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Second report on succession of States in respect of State responsibility

by Pavel Šturma, Special Rapporteur*

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Part One — Introductory

I. Introduction

A. Overview and summary of the debate

1. During its sixty-ninth session, in May 2017, the Commission decided to place the topic "Succession of States in respect of State responsibility" on its current programme of work, and appointed Mr. Pavel Šturma as Special Rapporteur. Thereafter, the Special Rapporteur prepared a short, first report (A/CN.4/708), in particular on the scope of the topic and a tentative programme of work, as a basis for an initial debate later in the session. That report was presented and considered by the Commission during the second part of the session between 13 and 25 July 2017.

2. The first report was generally well received by many of the members who took part in the debate on the topic. At the same time, some members expressed doubts as to whether the State practice analysed thus far supported the alleged shift from the theory of non-succession to that of succession. Several members also suggested that future reports should take into consideration more practice from regions other than Central and Eastern Europe. Regarding the general rule on succession of States in respect of State responsibility, a large number of members emphasized that it would be necessary to examine the general substantive rules relating to succession of States relating to State responsibility before examining potential exceptions or the saving clauses that had been set out in draft articles 3 and 4.

3. Following the debate in plenary, the Commission referred the four draft articles to the Drafting Committee, which provisionally adopted draft articles 1 and 2. At the request of the Special Rapporteur, the Drafting Committee did not address draft articles 3 and 4 and left them for consideration at a later stage.

4. During the debate in the Sixth Committee of the General Assembly at its seventy-second session in 2017, a significant number of delegations commented on the inclusion of the new topic in the Commission's programme of work and the first report, as well as the future programme of work.[1] Most States welcomed the submission of the first report by the Special Rapporteur in a very limited time and the outline of future work. They generally commended the Commission for its decision to look into this important but not yet sufficiently examined topic, although some States stressed its controversial nature due to the limited State practice. Some delegations also referred to the past decisions of the Commission not to include succession in the scope of articles on responsibility of States for internationally wrongful acts (hereinafter, "articles on State responsibility"[2]). They recalled the recent outcomes of the work of private bodies, such as the Institute of International Law and the International Law Association, which the Special Rapporteur could take into consideration.

5. Both the supportive and the critical comments raised many important points that are useful for the second report and future work of the Commission. Denmark, on behalf of the Nordic States, welcomed the topic as one where codification and progressive development could potentially bring clarity and predictability. The challenge was to fill a gap between the regimes of State succession and State responsibility. The Nordic countries would welcome further analysis of State practice

[1] See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat, A/CN.4/713, paras. 64–72.

[2] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

to substantiate the suggestion of transmissibility of rights and obligations relating to State responsibility.[3]

6. Several States, including Greece,[4] Estonia,[5] Trinidad and Tobago (on behalf of the Caribbean Community (CARICOM)),[6] admitted that, although relevant State practice was not abundant in this area, the Commission should fill gaps and engage in progressive development of international law, where necessary, and provide the international community with guidance on this complex issue. Mexico commended the useful historical survey provided by the Special Rapporteur and noted that the outcome of the work on the topic could be a set of draft articles similar to the articles on State responsibility.[7]

7. Portugal also pointed out that the Commission approached the topic as a zone of intersection of two areas of international law that had been already studied in its work. The Commission thus would assess the existence of general rules or principles governing both the succession of States and international responsibility and then produce a set of draft articles.[8]

8. The United States of America appreciated that the Commission's work could lead to greater clarity in this area of law. However, it was not confident that the topic would enjoy broad acceptance from States, in view of the small number of States that have ratified the Vienna Convention on Succession of States in Respect of Treaties (hereinafter, "1978 Vienna Convention")[9] and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter, "1983 Vienna Convention").[10] The Commission should be clear when it believed it was codifying existing law as opposed to progressively developing the law.[11]

9. The United Kingdom, as a preliminary observation, noted that the State practice identified in the Special Rapporteur's first report was highly context-specific and sensitive. It stressed the need for the Commission to be clear whether it was setting out *lex lata* or *lex ferenda*. However, it recognized that the work on the topic could produce model clauses useful as a starting point for determining where State responsibility lay.[12]

10. Some delegations were more supportive with regard to the topic, for example, Israel,[13] the Republic of Korea, Singapore, Slovenia and South Africa. In particular, Slovenia welcomed the report. It agreed with the Special Rapporteur that the examples of State practice and jurisprudence supported his finding on the evolution of the traditional rule of non-succession. It also suggested several issues to be addressed in future reports, such as succession agreements, the case law of the European Court of Human Rights, the plurality of responsible or injured States and the issue of joint and several responsibility.[14] The Republic of Korea recognized the necessity of ensuring harmony between the present topic and the previous work of

[3] A/C.6/72/SR.25, para. 39.
[4] *Ibid.*, para. 55.
[5] See A/C.6/72/SR.24, para. 25.
[6] See A/C.6/72/SR.25, para. 36.
[7] See A/C.6/72/SR.25, paras. 71–73.
[8] *Ibid.*, paras. 92–93.
[9] Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.
[10] Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983), United Nations, *Juridical Yearbook 1983* (United Nations publications, Sales No. E.90.V.1), p. 139.
[11] See A/C.6/72/SR.26, paras. 6–7.
[12] *Ibid.*, paras. 112–113.
[13] *Ibid.*, paras. 43–44.
[14] See A/C.6/72/SR.25, paras. 104–107.

the Commission and stressed the need to identify general rules applicable to the topic.[15] While admitting that cases of State succession were rare, South Africa believed that there would be at least some clear legal principles that could be invoked or referred to, in order to bring about an orderly and peaceful resolution of such situations.[16]

11. Other delegations, such as Austria, Belarus,[17] China,[18] the Russian Federation,[19] Spain[20] or Turkey,[21] were more sceptical as to the maturity of the topic for codification, possible outcomes or just some of the aspects reflected in the first report and draft articles 3 and 4. Some of the statements, in spite of their criticism, also included important suggestions for the future for work of the Special Rapporteur. For instance, Austria pointed out that it would be more apt to speak of the topic of "State responsibility problems in cases of succession of States". It expressed hope that the Commission's work on this new topic would lead to a clarification of the concept of State responsibility and the effects of instances of State succession.[22]

B. Outline of the general approach (methodology) to the topic

12. The Special Rapporteur welcomes all comments from members of the Commission and from delegations in the Sixth Committee. Although he does not necessarily agree with all of them, they provide an invaluable source of inspiration for future work. The reports and draft articles are always outcomes of the collective work within the Commission. The Special Rapporteur is therefore open to various suggestions and ready to adopt a flexible approach.

13. With this approach in mind, at the outset of the second report, the Special Rapporteur wishes to signal certain adjustments that could. at the same time, address the concerns and questions raised in the above-mentioned debates and preserve the thrust of the topic as outlined in the first report. Other adjustments may come at a later stage in the light of future comments. At the same time, he wants to reiterate that, in spite of the fact that the subject of succession of States still belongs to "the most complex in international law",[23] which complexity includes the specificity of each situation, its political dimension and the attitudes of third States, there is a need for international law to serve as a framework able to ensure legal security and stability in international relations.[24]

14. First, the Special Rapporteur agrees that it will be sensible to postpone the in-depth discussion on draft articles 3 and 4, as proposed in the first report[25] and referred to the Drafting Committee. They can easily remain in the Drafting Committee until the time of provisional adoption of other draft articles, namely those on general

[15] See A/C.6/72/SR.26, paras. 93–96.
[16] See A/C.6/72/SR.24, para. 19.
[17] See A/C.6/72/SR.26, paras. 69–76.
[18] See A/C.6/72/SR.23, paras. 62–63.
[19] See A/C.6/72/SR.19, paras. 44–46.
[20] See A/C.6/72/SR.25, para. 64.
[21] See A/C.6/72/SR.26, paras. 99–103.
[22] A/C.6/72/SR.25, paras. 45–46.
[23] Cf. P. M. Eisemann, "Rapport du directeur d'études de la section de langue française du Centre" [Report of the Director of the French-speaking Section of the Centre], *State Succession: Codification Tested against the Facts*, Eisemann and M. Koskenniemi (eds.) (The Hague, Martinus Nijhoff, 2000), p. 17.
[24] See P. Pazartzis, "La succession d'États comme moyen de régulation des relations internationales", *Faut-il prendre le droit international au sérieux ? Journée d'étude en l'honneur de Pierre Michel Eisemann*, S. Cassella and L. Delabie (eds.), (Paris, Pedone, 2016), p. 39.
[25] A/CN.4/708, paras. 111 and 132.

rules on succession of States in respect of State responsibility. Thereafter, the Drafting Committee and the Commission will be in a better position to decide on the final wording and placement of draft articles 3 and 4, on the role of agreements and unilateral declarations, respectively. This does not in any way mean that they should not play an important role in the present topic. It only recognizes the fact that the role of agreements and unilateral declarations may be captured in various ways, depending on the formulation of general and/or special rules on succession or non-succession. It goes without saying that any solution has to respect the *pacta tertiis* rule, as well as rules and principles governing unilateral acts of States.

15. Second, the Special Rapporteur is fully aware, in accordance with some views expressed in the Commission, that the work on this topic should also address the issue of legality of succession. This issue belongs undoubtedly to general provisions of the draft articles envisaged; therefore it must be dealt with at an early stage, in the present report.

16. Third, the fact that cases of State succession are of rare occurrence should not prevent the Commission from formulating certain general and/or special rules on succession or non-succession in respect of State responsibility. However, the Special Rapporteur admits that State practice is diverse, context-specific and sensitive in this area. He does not suggest replacing one highly general theory of non-succession by another similar theory in favour of succession. Instead, a more flexible and realistic approach is needed.[26] The outcome might well be a confirmation of non-succession in certain legal relations arising from State responsibility and a formulation of special rules (or possible exceptions) on succession in others.

17. Fourth, while the Special Rapporteur advocated and the Commission endorsed a basic consistency in terminology with the previous works of the Commission,[27] it does not necessarily mean that the general approach must follow the structure of the two Vienna Conventions (1978 and 1983)[28] and other documents on succession of States in areas other than State responsibility. As indicated, differences must be taken into consideration when it comes to the issue of succession in respect of State responsibility.[29] It is important to stress that rules in the present topic have to deal with the complex legal regime of State responsibility for internationally wrongful acts.[30] It is different from "tangible things", such as State property and archives,[31] or from international treaties[32] (being consensual acts), or even from the nationality of natural persons, which is essentially a matter for the national laws of the States concerned.[33]

18. Fifth, the understanding that State responsibility forms a complex legal regime under customary international law, being to a large extent already codified by the Commission in its articles on State responsibility, bears on the general approach (methodology) to be taken in the present topic. Albeit in a non-binding form, those

[26] *Ibid*., para. 64. Cf. also the summary of the debate in the Commission by the Special Rapporteur of 25 July 2017, contained in A/CN.4/SR.3381.

[27] See, in particular, draft article 2 (Use of terms).

[28] Having also in mind its critique; cf. Eisemann, Report of the Director of the French-speaking Section of the Centre, p. 62: "la codification n'a pas passé avec succès à l'épreuve des faits".

[29] See A/CN.4/708, para. 72.

[30] Cf. J. Crawford, "The system of international responsibility", *The Law of International Responsibility*, Crawford, A. Pellet and S. Olleson (eds.) (Oxford, Oxford University Press, 2010), pp. 17–24.

[31] 1983 Vienna Convention.

[32] 1978 Vienna Convention.

[33] Articles on nationality of natural persons in relation to the succession of States, General Assembly resolution 55/153 of 12 December 2000, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), paras. 47–48.

articles undoubtedly present one of the most important achievements of codification of customary international law. If not entirely, the articles on State responsibility are mostly considered as the reflection of customary international law.[34] Therefore, the present topic cannot but take into consideration the content of the articles on State responsibility and respond to the question if, and to what extent, this content may also apply in situations of succession of States. This approach warrants a combination of deductive and inductive methods. General principles and rules of the articles on State responsibility should be applied or developed, if necessary, to serve as guidance for States facing problems of responsibility in cases of succession. Clarifying and filling the gaps in such rules are precisely what the present topic aims at. On balance, they will also be tested against State practice, as the nature of State succession requires tailor-made solutions for different categories of succession rather than one general principle.

19. Sixth, having this approach in mind, it seems necessary to recall briefly the concept of State responsibility. Although there is no need for its formal definition in draft article 2 (Use of terms), it should be explained in the report and eventually in the commentary. According to the commentary to article 1 of the articles on State responsibility, the term "international responsibility" in article 1 "covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law".[35] It is possible to define the concept of State responsibility under contemporary international law as a bundle of principles and rules of a secondary character governing, in particular: (a) the establishment of an internationally wrongful act and its attribution to a given State; (b) the content and forms of responsibility (new obligations, namely cessation and reparation in all forms); and (c) invocation of the responsibility of a State. This structure, corresponding by and large to the structure (parts) of the articles on State responsibility, should be respected in the present topic. The issue of a general rule or rules on succession or non-succession can be resolved not with regard to "responsibility" *in abstracto* but rather with respect to its major constitutive parts, such as the attribution, the content and the invocation of the responsibility of a State, whether predecessor or successor.

20. Seventh, even a determination of general rules of succession (or non-succession, as the case may be) cannot exhaust the topic. It is just a first step. Such general rules are subject to exceptions and modifications, taking into account various factors, such as whether the breach is completed or continuing, localized damage, the continuing existence or disappearance of a predecessor State, etc. The last aspect seems to be of particular importance. Therefore, the part of the present report (and the draft articles) relating to special categories will group together cases of succession where the predecessor State continues and cases of succession where the predecessor State no longer exists. This approach should avoid unnecessary repetition of rules and exceptions for each and every case of succession. However, such approach must allow for flexibility, where appropriate, and is without prejudice to possible rules on plurality or shared responsibility of States in the context of succession.[36]

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[34] As evidence for the customary content of the articles on State responsibility, see, in particular, numerous references in case law of the International Court of Justice and other international tribunals in *Materials on the Responsibility of States for Internationally Wrongful Acts* (ST/LEG/SER.B/25).

[35] Para. (5) of the commentary to article 1 of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

[36] Cf., e.g., *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, Grand Chamber, European Court of Human Rights, No. 60642/08, *Reports of Judgments and Decisions* (ECHR) 2014.

21. Eighth, the present report will address, in addition to certain general rules, mainly the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State. In other words, succession of States in respect of responsibility "would therefore mean the devolution of the obligation of reparation from the predecessor State to the successor State".[37] The Special Rapporteur's third report (2019) will in turn focus on the transfer of the rights or claims of an injured predecessor State to the successor State. Although this is suggested as the predominant approach to the topic, such approach must also allow for flexibility, where appropriate. Again, it will also take into consideration the debate in the Commission and the overall progress of the topic.

II. Legality of succession

22. One of the general issues appearing in the common provisions of both the 1978 and 1983 Vienna Conventions — respectively, article 6 and article 3 — is the issue of the legality of the succession under international law. According to these provisions, "[t]he present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations". The same provision appears in article 3 of the articles on nationality of natural persons in relation to the succession of States.[38]

23. Moreover, in relation to State succession to international responsibility, the Institute of International Law in its resolution on "Succession of States in matters of international responsibility", article 2, paragraph 2, reproduces, almost verbatim, the text of article 6 of the 1978 Vienna Convention: "The present Resolution applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations."[39]

24. According to the Commission's commentaries to the above-mentioned provisions of what would become the 1983 Vienna Convention[40] and to the articles on nationality of natural persons,[41] it appears that the provisions were adopted mainly for the purposes of consistency with the approach adopted in the 1978 Vienna Convention. Therefore, it makes sense to look into the history of article 6 of that Convention.

25. The issue of the international legality of succession was firstly introduced in 1972 during the discussion within the Commission concerning succession in respect of part of the territory (on what became article 15 of the 1978 Convention).[42] Some Commission members had suggested the inclusion of the term "legally" to specify

[37] V. Mikulka, "State succession and responsibility", *The Law of International Responsibility*, Crawford and others, p. 295.

[38] See General Assembly resolution 55/153 of 12 December 2000, annex.

[39] Cf. Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), "State succession in matters of international responsibility", Fourteenth Commission, Rapporteur: Marcelo Kohen, p. 509, resolution, p. 711.

[40] Para. (4) of the commentary to art. 3 of the draft articles on succession of States in respect of State property, archives and debts and commentaries thereto, *Yearbook … 1981*, vol. II (Part Two), chap. II, sect. D.

[41] Para. (1) of the commentary to art. 3 of the draft articles on nationality of natural persons in relation to the succession of States, *Yearbook … 1999*, vol. II (Part Two), para. 48.

[42] G. Gaggioli, "Article 6", *La Convention de Vienne de 1978 sur la succession d'États en matière de traités: commentaire article par article et études thématiques*, G. Distefano, G. Gaggioli and A. Hêche (eds.) (Brussels, Bruylant, 2016), p. 184.

that the provision only applied to lawful transfers.[43] Other members had considered such a change superfluous, since in their view such a reading was already implicit in that provision.[44] From the point of view of substance, however, all members agreed that the article in question applied only to lawful transfers.[45] The majority ultimately favoured the inclusion of the point in general provisions, since in their view the lack of any mention with respect to other modes of succession, could have signalled that the Convention referred to illegal situations in these other situations, which would have been absurd.[46] After a long discussion, the Commission adopted in 1972 a clause very similar to article 6 of the 1978 Convention.[47]

26. In his first report, the Special Rapporteur on the topic, Sir Francis Vallat, pointed to the fact that the succession of States was defined in the draft articles as "*the fact of the replacement* of one State by another" without any indication as to whether it occurred in a lawful or unlawful manner.[48] "For the purposes of the draft articles, if the definition of 'succession of States' is kept in the present form, the definition, and consequently the draft articles, would appear to apply whether the fact occurred lawfully or unlawfully".[49] The Special Rapporteur suggested it would be "unsafe" to rely on the presumption of legality, which might have been inferred from the Commission's work, and recommended retention "of an express provision on the lines of article 6".[50]

27. Notwithstanding the comments of States on the draft articles and proposals to revise its wording during the Diplomatic Conference, it must be highlighted that the Diplomatic Conference essentially adopted article 6 in its wording of 1972.[51]

28. The provision seems to be very simple at first glance, but it reveals some interpretative problems at a closer examination. This provision was also criticized in the doctrine.[52] To be more precise, its hypothesis refers rather to the unlawfulness of territorial changes than to the succession itself, which is a legal consequence of such changes. From the interpretation of the 1978 and 1983 Vienna Conventions, it results that the drafters, including the Commission, did not want to establish two kinds of successions — lawful and unlawful. The problem may arise partly from the use of term "succession" to denominate both the facts of replacement of States (territorial changes) and their legal effects in particular areas, namely in respect of treaties and in respect of State property, archives and debts.

29. Perhaps, articles 6 and 3 of the 1978 and 1983 Vienna Conventions should be best understood as referring to the principle that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal".[53] Practice, particularly

[43] *Ibid*.
[44] *Ibid*. and footnote 3.
[45] *Ibid*.
[46] *Ibid*., pp. 184–185. See the discussion in *Yearbook … 1972*, vol. I, 1176th meeting, paras. 73–104, 1177th meeting, paras. 18–51 and 1181st meeting, paras. 44–48.
[47] Gaggioli, "Article 6", p. 185. See *Yearbook … 1972*, vol. I, 1187th meeting, paras. 1–7.
[48] *Yearbook … 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, para. 174.
[49] *Ibid*., para. 174.
[50] *Ibid*., para. 175; see also para. 177.
[51] Gaggioli, "Article 6", pp. 192–193; see also pp. 185–192.
[52] See P. Cahier, "Quelques aspects de la Convention de 1978 sur la succession d'états en matière des traités", *Mélanges Georges Perrin* (Lausanne, Payot, 1984), pp. 64–65.
[53] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex. Cf. D.F. Vagts, "State succession: the codifiers' view", *Virginia Journal of International Law*, vol. 33 (1992–1993), pp. 275–298, at pp. 282–283.

at the level of the organs of the United Nations, also confirms such a reading with respect to a purported statehood of certain illegal entities.[54]

30. In particular, after the issuance of the unilateral declaration of independence by Southern Rhodesia, the General Assembly adopted resolution 2024 (XX), in which it declared that it condemned "the unilateral declaration of independence made by the racialist minority in Southern Rhodesia".[55]

31. The Security Council also adopted resolution 216 (1965), in which, in addition to condemnation of this unilateral declaration of independence, it also called upon "all States not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime".[56] The Security Council also adopted resolution 217 (1965), in which it declared, *inter alia*, the declaration of independence "as having no legal validity" and called upon "all States not to recognize this illegal authority and not entertain any diplomatic or other relations with it".[57]

32. Moreover, the so-called Bantustans were also the object of several United Nations resolutions. Among others, in resolution 31/6 A (1976) the General Assembly "strongly condemn[ed] the establishment of bantustans", "reject[ed] the declaration of 'independence' of the Transkei and declare[d] it invalid" and also "call[ed] upon all Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans".[58]

33. Moreover, the General Assembly in its resolution 32/105 N (1977) declared that it "denounce[d] the declaration of the so-called 'independence' of the Transkei and that of Bophuthatswana and any other bantustans which may be created by the racist régime of South Africa and declares them totally invalid" and also reaffirmed "the inalienable rights of the African people of South Africa in the country as a whole".[59]

34. In reaction to the issuance of the declaration of the so-called Turkish Republic of Northern Cyprus, the Security Council adopted resolution 541 (1983), in which it stated that it considered this declaration as "legally invalid", called "for its withdrawal"

[54] See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 81: "Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council."

[55] General Assembly resolution 2024 (XX) of 11 November 1965, para. 1.

[56] Security Council resolution 216 (1965), paras. 1–2.

[57] Security Council resolution 217 (1965), paras. 3 and 6.

[58] General Assembly resolution 31/6 A of 26 October 1976, paras. 1–3.

[59] General Assembly resolution 32/105 N of 14 December 1977, paras. 2–3.

and called upon "all States not to recognize any Cypriot State other than the Republic of Cyprus".[60]

35. The practice not to accept the statehood of the Turkish Republic of Northern Cyprus was also confirmed by the European Court of Human Rights, in particular in its *Loizidou* and *Cyprus v. Turkey* cases.[61]

36. For these reasons, it is appropriate to agree with the positions reflected in the report of the Rapporteur of the Institute of International Law in 2015 that, "in an illegal situation, such as one of conquest, there is no State succession precisely because of its illegal character" … "Illegal entities claiming to be a State, as was the case of Southern Rhodesia, for example, are not cases of State succession, since the entity concerned cannot claim to be a State".[62]

37. Moreover, these provisions are also fully compatible with the duty of non-recognition under article 41, paragraph 2, of the articles on State responsibility, which entails not only formal, but also implied recognition.[63] However, it seems problematic to infer from the provisions of article 6 of the 1978 Vienna Convention (or article 3 of the 1983 Vienna Convention) that the entire process of creation and termination of States is governed by (more or less) precise rules of international law. This is not always the case. Apart from cases of consensual, agreed succession or devolution and the cases of the above-mentioned illegality, there are quite a few situations of unilateral declaration of a new State as a result of insurrection or revolution. Those are social facts not considered to be in violation of international law.[64]

38. Even the contemporary views on secession still partly accept the classical position that there are certain situations when international law neither prohibits nor authorizes secession and when it is simply *neutral* vis-à-vis secession.[65] The so-called neutrality or neutral zone reflects the classical position of international law towards secession, in the sense that, in order to establish itself as a State, the secessionist entity needed to win a war of independence against its parent State.[66] However, other authors refuse an argument of legal neutrality or lacuna in international law.[67]

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[60] Security Council resolution 541 (1983), paras. 2 and 7. See also Security Council resolution 550 (1984).

[61] *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; *Cyprus v. Turkey*, Grand Chamber, No. 25781/94, ECHR 2001-IV.

[62] Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), final report, para. 24 (footnote omitted).

[63] Para. (5) of the commentary to art. 41, para. 2, of the draft articles on State responsibility, in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77.

[64] Cf. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* (see footnote 54 above), at pp. 437–438, para. 81.

[65] See, e.g., "Sécession", *Dictionnaire de droit international public*, J. Salmon (ed.), (Brussels, Bruylant, 2001), pp. 1021–1022; M. Milanović, "What the Kosovo advisory opinion means for the rest of the world", *American Society of International Law Proceedings*, vol. 105 (2011), pp. 259–274, at p. 265; A. Tancredi, "In search of a fair balance between the inviolability of borders, self-determination and secession in international law", *Law, Territory and Conflict Resolution: Law as a Problem and Law as a Solution*, M. Nicolini, F. Palermo and E. Milano (eds.), (Leiden, Brill Nijhoff, 2016), p. 99.

[66] "Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States", *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* (see footnote 54 above), p. 437, para. 80. For the overview of the classical position see J. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford, Clarendon, 2007), pp. 37 *et seq*.

[67] See, e.g., O. Corten, "Are there gaps in the international law of secession?", *Secession: International Law Perspectives*, M. G. Kohen (ed.) (Cambridge, Cambridge University Press, 2006), p. 235.

39. However, it is far from settled and one may even say it is rather doubtful that, in the situations occurring not in conformity with international law, it is possible to speak about the presence of the successor *State* at all.[68] Indeed, as shown in the overview of the selected practice, the entities created in violation of international law were, on numerous occasions, declared illegal and null and void.[69]

40. In this context, the rationale for the inclusion of a draft article modelled on article 6 of the 1978 Vienna Convention seems to be still extremely pertinent. It is a modest provision, which only clarifies, in order to avoid any misunderstanding, the scope of application of the present draft articles. In addition, any possible problems of the transfer of obligations arising from international responsibility in "neutral zones", such as an insurrectional movement that succeeds in establishing a new State, seem to be settled by special rules on attribution of wrongful acts and also the rules of succession in case of separation of part of a State. There seems to be no reason to deviate from a well-settled practice of the Commission in these draft articles.

41. In the light of the above considerations, the following draft article is proposed:

Draft article 5
Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Part Two — General issues

III. General rules on succession of States in respect of State responsibility

A. No impact of State succession on attribution

42. The present chapter will turn to the impact of succession of States on the rules of State responsibility. It may be recalled that the Commission, in the context of its previous work on succession of States, has pointed out that "[d]elictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession of States, the solution of which is governed primarily by the *principles relating to international responsibility of States*" (emphasis added).[70]

43. Having this in mind, it is important to verify if and to what extent general principles and rules of State responsibility can be applied, directly or with possible modifications, where needed, to situations of internationally wrongful acts where succession of States occurred. As indicated above, the concept of State responsibility under contemporary international law is a bundle of principles and rules of a secondary character governing, in particular: (a) the establishment of an internationally wrongful act and its attribution to a given State; (b) the content and forms of responsibility (in particular reparation in all forms); and (c) the invocation of the responsibility of a State.

[68] D. Raič, *Statehood and the Law of Self-Determination* (The Hague, Kluwer, 2002), pp. 156–157. See also Crawford, *The Creation of States in International Law*, p. 148. *Contra* see S. Talmon, *La non-reconnaissance collective des états illégaux* (Paris, Pedone, 2007).

[69] Gaggioli, "Article 6", p. 224.

[70] See para. (36) of the commentary to art. 31 of the draft articles on succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), chap. II, sect. D.

44. The traditional doctrine of non-succession in respect of responsibility came mostly from the period prior to the codification by the Commission of responsibility of States for internationally wrongful acts.[71] This can partly explain the thesis of the "highly personal nature" of international responsibility, which is not transferable from a wrongdoing State to a successor State. Indeed, if we have in mind just the status (designation) of the responsible or injured State, the conclusion of the traditional doctrine appears to be right.[72]

45. However, the present topic is not to change the generally accepted view, expressed also in article 1, of the articles on State responsibility, that "every internationally wrongful *act of a State* entails international responsibility of *that* State" (emphasis added). In order to establish an internationally wrongful act of a State, the two well-known elements need to be present, namely conduct (either action or omission) that is: (a) attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

46. It is evident that *both* the act (conduct) that constitutes a breach and the international obligation breached must refer to *that* State only, and not to any other State, including predecessor or successor States. It follows that the content of Part One of the articles on State responsibility, dealing with the internationally wrongful act of a State, in particular with rules on attribution, suggests a general rule of non-succession. It seems to be generally acceptable that the main (or default) rule governing the issue of succession to obligations arising from an internationally wrongful act of the predecessor State committed before the date of succession in the context of separation of parts of a State is the principle of non-succession. Since the predecessor State continues to exist, "the continuing State should remain responsible for *its own* internationally wrongful acts committed before the date of succession".[73]

47. The more recent writings[74] and practice referred to and reflected in those writings, as well as articles 4, paragraphs 1 and 2, and 12, paragraph 1, of the 2015 Institute of International Law resolution have supported this general rule. In particular, article 4 of the latter resolution provides valuable guidance. In paragraph 1, it recalls that "[t]he internationally wrongful act committed before the date of succession of States by a predecessor State is attributable to this State". In other words, it is the

[71] See, e.g., A. Cavaglieri, "Règles générales du droit de la paix", *Collected Courses of the Hague Academy of International Law 1929-I*, vol. 26, pp. 374, 378, 416 *et seq.*; K. Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie Droz, 1968), pp. 11 and 189; M. C. R. Craven, "The problem of State succession and the identity of States under international law", *European Journal of International Law*, vol. 9 (1998), pp. 142–162, at pp. 149–150; J. P. Monnier, "La succession d'États en matière de responsabilité internationale", *Annuaire français de droit international*, vol. 8 (1962), pp. 65–90; D.P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I (Cambridge, Cambridge University Press, 1967), p. 482.

[72] Articles on State responsibility, art. 2 (Elements of an internationally wrongful act of a State).

[73] P. Dumberry, *State Succession to International Responsibility* (Leiden, Martinus Nijhoff, 2007), p. 142. See also Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, para. 56.

[74] See Dumberry, *State Succession to International Responsibility*, pp. 142–143; W. Czapliński, "State succession and State responsibility", *Canadian Yearbook of International Law*, vol. 28 (1990), pp. 339–358, at p. 357; M. J. Volkovitsch, "Righting wrongs: towards a new theory of State succession to responsibility for international delicts", *Columbia Law Review*, vol. 92 (1992), pp. 2162–2214, p. 2200.

predecessor State's continued responsibility. Next, paragraph 2 restates the rule of non-succession.[75]

48. However, two sets of exceptions to the general rule have to be examined and presented. First, with regard to attribution, the general rule of non-succession is to be complemented by special rules concerning continuing breaches[76] and insurrectional or other movements.[77] Second, with regard to invocation, the present report will present specific situations where, notwithstanding the fact that the international wrongful act is attributed to and remains the act of the predecessor State (whether it continues to exist or not), certain obligations arising from the responsibility may be required by an injured State or other subject also or solely from the successor State or States. This possibility is more likely in situations where the predecessor State ceased to exist.

49. It should be stressed that this distinction reflects a significant differentiation of legal obligations that may be requested by one State from another State. If an internationally wrongful act is attributed to a successor State on one of the above-mentioned bases, it will entail in principle all legal consequences arising from general rules on State responsibility. In other words, that State has obligations on the basis of responsibility for its own wrongful act, not as a matter of succession (transfer of obligations) from the predecessor State.

50. In contrast, if the internationally wrongful act committed before the date of succession of States by a predecessor State is still attributable to that State, then the possibility of invoking certain obligations of a successor State should be limited only to one of invoking reparation (and possibly only to such forms of reparation that the successor State is in position to make). Consequently, it requires looking into the forms of reparation in the light of all relevant factors, such as the nature of obligations breached, the special circumstances of the breach and the special kinds of succession.

B. Difference between breaches that are continuing and ones that have been completed

51. Before addressing the exceptions to the general rule of non-succession, which bear only on the possibility of invoking reparation (under special circumstances of succession), the present report presents first situations where the new (successor) State bears responsibility on the basis of attribution of an internationally wrongful act to it.

52. In other words, this approach means examining relevant rules on State responsibility, in particular those on attribution and breach of an international obligation (by referring to the articles on State responsibility), that are applicable in general but may also have special impact in the situations of succession of States. The first set of rules relates to the continuing breach and breach consisting of a composite act. They have been codified respectively in articles 14 and 15 of the articles on State responsibility.

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[75] Institute of International Law, *Yearbook*, vol. 76 (see footnote 40 above), resolution, p. 714: "If the predecessor State continues to exist, the injured State or subject of international law may, even after the date of succession, invoke the international responsibility of the predecessor State for an internationally wrongful act committed by that State before the date of succession of States and request from it a reparation for the injury caused by such internationally wrongful act."

[76] Articles on State responsibility, art. 14 (Extension in time of the breach of an international obligation); see also art. 15 (Breach consisting of a composite act).

[77] *Ibid*., art. 10 (Conduct of an insurrectional or other movement).

1. Breach having a continuing character

53. In the international law of State responsibility, there is a meaningful distinction between an instantaneous breach of an international obligation and a breach having a continuing character. As stated in the Commission's commentary to article 14 of the articles on State responsibility, "[t]he problem of identifying when a wrongful act begins and how long it continues is one which arises frequently".[78] The issue has often been raised before the International Court of Justice and its predecessor,[79] and the European Court of Human Rights,[80] as well as international arbitral tribunals,[81] including investment tribunals.[82]

54. The distinction between an instantaneous and a continuing act has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts. It may also have an impact on the secondary obligations of reparation.

55. According to article 14, paragraph 1, of the articles on State responsibility, "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue". It matters that a completed act occurs at the moment when the act is performed, even though its effects may continue.

56. In accordance with paragraph 2, "[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation". There are numerous examples of continuing wrongful acts, such as unlawful detention of a foreign official or unlawful occupation of embassy premises of another State, maintenance by force of colonial domination or unlawful occupation of part of the territory of another State.

57. Some other violations can also be qualified as continuing wrongful acts, depending on the circumstances of the given case. Thus, the Inter-American Court of Human Rights interpreted forced disappearance as a continuing wrongful act.[83] Cases of wrongful taking of property depend on the circumstances: where an expropriation is carried out by formal, legal process and the title to the property is transferred, the

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[78] Para. (1) of the commentary to art. 14, para. 1, of the draft articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77.

[79] See, e.g., Permanent Court of International Justice, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, PCIJ, Series A, No. 2*, p. 35; Permanent Court of International Justice, *Phosphates in Morocco, Judgment, 1938, PCIJ, Series* A/B, *No. 74*, pp. 23–29; International Court of Justice, *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960*, I.C.J. Reports 1960, p. 6, at pp. 33–36; International Court of Justice, *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at pp. 36–37, paras. 78–80.

[80] See, e.g., *Ireland v. the United Kingdom*, 18 January 1978, Series A, No. 25 (1978), p. 64 (separate opinion of Judge O'Donoghue); *Papamichalopoulos and Others v. Greece*, 24 June 1993, Series A, No. 260-B, para. 40; *Agrotexim and Others v. Greece*, Series A, No. 330-A (1993), p. 22; *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2216; *Ilaşcu and Others v. Moldova and Russia*, Grand Chamber, No. 48787/99, ECHR 2004-VII, paras. 320–321.

[81] See, e.g., Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, Award of 30 April 1990, United Nations, *Reports of International Arbitral Awards* (UNRIAA), vol. XX (Sales No. E/F.93.V.3), p. 215, at pp. 263–266.

[82] See, e.g., International Centre for Settlement of Investment Disputes, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ISCSID Case No. ARB(AF)/00/2, Award of 29 May 2003, *ICSID Reports*, vol. 10 (2006), pp. 134 *et seq*., at para. 62.

[83] *Blake v. Guatemala (Merits)*, Judgment of 24 January 1998, Series C, No. 36, para. 67.

expropriation will then be a completed act. However, cases of a *de facto* or "creeping" expropriation may be qualified as a continuing act.[84]

58. The issue of continuing violation was not relevant in the *Gabčíkovo-Nagymaros Project* case with respect to the question when the "Variant C" was put into effect. According to the International Court of Justice, the breach did not occur until the actual diversion of the Danube. "A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'".[85]

59. This distinction is important for the purpose of the establishment of responsibility in situations of succession of States. As was admitted with reference to the *Lighthouses Arbitration* case,[86] the theory of a continuing act "serves to facilitate succession in the area of international responsibility, where the successor State, by act or omission, pursues the same breach of international law".[87] The breach of an international obligation having a continuing character entails the responsibility of a successor State, if such State continues in the act commenced before the date of succession. Yet the question remains whether it is the sole responsibility of the successor State or a shared responsibility with the predecessor State.

60. In the *Gabčíkovo-Nagymaros Project* case, by contrast, the diversion of the Danube by putting into operation of "Variant C" in October 1992 was an instantaneous and not a continuing act. Therefore, Slovakia did not incur responsibility on the basis of continuing the breach of Czechoslovakia after the date of succession (1 January 1993). Its responsibility, held by the International Court of Justice, thus can only be explained as a matter of succession to certain obligations arising from the wrongful act committed by Czechoslovakia.

61. The difference between the two situations also appears in the case law of the European Court of Human Rights. In *Šilih v. Slovenia*,[88] the Court referred to article 14 of the articles on State responsibility as constituting "relevant international law and practice" in the context of the consideration of the jurisdiction *ratione temporis* of the Court.[89] Although it was not in the context of succession, it concluded, in a situation of a continuing breach (by omission), that a violation of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) in its procedural limb had taken place,[90] even though the death of the applicant's son had occurred before the ratification of the Convention by Slovenia. By contrast, in its 2006 judgment in *Blečić v. Croatia*,[91] the Grand Chamber of the Court quoted the text of article 14 of the articles on State responsibility[92] and came to the conclusion that "the termination of the applicant's

[84] See, e.g., *Papamichalopoulos and Others v. Greece*, 24 June 1993 (see footnote 80 above).

[85] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 54, para. 79.

[86] *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)* [*Lighthouses Arbitration*], Award of 24/27 July 1956, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198. See also *International Law Reports*, vol. 23, pp. 81 *et seq*.

[87] See J. Salmon, "Duration of the breach", *The Law of International Responsibility*, Crawford and others.

[88] *Šilih v. Slovenia*, Grand Chamber, No. 71463/01, 9 April 2009.

[89] *Ibid*., para. 108.

[90] *Ibid*., judgment.

[91] *Blečić v. Croatia*, Grand Chamber, Case No. 59532/00, CHR 2006-III.

[92] *Ibid*., para. 48.

tenancy did not create a continuing situation". Therefore, it found that the application was incompatible *ratione temporis* with the provisions of the Convention.[93]

62. Finally, and this time directly related to succession of States, in *Bijelić v. Montenegro and Serbia*, the European Court of Human Rights, having at hand also the written opinion of the Venice Commission[94] (as the third-party intervener) and with reference to continuing violations of the right to peaceful enjoyment of property that arose before the creation of the two separate States, found that Montenegro had sole responsibility after its separation from the State Union of Serbia and Montenegro.[95]

2. Breach consisting of a composite act

63. Moreover, the continuing breaches could be further analysed in the light of article 15 of the articles on State responsibility, dealing with breaches consisting of a composite act. Indeed, it is not rare that both issues, now codified in articles 14 and 15 of those articles, though being the object of more draft articles adopted on first reading, are discussed as interrelated.[96] The issue of when the internationally wrongful act started and stopped is not purely academic but may be relevant in several contexts,[97] e.g. for determination of remedies, such as cessation or quantum of compensation, or also in the context of assumption of a tribunal's jurisdiction *ratione temporis*.[98] Last but not least, it may influence the issue of possible responsibility obligations in the context of State succession.

64. Article 15 dealt with a composite act as follows: "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other action or omissions, is sufficient to constitute the wrongful act". As the Commission's commentary to this article makes clear, "composite acts" are limited to breaches of obligations that concern aggregate of conduct and not individual acts as such.[99] This implies that the concept of composite act as covered by article 15 (of the final articles on State responsibility) encompasses two notions presented as different in draft

[93] *Ibid*., paras. 86 and 92.

[94] European Commission for Democracy through Law (Venice Commission), *Amicus curiae* brief in the case of *Bijelić against Montenegro and Serbia* (Application No. 11890/05) before the European Court of Human Rights, adopted by the Venice Commission at its seventy-sixth plenary session held on 17–18 October 2008, CDL-AD (2008) 021. This opinion directly addresses the issue of succession in respect of State responsibility, although it builds the arguments in favour of devolution of responsibility on the basis of successful independence movement (articles on State responsibility, art. 10) rather than on continuing breach (*ibid*., art. 14).

[95] *Bijelić v. Montenegro and Serbia*, No. 11890/05, 28 April 2009, paras. 68–70.

[96] See, e.g., Salmon, "Duration of the breach"; E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", *Revue générale de droit international public*, vol. 95 (1991), pp. 881–914.

[97] See R. Kolb, *The International Law of State Responsibility. An Introduction* (Cheltenham, Edward Elgar, 2017), p. 54.

[98] See, e.g., *Papamichalopoulos and Others v. Greece*, 24 June 1993 (see footnote 80 above).

[99] Para. (2) of the commentary to art. 15 of the draft articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

article 25, paragraphs 2 and 3 (first reading, 1996), respectively "composite" and "complex" acts.[100]

65. In all situations under articles 14 and 15 (and the corresponding draft articles of 1996 first reading), the common feature is that the breach in question was not committed by an instantaneous act but it is the breach extending in time. While in typical cases of a continuing breach (under art. 14) it is a single act, constituting a wrongful act, which is prolonged in time, a composite or global act of the State was first defined in the 1976 annual report of the Commission as "an act made up of a series of separate actions or omissions which relate to separate situations but which, taken together, meet the conditions for a breach of a given international obligation".[101]

66. The 2001 commentary to the current article 15 specifies that examples of the obligations breached by composite acts include "the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.".[102] In other words, the concept of "composite acts" conveys an idea of situation where the wrongful act consists not of an isolated act but of a "practice" or "policy" that is systematic in character. In *Ireland v. the United Kingdom*, the European Court of Human Rights defined a practice which is incompatible with the Convention as consisting "of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches".[103]

67. By contrast, a complex act or delict of the State is constituted by a succession of actions or omissions that emanate from one or more organs, adopted for a specific case and that, considered as a whole, represent the position of the State in the case in question.[104] This very notion was introduced into the theory of international responsibility in arguments presented by Italy in *Phosphates in Morocco* before the Permanent Court of International Justice.[105] In spite of the rejection of the argument by the Permanent Court of International Justice, it found its way into the doctrine thanks to Roberto Ago, who was counsel in that case and maintained his view in his course at the Hague Academy in 1939.[106] Later, as Special Rapporteur of the Commission, he succeeded in bringing the Commission to accept the concept of

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[100] See *Yearbook … 1996*, vol. II (Part Two), chap. III, sect. D 1:
"2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.
3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between action or omission which initiated the breach and that which completed it."

[101] Para. (22) of the commentary to draft art. 18, of the draft articles on State responsibility, *Yearbook … 1976*, vol. II (Part Two), para. 78.

[102] Para. (2) of the commentary to art. 15 of the draft articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77.

[103] *Ireland v. the United Kingdom*, 18 January 1978 (see footnote 80 above), para. 159.

[104] See Salmon, "Duration of the breach", p. 393.

[105] Permanent Court of International Justice, *Phosphates in Morocco, Public Sittings and Pleadings, 1938, Series C, No. 85*, p. 1234.

[106] R. Ago, "Le délit international", *Collected Courses of the Hague Academy of International Law*, vol. 68 (1939-II), pp. 415–554, p. 512.

complex act of the State. It was reflected in draft article 25, paragraph 3, of 1996 draft articles on State responsibility (first reading).

68. It is important to point out that the concept of a complex act was linked to the distinction between two types of international obligations (i.e., primary obligations that were the object of a breach), namely obligations of conduct (means) and obligations of result. This theory found its expression in draft articles 20 and 21 of the 1996 version of the draft articles adopted on first reading, which together with draft article 22 (Exhaustion of local remedies) and draft article 23 (Breach of an international obligation to prevent a given event) introduced a rather sophisticated distinction between international obligations based on their scope.[107] However, the distinction between obligations of conduct and obligations of result was also the object of criticism.[108] Following Ago, the Commission saw typical examples of a complex act in obligations that require a State to ensure, by means of its choice, a certain result. When the obligation "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation".[109]

69. The examples given by the Special Rapporteur Roberto Ago and the Commission include: denial of justice,[110] the violation of the freedom of establishment by an administrative authority where the conduct is confirmed by a higher authority, acquittal at all jurisdictional levels of the perpetrators of a crime against the representative of a foreign government, and generally cases where the structure of obligations gives the State the possibility of providing a remedy through new means (illustrated by the exhaustion of local remedies) or of realizing the obligation by assuring an equivalent result (such as compensation).[111]

70. However, the notion of "complex act" was criticized by various governments, as well as in the literature on the topic.[112] This intrinsic linkage of the complex breach to the distinction between obligations of conduct and obligations of result, which was altogether abandoned in the final version of the articles on State responsibility, may help to explain the abandonment of the concept itself. There are also other reasons for criticism, relating to the exhaustion of local remedies or to the starting point of the breach of the obligation. One can also object that the notion greatly depends on the content of primary rules, blurring thus the distinction between primary and secondary rules. Clearly, the issue is one of interpretation of primary norms.[113] However, this can be said also with respect to certain other concepts.

71. From the point of view of succession, however, the distinction between the composite act and the complex act might be more important than in the law of State

[107] Cf., e.g., C.P. Economides, "Content of the obligation: obligations of means and obligations of result", *The Law of International Responsibility*, Crawford and others, pp. 371–382.

[108] See J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", *Mélanges offerts à Paul Reuter. Le droit international: unite et diversité* (Paris, Pedone, 1981), pp. 181 ff. Cf. also P.M. Dupuy, "Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to State responsibility", *European Journal of International Law*, vol. 10 (1999), pp. 371 ff.

[109] Draft art. 21, para. 2, of the draft articles on State responsibility (first reading, 1996), *Yearbook … 1996*, vol. II (Part Two), chap. III, sect. D 1.

[110] See *Yearbook … 1977*, vol. I, 1461st meeting, para. 11.

[111] Para. (15) of the commentary to draft art. 25 of the draft articles on State responsibility, *Yearbook … 1978*, vol. II (Part Two), para. 94.

[112] See J. Salmon, "Le fait étatique complexe — une notion contestable", "*Annuaire français de droit international*", vol. 28 (1982), pp. 709–738; E. Wyler, *L´illicite et la condition des personnes privées: la responsabilité internationale en droit coutumier et dans la Convention européenne des droits de l'homme* (Paris, Pedone, 1995), pp. 89–90.

[113] See Kolb, *The International Law of State Responsibility*, pp. 44–45.

responsibility in general. Let us suppose a typical situation where a series of actions or omissions commenced before the date of succession and was accomplished after that date. Provided that the obligation in question was binding on both States at the time when the act occurred, both the predecessor and the successor State would incur international responsibility for the breach consisting of a composite act. By contrast, in case of a complex act, only the successor State would incur responsibility for the breach completed by the last action or omission of its organs (or otherwise attributed to it), irrespective of the number and importance of actions or omissions attributable to the predecessor State, even if the predecessor State continues to exist. Such a hypothesis can hardly be supported either by general theory of international responsibility or by examples from State practice.

72. Therefore, it seems advisable to join the scepticism expressed in the second report of the Special Rapporteur, James Crawford,[114] which led the debates on second reading to excluding the notion of the complex act and adopting the final articles on State responsibility, with article 15 limited to a breach consisting of a composite act. This solution is less burdened by controversies and complications and has found already certain support in case law.[115] It also allows keeping the general rule of responsibility of the predecessor State if it continues to exist, while permitting the establishment of a separate attribution of acts to the successor State for this subcategory of continuing breaches. After all, there is no need to draw different conclusions from articles 14 and 15 of the articles on State responsibility for the purpose of the present topic. Indeed, the reference to the continuing breach also includes the case of a breach consisting of a composite act. It goes without saying that the successor State bears international responsibility only if the obligation breached was binding on it at the time of that continuing breach or those actions or omissions were sufficient to establish the wrongful act. This situation can always be assumed in case of obligations under general customary international law. The question if the obligation arising from multilateral or bilateral treaties continues to bind a new State is a matter of succession of States in respect of treaties.

73. The question whether the injured State or another subject may invoke solely the international responsibility of the predecessor State or that of the successor State, or the responsibility of both States, is contingent on several factors to be addressed in special draft articles.

74. For the sake of clarity, one needs to distinguish between the cases of a continuing breach and a breach consisting of a composite act and other cases where the injured State or subject may request reparation in spite of the occurrence of State succession. The former is a rule of State responsibility (attribution), not of succession of States; therefore it can be better expressed in the form of a “without prejudice” provision. By contrast, the latter only provides for a possibility of requesting reparation for damage, not the full-fledged consequences of an internationally wrongful act. Moreover, such possibility is subject to special rules expressed in the following draft articles.

75. On the basis of the above considerations, the following draft article is proposed:

[114] *Yearbook … 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4, paras. 90 and 125.

[115] Cf., e.g., *Ilaşcu and Others v. Moldova and Russia*, Grand Chamber (see footnote 80 above), para. 321; International Centre for Settlement of Investment Disputes, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003 (see footnote 82 above), para. 62.

Draft article 6
General rule

1. Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States.

2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the responsibility of the predecessor State and claim from it a reparation for the damage caused by such internationally wrongful act.

3. This rule is without prejudice to the possible attribution of the internationally wrongful act to the successor State on the basis of the breach of an international obligation by an act having a continuing character if it is bound by the obligation.

4. Notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles.

76. Next, the present report needs to examine the insurrectional or other movements that succeed in establishing a new State in part of the territory of a predecessor State. However, there is a problem when it comes to the placement of the analysis and eventually that of a draft article. On the one hand, such a rule belongs to the rules of attribution (as codified in article 12 of articles on State responsibility) and, consequently, to the general part and draft article 6. On the other hand, the rule seems to be relevant only to certain (and not all) situations of succession, namely separation of parts of a State (secession) and creation of newly independent States. Therefore, the issue will be better addressed in the beginning of the part of the report relating to special categories and the respective chapter of draft articles.

Part Three — Special categories of State succession to obligations from responsibility

IV. Cases of succession where the predecessor State continues to exist

77. First, the present report addresses the specific categories of State succession where the predecessor State continues to exist. Those cases best correspond to the general rule of non-succession to international responsibility (no impact of succession of States on the attribution of responsibility). At the same time, it is not of an absolute character, so various circumstances potentially justifying a deviation from the general principle need to be examined. It seems to be logical to start with the case of secession (as the most general category). Next, the attribution of responsibility of a separated State for the conduct of an insurrectional or other movement is an important element. The following sections cover more specific situations of newly independent States (i.e. in the decolonization context) and cases of cession of parts of the territory of a State.

A. Secession (separation of parts of a State)

1. Restatement of the general rule

78. Cases of secession seem to be among the most typical situations of succession. Such cases took place before and after the period of decolonization that gave rise, at least in respect of the earlier codified areas of succession, to special rules for newly independent

States. From the point of view of this topic (succession and responsibility) and with a view to the context in 2018, however, it appears more logical to start with those categories of succession that may be of practical application today and in future. Indeed, cases of secession (and dissolution) belong to those cases that both have occurred recently (since the 1990s) and may happen in future.

79. The doctrine on the topic usually refers to "secession", while the 1978 and 1983 Vienna Conventions use the term "separation of part or parts of the territory of a State". For the purpose of the present topic, there are no different meanings given to these terms. Therefore, they can be used interchangeably. However, for the sake of consistency, one of the terms needs to be selected and its definition will be added to the terms defined in draft article 2 (Use of terms).

80. The starting point for secession, as an example of the cases of succession where the predecessor State continues to exist, is to be the general rule of non-succession (see above, draft article 6 and the related analysis). This is supported by State practice.

81. The most frequently referred to instances of practice justifying it include: (*a*) the break-up of the Austro-Hungarian Empire following the First World War;[116] (*b*) municipal law cases concerning the secession of Poland;[117] (*c*) exceptions from the position of the German Democratic Republic regarding the Third Reich;[118] (*d*) practice with respect to the break-up of the Union of Soviet Socialist Republics (USSR);[119] and (e) the *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro*) case.[120] Because of their complexity and the potentially conflicting interpretation of them, some cases, in particular those of the end of the Austro-Hungarian Empire, the break-up of the Soviet Union and the *Genocide* case, need to be looked at more closely.

82. First, the break-up of Austria-Hungary after the First World War is a case that may be called controversial because of the different views of Austria and of the Allied Powers as to the question whether it must be understood as a dissolution or a secession. Austria viewed itself as a new State and the situation with respect to the Austro-Hungarian Empire as dissolution. This position was taken in order not to have to assume any obligations arising out of the War. On the contrary, the Allied Powers considered this situation as secession, and they saw Austria and Hungary as continuing the legal personality of the Austrian-Hungarian Empire and as a result they considered them being responsible for internationally wrongful acts committed during the First World War.[121] Although the case of Austria has been still discussed as controversial in doctrine, the post-war treaties provided for the responsibility of Austria for the War and damage caused as its consequence. Such a provision was contained in article 177 of the Peace Treaty of Saint-Germain-en-Laye.[122]

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[116] For details, see Dumberry, *State Succession to International Responsibility*, pp. 145–146.

[117] See P. Dumberry, "Is a new State responsible for obligations arising from internationally wrongful acts before its independence in the context of secession?", *Canadian Yearbook of International Law*, vol. 43 (2005), pp. 419–454, at pp. 429–430.

[118] *Ibid*., pp. 431–434.

[119] *Ibid*., pp. 434–438. See also J. Crawford, *State Responsibility: The General Part* (Cambridge, Cambridge University Press, 2013), pp. 452–453.

[120] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 76, para. 76.

[121] See Dumberry, *State Succession to International Responsibility*, pp. 99–100 and 145–146; Marek, *Identity and Continuity of States in Public International Law*, pp. 220 ff.

[122] Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye), Protocol, Declaration and Special Declaration (Saint-Germain-en-Laye, 10 September 1919), *British and Foreign State Papers, 1919*, vol. CXII (London, HM Stationery Office, 1922), p. 317, at art. 177: "The Allied and Associated Governments affirm and Austria accepts the responsibility of Austria and her Allies for causing the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Austria-Hungary and her Allies."

The same position was adopted by the United States, which concluded a separate peace treaty with Austria in 1921.[123]

83. From the beginning Hungary declared its identity with the former Hungarian Kingdom.[124] The United States signed with Hungary a separate peace treaty, which contains the same clause as that in the treaty with Austria.[125] In addition, and following the peace treaties with Austria and Hungary, the United States concluded an agreement with these two States on the determination of compensation for damage suffered by United States nationals during the War.[126] The Claims Commission established under this Agreement also indicated that the other successor States (Czechoslovakia, Poland and Yugoslavia) should not bear responsibility for such damage.[127]

84. Another problem that may also give rise to some controversy is related to the break-up of the Soviet Union in 1991. It raises the question whether the break-up of the USSR should be regarded as a case of *dissolution* or rather a series of *secessions*. What is also at issue is the legal status of States emerging in the territory of the former USSR. They are usually classified in three categories from the point of view of the law on succession of States.

85. First, the three Baltic States (Estonia, Latvia and Lithuania), which first declared their independence and left the Soviet Union during 1990 and 1991 (their independence was recognized by the USSR on 6 September 1991), are regarded not as new States (successors of the USSR) but as identical to the three Baltic States that existed before 1940.[128] This is clearly the prevailing view in the doctrine, except in the Russian doctrine of international law where the status of the Baltic States was qualified as that of successor States (on the basis of secession).[129]

86. When it comes to the 11 former Soviet republics (others than the Baltic States and Russia), there are no doubts that they are successor States of the USSR. This conclusion holds true irrespective of the qualification of the break-up of the USSR (dissolution or secession). On the one hand, the political process ongoing from 1989 to 1991 in several republics of the USSR, with parliamentary declarations or acts on State sovereignty or

[123] Treaty between the United States and Austria (Vienna, 24 August 1921), *American Journal of International Law*, vol. 16 (1922), Suppl., pp. 1–4.

[124] Czapliński, "State succession and State responsibility", p. 357.

[125] Treaty Establishing Friendly Relations between the United States of America and Hungary (Budapest, 29 August 1921), *American Journal of International Law*, vol. 16 (1922), Suppl., pp. 13–16.

[126] Agreement for the Determination of the Amounts to be paid by Austria and by Hungary in satisfaction of their Obligations under the Treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921 (Washington, 26 November 1924), League of Nations, *Treaty Series*, vol. 48, No. 1151, p. 69.

[127] Administrative Decision No. I, 25 May 1927, Tripartite Claims Commission, UNRIAA, vol. VI, p. 203, at p. 210: "All of the Successor States other than Austria and Hungary are classed as 'Allied and Associated Powers' and under the Treaties it is entirely clear that none of them is held liable for any damages suffered by American nationals resulting from acts the Austro-Hungarian Government or its agents during either the period of American neutrality or American belligerency."

[128] See L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Leiden, Martinus Nijhoff, 2003); R. Mullerson, "Law and politics in succession of States: international law on succession of States", *Dissolution, continuation et succession en Europe de l'Est*, G. Burdeau and B. Stern (eds.), (Paris, Montchrestien, 1994), pp. 26–27; M. Bothe and C. Schmidt, "Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie", *Revue générale de droit international public*, vol. 96 (1992), pp. 821–842, at pp. 822-823; M. Koskenniemi and M. Lehto, "La succession d'États dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande", *Annuaire français de droit international*, vol. 38 (1992), pp. 179–219, at pp. 191–198.

[129] Cf. P.P. Kremnev, *The Break-up of the USSR and Succession of States* [*Распад СССР и правопреемство государств*], (Moscow, Jurlitinform, 2012), p. 80.

independence,[130] supports the view that other former Soviet Republics seceded from the Soviet Union.[131] On the other hand, there are views that prefer the thesis of dissolution. They bear on the fact that the USSR ceased to exist as a result of both the Alma-Ata Declaration[132] and the Agreement establishing the Commonwealth of Independent States[133] by the end of 1991. However, taking into consideration the process preceding these acts, as well as the temporal sequence and wording of the Agreement and the Declaration, it is possible to interpret them as declaratory of the process that was only accomplished in December 1991. Therefore, the analysis done in the present report builds on the assumption that the break-up of the Soviet Union resulted from a series of secessions.

87. The main point where the doctrine has been divided is the question whether Russia should be considered as the continuing State (or "continuator") of the USSR. The majority view seems to support the position of the continuity of Russia.[134] Other writers support the view that Russia is not the "continuator" of the USSR but a new State.[135] Yet another and quite interesting opinion appears in the Russian doctrine that refutes both the position of a new State (successor) and that of continuator, i.e. the identical subject existing in a lesser territory. This doctrine suggests the new term "*gosudarstvo-prodolzatel*", which (in spite of the plain translation: State-continuator) is explained as a new category in international law. It is not based on the identity but rather on the replacement of the USSR by the Russian Federation.[136] This theory tries to draw an analogy of such State to the predecessor State in some aspects, and to the successor State in other aspects. Other Russian writers also propose the term "general successor" (*generalnyj pravopreemnik*)[137] or stress that the concept of continuity of the USSR by Russia was driven by practical needs.[138]

88. However plausible or not seems the term "gosudarstvo-prodolzatel" from the point of view of international legal theory, the practical purposes of this report warrant the working conclusions. Since the position of the Russian Federation in most aspects of succession of

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[130] Latvia (28 July 1989), Azerbaijan (25 September 1989), Georgia (9 March 1990), Lithuania (11 March 1990), Estonia (30 March 1990) and Armenia (23 August 1990). See Kremnev, *The Break-up of the USSR* (see previous footnote), p. 11.

[131] Cf. Mullerson, "Law and politics in succession of States", p. 19; W. Czapliński, "La continuité, l'identité et la succession d'États — évaluation de cas récents", *Revue belge de droit international*, vol. 26 (1993), pp. 375–392, at p. 388; M. Koskenniemi, Report of the Director of the English-speaking Section of the Centre, *State Succession: Codification Tested against the Facts*, pp. 71 and 119 ff.; P. Pazartzis, *La succession d'États aux traités multilatéraux : à la lumière des mutations territoriales récentes* (Paris, Pedone, 2002), pp. 55–56.

[132] Alma-Ata Declaration of 21 December 1991, A/46/60-S/23329, annex II. It states that "with the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist".

[133] Agreement establishing the Commonwealth of Independent States of 13 December 1991, A/46/771, annex II, stating in the preamble that the USSR "as a subject of international law and a geopolitical reality no longer exists".

[134] See, e.g., Mullerson, "Law and politics in succession of States", p. 19; Bothe and Schmidt, "Sur quelques questions de succession", p. 824; Koskenniemi and Lehto, "La succession d'États dans l'ex-URSS", pp. 189–190.

[135] See R. Rich, "Recognition of States: the collapse of Yugoslavia and the Soviet Union", *European Journal of International Law*, vol. 4 (1993), pp. 36–65, at p. 45; Y.Z. Blum, "Russia takes over the Soviet Union's seat at the United Nations", *European Journal of International Law*, vol. 3 (1992), pp. 354–361, at pp. 357-359; H. Tichy, "Two recent cases of State succession: an Austrian perspective", *Austrian Journal of Public and International Law*, vol. 44 (1992/1993), pp. 117–136, at p. 130.

[136] Cf. Kremnev, *The Break-up of the USSR* (see footnote 129 above), pp. 159–163.

[137] Cf. A.B. Aksenov, "On citizenship in relation to the succession of States" [О гражданстве в связи с правопреемством государств] (Dissertation thesis, Kazan, 2005), p. 25 (cited in Kremnev, *The Break-up of the USSR* (see footnote 129 above), p. 164).

[138] See S.V. Chernichenko, "Continuity, identity and succession of States" [Континуитет, идентичность и провопреемство государств], *Russian Yearbook of International Law 1996–1997* (1998), pp. 9–44, at p. 15.

States, including international (multilateral) treaties, diplomatic relations, State property abroad, membership in the United Nations and other international organizations, can be considered as identical with that of the predecessor State in situation of secession (separation) of parts of its territory, there is no need to come out with a new legal construct for the issue of succession in respect of State responsibility.[139]

89. There are at least two examples of treaties entered into by the Russian Federation, whereby it continued its obligations arising from international responsibility for acts committed by the USSR. The first one is the treaty between Russia and Germany. Following article 16 of the 1990 German–Soviet Union Good-Neighbourliness Treaty,[140] the Cultural Agreement of 1992 (after the break-up of the USSR) between Germany and Russia contains a commitment to the restitution of cultural property which was lost or "unlawfully brought into the territory" of Russia.[141] Another example is the 1997 Franco-Russian agreement on final settlement of pre-revolutionary Russian bonds issued in France and nationalized as a result of the Russian Revolution.[142]

90. Finally, one of the cases related to the break-up of Yugoslavia also supports the continuing legal personality and responsibility of the continuing State. Following the separation of Montenegro from Serbia on 3 June 2006, Serbia continued the legal personality of the State Union of Serbia and Montenegro, while Montenegro became the successor State to it.[143] As stated by the International Court of Justice, since Montenegro did not continue the legal personality of Serbia and Montenegro, it could not have acquired the status of respondent in the *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* case against Serbia and Montenegro.[144] The same conclusion seems to appear from the arbitral award in *Mytilineos Holdings*.[145] Also the European Court of Human Rights accepted, in several cases where applications have been lodged in time of the State Union of Serbia and Montenegro but the decision was delivered after the secession of Montenegro, that "Serbia remained the sole respondent in the proceedings before the Court".[146]

91. According to doctrinal views, "[t]his finding implicitly acknowledges the principle

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[139] The practical reasons also seem to prevail in the analysis of Dumberry, *State Succession to International Responsibility*, p. 152.

[140] Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good-Neighbourliness, Partnership and Cooperation (Bonn, 9 November 1990), *International Legal Materials*, vol. 30 (1991), p. 505, at p. 515.

[141] See Dumberry, *State Succession to International Responsibility*, pp. 153–154.

[142] Accord du 27 mai 1997 entre le Gouvernement de la République française et le Gouvernement de la Fédération de Russie sur le règlement définitif des créances réciproques financières et réelles apparues antérieurement au 9 mai 1945 [Agreement of 27 May 1997 between the Government of the French Republic and the Government of the Russian Federation on the final settlement of reciprocal financial and real claims arising prior to 9 May 1945] (Paris, 27 May 1997), *Journal officiel de la République française*, 15 May 1998). See also S. Szurek, "Épilogue d'un contentieux historique : l'accord du 27 mai 1997 entre le gouvernement de la république française et le gouvernement de la Fédération de Russie relatif au règlement définitif des créances réciproques entre la France et la Russie antérieures au 9 mai 1945", *Annuaire français de droit international*, vol. 44 (1998), pp. 144–166.

[143] Institute of International Law, Yearbook, vol. 76 (see footnote 39 above), travaux préparatoires, para. 78.

[144] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 120 above), para. 76.

[145] *Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia*, United Nations Commission on International Trade Law (UNCITRAL), Partial Award on Jurisdiction (in the matter of an arbitration under the UNCITRAL Arbitration Rules), 8 September 2006, para. 158.

[146] See, e.g., *Bodrožić v. Serbia*, No. 32550/05, 23 June 2009; *Filipović v. Serbia*, No. 27935/05, 20 November 2007; *Jevremović v. Serbia*, No. 3150/05, 17 July 2007; *Marčić and Others v. Serbia*, No. 17556/05, 30 October 2007.

that the continuing State remains responsible for acts which took place before the date of succession".[147] This was also supported by the Institute: "What is beyond doubt in the Court's reasoning is that the continuator State has to assume the obligations of internationally wrongful acts committed before the date of State succession as a result of the separation of part of its population and territory in order to constitute a new State".[148] The present report shares those views, which are fully consistent with the general rule on non-succession (see above, draft article 6).

2. Circumstances justifying deviation from the general rule

92. Despite non-succession being a general principle in this context, it might not be of an absolute character.[149] Indeed, the most important question in this regard is to ascertain whether the rule of non-succession applies in all circumstances or whether there are situations that would justify a different approach.[150]

93. From the overview of the literature and the approach adopted by the 2015 Institute of International Law resolution, the following circumstances have been invoked as justifying the deviation from the general rule of non-succession: (*a*) internationally wrongful acts committed by an autonomous entity of the predecessor State; (*b*) link between internationally wrongful act and territory; and (*c*) question of an unjust enrichment. These are in addition to the usual exceptions, which include an agreement and a unilateral declaration whereby a successor State may accept obligations.

(a) Internationally wrongful acts committed by an autonomous entity of the predecessor State

94. Indeed, situations of secession are different in nature, some are more closely related to an insurrectional or other movement than others. Nevertheless, it has been proposed that, even though the rule contained in article 10, paragraph 2, of the articles on State responsibility is not a rule of succession, by analogy, the principle that underpins it should be used "in the different context where independence is achieved as a result of a democratic process instead of an armed struggle".[151]

95. Apart from the fact that this approach indeed complements article 10, paragraph 2, of the articles on State responsibility, there is also some doctrinal support for such a conclusion.[152] Moreover, the 2015 Institute of International Law resolution also contains a provision to this end, which is, in the context of secession, article 12, paragraph 3.[153]

96. With respect to practice usually invoked to support this proposition, it may be noted that the leading arbitral award in the *Lighthouses Arbitration* (Claim No. 4) was adopted in

[147] Dumberry, *State Succession to International Responsibility*, p. 143.

[148] Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, para. 79.

[149] *Ibid*., para. 56.

[150] See Dumberry, "Is a new State responsible", p. 422.

[151] *Ibid*., p. 448, footnote 118.

[152] *Ibid*., p. 448, footnote 119, and see also p. 449, footnote 123 on analogy with the newly independent State in this regard.

[153] Institute of International Law, Yearbook, vol. 76 (see footnote 40 above), resolution, art. 12, para. 3: "If particular circumstances so require, the obligations arising from the commission of an internationally wrongful act by the predecessor State pass to the successor State when the author of that act was an organ of a territorial unit of the predecessor State that has later become an organ of the successor State."

the context of cession of territory.[154] Monnier, for example, seems to support such a conclusion.[155]

97. Moreover, regarding other aspects raised by this exception, the Institute of International Law's report of 2015 also highlights the need for a clear devolution of powers to local authorities in this scenario.[156] Subject to all these cautions, however, acts committed by an autonomous entity of the predecessor State should be accepted as one of the elements in support of the succession to responsibility.

(b) Link between internationally wrongful act and territory

98. Next, the question of succession to responsibility may arise where an internationally wrongful act was perpetrated by the predecessor State on the territory in question. It seems that writings and the 2015 report of the Institute of International Law take a more nuanced approach. The question is neither of the size of a separated territory, nor the fact that the act was perpetrated on the territory of a new State, but more a question of the linkage between the internationally wrongful acts and the territory in question.[157] This is subject to further remarks by the Special Rapporteur below.

99. First, while Dumberry limits such a situation to internationally wrongful acts specifically linked to the territory in question, such as the violation of territorial regimes obligations,[158] the Institute of International Law in its 2015 resolution goes further, covering also the situations of a direct link between the consequences of internationally wrongful acts and the territory and population in question.[159]

100. Second, while Dumberry refers to the transfer of *obligations* arising from an internationally wrongful act of the predecessor State specifically linked to the territory in question,[160] the Institute of International Law in its resolution refers to this situation in the context of secession only — with respect to the transfer of *rights* (art. 12, para. 2).

101. Third, there are a number of scholarly writings supporting the approach followed by the Institute,[161] but, as some of the authors admit "no State practice or international case law was found where the issue was discussed".[162] In fact, it is possible to recall one relevant example of practice, which arose in the context of the secession of Belgium from the Kingdom of the Netherlands in 1830. France, Great Britain, Prussia and the United States made a joint application to Belgium (the successor State), requesting compensation from it "solely upon the ground that the obligation to indemnify for such losses rested upon the

[154] See Dumberry, "Is a new State responsible", p. 448, footnote 120. For the argument of analogy, see Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, para. 75: "The solutions envisaged here can also be applied to situations of separation of part of a territory and population of a State in order to constitute an independent State or to join another existing State."

[155] See Monnier, "La succession d'États en matière de responsabilité internationale", pp. 84–85.

[156] Institute of International Law, Yearbook, vol. 76 (see footnote 39 above), travaux préparatoires, para. 65.

[157] See Dumberry, "Is a new State responsible", pp. 449–450. Cf. also Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, paras. 57–62.

[158] Dumberry, "Is a new State responsible", p. 450.

[159] Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, paras. 57–62.

[160] Dumberry, "Is a new State responsible", p. 450.

[161] See R. Jennings and A. Watts, *Oppenheim's International Law*, vol. I, 9th ed. (Harlow, Longman, 1996), p. 224 (in cases where the predecessor State does not cease to exist, it is nevertheless the new successor State which should be held liable for "those claims, having a local character attaching to the territory of the new State"); Monnier, "La succession d'États en matière de responsabilité internationale", pp. 88–89; Volkovitsch, "Righting wrongs …", pp. 2207–2208.

[162] Dumberry, *State Succession to International Responsibility*, p. 290.

country within which the injury was inflicted".[163]

102. What remains disputable is whether the *Gabčíkovo-Nagymaros Project* case cannot be considered directly relevant in this regard. Even though this case was one of dissolution (and not secession), it is doubtful that the outcome would have been different if the independence of Slovakia were the consequence of its separation from Czechoslovakia. In case of territorial regimes, the difference between the two categories of succession seems to be less important. It is also (and mainly) dictated by practical reasons, since in such cases, owing to the nature of restitution, only a successor State may be in a position to make such restitution.

103. To sum up, the successor State is not *automatically* responsible for obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession solely based on the fact that such acts took place on what is now its territory. The linkage of the acts to the territory is only *one relevant element* that needs to be taken into account.[164]

(c) Question of an unjust enrichment

104. It has been suggested that, in order to avoid unfair consequences of the application of the non-succession rule, the principle of unjust enrichment should be taken into account.[165] The advantage of such an approach is that it would not require the determination of the existence or not of a positive rule on succession in particular circumstances, but would rather require the answer to the question "whether a successor State which can be shown factually to have been unjustly enriched at the expense of a predecessor state's public creditors is under an 'equitable' obligation to take steps to correct the situation".[166]

105. There is some doctrinal support for the transfer of the obligation of reparation in cases when the successor State would unjustly enrich itself as result of an internationally wrongful act committed before the date of succession.[167] Moreover, in its 2015 resolution, the Institute of International Law refers to unjust enrichment as one of the criteria to be taken into consideration for the equitable apportionment of rights and obligations of the predecessor and successor States (in the context of secession art. 12, para. 5).

106. On balance, as it was admitted, there are only four cases referring to the principle of unjust enrichment that are not directly relevant, because they mostly concern succession in respect of debts.[168] Therefore, it is advisable to follow the Institute of International Law resolution, which does not treat unjust enrichment as an independent basis for succession to responsibility. The need to avoid unjust enrichment should be taken into consideration as one of criteria and circumstances relevant to the case.

B. Responsibility for the conduct of insurrectional or other movement

107. The most powerful exception to the general rule of non-succession is related to the responsibility of a new State for the conduct of an insurrectional or other movement. As it is well known, States are responsible for acts contrary to international law *which are attributable to them*. Under the articles on State responsibility, there is no direct link attributing unlawful acts of the predecessor to the successor State. However, this is subject

[163] The case cited in *ibid*., p. 287.
[164] *Ibid*., p. 287.
[165] *Ibid*., p. 277.
[166] *Ibid*., p. 276.
[167] Dumberry, "Is a new State responsible", p. 449 and fn. 125 with references therein.
[168] Cf. the cases referred to in Dumberry, *State Succession to International Responsibility*, pp. 269–273.

to the important exception set in article 10, paragraph 2.[169]

108. The main thesis of the present report is that the rule under article 10, paragraph 2, is fully applicable to *certain* categories of succession, namely secession and creation of a newly independent State. It is important to stress that article 10 treats all insurrections generally and makes no attempt to distinguish between a struggle for national liberation on the one hand and a simple rebellion on the other.[170]

109. This is notwithstanding the fact that it is a rule of attribution rather than a rule of State succession to responsibility. According to some authors, "the responsibility of the State for the wrongful acts of victorious rebels has always been conceived as a *rule of attribution*".[171] Indeed, this seems to be a plausible argument, as by attributing the conduct of a successful insurrectional movement to a State, "the issue is neatly circumvented: the armed opposition group is held accountable for its conduct *qua* group through the 'acceptable' mechanism of State responsibility".[172]

110. It should be noted that an original rationale conceived by the Special Rapporteur Roberto Ago very much centred on the continuity between personality of an insurrectional movement and that of a new State.[173] Later on, it seems that Ago gave more emphasis to organizational and structural continuity, specifically pointing to continuity "between the organization of the insurrectional movement and the organization of the State to which it has given rise",[174] between "an embryo State" and "a State proper, without any break in continuity between the two".[175]

111. However, it is interesting to note that Ago also briefly contemplated an alternative approach focusing on succession. "If we were to exclude the idea of continuity between the international personality of the insurrectional movement and that of the new State, it would only remain for us to raise here also the question of the possible succession of the State in respect of the obligations arising out of delinquencies committed by the subject of international law whose place it has taken".[176]

112. Therefore, it seems to be preferable, like the Commission several decades ago, not to enter into the issue of a potential legal personality of insurgents and to stick instead to the rationale expressed in the commentary to the final article 10 of the articles on State responsibility. "The basis for the attribution of conduct of a successful insurrectional *or other movement* to the State under international law *lies in the continuity between the movement and the eventual Government*".[177] The very same argument could be used also for

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[169] "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."

[170] See Crawford, *State Responsibility*, p. 172.

[171] J. D'Aspremont, "Rebellion and State responsibility: wrongdoing by democratically elected insurgents", *International and Comparative Law Quarterly*, vol. 58 (2009), pp. 427–442, at p. 430. It needs to be said that his article focuses on the scenario of rebels succeeding in becoming a new government of a State, which is clearly outside the scope of the present topic.

[172] S.I. Verhoeven, "International responsibility of armed opposition groups: lessons from State responsibility for actions of armed opposition groups", in Responsibilities of the *Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*. N. Gal-Or, C. Ryngaert and M. Noortmann (eds.) (Brill Nijhoff, 2015), p. 294.

[173] "[A]n existing subject of international law would merely change category: from a mere embryo State it would become a State proper, without any interruption in its international *personality* resulting from the change" (emphasis added) *Yearbook … 1972*, vol. II, document A/CN.4/264 and Add.1, para. 159.

[174] Para. (6) of the commentary to draft art. 15 of the draft articles on State responsibility, *Yearbook … 1975*, vol. II, document A/10010/Rev.1, para. 52.

[175] *Ibid*. See also Crawford, *State Responsibility*, p. 173.

[176] *Yearbook … 1972*, vol. II, document A/CN.4/264 and Add.1, para. 159.

[177] Para. (4) of the commentary to art. 10 of the draft articles on State responsibility, *Yearbook*…, 2001, vol. II (Part Two) and corrigendum, para. 77.

State organs of the predecessor that evolved into State organs of the successor, especially if they consist of the same personnel, which is the case in many situations.

113. Indeed, for the purpose of this topic, only the second of the scenarios foreseen in article 10 (expressed in article 10, paragraph 2 (establishment of a new State), and the corresponding commentary) is relevant.[178] This is because the first scenario, expressed in paragraph 1, only provides for an insurrectional movement that becomes the new government of a State, which means the same State and, consequently, no succession of States at all. The Special Rapporteur, in the present report, finds it very important to stress the difference, having also in mind the existence of criticism in writings on the issue. When criticising article 10 of the articles on State responsibility, some scholars do not always sufficiently distinguish between two scenarios foreseen by article 10.[179]

114. Another criticism points to an allegedly unsatisfactory wording of article 10, which only speaks of attribution of the conduct of a *movement*, rather than the *organs* of the movement.[180] On the one hand, it would be more logical to follow the model where the conduct of organs, persons or entities is attributed to a subject of international law. On the other hand, the Commission chose this approach in order to avoid the politically sensitive issue of the legal personality of insurrectional movements.

115. Moreover, some scholars also underline the fact that article 10 does not distinguish between the different types of insurrectional movements in terms of their nature or legitimacy of their struggle.[181] However, this is precisely the opposite of the approach of the Commission, justified in the commentary to article 10. It is not only for factual reasons that a comprehensive definition of the different types of groups "is made difficult by the wide variety of forms which insurrectional movements may take in practice".[182] There are also some strong legal arguments in favour of such an approach:

> No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international 'legitimacy' or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinction in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy

[178] Para. (6) of the commentary to art. 10 of the draft articles on State responsibility, *ibid*.: "Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule."

[179] Cf. J.A. Hessbruegge, "The historical development of the doctrines of attribution and due diligence in international law", *New York University Journal of International Law and Politics*, vol. 36 (2003), pp. 265–306, at pp. 273–274 and 300–302; K. Greenman, "The secret history of successful rebellions in the law of State responsibility, *ESIL Reflections*, vol. 6 (2017), available from www.esil-sedi.eu/node/1881.

[180] See E. Gayim, "Reflections on the draft articles of the International Law Commission on State responsibility: articles 14; 15; & 19 in the context of the contemporary international law of self-determination" [article 10 at the time of the author's writing was numbered 15], Nordisk Tidsskrift International Ret [Nordic Journal of International Law], vol. 54 (1985), pp. 85–110, at pp. 94–99.

[181] See E. Gayim, "Reflections on the draft articles of the International Law Commission on State responsibility", pp. 99–100; D'Aspremont, "Rebellion and State responsibility", p. 434.

[182] Para. (9) of the commentary to art. 10 of the draft articles on State responsibility, *Yearbook* …, 2001, vol. II (Part Two) and corrigendum, para. 77.

of its origin.[183]

The same approach should therefore be followed in the context of the present topic.

116. When it comes to practice, according to the Commission, "[a]rbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10". [184] However, the Institute of International Law in its travaux préparatoires of 2015 and some authors point to a relative scarcity of practice.[185] Nevertheless, there are at least three most-cited cases of the relevant State practice that support the rule in article 10, paragraph 2. They include (*a*) French municipal court decisions in the context of the independence of Algeria holding the Algeria responsible for the wrongful acts during the civil war;[186] (*b*) an *obiter dictum* in the *Socony Vacuum Oil Company* before the United States International Claims Commission;[187] and (*c*) the legal opinion of Great Britain in the context of the American Civil War.[188]

117. The French court decisions related to article 18 of the Declaration of 1962 that is a part of the Evian Accords that ended the national liberation war in Algeria.[189] This clause provided that "Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities". Although Algeria has in general refused to honour the undertaking to the extent of taking responsibility for the actions of the Front de Libération Nationale (FLN), the Declaration has always been interpreted within French jurisdictions as effectively dividing responsibility for acts committed during the Algerian War between the French and Algerian States.[190] Since Algeria was not a party in the proceedings before the French courts, these court decisions did not formally hold Algeria responsible for the obligations arising from internationally wrongful acts committed by the FLN. Instead, the decisions held that France could not be responsible for such acts that only concerned Algeria.[191]

118. Moreover, Crawford has also cited another example of older practice, referring to the United States Supreme Court judgment *Williams v. Bruffy*, issued in the context of the American Civil War.[192]

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[183] *Ibid*., para. (11).

[184] *Ibid*., para. (12).

[185] Cf. Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, para. 83; Dumberry, "New State responsibility for internationally wrongful acts by an insurrectional movement", *European Journal of International Law*, vol. 17 (2006), pp. 605–621, at pp. 612 ff.; D'Aspremont, "Rebellion and State responsibility", pp. 431–432; Verhoeven, "International responsibility of armed opposition groups: lessons from State responsibility for actions of armed opposition groups", p. 287.

[186] Cf. Dumberry, "New State responsibility", pp. 613-615.

[187] See *International Law Reports*, vol. 21 (1954), p. 55.

[188] Phillimore, Opinion of 16 February 1863, in McNair, *International Law Opinions*, vol. II: Peace (Cambridge, Cambridge University Press, 1956), pp. 256–257.

[189] Déclaration de principes relative à la coopération économique et financière [Statement of principles relating to economic and financial cooperation] (19 March 1962), *Journal officiel de la République française*, 20 March 1962, pp. 3024–3026.

[190] Crawford, *State Responsibility*, p. 178.

[191] See, e.g. France, *Perriquet*, Council of State, case No. 119737, 15 March 1995, *Recueil des décisions du Conseil d'État, statuant au contentieux (Recueil Leblon)*; *Hespel*, Council of States, case No. 11092, 5 December 1980, *Recueil Leblon*.

[192] "The other kind of *de facto* governments, to which the doctrines cited relate, is such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. Such was the case of the State governments under the old confederation on their separation from the British crown. Having made good their declaration of independence, every thing they did from that date was as valid as if their independence had been at once acknowledged. Confiscations therefore, of enemy's

119. In addition to these old examples of practice preceding the adoption of the articles on State responsibility, it is important to refer to recent cases where article 10, paragraph 2, has been invoked. For example, article 10, paragraph 2, has recently been invoked by Croatia in the *Application of the Genocide Convention (Croatia v. Serbia)* case, but the International Court of Justice ultimately did not have to examine the customary character of this provision or the fulfilment of the conditions set therein in the case in question.[193] Nevertheless, this judgment may be partly relevant for the clarification of potential meaning of article 10, paragraph 2, and its relation to article 13 of the articles on State responsibility. The Court makes it clear that the "Article is concerned only with the attribution of acts to a new State".[194] In other words, there is no contradiction between article 10, paragraph 2, and article 13, as the former deals with the attribution and the latter concerns the breach of existing international obligations. It implies that the rule under article 10, paragraph 2, will have its full effect in cases where the breached obligation continues to be binding on a new State. This is always the case in general customary law. It may also include obligations under treaty law to the extent that the principle of automatic succession applies.

120. This is in particular relevant with respect to multilateral conventions on human rights.[195] The Human Rights Committee made clear that, in the context of obligations arising from the International Covenant on Civil and Political Rights, the fundamental rights protected by international treaties "belong to the people living in the territory of the State party" concerned. In particular, "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession".[196]

121. This approach was confirmed by the case law of the European Court of Human Rights. In particular, in *Bijelić v. Montenegro and Serbia*, in the context of secession of Montenegro, the Court had before it, *inter alia*, the written opinion of the Venice Commission as the third-party intervener. This opinion relies heavily on article 10 of the articles on State responsibility and concludes that "[t]he International Law Commission thus provides for a general rule that responsibility devolves to a successful independence movement, while leaving it open for a successor state as regards a specific breach to show that this would be unreasonable because of an absence of real continuity between the independence movement and the new government".[197] In its judgment, the Court seemed to endorse the analysis, together with its previous case law and a reference to the general comment of the Human Rights Committee, and concluded for the responsibility of Montenegro.[198] Following the *Bijelić* case, the European Court of Human Rights accepted as a rule that, in case of a wrongful act committed by organs of Montenegro in time of the State Union of Serbia and

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property made by them were sustained as if made by an independent nation. But if they had failed in securing their independence, and the authority of the King had been re-established in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation." *Williams v. Bruffy* 96 US 176, 185–186 (1877). See Crawford, State Responsibility, pp. 176–177.

[193] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at pp. 51–53, paras. 102–105.

[194] *Ibid*., para. 104: "[I]t does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles that: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'".

[195] See M.T. Kamminga, "State succession in respect of human rights treaties", *European Journal of International Law*, vol. 7 (1996), pp. 496–484, at pp. 476–477.

[196] General comment No. 26 (1997) on continuity of obligations under the International Covenant on Civil and Political Rights, para. 4, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40*, vol. I (A/53/40 (Vol. I)), annex VII.

[197] Venice Commission, *Amicus Curiae* brief (see footnote 94 above), para. 43.

[198] *Bijelić v. Montenegro and Serbia*, No. 11890/05 (see footnote 95 above), paras. 68–70.

Montenegro, responsibility is succeeded by Montenegro.[199]

122. To conclude, the above analysis suggests the need to draft an article, in the context of secession, in which the general principle of non-succession is complemented by a number of exceptions. In addition to possible exceptions for cases of autonomous entities within a predecessor State and territorial regimes, the attribution of the conduct of an insurrectional or other movement to the new State should also be addressed. It remains to be examined, however, whether the same rules and exceptions are relevant, *mutatis mutandis*, to the situation of newly independent States.

123. On the basis of the above considerations, the following draft article is proposed:

Draft article 7
Separation of parts of a State (secession)

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of secession of a part or parts of the territory of a State to form one or more States, if the predecessor State continues to exist.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State or States.

4. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

C. Newly independent States

124. Both the 1978 and 1983 Vienna Conventions treat the situation of newly independent States differently from other categories of succession, including separation of parts of a State (secession). The question whether the approach, which was justified for codification influenced by the context of decolonization, is still relevant to the present context would go beyond the scope of the present topic. It suffices to point out that rules on succession in relation to State responsibility may not need to draw a sharp dividing line between the principle of automatic succession and that of *tabula rasa*, because the general rule of non-succession applies to both secession and the establishment of a newly independent State.

125. Before addressing the relevant practice and possible rules arising therefrom, the present report needs to define the meaning of "newly independent States". According to the standard provisions on the use of terms in both the 1978 and 1983 Vienna Conventions, this term means "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible".[200] It seems that such a definition could be easily added

[199] See also *Lakićević and Others v. Montenegro and Serbia*, Nos. 27458/06 and 3 others, 13 December 2011; *Milić v. Montenegro and Serbia*, No. 28359/05, 11 December 2012; *Mandić v. Montenegro, Serbia and Bosnia and Herzegovina*, No. 32557/05, Decision (Fourth Section) of 12 June 2012.

[200] See art. 2, para. 1 (*f*) of the 1978 Vienna Convention, and art. 2, para. 1 (*e*) of the 1983 Vienna Convention.

to the terms defined in draft article 2 for the purpose of the present topic.

126. In the previous codifications of the law on State succession, the term was defined broadly. As the Commission stated in its commentary to text which later became article 2, paragraph 1 (*f*), of the 1978 Vienna Convention, the definition

> includes any case of emergence to independence of any former dependent territories, whatever its particular type may be [colonies, trusteeships, mandates, protectorates, etc.]. Although drafted in singular for the sake of simplicity, it is also to be read as covering the case ... of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of uniting of two or more existing States.[201]

127. However, the question can arise whether the category of "newly independent State" should fully apply to cases of international protectorates. As generally recognized, "[i]nternational protectorates are those territories the governments of which, having agreed to protection, retain separate international status but lack in some respect the qualifications for statehood as defined".[202] On the one hand, even an international protectorate enters into the broad category of dependent territories. On the other hand, the status of particular international protectorates can vary. One of the most interesting, complex and perhaps controversial cases was that of Morocco.[203]

128. The status of Morocco, which was generally recognized as a State, depended on the system of treaties and capitulations, from the General Act of Algeciras (1906).[204] Next, the Treaty of Fez (1912) established a French protectorate over the major part of Morocco.[205] A smaller coastal area was recognized as within the Spanish sphere of influence. It follows from the respective treaties,[206] as well as from case law, that Morocco remained a State[207] and that certain international obligations could be attributed to Morocco and France separately.[208] It is possible to argue that the principle of continuity rather than *tabula rasa* applies after the termination of the international protectorate. It is less clear, however, if the conclusions valid for treaties can be extended to responsibility. In principle, the protecting State was responsible for its own acts in the protectorate and, as its representative in international relations, also for the international wrongs of the protected State.[209] However, in some circumstances, the responsibility of the protectorate could produce legal consequences. Such international obligations could even survive the termination of the protectorate.

129. In spite of the undoubtedly specific situation of Morocco and some other cases, all the cases of international protectorates belong to the old international law of the period before decolonization. It seems, therefore, that the situation of international protectorates does not

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[201] Para. (8) of the commentary to art. 2 of the draft articles on succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, chap. II, sect. D.

[202] Crawford, *The Creation of States in International Law*, p. 294.

[203] Cf. *ibid*., pp. 294–295; H. Ouazzani Chahdi, *La pratique marocaine du droit des traités : essai sur le droit conventionnel marocain* (Paris, LGDJ, 1982).

[204] General Act of the International Conference at Algeciras (7 April 1906), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 1776–1909*, W.M. Malloy (ed.) vol. II (Washington, Government Printing Office, 1910), p. 2182

[205] Fez, 30 March 1912, *British and Foreign State Papers*, vol. 106 (1913), p. 1023.

[206] See Ouazzani Chahdi, *La pratique marocaine du droit des traités*, pp. 132–133.

[207] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 176, at pp. 185 and 188.

[208] Permanent Court of International Justice, *Phosphates in Morocco, Judgment, 1938* (see footnote 79 above), pp. 25–27.

[209] *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)* [*Spanish Zone in Morocco Claims*] (1925), UNRIAA, vol. II, pp. 615–742, at pp. 648–649 (available in French only).

warrant a special rule of succession different from the rule for other newly independent States. However, such cases may be taken into account when it comes to possible exceptions to the rule of non-succession. In exceptional circumstances, the acts of international protectorates could be assimilated with the acts of autonomous territorial units within the predecessor State.

130. Indeed, the general rule of non-succession is fully applicable in the case of newly independent States. It is largely supported in doctrine that it should be for the predecessor State (here the colonial or protecting power), which continues its existence, to assume the consequences of its own internationally wrongful acts committed before the date of succession.[210] Examples of State practice and case law of domestic courts also support this conclusion.[211]

131. Of course, this is without prejudice to also applying the rule of attribution under article 10, paragraph 2, of the articles on State responsibility to the acts of a liberation movement that succeeds in establishing a newly independent State. The analysis of the practice and doctrinal views in the previous section of the report support this conclusion. The broad term of an insurrectional or other movement clearly encompasses the case of liberation movements too.[212]

132. A more complicated question may arise regarding other possible exceptions to the general rule of non-succession. As it was boldly stated by Judge Bedjaoui, there should be no succession to the colonial *ordre* without the consent of the successor.[213] The limited State practice seems to confirm this conclusion.

133. In addition to a few decisions of French municipal courts referred to in the previous section (from the perspective of attribution of acts of the movement, namely FLN, to a new State), the only other known case is that of Namibia. Indeed, this case seems to be specifically related to the circumstances of the independence of Namibia in 1990. It is worth noting that article 140, paragraph 3, of the Constitution of Namibia (1990) provides that the acts of the South African Government[214] should be deemed as the acts of the new Republic of Namibia.[215]

134. The scope of this provision was analysed in the case of *Mwandinghi v. Minister of Defence, Namibia* before the High Court of Namibia and that of *Minister of Defence, Namibia v. Mwandinghi* before the Supreme Court of Namibia. The case concerned damages arising out of the shooting of a Namibian national by the South African Defence Forces in 1987. The High Court accepted, in principle, that "in international law a new State is not

[210] See, e.g., Volkovitsch, "Righting wrongs", p. 2201; D.P. O'Connell, "Independence and problems of State succession", *The New Nations in International Law and Diplomacy*, W. O'Brien (ed.) (London, Steven & Sons, 1965), p. 31; B. Stern, "La succession d'États", *Collected Courses of the Hague Academy of International Law*, vol. 262 (1996), pp. 9–438, at p. 246; Jennings and Watts, *Oppenheim's International Law*, pp. 233-234.

[211] See different examples referred to in Dumberry, *State Succession to International Responsibility*, pp. 172–184.

[212] See above, in particular the cases of French municipal courts, paras. 116–117.

[213] See M. Bedjaoui, "Problèmes récents de succession d'États dans les États nouveaux", *Collected Courses of the Hague Academy of International Law*, vol. 130 (1970), pp. 455–586, at p. 520.

[214] As *de facto* predecessor State, while *de jure* predecessor of Namibia was the United Nations Council for Namibia. See, e.g., Y. Makonnen, "State succession in Africa: selected problems", *Collected Courses of the Hague Academy of International Law*, vol. 200 (1986), pp. 93–234, at p. 173.

[215] Constitution of Namibia, adopted on 9 February 1990, contained in document S/20967/Add.2, annex I, art. 140: "(3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament".

liable for the delicts committed by its predecessor",[216] but concluded, in the case in question, that article 140, paragraph 3, of the Constitution expressed the acceptance by the new State of the internationally wrongful acts committed by the predecessor.[217]

135. Next, the Supreme Court dismissed the appeal and confirmed the decision of the High Court, again with reference to article 140, paragraph 3. This is correct, in spite of the misleading reference contained therein to the draft articles on State responsibility, namely the provision that later became article 10, paragraph 1, which only deals with succession of governments, not that of States.[218]

136. Both article 140, paragraph 3, of the Constitution of Namibia and the *Mwandinghi* case were commented upon in doctrinal writings.[219] According to some authors, article 140, paragraph 3, illustrates the principle that a successor State is always free to agree to accept the obligations arising from internationally wrongful acts committed by the predecessor State.[220] The Constitution of Namibia and the *Mwandinghi* case is also referred to in the 2015 report of the Institute of International Law, which concludes that "[i]rrespective of its merits, what this case shows is the possibility of derogation from the general international law rule".[221]

137. Therefore, on the basis of the above considerations, the following draft article is proposed:

Draft article 8
Newly independent States

1. Subject to the exceptions referred to in paragraph 2, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State.

2. If the newly independent States agrees, the obligations arising from an internationally wrongful act of the predecessor State may transfer to the successor State. The particular circumstances may be taken into consideration where there is a direct link between the act or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy.

3. The conduct of a national liberation or other movement which succeeds in establishing a newly independent State shall be considered an act of the new State under international law.

D. Transfer of part of the territory of a State (cession)

138. The last category of succession where the predecessor State continues to exist is a transfer of part of the territory of a State. This category, which is usually referred to as "cession", includes a wide range of situations where part of the territory of a State is transferred by that State to another State. It may include agreements on minor frontier

[216] *Mwandinghi v. Minister of Defence, Namibia*, High Court, 14 December 1990, 1991 (1) SA 851 (Nm), p. 865, *International Law Reports*, vol. 91, p. 346.
[217] *Ibid*., p. 354.
[218] Cf. Dumberry, *State Succession to International Responsibility*, pp. 196–198.
[219] See H.A. Strydom, "Namibian independence and the question of the contractual and delictual liability of the predecessor and successor Governments", *South African Yearbook of International Law*, vol. 15 (1989–1990), pp. 111-121; N. Botha, "Succession to delictual liability: confirmation" in "Foreign judicial decisions", *South African Yearbook of International Law*, vol. 17 (1991–1992), pp. 175–179, at pp. 177–179.
[220] See J. Dugard, *International Law: A South African Perspective*, 2nd ed. (Landsdowne, Juta, 2000), pp. 232–233.
[221] Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, para. 67.

adjustments or exchanges of parts of the territories of the States concerned, but also cases when the area of the transferred territory is large and densely populated.[222] The form and conditions of such transfers can also differ in one case from another, such as the old practice (before the Second World War) of cessions of territories against payment,[223] or voluntary cessions without payment.[224] However, it is important to recall that forced transfers of territory are prohibited by international law, therefore they are not regulated by these draft articles (see draft article 5 above).

139. What is important to point out is that in this case "the predecessor State continues to exist after the transfer or cession, and the successor State already existed at the time of the succession. No creation of a new State is involved".[225] For the reasons explained in the previous parts of the present report, this is also a clear case in which the general principle of non-succession to State responsibility applies. The responsibility rests with the predecessor State. The present report concurs with the conclusions of the Institute of International Law, writings and the practice.

140. There are several cases that support the rule of non-succession. Some cases related to the cession of Alsace-Lorraine to France on the basis of the Treaty of Versailles (1919).[226] Article 67 thereof indicated that France was taking over all the rights over railways in Alsace-Lorraine but not the responsibility for any payments. In the case of *Alsace-Lorraine Railway v. Ducreux Es-qualité*, the French Court of Cassation (*Cour de Cassation*) held that France was not bound by pre-succession obligations based on the general principle of international law that a State is not responsible for acts it has not committed.[227] This solution was also adopted by the French-German Mixed Arbitral Tribunal in *Levy v. German State*.[228]

141. It can happen that the issue is governed by a treaty which provides for cession. For example, pursuant to the Treaty of Peace with Italy (1947), the Dodecanesian Islands were ceded by Italy to Greece. During the period of Italian occupation (1912–1924) and sovereignty (1924–1947), several properties of local Greek nationals were expropriated. According to article 38 of the Peace Treaty, Italy was under the obligation to compensate the victims of expropriation committed during the period when it exercised sovereignty or

[222] Cf., *mutatis mutandis*, the commentary to art. 13 of the draft articles on succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), pp. 30–31.

[223] See, e.g., the Convention ceding Alaska (Washington, 30 March 1867), *Treaties, Conventions, International Acts, Protocols and Agreements 1776–1909*, vol. II, Malloy, pp. 1521–1523, whereby Russia sold its North American possessions to the United States for US$ 7.2 million; the Treaty for the Cession of Louisiana (Paris, 30 April 1803), *Treaties and Other International Acts of the United States of America*, vol. 2, H. Miller (ed.) (Washington, D.C., U.S. Printing Office, 1931), pp. 498–511, whereby France ceded Louisiana to the United States for US$ 15 million.

[224] See, e.g., the Treaty between Brazil and Uruguay modifying their Frontiers on Lake Merim and the River Yaguaron and establishing General Principles of Treat and Navigation in those Regions (Rio de Janeiro, 30 October 1909), *The Consolidated Treaty Series*, vol. 209, C. Parry (ed.) (Dobbs Ferry, New York, Oceana, 1980), p. 419, for the cession without compensation of various lagoons, islands and islets; the voluntary cession of Lombardy by France to Sardinia, without payment, under the Treaty between France and Sardinia for the Cession of Lombardy (Zurich, 10 November 1859), *The Consolidated Treaty Series*, vol. 121, Parry (ed.) (Dobbs Ferry, New York, Oceana, 1969), p. 171.

[225] Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, para. 72.

[226] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919), *British and Foreign State Papers, 1919*, vol. CXII (see footnote 122 above), p. 1.

[227] *Chemin de fer d'Alsace-Lorraine v. Ducreux Es-qualité*, Court of Cassation, Civil Chamber, 30 March 1927, in *Journal du droit international*, vol. 55 (1928), p. 1034.

[228] *Levy v. German State*, Franco-German Mixed Arbitral Tribunal, Award of 10 July 1924, *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, pp. 726–890.

control over the Islands.[229]

142. The same principle was confirmed by the French-Greek Arbitral Tribunal in the *Lighthouses Arbitration* case (1956), precisely in two of the claims decided by it. In Claim No. 11, which concerned compensation sought by France against Greece (the successor State with regard to the territory) for expenditures incurred by the French owner of the concession in the course of the construction of two new lighthouses in Crete from 1903 to 1908, the Tribunal found that the responsibility for the damage suffered was divided between the French company and both the Cretan authorities and the Ottoman Empire. It decided that Greece should not be responsible for these acts.[230] The same conclusion can be drawn from the Claim No. 12-a, where France sought damages against Greece for acts committed by the authorities of the Ottoman Empire (as predecessor State). The Arbitral Tribunal ruled that the Ottoman authorities had not committed any internationally wrongful act. The Tribunal nevertheless indicated, *obiter dictum*, that even if the Ottoman Empire had committed a wrongful act, Greece could not be held liable for it. It is Turkey (the continuing State of the Ottoman Empire) that would be responsible for its own acts committed before the loss of a portion of its territory.[231] This was decided with reference to the "critical date" in accordance with article 9 of Protocol XII to the Treaty of Peace of Lausanne (1923).[232]

143. By contrast, the Arbitral Tribunal came to a different conclusion in Claim No. 4, which dealt with tax exemptions granted to a Greek shipping company and its ship (*Haghios Nicolaos*) by a law proclaimed by the local authorities of Crete in 1908. The law remained in place after 1913 when the island became officially part of Greece. The exemption was alleged by the French company to be in violation of its concession rights. In this case, the Arbitral Tribunal did not refer to the Treaty of Peace of Lausanne but held that the liability of Greece "could result only from a transmission of responsibility in accordance with the rules of customary law or the general principles of law regulating the succession of States in general".[233]

144. The Tribunal then found Greece responsible for the illegal acts committed against the French company in Crete: "the Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract".[234] This case is indeed a reason for possible exceptions to the general rule of non-succession also in the situation of cession of part of the territory. The similar decision was adopted by a municipal court in the largely similar context of the cession of the Aegean Islands to Greece.[235]

145. Indeed, Claim No. 4 in the *Lighthouses Arbitration*, can be interpreted in various ways. In addition to the continuing act (see draft art. 6, para. 3, and paragraphs 67–74 above), there are also other particular circumstances that may justify the transfer of obligations arising from the wrongful acts of the predecessor State (continuing) to the successor State. Here,

[229] Treaty of Peace with Italy (10 February 1947), in: United Nations, *Treaty Series*, vol. 49, No. 747, p. 3, at p. 142. See also P. Drakidis, "Succession d'États et enrichissements sans cause des biens publics du Dodécanèse", *Revue hellénique de droit international*, vol. 24 (1971), pp. 72–123, pp. 109–110 ; Dumberry, *State Succession to International Responsibility*, p. 129.

[230] *Lighthouses Arbitration* (see footnote 86 above), *International Law Reports*, vol. 23, p. 89.

[231] *Ibid*., p. 108: "The critical date evidently serves as the termination of Turkish responsibility and the commencement of Greek responsibility in the sense that everything which happened before the critical date and which can have given rise to charges against the concessionary firm continues to involve the responsibility of the Turkish State".

[232] Protocol [to the Treaty of Peace of Lausanne] relating to Certain Concessions granted in the Ottoman Empire and Declaration (Lausanne, 24 July 1923), League of Nations, *Treaty Series*, vol. 28, p. 203.

[233] *Lighthouses Arbitration* (see footnote 86 above), *International Law Reports*, vol. 23, p. 90.

[234] *Ibid*., p. 92.

[235] *Samos (Liability for Torts) Case*, Greece, Court of the Aegean Islands, 1924, No. 27, *Annual Digest of Public International Law Case: Being a Selection from the Decisions of International and National Courts and Tribunals*, H. Lauterpacht (ed.) (London, Longmans, 1923–1924), p. 70.

the award underlines the autonomous status of a territory under the Ottoman Empire. Another aspect may be a direct link between the consequences of this act and the territory transferred. The last aspect could be even more relevant if the injured State or subject required not just a financial compensation but restitution, which would clearly be outside of powers of the predecessor State after the cession of the territory in question. At the same time, this possible exception is limited, as the financial compensation for damage caused before the date of succession can also be required from the predecessor State.

146. In the light of the above considerations, the following draft article is proposed:

Draft article 9
Transfer of part of the territory of a State

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State when part of the territory of the predecessor State becomes part of the territory of the successor State.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State.

V. Cases of succession where the predecessor State does not exist

147. The present chapter deals with the situations of succession where the predecessor State ceased to exist. These situations include unification (but one needs to distinguish incorporation and merger) and dissolution of States. Unlike the categories of succession analysed so far, where the general rule of non-succession implies the responsibility of the predecessor State, this scenario presents a different issue. The wrongdoing State does not exist any longer, but the consequences of its international wrongful acts continue. The application of the general rule of non-succession to such cases would mean that no State incurs obligations arising from internationally wrongful acts. Such a solution would be hardly compatible with the objectives of international law, which include equitable and reasonable settlement of disputes.

148. This is why the distinction drawn in the present report in relation to draft article 6 seems to be of great importance. On the one hand, even in these cases, succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States. In other words, the internationally wrongful act was and remains attributed to the predecessor State only. On the other hand, however, the legal consequences of the act (namely the obligation of reparation) do not disappear. To this end, the general rule of non-succession should be replaced rather by a presumption of succession in respect of obligations arising from State responsibility. Of course, this is not an unqualified or absolute succession, because the presumption of such transfer of obligations may be confirmed, rebutted or modified by agreements, including agreements on distribution (sharing) of such obligations, where appropriate.

A. Unification of States

149. First, the present report will address the cases of unification. The term itself warrants a brief clarification. "Unification of States" refers to the situation where two or more States unite to form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States that have united. This situation corresponds to the category of "uniting of States" that was used by the Commission in the 1974 draft articles on the succession of States in respect of treaties[236] and the 1981 draft articles on succession of States in respect of State property, archives and debts.[237] This term has been employed in the 1978 Vienna Convention on Succession of States in respect of Treaties[238] and the 1983 Vienna Convention.[239]

150. The articles on nationality of natural persons in relation to the succession of States provide different categories of succession of States in Part II thereof, and the term "uniting of States" previously adopted by the Commission was replaced by "unification of States". During the meeting of the forty-ninth session of the Commission, the Special Rapporteur on the topic, Mr. Mikulka, introduced a definition of the term "unification of States" covering two situations: "the merging of two States into a single new State and the absorption of a State by another in conformity with international law, annexation by force being of course precluded".[240] Accordingly, "unifications of States" may refer to the situation of the uniting of States aiming at the creation of a new State, which predecessor States ceased to exist (s.-c. merger), as well as the situation of incorporation of a State into another existing State. The present report and proposed draft article will follow this approach.

151. The same approach was adopted by the Institute of International Law in its 2015 resolution, which divided the matter into article 13 (Merger of States) and article 14 (Incorporation of a State into another existing State). In both hypotheses, however, the rule adopted by the Institute of International Law is the same, namely that obligations arising from an internationally wrongful act pass to the successor State. For the purpose of the present report, it remains to look at various cases of merger and incorporation in order to identify if and how the obligations differ.

152. The present chapter is based on State practice in the twentieth century. Reference will not be made to the nineteenth century cases.[241] Modern cases of unification of States are not abundant. Modern practice is not always consistent; nevertheless, the examples given here include some cases in Africa, Asia, as well as in Europe. Examples of merger prevail in number over those of incorporation.

153. One example was the United Arab Republic, created as result of the unification of Egypt and Syria in 1958. There are three cases where the United Arab Republic as successor State took over the responsibility for obligations arising from internationally wrongful acts committed by the predecessor States. All these cases involved actions taken by Egypt against Western properties in the context of the nationalization of the Suez Canal in 1956 and the nationalization of foreign-owned properties. The first case deals with the nationalization of the *Compagnie Financière de Suez* by Egypt, which was settled by an agreement between

[236] Articles 30 to 32 in Part IV entitled "Uniting and Separation of States", draft articles on succession of States in respect of Treaties with commentaries, *Yearbook … 1974*, vol. II, (Part One), document A/9610/Rev.1, chap, II, sect. D. The 1974 draft articles on succession of States in respect of treaties and the 1978 Vienna Convention do not distinguish between separation and unification, and provide the same rules in both cases.

[237] Arts. 15, 27 and 37, entitled "Uniting of States", draft articles on succession of States in respect of State property, archives and debts and commentaries thereto, *Yearbook … 1981*, Vol. II (Part Two).

[238] Arts. 31–33.

[239] Arts. 16, 29 and 39.

[240] *Yearbook … 1997*, vol. I, 2489th meeting, para. 39.

[241] See some cases referred to in the commentary to art. 38 of the draft articles on succession of States in respect of State property, archives and debt, *Yearbook …, 1981*, vol. II (Part Two), chap. II, sect. D; and Dumberry, *State Succession to International Responsibility*, pp. 63–77.

the United Arab Republic and the private corporation (1958). In other words, the new State paid compensation to the shareholders for the act committed by the predecessor State.[242] Another example is an agreement between the United Arab Republic and France resuming cultural, economic and financial relations between the two States (1958). The agreement provided that the United Arab Republic, as the successor State, would restore the goods and property of French nationals taken by Egypt and that compensation would be paid for any goods and property not restituted.[243] A similar agreement was also signed in 1959 by the United Arab Republic and the United Kingdom.[244]

154. Another interesting case concerns the unification of Viet Nam. Following the 1954 Agreement on the Cessation of Hostilities between the belligerent forces of France and the Democratic Republic of Vietnam,[245] Viet Nam was divided into two States by a "provisional military demarcation line", namely the Democratic Republic of Vietnam in the north and the Republic of Vietnam in the south. On 30 April 1975, the military forces of the Provisional Revolutionary Government in the Republic of Vietnam succeeded in toppling the interim government. Not long after that, the new National Assembly of the Republic of Vietnam (a legislative body) sat together with the National Assembly of the Democratic Republic of Vietnam and decided to hold a joint general election on a nationwide scale. The newly elected National Assembly, upon its election, changed the name of the united Viet Nam into the Socialist Republic of Viet Nam.[246] This is a case of merging of two predecessor States to form a successor State. The question is therefore whether the rights and duties of the predecessor States, namely North Vietnam and South Vietnam, were transferred to the Socialist Republic of Viet Nam as a successor State.[247]

155. The South Vietnamese Government was alleged to have expropriated several properties of United States nationals and investors, which were left behind in the haste to flee from the country shortly before 30 April 1975.[248] Investigations conducted by the United States Foreign Claims Settlement Commission estimated the total value of expropriated properties to amount to US$99 billion, plus interest.[249] In the meantime, several assets belonging to the Republic of Vietnam held by United States banks had been frozen, under regulations issued by the Secretary of the Treasury, on 30 April 1975. To settle these expropriation claims, on 28 January 1995, the united Viet Nam and the United States concluded a lump-sum agreement. By this agreement, Viet Nam promised to pay in full the compensation claims by United States nationals, in other words, accepting full responsibility

[242] See L. Focsaneanu, "L'accord ayant pour objet l'indemnisation de la compagnie de Suez nationalisée par l'Egypte", *Annuaire français de droit international*, vol. 5 (1959), pp. 161–204, at pp. 196 ff.

[243] Accord entre le Gouvernement de la République française et le Gouvernement de la République arabe unie (Zurich, 22 August 1958), *Revue générale de droit international public*, vol. 62 (1958), pp. 738 *et seq.*; cf. C. Rousseau, "Chronique des faits internationaux", *ibid.*, p. 681.

[244] Agreement between the United Kingdom and the United Arab Republic concerning Financial and Commercial Relations and British Property in Egypt (Cairo, 28 February 1959), United Nations, *Treaty Series*, vol. 343, p. 159. Cf. E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly*, vol. 8 (1959), pp. 346–390, at p. 366.

[245] Agreement on the Cessation of Hostilities in Viet-Nam (Geneva, 20 July 1954), reproduced in A.W. Cameron (ed.), *Viet-Nam Crisis: A Documentary History, vol. 1: 1940–1956* (Ithaca, Cornell University Press, 1971), p. 288.

[246] See Y. Matsui, "Problems of divided State and the right to self-determination in the case of Vietnam", *Japanese Annual of International Law*, vol. 20 (1976), pp. 17–38, at p. 37.

[247] There is also the view that South Vietnam was merged with North Vietnam, with the result that "the Republic of Vietnam … is not simply moribund; it is defunct". See *Republic of Vietnam v. Pfizer Inc.*, 556 F 2d 892, 893–894 (8th Cir 1977). Cf. also Crawford, *The Creation of States in International Law*, p. 477.

[248] United States, Foreign Claim Settlement Commission, Final report of Vietnam Claims Program, p. 28.

[249] *Ibid.*, p. 36.

for wrongful acts of expropriation committed by its predecessor State.[250] In return, the United States was required to release the US$240 million worth assets of South Vietnam held in United States banks.

156. Other examples of merger include the unification of Tanzania and Yemen. The Yemen Arab Republic (North Yemen) and the People's Democratic Republic of Yemen (South Yemen) merged together on 26 May 1990 to form a single State called the Republic of Yemen. Whereas, Tanganyika and Zanzibar, then two newly independent States, united in 1964 to form a new Republic of Tanzania. In both cases, it was impossible to find statements on behalf of the successor States with regard to succession to State responsibility. The only statement made by both countries was with regard to treaty succession. Yemen confirmed in a letter addressed to the Secretary-General of the United Nations on 19 May 1990 that "all treaties and agreements concluded between either the Yemen Arab Republic or the People's Democratic Republic of Yemen and other States and international organizations in accordance with international law which are in force on 22 May 1990 will remain in effect".[251] Likewise, for Tanzania, all predecessors' treaties would remain in full force and effects "with the regional limits prescribed on their conclusion and in accordance with the principles of international law".[252]

B. Incorporation of a State into another existing State

157. Quite a different case is the reunification of Germany. On 31 August 1990, the Treaty on the Establishment of German Unity between the German Democratic Republic and the Federal Republic of Germany was signed, providing for the unification of the two States by 3 October 1990.[253] According to article 1 of the treaty, the German Democratic Republic ceased to exist as an independent State, and its territory comprising five Länder was incorporated (or integrated) into the already existing Federal Republic of Germany.[254] The reunification of the two parts of Germany is generally considered as "unification" of States. However, it was not a merger of States since no new State was created in the process.[255] It was a case of the integration of one State into another already existing State, which continued its legal personality under international law.[256] There was a continuity of State between the Federal Republic of Germany before and after the accession of the Länder forming the German Democratic Republic.[257]

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[250] Agreement between the Government of the United States of America and the Government of the Socialist Republic of Viet Nam concerning the settlement of certain property claims (Hanoi, 28 January 1995), United Nations, *Treaty Series*, vol. 2420, No. 43661. See also T.J. Lang, "Satisfaction of claims against Vietnam for the expropriation of U.S. citizens' property in South Vietnam in 1975", *Cornell International Law Journal*, vol. 28 (1995), pp. 265–300, at pp. 266–268.

[251] Agreement on the Establishment of the Republic of Yemen (San'a, 22 April 1990), *International Legal Materials*, vol. 30 (1991), p. 820. On the letter cited, see *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2004*, vol. I (United Nations publication, Sales No. E.05.V.3), p. xxxi.

[252] *Official Records of the United Nations Conference on Succession of States in respect of Treaties, vol. III, 1977 Session and Resumed Session 1978, Documents of the Conference* (A/CONF.80/16/Add.2, United Nations publication, Sales No. E.79.V.10), p. 21.

[253] Treaty on the Establishment of German Unity (Berlin, 31 August 1990), *International Legal Materials*, vol. 38 (1991), p. 457.

[254] Article 1 of the Treaty on the Establishment of German Unity provides that "upon the accession of the German Democratic Republic to the Federal Republic of Germany … the Länder [of the German Democratic Republic] shall become Länder of the Federal Republic of Germany".

[255] See Dumberry, *State Succession to International Responsibility*, p. 85.

[256] *Ibid*., p. 85. See also K. Hailbronner, "Legal aspects of the unification of the two German States", *European Journal of International Law*, vol. 2 (1991), pp. 18–44, at p. 33.

[257] Dumberry, *State Succession to International Responsibility*, p. 85. This also seems to appear from the correspondence between the German Permanent Mission and the United Nations of 17 December 1990; see document No. D/62 *State Practice Regarding State Succession and Issues of Recognition* (The Hague, Kluwer Law International, 1999), J. Klabbers and others (eds.), pp. 229 *et seq.*

158. Article 24, paragraph 1, of the Treaty on the Establishment of German Unity provides: "In so far as they arise from the monopoly on foreign trade and foreign currency or from the performance of other state tasks of the German Democratic Republic vis-à-vis foreign countries and the Federal Republic of Germany up to 1 July 1990, the settlement of the claims and liabilities remaining when the accession takes effect shall take place under instruction from, and under the supervision of, the Federal Minister of Finance."

159. This provision is interpreted in doctrine as indicating that the Federal Republic of Germany will endorse claims of third States regarding "claims and liabilities" arising from "the performance of State tasks" by the German Democratic Republic.[258] However, controversy remains as to whether this provision also indicates and could be interpreted as acceptance by the Federal Republic of Germany of obligations arising from internationally wrongful acts committed by the German Democratic Republic.[259]

160. The specific issue in relation to the unification of Germany was whether Federal Republic of Germany was responsible for restitution and compensation for acts of expropriation and nationalization that had been committed by the German Democratic Republic after 1949 and before the unification.[260] The issue was addressed in a decision of 1 July 1999 by the Federal Administrative Court (*Bundesverwaltungsgericht*). In this case, the court rejected that the Federal Republic of Germany had responsibility for obligations arising from internationally wrongful acts, which was the expropriation of real property, committed by the former German Democratic Republic against a Dutch national. At the same time, however, the Court stated that the unfulfilled obligations of the German Democratic Republic to pay compensation to the injured individual had now passed to the successor State because the expropriated property was now part of "unified" Germany.[261] This case provides an exception to the traditional approach of non-succession. It seems to confirm that the succession concerns rather the obligation to pay compensation than the wrongful act itself.

161. The obligation to pay compensation for obligations arising from internationally wrongful acts of the predecessor State (in this case the German Democratic Republic) can arise from or be confirmed by a claims agreement with a third country. This was the case of the 1992 Agreement between the Federal Republic of Germany and the United States concerning the Settlement of Certain Property Claims. The Agreement was for an amount of up to US$190 million, with an initial payment of US$ 160 million (art. 2). Article 1 thereof provided that: "This agreement shall cover claims of nationals of the United States

[258] Dumberry, *State Succession to International Responsibility*, p. 86.

[259] Some authors in favour of interpreting it as involving the obligation are: S. Oeter, "German unification and State succession", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 51 (1991), pp. 349–383, at p. 381; B. Stern, "Responsabilité internationale et succession d'États", *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, L. Boisson de Chazournes and V. Gowland-Debbas (eds.) (The Hague, Martinus Nijhoff, 2001), pp. 327–356, at p. 352. Some authors on the contrary interpret the provision as not dealing with the question of succession to obligations arising from the commission of internationally wrongful acts, but limit the scope of this provision to "international contractual obligations". See P.E. Quint, "The constitutional law of German unification", *Maryland Law Review*, vol. 50 (1991), pp. 475–631, at p. 534, footnote 217.

[260] See J.J. Doyle, "A bitter inheritance: East German real property and the Supreme Constitutional Court's 'land reform' decision of April 23, 1991, *Michigan Journal of International Law,* vol. 13 (1992), pp. 832–864, at p. 834.

[261] *BverwG* 7 B 2.99, cited from Dumberry, *State Succession to International Responsibility*, p. 90. The Court also stated that the successor State's obligation would be limited to the payment of compensation and not extend to the restitution of property. Thus, "the claim was ultimately dismissed by the Court on the ground that the injured Dutch national had already received some sort of compensation for his lost property by the [German Democratic Republic]. To the extent that the victim had no valid claim for expropriation against the [German Democratic Republic] *before the date of succession*, the Court simply decided that no such valid claim also existed against the Federal Republic of Germany after the date of succession" (*ibid.*).

(including natural and juridical persons) arising from any nationalization, expropriation, intervention, or other taking of, or special measures directed against, property of nationals of the United States before October 18, 1976, covered by the United States German Democratic Republic Claims Program established by the United States Public Law 94-542 of October 18, 1976."[262]

162. Another example is the incorporation of Singapore into the Federation of Malaya. On 9 July 1963, the United Kingdom and the Federation of Malaya, North Borneo, Sarawak and Singapore signed the Agreement relating to Malaysia.[263] The Federation of Malaya had already become independent on 31 August 1957.[264] It was joined on 16 September 1963 by the State of Singapore and by the British dependencies of Sabah (North Borneo) and Sarawak, and became Malaysia.[265] Even though Singapore was named "the State of Singapore" it was still the territory of the United Kingdom.[266] Annex A of the Agreement, entitled the "Malaysia Bill", acknowledged succession to responsibility: it was provided in article 76 (Succession to rights, liabilities and obligations).[267]

163. The 2015 resolution adopted by the Institute of International Law provides two relevant articles on the situation of unification of States. Article 13 deals with the case of "merger of States" and article 14 provides for the case of "incorporation of a State into another existing State". In this resolution, the category of "merger of States" refers to the case when two or more States unite and so form one successor State and, as a consequence of the unification, the predecessor States ceases to exist.[268] On the other hand, "incorporation of a State into another existing State" refers to the case when one predecessor State continues to exist. The incorporation of a State into another existing State is a case in which only the former predecessor State ceases to exist. The existing State is its successor, but its personality remains unchanged.[269] Both articles concluded that that the rights and obligations stemming from the commission of an international wrongful act in relation to which a predecessor State has been the author or the injured State pass to the successor State, irrespective of whether the predecessor State itself ceased to exist or continued to exist.

164. Although we have not identified many relevant examples of State succession in respect of international responsibility in the context of unification of States (both merger and incorporation), there is little doubt in doctrine about the succession in the obligations arising from the internationally wrongful acts of the predecessor State or States.[270] Therefore, it seems appropriate to accept the presumption that obligations arising from an internationally wrongful act of the predecessor State pass to the successor State, unless the States concerned

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[262] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Settlement of Certain Property Claims (Bonn,13 May 1992), United Nations, *Treaty Series*, vol. 1911, No. 32547, p. 27; also in *State Practice Regarding State Succession …* (see footnote 257 above), p. 240.

[263] London, 9 July 1963, United Nations, *Treaty Series*, vol. 75, No. 10760, p. 2.

[264] It joined the United Nations on 17 September 1957 (see www.un.org/en/member-states/).

[265] *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/243 and Add.1, para. 102.

[266] L.C. Green, "Malaya/Singapore/Malaysia: comments on State competence, succession and continuity", *Canadian Yearbook of International Law*, vol. 4 (1966), p. 33.

[267] "76. (1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State."

[268] See Institute of International Law, *Yearbook*, vol. 76 (see footnote 39 above), travaux préparatoires, para. 85.

[269] *Ibid*., para. 87.

[270] See Czapliński, "State succession and State responsibility", p. 357; Volkovitsch, "Righting wrongs", p. 2206; J.H.W. Verzijl, *International Law in Historical Perspective*, part II, (Leiden, Sijthoff, 1969), pp. 219–220; I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford, Oxford University Press, 2003), p. 632. On the contrary, see Jennings and Watts, *Oppenheim's International Law*, p. 218.

(which include an injured State) otherwise agreed.

165. In the light of the above considerations, the following draft article is proposed:

Draft article 10
Uniting of States

1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State.

2. When a State is incorporated into another existing State and ceased to exist, the obligations from an internationally wrongful act of the predecessor State pass to the successor State.

3. Paragraphs 1 and 2 apply unless the States concerned, including an injured State, otherwise agree.

C. Dissolution of State

166. The category of dissolution of State presents the last and perhaps the most important challenge to the traditional rule of non-succession. Dissolution is where a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States. There are many examples of dissolution of State in various regions, including Africa, Europe and Latin America. They include the dissolution of Great Colombia (1829–1831), the dissolution of the Union of Norway and Sweden (1905), the disappearance of the Austro-Hungarian Empire (1918), the disappearance of the Federation of Mali (1960), the dissolution of the United Arab Republic (1961) and the dissolution of the Federation of Rhodesia-Nyasaland (1963).[271] However, fewer cases reveal the relevant State practice of succession with respect to obligations arising from internationally wrongful acts committed by the predecessor State before the date of succession.

167. The early practice, with the exception of the dissolution of Great Colombia in 1831, does not provide support for the principle of succession. By contrast, modern State practice, though not very frequently occurring (some agreements and cases), allows for a rejection of a strict and automatic application of the principle of non-succession. The view of the doctrine, which is shared by the Special Rapporteur, rightly points out that the strict "application of the principle of non-succession in the context of dissolution of State would be in complete contradiction with the very idea of justice".[272] This does not mean, however, the endorsement of the opposite solution of the *automatic* transfer of *all* obligations arising from the responsibility of the predecessor State to *all* new successor States. Whether the obligations arising from internationally wrongful acts (and what obligations) may be transferred to the successor States depends on the particular circumstances of each case.

168. The early practice includes the dissolution of the Union of Colombia (1829–1831), after which the United States invoked the responsibility of the three successor States (Colombia, called at that time New Granada, Ecuador and Venezuela), leading to the conclusion of agreements on compensation for illegal acquisition of American ships. The three successor States agreed to recognize and share among themselves the compensation related to the damage alleged by the United States. Venezuela (in 1852), New Granada/Colombia (in 1857) and Ecuador (in 1862) signed separate treaties with the United

[271] See para. (6) of the commentary to art. 39 of the draft articles on succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), chap. II, sect. D.

[272] Dumberry, *State Succession to International Responsibility*, p. 104. "Thus, the injured third State would be found to be left with no debtor to provide compensation for the damage it suffered as a result of the commission of the internationally wrongful act. The successor State(s) would also benefit from the consequences of the commission of the acts of the predecessor State". (*ibid*.)

States whereby they apparently agreed to divide the responsibility among themselves in proportion to the division of the national debt of the Union of Colombia.[273] The division was made by the Convention of Bogota of 23 December 1834, concluded between New Granada and Venezuela, to which Ecuador acceded on 17 April 1857. These instruments indicate the following proportions: New Granada 50 per cent, Venezuela 28.5 per cent, and Ecuador 21.5 per cent.[274]

169. Article 1 of the United States-Venezuela treaty stipulates that Venezuela obligates itself to pay to the United States a sum for the wrongful acts committed upon these vessels. It is well evident from the context of the treaty that confiscations had occurred when Venezuela was part of the Union of Colombia; consequently, Venezuela engaged to pay a part of the reparation for injury committed by the former State.[275] On the contrary, the agreement concluded in 1862 between the United States and Ecuador[276] in order to "adjust the claims of citizens of said States against Ecuador" and vice versa does not provide a clear answer to the issue of transfer of responsibility. This agreement simply established a temporary commission, whose aim was to settle claims on the part of "corporations, companies or individuals" upon the two States concerned.[277] The Commission established under the above-mentioned United States-Ecuador agreement decided in the case of the schooner *Mechanic* on the liability of Ecuador to pay 21.5 per cent of the sum due as compensation for a wrongful act for which Colombia was responsible.[278]

170. Another example was the United Arab Republic, created as result of the unification of Egypt and Syria in 1958. The United Arab Republic lasted only until 1961 when Syria left the united State. After the dissolution, Egypt, as one of the two successor States, entered into agreements with other States (e.g. Italy in 1965, Sweden in 1972, the United Kingdom in 1972, the United States in 1976) on compensation to foreign nationals whose property had been nationalized by the United Arab Republic (the predecessor State) during the period 1958–1961.[279] Other types of agreements were also entered into by the Arab Republic of Egypt with Switzerland (1964), Lebanon (1964), Denmark (1965), Greece (1966) and the Netherlands (1971). Those agreements all gave the foreign nationals concerned the possibility for to recover compensation for 65 per cent (or 50 per cent in that of the Netherlands) of what they would be entitled to under the laws of the United Arab Republic.[280] Yet another aspect is worth mentioning; it seems to be undisputed that the

[273] See D.P. O'Connell, *The Law of State Succession* (Cambridge, Cambridge University Press, 1956), p. 158; Dumberry, *State Succession to International Responsibility*, p. 106.

[274] Convention concluded between the Republic of Venezuela and the Republic of New Grenada, for the acknowledgement and division of the active and passive credits of Colombia (Bogotá, 23 December 1834), *British and Foreign State Papers, 1834–1835* (London, 1852), vol. XXIII, p. 1342. Cf. para. (6) of the commentary to draft article 39 of the draft articles on succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), chap. II, sect. D.

[275] See Protocol between the United States of America and Venezuela (Caracas, 1 May 1852), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 1776–1909*, vol. II, Malloy, pp. 1842–1843.

[276] Convention on Adjustment of Claims (Guayaquil, 25 November 1862), *Treaties and Other International Agreements of the United States of America 1776–1949*, C.I. Bevans (ed.), vol. 7 (Washington, D.C., U.S. Government Printing Office, 1971), p. 316.

[277] See Volkovitsch, "Righting wrongs", p. 2175.

[278] *Case of the Atlantic and Hope Insurance Companies v. Ecuador (case of the schooner* Mechanic*)*, opinion of the Commissioner, Mr. Hassaurek, UNRIAA, vol. XXIX (United Nations publication, 2012), pp. 108–114.

[279] E.g. Agreement between the Government of the United States of America and the Government of the Arab Republic of Egypt Concerning Claims of Nationals of the United States (Cairo, 1 May 1976), *United States Treaties and Other International Agreements*, vol. 27 (1976), p. 4214. See also B.H. Weston, R.B. Lillich and D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements 1975–1995* (Ardsley, New York, Transnational, 1999), pp. 139, 179, 185 and 235. Cf. Dumberry, *State Succession to International Responsibility*, pp. 107–110.

[280] See Dumberry, *State Succession to International Responsibility*, p. 110.

parties to those agreements, albeit implicitly, referred to a "territorial limitation" clause, in order to confine responsibility to assets located within the territory of the signatory State, namely Egypt.[281]

171. More recent examples of State practice are the dissolutions of Czechoslovakia and Yugoslavia. First, there is almost no controversy that the break-up of Czechoslovakia on 1 January 1993 is a case of dissolution of State. The dissolution of Czechoslovakia was based on agreement and even done in conformity with its Constitution. Both Czech and Slovak national parliaments declared before the dissolution their willingness to assume the rights and obligations arising from the international treaties of the predecessor State.[282] Article 5 of Constitutional Act No. 4/1993 even stated that "The Czech Republic took over rights and obligations which had arisen from international law for the Czech and Slovak Federal Republic at the day of its end, except of the obligations related to the territory which had been under the sovereignty of the Czech and Slovak Federal Republic, but not being under the sovereignty of the Czech Republic".[283]

172. The most important judicial decision in favour of the transfer of responsibility may be that of the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case. Concerning international responsibility of Slovakia, the Court stated:

> According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct, but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.[284]

173. Notwithstanding its reference to the special agreement (*compromis*) between Hungary and Slovakia, the Court thus seems to recognize the succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts. Indeed, the present report does not deny the role of the Special Agreement. However, it was not a perfect agreement on all issues of succession and responsibility, which remained the object of dispute. For example Hungary, while assuming on one hand that Slovakia could not be deemed responsible for breaches of treaty obligations and obligations under customary international law attributable only to Czechoslovakia, which no longer existed, on the other hand argued that such breaches "created a series of secondary obligations, namely, the obligation to repair the damage caused by the wrongful acts" and that "[t]hese secondary obligations were [not] extinguished by the disappearance of Czechoslovakia".[285] In other words, one can conclude that it was not the responsibility of Czechoslovakia as such, but the secondary obligations created by wrongful acts that continued after the date of succession. Moreover, the arguments of Hungary seem to be based on an exception to the general

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[281] See Weston, Lillich and Bederman, *International Claims: Their Settlement by Lump Sum Agreements*, p. 56.

[282] See Proclamation of the National Council of the Slovak Republic to Parliaments and Peoples of the World (3 December 1992) and Proclamation of the Czech National Council to all Parliaments and Nations of the World (17 December 1992) (reproduced in A/47/848, annexes II and I, respectively).

[283] Constitutional Act No. 4/1993, on measures relating to the extinction of the Czech and Slovak Federative Republic.

[284] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment* (see footnote 85 above), at p. 81, para. 151.

[285] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Memorial of the Republic of Hungary, vol. I, 2 May 1994, para. 8.03. Cf. Dumberry, *State Succession to International Responsibility*, p. 114.

principle of non-succession.[286]

174. Similarly, and interestingly, Slovakia also rejected its succession in the responsibility of Czechoslovakia. Slovakia mostly focused its attention on rules of State succession to treaties. It nevertheless briefly dealt with the question of succession and responsibility. It referred to the "widely accepted thesis of non-succession to delictual responsibility", quoting the work of Monnier to recall "the practically unanimous view of the doctrine" on this question.[287]

175. It means that the Court had to decide the issue of responsibility in spite of the contradictory pronouncements of the parties to this dispute. It seems therefore that the role of the presumed consent (in the Special Agreement) should not be overestimated. However important was this Agreement, there are nevertheless also other relevant circumstances. They include the fact that the 1977 treaty[288] established a territorial regime, an argument maintained by Slovakia, denied by Hungary and ultimately upheld by the International Court of Justice. Indeed, the close link between the internationally wrongful act or its consequences and the territory is another important factor. Last but not least, the case also bears on the acts of the authorities of one of the republics of the Czechoslovak federation, committed in 1992, i.e. before the date of succession, which devolved in the independent and sovereign Slovak Republic.

176. Even more complex than the case of Czechoslovakia were the issues of State succession after the collapse of the former Yugoslavia. One of the reasons was that, in 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) declared itself to be a continuator of the Socialist Federal Republic of Yugoslavia. However, the other former Yugoslav republics did not agree. The Security Council and General Assembly also refused to recognize the Federal Republic of Yugoslavia as a continuing State in resolutions of September 1992.[289] The Arbitration Commission (the Badinter Commission) took the same position.[290] Finally, the Federal Republic of Yugoslavia changed its position in 2000, when it applied for admission to the United Nations as a new State.[291]

177. On the basis of a recommendation of the Badinter Commission, the successor States to the former Yugoslavia had to resolve all issues relating to succession of States by agreement. The Agreement on Succession Issues was concluded on 29 June 2001.[292] According to its preamble, the Agreement was reached after negotiations "with a view to

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[286] See oral pleadings by Prof. P.M. Dupuy, Counsel for Hungary, 7 March 1997, contained in document CR 97/6 of the International Court of Justice), para. 6: "La Slovaquie prétend constamment qu'à l'égard du traité de 1977, elle a succédé à la Tchécoslovaquie et qu'elle est donc à son tour partie à ce traité … Si l'on suivait … le raisonnement slovaque, il y aurait bien entendu là un fondement suffisant pour établir sa responsabilité, si toutefois on évitait d'appliquer le principe général selon lequel il n'y a pas succession en matière de responsabilité internationale … à ce dernier principe, il est toutefois une exception. Celle qui se trouve réalisée lorsqu'un État revendique et poursuit les faits illicites de son prédécesseur" ["Slovakia consistently claims that, with regard to the 1977 Treaty, it has succeeded to Czechoslovakia and so is, in its turn, a Party to that Treaty … If one were … to follow the reasoning of Slovakia, it would of course provide a sufficient basis for the establishment of its responsibility — provided one were to avoid applying the general principle according to which there is no succession in matters of international responsibility … but there is however one exception to that latter principle. That exception comes about when a State lays claim to and continues the unlawful acts of its predecessor." (translation contained in document CR 97/6 (translation)].

[287] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Counter-Memorial of the Slovak Republic, vol. I, 5 December 1994, paras. 3.59–3.60.

[288] Treaty on the the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (Budapest, 16 September 1977), United Nations, *Treaty Series*, vol. 1109, p. 211.

[289] Security Council resolution 777 (1992); General Assembly resolution 47/1 of 22 September 1992.

[290] Opinion No. 10, 4 July 1992, reproduced in A/48/874-S/1994/189, annex.

[291] General Assembly resolution 55/12 of 1 November 2000.

[292] Vienna, 29 June 2001. United Nations, *Treaty Series*, vol. 2262, No. 40296, p. 251.

identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of Yugoslavia". It must be pointed out that article 2 of annex F to the Agreement deals with the issues of internationally wrongful acts against third States before the date of succession:

> All claims against the [Socialist Federal Republic of Yugoslavia] which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement. The successor States shall inform one another of all such claims against the [Socialist Federal Republic of Yugoslavia].

178. It can be assumed from this text that the obligations of the predecessor State do not simply disappear as a result of the dissolution of the Socialist Federal Republic of Yugoslavia.[293] In addition, article 1 of the annex F refers to the transfer of claims from the predecessor State to the successor State.[294]

179. The question of a successor State assuming responsibility for wrongful acts committed by the predecessor State was discussed in the second case on *Application of the Genocide Convention (Croatia v. Serbia)*.[295] In spite of the fact that the Court rejected the claim of Croatia and the counter-claim of Serbia on the basis that the intentional element of genocide (*dolus specialis*) was lacking, the judgment seems to be the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession.

180. The International Court of Justice recalled that, in its judgment of 18 November 2008, it had found that it had jurisdiction to rule on the claim of Croatia in respect of acts committed as from 27 April 1992, the date when the Federal Republic of Yugoslavia came into existence as a separate State and became party, by succession, to the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, "Genocide Convention"), but had reserved its decision on its jurisdiction in respect of breaches of the Convention alleged to have been committed before that date.[296] In its 2015 judgment, the Court begins by stating that the Federal Republic of Yugoslavia could not have been bound by the Genocide Convention before 27 April 1992, even as a State *in statu nascendi*, which was the main argument of Croatia.[297]

181. The Court takes note, however, of an alternative argument relied on by the applicant during the oral hearing in March 2014, namely that the Federal Republic of Yugoslavia (and subsequently Serbia) could have succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia for breaches of the Convention prior to that date. Croatia advanced two separate grounds on which it claimed the Federal Republic of Yugoslavia had succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia. First, it claimed that this succession had come about as a result of the application of the principles of general international law regarding State succession.[298] It relied upon the award of the Arbitration Tribunal in the *Lighthouses Arbitration*, which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make the successor State responsible

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[293] Cf. Dumberry, *State Succession to International Responsibility*, p. 121.

[294] "All rights and interests which belonged to the [Socialist Federal Republic of Yugoslavia] and which are not otherwise covered by this Agreement (including, but not limited to, patents, trade marks, copyrights, royalties, and claims of and debts due to the [Socialist Federal Republic of Yugoslavia]) shall be shared among the successor States, taking into account the proportion for division of [Socialist Federal Republic of Yugoslavia] financial assets in Annex C of this Agreement."

[295] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* (see footnote 193 above).

[296] *Ibid.*, paras. 74-78 and 84 *et seq*.

[297] *Ibid*., paras. 104–105.

[298] *Ibid*., para. 107.

for the former's wrongdoing.[299] Secondly, Croatia argued that the Federal Republic of Yugoslavia, by declaration of 27 April 1992, had indicated "not only that it was succeeding to the treaty obligations of the [Socialist Federal Republic of Yugoslavia], but also that it succeeded to the responsibility incurred by the [Socialist Federal Republic of Yugoslavia] for the violation of those treaty obligations".[300]

182. Although the Court did not need to decide on the question of succession because of the rejection of the Croatian claim at the first step of the three-fold test,[301] it did not refuse and thus accepted the alternative argument of Croatia as to its jurisdiction over acts prior to 27 April 1992.

183. It is interesting to note that Serbia, while refusing the arguments of Croatia, also maintained that all issues of succession to the rights and obligations of the Socialist Federal Republic of Yugoslavia were governed by the Agreement on Succession Issues (2001),[302] which lays down a procedure for considering outstanding claims against the Socialist Federal Republic of Yugoslavia.[303] This seems to support the view that the 2001 Agreement and annex F thereto are indeed relevant to the issues of succession in respect of State responsibility.

184. The problems of various individual claims affected by the dissolution of Yugoslavia gave rise to disputes before national courts in the successor States of Slovenia and Croatia, some of which were eventually submitted to the European Court of Human Rights. Several cases arose from the acts of the Federal Customs Inspectorate of the Socialist Federal Republic of Yugoslavia on the territory of the present day Slovenia[304] and those of the Federal Foreign Exchange Operations Inspectorate in Croatia.[305] The consequences of such acts remained or judicial proceedings continued after the date of succession. In the first proceedings, the civil action was initiated against the Socialist Federal Republic of Yugoslavia, in others against Slovenia and Croatia, respectively. The Slovenian courts and the European Court of Human Rights were of the opinion that annex F or annex C (financial assets and liabilities) of the Agreement on Succession Issues were a proper legal foundation for resolving the cases.

185. The above-mentioned considerations and examples of practice and views given in doctrine may lead to the conclusion that, in cases of dissolution of State, obligations arising from the internationally wrongful act do not disappear and usually pass to one or more

[299] *Ibid.* See the pleadings of Prof. J. Crawford, advocate for Croatia, public sitting held on Friday, 21 March 2014, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, document CR 2014/21, para. 42: "We say the rule of succession can occur in particular circumstances if it is justified. There is no general rule of succession to responsibility but there is no general rule against it either."

[300] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* (see footnote 193 above), para. 107.

[301] *Ibid*., para. 112: "[T]he Court would need to decide: (1) whether the acts relied on by Croatia took place; and if they did, whether they were contrary to the Convention; (2) if so, whether those acts were attributable to the [Socialist Federal Republic of Yugoslavia] at the time that they occurred and engaged its responsibility; and (3) if the responsibility of the [Socialist Federal Republic of Yugoslavia] had been engaged, whether the [Federal Republic of Yugoslavia] succeeded to that responsibility."

[302] Vienna, 29 June 2001. United Nations, *Treaty Series*, vol. 2262, No. 40296, p. 251.

[303] Cf. the pleadings of Prof. A. Zimmermann, advocate for Serbia, who referred to article 2 of annex F to the Agreement, which provides for the settlement of disputes by the Standing Joint Committee, public sitting held on Thursday, 27 March 2014, at 3 p.m., in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, document CR 2014/22, paras. 52–54.

[304] *Glas-Metall Trust Reg. v. Slovenia*, application No. 42121/04, European Court of Human Rights; *Glas-Metall Trust Reg v. Slovenia*, application No. 47523/10, European Court of Human Rights (still pending).

[305] *Zaklan v. Croatia*, application No. 57239/13, European Court of Human Rights (still pending).

successor States. It is less clear, however, to which of the successor States they pass and to what extent those States would be bound by such obligations.

186. The Institute of International Law resolution adopted a relatively unequivocal solution in article 15 (Dissolution of a State), paragraph 1: "When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the rights or obligations arising from an internationally wrongful act in relation to which the predecessor State has been the author or the injured State pass, bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs 2 and 3 of the present Article, to one, several or all the successor States."[306] This article simply states that the obligations pass to one, several or all the successor States. Without reference being made in that article to agreements, all that remains is the duty to negotiate and the relevant circumstances to determine which of the successor States becomes bearer of the rights or obligations. These relevant factors are: the existence of a direct link between the consequences of the internationally wrongful act and the territory or the population of the successor State or States; and the fact that the author of the internationally wrongful act was an organ of the predecessor State that later became the organ of the successor State.[307]

187. The present report takes a slightly more cautious approach. While accepting the presumption of the transfer of obligations from the predecessor State to the successor State or States, it underlines the role of agreements. It should be recalled that different categories of agreements can be distinguished, namely the agreements between the predecessor and successor States (devolution agreements), the agreements between the successor States and the injured State (claims agreements) and those where the successor States agree between themselves to share and settle consequences of the internationally wrongful act of the predecessor State. The principle of *pacta tertiis* will apply accordingly.[308]

188. When it comes to the factors to be considered in determining the holder of obligations, the analysis of State practice also supports considering both the factor of a territorial link and of the devolution of an organ of the predecessor State into the organ of one of the successor States. The *Gabčíkovo-Nagymaros Project* case supports consideration of both criteria. Indeed, this was a case of dissolution of two-part federation based on a consensus. Moreover, the wrongful act consists of the breach of the bilateral treaty establishing a kind of territorial regime. However, the dissolution of Colombia and that of Yugoslavia presented more complex issues. Therefore, these cases stress the importance of agreements in order to distribute the obligations arising from responsibility among the successor States.

189. Having said that, the Special Rapporteur wishes to make it clear that a transfer of obligations may take place according to or in the absence of an agreement. At the very least, the successor States have to negotiate among themselves and with the injured State in good faith. The above-mentioned circumstances are certainly relevant but not the only possible factors. In cases where no territorial link exists, the distribution of the obligation of reparation (in particular, compensation) may follow the equitable proportion used for distribution of State property and debts. In addition, other factors should be taken into account, such as the nature and form of reparation. It may include the situations where, due to the nature of restitution, only a given successor State is in a position to make such restitution, etc. At this stage, it seems impossible to determine with a sufficient clarity all the relevant factors. They can be better addressed at a later stage, in the context of the plurality of States and their shared responsibility.

[306] Institute of International Law, *Yearbook*, vol. 76 (see footnote 40 above) resolution, p. 565, art. 15, para. 1.
[307] *Ibid.*, art. 15, paras. 2 and 3.
[308] Cf. A/CN.4/708, paras. 94 *et seq*.

190. In the light of the above considerations, the following draft article is proposed:

Draft article 11
Dissolution of State

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States.

2. Successor States should negotiate in good faith with the injured State and among themselves in order to settle the consequences of the internationally wrongful act of the predecessor State. They should take into consideration a territorial link, an equitable proportion and other relevant factors.

Part Four — Future work

VI. Future programme of work

191. Concerning the future programme of work on the present topic, it is the intention of the Special Rapporteur to follow the programme of work outlined in his first report,[309] with a necessary degree of flexibility. Some of the adjustments have been introduced in the first part of the present report (paras. 13 to 20). The third report (2019) will focus on the transfer of the rights or claims of an injured predecessor State to the successor State. The fourth report (2020) could address procedural and miscellaneous issues, including the plurality of successor States and the issue of shared responsibility, or a possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals.

192. It is clear that draft articles 3 and 4, as proposed in 2017, will need to be revisited in the light of other draft articles that may be adopted by the Commission on the basis of this report and the next report. Similarly, the newly identified issue of forms and invocation of reparation will also require further analysis, which may eventually give rise to additional draft articles. The Commission may also wish to include some other definitions in draft article 2 (Use of terms). Depending on the progress of the debate on the reports of the Special Rapporteur and the overall workload of the Commission, the entire set of draft articles could be adopted on first reading in 2020 or in 2021.

[309] A/CN.4/708, para. 133.

Annex I

Text of the new proposed draft articles

Draft article 5
Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Draft article 6
General rule

1. Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States.

2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the responsibility of the predecessor State and claim from it a reparation for the damage caused by such internationally wrongful act.

3. This rule is without prejudice to the possible attribution of the internationally wrongful act to the successor State on the basis of the breach of an international obligation by an act having a continuing character if it is bound by the obligation.

4. Notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles.

Draft article 7
Separation of parts of a State (secession)

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of secession of a part or parts of the territory of a State to form one or more States, if the predecessor State continues to exist.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State or States.

4. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

Draft article 8
Newly independent States

1. Subject to the exceptions referred to in paragraph 2, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State.

2. If the newly independent States agrees, the obligations arising from an internationally wrongful act of the predecessor State may transfer to the successor State. The particular circumstances may be taken into consideration where there is a direct link between the act

or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy.

3. The conduct of a national liberation or other movement which succeeds in establishing a newly independent State shall be considered an act of the new State under international law.

Draft article 9
Transfer of part of the territory of a State

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State when part of the territory of the predecessor State becomes part of the territory of the successor State.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State.

Draft article 10
Uniting of States

1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State.

2. When a State is incorporated into another existing State and ceased to exist, the obligations from an internationally wrongful act of the predecessor State pass to the successor State.

3. Paragraphs 1 and 2 apply unless the States concerned, including an injured State, otherwise agree.

Draft article 11
Dissolution of State

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States.

2. Successor States should negotiate in good faith with the injured State and among themselves in order to settle the consequences of the internationally wrongful act of the predecessor State. They should take into consideration a territorial link, an equitable proportion and other relevant factors.

Annex II

Text of draft articles 1 and 2, as provisionally adopted by the Drafting Committee

Draft article 1
Scope

The present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.

Draft article 2
Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

…

Annex III

Text of draft articles 3 and 4, as proposed in the first report (A/CN.4/708)

Draft article 3

Relevance of the agreements to succession of States in respect of responsibility

1. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

2. The rights of a predecessor State arising from an international wrongful act owed to it by another State before the date of succession of States do not become the rights of the successor States towards the responsible State only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such rights shall devolve upon the successor State.

3. An agreement other than a devolution agreement produces full effects on the transfer of obligations or rights arising from State responsibility. Any agreement is binding upon the parties to it and must be performed by them in good faith.

4. The preceding paragraphs are without prejudice to the applicable rules of the law of treaties, in particular the *pacta tertiis* rule, as reflected in articles 34 to 36 of the Vienna Convention on the Law of Treaties.

Draft article 4

Unilateral declaration by a successor State

1. The rights of a predecessor State arising from an internationally wrongful act committed against it by another State or another subject of international law before the date of succession of States do not become the rights of the successor State by reason only of the fact that the successor State has made a unilateral declaration providing for its assumption of all rights and obligations of the predecessor State.

2. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it, unless its unilateral declaration is stated in clear and specific terms.

3. Any unilateral declarations by a successor State and their effects are governed by rules of international law applicable to unilateral acts of States.