United Nations A/CN.4/751

General Assembly

Distr.: General
1 April 2022

Original: English

International Law Commission
Seventy-third session
Geneva, 18 April–3 June and 4 July–5 August 2022

Fifth report on succession of States in respect of State responsibility

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Contents

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Part One – Introduction

I. Overview of 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. At the same session the Special Rapporteur submitted his first report on the topic (A/CN.4/708), focusing on the approach to the topic, its scope and outcome and the tentative programme of work, as a basis for initial debate later in the session. He also proposed four draft articles: 1 (Scope), 2 (*a*)–(*d*) (Use of terms), 3 (Relevance of the agreements to succession of States in respect of responsibility) and 4 (Unilateral declarations by a successor State).

2. In the light of the debate in the Commission and in the Sixth Committee in 2017, for the seventieth session (2018) the Special Rapporteur prepared his second report (A/CN.4/719), which included seven new draft articles: 5 (Cases of succession of States covered by the present draft articles), 6 (General rule), 7 (Separation of parts of a State (secession)), 8 (Newly independent States), 9 (Transfer of part of the territory of a State), 10 (Uniting of States) and 11 (Dissolution of State). These articles mainly addressed the issue of the possible transfer of obligations arising from the internationally wrongful acts of a predecessor State. In both years, the Commission considered the reports during the second part of its session and referred all the draft articles to the Drafting Committee. The Commission subsequently took note of an interim report by the Chair of the Drafting Committee regarding draft articles 1, 2, 5 and 6, which the Drafting Committee had provisionally adopted.

3. At its seventy-first session (2019), the Commission considered the third report of the Special Rapporteur (A/CN.4/731). In that report, the Special Rapporteur discussed, in addition to certain general considerations (Part One), questions of reparation for injury resulting from internationally wrongful acts committed against a predecessor State or against the nationals of a predecessor State. Consequently, he proposed draft articles 12 (Cases of succession of States when the predecessor State continues to exist), 13 (Uniting of States), 14 (Dissolution of States) and 15 (Diplomatic protection). Further, the Special Rapporteur made technical proposals in relation to the structure of the draft articles, including new draft articles X and Y (to be renumbered in due course) that concern the scope of Parts II and III, respectively. All his proposals were referred to the Drafting Committee.

4. Owing to the coronavirus disease (COVID-19) crisis, the Commission had to postpone its seventy-second session from 2020 to 2021. At that session, in July 2021, the Commission considered the fourth report of the Special Rapporteur, which had been drafted in 2020 (A/CN.4/743 and Corr.1). It addressed questions relating to the impact of succession of States on the legal consequences of responsibility, in particular the different forms of reparation, the obligation of cessation, and assurances and guarantees of non-repetition. Following the plenary debate, the Commission decided to refer draft articles 7 *bis* (Composite acts), 16 (Restitution), 17 (Compensation), 18 (Satisfaction) and 19 (Assurances and guarantees of non-repetition) to the Drafting Committee, taking into account the comments made in the plenary debate. However, the Drafting Committee did not discuss these draft articles because it had others pending from the previous session.

5. Members of the Commission generally welcomed the fourth report of the Special Rapporteur. Regarding the general considerations for work on the topic, members generally agreed with the Special Rapporteur on the subsidiary nature of the draft articles and on the priority to be given to agreements between the States concerned. Some members suggested that the commentaries to the draft articles could provide examples of succession agreements between States and that a number of model clauses could be

drafted to be used as a basis for negotiating agreements on succession in respect of State responsibility. Differing views were expressed on the general rule of non-succession, the "clean slate" rule and the rule of "automatic" succession. Some members concurred with the Special Rapporteur's assertion that the diverse and context-specific State practice did not support the primacy of either the clean slate rule or automatic succession, while some members were of the view that there might be exceptions to the general rule of non-succession.

6. At the same session, the Commission adopted draft articles 7, 8 and 9, which had been provisionally adopted by the Drafting Committee at the seventy-first session, together with commentaries thereto.[1] The Commission also took note of an interim report by the Chair of the Drafting Committee on draft articles 10 (Uniting of States), 10 *bis* (Incorporation of a State in another existing State) and 11 (Dissolution of State), which the Drafting Committee had provisionally adopted. The constructive debate helped the Commission to overcome the dichotomy between the clean slate rule and automatic succession by adopting a middle-ground approach suggested by the Special Rapporteur. A solution was found, as reflected in the wording "shall agree on how to address the injury". As this happened during the second part of the session, the Commission will not be able to adopt these draft articles with commentaries until 2022. The lack of time did not allow the Drafting Committee (and eventually the Commission) to address the remaining draft articles.

A. Summary of the debate in the Sixth Committee

7. The fact that discussion and adoption of the draft articles has been split between multiple sessions of the Commission from 2019 to 2022 is one of the factors that may complicate debate in the Sixth Committee. The Special Rapporteur appreciates the interest States have shown in this topic. Although 40 delegations made statements on it during the meetings devoted to the report of the Commission on its seventy-second session,[2] summarizing them is affected by the fact that various delegations addressed different aspects of the Commission's work. Some delegations preferred to comment mainly on general aspects of the fourth report and the approach taken by the Special Rapporteur. Several delegations focused on draft articles 7, 8 and 9, with commentaries, as provisionally adopted by the Commission. Other delegations provided comments on the newly proposed draft articles 7 *bis* and 16 to 19. Only exceptionally did comments also address the draft articles pending in the Drafting Committee.

8. The Special Rapporteur welcomes all comments: they are an indispensable part of the rigorous analysis of complex legal issues inherent to the topic and contribute to the advancement of the Commission's work, providing invaluable feedback and guidance. They may also be indicative of the need for further clarification and the elimination of potential misunderstandings. As such, they will inform the future work of the Commission, including the present report.

9. Having said that, however, the Special Rapporteur wishes to stress that this short summary cannot and should not be taken as a detailed and comprehensive analysis of all comments made by States. This is a task that must be accomplished only when the topic is completed on first reading, prior to its second reading. At that stage, there will be sufficient time for Member States and the Special Rapporteur, respectively, to send their comments and observations on the entire set of draft articles and to analyse and reflect them in the appropriate manner. By contrast, this short summary reflects only

[1] Report of the International Law Commission, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 165.

[2] See documents A/C.6/76/SR.17, 23, 24 and 25.

heterogeneous comments on the work in progress. The Special Rapporteur therefore makes no claim as to its completeness.

10. First, with respect to the general issues, most delegations generally welcomed the fourth report. In particular, most States agreed with the Special Rapporteur that the draft articles were subsidiary in nature and that priority should be given to agreements between the States concerned, as stated in draft article 1, paragraph 2. They also agreed that it was important to preserve consistency, both in terminology and substance, with the previous work of the Commission, in particular its articles on responsibility of States for internationally wrongful acts.[3]

11. Still on the general level, the main issue underlying the debate both in the Commission and in the Sixth Committee concerned the competing theories of the clean slate rule and automatic succession. Without going into the details of this highly theoretical discussion, it is noteworthy that most States agreed (or at least did not dispute) that neither the clean slate rule nor automatic succession could be accepted as general rules (Brazil, Cameroon, Croatia, Denmark on behalf of the Nordic countries, Italy, Portugal, Sierra Leone, Slovenia and the United Kingdom). Only two delegations (Austria and Turkey) opposed the wording proposed by the Special Rapporteur, which they interpreted as a rule of automatic succession, instead favouring the clean slate rule. By contrast, a few delegations declared themselves, albeit implicitly, in favour of automatic succession as a default rule (the Netherlands[4] and Mexico[5]). One delegation (Niger) took note of the contradictory views concerning the clean slate rule and the rule of automatic succession and called for further discussions in order to reach an understanding and consensual provisions.[6]

12. Another general issue relates to the dichotomy between the progressive development of international law and its codification. Here, most States either supported the view of the Special Rapporteur that the topic involves both tasks of the Commission, or viewed it as predominantly one of progressive development. At the same time, one delegation (Sierra Leone) stressed the need for transparency as to which elements of the Commission's project constitute progressive development and which represent codification.[7] However, it is noteworthy that one delegation (Denmark) said, regarding the draft articles provisionally adopted, that it was predominantly a matter of applying existing law to the particular circumstance of succession of States.[8] Another State (Austria) took a radically opposing position, rejecting the transfer of rights and obligations arising from responsibility even as a matter of progressive development of law.[9]

13. Second, several delegations commented on draft articles 7, 8 and 9, provisionally adopted by the Commission. Most of them generally supported the adopted text as stemming from the established rules on State responsibility. However, one State (Austria)

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

[4] A/C.6/76/SR.24, para. 110 ("the Commission's work should be based on the principle that no vacuum in State responsibility should emerge… Whether or not rights or obligations were transferred in specific situations should be assessed on a case-by-case basis and addressed in a succession agreement. If no such agreement could be reached, a vacuum should be avoided by transferring rights and obligations to the successor State or States").

[5] A/C.6/76/SR.23, para. 147 ("it was important not to give legal advantages to States that violated international law").

[6] A/C.6/76/SR.25, para. 24.

[7] A/C.6/76/SR.23, para. 43.

[8] Ibid., para. 35.

[9] Ibid., para. 134.

expressed concern about the wording of draft article 9, paragraph 2.[10] Two delegations (the Czech Republic and Slovakia) provided some comments on how to improve and strengthen the wording of these draft articles. These comments should inform the future work of the Commission, in particular with regard to internationally wrongful acts committed against a predecessor State and continuing after the date of succession.

14. Third, several delegations expressed their views on the newly proposed draft articles. They mostly supported draft article 7 *bis*, even if they suggested some ways in which the text could be fine-tuned or linked to the issue of shared responsibility (Denmark, India, Malaysia and the United States). However, one delegation (Austria) criticized the content of paragraph 2 of this draft article.[11] Most of the delegations addressing draft articles 16 to 19 agreed that they reflected existing international law, i.e. the articles on responsibility of States for internationally wrongful acts.[12] A few States (Austria and the Republic of Korea) questioned whether, as such, the draft articles were necessary. Some States (Cameroon, Israel, the Netherlands and the United States) called for caution in drafting these articles and the commentaries thereto so as to avoid a misleading impression of departure from or re-writing of the general rules of State responsibility, in particular concerning the primacy of or relations among individual forms of reparation. In addition, some States (Cameroon and India) suggested that these provisions should be streamlined into just two draft articles, one on cessation and guarantees of non-repetition and the other on all forms of reparation. These comments are useful and will be taken duly into consideration in the Special Rapporteur's proposals to the Drafting Committee.

15. Finally, regarding the form of the final outcome of work on this topic, several delegations expressed the view that this would be better decided at a later stage. Some States expressly supported or accepted draft articles as the appropriate form (Denmark and Slovakia). Others expressed their preference for a "softer" outcome, such as draft guidelines or conclusions (Brazil, India, Israel, Italy, Poland, Sierra Leone and the United States).

B. General approach (methodology) of the report

16. The Special Rapporteur first reiterates that, as always, he welcomes all comments from the debate in the Sixth Committee. They continue to provide invaluable feedback and guidance for the future work of the Commission. At the same time, as was stated in the fourth report, such comments "may also be indicative of the need for further clarifications and elimination of possible misunderstandings".[13] This is also true for the debate in 2021.

17. Before addressing some new problems and misunderstandings, the Special Rapporteur wishes to briefly recall the general conclusions expressed in or underlying previous reports. They were generally (with few exceptions) supported by Member States in the Sixth Committee debate. These conclusions are as follows: (1) the draft articles are subsidiary in nature and priority is to be given to agreements between the States concerned; (2) the topic must preserve consistency, in terminology and substance, with the previous works of the Commission; (3) the concept of equity, equitable proportion or distribution of rights and obligations, as well as the concept of unjust enrichment, seems to be important; (4) the rare occurrence of succession of States does not, by itself, exclude the possibility of progressive development of international law and its codification; and

[10] Ibid., paras. 141–142.
[11] A/CN.6/76/SR.23, para. 135.
[12] See footnote 3 above.
[13] A/CN.4/743, para. 13.

(5) the non-conclusiveness of State practice does not support either the clean slate principle or the principle of automatic succession as a general rule.

18. This last point was reflected, inter alia, in the wording "shall agree on how to address the injury" in draft articles 10, 10 *bis* and 11, which were provisionally adopted by the Drafting Committee in 2021. Even if the wording may appear rather weak, one should recall the concept of *pactum de negotiando* in international law. The obligation flowing from a *pactum de negotiando* – to negotiate with a view to concluding an agreement – must be fulfilled in good faith, in accordance with the fundamental principle *pacta sunt servanda*. This is clearly supported by several decisions of international courts and arbitral tribunals. As the Permanent Court of International Justice stated in 1931 in the case concerning *Railway Traffic between Lithuania and Poland*, the obligation to negotiate is first of all "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements".[14] The International Court of Justice summarized and confirmed the relevant case law in its 2011 judgment in *Application of the Interim Accord of 13 September 1995*.[15] In the same vein, in 1972 the Arbitral Tribunal constituted under the Agreement on German External Debts very aptly explained the nature of the obligation to negotiate in the case brought by Greece against the Federal Republic of Germany.[16] If those are the effects of the obligation to negotiate, it seems plausible to interpret the language "shall agree" as an even stronger obligation.

19. Finally, in response to some comments and concerns expressed in the Sixth Committee, the Special Rapporteur finds it important to provide reassurance that he does not intend to question or re-write the general rules on State responsibility. Although some of the draft articles and supporting analyses proposed in the fourth report do also address general issues of the law of State responsibility, in particular the forms of legal consequences for internationally wrongful acts (cessation, assurances of non-repetition and reparation), this was done in order to apply these rules to situations of succession of States. Possible, albeit unintentional, flaws in the wording of the draft articles may be corrected by the Drafting Committee.

20. As has been restated above, the articles on responsibility of States for internationally wrongful acts were and remain the basis for the study of responsibility even in situations of succession of States. This is in spite of the fact that the articles neither exclude such cases nor address them in any way. However, the present report will address, along with the plurality of States, the issue of shared responsibility.

21. This warrants a clarification. Seeking consistency with the articles on responsibility of States for internationally wrongful acts implies that the present report will build on the existing rules when it comes to plurality of States – both responsible and injured – in the context of succession of States. The term "shared responsibility" is to be understood accordingly, in its plain meaning of the responsibility of more than one State. However, it does not mean that the Special Rapporteur endorses the Guiding Principles on Shared Responsibility in International Law, which is an unofficial, scholarly document prepared by a group of international lawyers at the University of Amsterdam with recognized

[14] *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, Advisory Opinion, P.C.I.J. Series A/B 1931, No. 42, p. 108, at p. 116.

[15] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, *I.C.J. Reports 2011*, p. 644, para. 132.

[16] *Case concerning claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Between Greece and the Federal Republic of Germany)*, Decision of 26 January 1972, United Nations, *Reports of International Arbitral Awards*, vol. XIX (Sales No. E/F.90.V.7), p. 27, at paras. 62–65 (especially para. 62: "However, a *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken"). For the text of the Agreement on German External Debts (London, 27 February 1953), see United Nations, *Treaty Series*, vol. 333, No. 4764, p. 3.

expertise in the field of international responsibility, chaired by Professor André Nollkaemper.[17] Even though "the Principles and the commentaries are of an interpretative nature and build on the existing rules of the law of international responsibility" and, therefore, do not distinguish between the codification and the progressive development of international law,[18] they sometimes offer novel interpretations of the law of international responsibility.[19] Although any interpretation (including a novel interpretation) remains an interpretation and must not be confused with a revision of the existing rules of international responsibility, one should not omit that theoretical possibility. However, this is not the intention of the Special Rapporteur.

22. For greater certainty, the Special Rapporteur does not intend to re-write the law of international responsibility or open general questions that are not related to responsibility in situations of succession of States. Therefore, the report will differentiate between the above Guiding Principles and the general rules on plurality of States applicable even in the context of succession of States.

Part Two – Plurality of States in respect of responsibility in cases of succession of States

II. Introductory note and use of terms

23. The notion of plurality of States means, generally speaking, that there is more than one injured State or more than one responsible State with respect to a single internationally wrongful act. This situation is not specific to responsibility in the context of succession of States. On the contrary, the plurality of States is governed by the general rules of State responsibility, as codified in the 2001 articles on responsibility of States for internationally wrongful acts (articles 46[20] and 47[21]).

24. Such situations are addressed in Part Three, chapter I (Invocation of the responsibility of a State) of the articles on responsibility of States for internationally wrongful acts. This implies that the Commission viewed the issue as one of invoking responsibility, rather than attributing the same conduct to several States. When it comes to attribution, the general rules codified in Part One of the articles apply. The condition for applying the rules on plurality is that several States are injured by or responsible for "the same internationally wrongful act". The placement of these provisions in the chapter on invocation of responsibility also means that these rules should be read in the context of other relevant provisions of the articles on State responsibility.

25. First, according to article 33, paragraph 1, where an internationally wrongful act is committed, the obligations of the responsible State (the obligations which form the content of responsibility) "may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content

[17] See André Nollkaemper and others, "Guiding Principles on Shared Responsibility in International Law", *European Journal of International Law*, vol. 31, No. 1 (2020), p. 15.

[18] Ibid., p. 21.

[19] Ibid., p. 16.

[20] Article 46 (Plurality of injured States): "Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act" (see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76).

[21] Article 47 (Plurality of responsible States): "1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. 2. Paragraph 1: (*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered; (*b*) is without prejudice to any right of recourse against the other responsible States" (ibid.).

of the international obligation and on the circumstances of the breach".[22] Next, article 42 covers the entitlement of an injured State to invoke the responsibility of another State, while defining the "injured State" in terms of the obligation breached.[23] In addition, article 48 provides for the possibility of responsibility being invoked by a State other than an injured State.[24] It is important, even in the context of succession of States, to stress the role of obligations *erga omnes* and *erga omnes partes*, a breach of which also entails the right of any State to invoke responsibility.[25]

26. The term "shared responsibility" is not a corollary to (much less a synonym for) the concept of the plurality of responsible States (or plurality of States in general). It simply conveys the idea of responsibility being shared by two or more States (or even international persons), which may be the case in situations involving a plurality of responsible States. However, it may also happen in other situations. On the one hand, a claim of responsibility may be invoked against a single State, and that State alone may satisfy it (for example, by way of compensation). On the other hand, shared responsibility can also be engaged in situations of aid or assistance or situations of control, when one State is responsible for its own, principal internationally wrongful act, while another State or States bear responsibility for aiding, assisting or exercising control in the commission of that internationally wrongful act.[26] It is clear, however, that those States do not commit exactly the same internationally wrongful act as the main (principal) perpetrator but contribute to the injury. They are responsible on the grounds of other acts (providing aid or assistance, exercising direction and control, or coercing another State). The articles on responsibility of States for internationally wrongful acts address these situations in Part One, chapter IV (Responsibility of a State in connection with the act of another State).[27]

27. In turn, the Guiding Principles on Shared Responsibility in International Law provide for shared responsibility in situations of aid or assistance and direction or control, provided that the conduct of each of the international persons involved (meaning not only States but also international organizations) contributes to an "indivisible injury", which is the key term used therein.[28] It seems that the "indivisible injury", rather than the internationally wrongful act, is the starting point for the Guiding Principles. Principle 2 makes it clear that the commission "by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury entails shared responsibility".[29] The focus on "injury" and a causal relationship between conduct and injury appears in principle 1 (Use of terms). It is significant that, for the purposes of the Guiding Principles, "injury" means "material and non-material damage, and does not include legal injury".[30] Although the Guiding Principles do not seek to impose a general test of causation, principle 2, paragraph 2, provides that "[c]ontribution to an indivisible injury may be individual, concurrent or cumulative".[31]

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[22] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.
[23] Ibid.
[24] Ibid.
[25] This was raised by Portugal in its statement to the Sixth Committee (A/C.6/76/SR.23, para. 71, at para. 75).
[26] These aspects are addressed in the Guiding Principles on Shared Responsibility in International Law (see footnote 17 above), in particular principles 6 (Shared responsibility in situations of aid or assistance), 7 (Shared responsibility in situations of concerted action) and 8 (Shared responsibility in situations of control).
[27] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.
[28] Nollkaemper and others, "Guiding Principles …" (see footnote 17 above), p. 16.
[29] Ibid.
[30] Ibid., p. 16 (principle 1, para. 1 (c)) and pp. 22–23 (para. 4 of the commentary to principle 1). See also principle 1 (d) ("'contribution to injury' means a causal relationship between conduct and injury").
[31] Ibid.

28. The above differences show that the Guiding Principles on Shared Responsibility in International Law may be of limited use for the topic of succession of States in respect of State responsibility. First of all, the main added value of the Guiding Principles seems to lie in their focus on what constitutes international responsibility of States and other international persons (attribution), while the Commission's work on the present topic aims to clarify the impact of succession of States on responsibility, making it clear that succession of States has no impact upon attribution.[32] Next, the Guiding Principles address only the plurality of responsible international persons (proposing a solution in the form of shared responsibility). The Commission's topic seems broader, as it needs to examine both the plurality of injured States and the plurality of responsible States with a view to the possible transfer of rights and obligations. At the same time, however, it is much narrower, because it addresses only the plurality of States (and not other persons, such as international organizations) in the context of succession of States, leaving aside general rules of responsibility.

29. Moreover, it is significant that the extensive and in-depth studies conducted by the authors of the Guiding Principles, which dwell on many aspects of the concept of shared responsibility, do not even mention its application with respect to succession of States.[33] Indeed, the paradigm of shared responsibility supposes the commission by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury. In the context of succession of States, however, a wrongful act is usually committed by one State (the predecessor), but an injury remains after the date of succession. There is therefore no contribution by other States to the given injury, with the possible exception of continuing acts[34] and composite acts.[35]

30. Consequently, the analysis in the next chapter of the present report is divided into the following sections: 1. Plurality of injured successor States; 2. Plurality of responsible successor States; and 3. Particular aspects of plurality of States in cases of continuing and composite acts.

III. Plurality of States in the context of succession

A. Plurality of injured successor States

31. As explained in detail in the third report of the Special Rapporteur,[36] the succession of States may affect one or more injured States. It was pointed out that in this situation the right to reparation is merely a consequence of the internationally wrongful act of the

[32] Draft article 6, as provisionally adopted by the Drafting Committee in 2018, reads: "A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession" (see the interim report of the Chair of the Drafting Committee to the seventieth session of the Commission (3 August 2018), available at https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sosr.pdf&lang=E).

[33] See André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge, United Kingdom: Cambridge University Press, 2014); André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge, United Kingdom: Cambridge University Press, 2015); André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge, United Kingdom: Cambridge University Press, 2017).

[34] See draft article 7, provisionally adopted by the Commission at its seventy-second session (A/76/10, paras. 122 and 164).

[35] See draft article 7 *bis*, as proposed by the Special Rapporteur in his fourth report (A/CN.4/743, para. 121).

[36] A/CN.4/731, especially paras. 40–50.

responsible State. This State (and its wrongful act) remains the same and is not affected by territorial modifications giving rise to the succession of States.[37]

32. However, it is indisputable that certain claims may be influenced by the application of the rule of nationality of claims (article 44 (*a*) of the 2001 articles on responsibility of States for internationally wrongful acts) or by rules governing the plurality of injured States (article 46 of the same articles). Although the rules codified in the 2001 articles are general in nature, they do not cease to apply just because a succession of States occurs.

33. This was acknowledged by the Commission when it accepted the Special Rapporteur's approach to the present topic. In substance, possible rules on reparation for injury resulting from internationally wrongful acts committed against a predecessor State have been proposed and referred to the Drafting Committee. Draft articles 12, 13 and 14 address cases of succession of States when the predecessor State continues to exist, the uniting of States, and the dissolution of States, respectively.[38]

34. It is evident that not all categories of succession of States are equally relevant with respect to plurality of successor States. The typical situation is that of the dissolution of a State, where the predecessor State ceases to exist and several successor States emerge. One of the modern examples is the dissolution of Czechoslovakia. The practice of the United Nations Compensation Commission, for example, shows that, with respect to Czechoslovak claims, the Compensation Commission decided that some claims had been submitted before the Czech and Slovak Federal Republic ceased to exist, but that awards of compensation would have to be paid to the Governments of the Czech Republic and the Slovak Republic, respectively, pursuant to an agreement between the two Governments.[39]

35. Another situation of plurality of successor States may exist in cases of the separation of parts of a State, where more than one new State separates from a predecessor State which continues to exist. This was, for example, the case with the secession of Pakistan from India in 1947. The British Dominion of India had been 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, the purpose of which was the equitable distribution of the total assets available as reparation from Germany among several injured States.[40] 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 had seceded from India. The Governments of India and Pakistan agreed in January 1948 on how to divide the share of reparations allocated to India under the 1946 Agreement. This bilateral agreement led to the conclusion of an additional Protocol to the 1946

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[37] Ibid., para. 42; see also Patrick Dumberry, *State Succession to International Responsibility* (Leiden: Martinus Nijhoff, 2007), p. 312.

[38] Draft articles 12, 13 and 14, referred to the Drafting Committee by the Commission at its seventy-first session (see the interim report by the Chair of the Drafting Committee of 31 July 2019 (available at https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2019_dc_chairman_statement_sosr.pdf&lang=E), p. 2; see also Report of the International Law Commission, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), footnote 1444).

[39] United Nations Compensation Commission, Governing Council Decisions 20 (1994) and 22 (1994): see documents S/AC.26/Dec.20 (1994), para. 3, footnote 2 ("The claims were initially submitted by the Czech and Slovak Federal Republic. The award of compensation is to be paid to the Government of the Slovak Republic") and A/AC.26/Dec.22 (1994), para. 2, footnote 2 ("These 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 the Slovak Republic, respectively"). Decisions of the Governing Council are available at https://uncc.ch/decisions-governing-council.

[40] Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, done at Paris on 14 January 1946 (United Nations, *Treaty Series*, vol. 555, No. 8105, p. 69).

Agreement.[41] It was thus accepted that not only India but also Pakistan could claim reparation from Germany.[42]

36. The recent and most complex case of a plurality of successor States, which started as separation and ended in complete dissolution, is that of the former Yugoslavia. In some cases, a territorial or personal link allows a successor State or States to be identified as being entitled to invoke the responsibility of a State that has committed an internationally wrongful act. In a case of succession in which it is not possible to determine a single successor State, each injured successor State may separately invoke that responsibility. However, this should be done in an equitable manner so as to ensure that any injured State does not recover more than the damage it has suffered.

37. The notion of equity is generally used for the establishment of "equitable criteria of repartition" of rights and obligations among the various States concerned.[43] This is perfectly in line with other documents dealing with State succession, in particular in matters of property and debts. The concepts of equity and "equitable proportion" are reflected in the Vienna Convention on Succession of States in respect of State Properties, Archives and Debts.[44] Similarly, article 8, paragraph 1, of the resolution entitled "State Succession on Matters of Property and Debts", adopted by the Institute of International Law (*Institut de Droit international*) in 2001, provides that "[t]he result of the apportionment of property and debts must be equitable".[45]

38. With respect to the former Yugoslavia, the Badinter Arbitration Commission stated, in its Opinion No. 1, that "the outcome of succession should be equitable, the States concerned being free to settle terms and conditions by agreement".[46] Both the concept of equity and that of agreement became central to the 2001 Agreement on Succession Issues concluded by the successor States of the Socialist Federal Republic of Yugoslavia: Bosnia and Herzegovina, Croatia, Serbia and Montenegro (later succeeded by Serbia), Slovenia, and the former Yugoslav Republic of Macedonia (now North Macedonia). The preamble to the 2001 Agreement indicates that it was reached by the successor States "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 Yugoslavia".[47]

39. It is noteworthy that, according to article 1 of annex F to the Agreement, "[a]ll rights and interests which belonged to the [Socialist Federal Republic of Yugoslavia] and which are not otherwise covered by this Agreement … shall be shared among the successor States, taking into account the proportion for division of [the financial assets of the Socialist Federal Republic of Yugoslavia] in Annex C of this Agreement."[48] This means that the agreed proportions for the division of State property and debts could also be used for other claims. The financial assets of the Socialist Federal Republic of Yugoslavia were

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[41] 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).

[42] Dumberry, *State Succession to International Responsibility* (see footnote 37 above), p. 325.

[43] V.D. Degan, "Equity in Matters of State Succession", in Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1994), p. 201, at p. 207.

[44] Articles 37, 40 and 41. For the text of the Convention, which was signed on 8 April 1983 but has yet to enter into force, see *Official Records of the United Nations Conference on Succession of States in Respect of State Properties, Archives and Debts, Vienna, 1 March–8 April* (United Nations Sales No. E.94.V.6), vol. II, p. 141.

[45] "State Succession in Matters of Property and Debts", resolution of 26 August 2001, *Annuaire de l'Institut de Droit international*, vol. 69 (Session of Vancouver, 2001), p. 712, at p. 721.

[46] International Conference on the Former Yugoslavia, Arbitration Commission, Opinion No. 1, 29 November 1991, *International Legal Materials*, vol. 31, No. 6 (1992), p. 1494, at pp. 1495–1496.

[47] Agreement on Succession Issues (with annexes), signed at Vienna on 29 June 2001 (United Nations, *Treaty Series*, vol. 2262, No. 40296, p. 251, at p. 253).

[48] Ibid., p. 293.

divided among the successor States in the following proportions: Bosnia and Herzegovina – 15.5 per cent; Croatia – 23 per cent; the former Yugoslav Republic of Macedonia – 7.5 per cent; Slovenia – 16 per cent; and Serbia and Montenegro (later succeeded by Serbia) – 38 per cent (pursuant to article 5 of annex C to the Agreement).[49] These proportions generally reflect the size of the territory and population of the States concerned and their respective contributions to the GDP of the predecessor State.

40. The above proportions can only be taken into consideration as an application of the principle of equitable distribution in the absence of another agreement and where there are no special connections between one or more successor States and the injury that remained (without full reparation) at the date of the succession of States. All these criteria are relevant for the apportionment of reparations among the injured successor States. However, the responsible State cannot refuse a claim by one successor State simply because of a plurality of injured States. This would be contrary to the rule codified in article 46 of the articles on responsibility of States for internationally wrongful acts.[50] The draft articles on the present topic maintain consistency with the Commission's previous work, in particular its articles on State responsibility. Any departure from that rule would need the agreement of the all States concerned, not only the successor States *inter se*.

B. Plurality of responsible successor States

41. The impact of succession of States with respect to the responsibility of a predecessor or successor State or States is a little more complicated. As has already been thoroughly discussed by the Commission and reflected in the draft articles provisionally adopted to date, where a predecessor State that has committed an internationally wrongful act continues to exist, "an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession".[51] This rule (with some possible exceptions) applies to the following categories of succession of States: cession of a part of the territory; separation of a part or parts of the territory; and the creation of a newly independent State. Even if we may speak of a plurality of (potentially) responsible States, not all such States will be equally relevant in addressing an injury.

42. Two other categories of succession of States exclude *ipso facto* any issue of plurality, because they result in a single State. This is the case for the situations described as uniting of States (merger) and incorporation of one State into another.[52]

43. However, in the case of the dissolution of a State, plurality of responsible States poses a real and serious problem. Even if the guidance in draft article 11 requires that "the injured State and the relevant successor State or States shall agree on how to address the injury arising from the internationally wrongful act", the injured State may not know, at least *a priori*, which of the successor States is relevant. As a matter of invocation, which merely begins a process of negotiation or judicial settlement of a dispute, the injured State should be able to rely, *mutatis mutandis*, on the rule codified in article 47 (Plurality of responsible States) of the articles on responsibility of States for internationally wrongful acts.[53] The injured State may therefore request reparation from one, several or all successor States.

[49] Ibid., pp. 282–283.
[50] See footnote 20 above.
[51] Draft article 9, provisionally adopted by the Commission at its seventy-second session (see A/76/10, paras. 122 and 164).
[52] See draft articles 10 and 10 *bis*, provisionally adopted by the Drafting Committee during the seventy-second session of the Commission (A/CN.4/L.954).
[53] See footnote 21 above.

44. This principle can be moderated by the territorial principle, which seems to prevail in both dissolution and separation scenarios. The former is illustrated by the dissolution of Czechoslovakia, where the International Court of Justice dealt with the sole responsibility of Slovakia in the *Gabčíkovo-Nagymaros* case.[54] However, even the recent example of the separation of South Sudan from Sudan expressly confirms the territorial principle, together with the need for good faith negotiations to conclude apportionment of external debt, in the 2012 Agreement on Certain Economic Matters, in particular articles 3 and 4.[55]

45. The breakdown of the Soviet Union presents a special case that excludes, in principle, shared responsibility, because the Russian Federation acts as a continuator State. This was also confirmed by the Austrian Supreme Court in a decision of 30 September 2002.[56] The case concerned a claim brought by an Austrian citizen for compensation from the Republic of Austria because of a "(quasi) expropriation". The applicant had been arrested by the Soviet occupying forces in 1952 and taken to a Soviet military prison, and his property had been confiscated. In general, the Russian Federation assumed responsibility for such acts by the Soviet authorities (committed after 7 November 1917) under the 1991 Act on the Rehabilitation of Victims of Political Repression.[57] This Act applied not only to Russian nationals but also to foreigners, but the applicant in question was deprived of compensation because Austria had waived all claims against the Allies on behalf of all Austrian nationals under article 24 of the Austrian State Treaty of 1955.[58] The Supreme Court found that in the case at hand there was no need to decide whether the transition from the Soviet Union to the Russian Federation was a case of State succession or State continuity, as the applicant had based his claim for compensation only on the assertion that he could not enforce the claim against the Russian Federation. Without the waiver, he would have had a claim against the Russian Federation. The case thus supports the sole responsibility of the Russian Federation for at least a broad category of acts attributed to the Soviet Union.

46. As mentioned above, the most significant recent example of problems related to a plurality of successor States is the dissolution of Yugoslavia. Notwithstanding the 2001 Agreement on Succession Issues,[59] there are still many claims, in particular individual claims, pending mostly before the European Court of Human Rights. So far, this Court has dealt with the majority of claims with respect to the responsibility of successor States of the former Yugoslavia. Moreover, in order to decide such cases on their merits, the Court has had to tackle the issue of plurality and to resolve the question of which

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[54] See the Special Agreement for Submission to the International Court of Justice of the Differences concerning the Gabčíkovo-Nagymaros Project, signed at Brussels on 7 April 1993 (United Nations, *Treaty Series*, vol. 1725, No. 30113, p. 225), second paragraph of the preamble: "*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. 226). Documents pertaining to the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* are available on the website of the International Court of Justice (www.icj-cij.org/en/case/92).

[55] See *United Nations Juridical Yearbook 2013*, p. 87, footnote 29. This Agreement has not been registered by the parties pursuant to Article 102 of the Charter of the United Nations. Consequently, the Secretariat has no information on its status, the authentic text, or its entry into force. The text of the Agreement can be found in the United Nations Peace Agreements database, at http://peacemaker.un.org/node/1617.

[56] Decision of the Supreme Court of Justice of Austria, 1Ob149/02x, 30 September 2002.

[57] Act No. 1761-I of the Russian Federation of 18 October 1991 on the Rehabilitation of Victims of Political Repression (as amended up to 6 December 2021), available at https://docs.cntd.ru/document/9004648.

[58] State Treaty (with annexes and maps) for the Re-establishment of an Independent and Democratic Austria, signed at Vienna on 15 May 1955 (United Nations, *Treaty Series*, vol. 217, No. 2949, p. 223).

[59] See footnote 47 above.

successor State would be a respondent in the proceedings and, eventually, the bearer of obligations arising from international responsibility.

47. The complexity of these issues can be best illustrated by several judgments of the Court. In this respect, the landmark decision is *Ališić and Others*.[60] This case originated in an application by three citizens of Bosnia and Herzegovina against five successor States of the former Yugoslavia. The applicants alleged that they had not been able to withdraw their "old" foreign-currency savings from their accounts at the Sarajevo branch of Ljubljanska Banka Ljubljana and the Tuzla branch of Investbanka following the dissolution of the Socialist Federal Republic of Yugoslavia in 1991–1992. In the successor States of the former Yugoslavia, foreign-currency savings deposited prior to its dissolution were placed under a special regime and are commonly referred to as "old" or "frozen" foreign-currency savings.[61]

48. The succession of States was at the core of this case. The Court, sitting as a Grand Chamber, recalled that the obligation to negotiate in good faith with a view to reaching an agreement was the basic principle for the settlement of the various aspects of succession.[62] Failing an agreement, the Court took the view that the territoriality principle was of vital importance as far as succession in respect of State property was concerned.[63] Consequently, the Court concluded that there had been a violation of article 1 of Protocol No. 1 to the European Convention on Human Rights (right to peaceful enjoyment of possessions)[64] by Serbia (in respect of one applicant) and by Slovenia (in respect of two other applicants). However, there had been no violation by the other respondent States.[65] It is noteworthy, from the point of view of the content and forms of legal consequences of responsibility addressed in the fourth report of the Special Rapporteur,[66] that the Court awarded not only financial compensation ("just satisfaction" in the words of the Convention[67]) but held that "the failure of the Serbian and Slovenian Governments to include the present applicants and all others in their position in their respective schemes for the repayment of 'old' foreign-currency savings represents a systemic problem".[68] Therefore, the Court decided that Serbia and Slovenia, respectively, must make all the necessary arrangements, including legislative amendments, within one year, under the supervision of the Committee of Ministers of the Council of Europe, to allow the applicants and others in their position to recover their "old" foreign-currency savings under the same conditions as those who had such savings in domestic branches of Serbian or Slovenian banks.[69]

49. The European Court of Human Rights resolved the problem of there being multiple (in fact, five) respondent States, all successors to the former Yugoslavia, by means of separated responsibility for acts attributed individually to Serbia and Slovenia alone, based on the territoriality principle, rather than by applying the principle of shared responsibility. This fact is emphasized in some critical points made regarding this

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[60] *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, ECHR 2014, vol. IV.

[61] Ibid., para. 23.

[62] Ibid., para. 60, citing Opinion No. 9 of the Arbitration Commission of the International Conference on the Former Yugoslavia (*International Law Reports*, vol. 92 (1993), pp. 162–208, and vol. 96 (1994), pp. 719–737).

[63] *Ališić and Others* (see footnote 60 above), para. 60, citing article 18 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (see footnote 44 above).

[64] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Paris on 20 March 1952 (United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221, at p. 262).

[65] *Ališić and Others* (see footnote 60 above), pp. 272–273, paras. 2–4 of the judgment.

[66] A/CN.4/743.

[67] Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221), article 50.

[68] *Ališić and Others* (see footnote 60 above), p. 273, para. 9 of the judgment.

[69] Ibid., paras. 10–11 of the judgment.

principle in the Concurring Opinion of Judge Ziemele[70] and, in particular, in the Partly Dissenting Opinion of Judge Nussberger joined by Judge Popović.[71]

50. However, the territoriality principle, upheld by the Court in the *Ališić* case, is not the only relevant criterion for how to address unsettled injuries arising in the context of the Yugoslav succession. Other factors that appear in the case law of the Court include the institutional link (or devolution) between an organ of a territorial unit (republic) of the Yugoslav federation, as the author of a violation, and an organ of a successor State. This was confirmed in the Court's recent judgment in *Zaklan v. Croatia*.[72] In this case, the Government of Croatia argued that the alleged violation could not have been attributed to the respondent State as it had resulted from actions undertaken by federal authorities (the Federal Foreign Currency Operations Inspectorate) of the former Yugoslavia before Croatia had declared independence, and because Croatia had not taken over the administrative offence proceedings instituted by the former federal authorities.[73] The Government also submitted that, as the money temporarily confiscated from the applicant on 28 January 1991 was located in present-day Serbia, he should have requested the return of his money from Serbia, not from Croatia. However, the Court established that Croatia had taken over the administrative offence proceedings against the applicant, a national of Croatia.[74] The Court concluded that "the situation the applicant complained of is attributable to the Croatian authorities, it being understood that Serbia is not a party to the proceedings the applicant instituted before the Court and that the Court therefore cannot pronounce itself on the issue whether Serbia may as well be held responsible for that situation."[75]

51. It is significant that the Court, aware of the fact that the confiscated money was being kept in Serbia and that multilateral consultations on issues of succession under the 2001 Agreement on Succession Issues[76] had not resolved the problem, decided only on the responsibility of Croatia, leaving open the possible issue of shared responsibility.

52. It is noteworthy that, in 2003, Croatia adopted a special law entitled "Act on the Responsibility of the Republic of Croatia for Damage Caused in the former Socialist Federal Republic of Yugoslavia for which the former Socialist Federal Republic of Yugoslavia was responsible". Its article 1, paragraph 1, provides the following: "The Republic of Croatia, as one of the legal successors to the former Socialist Federal Republic of Yugoslavia, shall be liable for those damages incurred in the former Socialist Federal Republic of Yugoslavia for which the former Socialist Federal Republic of Yugoslavia was liable under the regulations in force at the time, if it can be deducted from the fair weighting of all circumstances of the case, in particular nationality, temporary residence, permanent residence, the seats of the responsible party and the injured party, the place of harmful action and the resulting harmful consequences, the manner of causing damage and other circumstances weighed in their entirety, that the Republic of Croatia, of all other successor states to the former Socialist Federal Republic of Yugoslavia, has the closest connection to the damage".[77]

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[70] Ibid., p. 275.

[71] Ibid., p. 279.

[72] *Zaklan v. Croatia*, no. 57239/13, ECHR, judgment of 16 December 2021.

[73] Ibid., paras. 65–66.

[74] Ibid., paras. 79–80.

[75] Ibid., para. 86. The similar case brought against Slovenia by a private company registered in Liechtenstein was declared inadmissible for non-exhaustion of domestic remedies (*Glas-Metall Trust Reg v. Slovenia*, no. 47523/10, ECHR, Fourth Section decision of 5 July 2018).

[76] See footnote 47 above.

[77] See *Zakon o odgovornosti Republike Hrvatske za štetu nastalu u bivšoj SFRJ za koju je odgovarala bivša SFRJ* (NN 117/03). It is quite significant that under article 1, paragraph 2, the closest connection is considered to exist if, at the time of the harmful event, the injured party was a citizen of the former Socialist Republic of Croatia or a legal entity with registered office in its territory.

53. In addition to cases involving the dissolution of the Federal Socialist Republic of Yugoslavia, the European Court of Human Rights has also addressed many cases relating to the subsequent separation of Montenegro from the State Union of Serbia and Montenegro. In this respect, two clear lines of case law can be distinguished. The first is that of continuity of responsibility where the predecessor State continues to exist. The Court has accepted the rule that the responsibility of the predecessor State continues even after the date of succession. In such cases, the Court has continued proceedings against Serbia, noting that "[f]rom 3 June 2006, following Montenegro's declaration of independence, Serbia remained the sole respondent in the proceedings before the Court", or the respondent "succeeded by Serbia on 3 June 2006".[78]

54. The second line of case law stems from the landmark judgment in the *Bijelić* case.[79] In this application against Montenegro and Serbia, the Court ruled that if a wrongful act had been committed by an organ of Montenegro during the existence of the State Union of Serbia and Montenegro, Montenegro succeeded to the responsibility as an independent State. As the impugned events had taken place in Montenegro only, the Court considered that a complaint in respect of Serbia was incompatible *ratione personae* with the provisions of the Convention.[80] This decision has been confirmed in other cases, such as *Lakićević and Others*,[81] *Milić*[82] and *Mandić*.[83] The approach of the Court seems to combine the test of institutional continuity with the territoriality principle.

55. To sum up, although the 2001 Agreement on Succession Issues suggests that responsibility be shared among all successor States, the practice and, in particular, the case law of the European Court of Human Rights point rather to the separate responsibility of one State, either predecessor (continuator) or successor. Even if more than one continuator or successor State bears some obligations arising from an internationally wrongful act, each of them is obliged to make reparation only for injury resulting from its own act, or that of the predecessor State, to which it has a special link.

Moreover, article 6, paragraph 2 provides for the possibility of apportionment, with an implicit reference to the 2001 Agreement: "This Act does not affect the right of the Republic of Croatia, depending on the agreement of the successor States of the former Socialist Federal Republic of Yugoslavia on the distribution of obligations of the former Socialist Federal Republic of Yugoslavia to pay damages in the former Socialist Federal Republic of Yugoslavia for which the former Socialist Federal Republic of Yugoslavia was responsible, to request reimbursement from other successor States of the former Socialist Federal Republic of Yugoslavia of amounts paid for damages under the present Act."

[78] See, in particular, the following judgments: *Bodrožić v. Serbia*, no. 32550/05, 23 June 2009; *Filipović v. Serbia*, no. 27935/05, 20 November 2007; *Jevremović v. Serbia*, no. 3150/05, 17 July 2007; *Kin-Stib and Majkić v. Serbia*, no. 12312/05, 20 April 2010; *Kostić v. Serbia*, no. 41760/04, 25 November 2008; *Lepojić v. Serbia*, no. 13909/05, 6 November 2007; *Marčić and Others v. Serbia*, no. 17556/05, 30 October 2007; *Matijašević v. Serbia*, no. 23037/04, ECHR 2006-X; *Milošević v. Serbia*, no. 31320/05, 28 April 2009; *Molnar Gabor v. Serbia*, no. 22762/05, 8 December 2009; *Salontaji-Drobnjak v. Serbia*, no. 36500/05, 13 October 2009; *Stojanović v. Serbia*, no. 34425/04, 19 May 2009; *V.A.M. v. Serbia*, no. 39177/05, 13 March 2007; and *Vrenčev v. Serbia*, no. 2361/05, 23 September 2008.

[79] *Bijelić v. Montenegro and Serbia*, no. 11890/05, 28 April 2009.

[80] Ibid., para. 70.

[81] *Lakićević and Others v. Montenegro and Serbia*, no. 27458/06 and 3 others, 13 December 2011.

[82] *Milić v. Montenegro and Serbia*, no. 28359/05, 11 December 2012.

[83] *Mandić v. Montenegro, Serbia and Bosnia and Herzegovina*, no. 32557/05, Fourth Section decision of 12 June 2012.

C. Particular aspects of plurality of States in cases of continuing or composite acts

56. In previous reports, the Special Rapporteur addressed, in the context of succession of States in respect of State responsibility, the particular cases of continuing acts and composite acts. To this end, he proposed draft article 7[84] and draft article 7 *bis*.[85] By their nature, these types of act may entail the responsibility of both a predecessor State and a successor State. However, unless a successor State acknowledges and adopts the act of the predecessor State as its own, each of the States bears international responsibility for its own act, or its part of the act, if and to the extent that it constitutes a breach of any international obligation in force for that State.

57. Plurality of States is therefore possible in such situations. This may involve a successor State and a predecessor State, if the latter continues to exist, or two or more successor States, in certain cases of the dissolution of a predecessor State. For example, if two or more successor States of the former Yugoslavia continued in and/or completed a wrongful act begun by the Yugoslav federal customs authorities, they would bear responsibility for that act. However, this is not based on the rules of State succession but rather on the application of general rules on State responsibility.

58. Consequently, even the general rule included in article 47 of the articles on responsibility of States for internationally wrongful acts[86] must apply to such situations. If the States concerned committed separate acts, distinct from the continuing or composite act, this would entail the separate responsibility of each State for its own act. However, "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act." Of course, this option in favour of an injured State (or nationals thereof) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered (art. 47, para. 2 (*a*)). Under article 44 (*a*) of the same articles, the rule relating to the nationality of claims may apply as well.

59. All the above considerations point to the conclusion that the issue of plurality of States involved in continuing or composite acts does not need to be addressed differently under the topic of succession of States in respect of State responsibility. On the contrary, it can be resolved on the basis of the general rules of State responsibility.

D. Partial conclusions

60. The above analyses and considerations have implications for a possible draft article that may be proposed, but they do not support any special rule on plurality of States in the context of succession, much less on shared responsibility. Rather, the practice involves cases of either the responsibility of a predecessor (and continuator) State or the responsibility of a successor State for its own acts or the acts of a predecessor State to which it has a special link. The criteria by which such a State may be identified have already been included in other proposed draft articles and the commentaries thereto.

61. Without any doubt, special agreements such as the 2001 Agreement on Succession Issues concluded by the successor States of the Socialist Federal Republic of Yugoslavia[87]

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[84] Draft article 7 and the commentary thereto were provisionally adopted by the Commission at its seventy-second session (see A/76/10, paras. 122 and 164–165).

[85] Draft article 7 *bis* was referred to the Drafting Committee by the Commission at its seventy-second session; see the interim report by the Chair of the Drafting Committee of 28 July 2021 (available at https://legal.un.org/ilc/documentation/english/statements/2021_dc_chair_statement_sosr.pdf). See also document A/76/10, footnote 398.

[86] See footnote 21 above.

[87] See footnote 47 above.

may provide for equitable shares (proportion) not only in terms of property and debts, but also in terms of responsibility. However, while such agreements are binding on States parties *inter se*, they cannot limit third States, in particular the victim or victims of an internationally wrongful act, in their right to invoke the responsibility of the State (i.e. each State) which has committed the internationally wrongful act. As was recalled by the Commission on another occasion,[88] rules of responsibility "cannot be allowed to undermine the principle, stated in article 34 of the [Vienna Convention on the Law of Treaties], that a 'treaty does not create either obligations or rights for a third State without its consent'".[89] To make another proposal would not have been consistent with the previous work of the Commission, which is certainly not the intention of the Special Rapporteur.

62. As an alternative proposal, a "without prejudice" clause was considered. However, to say that the present draft articles are without prejudice to the application of articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts would not do justice to the present topic. The proposed draft articles are indeed without prejudice to the aforementioned articles; at the same time, this might imply *a contrario* that the present draft articles are not without prejudice to other rules on State responsibility. If the Commission decides to adopt a general without prejudice clause, the Special Rapporteur will not object, but he is not proposing such a clause in the present report.

63. It follows that there is no need to propose a new draft article on plurality of States.

Part Three – Consolidation and restructuring of draft articles submitted thus far

IV. Consolidated draft articles

64. In his previous four reports, the Special Rapporteur presented, on the basis of the underlying analysis and in accordance with the plan for future work outlined in his first report, no less than 24 draft articles, albeit some of them of a technical character or awaiting eventual renumbering. However, as a new topic, all reports on succession of States in respect of State responsibility have been discussed in plenary meetings during the second part of the Commission's annual sessions. Consequently, all the draft articles proposed by the Special Rapporteur and referred by the Commission to the Drafting Committee have been addressed by the Drafting Committee at a late stage of the session. This fact, in addition to the complexity of the topic and the limited time allocated for debate in the Drafting Committee, has led to work begun at one session being carried over to another. Even though some draft articles have been provisionally adopted by the Drafting Committee, the late stage (close to the end of session) has made it impossible for the Commission to adopt them with commentaries thereto. This is why they do not appear as draft articles with commentaries in the reports of the Commission on its work at the relevant annual session. At best, they may appear one year later in the following report, with commentaries drafted by the Special Rapporteur in the inter-sessional period.

65. Even if this practice is not unusual in the works of the Commission and does not imply any difficulties if it happens occasionally, its systematic repetition over four years may lead to a certain degree of confusion. The total number of draft articles reported

[88] In the context of the responsibility of a State in connection with the act of another State; chap. IV of Part One of articles on responsibility of States. See *Yearbook…, 2001*, vol. II (Part Two) and corrigendum, p. 65.

[89] See, in particular, paragraph (8) of the general commentary to Part One, chapter IV, of the articles on responsibility of States for internationally wrongful acts (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 65). For the text of the Vienna Convention on the Law of Treaties, see United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

officially by the Commission seems to be disproportionally low in comparison with the number of drafts presented, discussed and even adopted, at least provisionally, by the Drafting Committee. The entire corpus of draft articles includes provisions with various statuses: draft articles adopted with commentaries, draft articles adopted provisionally by the Drafting Committee, and draft articles pending in the Drafting Committee, discussion of which has been postponed for lack of time. Nevertheless, Member State delegations often comment, during their statements in the Sixth Committee, on draft articles which in fact have different statuses.

66. The Special Rapporteur, being aware of this situation – which is, if not confusing, at least uncomfortable, both for members of the Commission and for any reader wishing to follow the work in progress on the topic – presents Part Four of the present report in view of the first reading, planned for 2022.[90] Although all the draft articles that have not yet been adopted remain, technically, with the Drafting Committee, the need to improve the Commission's working methods, in particular when its work may still be affected by the pandemic and the necessary resort to a hybrid mode of working, justifies this chapter. It is presented for the benefit of all members of the Commission, irrespective of their involvement in debates in plenary meetings, in the Drafting Committee or in informal consultations.

67. The first reading also offers a unique opportunity to consolidate and restructure the draft articles submitted thus far. Their presentation will therefore follow the proposed structure for the draft articles as a whole, rather than the current adoption status of each draft article. The proposed structure is as follows: I. General provisions; II. Reparation for injury resulting from internationally wrongful acts committed by the predecessor State; III. Reparation for injury resulting from internationally wrongful acts committed against the predecessor State; and IV. Content of international responsibility.

A. General provisions

68. The first part includes a number of draft articles proposed throughout the reports. While most of them arise from the first and second reports,[91] the last one – draft article 7 *bis* (Composite acts) – was added in the fourth report.[92] The lapse of time between 2017 and 2022 and the progress of work in the Commission suggest that the function and placement of some older provisions pending with the Drafting Committee should be reviewed.

69. There are no questions about the role and placement of draft article 1 (Scope) and draft article 2 (Use of terms). The only issue left open is whether an additional subparagraph is needed in the article on use of terms. In spite of diverse views, the Special Rapporteur still considers it useful to include a definition of "States concerned". This is, in particular, because of the key role played by agreements in this topic, as is also reflected in the new paragraph 2 inserted into draft article 1 as a result of the debate in the Drafting Committee.[93] The principle of relative effects of agreements (the *pacta tertiis* principle) excludes agreements between predecessor and successor States alone (devolution agreements) as the sole legal basis for a possible transfer of rights and obligations arising from internationally wrongful acts.

[90] It was originally envisaged that this might take place in 2021 (see A/CN.4/743, para. 138), but owing to the COVID-19 pandemic the Commission did not meet in 2020.

[91] A/CN.4/708 and A/CN.4/719, respectively.

[92] A/CN.4/743.

[93] "The present draft articles apply in the absence of any different solution agreed upon by the States concerned." Draft article 1 and the commentary thereto were provisionally adopted by the Commission at its seventy-first session (see A/74/10, paras. 78, 80 and 117–118).

70. This issue is closely related to any decision as to the function and placement of draft articles 3 and 4. 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) were referred to the Drafting Committee by the Commission at its sixty-ninth session, in 2017. The Commission referred draft articles 3 and 4 to the Drafting Committee on the understanding that they would be left pending with the Drafting Committee for consideration at a later stage.[94] The intention was to revisit these draft articles before completing the first reading of the draft articles as a whole.

71. Now, when the Special Rapporteur has presented all the draft articles, is the right time to address the draft articles left pending. The rationale for introducing these draft articles was to ensure consistency with articles 8 and 9 of the Vienna Convention on Succession of States in respect of Treaties (the 1978 Vienna Convention)[95] and article 6 of the resolution entitled "Succession of States in Matters of International responsibility" adopted by the Institute of International Law in 2015.[96] However, there are also some good reasons why the proposed draft articles 3 and 4 are not needed, especially in their current wording.

72. Concerning draft article 3, its current structure reflects the focus on agreements, which are covered in the first three paragraphs, while paragraph 4 is a simple without prejudice clause referring to the applicable rules of the law of treaties. Paragraph 1 deals with the transfer of obligations on the basis of an agreement between a predecessor State and a successor State. Paragraph 2 refers in the same way to the transfer of rights, in line with the 1978 Vienna Convention. Since the merit of the Special Rapporteur's first report lies in distinguishing between "devolution agreements", on the one hand, and compensation and other agreements, on the other, paragraph 3 sets out the opposite rule for "[a]n agreement other than a devolution agreement". However, the provisional adoption of the draft articles subsequently proposed calls for the approach suggested in the first report to be reviewed.

73. First, the succession of States with respect to State responsibility is different from succession in respect of treaties, as codified in the 1978 Vienna Convention. Second,

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[94] See the summary record of the 3381st meeting of the Commission (A/CN.4/SR.3381) and the interim reports by the Chair of the Drafting Committee of 31 July 2019 (available at https://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_sosr.pdf) and 31 July 2017 (available at https://legal.un.org/ilc/documentation/english/statements/2017_dc_chairman_statement_ssrsr.pdf); see also Report of the International Law Commission, *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), footnotes 822 and 823.

[95] Vienna Convention on Succession of States in respect of Treaties (with annex), concluded at Vienna on 23 August 1978 (United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3).

[96] *Annuaire de l'Institut de Droit international*, vol. 76 (Session of Tallinn, 2015), p. 693, at p. 696. Article 6 of the resolution, entitled "Devolution agreements and unilateral acts", states:

"1. Devolution agreements concluded before the date of succession of States between the predecessor State and an entity or national liberation movement representing a people entitled to self-determination, as well as agreements concluded by the States concerned after the date of succession of States, are subject to the rules relating to the consent of the parties and to the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties. The same principle applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.

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

"3. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it. …"

unlike succession of States in respect of treaties and other areas, which is based on automatic succession (with some exceptions), the present topic does not go as far as that, linking it instead to agreements. Put simply, agreements are more often than not the reason for a transfer of rights and obligations. Third, the central role of agreements for certain transfers of rights and obligations arising from State responsibility is reflected not only in draft article 1, paragraph 2, but also in most other draft articles throughout the project. Fourth, these agreements are generally different from devolution agreements. They involve not just a predecessor State and a successor State but all States concerned, including injured States. Fifth, unlike article 6 of the Institute of International Law's resolution (which focuses only on obligations), draft article 3, paragraph 2, also addresses the rights of a predecessor State arising from an internationally wrongful act. However, this may have undesirable effects by protecting the interests of the wrongdoer, not the victim.[97]

74. In view of the other draft articles proposed and provisionally adopted in the meantime, this draft article does not seem to add any value. Moreover, certain provisions (in particular paragraph 2) appear to be problematic, and their wording would have to be substantively amended. For all the above reasons, the Special Rapporteur wishes to propose that draft article 3 be omitted in its entirety.

75. When it comes to draft article 4, the position should be more nuanced. In practice, it is not unusual for a successor State to make a unilateral declaration providing for its assumption of all the rights and obligations of the predecessor State. Even if a transfer of rights and obligations cannot occur only by reason of a unilateral declaration, such a declaration is capable of creating some legal effects. In some provisions (in particular draft article 7), unilateral acts play an express role ("the successor State acknowledges and adopts…"[98]). In general, even a unilateral declaration, if accepted by another State concerned, can contribute to an agreement. However, draft article 4, paragraph 2, has also been criticized as diluting the goal of this provision: to protect the interest of the injured State, which should have the possibility of taking a position regarding unilateral declarations made by a successor State.[99]

76. It seems that draft article 4, as proposed in 2017, could not be adopted without substantive redrafting in all paragraphs. Its wording should not lead to the interpretation that it would put the wrongdoer in a better position than the injured State. For the same reason, the Special Rapporteur wishes to propose that draft article 4 be omitted in its entirety.

77. Part I also includes draft articles 5 (Cases of succession of States covered by the present draft articles), 7 (Acts having a continuing character) and 8 (Attribution of conduct of an insurrectional or other movement), all of which have been provisionally adopted by the Commission (with commentaries), as well as draft article 6 and draft article 7 *bis*.

78. Draft article 6 (No effect upon attribution) was provisionally adopted by the Drafting Committee at the Commission's seventieth session. It was decided that its text

[97] See Marcelo G. Kohen and Patrick Dumberry, *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries* (Cambridge, United Kingdom: Cambridge University Press, 2019), p. 43: "… the perpetrator of the wrongful act would have to consent for any such rights to be transferred to the successor State. The risk associated with Draft Article 3(2) is that the wrongdoer may find comfort in such a provision if it intends to delay the accomplishment of its obligation to repair."

[98] For the full text of draft article 7, see document A/76/10, para. 164.

[99] Kohen and Dumberry, *The Institute of International Law's Resolution …* (see footnote 97 above), p. 51.

and placement would be revisited at a later stage.[100] The Special Rapporteur maintains his view that this provision is correct and that it plays a pivotal role in the draft articles. The subsequent work of the Commission, including the draft articles provisionally adopted thus far, has not called this conclusion into question.

79. Regarding draft article 7 *bis* (Composite acts), which is a logical counterpart to draft article 7 already provisionally adopted, the Special Rapporteur points out that he proposed this provision in his fourth report as a response to the debate within the Commission in 2019. He therefore favours its adoption and its placement next to draft article 7. In due course, the draft articles will need to be renumbered, as suggested in annex III.

B. Reparation for injury resulting from internationally wrongful acts committed by the predecessor State

80. This part consists of four draft articles, all provisionally adopted either by the Commission or by the Drafting Committee. They include draft article 9 (Cases of succession of States when the predecessor State continues to exist),[101] draft article 10 (Uniting of States), draft article 10 *bis* (Incorporation of a State into another State) and draft article 11 (Dissolution of a State).[102] All these draft articles form a logically linked whole, as will also be reflected in the commentary.

81. However, to achieve this aim, two additional proposals have been made during work on the topic. First, the Special Rapporteur proposed "Reparation for injury resulting from internationally wrongful acts committed by the predecessor State" as the title for Part II of the draft articles. This proposed title was referred to the Drafting Committee by the Commission at its seventy-first session.[103]

82. Second, a new draft article X (Scope of Part II) was proposed in order to introduce Part II and delimit its scope of application. It was referred to the Drafting Committee by the Commission at the seventy-first session. According to this draft article, "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."[104] This provision has a double purpose. In addition to delimiting the scope of Part II, the new draft article X aims to ensure that no injured State is able to receive full reparation from a predecessor State and claim more from a successor State after the date of succession, i.e. it means that double recovery is prohibited.[105] To provide otherwise would amount to a violation of the principle of unjust enrichment, the concept of which is central to the whole question of succession of States.[106]

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[100] Interim report by the Chair of the Drafting Committee of 3 August 2018 (available at https://legal.un.org/ilc/documentation/english/statements/2018_dc_chairman_statement_sosr.pdf), pp. 5–6.

[101] Draft article 9 and the commentary thereto were provisionally adopted by the Commission at its seventy-second session (see A/76/10, paras. 122, 125 and 164–165).

[102] Draft articles 10, 10 *bis* and 11 were provisionally adopted by the Drafting Committee at the seventy-second session of the Commission (see A/CN.4/L.954).

[103] Interim report by the Chair of the Drafting Committee of 31 July 2019 (see footnote 94 above), p. 2; see also document A/74/10, footnote 1444.

[104] Interim report by the Chair of the Drafting Committee of 31 July 2019 (see footnote 94 above), p. 2; see also document A/74/10, footnote 1444.

[105] This is in line with article 47, paragraph 1 (*a*), of the articles on responsibility of States for internationally wrongful acts (see footnote 3 above).

[106] See D.P. O'Connell, "Recent problems of State succession in relation to new States", *Recueil des Cours de l'Académie de droit international de la Haye, 1970-II* (Leiden: Sijthoff, 1971), p. 140; Kohen and Dumberry, *The Institute of International Law's Resolution…* (footnote 97 above), pp. 55–57.

C. Reparation for injury resulting from internationally wrongful acts committed against the predecessor State

83. This part (Part III) of the draft articles will contain five articles. In addition to draft article 12 (Cases of succession of States when the predecessor State continues to exist), draft article 13 (Uniting of States), draft article 14 (Dissolution of States) and draft article15 (Diplomatic protection),[107] one technical and introductory provision has been proposed as draft article Y (Scope of the present Part).[108]

84. Draft article Y, proposed together with the title for Part III ("Reparation for injury resulting from internationally wrongful acts committed against the predecessor State"), mirrors draft article X. It serves the same purpose as draft article X, which is explained above.

85. All these provisions, including draft article Y, are pending in the Drafting Committee, which is free to redraft them as it considers appropriate. However, for the sake of consistency, the Special Rapporteur now wishes to suggest slight amendments to the wording of both the title and the first few words of draft article Y. The title would then be "Scope of Part III", while draft article Y would read as follows: "The provisions of this 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."

D. Content and forms of obligations arising from State responsibility in the context of succession of States

86. The next and final part of the present draft articles deals with the content and forms of legal consequences arising from State responsibility in the context of succession of States. To this end, the Special Rapporteur proposed draft articles 16 (Restitution), 17 (Compensation), 18 (Satisfaction) and 19 (Assurances and guarantees of non-repetition) in his fourth report.[109] All these draft articles were referred to the Drafting Committee by the Commission at its seventy-second session.[110]

87. For lack of time, the Drafting Committee did not address these new draft articles in 2021. Nevertheless, the debate in plenary meetings of the Commission revealed that the Committee might wish to consider their number and structure. One possible option seems to be to group these provisions into two larger draft articles, dealing respectively with forms of reparation and with cessation and assurances of non-repetition. Such an approach would have both advantages and disadvantages. However, the Special Rapporteur would not object to streamlining these draft articles, provided that the substance is not lost.

88. In addition, this part (Part IV) will need a title. Although the Special Rapporteur had envisaged a shorter title, discussion of the appropriateness of the term "forms of responsibility" has made him reconsider. The title could be made longer but more precise.

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[107] Draft articles 12 to 15 were referred to the Drafting Committee by the Commission at its seventy-first session (interim report by the Chair of the Drafting Committee of 31 July 2019 (see footnote 94 above), p. 2; see also document A/74/10, footnote 1444).

[108] Draft article Y reads: "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" (interim report by the Chair of the Drafting Committee of 31 July 2019 (see footnote 94 above), p. 2; see also document A/74/10, footnote 1444).

[109] A/CN.4/743.

[110] Interim Report by the Chair of the Drafting Committee of 28 July 2021 (see footnote 85 above); see also document A/76/10, footnote 398.

The following title is therefore proposed: “Content and forms of obligations arising from State responsibility in the context of succession of States”.

Part Four – Future work

V. Future programme of work

89. This is the fifth and last report on succession of States in respect of State responsibility prepared by this Special Rapporteur. It has been done to facilitate the work of the Commission with a view to the entire set of draft articles being adopted on first reading. Future work on the topic is in the hands of the Commission. It is not appropriate to set a future programme of work in the present report. The programme of work for the next quinquennium should be discussed and adopted by the Commission in its new composition in 2023.

Annex I

Draft articles provisionally adopted by the Commission to date

Draft article 1
Scope

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

2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

Draft article 2
Use of terms

For the purposes of the present draft articles:

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

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

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

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

…

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

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

…

Draft article 7
Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Draft article 8
Attribution of conduct of an insurrectional or other movement

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

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered

an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Draft article 9
Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

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

2. In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

Annex II

Text of draft articles 10, 10 *bis* and 11, as provisionally adopted by the Drafting Committee

Draft article 10
Uniting of States

When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State shall agree on how to address the injury.

Draft article 10 *bis*
Incorporation of a State into another State

1. When an internationally wrongful act has been committed by a State prior to its incorporation into another State which continues to exist, the injured State and the incorporating State shall agree on how to address the injury.

2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Draft article 11
Dissolution of a State

When a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the injured State and the relevant successor State or States shall agree on how to address the injury arising from the internationally wrongful act. They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

Annex III

Consolidated and renumbered draft articles on succession of States in respect of State responsibility, prepared in view of the first reading*

Part I: General provisions

Draft article 1
Scope

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

2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

Draft article 2
Use of terms

For the purposes of the present draft articles:

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

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

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

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

(e) [(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.

[Draft article 3 (Relevance of the agreements to succession of States in respect of responsibility): *omitted***]**

[Draft article 4 (Unilateral declaration by a successor State): *omitted***]**

Draft article 3 [5]
Cases of succession of States covered by the present draft articles

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

* Draft articles already provisionally adopted by the Commission (see annex I) or the Drafting Committee (see annex II) appear in normal type. Draft articles pending with the Drafting Committee appear in italics. Where draft articles have been renumbered, the original numbering appears in square brackets.

Draft article 4 [6]
No effect upon attribution

A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

Draft article 5 [7]
Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Draft article 6 [7 bis]
Composite acts

1. *When an internationally wrongful act is of a composite character, the international responsibility of a predecessor State and/or that of a successor State is engaged if a series of actions or omissions defined in aggregate as wrongful occurs. If the action or omission, taken with the other action or omission, is sufficient to constitute the wrongful act of either the predecessor State or the successor State, such State is responsible only for the consequences of its own act.*

2. *However, if an internationally wrongful act occurs only after the last action or omission by the successor State, the international responsibility of this State extends over the entire period starting with the first of the actions or omissions and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.*

3. *Provisions of paragraphs 1 and 2 are without prejudice for any responsibility incurred by the predecessor State or the successor State on the basis of a single act if and to the extent that it constitutes a breach of any international obligation in force for that State.*

Draft article 7 [8]
Attribution of conduct of an insurrectional or other movement

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

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Part II: Reparation for injury resulting from internationally wrongful acts committed by the predecessor State

Draft article 8 [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.

Draft article 9
Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

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

2. In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

Draft article 10
Uniting of States

When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State shall agree on how to address the injury.

Draft article 11 [10 *bis*]
Incorporation of a State into another State

1. When an internationally wrongful act has been committed by a State prior to its incorporation into another State which continues to exist, the injured State and the incorporating State shall agree on how to address the injury.

2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Draft article 12 [11]
Dissolution of a State

When a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the injured State and the relevant successor State or States shall agree on how to address the injury arising from the internationally wrongful act. They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

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

Draft article 13 [Y]
Scope of Part III

The provisions of this 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 14 [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 15 [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 16 [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 17 [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.

Part IV: Content and forms of obligations arising from State responsibility in the context of succession of States

Draft article 18 [16]
Restitution

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make restitution, provided and to the extent that restitution is not materially impossible or does not involve a burden out of all proportion.

2. If, due to the nature of restitution, only a successor State or one of the successor States is in a position to make such restitution or if a restitution is not possible without participation of a successor State, a State injured by an internationally wrongful act of the predecessor State may request such restitution or participation from that successor State.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.

4. A successor State may request restitution from a State which committed an internationally wrongful act against the predecessor State if the injury caused by this act continues to affect the territory or persons which, after the date of succession of States, are under the jurisdiction of the successor State.

Draft article 19 [17]
Compensation

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make compensation for the damage caused by its internationally wrongful act, insofar as such damage is not made good by restitution.

2. In particular circumstances, a State injured by such internationally wrongful act may request compensation from a successor State or one of the successor States, provided that the predecessor State ceased to exist or, after the date of succession of States, that successor State continued to benefit from such act.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.

4. A successor State may request compensation from a State which committed an internationally wrongful act against the predecessor State, provided that the predecessor State ceased to exist or, after the date of succession of States, the successor State continued to bear injurious consequences of such internationally wrongful act.

Draft article 20 [18]
Satisfaction

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to give satisfaction for the injury caused by its internationally wrongful act, insofar as such injury is not made good by restitution or compensation.

2. Paragraph 1 is without prejudice to an appropriate satisfaction, in particular prosecution of crimes under international law, that any successor State may claim or may provide.

Draft article 21 [19]
Assurances and guarantees of non-repetition

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, even after the date of succession of States.

2. Provided that the obligation breached by an internationally wrongful act remained in force after the date of succession of States between a successor State and another State concerned, and if circumstances so require:

(a) a State injured by an internationally wrongful act of the predecessor State may request appropriate assurances and guarantees of non-repetition from a successor State; and

(b) a successor State of a State injured by an internationally wrongful act of another State may request appropriate assurances and guarantees of non-repetition from this State.