

International succession differs from domestic inheritance law in other aspects. In cases of domestic succession, a predecessor and a successor exist at the same time physically and legally as two different entities. At a certain moment, the predecessor ceases to exist and its rights and obligations devolve to the successor. In international law, emerging new states always conserve some elements of their predecessors, and there is always a certain de facto continuity in cases of state succession. A state simply cannot disappear and the newness of the new states is always relative.[25] Therefore, succession and continuity may coexist; they often reflect two different aspects of the same process.

In the continuity scenario, the predecessor state is divided into several entities. One of these new entities asserts to 'continue' the personality of the predecessor, whilst other entities consider themselves as new states. There is no discontinuity in the international personality of the state: the continuing state is, legally speaking, identical to the predecessor state.[26] In the case of the dissolution of federal states, it may happen that a member state is continuing the international personality of the former federal state, and the other federate states become new subjects of international law. The continuity of the legal bond corresponds to the identity of the personality. In principle, if an entity that is part of the new territorial organization

19 Stern, *supra* note 16, at 38.
20 See H. Pazarcı, *Uluslararası Hukuk* (2010), 356.
21 E. Sciso, 'Dissoluzione di Stati e problemi di successione nei trattati' (1994) 1 *La Comunità internazionale* 63, at 71.
22 Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, Art. 1(2)(b); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 7 April 1983, Art. 2(1)(a).
23 D. P. O'Connel, *State Succession in Municipal Law and International Law (Internal Relations)*, Vol. 1 (1967), 3.
24 See P. Dumberry, *State Succession to International Responsibility* (2007) 17; Stern, *supra* note 16, at 108.
25 R. Mullerson, 'The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia', (1993) 42 ICLQ 473, at 475.
26 H. Ascensio, 'Etat', in D. Alland (ed.), *Droit international public* (2000), 89, at 131.

is identical to the former federal state, it continues to be the recipient of the former state's rights and obligations.[27]

Continuing and successor states are not governed by completely different legal regimes. Continuity may be compared, *mutatis mutandis*, to a 'universal succession'[28] in the sense that the continuing state is automatically entitled to all the responsibilities and rights of the predecessor state, except those specifically excluded by agreement. Furthermore, the determination of identity is not only in the interest of the state concerned, but also gives security to third states by guaranteeing the continuity of treaties and of international obligations, including debts, and provides a basis for the continued international responsibility of the state.[29]

It is also possible that the same predecessor state may have a continuing state and several successor states. The claimant continuing state may accept that successor states are entitled to a just distribution of the rights and responsibilities of the predecessor state, without continuing the predecessor's international-law personality.[30] The continuing state assumes responsibility for the financial obligations of the extinguished state, particularly the public debt. However, a partial successor must, in principle, take over a proportional part of the general public debt of the predecessor state. Having said this, there is no positive rule of international law as to how equitable and just such an arrangement may be.[31]

In most cases, it may prove to be difficult to distinguish properly between a case of multiple succession and one of dismemberment. The problem of the identity of states is the antithesis not of the problem of state succession, but of the problem of the extinction of states, but cases of continuity may be intermingled with the issues of succession. A conceptual distinction between state succession and state continuity is desirable, and even necessary. While the continuing state assumes automatically all the rights and obligations of the predecessor state, the transmission of such rights and obligations to the successor states has to be assessed casuistically. However, the problems of succession differ from those of continuity only to the extent that the legal regime governing the consequences of a change of sovereignty differs from that governing the consequences of a change of government.[32]

Despite the theoretical distinction between continuity and succession, the term 'continuity' of states is not always employed with any precision, and may be used to allude to a diversity of legal problems.[33]

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27 M. Bothé and C. Schimidt, 'Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie', (1992) 96 RGDIP 811, at 814–15.

28 For the concept, see A. S. Hershley, 'The Succession of States', (1911) 5 AJIL 285.

29 J. Kunz, 'Identity of States in International Law', (1955) 49 AJIL 68, at 69–70.

30 R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', (1993) 4 EJIL 36, at 58.

31 Hershley, *supra* note 28, at 286, 289–90. In 1925, an arbitral sentence held that it was impossible to say that the state that acquires territory by cession is in strict law bound to take over a corresponding part of the public debt of the ceding state: 'Affaire de la dette publique ottomane', 1 *Recueil des sentences arbitrales* 529 ff. This sentence must, however, be read in its historical context. It seems that, although no customary rule according to which a partial successor must take over a proportional part of the general public debt of the predecessor state has crystallized, there is a practice in this sense, which only needs the *opinio juris* to become a positive rule.

32 M. C. R. Craven, 'The Problem of State Succession and the Identity of States under International Law', (1998) 8 EJIL 142, at 153, 153–4, 158.

33 I. Brownlie, *Principles of Public International Law* (2008), 80.

The concept of continuation implies a certain element of fiction that assumes a legal identity between two entities that are not materially identical. The fiction of continuity is therefore tantamount to the fiction of identity.[34] International law has not elaborated clear criteria about the identity or the succession of states. This evaluation is left to third states, which will judge the eventual declaration made by the interested states claiming recognition, by the successor state, or by the government, in case of identity. Among the forms of recognition of continuity, the application of all international agreements with no special modification or declaration, or the admission to international organizations' activities with no procedure of accession, may be mentioned.[35] The determinant element that permeates through these acts and manifestations is the *opinio juris* of the international community.[36] This may be contrasted with the prevailing tendency in the literature on state recognition as being declaratory.[37] In this view, the existence or not of a state is considered a factual question. However, the same cannot be said for continuity. It is mainly because continuity per se is a fiction. Therefore, it needs to be recognized by all those who will attach consequences to it. That is to say that the recognition of continuity by third states enjoys a constitutive character. The fact that such recognition has a constitutive character does not contradict the existence of a presumption in favour of continuity.

According to the presumption of continuity, a state continues to exist from the international viewpoint unless its dissolution can be ascertained beyond any doubt. If the conditions of dissolution are not met, the eventual changes of the state structure should be considered as a matter of succession of governments.[38] If the state remains the same, there will be no change in its obligations, responsibilities, and rights.[39]

It can hardly be asserted that customary rules on state succession and continuity have crystallized. Different situations of territorial mutation are so rich with consequences that they exclude, a priori, the emergence of simple and uniform legal rules on the matter.[40] Some authors assert that the provisions of the 1978 Vienna Convention ripened enough to be said to reflect international custom on the matter.[41] The Arbitral Commission for the Former Yugoslavia, for instance, referred to the relevant norms of the 1978 Convention as applicable to the former Yugoslavia.[42] To the contrary, others (such as France) pinpoint the lack of ratification

34 Stern, *supra* note 16, at 40, 41, 89.
35 W. Czaplinski, 'La continuité, l'identité et la succession d'Etats: Evaluation de cas récents', (1993) 2 RBDI 374, at 379.
36 Stern, *supra* note 16, at 85.
37 See, e.g., J. F. Williams, 'La doctrine de la reconnaissance en droit international et ses développements récents', (1933/III) 44 RCADI 203, at 204, 206–7, 236, 239; G. Abi Saab, 'Cours général de droit international public', (1987/VII) 207 RCADI 29, at 68, 69; J. Verhoeven, 'La reconnaissance internationale: Déclin ou renouveau?', (1993) XXXIX AFDI 7, at 29; A. Cassese, *International Law* (2003), 48; B. Conforti, *Diritto Internazionale* (1996), 16.
38 Czaplinski, *supra* note 35, at 374, 379.
39 H. Kelsen, *Principles of International Law* (1967), 383.
40 Degan, *supra* note 17, at 300.
41 Interview given to *Izvestiia* (14 January 1992) by Vereshchetin (cited in Bothé and Schimidt, *supra* note 27, at 830).
42 Sciso, *supra* note 21, at 80–1.

of the 1978 and 1983 Conventions, which forecloses the possibility of considering them as a fair reflection of positive law. Nevertheless, both conventions are inspired by some principles that are not contestable and indeed provide general guidelines on the matter.[43] The problem remains to distinguish between those provisions that are merely 'sources of inspiration' – that is, those at the stage of the progressive development of international law- and those that have acquired customary value.[44] Due to this ambiguity, all the rules pertaining to the birth and the death of the state become legal arguments that international actors may resort to when their disputes are brought into the international scene.[45]

## 3. Past debates on succession and continuity

The history of international law displays various cases of state continuity. The significant cases that have given rise to colourful legal debates took place following the major international crises of the twentieth century. These cases will be studied separately in the following sections. Before we turn to the analysis of these cases, a quick reminder on the preceding instances would be well in place. During the revolutions of 1649 and 1688, neither Cromwell nor William of Orange repudiated the legal obligations arising from the international treaties concluded by the Stuarts. Once restored, the Stuarts recognized the validity of the treaties concluded by Cromwell. In the same vein, the French Republic recognized the treaties concluded by the monarchy. In 1834, the foreign minister of the French *Restauration* period rejected the proposal, by a member of the parliament, to declare null and void all the treaties of the Napoleonic regime. The 1831 London Conference declared that the treaties would not lose their binding force, whatever changes occur in the internal organization of the peoples.[46]

The following case studies will display that there are clear links between the theoretical assertions made above and political history. Each case bears resemsblance to a particular dimension of the Ottoman/Turkish continuity case. The crucial question is whether the continuity may be asserted even if substantial changes in territory, name, and regime, as well as radical ideological and social transformations, took place in a particular case.

### 3.1. The case of the Austro-Hungarian Empire

Following the First World War, some successor states were, or wanted to be, treated as continuing states. Upon the dissolution of the Hapsburg monarchy that ruled the Austro-Hungarian Empire, Hungary declared itself to be identical to the ancient Hungarian Kingdom. The Austrian Republic was constituted as a new state, but the Peace Treaty of Saint-Germain treated the republic as identical to the Empire. Other parts of the old monarchy emerged as new states such as

43 N. Q. Dinh, P. Daillier, and A. Pellet, *Droit international public* (2002), 542, para. 353.
44 Stern, *supra* note 16, at 147, 148, 150.
45 Ascensio, *supra* note 26, at 119.
46 A. Verdross, 'Le fondement du droit international', (1927) 16 RCADI 247, at 269–70.

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Poland, Czechoslovakia, and the Yugoslav Kingdom.[47] All successor states of the Austro-Hungarian Empire assumed responsibility for such portions of the pre-war bonded debts as were determined by the Reparations Commission.[48]

However, the Austrian Supreme Court ruled (in 1925) that the Austrian Republic was not the same state as the Austrian Empire, and the Austrian Constitutional Court decided (in 1926) that the Austrian Republic was not bound by the liabilities of the monarchy, except when otherwise provided by a treaty entered into by the Republic or by a municipal law of the Republic.[49] It is curious to observe that the neutral states of the First World War accepted Austria's declaration that it would definitely be a new state and would not incur all the legal obligations of the Austro-Hungarian monarchy, whilst victor states considered that both states, Austria and Hungary, should honour all the conventional obligations contracted by the Empire prior to the opening of hostilities.[50] This controversy exhibits clearly what is often at stake in continuity issues. Considering a state as the continuing state of a predecessor may have serious financial implications. For instance, the Soviet Union, which, at the beginning of its existence, rejected any kind of continuity with the Empire of the Tsars, seems to have bowed to the pressures to fulfil Russia's commitments – especially financial ones – as the price of international recognition.[51]

### 3.2. The German case

Subsequent to the Second World War, international practice, as well as socialist doctrine, with some divergences, seem to have admitted the identity of the post-revolutionary socialist states with the pre-existing states.[52] The German case gave rise to more debate. As a consequence of the Berlin Declaration on 5 June 1945, made by the victorious powers that assumed 'supreme authority with respect to Germany', the legitimate government of Germany had ceased to exist. By abolishing the last government, these powers had destroyed the existence of Germany as a sovereign state.[53] The later emergence of two Germanys made the legal heritage of the Third Reich more complicated. According to West German lawyers, the personality of the Reich, sometimes qualified as a 'passive subject of international law',[54] was continued by the Federal Republic of Germany within the limits of its own territory, whilst, in the view of the East German lawyers, the Reich had disappeared in 1945, and the two German states had to be considered as new

47 Czaplinski, *supra* note 35, at 375–6.
48 O'Connel, *supra* note 23, at 401.
49 Kelsen, *supra* note 39, at 384–5, footnote 85.
50 Sciso, *supra* note 21, at 74.
51 See H. Lauterpacht, *Recognition in International Law* (1948), at 109; Czaplinski, *supra* note 35, at 383.
52 Czaplinski, *supra* note 35, at 383, 378.
53 H. Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin', (1945) 39 AJIL 518.
54 This legal notion seems to reflect a historical and even psychological conception of the German state. Before being shot by the death squad, Stauffenberg, the perpetrator of the failed attempt against Hitler, had shouted 'Long live Holy Germany' (see P. Hoffman, *Stauffenberg, a Family History, 1905–1944* (1997), 277). What the young count meant by 'Holy Germany' was certainly not the Third Reich that he tried to destroy, but a more abstract and perennial entity.

entities. The unification agreement reached in 1990[55] showed the way out of the controversy: the legal personality of the Reich, which was 'suspended' following the *debellatio*,[56] is henceforth assimilated with that of the Federal Republic of Germany (FRG).[57] It is noteworthy that, while the United Kingdom expressly recognized the continuous existence of the Reich, France and French doctrine rather defended the idea that the Reich had ceased to exist in 1945.[58]

As for the reunification of Germany, it cannot be interpreted as involving the creation of an entirely new state, otherwise it might have been concluded that both the FRG and the German Democratic Republic (GDR) had ceased to exist and that the new Germany would have to apply afresh for membership in international organizations, including the United Nations and the European Community.[59] The Federal Republic's persistent claim of being identical with the former German state was now formally confirmed by history. All treaties concluded by the FRG, as well as memberships in international organizations, remained unaffected by the accession of the GDR.[60]

### 3.3. From the tsars to the Soviets, and from the Soviets to Russia

The collapse of the USSR in 1991 gave rise to a political – and fascinating – legal debate on the Russian continuum. The USSR initially claimed total discontinuity with the Tsarist Russia. However, it later softened this rigid position with respect to certain treaties of the *ancien régime*, but not necessarily for its debts. The current dominant position taken by Russian historians and politicians considers imperial Russia and the current Russian Federation as parts of one and the same continuum.[61] Possibly influenced by the ideal of 'Holy Russia', this conception is, nevertheless, not devoid of legal validity.

The preamble of the two declarations adopted in Minsk on 8 December 1991 by the leaders of Belarus, Russia, and Ukraine stated that 'the USSR, as a subject of international law and a geopolitical reality, is ceasing its existence'. Likewise, the 11 participating republics at the Alma-Ata Conference on 21 December 1991 stated that 'with the formation of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist'. The signatory states agreed that:

> Member States of the Commonwealth support Russia in taking over the USSR membership in the United Nations, including permanent membership in the Security Council. On 24 December 1991, the Permanent Representative of the USSR to the United Nations submitted to the Secretary-General a letter from the President of the Russian

55 Treaty on the Final Settlement with Respect to Germany, concluded by the Federal Republic of Germany, the German Democratic Republic and the four Allied powers and signed in Moscow on 12 September 1990 and entered into force on 15 March 1991.

56 K. U. Meyn, 'Debellatio', in *Encyclopaedia of Public International Law*, Vol. 1 (1992), 869: 'The minimum content of any definition of debellatio is that one of the belligerent States has been defeated so totally that its adversary or adversaries are able to decide alone what the fate of the territory of that State and of the State authorities concerned will be.'

57 Ascensio, *supra* note 26, at 118.

58 Czaplinski, *supra* note 35, at 381.

59 Craven, *supra* note 32, at 145.

60 See J. A. Frowein, 'The Reunification of Germany', (1992) 86 AJIL 152, at 157.

61 Degan, *supra* note 17, at 304, 308.

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> Federation stating that the membership of the USSR in the United Nations, including the Security Council, is being continued by the Russian Federation with the support of the Commonwealth of Independent States.[62]

The European Community accepted Russia's claim to the continuity of its international rights and obligations, including those under the UN Charter.[63] It seems that the *opinio juris* of the three Slavic[64] states at the Minsk Declaration about the status of the USSR and its consequences progressively pervaded the entire international society.[65]

Recognition of Russia as the continuation of the erstwhile USSR, even as a legal fiction, made the lives of existing states less complicated.[66] No state objected – at least overtly – to Russia's pretension to the seat of the USSR at the Security Council. Although the Alma-Ata Declaration did not use such terms as continuity or identity, but referred to succession, the implementation practice of the Declaration, which did not treat Russia and the other republics on an equal footing, was clearly based upon the idea of identity. Multilateral treaties' lists read henceforward Russia instead of the USSR. For instance, the Swiss Federal Council, depositary of the 1949 Geneva Conventions, simply modified the USSR's name in the list of the states parties. Soviet property abroad was taken over by the Russian Federation, and the Soviet embassies have simply become Russian embassies, whilst new republics were obliged to open new ones.[67]

The Soviet dissolution, which may be analysed as a series of secessions giving birth to several successor states, displays similarities to the Austro-Hungarian model in which the continuing 'nucleus-state' preserved its identity with the Empire.[68] It may be argued that the very use of the word 'dissolution' is problematic, since the concept of dissolution excludes, in principle, continuation. When there is dissolution, all new states are supposed to be successor ones. Once a state's extinction is accepted, its resurrection cannot be asserted.[69] However, this incongruity was rectified by the overall willingness to admit the Russian Federation as the continuing state of the USSR: *ex factis jus oritur* . . ..

With respect to the settlement of Soviet public debts, a memorandum of understanding was signed on 28 October 1991 by 12 republics in the presence of the high representatives of the G7 governments. The signatory states accepted 'jointly and severally' the responsibility for the Soviet debts.[70] On 20 March 1992, the Council of the Heads of State of the CIS members recognized that all CIS member states are successors to the rights and obligations of the former Soviet Union and decided to

62 Y. Z. Blum, 'Russia Takes Over the Soviet Union's Seat at the United Nations', (1992) 3 EJIL 354, at 355–6.
63 Rich, *supra* note 30, at 59.
64 Observation by Degan, *supra* note 17, at 306.
65 Stern, *supra* note 16, at 316, 318.
66 Mullerson, *supra* note 25, at 478.
67 Bothé and Schimidt, *supra* note 27, at 824, 826–9.
68 See Czaplinski, *supra* note 35, at 388.
69 Stern, *supra* note 16, at 44.
70 Bothé and Schimidt, *supra* note 27, at 832.

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establish a commission of representatives to negotiate and prepare proposals of state succession.[71]

Another delicate issue to arise because of the USSR's dissolution was the partition and governance of the Soviet military assets and especially the nuclear arsenal. Only the republics in whose territories Soviet nuclear weapons were located (Russia, Ukraine, Kazakhstan, and Belarus) were invited to endorse the obligations assumed by the USSR vis-à-vis the United States for the progressive dismantlement of nuclear weapons, by virtue of the START I Agreement signed on 31 July 1991.[72] Nuclear military units of the Commonwealth of Independent States were placed under the control of a central military command and the power to authorize the use of nuclear weapons was given to the president of Russia, subject to the approval of the nuclear-weapon-holding states' presidents and to the consultation of other member states' presidents.[73] Such a power may be interpreted in the sense that Russia is not only legally, but also militarily, the continuing state of the USSR.

### 3.4. The Yugoslav saga

Unlike the Soviet case, none of the resulting states of the Socialist Federal Republic of Yugoslavia (SFRY) succeeded to the Yugoslav place in the international community.[74] Bosnia and Herzegovina, Croatia, Macedonia, and Slovenia sought recognition by the international community as new entities. Serbia and Montenegro, on the other hand, subsequent to the dissolution of the former Yugoslavia, created the Federal Republic of Yugoslavia (FRY) on 27 April 1992. The FRY claimed to be the continuing state of the former Yugoslavia and rejected any recognition, considered to be 'unnecessary'.[75] Serbia and Montenegro declared themselves to be 'strictly respecting the continuity of the international personality of Yugoslavia' and undertook to 'fulfil all the rights conferred on and the obligations assumed by the SFRY in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia'.[76] Once recognized, the other republics accepted, by declarations of succession, to be parties to the international treaties concluded by the former Yugoslavia. Serbia and Montenegro considered the emergence of the other republics as unlawful secession attempts.[77]

The FRY's claims triggered harsh reactions in the international community. In its Resolution 757 (1992) of 30 May 1992, the UN Security Council observed that the

71 Mullerson, *supra* note 25, at 479.
72 Sciso, *supra* note 21, at 78–9.
73 Ş. Ünal, *Uluslararası Hukuk* (2005), 220.
74 D. O. Lloyd, 'Succession, Secession, and State Membership in the United Nations' (1993–94) 26 NYUJILP 761, at 779.
75 R. Kherad, 'La reconnaissance des états issus de la dissolution de la République Socialiste fédérative de la Yougoslavie par les membres de l'Union Européenne', (1997) 101 RGDIP 663, at 686. In fact, in addition to the continuity claims in question, Serbia had asserted preservation of a perfect identity since 1878 onwards. It is noteworthy that the Kingdom of Serbs, Croats, and Slovenians was considered to be the continuing state of the Serbian Kingdom with regard to the treaties concluded by the latter prior to 1918; see Degan, *supra* note 17, at 304, 311.
76 Rich, *supra* note 30, at 53.
77 Sciso, *supra* note 21, at 68, 88.

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FRY's continuity claim was not generally accepted. In its Resolution 777 (1992) of 19 September 1992, the Security Council recommended to the General Assembly to decide that the FRY should apply afresh for membership of the organization and not participate in the work of the General Assembly. The General Assembly agreed with the Security Council and adopted its Recommendation 47/1 (1992).[78] The GATT's Council as well as the OSCE's summit decided to suspend the 'new' Yugoslavia's membership,[79] and all of the former Yugoslavia's properties and assets abroad were frozen.[80] The Arbitration Commission established by the European Community (the Badinter Commission) to evaluate legal questions arising from the dissolution of Yugoslavia came to the view that the SFRY no longer existed and the Federal Republic of Yugoslavia was a new state that could not be regarded as the sole successor state of the SFRY. The recognition of the FRY should thus be subject to general principles of international law and to the European Communities Guidelines of 16 December 1991. The FRY should not automatically succeed to the SFRY's seats in international organizations or to title to the SFRY's property abroad.[81]

At first sight, the Yugoslav dismemberment process reminds one of the aforementioned scenario of dissolution of federal states: the secession of republics led to a territorial reduction of the former state, but not to its disappearance as a subject of international law[82] in a similar way to the USSR. One can legitimately wonder why the international community acknowledged Russia's claim to be the USSR's continuing state and staunchly rejected the FRY's similar pretensions. At the outset, factual continuation of some of the SFRY's international relations by the FRY could have presaged that the latter would be recognized as the continuing state in the long term. But the time factor seems to have played a determining role: contrary to the Russian case, in which the Soviet Union was considered to have ceased to exist at the moment at which its continuation by Russia was affirmed, no immediate recognition of continuation followed the SFRY's dissolution and the passage of time ran against the FRY.[83]

One major difference between the two cases is that ten successor states of the USSR supported Russia's continuing UN membership; however, apart from Serbia and Montenegro, the other republics of the SFRY vigorously asserted that all the former republics of the SFRY were successor states. The international community may have wanted to emphasize that there should be no rewards for the unacceptable behaviour that led to the imposition of mandatory sanctions against Serbia and Montenegro.[84] The international community's refusal to recognize the continuity of Yugoslavia was used as a means of pressure in order to re-establish peace. Another reason for the differences in treatment between the USSR and the SFRY could be practical: had Russia's identity with the USSR not been accepted, then the UN Charter

78 See B. Stern, *Le statut des états issus de l'Ex-Yougoslavie* (1996), 17, 75, 89, 129.
79 Czaplinski, *supra* note 35, at 390.
80 Sciso, *supra* note 21, at 70.
81 Rich, *supra* note 30, at 54.
82 Bothé and Schimidt, *supra* note 27, at 825.
83 Stern, *supra* note 16, at 46.
84 Rich, *supra* note 30, at 59–60.

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would have had to be modified, since an unprecedented 'right to succession to a seat of a permanent member of the Security Council' could hardly be invented.[85] The following fact illustrates clearly the difference between continuity and succession processes: Soviet embassies and consulates were simply transformed into Russian missions, while the FRY did not automatically succeed to the Yugoslav embassies and property abroad.[86]

## 4. The Ottoman Empire's legacy before international justice

An arbitral sentence had to deal with the curious question of whether Turkey is the continuing or a successor state of the Ottoman Empire. By virtue of the 1923 Treaty of Lausanne, the successor states of the Ottoman Empire took over a share of the Ottoman public debt on a basis determined by the proportion of total revenues contracted by each during the financial years 1910–12. In fixing this basis, the Ottoman Debt Council excluded revenues from territories that had, since 1912, ceased to be part of the Empire. Iraq, Palestine, and Transjordan protested, contending that the Turkish Republic was burdened with such part of the debt as remained after the contributions laid down in the treaty had been paid, and that, apart from the Lausanne Treaty, there was no principle of international law according to which a state acquiring part of the territory of another ought to be charged with the corresponding portion of the public debt of the ceding state.[87] The matter was referred to arbitration. The only arbitrator, Borel, held that:

> à l'égard de la D. P. O., (*Dette publique ottomane, Ottoman public debt*) la situation juridique de la Turquie n'est nullement identique à celle des autres Etats intéressés. En droit international, la République turque doit être considérée comme continuant la personnalité de l'Empire ottoman. C'est à ce point de vue qu'évidemment le Traité se place, preuves en soient les articles 15, 16, 17, 18 et 20,[88] qui n'auraient guère de sens si aux yeux des hautes parties contractantes, la Turquie était un Etat nouveau, au même titre que l'Irak ou la Syrie. La raison d'être de l'article 99,[89] du traité n'est pas celle qu'a indiquée, lors des débats, la Représentant du Gouvernement turc. Elle réside dans le fait

85 Bothé and Schimidt, *supra* note 27, at 838.

86 Lloyd, *supra* note 74, at 778, 782.

87 For the English summary of the case, see O'Connel, *supra* note 23, at 401–2.

88 Art. 15: 'Turkey renounces in favour of Italy all rights and title over the following islands: . . ..' Art. 16: 'Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned. (§) The Provisions of the present article do not prejudice any special arrangements arising form neighbourly relations which have been or may be concluded between Turkey and any limitrophe countries.' Art. 17: 'The renunciation by Turkey of all rights and titles over Egypt and over the Soudan will take effects as from the 5th November, 1914.' Art. 18: 'Turkey is released from all undertakings and obligations in regard to the Ottoman loans guaranteed on the Egyptian tribute, that is to say, the loans of 1855, 1891 and 1894. The annual payments made by Egypt for the service of these loans now forming part of the service of the Egyptian Public Debt, Egypt is freed from all other obligations relating to the Ottoman Public Debt.' Art. 20: 'Turkey hereby recognises the annexation of Cyprus proclaimed by the British Government on the 5th November, 1914.' For the English text of the Lausanne Treaty, see F. L. Israel (ed.), *Major Peace Treaties of Modern History, 1648–1967, with an Introductory Essay by Arnold Toynbee*, Vol. 4 (1967), at 2309–10.

89 Art. 89: 'From the coming into force of the present Treaty and subject to the provisions thereof, the multilateral treaties, conventions and agreements of an economic or technical character enumerated below shall enter

> que la guerre a été considérée comme ayant mis fin, entre Puissances belligérantes, à toutes conventions autres que celles dont le trait particulier est de déployer leurs effets précisément au cours des hostilités ; et la déclaration formelle faite à Lausanne par M. Bompard . . . prouve que le point de vue auquel se place la Turquie n'a pas été admis par les autres Puissances signataires du Traité. La D. P. O. est sa dette, dont Elle n'est libérée que dans la mesure où le Traité l'en décharge pour en grever d'autres Etats.[90]

Turkey had argued that the Lausanne Treaty merely applied a rule of international law to the effect that cessionary states must take over a part of their predecessor's debt. The arbitrator held that it was impossible to say that the state that acquires territory by secession is bound to take over a corresponding part of the public debt of the ceding state. The distribution in the treaty was a favour, since the debtor remained, in law, solely responsible. Only those revenues that had been public revenues of the Ottoman Empire were to be included in the distribution, and the revenues that proceeded from commercial operations of the Ottoman Public Debt were to be excluded.[91]

Turkish doctrine criticized the judgment's conclusion on continuity on the following points: Articles 15, 16, 17, 18, and 20 of the Lausanne Treaty entail Turkey's renunciation of rights and title over certain territories as well as Egypt and Cyprus. By these provisions, Turkey, as a new state, declares having no title over those territories that used to be part of the old Ottoman Empire. The Turkish state persistently argued that it was a new state during the *travaux préparatoires* of the Lausanne Treaty. Borel's thesis that explains the *raison d'être* of Article 99 by the effect of hostilities on treaties is irrelevant. By virtue of Articles 101, 102, 103, and 104 of the Lausanne Treaty, Turkey has undertaken to adhere to certain international conventions and declarations and to bring into force their provisions;[92] therefore, it proceeded to choose by its own will the rights and obligations arising from the treaties concluded by the Empire. The Ottoman Empire's huge loss of territory may, per se, suffice to exclude any allegation of identity or continuity. Most of the states that had concluded with the Ottoman Empire treaties relating to such subjects as friendship, residence, trade, consular relations, extradition, etc., proceeded to conclude anew treaties relating to identical subjects with the Turkish Republic.[93]

In 1956, the Lighthouse Arbitration (Greece/France) directly referred to the Ottoman Public Debt Arbitration[94] and embraced arbitrator Borel's conclusion that Turkey was the continuator of the Ottoman Empire. In determining the critical date

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again into force between Turkey and those of the other Contracting Powers party thereto: (1)– (8)'; see Israel, *supra* note 88, at 2350–1.

90 'Affaire de la dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie) 18 April 1925', 1 *Recueil des sentences arbitrales* 573. Art. 46(2): 'From the dates laid down in Article 53, Turkey shall not be held in any way whatsoever responsible for the shares of the Debt for which other States are liable'; see Israel, *supra* note 88, at 2320.

91 See O'Connel, *supra* note 23, at 402.

92 By the Law No. 241 of 6 May 1926, the Turkish Parliament determined 'the modality of ratification and accession to the international treaties, conventions and agreements enumerated in articles 89 and 100 of the Treaty of Lausanne'; see S. Toluner, *Milletlerarası Hukuk ile İç Hukuk Arasındaki İlşkiler* (1973), 570.

93 I. Doğan, *Devletin Milletlerarası Andlaşmalardan Doğan Hak ve Borçlara Halefiyeti Sorunu* (1970), 88–91.

94 'Affaire relative à la concession de phares de l'Empire ottoman (Grèce, France) 24/27 July 1956', XII *Recueil des sentences arbitrales* 184.

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of succession regarding a certain part of the Ottoman territory, the Arbitral Tribunal ruled:

> La date critique sert évidemment de terme à la responsabilité turque et de point de départ de la responsabilité hellénique en ce sens que tout ce qui s'est passé avant la date critique et qui peut avoir engendré des charges vis-à-vis de la société concessionnaire, continue à donner lieu à la responsabilité de l'Etat turc.[95]

## 5. The ongoing debate: succession or continuity?

Shortly after the 1925 Ottoman Public Debt Arbitration, Verdross, referring, inter alia, to the judgment in question, considered that:

> a State's obligations do not cease to exit after a revolutionary change of the form of the State or its constitution. All these changes have no influence from the point of view of international law. The State remains internationally the same. There can hardly be rules of international law which are more certain.[96]

In his article on the personality of Borel and his arbitral sentence on the Ottoman Public Debt, Sottile embraces Borel's conclusion that Turkey continues the Ottoman Empire's personality.[97] The overwhelming tendency in the legal doctrine is that, in spite of considerable territorial losses, there is an identity of international personality between the Turkish Republic and the Ottoman Empire.[98] Like other cases of continuity, the territory over which the predecessor state used to exert its *imperium* served as a spatial basis for a new state, subsequent to independence claims manifested by the residing population and confirmed by the facts. Generally, the former state does subsist, but its territory is reduced to what was considered the 'metropolis' in (post-)colonial cases, and to the 'historical homeland' in the Turkish case.[99] In fact, an important touchstone to determine identity with the previous state is that the former capital and the surrounding regions, as well as other zones of historical significance constituting the genuine nucleus of the state, remain untouched.[100]

Some criticisms directed at Borel's judgment, such as those that are based on territorial losses and radical political transformation, may, at first, appear seductive. It should, however, be recalled that alteration of territory as such does not affect the identity of a state[101] and there is a strong presumption in favour of the

95 Ibid., at 190.
96 Verdross, *supra* note 46, at 271–2.
97 A. Sottile, 'Eugène Borel: Son rôle dans la jurisprudence internationale, sa sentence arbitrale sur la répartition de la dette ottomane', (1926) IV *Revue de droit international, de sciences diplomatiques et politiques* 88, at 106. Sottile makes curious observations about the story of the Lausanne Treaty: 'Les négociations de Lausanne consacrèrent le succès de la diplomatie turque, la plus habile du monde, et l'échec du Quai d'Orsay', at 101.
98 Kunz, *supra* note 29, at 68, 72; G. Cansacchi di Amelia, 'Identité et continuité des sujets internationaux', (1970/II) 130 RCADI 1, at 32; Czaplinski, *supra* note 35, at 376 ; K. Gözler, *Devletin Genel Teorisi* (2007), at 18.
99 Ascensio, *supra* note 26, at 118; see İ. Ortaylı (interviewed by Mehmet Gündem), 'Tarihten kaçamayız' ['We Cannot Escape History'], in M. Gündem, *Eleştirel Akla Çağrı, Bir Entellektüel Ajanda* (2000), 69: 'There is continuity in history . . .. The territories on which the Turkish Republic was founded are the homeland of the Ottoman Empire, hence the State is continuing with the Republic.'
100 Castren, *supra* note 15, at 393.
101 Rich, *supra* note 30, at 58; Kunz, *supra* note 29, at 72; W. Schoenborn, 'La nature juridique du territoire', (1929/V) 30 RCADI 81, at 119; H. Kelsen, 'Théorie générale du droit international public: Problèmes choisis',

continued statehood of existing states, despite very extensive loss of actual authority sometimes.[102] The crucial issue is that the territorial change must leave a part of the territory that can be recognized as an essential portion of the old state.[103] It is meaningful that, in instances in which member states of the United Nations lost a portion of their territorial domain as a result of the secession of a part of their population, the general practice of the United Nations has been to regard the 'parent' state's membership in the organization as unaffected by the loss of a part of its territory, while requiring secessionist province(s) to apply for membership.[104] In his Dissenting Opinion to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, Judge Kreca states that:

> The practice of the Secretary-General as the depositary of multilateral treaties corresponds to the general legal principle that a diminution of territory does not of itself affect the legal personality of the state. This principle of international law is deeply rooted in international practice. As early as 1925, the arbitrator, Professor Borel, held in the *Ottoman Debt Arbitration* that, notwithstanding both the territorial losses and the revolution, 'in international law, the Turkish Republic was deemed to continue the international personality of the former Turkish Empire'.[105]

True, the transformation of the Ottoman Empire into the Turkish Republic was politically and ideologically a most radical change. But the radical nature of this change does not necessarily change the identity of the state.[106] For instance, the change from the Third Reich into the Federal Republic of Germany was certainly not less radical, but German continuity was not put at stake. The same holds true for the continuity from Tsarist Russia to the Soviet Union and from the Soviet Union to the Russian Federation: Soviet claims of discontinuity on the grounds of changes of economic and political organization were rejected by third states.[107] Despite innumerable territorial and political changes, the French Republic is the continuing state of the Kingdom of France. Asserting the contrary would lead to admission that each change is a succession case and would give rise to inextricable legal problems. It is a fully recognized principle of general international law that unconstitutional, and even revolutionary, changes in government do not affect the identity of the state.[108] Deep social changes are also irrelevant in determining whether or not a state continues to exist.[109] Despite undeniable political aspects, the problem of identity of

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(1932/IV) 42 RCADI 121, at 337; O. Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', (1948) 25 BYBIL 81, at 105; Degan, *supra* note 17, at 303.

102 J. Crawford, 'The Criteria for Statehood in International Law', (1976–77) 48 BYBIL 83, at 139.

103 Kunz, *supra* note 29, at 72.

104 Blum, *supra* note 62, at 357.

105 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep., General List No. 91, at 762–3, para. 87 (Judge Kreca, Dissenting Opinion).

106 See Castren, *supra* note 15, at 395: 'les modifications apportées à l'organisation intérieure de l'Etat telles que le changement de gouvernement et de l'ordre juridique et social . . . n'influent pas sur ses droits et obligations internationaux . . .. Pareilles modifications intérieures n'altèrent pas la personnalité juridique internationale de l'Etat '; see also Stern, *supra* note 16, at 40.

107 Stern, *supra* note 16, at 83.

108 Kunz, *supra* note 29, at 73–4.

109 Mullerson, *supra* note 25, at 476.

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states under international law is a legal problem[110] and not an ideological one. The very notion of identity of states is fictitious. It is a matter of identity of international subjectivity and not of the identity of territory, population, and state power.[111]

The Turkish Republic rejected the Ottoman 'regime' but not the Ottoman 'state'.[112] Some legal and factual elements support the continuity thesis. Theoretically, a continuing state does not need to be recognized, whilst successor states do. In the case of continuity, third states express their acceptance or denial of the character of continuing states by diverse manifestations.[113] As a matter of fact, the Turkish Republic was never recognized as a new state. It could be asserted that the Ankara government was tacitly recognized, at first, as the de facto government of the portion of territory that it was controlling and, progressively, as the only government of the Turkish state. Besides, among the states that emerged after the demise of the Ottoman Empire, Turkey is the only party to the Lausanne Treaty. All former Ottoman capitals (Bursa, Edirne–Adrianople, and Istanbul) are located within Turkish borders. The official flag of the Ottoman Empire was adopted by the Republic, then simply submitted to a geometrical regulation. The official language – Turkish – is the same.[114] In its documents redacted in Turkish, the Ottoman Empire never described itself as Turkey; therefore the passage from the Ottoman Empire to the Turkish Republic is a drastic change for Turks. However, the change of a state's name does not necessarily entail a change of international personality.[115] Besides, the Europeans were accustomed to calling the Ottoman Empire *Turquie*, *Turkey*, and *Turchia* and such vocabulary was broadly used in official texts and international treaties,[116] at least from the beginning of the nineteenth century onwards.

Comparable to the Russian Federation as the USSR's continuing state,[117] Turkey has acquired all the embassies and consulates inherited from the Ottoman Empire and is currently using most of them. Modern Turkey is the most direct and the principal heir of Ottoman diplomacy. The republic inherited not only the central territory of the Empire, but also a bureaucratic and military elite who helped to establish a new state.[118] The Empire transmitted to the Republic most of its institutions, including its administration and its legal structure, as well as the parliamentary

110 Kunz, *supra* note 29, at 71.
111 Czaplinski, *supra* note 35, at 374.
112 B. Oran, *Türk Dış Politikası*, Vol. 1 (2002), 24; in fact, some historians draw attention to 'more or less hidden' continuities between the Ottoman Empire and the Turkish Republic, especially in terms of authoritarianism, centralization, and the weight of the state; see F. Georgeon, *Abdulhamid II, le sultan calife* (2003), 447.
113 Stern, *supra* note 16, at 59, 67.
114 In the republican era, Turkish language underwent a neologist reform process (initiated in the late Ottoman period) in order to be purified from Arabic and Persian vocabulary; however, the grammar and the basic Turkish vocabulary are strictly the same; for further information, see G. Lewis, *The Turkish Language Reform: A Catastrophic Success* (2002).
115 Stern, *supra* note 16, at 74.
116 For instance, see 'Protocole signé à Constantinople par les représentants de la France, de la Russie et de la Turquie, le 5 septembre 1862' (10 Rebiülevvel 1279); 'Coupole du Saint-Sépulcre' (1884 Recueil des traités de la Porte ottomane avec les puissances étrangères par le Baron I. De Testa, Tome Sixième, at 474).
117 See Stern, *supra* note 16, at 405.
118 R. H. Davidson, 'Ottoman Diplomacy and Its Legacy', in L. C. Brown (ed.), *Imperial Legacy: The Ottoman Imprint in the Balkans and in the Middle East* (1996), at 197–8.

experience and the educational and financial systems, without major changes.[119] Even the organizational features of the army – ideologically the most republican element of the state apparatus – remained the same, such as military units' numbers.

Contrary to the fact that the Russian Federation had to share with the successor states the USSR's military inheritance, including critical items such as the nuclear arsenal and the Black Sea Fleet,[120] Turkey acquired all weaponry,[121] warships, and other military assets. Nothing was left to successor states, except permanent military installations such as barracks.

The National Covenant, or the Turkish 'social contract',[122] adopted by the last Ottoman Chamber of Deputies, which asserted the principle of self-determination and insisted on the preservation of Turkey's existing frontiers,[123] was subsequently to figure among the constitutional landmarks of the new Republic and establish the basic principles of its domestic and foreign policy.[124] At the moment of the creation of the Turkish Republic, all Ottoman legislation was in force. This legislation would subsequently be reformed in conformity with the Kemalist revolutionary conception, by the adoption of foreign codes such as the Swiss civil code, or by the rules produced by the new republican institutions. In any event, the reform process would be progressive and some elements of the Ottoman legislation continued to be in force.[125] Regulatory acts of the Ottoman period have still, in the hierarchy of norms of the Turkish Constitutional system, the same rank as the ordinary laws.[126]

If one assumes that Turkey is not the continuing, but a successor, state of the Ottoman Empire, then one should also establish at what precise moment the succession occurred. As recognition certifies, in an anthropomorphic vision, the birth of the state, then its death may need to be certified, too. The declaration of a state's demise is the *actus contrarius* of the act of recognition.[127] As the death moment has critical importance in inheritance law for the rights of the heirs, the time of state succession is determinant for the transfer of international rights and obligations. Whether they involved a concomitant continuing state or not, the recent

119 I. H. Özay, 'Cumhuriyetin Dini', (1981) 2/3 *İdare Hukuku ve İlimleri Dergisi* at 79; Ortaylı, *supra* note 99, at 67–8.

120 See Stern, *supra* note 16, at 386.

121 A family friend, who performed his military service in the early 1970s, reported that the ammunition boxes used in shooting exercises were stamped 'Enwerland'. This is the nickname given by Germany to its First World War ally, which was de facto ruled by the military dictator Enver Pasha, son-in-law of the Sultan. The German General Staff could not help bitterly joking while sending military materiel to the Ottoman Empire and Turkey was still using the strong made-in-Germany Enwerland boxes over half a century after they had been sent.

122 T. Z. Tunaya, *Devrim Hareketleri İçinde Atatürk ve Atatürkçülük* (2002), 213.

123 See Lord Kinross, *Atatürk: The Rebirth of a Nation* (1966), 180, 531.

124 E. Çelik, *Türkiye'nin Dış Politika Tarihi* (1969), 17.

125 For instances, see Law on Civil Servants' Trial (4 February 1913, Julian Calendar – still problematic before the European Court of Human Rights!), Statute Law on Land (7 Ramadan 1274), Law on Concessions of Public Interest (10 June 1326), Law on Provisory Occupation of Lands and Stone Quarries Belonging to Private Persons for Reasons of Public Interest (18 February 1331), Law on Field Watchmen (18 February 1330), Provisory Law on Breaches of the Regulation of 17 June 1329 on Steam Generators, Chambers and Motors Used for Purposes Other than Sea Transportation (6 Teşrinisani 1329), Law on the Expropriation of the Places Located in the Inner Sanctuary or the Annexes of the Holy Mosques or Other Pious Foundations (25 June 1328) (dates after Hegira).

126 See E. Teziç, *Anayasa Hukuku* (2003), 83.

127 H. Kelsen, 'Recognition in International Law: Theoretical Observations', (1941) 35 AJIL 611.

succession cases gave rise to arduous controversies on the determination of the date of the former state's demise and the beginning of the succession.[128] The result seems to point to a casuistic method. That is, there does not have to be one single date of succession; it may occur at different points of time for each successor state. In the *Ottoman Public Debt* case, arbitrator Borel considered the succession processes not only for each state, but also for each territory detached from the Ottoman Empire and involved in the arbitration. All these concur to confirm the current definition of succession based on the territorial element.

The question remains to determine the moment of the Ottoman Empire's demise. The date of the abolition of the monarchy (Sultanate) by the Turkish National Assembly (30 October, 1–2 November 1922)[129] seems to be the most plausible possibility.[130] However, the Assembly Decision No. 308 of 1–2 November 1922 provided that, subsequently to the adoption of the Constitution (20 January 1921), a new and national Turkish state had replaced the Ottoman Empire and, from 16 March 1920 onwards, the 'formal' government of Istanbul had passed away into history. This decision is consistent with the law dated 7 June 1920 declaring 'non-existent' – not even null and void – all international agreements concluded by the Istanbul Government from 16 March 1920 onwards.[131]

The problem is that, from the opening of the Turkish National Assembly on 23 April 1920 onwards, two political powers coexisted on the Ottoman territory and, with the promulgation of the Constitution by the Assembly on 20 January 1921, two constitutions were simultaneously in force. The Law on the General Staff, adopted during the period of the 1921 Constitution, referred to both constitutions. It is extremely interesting that only after the proclamation of the Republic on 29 October 1923 did Article 104 of the 1924 Constitution put an end to this duality by abrogating the Ottoman Constitution of 1293 (1876).[132] In the considered period, the Ottoman Empire had politically collapsed; it nevertheless existed as a subject of international law. The Turkish National Assembly's acts of 30 October and 1–2 November 1922 were not laws, but parliamentary decisions[133] that were adopted during the negotiation process of the Lausanne Treaty, in order to find an urgent solution to the problem of who would represent Turkey. It is noteworthy that Article 53(2) of the Lausanne Treaty provides: 'The annuities due by the States newly created in territories in Asia detached from the Ottoman Empire under the present Treaty, . . . shall be payable as from 1st March, 1920.' According to Article 77(3), 'All contracts and arrangements duly concluded after the 16th March 1920, with the Constantinople Government concerning territories which remained under the effective control of

128 For the debate on the USSR, see Rich, *supra* note 30, at 44; Stern, *supra* note 16, at 220; for the former Yugoslavia, see Degan, *supra* note 17, at 289; Stern, *supra* note 16, at 227, 228.

129 For the decisions abolishing the monarchy, see Ş. Gözübüyük and S. Kili, *Türk Anayasa Metinleri, 1839–1980* (1982), 88–9.

130 The Turkish public law professor Okandan argues, without providing any explanation, that the Ottoman Empire ceased to exist on 3 November 1922, when the Tevfik Pasha Government presented its resignation to the last Ottoman monarch; see R. G. Okandan, *Amme Hukukumuzun Anahatları, I* (1977), 411–12.

131 See Çelik, *supra* note 124, at 18.

132 Tunaya, *supra* note 122, at 78; B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789–1980)* (2001), 268.

133 See Tanör, ibid., at 279.

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the said Government, shall be submitted to the Grand National Assembly of Turkey for approval'. The Lausanne Treaty attributes, thus, a crucial importance to the date of 16 March 1920, but acknowledges that the Government of Istanbul wielded a certain control even afterwards.

The Decisions of 1–2 November 1922 are certainly meaningful from the Turkish constitutional viewpoint. However, they scarcely provide conclusive elements for the succession issue. Asserting that the succession took place on 16 March 1920 implies a new question: who is the successor? Be it named insurgent or belligerent power, or de facto recognized government, the government of Ankara was a subject of international law, and concluded international agreements with Armenia, Afghanistan, the Soviet Union, Azerbaijan, Georgia, France, Great Britain, Italy, etc.[134] The government of Ankara cohabited with another subject of international law, namely the Ottoman Empire.

The representatives of the Grand National Assembly of Turkey and of the government of Istanbul participated to the London Conference of 27 February–12 March 1921 together. In 1922, the Parliamentary Decision No. 308 on the abolition of the monarchy explicitly defined the 'Turkish state' in a way that sounds astonishing in today's secular Turkey: 'The Turkish State is the fulcrum of the dignity of the Caliphate.' The reference to Turkey certainly existed before 1922. The 1921 Constitution (Art. 3) of the Ankara Great National Assembly clearly referred to the 'Turkish State'. The treaty signed with Afghanistan on 1 March 1921 refers to the 'Turkish State which continues an independent life'.[135] The word 'Turkey' here can be read, in its political context, as the state of the Turks in a broad sense, as in the nineteenth-century international practice, rather than a new state.

There is a twilight zone of legal and political transition from the Ottoman Empire to the Turkish Republic. In the beginning, far from showing any sign of hostility towards the monarchy, the Ankara movement announced its *raison d'être* as the liberation of the Istanbul government, which was under enemy occupation. This is why the Grand National Assembly of 'Turkey' may coexist with the 'Ottoman' Empire. According to Article 1 of the law, dated 5 September 1920, on the Deliberation Quorum (*Nisabı- Müzakere Kanunu*), 'the Grand National Assembly of Turkey shall be in meeting, under the following conditions, until the attainment of its aim which consists in the rescue and liberation of the Caliphate, the Sultanate, of the homeland and the nation'.[136] However, the Assembly's and the monarchy's respective political designs were revealed to be incompatible and the republican tendency within the Assembly outweighed the monarchist one. Instead of rescuing the Istanbul government, Ankara chose to substitute itself for it. The transition period witnessed a progressive, soft transformation, rather than a sharp break.

134 See İ. Soysal, *Tarihçeleri ve Açıklamalarıyla Birlikte Türkiye'nin Siyasal Andlaşmaları*, Vol. 1 (1989), 17; it is noteworthy that Art. 8 of the Ankara Treaty of 20 October 1921 concluded between the Turkish National Assembly and France preserves Turkish sovereignty over the Jabar castle, where 'the grave of Suleiman Shah, grandfather of Sultan Osman, founder of the Ottoman Dynasty', is located (at 51).

135 See Soysal, *supra* note 134, at 25.

136 Tanör, *supra* note 132, at 240.

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The international community kept calling the new republic 'Turkey', as it had the old monarchy. Moreover, it reacted less to the political transition than to the change of the capital, which meant the transfer of the embassies from the verdant shores of the Bosphorus to the arid central Anatolian steppe.

## 6. Concluding observations

The legal continuity thesis would obviously constitute a precious trump card to the neo-Ottomanist ideology in shaping its relationship with the former Ottoman space. But, beyond its undeniable symbolic value, would continuity give rise to any tangible consequences on legal and political grounds? In fact, continuity operates like a double-edged sword. The continuing state is *ipso jure* entitled to the predecessor's rights, but is also bound by the predecessor's obligations. The Ottoman legacy is a Pandora's box that may unveil all kinds of surprises.

Almost a century after the Empire's demise, the discovery of a pecuniary debt can hardly be expected. As for an eventual delictual responsibility, not only the continuing state, but also the successor states may be held responsible for the acts of the predecessor state on the basis of customary law. The analysis of state practice indicates that the continuing state 'remains responsible for the commission of *its own i*nternationally wrongful acts before the date of succession'.[137] However, the situation is not as clear with respect to succession. Although it is possible to observe a tendency in state practice 'towards the recognition that successor States should take over the obligations arising from the commission of internationally wrongful acts', this tendency is not uniform enough to crystallize into a rule of international law.[138] The difficulty in discerning a general rule with respect to succession may well be related to the fact that the cases of continuity and succession represent an immense factual diversity. The arbitrator in the *Phares de l'Empire Ottoman* case has underlined this diversity as follows:

> Il se peut qu'une solution parfaitement adéquate aux éléments essentiels d'une hypothèse déterminée se révèle tout à fait inadéquate à ceux d'une autre. Il est impossible de formuler une solution générale et identique pour toutes les hypothèses imaginables de succession territoriale et toute tentative de formuler une telle solution identique doit sérieusement échouer sur l'extrême diversité des cas d'espèces.[139]

Since most of the scenarios involve successor and continuing states simultaneously, and as continuity and succession debates feature an entangled character, it is highly likely that ambiguity with respect to the responsibility of successor states would also affect the debates on the responsibility of continuing states.

Needless to say, this discussion on the relationship between delictual responsibility and continuity may have a bearing on the debate on the legal consequences of 1915 events concerning Ottoman Armenians. Having said this, while it is certainly important to determine the legal reality, it should not be expected that such a

137 Dumberry, *supra* note 24, at 123 (emphasis in original).
138 Ibid., at 201–3.
139 'Affaire relative à la concession de phares de l'Empire ottoman', *supra* note 94, at 197, 198.

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determination would necessarily bring about actual practical consequences. This is mainly because Turkey has a firm political position with respect to 1915 events whereby it does not consent to any judicial settlement of the issue. The official Turkish position is that the characterization of the 1915 events should be left to historians. This political position becomes relevant since there is no international body whose jurisdiction is recognized by Turkey and who can pronounce on such matters. It is noteworthy that, by virtue of the Protocol on the Establishment of Diplomatic Relations between the Republic of Turkey and the Republic of Armenia signed in Zurich on 10 October 2009 (not in force as of February 2011), the two states agree to 'implement a dialogue on the historical dimension with the aim to restore mutual confidence between the two nations, including an impartial scientific examination of the historical records and archives to define existing problems and formulate recommendations' (Art. 2).

With respect to the delictual responsibility, it should also be underlined that the Treaty of Lausanne, in its Article 58(1), reads as follows:

> Turkey, on the one hand, and the other Contracting Powers (except Greece) on the other hand, reciprocally renounce to all pecuniary claims for the loss and damage suffered respectively by Turkey and the said Powers and their nationals (including juridical persons) between the 1st August 1914, and the coming into force of the present Treaty, as the results of acts of war or measures of requisition, sequestration, disposal or confiscation.[140]

The fact that the international community felt the need to settle the above-mentioned issues only with respect to Turkey, but not with respect to the states of other former Ottoman territories, is another sign supporting the continuity thesis. This provision shows an interesting parallel to the Austrian case, in which the continuity was clearly admitted. The Peace Treaty of St Germain (entered into by the Allied Powers and Austria) contained a provision indicating Austria's responsibility, as the continuing state, for the war (Article 177).[141]

A similar provision was included in the 'Agreement regarding the Settlement of the Claims Embraced by the Agreement of December 24th, 1923, signed at Ankara, October 25th, 1934'. In return for a lump-sum payment of US$1,300,000, the agreement provided for a final settlement of the claims of American citizens for acts committed during the First World War. Article II of the said agreement expressly stated that the Republic of Turkey would be released from liability with respect to all such claims.[142]

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140 See Israel, *supra* note 88, at 2329.

141 See Dumberry, *supra* note 24, at 100.

142 See *League of Nations: Treaty Series* (1935), 391, 392; Turkish Official Gazette No. 2896, 2 January 1935, at 4616–17. The District Court of California ruled that a California law extending the statute of limitations for claims to 'looted assets by heirs to victims of the Armenian genocide' conflicted with the executive agreement in question (*Deirmenjian v. Deutsche Bank*, A. G. 525 F. Supp. 2nd 1068 (C.C. Cal, 14 December 2007); see 'California District Court Finds Post-World War I Agreements with Turkey Trump California Armenian Genocide Statute', (2008) 102 AJIL 349.

In terms of titles, the continuity thesis could enhance Turkey's eventual arguments on the settlement of territorial sovereignty issues.[143] Similarly, the admission of continuity would entitle the Turkish Republic to bring claims on the grounds of delicts committed against the Ottoman Empire. Since the last decade of the Empire was the scene of a series of wars, it is not impossible to come up with some instances in which the commission of delicts against the Turks could be asserted.

This continuity argument may also constitute a political line of reasoning for Turkey's accession to the European Union. Some members of the European Union deny the 'Europeanness' of Turkey. However, the Ottoman Empire had long been internationally recognized as a European power, at least since the 1856 Paris Treaty.[144] There would be no reason, merely on grounds of identity, to refuse EU membership to the continuing state, which has pushed forward the Europeanization process more than the Empire did.

In any event, despite undeniable political parameters, the solution of the continuity issue should primarily be inspired by legal methodology, and not by the utopian ambitions of an imperialistic neo-Ottomanism or a reactionary anti-Ottomanism. May it suffice to remember the Tsarist Russia–USSR–Russian Federation and the Third Reich–Federal German Republic cases to show that ideology plays little, if any, role in continuity issues.

143 See A. Kurumahmut (ed.), *Ege'de Temel Sorun: Egemenliği Tartışmalı Adalar* [*The Main Problem in the Aegean: Disputed Sovereignty over the Islands*] (1998).

144 The *travaux préparatoires* seem to show that the recognition the European character of the Ottoman Empire was more declaratory than constitutive; see E. Öktem, 'Le traité de Paris de 1856 revisité à son 150e anniversaire: Quelques aspects juridiques internationaux', in G. Ameil, I. Nathan, and G.-H. Southou (eds.), *Le Congrès de Paris (1856): Un événement fondateur* (2009), 151, at 164.

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