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Third report on succession of States in respect of State responsibility

by Pavel Šturma, Special Rapporteur**

Contents

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Part One – Introduction

I. Overview of the work on the topic

1. During its sixty-ninth session, in May 2017, the Commission decided to include the topic "Succession of States in respect of State responsibility" in its current programme of work, and appointed Mr. Pavel Šturma as Special Rapporteur. Thereafter, the Special Rapporteur submitted his first report on the topic,[1] focusing on the approach to the topic, its scope and outcome, as well as a tentative programme of work, as a basis for an initial debate later in the session. He also proposed four draft articles: draft article 1 (Scope), draft article 2 (*a*)–(*d*) (Use of terms), draft article 3 (Relevance of the agreements to succession of States in respect of responsibility) and draft article 4 (Unilateral declaration by a successor State). The report was considered by the Commission during the second part of its session in July 2017 and draft articles 1 to 4, as proposed by the Special Rapporteur, were referred to the Drafting Committee.

2. In the light of the debate in the Commission and in the Sixth Committee in 2017, the Special Rapporteur prepared his second report which included seven new draft articles,[2] namely draft article 5 (Cases of succession of States covered by the present draft articles), draft article 6 (General rule), draft article 7 (Separation of parts of a State (secession)), draft article 8 (Newly independent States), draft article 9 (Transfer of part of the territory of a State), draft article 10 (Uniting of States) and draft article 11 (Dissolution of State). This report was considered by the Commission during the second part of the session in July 2018.

3. According to the report, the fact that cases of State succession are of rare occurrence should not prevent the Commission from formulating certain general and special rules on succession or non-succession in respect of State responsibility. However, the Special Rapporteur admitted that State practice was diverse, context-specific and sensitive in this area. He did not suggest replacing one highly general theory of non-succession by an inverse theory in favour of succession. Instead, he suggested a more flexible and realistic approach.

4. Members generally agreed that it was important to maintain consistency with the previous work of the Commission, especially in relation to the articles on responsibility of States for internationally wrongful acts.[3] In relation to the subsidiary nature of the proposed rules, several members proposed that a draft article be added to indicate that the draft articles would only apply in the absence of any agreement between the parties, including the injured State. Some members also proposed changing the title of the topic to "State responsibility problems in cases of succession of States".

5. Following the debates in plenary in 2017 and 2018, the Commission referred all the draft articles proposed by the Special Rapporteur in his first and second reports to the Drafting Committee. At its 2017 and 2018 sessions, the Commission took note of the interim reports of the Chairperson of the Drafting Committee. So far, the Drafting Committee has provisionally adopted draft article 1 (Scope) [including new paragraph 2 (on the subsidiary nature of the draft articles)], draft article 2 (*a*)–(*d*) (Use of terms), draft article 5 (Cases of succession of States covered by the present

[1] First report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur (A/CN.4/708).

[2] Second report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur (A/CN.4/719).

[3] *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., para. 76.

draft articles) and draft article 6 (No effect upon attribution). Due to a lack of time, the Drafting Committee was not able to complete its work on the remaining draft articles. Furthermore, as proposed by the Special Rapporteur, draft articles 3 (Relevance of the agreements to succession of States in respect of responsibility) and 4 (Unilateral declaration by a successor State) would remain within the Drafting Committee until the Commission had a clear picture of rules applicable in various types of succession of States.

A. Summary of the debate in the Sixth Committee

6. In the course of the debate in the Sixth Committee of the General Assembly in 2018, a number of delegations commented on the Commission's report on the topic, including the second report of the Special Rapporteur, as well as the future programme of work on the topic.[4] Sweden (on behalf of the Nordic countries) and Slovenia welcomed the report and the fact that the Special Rapporteur, when drafting the second report, took into consideration the comments and suggestions from the Sixth Committee presented in 2017. At the same time, in their view, the work on the topic should not be unduly accelerated and the draft articles should be further elaborated. Bahamas (on behalf of the Caribbean Community (CARICOM)) appreciated the progress on the topic, while noting that at present the subject directly concerns only some States. However, the further codification work would make it possible to fill the existing gaps in legal regulation. Some States (for example, Romania and the Russian Federation) regretted that the Commission had not been able to make more significant progress.

7. Some States addressed the issue of the scarcity of State practice relevant to the topic (Belarus, the Islamic Republic of Iran, Israel, the Republic of Korea, the United Kingdom, and the United States of America). It was recalled that State practice was limited, diverse, context-specific and sensitive, as well as susceptible to divergent interpretations (Austria, Belarus, Israel, Malaysia, the Republic of Korea, the Russian Federation, Turkey and the United Kingdom). On the other hand, Japan recognized the importance of the work of the Special Rapporteur on the topic. The outcome of the Commission's work could be very beneficial if it filled gaps in the law on succession of States. In that regard, the Commission should collect and analyse a wide range of State practice from main legal systems of the world. France also appreciated the diversity of language sources used for the analysis. However, due to the paucity of individual cases, the Commission could clarify whether the draft articles constituted codification or progressive development of international law.

8. Concerning plausibility of the existence of the general rule applicable to the succession of States in respect of State responsibility, several delegations agreed with the Special Rapporteur that a general theory of non-succession should not be replaced by an inverse theory in favour of succession, and that a more flexible and realistic approach was required (France, Sweden (on behalf of the Nordic countries) and the United Kingdom). Yet other delegations expressed support for a general rule of non-succession, with some exceptions thereto (Mexico and Slovenia). The relevance of the principle of unjust enrichment was highlighted as a possible foundation for such exceptions (Austria).[5]

9. Several delegations commented on the issue of subsidiary nature of the draft articles. Few States (in particular Austria) stated that draft article 1, paragraph 2, was superfluous as it presented a general provision on *lex specialis*. This was also

[4] See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-third session, prepared by the Secretariat (A/CN.4/724).

[5] *Ibid.*, para. 51.

expressed by Slovakia. On balance, a number of States welcomed the inclusion of this provision into the present draft article 1 (the Czech Republic, Portugal, the Republic of Korea, and the Russian Federation) or favoured a provision to this effect (France, Israel and the United Kingdom).

10. Portugal also supported the Drafting Committee's changes to draft article 6, which had transformed it from an affirmation of a general rule to a provision on the attribution of responsibility. Likewise, the Czech Republic supported the content of the provisionally-adopted draft article 6, which it considered to be a logical and necessary prelude to the provision of draft article 6, paragraph 4, as proposed by the Special Rapporteur. It appreciated the soft language used in the formulation of draft article 6, paragraph 4.

11. While most delegations did not question the form of draft articles, some States presented different views. For example, Peru and Poland would prefer the outcome of the work in the form of general conclusions, the Russian Federation proposed an analytical report, the Islamic Republic of Iran suggested the form of draft guidelines and Romania pointed out that the relevant outcome of the Commission's work could result in elaboration of model clauses to be used by States concerned in their agreements on succession.

12. Some States suggested changing the title of the topic to "State responsibility problems in cases of succession of States", although the view was expressed that the words "aspects" or "dimensions" may be more appropriate than "problems" (Belarus, Israel and Portugal).

13. A number of delegations highlighted the importance of maintaining consistency with the 1978 Vienna Convention on succession of States in respect of treaties ("1978 Vienna Convention"),[6] with the 1983 Vienna Convention on succession of States in respect of State property, archives and debts ("1983 Vienna Convention"),[7] and with the 2001 articles on responsibility of States for internationally wrongful acts. However, an opposite view was also expressed (by the Russian Federation) considering the emphasis put by the Special Rapporteur on rules of State responsibility as inappropriate and recommending instead to follow the example of the 1978 and 1983 Vienna Conventions.

14. Most delegations supported the content of draft article 5. Nevertheless, some States raised certain questions (Austria, Belarus and Sweden), which, in the view of the Special Rapporteur, could be answered in the text of the commentary to draft article 5.

B. General approach (methodology) of the report

15. Before addressing new aspects of the topic as envisaged in the programme of future work outlined in the first report (para. 133), the Special Rapporteur finds it useful to revert to some general aspects of the topic, in the light of some views expressed during the debate in 2018 in the Commission and views expressed by some delegations in the Sixth Committee during the consideration of the topic. The Special Rapporteur welcomes all comments. They are an indispensable part of the rigorous analysis of the complex legal issues inherent to the topic and contribute to the advancement of the work. They provide invaluable feedback and guidance for future work. They may also be indicative of a need for further clarifications and elimination of possible misunderstandings. The Special Rapporteur will address these comments

[6] United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.
[7] A/CONF.117/14.

and suggestions when dealing with the issues to which they primarily relate. Here, he wishes to touch upon those that have broader ramifications for the topic.

16. The above considerations, based on the debate in the Commission and comments in the Sixth Committee, suggest the following points that may inform further work. They bear partly on the content of previous reports (and draft articles provisionally adopted thus far), and partly on the reflection of the received comments.

17. First, the Special Rapporteur fully recognizes the subsidiary nature of draft articles and priority of agreements between the States concerned, as has been highlighted in draft article 1, paragraph 2, provisionally adopted by the Drafting Committee.[8] The subsidiary nature of rules governing succession of States is also evident from some provisions of the 1978 and 1983 Vienna Conventions. Thus, paragraph 3 of article 10 of the 1978 Vienna Convention is an example showing that the Commission was aware of the fact that the provisions it was proposing in its draft articles on the succession of States in respect of treaties are of a *residual nature*. The rule concerning provisional application contained in paragraph 3 is qualified by the concluding proviso "unless the treaty otherwise provides or it is otherwise agreed". This proviso is clearly explained in the commentary relating to this paragraph.[9] Similarly, all draft articles being prepared under the current topic have to be understood as provisions having residual character. This approach underlines also other draft articles that the Special Rapporteur has already proposed[10] and will be at the basis of those proposed in the future.

18. Second, the work on this topic must preserve consistency with both the articles on the responsibility of States for internationally wrongful acts and the 1978 and 1983 Vienna Conventions. The consistency should concern not only terminology used but also solutions for substantive issues to be adopted. However, there are significant differences in the nature of legal relations based on treaties and those concerning property rights and obligations stemming from an internationally wrongful act on the other hand. These differences must be duly taken into consideration when it comes to the issue of succession in the context of State responsibility.[11]

19. Third, the Special Rapporteur is fully aware of the fact that "State practice is diverse, context-specific and sensitive in this area",[12] which seems to be broadly accepted by the members of the Commission. This aspect has been underscored also by several States that commented on the first and second reports. At the same time, this fact seems to lead to various views as to the possibility of formulating rules applicable in this field. The non-conclusiveness of State practice does not allow the existence of the "clean slate" principle to be asserted as a legal basis governing the relations between States. Or, in other words, the non-conclusiveness of State practice does not mean that the view according to which the responsibility for an

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[8] Paragraph 2 provides: "The present draft articles apply in the absence of any different solution agreed upon by the States concerned" (2018 statement of the Chairperson of the Drafting Committee, available from the website of the Commission at http://legal.un.org/ilc/guide/gfra.shtml).

[9] "*Paragraph 3*, [provides] that, as a general rule, the successor State, if it consents to be considered as a party [to the treaty], will be so considered *as from the date of the succession of States*. This general rule is qualified by the concluding proviso 'unless the treaty otherwise provides or it is otherwise agreed' which safeguards the provisions of the treaty itself … . The Commission concluded [that] it would be reasonable to maintain the residual rule in the form in which it appears in paragraph 3", *Yearbook … 1974*, vol. II (Part One), p. 196, para. (13) of the commentary to article 10 of the draft articles on succession of States in respect of treaties.

[10] See, in particular, draft article 3 (Relevance of agreements to succession of States in respect of responsibility), second report on succession of States in respect of State responsibility (A/CN.4/719), annex III.

[11] See the first report on succession of States in respect of State responsibility (A/CN.4/708), para. 72; and the second report (A/CN.4/719), para. 17.

[12] Second report on succession of States in respect of State responsibility (A/CN.4/719), para. 16.

internationally wrongful act "stops at the door of succession of States" is grounded in international law. The non-conclusiveness of State practice in this field also does not mean that the work on this topic is impossible or cannot be useful. The Commission's role is not limited to that of mere codification of well-established rules of international law. It includes "progressive development of international law and its codification" as one of the purposes of the United Nations referred to in Article 13 of the Charter of the United Nations. The articles governing responsibility of States for internationally wrongful acts have been formulated by the Commission and are largely considered as reflecting customary international law. Yet, they do not answer questions arising in the situations when one of the parties of the legal relationship resulting from an internationally wrongful act is affected by a succession of States. In this respect, an exercise aiming at the clarification of rules applicable in these situations clearly meets criteria of progressive development of international law in the area overlapping with rules on State responsibility, which already have been successfully codified.

20. Fourth, according to the programme of work outlined by the Special Rapporteur in his first report, which was accepted by members of the Commission, he focused first on the question of transfer of obligations arising from the commission of an internationally wrongful act. Thereafter, in the present report, he turns to that of transfer of rights, or the possibility to claim reparation. The question of separate or joint treatment of responsibility obligations and rights in the context of succession depends on an analysis of all relevant elements. Such analysis should precede the decision on the structure of draft articles, which is mostly a technical or drafting issue.

21. Fifth, the Special Rapporteur proceeds on the understanding that the articles should be formulated in view of different categories of succession of States, following, in principle, the different categories of succession of States identified in the 1978 and 1983 Vienna Conventions. This does not exclude possibility of merging some categories in one draft article in order to avoid unnecessary repetitions of identical substantive provisions. Such mergers are of a drafting nature and do not impact on the substance of provisions concerning a specific category of succession.

22. Sixth, the invocation of responsibility (secondary obligations or rights of the predecessor State against a successor State or by a successor State) may depend on particular circumstances, such as the existence of a territorial or personal nexus (link of the wrongful act or its consequences to the territory or population of the State); or other considerations, such as the existence of unjust enrichment resulting from an internationally wrongful act; or the determination of an equitable proportion when it comes to distribution of losses and reparation among several States. These issues will have to be kept in mind when considering various categories of succession of States.

23. Seventh, the main consequence of an internationally wrongful act is the obligation to provide full reparation, which may take different forms (see article 34 of the articles on responsibility of States for internationally wrongful acts). However, for the purpose of this topic, it seems to be appropriate to consider the question of reparation without entering into specific forms of reparation. Accordingly, this and future reports will address substantive problems from the overall perspective of reparation, assuming at the same time, that proposed solutions may, case by case, require an additional settlement between States concerned.

C. Additional general considerations

24. The debate also revealed the diversity in the interpretation of certain legal concepts relevant to the topic. Indeed, both rules on State responsibility and those of succession of States belong to the most complex problems in international law. They

include the issues of statehood, legal personality, identity or difference of subjects, continuity or discontinuity of States and their rights and obligations, as well as various elements generating international responsibility of States, in particular in situations involving more than one responsible State or more than one injured State.[13]

25. It may therefore be useful to briefly clarify the understanding and use, by the Special Rapporteur, of concepts such as succession, continuity and discontinuity in the context of State responsibility.

26. As already provided in draft article 2 (*a*) as provisionally adopted by the Drafting Committee, for the purpose of these draft articles, the term "succession of States" means "the replacement of one State by another in the responsibility for the international relations of territory". This definition is identical to the respective definitions contained in article 2 of the 1978 and 1983 Vienna Conventions. The Commission decided to leave definitions unchanged so as to ensure consistency in the use of terminology in its work on questions relating to the succession of States.

27. However, in order to avoid any misunderstanding in our discussions, it is important to be aware that in the literature, this term is sometimes defined in a different manner, or even used in a substantively different meaning. Some authors focus on the aspect of State sovereignty, or on the territorial and personal jurisdiction of States.[14]

28. Quite often, however, the term "succession" is used both to describe the factual situation of replacement of one State by another on the given territory and the legal regime (legal succession) in a sense of the transfer of rights and obligations from one State to another State, as a result of the territorial change.[15] Thus, according to the *Dictionnaire du droit international*, the term "succession of States" has two meanings: (*a*) "replacement of one State by another in the responsibility for the international relations of territory" (art. 2, para. 1(*b*) of the 1978 Vienna Convention) and (b) "a legal regime, in other words a devolution of rights and obligations from the predecessor State to the successor State".[16]

29. Neither the 1978 Vienna Convention nor the 1983 Vienna Convention employ the term "succession" in the meaning of a "legal succession" as substitution of one State to another State in a treaty or other relation. This was a result of the thorough debate in the Commission.[17] Consequently, also under this topic the use of the term

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[13] Certain aspects, namely those related to the shared responsibility, will be addressed in the fourth report. See also J. D. Fry, "Attribution of responsibility", in A. Nollkaemper, I. Plakokefalos and J. N. M. Schechinger (eds.), *Principles of Shared Responsibility in International Law: an Appraisal of the State of the Art*, Cambridge University Press, 2014), pp. 98–133, at pp. 101–104.

[14] This was very aptly captured for example by Brigitte Stern who proposed the definition as follows: "there is a succession of States when the sovereignty of one State is replaced by that of another State over a given territory, and in respect of the population under its jurisdiction" (B. Stern, "La succession d'États", in *Collected Courses of the Hague Academy of International Law*, vol. 262 (1996), pp. 9 *et seq*., at p. 92 (*il y a succession d'Etats lorsque la souveraineté d'un Etat est remplacée par celle d'un autre Etat sur un territoire donné, et à l'égard de la population relevant de sa juridiction*). See also the definition in I. Brownlie, *Principles of Public International Law*, 4th ed. Oxford, Clarendon Press, 1990, p. 654 (however, it lacks the reference to population).

[15] See Stern, "La succession d'États" (footnote above), pp. 88–95.

[16] J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant, 2001, p. 1059: *A. Conséquences des mutations territoriales de l'Etat dans l'ordre juridique interne et dans l'ordre juridique international lorsque ces mutations ont pour effet de substituer un ou plusieurs Etat(s) … à un autre… . B. … le terme succession est employé également pour qualifier un régime juridique, c'est-à-dire une dévolution des droits et obligations de l'Etat prédécesseur à l'Etat successeur, soit volontaire soit automatique*.

[17] See *Yearbook … 1974*, vol. II (Part One), p. 167, paras. 48–49 (A natural enough tendency also manifests itself both among writers and in State practice to use the word 'succession' as a convenient term to describe any assumption by a State of rights and obligations previously

"succession" in the meaning of "legal succession" will be avoided. It should also prevent any possible misunderstanding concerning the content and legal basis of the rules governing the fate of secondary rights and obligations resulting from an internationally wrongful act after the territorial change affecting the predecessor State, to be formulated by the Commission.

30. In the interest of full clarity, it also has to be stressed that the notion of "legal succession" discussed above is different from the problem of "legality" of the "succession of States", as defined in draft article 2 (*a*). The present draft articles do not deal with all "factual" situations of succession of States. As already clearly established in draft article 5, provisionally adopted by the Drafting Committee, and consistent with the equivalent provisions of the 1978 and 1983 Vienna Conventions, these articles deal solely with the effect of a succession of States (territorial change) that occurred in conformity with international law.

31. It may be also be recalled that when it comes to the discussion concerning notions of continuity or discontinuity and their impacts for the topic, there are often ambiguities concerning the concept of statehood. According to the definition in article 1 of the 1933 Convention on the Rights and Duties of States, the concept of "State" means an entity that has to have at least a permanent population, a defined territory, a government and a capacity to enter into relations with other States.[18] It is useful to keep in mind those objective elements of statehood in the context of succession of States. Even in cases of succession of States, those elements, in particular territory and population (and even some governmental organs), do not disappear but just pass from the space of sovereign powers (jurisdiction) of a predecessor State to that of its successor State or States.

32. Obviously, "the successor State does not derive its sovereignty from the predecessor State, but from international law and from its own statehood".[19] In other words, "[t]he successor State in no sense 'continues' the sovereignty of its predecessor".[20] Thus the new State establishes its sovereignty as its own original sovereignty, in accordance with international law. However, "[i]t cannot disengage itself from pre-existing rules and situations, or at least it cannot do so immediately and forever".[21] Therefore, it is possible that, while there is no transfer of sovereignty, in some situations one can "still reach the conclusion that the successor State is entitled to exercise the predecessor's rights and is obliged to discharge the predecessor's duties, because international law so directs".[22]

33. All these aspects should be taken into consideration in any debate on possible legal outcomes of a succession of States. There are two possible outcomes: continuity or discontinuity of rights and obligations. However, these concepts are not

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applicable with respect to territory which has passed under its sovereignty without any consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. … The approach to succession adopted by the Commission after its study of the topic of succession in respect of *treaties* is based upon drawing a clear distinction between, on the one hand, *the fact of the replacement of one State by another** in the responsibility for the international relations of a territory and, on the other, *the transmission of … rights and obligations** from the predecessor to the successor State" (*emphasis added).

[18] Article 1 of the Convention on the Rights and Duties of States, signed at Montevideo on 26 December 1933 (League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19).

[19] Second report on succession in respect of matters other than treaties by Mr. Mohammed Bedjaoui, Special Rapporteur, *Yearbook … 1969*, vol. II, A/CN.4/216/Rev.1, p. 77, para. 29.

[20] D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I: *International Relations*, Cambridge University Press, 1967, p. 26.

[21] Second report on succession in respect of matters other than treaties by Mr. Mohammed Bedjaoui, Special Rapporteur, *Yearbook … 1969*, vol. II, A/CN.4/216/Rev.1, p. 76, para. 23.

[22] D.P. O'Connell, *State Succession in Municipal Law and International Law* (see footnote 20 above), p. 32.

interchangeable with the problem of the existence of the rule of succession or that of non-succession. In fact, the legal continuity of rights and obligations may occur in three different hypotheses: (*a*) it is a result of the continuity (the identity of the State), where the continuator is consider to be identical with the predecessor State; (*b*) it is a result of the succession (the devolution of rights and obligations in application of a rule of international law (automatic succession)); or (*c*) it is a result of an adaptation (*novation*) or an agreed transfer of certain rights and obligations (despite the lack of automatic succession).[23]

34. In other words and in the context of State responsibility, the present report does not assert any automatic succession to rights and obligations arising from internationally wrongful acts (State responsibility), which would be the result of an automatic operation of rules of international law.[24] Rather, it proposes, in addition to cases of responsibility of the continuator and other cases where general rules of State responsibility apply, the possibility for a successor State to raise the issue of reparation of injury caused to the predecessor State, which is now affecting the successor State, with the wrongdoing State. This is the meaning of the phrase "may request reparation" used in articles proposed by the Special Rapporteur in this report.

35. The approach of the Special Rapporteur to the topic excludes both the (automatic) extinction of responsibility and the automatic transfer of responsibility in cases of succession of States.

36. As in the second report, the search for solutions is carried out based on individual categories of succession of States. It reveals a certain similarity among cases where the predecessor State continues to exist (cession of part of the territory, separation of parts of a State, and creation of a newly independent State). The default rule is that the predecessor State continues to have obligations and, subject to Part Two of this report, also rights arising from State responsibility. Nevertheless, when special circumstances so warrant, the injured State or subject may seek reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States. The purpose of the draft articles is to specify where such claims may take place.

37. Indeed, there are also other situations where responsibility may be invoked by the predecessor State and a successor State or by successor States only. If one of those States received from the wrongdoing State full reparation, the other of these States could eventually seek from this State compensation or another form of settlement. This and other aspects of possible relations among successor States will not be addressed in detail now, but at a later stage in another set of provisions that will be elaborated in the fourth report.

38. Finally, concerning the "time" element of an internationally wrongful act committed by the predecessor State or against the predecessor State, in both situations the draft articles are dealing only with situations when damage (injury) was not made good by reparation *before the date of succession of States*. Although this aspect should be evident, it is still useful to state it expressly. This aspect was raised in the debate in the Sixth Committee by Slovakia.[25] It is important, from both the legal and political points of view, to make it clear that the topic does not aim at addressing or providing any motives for reopening the cases resolved prior to the date of succession of States.

39. In other words, draft articles prepared under this topic apply solely to cases where the injured State did not receive full reparation before the date of succession of States. They concern only open cases where damage caused by an international

[23] See Stern, "La succession d'États" (footnote 14 above), p. 100.
[24] See *ibid*., p. 103. See also paragraphs 28 and 29 above and footnotes 16 (*in fine*) and 17 above.
[25] See A/C.6/73/SR.28, para. 111.

wrongful act committed before the date of succession remained entirely or partly without reparation. The notion of "full reparation" should be interpreted in accordance with the famous *Chorzów Factory* dictum[26] and the 2001 articles on responsibility of States for internationally wrongful acts.[27] However, succession of States as such does not provide grounds for reopening cases where the injured State received from the predecessor State less than full reparation but it accepted such compensation as "full and final settlement" of mutual claims. This is the case of lump sum agreements.[28]

Part Two – Reparation for injury resulting from internationally wrongful acts committed against the predecessor State

II. General issues

40. In accordance with the tentative programme of work on the topic outlined in the first report (para. 133 of the first report), this Part will address questions of reparation for injury resulting from an internationally wrongful act *committed against* the predecessor State for which the predecessor State did not receive full reparation before the date of succession of States. In other words, the focus here will be on where the succession of States occurs on the side of the injured State or States. As in the case of situations which were analysed in the second report from the perspective of an internationally wrongful act *committed by* the predecessor State, the problems will be analysed based the different categories of succession of States.

41. Unlike the work of the Institute of International Law, which treated the sort of secondary rights and obligations on the background of different categories of succession of States simultaneously,[29] the Special Rapporteur proposed and the Commission accepted a different approach for the reasons explained earlier.[30]

42. Indeed, an important difference between the question of succession to the right to reparation and the question of succession to obligations arising from State responsibility is that the right to reparation is merely a consequence of the internationally wrongful act of the responsible State. This State (and its wrongful act) remains the same and *not affected* by territorial modifications giving rise to the succession of States.[31] Moreover, certain claims may be influenced by the application

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[26] *Factory at Chorzów, Judgment of 13 September 1928 on the merits, PCIJ Reports*, Series A, No. 17, pp. 3 *et seq.*, at p. 47.

[27] Article 31 (Reparation): "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. "2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State." *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 91–94.

[28] See, for example, the 1982 Czechoslovakia–United States Claims Agreement on the settlement of certain outstanding claims and financial issues, *International Legal Materials*, vol. 21 (1982), pp. 371 *et seq*. See also V. Pěchota, "The 1981 U.S.–Czechoslovak Claims Settlement Agreement: an epilogue to postwar nationalization and expropriation disputes", *The American Journal of International Law*, vol. 76, No. 3 (July 1982), pp. 639–653; and R. B. Lillich and B. H. Weston, "Lump sum agreements: their continuing contribution to the law of international claims", *ibid.*, vol. 82, No. 1 (January 1988), pp. 69–80.

[29] See Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), Fourteenth Commission, Succession of States in matters of international responsibility, resolution (final text), pp. 711 *et seq*.

[30] See the present report, para. 20 above; and the second report on succession of States in respect of State responsibility (A/CN.4/719), paras. 21 and 191–192.

[31] See P. Dumberry, *State Succession to International Responsibility*, Leiden, Martinus Nijhoff, 2007, p. 312.

of the rule of *nationality* of claims (article 44 (*a*) of the articles on responsibility of States for internationally wrongful acts) or by rules governing the *plurality* of injured States (article 46 of the same articles). Therefore, the possible transfer of rights will be analysed separately from that of obligations.

43. This Part of the report will discuss, first, general issues relating to the rights of an injured State from the perspective of succession of States occurring on the side of an injured State, before turning to those aspects of the problem that are specific to the different categories of succession of States. Finally, the discussion will focus on secondary rights stemming from an internationally wrongful act which affected nationals of the predecessor State.

44. Concerning the categories of succession of States, attention will be paid separately to situations when the predecessor State *continues to exist* after the date of succession of States and to situations when the predecessor State *ceases to exist*.[32] In view of the fact that in the former case the predecessor's international legal personality is not affected by partial loss of its territory and the successor State (or States) appears next to this State,[33] the problems are of a different nature from those which arise in the latter situation when the predecessor State ceases to exist and only the successor State or States are confronted with unresolved problems of a wrongful act against the predecessor State.

45. It is largely accepted that succession of States does not affect the right of the predecessor State that continues to exist to claim reparation from the wrongdoing State for its acts committed before the date of succession of States.[34] Such a claim is based on the generally applicable rules on State responsibility. In principle, this thesis is correct. However, it does not answer all questions arising from situations when the injury caused by a wrongful act affected primarily or exclusively part of the territory which, following the succession of States, became territory of the successor State. This may be the case when the injury caused by an internationally wrongful act against predecessor State affected persons who subsequently became nationals of the successor State, in situations such as decolonization, separation or transfer of part of the territory (territorial cession). It is hard to imagine that the predecessor State could, after the date of succession of States, still claim reparation for the injury caused by an internationally wrongful act to the population of a territory that became a part of the successor State, on the basis of the fact that such wrongful act occurred before

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[32] This distinction was considered by the Commission in the draft articles on the succession of States in respect of treaties, adopted in the first reading; it was abandoned in the final draft on which the 1978 Vienna Convention is based. However, this distinction was made, with due justifications, in the 1983 Vienna Convention on succession of States in respect of State property, archives and debts, as well as in the 1999 Articles on nationality in relation to succession of States. On several occasions, during the work on the above topics, difficulties arising in practice with this distinction were voiced. See, for example, the debate in the Commission concerning the case of separation of Bangladesh from Pakistan (*Yearbook ... 1972*, vol. I, 1181st meeting, pp. 178–180). This view was expressed also by many States; see for instance the comments by the United States (*Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 329–330).

[33] For example, the case of separation of Pakistan from India in 1947; the case of Singapore that, two years after its adhesion to the Federation of Malaysia, separated from Malaysia in 1965; the separation of Bangladesh from Pakistan in 1971; the secession of Eritrea from Ethiopia in 1991; a wave of separations following the break-up of the Union of Soviet Socialist Republics in 1991; the separation of Montenegro from Serbia in 2006; or the case of creation of South Sudan by secession from Sudan in 2011.

[34] See, for example, B. Stern, "Responsabilité internationale et succession d'Etats", in L. Boisson de Chazournes and V. Gowland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality:* Liber amicorum *Georges Abi-Saab*, The Hague, Martinus Nijhoff, 2001, pp. 327 *et seq.*, at p. 354; and J.-P. Monnier, "La succession d'Etats en matière de responsabilité internationale", *Annuaire français de droit international*, vol. 8 (1962), pp. 65–90, at p. 67.

that date of succession of States. These situations undoubtedly exist, but are largely ignored by the writers.

46. By contrast, in the second type of situation when the predecessor State, which has been the victim of an internationally wrongful act of another State, ceases to exist, the prevailing opinion in doctrine is that there is no devolution of the right to reparation from the predecessor State to the successor State. According to this view, the successor State or States cannot claim reparation for injury from an internationally wrongful act committed against the predecessor State before the date of succession.[35] In a broader sense, according to this view, there is no succession (meaning *automatic* succession) of the rights of the injured State or the obligations of the wrongdoing State.[36]

47. The contrast between the outcomes of the application of these doctrinal views in situations when the injured State *continues to exist* and when that State *ceases to exist* (in cases of unification and dissolution) is noticeable. It is particularly striking when it comes to the distinction made between the cases of dissolution of a State and those of secession (separation) of a State. Concerning the differentiation between these two types of succession of States, the Commission observed – in the course of its previous work on succession of States – that the matter of continuity of international legal personality of a State is often a matter of broader political consideration, rather than that of application of objectively assessable criteria.[37] Deciding whether the situation is that of continuity or discontinuity involves a large degree of voluntarism. In this respect, numerous writers have opined that the concept of State continuity (based on the idea of identity of legal personality) is a mere fiction.[38] Consequently, blind application of the criteria of continuity of legal personality could result in the discriminatory treatment of States in a situation of disputed continuity.[39]

48. Moreover, the above-discussed doctrinal views are primarily based on the idea that the right to claim reparation for injury belongs, as a kind of "personal" right, only to the predecessor State.[40] This seems to be a reflection of the positivist doctrine that

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[35] See Monnier (footnote above), p. 86 (*l'Etat nouveau ne reprend pas les droits appartenant à l'Etat antérieur du fait d'un acte illicite dont il a été la victime* ("the new State does not take over the rights belonging to the previous State by reason of an unlawful act of which it was the victim")).

[36] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London, Routledge, 1997, p. 169.

[37] See *Yearbook ... 1974*, vol. II (Part One), p. 265, paras. (23)–(25) of the commentary to articles 33 and 34 of the draft articles on succession of States in respect of treaties. See also A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, 2015; and V. Mikulka, "Article 35 : cas de l'Etat qui subsiste après séparation d'une partie de son territoire", in G. Distefano, *et al.* (eds.), *La Convention de Vienne sur la succession d'États en matière de traités : Commentaire article par article et études thématiques*, vol. I, Brussels, Bruylant, 2016, pp. 1218–1219. In particular, see M. C. Wood, "Participation of former Yugoslav States in the United Nations and in multilateral treaties", *Max Planck Yearbook of United Nations Law*, vol. 1 (1997), pp. 231–257, at p. 242: "history demonstrates that there is often no agreement among [S]tates on whether a given situation is one of continuity or succession. Pragmatic solutions … may involve elements of both continuity and succession".

[38] W. Czapliński, "State succession and State responsibility", *Canadian Yearbook of International Law,* vol. 28 (1990), pp. 339–359.

[39] See also J. L. Kunz, "Identity of States under international law", *The American Journal of International Law*, vol. 49 (1955), pp. 68–76, at p. 73; K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, Librairie E. Droz, 1954; P. M. Eisemann and M. Koskenniemi (eds.), *State Succession: Codification Tested against the Facts, Hague Academy of International Law*, The Hague, Martinus Nijhoff, 1997, pp. 56–60; Stern, "La succession d'États" (footnote 14 above), p. 40; and H. Tichy, "Two recent cases of State succession – an Austrian perspective", *Austrian Journal of Public International Law*, vol. 44 (1992), pp. 117–136, at p. 120.

[40] C. Rousseau, *Droit international public*, vol. III : *Les compétences*, Paris, Sirey, 1977, p. 142.

viewed State responsibility as an aspect or capacity closely linked to the legal personality of the predecessor State, not as a body of rights and obligations of secondary nature.[41] Indeed, it was this approach, which – combined with the outdated concept of the recognition of States (as having constitutive effects) – led to the formation of the doctrine hostile to any possibility of invocation of responsibility towards the successor State or by the successor State.

49. Therefore, before examining the individual categories of succession of States, a few comments need to be made on the applicable rules of State responsibility, as codified in the articles on responsibility of States for internationally wrongful acts. First, the concept of "injured State" does not have its own general definition in the final version of articles (2001), but it was included in article 40 of the draft articles adopted on first reading (1996).[42] This was an introductory provision to the following paragraphs that specified the meaning of "injured State" by reference to sources of the infringed right (draft art. 40, para. 2) or to the concept of international crime where all other States were deemed to be injured (draft art. 40, para. 3). Without re-entering in the old debate on the distinction between "rights" and "interests" that took place in the earlier works of the Commission, it suffices to recall that the single and broadly defined concept of "injured State" was replaced by the diversity of rules governing standing of States.[43]

50. However, both the first and second reading versions of the relevant article build the concept of "injured State" on the right (or the obligation breached) rather than on (material) damage. This has a necessary impact on the issue of transfer (succession) of the right of reparation.

III. Claims for reparation in different categories of State succession

51. This chapter of the report focuses on problems of reparation for injury resulting from an internationally wrongful act committed against the predecessor State on the background of different categories of succession of States. The first section (A) will focus on cases when the predecessor State continues to exist. This includes cases of transfer of part of the territory by one State to another State (territorial cession), separation of part of the territory of a State resulting in creation of a new State (secession)[44] and cases when dependent territories acquired independence, which

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[41] See, for example, A. Cavaglieri, "Effets juridiques des changements de souveraineté territoriale", in Institute of International Law, *Annuaire*, vol. 36, Session of Cambridge (1931), Part I, p. 190 : *Qu'il s'agisse de l'observance des principes de droit international commun, qui lie les Etats dès le moment de leur reconnaissance mutuelle comme sujet de droit ... le rapport est toujours si personnel, si étroitement lié avec son sujet que leur sort ne peut être que le même. Il est absurde de penser qu'un Etat ... puisse hériter les droits fondamentaux que l'Etat disparu tenait de sa qualité de membre de la communauté internationale* ("Whether it is the observance of the principles of common international law, which binds States from the moment of their mutual recognition as subjects of law ... the report is always so personal, so closely linked with its subject that their fate can only be the same. It is absurd to think that a State ... could inherit the fundamental rights that the disappeared State had from being a member of the international community").

[42] "For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part one, an internationally wrongful act of that State" (*Yearbook ... 1996*, vol. II (Part Two), p. 62, art. 40, para. 1.

[43] See, for example, C. J. Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge University Press, 2005, pp. 32–40.

[44] *Par territoire en question, on comprend le territoire* étatique *et non un territoire dépendant qui ne faisait pas partie intégrante de l'Etat prédécesseur. La séparation doit aussi aboutir à l'apparition d'au moins un nouvel Etat sur le territoire qui auparavant faisait partie de l'Etat originaire. Ces deux critères permettent de distinguer [ces situations] de celles des Etats*

resulted in the establishment of newly independent States (decolonization). The other section (B) is devoted to situations when the predecessor State ceases to exist. These are cases of unification of States and cases of dissolution of States.

A. Cases of succession of States when the predecessor State continues to exist

1. Separation of parts of territory

52. In cases of separation of part or parts of the territory of a State, the analysis of State practice has to include both the practice concerning the State that continues to exist, and the practice concerning a State or States created as a result of separation from that State.[45] The entitlement of the predecessor State to claim reparation from the State responsible for an internationally wrongful act, committed before the date of succession, is generally accepted.

53. One such example of State practice can be found in the 1997 Agreement between the Government of France and the Government of Russia on reparation for expropriation of bonds after the Russian revolution of 1917.[46] While the primary object of the Agreement seems to be loans and bonds issued or guaranteed to the Government of France or French individuals by the Government of the Russian Empire before 7 November 1917, it covered claims concerning interests and assets based in territories ruled by the Government of the Russian Empire and subsequent Governments to which the Government of France or private and legal persons were deprived of property or ownership rights.[47] While the Agreement does not explicitly mention any legal responsibility of either party, article 2 (a) of the Agreement also refers to the claims linked to the intervention and other hostile operations by Western States, including France, against the Soviet Government in the period 1918–1922. This example illustrates the situation in whcih the issue of old claims is resolved a long time after the separation of numerous parts of territories from Russia.[48]

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nouvellement indépendants … , ou encore de celles du détachement d'une partie du territoire d'un Etat (ou d'un territoire dépendant) qui, sans former un nouvel Etat, s'attacherait à un autre Etat déjà existant ("By territory in question, one understands the *State* territory and not a dependent territory which did not form an integral part of the predecessor State. The separation must also lead to the appearance of at least one new State in the territory that previously was part of the original State. These two criteria make it possible to distinguish [these situations] from those of the newly independent States … , or from the detachment of part of the territory of a State (or dependent territory) which, without forming a new State, would attach to another already existing State") (V. Mikulka, "Article 34 : succession d'Etats en cas de séparation de parties d'un Etat", in G. Distefano, et al. (footnote 37 above), p. 1176, para. 52).

[45] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 323.

[46] 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, Decree No. 98-366 of 6 May 1998, *Journal Officiel de la République française* No. 112 of 15 May 1998, p. 7378.

[47] See, for example, P. M. Eisemann, "Emprunts russes et problèmes de succession d'Etats", in P. Juillard and B. Stern (eds.), *Les emprunts russes et le règlement du contentieux financier franco-russe*, CEDIN, Paris, 2002, pp. 53–78; and S. Szurek, "Epilogue 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 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.

[48] *L'éclatement de l'U.R.S.S. en décembre 1991, … a donné lieu à la naissance de 11 nouveaux Etats, notamment l'Azerbaïdjan, l'Arménie, le Belarus, la Géorgie, le Kazakhstan, le Kirghizstan, l'Ouzbékistan, la République de Moldova, le Tadjikistan, le Turkménistan et l'Ukraine. La Fédération de Russie, qui a perpétué la personnalité juridique de l'union en réclamant la continuité avec celle-ci, apparaît ainsi comme l'Etat prédécesseur qui subsiste après la date de la succession d'Etats. … Le cas du Belarus et de l'Ukraine présente une particularité : en effet, pendant l'existence de l'U.R.S.S., ces deux républiques avaient la*

Undoubtedly, the final mutual settlement is based on the legal premise that Russia is the legal "continuator" of the Union of Soviet Social Republics.[49] There are no reports, to the Special Rapporteur's knowledge, of any subsequent financial settlement between the Russian Federation and any successor State of the Soviet Union.

54. Unlike the above example of Russia, which illustrates the practice from the perspective of the State that preserved its international legal personality, other examples illustrate cases where States accepted that reparation is due, at least in part, to a successor State. Here, again, the practice takes the form of agreements.

55. The first such example concerns the distribution of reparation payable by Germany in the context of secession of Pakistan from India in 1947. The British Dominion of India was party to the 1946 Agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold. Its purpose was the equitable distribution among several injured States of the total assets available as reparation from Germany.[50] After the independence of India and the division of the territory of the former Dominion in 1947, Pakistan was viewed as a new State (successor State) that seceded from India. The Governments of India and Pakistan agreed in January 1948 on the division of the share of reparation allocated to India under the 1946 Agreement. This bilateral agreement led to the conclusion of an additional Protocol to the Agreement.[51] It was thus accepted that Pakistan (a new State) could claim reparation from Germany. The example shows that both the continuing State and the successor State were entitled to reparation for injury from internationally wrongful acts predating the date of succession of States.[52]

56. The following case illustrates the reparation (in the form of restitution) in connection with the end of the Second World War. After the defeat of Germany, many works of art and cultural property were transferred by the Red Army in 1945 from Germany to the Soviet Union. One part of these objects was returned in the 1950s and 1960s during the existence of the German Democratic Republic, a new State, created by secession from Germany only after the above referred transfer of art and other objects occurred. The return was agreed in 1958, when the Soviet Union and the German Democratic Republic signed a protocol for the restitution of some of the art treasures, books and archives.[53]

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compétence de conclure certains traités internationaux en leur propre nom, en particulier les multiples conventions internationales adoptées sous les auspices de l'Organisation des Nations Unies ("The break-up of the U.S.S.R. in December 1991, ... led to the creation of 11 new States, including Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Uzbekistan, the Republic of Moldova, Tajikistan, Turkmenistan and Ukraine. The Russian Federation, which perpetuated the legal personality of the union by claiming continuity with it, thus appears as the predecessor State which survives after the date of the succession of States. ... The case of Belarus and Ukraine has a peculiarity: indeed, during the existence of the USSR, these two republics had the power to conclude certain international treaties on their own behalf, in particular the many international conventions adopted under the auspices of the United Nations") (Mikulka, "Article 34 ..." (see footnote 44 above), pp. 1201–1202, paras. 113–114).

[49] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 324.

[50] Agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold, signed at Paris on 14 January 1946, United Nations, *Treaty Series*, vol. 555, No. 8105, p. 69.

[51] Protocol attached to the Paris Agreement of 14 January 1946 on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold, signed at Brussels on 15 March 1948), *ibid.*, p. 104.

[52] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 325.

[53] *Ibid.*, pp. 153–154 and 325–326.

2. Creation of newly independent States

57. The emergence of newly independent States represents the most significant category of succession of States, when the predecessor State (former colonial/administrative power) continues to exist. Unlike in cases of territorial cession or secession discussed above, a dependent territory had a status different from that of the administrating State – it was not considered as part of the metropolitan territory and it was not under the sovereignty of the colonial power. The international status of dependent territories varied significantly, in particular as far as various degrees of autonomy were concerned. Accordingly, international wrongful acts against a State having administrative authority which did not affect the territory of the dependent territory are not within the scope of this analysis. For the purpose of this analysis, only those internationally wrongful acts that were committed before independence and caused injury to these territories or their population will be examined here.

58. In the case of separation (secession), the predecessor State remains responsible for its own internationally wrongful acts against other States. The opposite situation is when a wrongful act committed by another State causes injury to the territory under the administration of the predecessor State, and this puts the predecessor State in a different position from a predecessor State in case of secession. The review of State practice will reveal examples of situations when the new successor State was able to claim reparation for wrongful acts, committed before the date of succession, that caused injury to its territory, which at the time of commission of such acts was a dependent territory.

59. One of the examples is the case concerning *Certain Phosphate Lands in Nauru* (1992).[54] In this case, Nauru initiated proceedings before the International Court of Justice concerning a dispute over the rehabilitation of certain phosphate lands worked out before its independence in 1968. In the period between 1947 and 1968, Nauru was a United Nations Trust Territory jointly administered by Australia, New Zealand and the United Kingdom. It is worth noting that this claim was not based merely on an agreement. Instead, Nauru alleged that Australia had breached many of its obligations under general international law, including its "obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources".[55] The Court implicitly recognized the right to submit a claim for a new State (Nauru), because it decided that it had jurisdiction over the dispute. However, the case was not decided on the merits because the parties reached an agreement under which Australia made an *ex gratia* payment. The parties in dispute then asked the Court to discontinue the proceedings.[56]

60. Another example of State practice relates to the peace treaties entered into by Japan with its Asian neighbours, namely Indonesia, Malaysia and Singapore, after the Second World War. What is particularly relevant for the topic is that the wrongful acts and damage were caused by Japan to the occupied territories and populations that were at that time under the British or Dutch colonial power. In other words, these States entitled to reparation are the new States (successor States) that did not exist

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[54] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.See also M. G Kohen and P. Dumberry, *The Institute of International Law's Resolution on State Responsibility and State Succession: Introduction, Text and Commentaries*, Cambridge University Press, 2019, p. 140.

[55] *Certain Phosphate Lands in Nauru, Memorial of the Republic of Nauru*, vol. 1, April 1990, p. 250. See also *ibid*., pp. 97 and 155–156.

[56] "Australia–Republic of Nauru: settlement of the case in the International Court of Justice concerning *Certain Phosphate Lands in Nauru*" [of 10 August 1993], *International Legal Materials*, vol. 32 (1993), pp. 1471–1479. See also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 322.

when the international wrongful acts affecting their territory were committed. This shows that the criterion for the identification of a State entitled to reparation for injury caused by the act of aggression was not the continuing legal personality of the predecessor State (colonial power) but the place where the wrongful act caused real damage and suffering to the populations of then dependent territories.

61. The first peace treaty containing provisions to this end was concluded between Japan and Indonesia (a former colony of the Netherlands) in 1958.[57] In article 4 of the Treaty, Japan committed that it was "prepared to pay reparation to the Republic of Indonesia in order to compensate the damage and suffering caused by Japan during the war". In return, Indonesia waived all its claims against Japan. This may support the view that the Treaty has some features of lump sum agreements.[58]

62. Another peace treaty was signed by Japan with Malaysia in 1967.[59] This former British colony, which became independent in 1957, also suffered during the Second World War. The Treaty provided for the obligation by Japan to pay reparation in the amount of 2,94 billion Yen (partly in goods and services). Another similar Treaty was signed in 1967 with Singapore after its secession from Malaysia (in 1965).[60] Both Treaties also confirmed the full and final settlement of all questions arising out of the events during the Second World War.

63. Similarly, the case of Namibia and its right to claim reparation, upon its independence, can be mentioned. Before the independence of Namibia in 1990, the General Assembly explicitly recognized that the future Government of an independent Namibia had the right to claim reparation for damages against South Africa as a result of the latter's illegal occupation and human rights violations.[61] The United Nations Council for Namibia also recognized such a right for Namibia against other States, individuals and corporations.[62]

64. To conclude, the State practice analysed, however limited it may appear, supports the view that the reparation for damage caused by an internationally wrongful act committed before the date of succession can be claimed even after the date of succession.

65. In the course of his work on provisions concerning situations of succession of States when the predecessor State continues to exist, the Special Rapporteur took into consideration comments and proposals made in 2018 by some members of the Commission in connection with draft articles 7, 8 and 9 proposed in the second report (cases of transfer of part of the territory by one State to another State (territorial cession); separation of part of the territory of a State resulting in creation of a new State (secession); and cases when dependent territories acquired independence, which resulted in the establishment of newly independent States (decolonization)). These proposals aimed at merging provisions dealing with these three situations into a single article, because of their common denominator, namely the fact that in all these cases the predecessor State continues to exist. This element is a most important aspect

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[57] Treaty of Peace [between Japan and Indonesia], signed at Jakarta on 20 January 1958 (United Nations, *Treaty Series*, vol. 324, No. 4688, p. 227).

[58] See R. B. Lillich and B. H. Weston, *International Claims: their Settlement by Lump Sum Agreements*, Charlottesville, University Press of Virginia, 1975, p. 158.

[59] Agreement between Japan and Malaysia, signed at Kuala Lumpur on 21 September 1967, (Lillich and Weston, *International Claims* ... (footnote above), p. 349).

[60] Agreement between Japan and the Republic of Singapore, signed at Singapore on 21 September 1967 (Lillich and Weston, *International Claims* ... (footnote 58 above), p. 350.

[61] See General Assembly resolution 36/121 of 10 December 1981, para. 25.

[62] Addendum to the Report of the United Nations Council for Namibia, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 24A* (A/9624/Add.1), pp. 27–28. See also General Assembly resolution 40/52 of 2 December 1985, para. 14; and Kohen and Dumberry (footnote 54 above), p. 140.

influencing the content of the basic rule governing these situations. The Special Rapporteur recognizes the merits of such an approach. Accordingly, for the purpose of his third report, he prepared a single draft article encompassing all three situations. As a matter of consistency, as far as draft articles 7, 8 and 9 (which were referred to the Drafting Committee in 2018), the Special Rapporteur will propose, during their consideration in the Drafting Committee, their merger, in a manner analogous to the structure of draft article 12 proposed below.

66. In view of the above considerations, the Special Rapporteur proposes the following title for Part III, a draft article on the scope of Part III and a draft article to be included in this part concerning three situations of succession of States in which the predecessor State continues to exist:

Part III – Reparation for injury resulting from internationally wrongful acts committed against the predecessor State

Draft article Y
Scope of the present Part

The draft articles of the present Part apply to reparation for injury resulting from internationally wrongful acts committed against the predecessor State for which this State did not receive full reparation before the date of succession of States.

Draft article 12
Cases of succession of States when the predecessor State continues to exist

1. In the cases of succession of States:

(a) when part of the territory of a State, or any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State; or

(b) when a part or parts of the territory of a State separate to form one or more States, while the predecessor State continues to exist; or

(c) when a successor State is a newly independent 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; the predecessor State injured by an internationally wrongful act of another State may request from this State reparation even after the date of succession of States.

2. Notwithstanding paragraph 1, the successor State may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the predecessor State and the successor State.

B. Cases of succession of States where the predecessor State ceases to exist

67. This section deals with the categories of unification and dissolution of States, in which the predecessor State was a victim of an internationally wrongful act of another State, thus mirroring the situations discussed in the second report. While there are in practice examples of situations when internationally wrongful acts affected the predecessor State alone, State practice offers more examples of such acts affecting its nationals. These examples indicate that the successor State may claim reparation (see

chapter IV below). For practical reasons, attention will be given first to cases of unification of States and thereafter to cases of dissolution of States.

1. Unification of States

68. While in the case of unification of States the distinction is made between (*a*) the merger of two States in one State which acquires its own, new international legal personality different from either of the merging States, and (*b*) the incorporation of a State in another State which preserves its international legal personality, in both cases at least one of predecessor States loses its international legal personality. In other words, it ceases to exist. In both scenarios, the unified State is a successor State (in the meaning of the definition of this term contained in draft article 2), while the merging States or the State which was incorporated in another State are predecessor States. It should be further clarified that only internationally wrongful acts committed against these States prior to unification are the subject of the current topic.

69. There seems to be support, in the literature, for the view that in cases of unification the successor State may claim reparation for injury from an internationally wrongful act committed before the date of unification against any of the merging States or State which was incorporated.[63] This view is also supported by examples of State practice.

70. One well-known case of unification is the United Arab Republic, created as result of the merger of Egypt and Syria in 1958. There are at least two examples of agreements arrived at by the new State (the United Arab Republic) and France and the United Kingdom, as a result of mutual claims arising out of the Suez Canal crisis in 1956. From the perspective of the right to reparation by a new State, it is worth mentioning that the United Arab Republic submitted claims requesting compensation from France and the United Kingdom for damage caused during the Suez crisis by these States to Egypt, one of the two predecessor States.[64]

71. The issue of claims submitted by the United Arab Republic to the United Kingdom was dealt with in the exchange of notes leading to the conclusion of an Agreement between the two Governments in February 1959.[65] The United Arab Republic waived all its claims for war damage against the United Kingdom. In return, the United Kingdom waived its claims "in respect of United Kingdom Government property situated in the Suez Canal Base" (nationalized by Egypt) and in respect of the "costs incurred by the Government of the United Kingdom for clearance of the Suez Canal".[66]

72. The Agreement of 22 August 1958 between the United Arab Republic and France had a similar character.[67] In spite of the claims by the United Arab Republic, the

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[63] See, for example, Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 315–316 and 318–319; Stern, "Responsabilité internationale et succession d'Etats" (footnote 34 above), p. 354.

[64] See 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. 349–390, at pp. 368–369. The United Arab Republic claimed from the United Kingdom and France damages in the amount of 78 million GBP (see C. Rousseau, "Chronique des faits internationaux", *Revue générale de droit international public*, vol. 62, No. 4 (October–December 1958), pp. 665–715, at p. 681).

[65] Agreement concerning financial and commercial relations and British property in Egypt, signed at Cairo on 28 February 1959 (United Nations, *Treaty Series*, vol. 343, No. 4925, p. 159). See Weston and Lillich, *International Claims …* (footnote 58 above), pp. 186 *et seq*.

[66] United Nations, *Treaty Series*, vol. 343, p. 194. See also Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 317.

[67] Accord entre le Gouvernement de la République française et le Gouvernement de la République arabe unie, *Revue générale de droit international public* (see footnote 64 above), p. 738 *et seq*. See also Rousseau, "Chronique des faits internationaux" (*ibid.*), p. 681.

Agreement did not refer to any payment for war damage paid by France. Although a part of the doctrine suggests that France paid some compensation to the United Arab Republic,[68] France has always denied having done so.[69]

73. These two Agreements are relevant for our analysis because there is no indication that France or the United Kingdom objected to the right of the successor State (United Arab Republic) to claim reparation for internationally wrongful acts committed by them against the predecessor State (Egypt) before the date of succession.[70]

2. Dissolution of States

74. Among cases of dissolution of States, mention is often made of the separation, in 1961, of the United Arab Republic (created in 1958 by Egypt and Syria), as well asthe dissolution of two federal States, namely that of Yugoslavia [71] in 1991–1992 and Czechoslovakia in 1993. Concerning the dissolution of States, there are several examples where States or international judicial bodies accepted the claim of a successor State for reparation for damage resulting from an internationally wrongful act against the predecessor State. They all relate to the two most significant cases of dissolution in Europe in the 1990s, the dissolution of Czechoslovakia and that of Yugoslavia.

75. In the well-known case of the *Gabčíkovo–Nagymaros Project* (1997), the International Court of Justice determined that before the date of succession Hungary had committed an internationally wrongful act and it had the obligation to pay compensation to Czechoslovakia (the predecessor State).[72] The Court did not find it necessary to address explicitly the issue of succession to the right to reparation. Instead, the Court simply referred to the second paragraph of the preamble to the Special Agreement between Slovakia and Hungary of 2 July 1993.[73] It concluded that

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[68] See Cotran (footnote 64 above), p. 369.

[69] Rousseau, "Chronique des faits internationaux" (see footnote 64 above), p. 681.

[70] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 317.

[71] *Les proclamations d'indépendance par la Slovénie en juin 1991 et par la Croatie en octobre 1991 ont déclenché le processus de désintégration de la République fédératives socialiste de Yougoslavie … . Ont ensuite également déclaré leur indépendance l'ex-République yougoslave de Macédoine, en novembre 1991, et la Bosnie-Herzégovine, en mars 1992. En 2000, la République fédérale de Yougoslavie, qui consistait en l'Etat de Serbie-et-Monténégro, vu l'opposition manifestée à sa revendication d'assumer la continuité de la personnalité juridique internationale de la République fédérative socialiste de Yougoslavie, a admis qu'elle aussi était un des Etats successeurs de la République fédérative socialiste de Yougoslavie; son acceptation en tant que nouveau membre de l'ONU a suivi peu après. … En juin 2006, le Monténégro a déclaré son indépendance à la suite d'un référendum, se séparant ainsi de l'État de Serbie et Monténégro* ("The proclamations of independence by Slovenia in June 1991 and by Croatia in October 1991 triggered the process of disintegration of the Socialist Federal Republic of Yugoslavia … . The former Yugoslav Republic of Macedonia, in November 1991, and Bosnia and Herzegovina, in March 1992, also declared their independence. In 2000, the Federal Republic of Yugoslavia, which consisted of the State of Serbia and Montenegro, in view of the opposition to its claim to assume the continuity of the international legal personality of the Socialist Federal Republic of Yugoslavia, admitted that it too was one of the successor states of the Socialist Federal Republic of Yugoslavia; its acceptance as a new member of the United Nations followed soon after. … In June 2006, Montenegro declared its independence following a referendum, thus separating from the State of Serbia and Montenegro") (Mikulka, "Article 34 …" (see footnote 44 above), pp. 1202–1203, para. 116, and p. 1206, para. 124; see also http://treaties.un.org/Pages/HistoricalInfo.aspx, note 1 under Montenegro).

[72] *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at pp. 66–67, paras. 108–110 and p. 81, para. 152.

[73] "*Bearing in mind* that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor state in respect of rights and obligations relating to the Gabčíkovo–Nagymaros Project" (*ibid*., p. 11).

"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 by Hungary".[74]

76. The relevance of the case should not be denied by reference to the existence of the Special Agreement. In fact, neither Slovakia nor Hungary seemed to recognize any principle of *ipso jure* succession to the obligation to repair and to the right to reparation. This may be seen in the position that Slovakia took in its pleadings.[75] Nevertheless, the Court arrived at its conclusion, having also found that the 1977 Treaty between Hungary and then Czechoslovakia on the joint construction of the Gabčíkovo–Nagymaros project remained in force, after the dissolution of Czechoslovakia, between Hungary and Slovakia. (It is noteworthy that the Treaty contained, *inter alia*, provisions concerning compensation between the parties).

77. The similar conclusion was adopted by the United Nations Compensation Commission (UNCC) in the claim submitted by the Czech Republic for damage caused by Iraq to the Czechoslovak Embassy in Baghdad. After the dissolution of Czechoslovakia, the Ministry of Foreign Affairs of the Czech Republic filed a claim for damage caused by Iraq to the Czechoslovak Embassy in Baghdad during the Gulf War (1990–1991), which was before the date of succession. However, the Czechoslovak Embassy and the Embassy residence in Baghdad became the property of the Czech Republic.

78. The Panel of Commissioners recommended an award in the amount of 4,733 USD (out of 11,208 USD claimed).[76] The Panel concluded that the Czech Republic was not the injured State at the time of the commission of the internationally wrongful act. Nevertheless, the Czech Republic (the successor State) should be deemed to be the "proper and sole claimant" based on the agreement between the two successors to the former Czechoslovakia. "[T]he Panel did not reject the validity of the possibility of the transfer of such right to reparation."[77]

79. The legal reasoning seems to reflect correctly the law of State responsibility, as it did not refer to the Czech Republic as the injured State (which was indeed the predecessor State, Czechoslovakia). However, the combined fact of succession of States and of the agreement between the successor States can be viewed as the special element that allows transferring and/or sharing such responsibility claims. In other words, other States and international judicial bodies should respect agreements entered into by the successor States.

80. This conclusion can be even supported by the Agreement on Succession Issues (2001), concluded among the successor States to the former Yugoslavia.[78] According to its Preamble, the Agreement was reached after negotiations "with a view to identifying and determining the equitable distribution amongst themselves of rights, obligations, assets and liabilities of the former Socialist Federal Republic of

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[74] *Ibid*., p. 81, para. 151.

[75] See the Counter-Memorial submitted by the Slovak Republic, vol. I, 5 December 1994, p. 69, para. 3.60 (available from the website of the International Court of Justice: www.icj-cij.org).

[76] Report and Recommendations made by the Panel of Commissioners Concerning the Second Instalment of "F1" Claims, UNCC Governing Council (S/AC.26/1998/12), p. 32, note 3: "On the basis of agreements concluded at the time of the separation, the Czechoslovak Embassy and Embassy residence in Bagdad became the property of the Czech Republic. Accordingly, although it had been the Federal Republic that had suffered the losses in respect of which compensation is claimed, the Czech Republic is the proper and sole claimant in respect of these losses."

[77] Dumberry, *State Succession to International Responsibility* (see footnote 31 above), p. 322.

[78] Signed at Vienna on 29 June 2001 (United Nations, *Treaty Series*, vol. 2262, No. 40296, p. 251).

Yugoslavia". Article 1 of Annex F of the Agreement dealt also with the possible issues of international wrongful acts against third States before the date of succession.[79]

81. All the above examples seem to support the possibility for the successor States to submit claims to reparation even for damage caused by internationally wrongful acts committed before the date of succession, while stressing the primary role of agreements.

82. In view of the above considerations the following draft articles are proposed:

Draft article 13
Uniting of States

1. When two or more States unite and so form one successor State, the successor State may request reparation from the responsible State.

2. Paragraph 1 applies unless the States concerned otherwise agree.

Draft article 14
Dissolution of States

1. When parts of the territory of the State separate to form two or more States and the predecessor State ceases to exist, one or more successor States may request reparation from the responsible State.

2. Such claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the successor States.

IV. Reparation for injury arising from internationally wrongful acts committed against the nationals of the predecessor State

83. This chapter deals with possible succession to the right to reparation in cases where an internationally wrongful act was committed against the nationals of the predecessor State. Damages arising from internationally wrongful acts committed by States against other States' nationals form a part of international law as much as damages arising from internationally wrongful acts committed against other States. While in this latter case damages are considered as "direct damages", those caused to the nationals of States are regarded as "indirect damages" because of the bond of nationality that exits between the States and persons injured through the internationally wrongful act.[80]

84. However, as States can be held responsible only when damage is legally caused to a subject of international law,[81] a legal fiction is needed for the reparation of damage arising from internationally wrongful acts committed against other States'

[79] "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 [financial assets of the Socialist Federal Republic of Yugoslavia] in Annex C of this Agreement. The division of such rights and interests shall proceed under the direction of the Standing Joint Committee established under Article 4 of this Agreement" (*ibid.*).

[80] A. Vermeer-Künzli, "As if: the legal fiction in diplomatic protection", *The European Journal of International Law*, vol. 18, No. 1 (2007), pp. 37–68, at p. 39.

[81] P. Daillier, *et al.*, *Droit international public* , Paris, LGDJ, 2009, p. 884.

nationals. This legal fiction, called "diplomatic protection", allows States to assume the claims of their nationals and makes it possible to repair damage suffered by individuals or private legal persons as a result of internationally wrongful acts committed by other States.

85. It is well known that this legal fiction owes its existence to the doctrine developed by Emmerich de Vattel during the mid-1700s.[82] The famous formulation (called also "Vattelian fiction")[83] was endorsed by the international community, in particular through arbitration, at the end of the nineteenth century.[84] Subsequently, the principle according to which States have the right to protect their nationals injured by other States was adopted by the Permanent Court of International Justice in its 1924 *Mavrommatis* decision where the Court stated that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law".[85]

86. The *Mavrommatis* fiction has been repeatedly maintained in subsequent jurisprudence[86] and in international legal doctrine and became part of the international legal system after the Second World War.[87] Since then, diplomatic protection has been defined as "the means by which a State gives effect to another State's responsibility for an act in contravention of international law affecting the person or property of a national of the first State".[88] In this context, the nationality bond between the individual and his or her State has been considered as the sole legal basis of a State's right to diplomatic protection, which cannot be exercised without this connecting factor.[89] This principle is affirmed by the Commission's draft articles on diplomatic protection, which provide in article 3, paragraph 1, that "the State entitled to exercise diplomatic protection is the State of nationality".[90]

87. This traditional legal framework of diplomatic protection considered together with article 44 of the articles on responsibility of States for internationally wrongful

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[82] C. F. Amerasinghe, *Diplomatic Protection*, Oxford University Press, 2008, p. 8; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1916, p. 351; and B. Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973, p. 96.

[83] E. De Vattel, *Le droit des gens ou Principes de la loi naturelle* (1758), Washington D.C., The Columbia Planograph Company, Book II, chapter VI, p. 309, para. 71: *Quiconque maltraite un Citoyen offense indirectement l'Etat, qui doit protéger ce Citoyen. Le Souverain de celui-ci doit venger son injure, obliger, s'il le peut, l'aggresseur à une entière réparation, ou le punir ; puisqu'autrement le Citoyen n'obtiendroit point la grande fin de l'association Civile, que est la sûreté* (See the English translation in E. de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Indianapolis, Liberty Fund, 2008, Book II, chapter VI, p. 298, para. 71: "Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety").

[84] J. Dugard, "Articles sur la protection diplomatique", *United Nations Audiovisual Library of International Law*, 2014, available from http://legal.un.org/avl/pdf/ha/adp/adp_f.pdf.

[85] *The Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, Permanent Court of International Justice, *Collection of Judgments, Series A*, No. 2, p. 5, at p. 12.

[86] See the judgment in *Factory at Chorzów* (footnote 26 above), pp. 27–28; and *The Panevezys–Saldutiskis Railway Case, Judgment of 28 February 1939*, Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions, Series A/B*, No. 76, p. 4, p. 16.

[87] See Amerasinghe (footnote 82 above), pp. 16–17.

[88] G. I. F. Leigh, "Nationality and diplomatic protection", *International and Comparative Law Quarterly*, vol. 20, No. 3 (1971), pp. 453–475, at p. 453.

[89] *Ibid*.

[90] Draft Articles on Diplomatic Protection with commentaries, Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10).

acts,[91] which stipulates that "the responsibility of a State may not be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims", raises serious issues relating to the succession of States to the right to reparation of damages arising from internationally wrongful acts committed against the nationals of the predecessor States. Specifically, it triggers the question of whether the successor State can claim reparation for damages arising from internationally wrongful acts committed before the date of succession against the nationals of the predecessor State who became its nationals after the date of the commission of the acts, that is, after the date when the damage occurred. The problem arises because in cases of diplomatic protection the damage in question is not the one suffered by the individual but the one indirectly suffered by the State[92] and the reparation claimed in such cases by the State of nationality is not the reparation of the harm suffered by its national but the reparation of the harm suffered by itself.[93]

A. Traditional approach

1. The theoretical and doctrinal basis

88. The classical approach argues on the ground of the so-called "continuous nationality principle" that the right to reparation of damages arising from internationally wrongful acts committed against the nationals of the predecessor State cannot be transferred to the successor State. According to this view, the State exercising diplomatic protection on behalf of its nationals does not act as an agent but as the protector of the interests of its nationals.[94] And "[s]ince a State is, in fact, 'asserting its own right' when protecting one of its nationals by exercising diplomatic protection, it needs to ensure that such person is, indeed, one of its nationals".[95] Therefore, "[t]he traditional rule of diplomatic protection concerning the nationality of claims is the principle of continuous nationality".[96]

89. According to the principle of continuous nationality, the State can exercise diplomatic protection on behalf of its citizens who possess its nationality from the time of the commission of the internationally wrongful act by the third State until the date when it takes up the claim.[97] Notwithstanding this, some authors interpret the principle rigidly and claim that for a State to exercise diplomatic protection on behalf of the person injured as a result of an internationally wrongful act of a third State,

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[91] Articles on responsibility of States for internationally wrongful acts with commentaries thereto, adopted by the International Law Commission at its fifty-third session, in 2001, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., para. 76.

[92] H. Meunier, "Le fondement de la protection diplomatique : pour une nouvelle approche au moyen de la distinction entre préjudice et dommage", *Annuaire français de droit international*, vol. 59 (2013), pp. 223–255, at p. 242.

[93] D. Anzilotti, *Corso di diritto internazionale*, vol. I, Padova, Cedam, 1955, p. 422.

[94] Leigh (see footnote 88 above), p. 455.

[95] P. Dumberry, "Obsolete and unjust: the rule of continuous nationality in the context of State succession", *Nordic Journal of International Law*, vol. 76, No. 2 (2007), pp. 153–183, at pp. 154–155.

[96] *Ibid.*, p. 155. See also O'Connell, *State Succession in Municipal Law and International Law* (footnote 20 above), p. 537 ("The doctrine of continuous nationality appears to have its origins in the *Santangelo* Case in 1839 when the United States failed in a claim against Mexico respecting an injury done to a person while he was an aspirant to United States citizenship, and succeeded in a second claim respecting one done to him after he acquired this citizenship. The explanation of the rule is that, if it did not exist, persons would seek naturalization in States which were parties to arbitration agreements merely to get a hearing for their claims").

[97] Monnier (see footnote 35 above), p. 68; Leigh (see footnote 88 above), p. 456; Dumberry, *State Succession to International Responsibility* (see footnote 31 above), p. 338; and Dumberry, "Obsolete and unjust ..." (see footnote 95 above), p. 155.

this person should have its nationality also at the date of the award.[98] The latter view seems to be exaggerated and not supported in practice.

90. In this context, traditional legal doctrine claims that when the nationality of the person injured as a result of an internationally wrongful act committed by a third State changes between the date when the injury is caused and the date when the reparation claim is made, the principle of continuous nationality would result in hindering the reparation. In other words, in cases where the State of citizenship of the person injured because of an internationally wrongful act passes through a process of succession, the successor State would not inherit the right to reparation of the predecessor State. As the person injured by the wrongful act is not a national of the successor State at the date when the act is committed, the successor State cannot be considered as indirectly injured.

91. As can be seen, the traditional view starts from the premise that the owner of the right to diplomatic protection is not the national but the State, and explains that the right to reparation arising from an internationally wrongful act committed against the national of the predecessor State would not be transferred to the successor State because of the rupture of the nationality link.[99] Several other authors support this argument.[100] For instance, according to Stern, who refers to Monnier's view, the principle of continuous nationality would prevent the transfer of the right to reparation from the predecessor State to the successor State.[101]

92. It appears that the draft articles on diplomatic protection also adopt, in principle, the rule of continuous nationality, notwithstanding many objections raised in this respect within the Commission. Indeed, article 5 related to diplomatic protection on behalf of natural persons and article 10 concerning diplomatic protection on behalf of corporations provide in their first paragraphs that "a State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates". However, these articles, starting from the premise that the rigid application of the continuous nationality principle in cases of State succession could create unequitable results, soften the principle and provide that, in some cases, the right to diplomatic protection can be exercised by the successor State. These exceptions are regarded by authors refusing the traditional approach to State succession as affirming that the right to reparation of indirect injury suffered by States can be subject to succession and will be mentioned in the second part of this chapter.

2. Case law

93. Several international judicial decisions admitted that the principle of continuous nationality constituted the legal basis of the right to diplomatic protection. One of the first cases where the principle was applied is the 1881 *Henriette Levy* case dealt with by a United States–France Commission. Jacob Levy, a French national moved to Strasbourg, France, after the seizure of his cotton firm in 1863 by United States forces, and died in this city in 1871. The same year, Strasbourg, being part of the territories of Alsace-Lorraine, was ceded by France to Germany. Jacob Levy's wife,

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[98] See M. J. Jones, "The Nottebohm case", *International and Comparative Law Quarterly*, vol. 5, No. 2 (April 1956), pp. 230–244, at p. 231; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, vol. I: *Peace, Introduction and Part 1*, 9th ed., London, Longman, 1992, p. 512; and Brownlie (footnote 14 above), p. 659.

[99] Monnier (see footnote 35 above), pp. 68–69 and pp. 70–71.

[100] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 340–341.

[101] Stern, "Responsabilité internationale et succession d'Etats" (see footnote 34 above), pp. 327–355.

Henriette Levy, did not make use of her right of option to keep her French nationality pursuant to article II of the Treaty of Frankfurt of 10 May 1871 and became a German national in 1871. Nine years later, Henriette Levy made an application to the United States–France Commission and claimed reparation for damages suffered by her husband in 1863 as a result of the internationally wrongful acts that the United States committed. However, the Commission dismissed the claim based on the fact that it had no jurisdiction over claims submitted by individuals who were "no longer" French nationals.[102]

94. Similarly, in 1925 Umpire Huber indicated in the *Affaire des biens britanniques au Maroc espagnol* that the person injured as a result of an internationally wrongful act committed by a third State needs to be a national of the State which would resort to diplomatic protection on behalf of that national until the date of the judgment concerning the reparation.[103]

95. The traditional principle of continuous nationality was then applied in the *Panevezys–Saldutiskis Railway* decision of the Permanent Court of International Justice,[104] which is considered as the most significant judicial decision confirming that the successor States cannot claim reparation on behalf of their new nationals who were injured as a result of internationally wrongful acts committed before the date of succession.[105] Nonetheless, the decision was controversial and already criticised at that the time of its adoption.[106]

96. In this case, the company named First Company of Secondary Railways in Russia, founded in 1892 in Saint Petersburg under the law of the Russian Empire, was nationalized after the First World War. In 1918, after the independence of Estonia and Lithuania, one railway line, the Panevezys–Saldutiskis, passed through the Baltic provinces. In 1919, the new State of Lithuania confiscated, with no compensation in return, the assets of the company situated within its territory, including the Panevezys–Saldutiskis line. In 1920, Estonia and the USSR concluded the Treaty of Tartu and decided to transfer from Russia to Estonia all rights and shares of the company which was now situated in Estonia. In 1923, Estonia nationalized the railway line of the First Company, which was situated within its territory. During the same year, the company changed its name and registered itself in Estonia as Esimene. Esimene claimed reparation from Lithuania for the damage suffered as a result of the nationalization that took place in 1919 but failed to obtain compensation. In 1937, Estonia resorted to diplomatic protection on behalf of the company and claimed reparation from Lithuania for damage suffered because of the nationalization of the Panevezys–Saldutiskis line. However, according to Lithuania, the company had already changed its nationality in 1919 and was not an Estonian national company at the time when its assets were confiscated by Lithuania.

97. According to the Court, which recalled its *Mavrommatis* fiction, "by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect

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[102] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 404–405; J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. III, Washington D.C., Government Printing Office, 1898, pp. 2514–2518; and E. Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, Presses Universitaires de France, 1990, pp. 104–105.

[103] *Affaire des biens britanniques au Maroc espagnol (Espagne c. Royaume-Uni), Award of 1 May 1925*, United Nations, *Reports of International Arbitral Awards*, Vol. II, pp. 615–742, at p. 706.

[104] *The Panevezys–Saldutiskis Railway Case* (see footnote 86 above), p. 16.

[105] Dumberry, *State Succession to International Responsibility* (see footnote 31 above), p. 390.

[106] *Ibid*., pp. 399–401.

for the rules of international law".[107] Therefore, the Court stated that in order for Estonia to resort to diplomatic protection on behalf of the company, this latter should have possessed Estonian nationality at the time when the damage occurred because of the alleged internationally wrongful act[108]. As the company took the Estonian nationality in 1920 under the Treaty of Tartu, it was not possible for Estonia to claim reparation for damages that occurred as a result of the acts of nationalization that took place in 1919. In other words, the Court decided that the right to reparation of the predecessor State could not be transferred to the successor State.

98. The 1939 *Panevezys–Saldutiskis Railway* decision's traditional approach relating to the exercise of diplomatic protection seems to have been followed in the 2000s in the *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America* award. In this case, in a different context (that of investment arbitration), the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes (ICSID) stated: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."[109] It appears that by stating that the person on behalf of whom a State wants to exercise diplomatic protection should have the nationality of this State at the date of the award, the Tribunal adopted a very rigid interpretation of the principle of continuous nationality. This decision is unusual in investment arbitration and was rightly criticized.[110] Moreover, the *Loewen* case has nothing to do with succession of States. Therefore, it does not present any authority as to whether the rule of continuous nationality should apply or not in cases of *involuntary* changes of nationality due to State succession.

B. Modern approach

99. The modern approach to State succession rejects the traditional legal approach that supports the principle of non-succession to the right to reparation of damages arising from internationally wrongful acts committed against the nationals of the predecessor States and that explains this view by the principle of continuous nationality, claimed to be part of customary international law. Opponents to the traditional view argue that the principle of continuous nationality, which traditionally has been considered as preventing the transfer of the right to diplomatic protection of the predecessor State to its successor, should not be applied within the context of State succession for theoretical, jurisprudential and practical reasons.

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[107] *The Panevezys–Saldutiskis Railway Case* (see footnote 86 above), p. 16. The Court also stated: "This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford, nor can it give rise to a claim which that State is entitled to espouse" (*ibid.*).

[108] *Ibid.*, pp. 16–17.

[109] *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, Case No. ARB(AF)/98/3, Award of 26 June 2003, International Centre for Settlement of Investment Disputes, , *International Legal Materials*, vol. 42, pp. 811–851, at p. 847, para. 225.

[110] M. Mendelson, "The runaway train: the continuous nationality rule from the *Panevezys–Saldutiskis Railway Case* to *Loewen*", in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May, 2005, pp. 97–149; and P. Dumberry, *A Guide to State Succession in International Investment Law*, Cheltenham, Edward Elgar, 2018, pp. 435–441 and 449–453.

1. Theoretical basis

100. It seems that authors who reject the principle of non-succession question the expediency of this legal fiction. Indeed, while on the one hand the *Mavrommatis* fiction has been supported by several authors, whether the damage claimed by the State of nationality which resort to diplomatic protection on behalf of its national against whom an internationally wrongful act is committed by a third State is truly a damage suffered by the State has, on the other hand, also been seriously called into question. For example, as it was expressed by Charles de Visscher in his course in the 1930s, "while the right to diplomatic protection belongs to the State of nationality, the injury giving rise to diplomatic protection is not an injury suffered by the State but by a national of that State and that by resorting to diplomatic protection on behalf of its national the State acts as the protector of international law".[111]

101. Following the extension of natural persons' rights under international law, discussions concerning whose rights are actually protected by the exercise of diplomatic protection have continued. The argument that it is the individual itself against whom the internationally wrongful act is committed and not the State of nationality of this individual who is in reality injured has been more frequently invoked.[112]

102. In this context, even the owner of the right to diplomatic protection has been the subject of debate. For instance, O'Connell considers that the Vattelian fiction, according to which whomever ill-treats a citizen indirectly offends the State, was not appropriate. The author states that "[i]f the State was really injured the only relevant point in time would be the moment of the injury; there after the State would be able, logically, to seek redress even if the injured individual died or changed his nationality".[113]

103. This approach, which rejects the *Mavrommatis* fiction, rejects also that States can exercise diplomatic protection on behalf of individuals or corporations under the condition of continuous nationality. Indeed, it is claimed that the principle of continuous nationality should not be applied in diplomatic protection claims within the context of State succession cases because otherwise injuries suffered by individuals before the date of succession cannot be repaired. "In other words, the application of the rule of continuous nationality in the context of State succession would result in neither the continuing State nor the successor State being able to exercise diplomatic protection on behalf of an individual injured as a result of an internationally wrongful act committed before the date of succession. As no State would be entitled to seek redress against the State responsible, the internationally wrongful act would remain unpunished."[114]

104. Similarly, according to Verzijl, the principle of continuous nationality is an artificial customary norm and any rigid application of this principle would lead to unreasonable results.[115] According to Donner, the requirement of an existing nationality bond between the State and the individual from the date when the damage

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[111] C. de Visscher, "Le déni de justice en droit international", *Collected Courses of the Hague Academy of International Law*, vol. 52 (1935), pp. 365–442, at p. 435: "L'État n'intervient que comme gardien de l'observation du droit international. À ce titre, c'est bien un droit propre, mais ce n'est pas, à bien parler, un dommage propre que l'État fait valoir. Ainsi, c'est la violation d'un devoir international, dans l'espèce du devoir de protection judiciaire, qui est la base de l'action diplomatique ou de l'action judiciaire provoquée par un déni de justice..."

[112] See Vermeer-Künzli (footnote 80 above), pp. 37–68.

[113] D. P. O'Connell, *International Law*, vol. II, London, Stevens and Sons, 1970, p. 1034.

[114] Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 342.

[115] J. H. W. Verzijl, *International Law in Historical Perspective*, Part V, Leiden, A. W. Sijthoff, 1972, pp. 449–450.

occurred until the date when the diplomatic protection claim is made would create unequitable consequences.[116]

105. As for O'Connell, he believes that the principle of continuous nationality is not a substantive rule of international law but rather a procedural rule that arose out from arbitral practice, which should not be applied in State succession cases[117]. Besides, according to this author, if it is admitted that the claim of reparation of damages arising from internationally wrongful acts "is primarily that of the individual and only secondarily that of the State, … the rationalization of the rule excludes its operation when the change of nationality occurs through change of sovereignty, and ... the successor State is competent to claim on his behalf".[118] Alternatively, if it is admitted that such right to claim reparation is always that of the State, the successor State would inherit the claim not on the ground to protect the individual but on the ground that it is asserting its predecessor's rights by transmission.[119]

106. The doctrinal debate seems to show that the rejection of the Vattelian (*Mavrommatis*) fiction is not the only possible theoretical basis for questioning the rule of continuing nationality in its *absolute* form. Indeed, the cases of involuntary changes of nationality because of the change of sovereignty (succession of States) support an exception to that rule. However, its recognition and confirmation have been a result of a long development in not only doctrinal views but also in State practice and case law (see below).

107. The applicability of the principle of continuous nationality to the cases of State succession was also discussed within the Institute of International Law. While Rapporteur Borchard supported in his reports the application of the principle within the context of State succession,[120] several members of the Institute claimed in meetings held in 1931 and 1932 that the adoption of the proposed rule would deprive a claimant of any protection because neither the State of the claimant's former nationality, nor that of the claimant's new nationality, would be able to intervene in his or her favour.[121]

108. Although Borchard accepted to amend his initial text by suggesting a formulation according to which in cases of change of nationality made by a political act independent on the will of the individual, the two States should agree on the issue of protection,[122] he could not persuade the members of the Institute, which ended up not adopting a resolution on this question.[123]

109. The Institute of International Law discussed the issue again in 1965 in Warsaw under the rapporteurship of Mr. Herbert Whittaker Briggs, who also supported in his first draft the adoption of the traditional rule of continuous nationality. However, several members of the Institute proposed once again the non-adoption of the

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[116] R. Donner, *The Regulation of Nationality in International Law*, 2nd ed., Irvington-on-Hudson, NY, Transnational Publishers, Inc., 1994, p. 252.

[117] O'Connell, *State Succession in Municipal Law and International Law* (see footnote 20 above), pp. 537–538.

[118] *Ibid.*, p. 540.

[119] *Ibid.*

[120] E. M. Borchard: "La protection diplomatique des nationaux à l'étranger", *Annuaire de l'Institut de droit international*, vol. II, Session of Cambridge (1931), pp. 201–212; and "La protection diplomatique des nationaux à l'étranger : rapport supplémentaire", *ibid.*vol. 37, Session of Oslo (1932), Nineteenth Commission, pp. 235–282.

[121] Comments by M. Politis in *ibid.*, vol. II (1931), pp. 201–212, at p. 207.

[122] *Ibid.*, vol. 37 (1932), p. 515: *si le changement de nationalité se fait par acte politique, indépendamment de la volonté de l'individu, il est à désirer, que les deux Etats s'entendent au sujet de la protection à lui accorder* ("if the change of nationality is made by political act, independently of the will of the individual, it is to be desired, that the two States agree on the protection to be granted to him").

[123] Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 352.

principle within the context of State succession and suggested the endorsement of a more flexible rule at least for newly independent States.[124]

110. For instance, Wright proposed that the successor State should be able to resort to diplomatic protection on behalf of the person, regardless of under which State's nationality this person was injured by the internationally wrongful act. Similarly, Spiropoulos claimed that it was necessary to interpret the legal norms such as the principle of continuous nationality in accordance with modern requirements.[125]

111. Notwithstanding these objections raised in this respect for more than thirty years, the final text adopted by the Institute of International Law endorsed the principle of continuous nationality by providing the sole exception for newly independent States in article 1(b).[126] It was also decided that the applicability of the rule of continuous nationality to other types of State succession would be discussed in the future, but the Institute has never addressed the issue of diplomatic protection since.[127]

112. However, more interesting and directly related to the present topic is the recent work of the Institute on State succession in matters of State responsibility. As is well known, this work under the rapporteurship of Mr. Kohen gave rise to the adoption of the final resolution at the Session of Tallinn (2015). Its article 10 (Diplomatic protection) articulated the clear and unambiguous exception to the rule of continuing nationality in cases of State succession. This article[128] and the commentary thereto provide a thorough and convincing analysis of the doctrinal views and State practice that ultimately supports the development from the traditional (strict, absolute) to the modern (flexible) content of the continuing nationality rule.[129]

113. The provision of the resolution of the Institute of International Law deals with three distinct situations:

> [(i) w]hether or not a successor State can exercise diplomatic protection in respect of one of its nationals [when] this person ... did *not* have its nationality at the date of injury, which occurred before the date of succession ([a]rticle 10(1));
>
> [(ii) w]hether or not the successor State can continue a claim in exercise of diplomatic protection which was ... initiated *by* the predecessor State ([a]rticle 10(2));

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[124] H. W. Briggs, "La protection diplomatique des individus en droit international : la nationalité des réclamations", *Annuaire de l'Institut de droit international*, vol. 51, tome II, Session of Warsaw (1965), , pp. 157–262, at p. 196.

[125] *Ibid.*, p. 199.

[126] *Ibid*., p. 261: b) *Une réclamation internationale présentée par un Etat nouveau en raison d'un dommage subi par un de ses nationaux avant l'accession à l'indépendance de cet Etat, ne peut être rejetée ou déclarée irrecevable en application de l'alinéa précédent pour la seule raison que ce national était auparavant ressortissant de l'ancien Etat*" ("*b)* An international claim presented by a new State because of damage suffered by one of its nationals before the accession to independence of that State may not be rejected or declared inadmissible under the preceding paragraph for the sole reason that national was formerly a national of the former State").

[127] Dumberry, *State Succession to International Responsibility* (see footnote 31 above), p. 354.

[128] "1. A successor State may exercise diplomatic protection in respect of a person or a corporation that is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law" (Institute of International Law, *Yearbook*, vol. 76 ... (see footnote 29 above), p. 716).

[129] See Kohen and Dumberry (footnote 54 above), pp. 64–77.

> [(iii) w]hether or not a State can continue against the successor State a claim in exercise of diplomatic protection which was first initiated *against* the predecessor State ([article] 10(3)).[130]

114. The principle of continuous nationality was also criticized within the International Law Commission during the drafting process of the draft articles on diplomatic protection.[131] Indeed, the first report submitted to the Commission by Rapporteur Dugard in 2000 had proposed not to adopt the principle, which was considered as imprecise and unfair.[132]

115. In spite of the Rapporteur's proposal, the Commission endorsed the principle of continuous nationality and admitted in article 5 of its 2006 draft articles on diplomatic protection that "a State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates". Nonetheless, taking into account the situations where the application of the principle of continuous nationality would create unequitable results, the draft articles provide also that in some exceptional cases States can resort to diplomatic protection although there is no continuous nationality.

116. Indeed, this is reflected in the second paragraph of article 5 of the draft articles on diplomatic protection. It stipulates that "notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law". As indicated by the commentaries, draft article 5, paragraph 2, includes situations where the person injured as a result of an internationally wrongful act loses its nationality either voluntarily or involuntarily.[133] In this context, it has been claimed that the principle of continuous nationality should not be applied in cases of State succession where individuals generally lose their nationality involuntarily and that the successor State should inherit the right to claim reparation on behalf of its new nationals for pre-succession damages.[134]

117. Yet, some authors, who on the one hand objected to the rule of continuous nationality, have claimed on the other hand that a successor State should not be allowed to submit a claim on behalf of its new nationals if this latter was injured as a result of a breach of a treaty obligation to which the successor State is not a party. For instance, O'Connell stated that

> [i]f the tribunal's jurisdiction is with respect to a claim arising out of breach of a treaty, it is clear that only the offended signatory State is entitled to take action, and the question that arises is whether it remains entitled so to do if the injured party has lost its nationality through State succession. Unless the rule of

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[130] *Ibid*., p. 65.

[131] See A. Pellet, "Le projet d'articles de la C.D.I. sur la protection diplomatique: une codification pour (presque) rien", in M. G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law:* Liber Amicorum *Lucius Caflisch*, Leiden, Martinus Nijhoff, 2007), pp. 1133–1155, at p. 1138; Vermeer-Künzli (footnote 80 above), pp. 56–65; first report on diplomatic protection by Mr. John R. Dugard, Special Rapporteur, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, chap. III, pp. 239–246; and article 5 of the draft articles on diplomatic protection with commentaries thereto, adopted by the Commission at its fifty-eighth session, in 2006 (*Yearbook ... 2006*, vol. II (Part Two), pp. 31–33.

[132] First report on diplomatic protection by Mr. John R. Dugard, Special Rapporteur, *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, p. 244, para. 206.

[133] *Yearbook ... 2006*, vol. II (Part Two), p. 32, paragraphs (7)–(8) of the commentary to article 5 of the draft articles on diplomatic protection.

[134] Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 358 and 361.

> continuous nationality is one of substantive law, a distinction might be urged between cases where action is brought by the State in its own right, as a signatory, and cases where it is brought to recover damages on behalf of persons who have lost its nationality, and since the successor State is incompetent to complain of the breach of a treaty to which it was not a party, the principle of continuous nationality operates here to inhibit any claim being made on behalf of the individual, but not on behalf of the signatory.[135]

118. The last arguments have certain merits. However, they do not deny the fact that the involuntary change of nationality because of the succession of States may be (and indeed was) recognized as an exception to the rule of continuing nationality. They rather relate to the content and the means and modalities of invocation of responsibility. As such, they are not discussed in this report but will be addressed in the next report.

2. Case law

119. As pointed out above, in the 1939 *Panevezys–Saldutiskis Railway* decision, the Permanent Court of International Justice, by applying the traditional principle of continuous nationality, had decided that the successor State could not claim reparation for damages that its new nationals had suffered as a result of internationally wrongful acts committed by third States before the date of succession.[136] This decision supporting the non-succession approach marks at the same time the beginning of debates concerning the expediency of the principle of continuous nationality.

120. The dissenting opinion that Judge Jonkheer van Eysinga delivered in this case constitutes proof: "whether it is reasonable to describe as an unwritten rule of international law a rule which would entail that, when a change of sovereignty takes place, the new State or the State which has increased its territory would not be able to espouse any claim of any of its new nationals in regard to injury suffered before the change of nationality. It may also be questioned whether indeed it is any part of the Court's task to contribute towards the crystallization of unwritten rules of law which would lead to such inequitable results."[137]

121. Other judges have over time adopted a similar approach in other cases brought before the International Court of Justice. For instance, Sir Gerald Fitzmaurice stated in his separate opinion in the *Barcelona Traction* decision that "too rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act".[138] Similarly, Judge Jessup indicated in the separate opinion that he delivered in the same case that the principle of continuous nationality which he considered to be a generally binding international rule should exceptionally not be applied (*specialia generalibus derogant*) in State succession disputes.[139]

122. The criticism expressed by Judges Van Eysinga, Fitzmaurice and Jessup against the principle of continuous nationality and its application in State succession cases constituted an important basis for authors supporting a modern theory of succession to international responsibility. These authors who argue that the right to reparation of damages arising from internationally wrongful acts committed by third States against

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[135] O'Connell, *State Succession in Municipal Law and International Law* (see footnote 20 above), p. 538. See also Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 359.

[136] *The Panevezys–Saldutiskis Railway Case* (see footnote 86 above), pp. 16–17.

[137] *Ibid.*, Dissenting Opinion by Jonkheer van Eysinga, p. 35.

[138] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, Separate Opinion of Judge Sir Gerald Fitzmaurice, pp. 101–102, para. 63.

[139] *Ibid.*, Separate Opinion of Judge Jessup, p. 202, para. 73.

the nationals of the predecessor states before the date of succession is transferable to the successor States underline the objections expressed against the rule of continuous nationality within the Court itself and remind that there are international judicial decisions where the rule was not applied.[140]

123. One of these decisions is the 1928 *Pablo Nájera (France)* v. *United Mexican States* arbitral award of the France–Mexico Claims Commission which dealt with the injuries suffered by Pablo Nájera, a national of the Ottoman Empire who was born in Lebanon, as a result of the acts committed during the Mexican Revolution.[141]. Following the military defeat of the Ottoman Empire in the First World War, the League of Nations had decided on 28 April 1920 to place Lebanon and Syria under French mandate.[142] Meanwhile, France and Mexico had established a Claims Commission in 1923 for the reparation of injuries suffered by French nationals during the Mexican Revolution and had decided, under article 3 of the *compromis* establishing the Commission, that France could resort to diplomatic protection on behalf of all French *protégés*. In this context, France went before the Commission, on 15 June 1926, for the reparation of injuries suffered by Pablo Nájera as a result of internationally wrongful acts committed by Mexico during the revolution, but Mexico claimed that as Nájera was not a French *protégé* at the date when the internationally wrongful acts were committed, France did not have the right to exercise diplomatic protection on his behalf.

124. However, Verzijl, the President of the Arbitral Tribunal, stated that Pablo Nájera was under French protection both at the date when the damage occurred and when the claim of reparation was presented. According to Verzijl, individuals living in Lebanon and Syria should be considered as French *protégés* not from the date when they were placed under French mandate but from the date when France started to exercise sovereignty over these territories.[143] By this interpretation, the Arbitral Tribunal decided that France could resort to diplomatic protection on behalf of Pablo Nájera who was injured in the 1910s by the internationally wrongful acts committed by Mexico.

125. The second case which is considered as confirming that the right to reparation of damages arising from internationally wrongful acts committed against the predecessor State's nationals can be subject to succession arose in the 1930s between Finland and the United Kingdom.[144] In 1934, Finland claimed reparation from the United Kingdom for damages that the latter caused to some individuals who were Russian nationals at the date of the commission of the internationally wrongful acts but who became Finnish nationals after the 1917 Bolshevik Revolution. During the judicial process, the United Kingdom never claimed that persons who were injured by the alleged internationally wrongful acts were not Finnish nationals at the date when the damages occurred. Some authors interpret this fact as confirming the argument that the right to reparation arising from internationally wrongful acts committed to the predecessor State's nationals can be transferred to the successor State and that the principle of continuous nationality is not applied in State succession cases.[145]

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[140] Dumberry, *State Succession to International Responsibility* (see footnote 31 above), pp. 367–382; and Dumberry, "Obsolete and unjust ..." (see footnote 95 above), pp. 173–179.

[141] *Pablo Nájera (France)* v. *United Mexican States, Decision No. 30-A of 19 October 1928*, France–Mexico Claims Commission, United Nations, *Reports of International Arbitral Awards*, vol. V, pp. 466–508.

[142] League of Nations, *Mandat pour la Syrie et le Liban*, document C.528.M.313.1922.VI.

[143] *Pablo Nájera (France)* v. *United Mexican States* (see footnote 141 above), p. 488.

[144] *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war* (*Finland, Great Britain*), *Award of Dr. Algot Bagge of 9 May 1934*, United Nations, *Reports of International Arbitral Awards*, vol. III, pp. 1479–1550.

[145] Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 370.

126. Third, the mixed arbitral tribunals established after the First World War under the treaties concluded between the victorious and the defeated States decided in several cases that the right to diplomatic protection could be subject to State succession.[146] It appears that the arbitral tribunals interpreted article 304 of the Treaty of Versailles[147] concluded between the Allies and Germany in a way that is inconsistent with the principle of continuous nationality. Indeed, article 304 of the Treaty of Versailles provides that "[w]ithin three months from the date of the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Germany on the other hand. … [A]ll questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and German nationals shall be decided by the Mixed Arbitral Tribunal". The tribunals established under this provision accepted in several cases to consider the reparation claims brought by individuals who were not nationals of the Allied Powers at the date when the damages arising from the alleged internationally wrongful acts occurred on the ground that these individuals were nationals of the Allied Powers at the date of the entry into force of the Treaty of Versailles.[148]

127. Finally, it was agreed within the United Nations Compensation Commission established for the reparation of damages arising from the Iraqi invasion and occupation of Kuwait in 1991 that reparation claims of individuals who were injured as a result of the internationally wrongful acts committed by Iraq were to be made by their States of nationality. In this context, decision No. 10 taken by the UNCC Governing Council on 26 June 1992 did not endorse the principle of continuous nationality and provided that "[a] Government may submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory. In the case of Governments existing in the territory of a former federal state, one such Government may submit claims on behalf of nationals, corporations or other entities of another such Government, if both Governments agree".[149] Thereby, it was made possible for

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[146] *Ibid.*, pp. 370–379.

[147] Treaty of Versailles, signed at Versailles on 28 June 1919, *Major Peace Treaties of Modern History 1648–1967*, vol. II, New York, Chelsea House Publishers, 1967, pp. 1265–1533, at p. 1470, article 304 (*b*) (2).

[148] See *Mercier et Cie* v. *Etat allemand, Case No. S. II-308, Decision of 26 October 1923*, Tribunal arbitral mixte franco–allemand, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. III, pp. 686–689, at p. 686; *D'Esquevilley* v. *Aktiengesellschaft Weser, Case No. S. II-89, Decision of 27 October 1923*, *ibid.*, at p. 692; *Poznanski* v. *Lentz et Hirchfeld, Case No. 8, Decision of 22 March 1924*, Tribunal arbitral mixte germano–polonais, *ibid.*, vol. IV, pp. 353–362, at p. 353; *National Bank of Egypt* v. *German Government and Bank fur Handel und Industrie, Claim No. 631, Decisions of 14 December 1923 and 31 May 1924*, Tribunal arbitral mixte anglo–allemand, *ibid.*, pp. 233–238, at p. 234; *Meyer-Wildermann* v. *Hoirie Hugo Stinnes et autres, Case No. 32, Decision of 6 November 1924*, Tribunal arbitral mixte roumano–allemand, *ibid.*, pp. 842–852, at p. 845; *M. Kirschen senior* v. *F. Sobotka, ZEG et Empire allemand. M. Kirschen junior intervenant, Case No. 23, Decision of 3 January 1925*, Tribunal arbitral mixte roumano–allemand, *ibid.*, pp. 858–865, at pp. 862–863; *O.V.C. (Pevée)* v. *R.A.A. (Dony), Case No. 1258, Decision of 18 July 1927*, Tribunal arbitral mixte germano–belge, *ibid.*, vol. VII, pp. 548–550, at p. 548; and *Dame de Laire* v. *Etat hongrois, Case No. 51, Decision of 27 July 1927*, Tribunal arbitral mixte franco–hongrois, *ibid.*, pp. 825–829, at pp. 827–828. See also Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 373–374.

[149] Decision [on the Provisional Rules for Claims Procedure] taken by the UNCC Governing Council at the 27th Meeting, Sixth Session, held on 26 June 1992 (S/AC.26/1992/10), p. 5, art. 5, para. 1)a).

successor States to bring the reparation claims of individuals who were not their nationals at the date when the internationally wrongful acts were committed.[150]

128. To give some examples from its case law, the dissolution of Czechoslovakia may provide the best illustration. Before its dissolution in 31 December 1992, Czechoslovakia filed several claims on behalf of its nationals. However, it had ceased to exist by the time when the UNCC Governing Council was to approve the recommendations made in the Report of the Panel of Commissioners. One decision of the Governing Council took the view that "[t]he claims were initially submitted by the Czech and Slovak Federal Republic", but that for the reasons not even indicated in its decision, "[t]he award of compensation is to be paid to the Government of the Slovak Republic".[151] In another decision, the Governing Council mentioned that "[t]hese claims were submitted before the Czech and Slovak Federal Republic ceased to exist. Awards of compensation are to be paid to the Governments of the Czech Republic and Slovak Republic, respectively."[152]

129. Similar provisions were adopted the UNCC during the succession processes in the former Yugoslavia and in the Soviet Union.[153] All in all, it seems that the modern practice of claims settlement confirms the earlier arbitral decisions going to the exception to the rule of continuing nationality in cases related to State succession.

3. State practice

130. The available State practice shows that the right to claim reparation for damages suffered by the predecessor States' nationals was in some cases transferred to the successor States.

131. First, it is known that damages suffered by the Jewish nationals of several European States during the Second World War were repaired by payments made to Israel after the war. For example, the Federal Republic of Germany and Israel concluded in 1952 the Reparations Agreement between Israel and the Federal Republic of Germany, which provided for Germany to pay reparation not only to the State of Israel but also to individuals who were victims of Nazi crimes.[154] These individuals were not nationals of Israel – which did not even exist at the date of the commission of the internationally wrongful acts – when the damages occurred, but had the nationality of different European States such as France, Germany or Poland. This example is considered by some authors as confirming the argument that the right

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[150] See D. J. Bederman, "The United Nations Compensation Commission and the tradition of international claims settlement", *New York University Journal of International Law and Politics*, vol. 27, No. 1 (Fall 1994), pp. 1–42, at pp. 31 *et seq*.; J. R. Crook, "The United Nations Compensation Commission: a new structure to enforce State responsibility", *American Journal of International Law*, vol. 87, No. 1 (January 1993), pp. 144–157, at pp. 151–152; and Dumberry, *State Succession to International Responsibility* (footnote 31 above), p. 380.

[151] Decision Concerning the First Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims) taken by the UNCC Governing Council at its 43rd meeting, held on 26 May 1994 in Geneva (S/AC.26/Dec.20 (1994)), p. 2, note 2.

[152] Decision Concerning the First Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims) taken by the UNCC Governing Council at its 46th meeting, held on 20 October 1994 in Geneva (S/AC.26/Dec.22 (1994)), p. 2, note 2.

[153] N. Wühler, "The United Nations Compensation Commission: a new contribution to the process of international claims resolution", *Journal of International Economic Law*, vol. 2, No. 2 (June 1999), pp. 249–272, at pp. 253–254.

[154] Agreement between the Government of Israel and the Government of the Federal Republic of Germany, signed at Luxembourg on 10 September 1952, United Nations, *Treaty Series*, vol. 162, No. 2137, p. 206 (art. 1 (*b*)).

to claim reparation for indirect damages suffered by a State can be subject to succession.[155]

132. It should also be mentioned that the Federal Republic of Germany adopted in 2000 the Law on the Creation of a Foundation "Remembrance, Responsibility and Future" and signed a joint statement with Belarus, the Czech Republic, Israel, Poland, the Russian Federation, Ukraine, the United States of America, the Foundation Initiative of German Enterprises and the Claims Conference, which is a Jewish organization[156]. In this statement, Germany "accepted that these States could negotiate a reparation agreement on behalf of individuals which did not have their nationality at the time the damage occurred".[157]

133. Similarly, the third example is the Fund for Reconciliation, Peace and Cooperation, established by Austria in 2000 for the reparation of injuries suffered as a result of the internationally wrongful acts committed by the Nazis during the Second World War. It made large-value payments to the victims who had the nationality of different States such as Belarus, the Czech Republic, Hungary, Poland, Russia, and Ukraine but who were not nationals of these States at the date of the commission of the wrongful acts[158].

134. Another example is not related to the Second World War and injuries arising from the internationally wrongful acts committed by the Nazis in Europe. It relates instead to an issue concerning one uncompleted case of decolonization of islands in the Indian Ocean.[159] In 1966, before Mauritius reached a status of independent State (in 1968), the United Kingdom (the former colonial power) separated the Chagos Islands from Mauritius. The United Kingdom also ceded one of the islands, the Island of Diego Garcia, to the United States (for a first period of 50 years, with an extension option), which eventually built a military base there.[160] Because of these events, the local population who lived on the Island of Diego Garcia (some 2000 Ilois) were removed to Mauritius. This situation created disputes, some of which still exist. One of the disputes was settled by an Agreement that entered into force between the United Kingdom and Mauritius in 1982.

135. The 1982 Agreement concerning the Ilois from the Chagos Archipelago was adopted with the desire to "settle certain problems which have arisen concerning the Ilois who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965".[161] This case of State practice is relevant and should not be discarded only because of the fact that its article 1 mentioned that the Government of the United Kingdom would pay *ex gratia* the sum of 4 million GBP

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[155] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 383–385.

[156] Law of 2 August 2000 on the Creation of a Foundation "Remembrance, Responsibility and Future", *BGBl*, vol. I, No. 38 (2000), p. 1263, and the Joint Statement of 26 October 2000 on the German-American Agreement of 17 July 2000 on the Foundation "Remembrance, Responsibility and Future", *BGBl*, vol. II, No. 34 (2000), p. 1372, both cited in Dumberry, *State Succession to International Responsibility* (see footnote 31 above), pp. 388–389.

[157] Dumberry, *State Succession to International Responsibility* (see footnote 31 above), p. 389.

[158] For the official website of the Fund for Reconciliation, Peace and Cooperation see http://reconciliationfund.at/. See also Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 386–387.

[159] The present report focuses only on the Agreement concerning the Ilois from the Chagos Archipelago, signed at Port Louis on 7 July 1982 (United Nations, *Treaty Series*, vol. 1316, No. 21924, p. 127), and does not include any comments on the advisory opinion adopted on 25 February 2019 by the International Court of Justice on the *Legal Consequences of the Separation of Chagos from Mauritius in 1965* (available from the website of the Court at www.icj-cij.org).

[160] See Dumberry, *State Succession to International Responsibility* (footnote 31 above), pp. 385–386.

[161] Agreement concerning the Ilois from the Chagos Archipelago, signed at Port Louis on 7 July 1982 (United Nations, *Treaty Series*, vol. 1316, No. 21924, p. 127). See also B.H. Weston, R.B. Lillich and D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreement, 1975-1995* (Ardsley, Transnational Publ., 1999), p. 283.

"in full and final settlement of all claims". Indeed, such formulations are standard in all compensation agreements of this kind (also called "lump sum agreements"). What is important for the purpose of this report, however, is that the United Kingdom did not object to the fact that Mauritius could submit claims with regard to a group of people who did not have its nationality at the time when the damage occurred.[162]

136. To conclude, the above analysis of State practice, case law and the doctrinal views supports the conclusions of the previous chapter concerning the possibility of the successor State to request reparation from the responsible State. This is not an automatic succession but a mere possibility, under special circumstances, to claim reparation. This idea is reflected in draft articles 12, 13 and 14 that use a rather soft language ("the successor State *may* request reparation"). However, even if the report confirms the initial idea of the priority of agreements, it is key that the successor State may claim reparation. Indeed, if it were not be able to so, the possibility to reach an agreement or a judicial or arbitral decision would have been purely theoretical and not realistic.

137. The above chapters show that both methods (agreements and case law) are equally important. In addition, they seem to confirm the special importance of the link between the internationally wrongful act and nationals of the successor State (personal nexus). Indeed, more examples of State practice relate to the injury caused to the nationals of the predecessor State than to that caused directly to the State itself. From this perspective, this report takes a nuanced position as to the relevance of the rule of continuing nationality. While it accepts such a rule as a traditional condition in the law of diplomatic protection, it rejects its strict and absolute interpretation. Consistent with the modern State practice, case law and doctrinal views, the report maintains the exception to the rule of continuing nationality in cases of State succession.

138. This conclusion does not question the content of the above draft articles 12, 13 and 14. However, it warrants proposing an additional draft article focusing on the issue of diplomatic protection and the exception to the rule of continuing nationality. Therefore, draft article 15 is proposed as follows.

Draft article 15
Diplomatic protection

1. The successor State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of a predecessor State or lost his or her nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

2. Under the same conditions set in paragraph 1, a claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession by the successor State.

3. Paragraphs 1 and 2 are without prejudice to application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection.

[162] Kohen and Dumberry (footnote 54 above), pp. 73–74.

Part Three – Scheme of the draft articles

V. Proposals for additional new draft articles (of a technical nature)

139. During the debate in the Sixth Committee one delegation (the Czech Republic) opined that draft articles would benefit if they are properly organized in various parts of the scheme. The Special Rapporteur sees the merits of this proposal. In proposing new articles in this third report, he already proposed a draft title of Part III and draft article Y which would become an opening provision of Part III.

140. In the interest of uniformity, the Special Rapporteur proposes (below), also a draft title for Part I (which would include draft articles 1 to 6), a draft title for Part II, and a draft article X, which would be the opening provision of Part II (which would include draft articles 7 to 11).

141. Draft articles X and Y would capture also one additional aspect of the topic – namely the clarification of the fact that only international wrongful acts committed by or against predecessor State for which the injured State did not receive full compensation before that date are within the scope of this topic. This issue was raised in the Sixth Committee by Slovakia. Again, the Special Rapporteur sees the merit of this proposal.

142. Finally, in view of the use of term "States concerned" in some draft articles, the Special Rapporteur proposes to include definition of this term to draft article 2, as its paragraph (*f*). The definition needs to be broad enough to capture all possible situations. It includes first a predecessor State, which committed an internationally wrongful act, its successor State or States and an injured State. However, it also includes a State which committed a wrongful act against a predecessor State, the predecessor State in position of an injured State and its successor State or States.

143. In view of the above, the following draft articles are proposed:

Title for Part I – General provisions

Draft article 2
Use of terms

For the purposes of the present draft articles: …

(*f*) "States concerned" means, in respect of a case of succession of States, a State which before the date of succession of States committed an internationally wrongful act, a State injured by such act and a successor State or States of any of these States; …

Title for Part II – Reparation for injury resulting from internationally acts committed by the predecessor State

Draft article X
Scope of Part II

The provisions of this Part apply to reparation for injury resulting from internationally wrongful acts committed by the predecessor State for which the injured State did not receive full reparation before the date of succession of States.

Part Four – Future work

VI. Future programme of work

144. As to the future programme of work on the present topic, the Special Rapporteur intends to observe the programme of work outlined in his first report[163] and complemented in his second report.[164] In particular, the fourth report will accordingly focus on forms and invocation of responsibility (namely restitution, compensation and guarantees of non-repetition) in the context of succession of States. It could also address procedural and miscellaneous issues, including the problems arising in situations where there are several successor States (the problem of plurality of successor States) and the issue of shared responsibility.

145. 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.

[163] First report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur (A/CN.4/708), para. 133.

[164] Second report on succession of States in respect of State responsibility (A/CN.4/719), para. 191.

Annex I

Text of the draft articles proposed in the third report

Draft article 2
Use of terms

For the purposes of the present draft articles: …

(*f*) "States concerned" means, in respect of a case of succession of States, a State which before the date of succession of States committed an internationally wrongful act, a State injured by such act and a successor State or States of any of these States; …

Title for Part II – Reparation for injury resulting from internationally acts committed by the predecessor State

Draft article X
Scope of Part II

The provisions of this Part apply to reparation for injury resulting from internationally wrongful acts committed by the predecessor State for which the injured State did not receive full reparation before the date of succession of States.

Title for Part III – Reparation for injury resulting from internationally wrongful acts committed against the predecessor State

Draft article Y
Scope of the present Part

The articles in the present Part apply to reparation for injury resulting from internationally wrongful acts committed against the predecessor State for which this State did not receive full reparation before the date of succession of States.

Draft article 12
Cases of succession of States when the predecessor State continues to exist

1. In the cases of succession of States:

(*a*) when part of the territory of a State, or any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State; or

(*b*) when a part or parts of the territory of a State separate to form one or more States, while the predecessor State continues to exist; or

(*c*) when a successor State is a newly independent 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;

the predecessor State injured by an internationally wrongful act of another State may request from this State reparation even after the date of succession of States.

2. Notwithstanding paragraph 1, the successor State may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the predecessor State and successor State.

Draft article 13
Uniting of States

1. When two or more States unite and so form one successor State, the successor State may request reparation from the responsible State.

2. Paragraph 1 applies unless the States concerned otherwise agree.

Draft article 14
Dissolution of States

1. When parts of the territory of the State separate to form two or more States and the predecessor State ceases to exist, one or more successor States may request reparation from the responsible State.

2. Such claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the successor States.

Draft article 15
Diplomatic protection

1. The successor State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of a predecessor State or lost his or her nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

2. Under the same conditions set in paragraph 1, a claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession by the successor State.

3. Paragraphs 1 and 2 are without prejudice to application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection.