



## International Law Commission

### Seventy-sixth session

Geneva, 14 April–30 May and 30 June–31 July 2025

## Draft report of the Working Group on succession of States in respect of State responsibility, by Bimal N. Patel, Chair of the Working Group\*

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\* I express deep appreciation to Digvijay Rewatkar, Suraj Saikia, Varun VM, Antaranihita and Shashwat Singh, Rashtriya Raksha University Center for International Law ([www.rru.ac.in](http://www.rru.ac.in)) for their research support.



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## Introduction, methodology and scope of report

1. The International Law Commission, at its 3694th meeting, on 26 July 2024, decided to establish at its seventy-sixth session a Working Group on the topic “Succession of States in respect of State responsibility” for the purpose of drafting the present report, which would bring the work of the Commission on the topic to an end. It also decided that the present report would contain a summary of the difficulties that the Commission would face if it were to continue its work on the topic and explain the reasons for the discontinuance of such work. It further decided to appoint Mr. Bimal N. Patel as Chair of the Working Group to be established at the seventy-sixth session of the Commission and recommended that the Chair be encouraged to prepare the draft report of the Working Group in advance of the following session, in close collaboration with interested members.

2. Chapter I of this report provides a summary of the issues and questions that constituted the work of the Commission. Chapter II identifies and summarizes the challenges that were faced during the examination of the topic. The report also contains an annex showing the evolution of draft articles and guidelines. A multilingual bibliography will be contained in an addendum to the present report.

3. Upon the inclusion of the topic in the long-term programme of work of the Commission, the topic of succession of States in respect of State responsibility was received positively by States owing to its relevance to the daily concerns of the people<sup>1</sup> and its potential to fill gaps following the codification on succession.<sup>2</sup> However, concerns were raised regarding its contemporary relevance<sup>3</sup> and the consequent difficulty in building consensus among States on the topic.<sup>4</sup>

4. The Commission faced a difficult task, as debates on continuation or discontinuation met with lengthy arguments in favour of either side within the Commission as well as in the Sixth Committee. On the one hand, the continuation of the study was faced with the questions and issues outlined in the second part of this report, including whether it would eventually result in an instrument that would be both useful and universally accepted. On the other hand, several States underlined the need to continue the study even in the form of draft guidelines as these would aid in appreciating the evolving status of succession of States in respect of State responsibility.<sup>5</sup> Additionally, other difficulties emerged. Nevertheless, such difficulties are not unusual for international lawyers and jurists, who often have to deal with normative conflicts arising from the analysis of complex topics such as this one.

5. Discontinuance of its work on a topic is a deviation from the Commission’s consistent past practice, and, though a logical decision, remains controversial within the Commission.<sup>6</sup>

<sup>1</sup> See the statements by Togo, Slovakia and Slovenia as described in the first report on succession of States in respect of State responsibility, by Mr. Pavel Šturma, Special Rapporteur, *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/708, pp. 171–172, paras. 3 and 4, respectively.

<sup>2</sup> See the statements by Mongolia, Egypt and the Czech Republic, *ibid.*, p. 172, para. 5. See also *ibid.*, vol. II (Part Two), p. 140, para. 216.

<sup>3</sup> See the statement by Romania as described in the first report on succession of States in respect of State responsibility, by Mr. Pavel Šturma, Special Rapporteur, *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/708, p. 172, para. 6.

<sup>4</sup> See the statements by Turkey and Austria, A/C.6/71/SR.21, paras. 21 and 80, respectively.

<sup>5</sup> See the statements made before the Sixth Committee at its seventy-seventh session by: Brazil (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_brazil\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_brazil_3.pdf)); Colombia (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_colombia\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_colombia_3.pdf)); the Czech Republic (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_czech\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_czech_3.pdf)); and Norway, on behalf of the Nordic countries (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/29mtg\\_nordic\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/29mtg_nordic_3.pdf)).

<sup>6</sup> “The topics “Fragmentation of international law: difficulties arising from the diversification and expansion of international law” and “The most-favoured-nation clause (Part Two)” were both completed with an important substantive study and report, but the method of work, namely a study group, had been chosen from the outset. Moreover, the two Study Groups were given adequate time to complete their work: five and nine years, respectively. Other examples include the Working Group on the topic “Unilateral acts of States”, which, having been established in 1997, did not complete its work until 2006. Lastly, the Working Group on the topic “Obligation to extradite or prosecute (*aut*

The prevailing view of its members was in favour of a summary report that would describe the difficulties faced on the topic. A product that fails to reconcile diverging views might ultimately be unacceptable, and thus, reason dictated the discontinuance of the work.

6. This report summarizes the major difficulties and concerns expressed by the Commission and States, and provides pointers for future work, should circumstances and developments in international law require revisiting the topic. It would then be helpful in proceeding with a clear sense of direction. The approach is to identify issues and questions of substance, procedure and an institutional nature that have been identified by the Commission and States in each of the reports and indicate whether these have been addressed by the Commission thus far.<sup>7</sup>

## I. Summary of debates on the topic

### A. 2017: First report of the Special Rapporteur

7. The first report was introduced in 2017, setting out the scope and outcome of the topic with an overview of the general provisions relating to it.<sup>8</sup> Primarily, the report shed light on whether rules of international law existed that governed both the transfer of obligations and the transfer of rights arising from the international responsibility of States for internationally wrongful acts in situations of succession of States.<sup>9</sup> It was noted that, historically, the doctrine of State succession had generally denied the possibility of transferring responsibility to a successor State, in other words, the theory of non-succession.<sup>10</sup> The scope of the topic was also narrowly defined so as not to extend issues of international liability for injurious consequences arising out of acts not prohibited by international law.

8. A preliminary survey of existing State practice was introduced by the Special Rapporteur in the report, including some judicial decisions with a provisional conclusion that international law did not support a general theory of non-succession in respect of State responsibility.<sup>11</sup> It was recognized that there was no universal regime concerning succession of States, but rather several areas of legal relations to which succession of States applied.<sup>12</sup> The Special Rapporteur drew a preliminary conclusion that wrongful acts would constitute a debt for the purposes of rules on succession in respect of State debts, if such an interest in assets of a fixed or determinable value was acknowledged by the State or so adjudicated by an international court or arbitral tribunal at the date of succession. However, if an internationally wrongful act occurred before the date of the succession, but the legal consequences arising therefrom had not yet been specified, then any possible transfer of obligations or rights would be governed by rules on succession of States in respect of State responsibility.<sup>13</sup>

9. According to the Special Rapporteur, his analysis indicated support for two preliminary conclusions: first, that the traditional theory of non-succession had been questioned in modern practice; and second, that the transfer or non-transfer of obligations or

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*dedere aut judicare*)” was established in 2012, in the absence of a Special Rapporteur and with no member of the Commission ready to assume that responsibility.

<sup>7</sup> The Special Rapporteur prepared 15 draft guidelines. These concerned: the scope of the guidelines; use of terms; cases of succession of States covered by the draft guidelines; acts having a continuing character; composite acts; attribution of conduct of an insurrectional or other movement; reparation for injury arising from internationally wrongful acts committed by the predecessor State; cases of succession of States when the predecessor State continues to exist; uniting of States; incorporation of a State into another State; dissolution of a State; diplomatic protection and cessation and non-repetition; and a summary of the comments of each State for each of the guidelines. For the evolution of draft articles and draft guidelines, see the annex to this report.

<sup>8</sup> *Yearbook ... 2017*, vol. II (Part Two), p. 140, para. 212.

<sup>9</sup> *Ibid.*, para. 217.

<sup>10</sup> *Ibid.*, p. 141, para. 219.

<sup>11</sup> *Ibid.*, para. 220.

<sup>12</sup> *Ibid.*, para. 221.

<sup>13</sup> *Ibid.*, para. 222.

rights arising from State responsibility in specific cases of succession needed to be determined on a case-by-case basis.<sup>14</sup> Regarding the modality of application of these rules, the Special Rapporteur emphasized that the rules to be codified should be subsidiary: first, a useful model that States could utilize and modify as needed; and second, in cases where no agreement was reached, they could present a default rule to be applied in case of a dispute.<sup>15</sup> This approach was based on the principled understanding that an agreement between the States concerned should have priority over subsidiary general rules on succession.<sup>16</sup> Finally, addressing the question of the relevance of unilateral acts in the context of the present topic, the Special Rapporteur suggested a distinct approach to unilateral acts in the context of international responsibility—one that differed from the strict approach adopted under the 1978 Vienna Convention on succession of States in respect of treaties (1978 Vienna Convention).<sup>17</sup>

10. Regarding the general rule on succession of States in respect of State responsibility, members emphasized the necessity of examining the general substantive rules relating to succession of States in respect of State responsibility before examining the potential exceptions, and that those established ways to transfer responsibility were not dependent on the general rule.<sup>18</sup> Much discussion surrounded the “traditional” rule of non-succession, with several members considering it to be the prevailing position, with the possibility of automatic succession being limited. Members suggested that any shift from the traditional rule must be supported by clear and unambiguous evidence of State practice and decisions of courts and tribunals, which the Special Rapporteur had not articulated.<sup>19</sup> It was also stated that the doctrine presented by the Special Rapporteur did not support an evolving trend either. Further, it was underlined that agreements between States or unilateral declarations on matters of succession could not depend on a sense of obligation arising from general international law and might support the traditional rule as opposed to any new trend.<sup>20</sup> In examining the question of a general rule on succession, some members emphasized a desire for greater attention to State practice, as well as to practice from all regions. Concern was expressed that there was a lack of clarity as to the extent that examination of the topic was to be an exercise of codification or of progressive development, and that this ambiguity could lead to difficulty in achieving wide acceptance by States.<sup>21</sup>

## B. 2018: Second report of the Special Rapporteur

11. In his second report, which was composed of four parts, the Special Rapporteur addressed certain introductory issues, including the legality of succession. He also discussed the general rules on the succession of States in respect of State responsibility in relation to attribution and the difference between continuing and completed breaches, and considered certain special categories of State succession to the obligations arising from responsibility.<sup>22</sup> Based on the comments of members and States, the Special Rapporteur considered that a general theory of non-succession should not be replaced by another similar theory in favour of succession; instead, a more flexible and realistic approach was needed.<sup>23</sup> The general principles and rules arising therefrom should thus be applied or developed, if necessary, to serve as guidance for States facing problems of responsibility in cases of succession. The question of succession had to be considered, not with respect to “responsibility” *in abstracto*, but rather with respect to the principles and rules of a secondary character governing, in particular: the establishment of an internationally wrongful act and its attribution to a given State; the content and forms of responsibility; and the invocation of such responsibility. Any

<sup>14</sup> *Ibid.*, para. 223.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, para. 224.

<sup>17</sup> *Ibid.*, para. 225.

<sup>18</sup> *Ibid.*, p. 142, para. 230.

<sup>19</sup> *Ibid.*, pp. 142–143, paras. 231–232.

<sup>20</sup> *Ibid.*, p. 143, para. 232.

<sup>21</sup> *Ibid.*, p. 143, para. 233.

<sup>22</sup> *Yearbook ... 2018*, vol. II (Part Two), p. 187, para. 222.

<sup>23</sup> *Ibid.*, p. 188, para. 226.

general rules identified would then be subject to exceptions and modifications, taking into account various factors, such as whether the breach was completed or continuing, whether damage was localized and whether the predecessor State continued to exist.<sup>24</sup>

12. The Special Rapporteur subsequently proposed draft articles addressing the legality of succession, the general rule applicable to succession and the remaining provisions concerning individual categories of succession, specifying the circumstances where the obligations arising from an internationally wrongful act rested with the predecessor State and those where they passed to the successor State.<sup>25</sup>

13. It was highlighted by members that the scarcity of State practice on succession of States in respect of State responsibility presented significant challenges to the work of the Commission on the topic and that the available State practice was diverse, context specific and often politically sensitive, and observed that not many relevant decisions by domestic and international courts and tribunals were available.<sup>26</sup> Further, the existence and exception of the general rule applicable to the succession of States in respect of State responsibility became a subject of debate with some recognizing the possibility of a general rule, while others called for a flexible approach.<sup>27</sup> On the exceptions to the general rule, members cautioned against replacing a general theory of non-succession with a general presumption of succession, as such proposals were based on policy grounds rather than on State practice, and were more in the nature of progressive development, or *de lege ferenda*, than of codification of existing international law.<sup>28</sup> In this regard, there were also calls to clarify the extent to which each of the draft articles would constitute progressive development or codification of international law.<sup>29</sup> Other members questioned the methodology of separating, on policy grounds, the succession to obligations arising from an internationally wrongful act of a predecessor State from the issues concerning the rights and claims arising from an internationally wrongful act injuring a predecessor State, as this could lead to unnecessary duplication of work.<sup>30</sup>

### C. 2019: Third report of the Special Rapporteur

14. In his third report, the Special Rapporteur examined questions of reparation for injury resulting from internationally wrongful acts committed against a predecessor State, considering, in particular, claims for reparation in different categories of State succession as well as various approaches to reparation for injury arising from internationally wrongful acts committed against the nationals of the predecessor State. He also made technical proposals in relation to the scheme of the draft articles.<sup>31</sup> In his third report, the Special Rapporteur clarified his approach to the topic, which excluded both the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States.<sup>32</sup> The report also dealt with reparation for injury resulting from internationally wrongful acts committed against the predecessor State and addressed the so-called “passive” aspect of State responsibility where succession of States occurs in relation to the injured State.<sup>33</sup>

15. The Special Rapporteur distinguished between situations when the predecessor State continued to exist after the date of succession and those in which the predecessor State ceased to exist. When the predecessor State continued to exist, succession would not affect its right to claim reparation from the wrongdoing State for acts committed before the date of succession. Such a claim would be based on the rules governing the responsibility of States for internationally wrongful acts. However, that did not answer all questions that could arise

<sup>24</sup> *Ibid.*, para. 227.

<sup>25</sup> *Ibid.*, pp. 188–189, paras. 228–230.

<sup>26</sup> *Ibid.*, p. 189, para. 234.

<sup>27</sup> *Ibid.*, para. 235.

<sup>28</sup> *Ibid.*, para. 236.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, pp. 189–190, para. 237.

<sup>31</sup> *Yearbook ... 2019*, vol. II (Part Two), p. 202, para. 76.

<sup>32</sup> *Ibid.*, p. 203, para. 81.

<sup>33</sup> *Ibid.*, para. 82.

when the injury primarily or exclusively affected part of the territory that became part of the successor State. In situations such as decolonization, separation or transfer of territory, when the injury affected persons who subsequently became nationals of the successor State, the Special Rapporteur considered it unlikely that the predecessor State could still claim reparation after the date of succession. In contrast, according to the prevailing opinion in doctrine, when the predecessor State ceased to exist, the right to reparation did not devolve from the predecessor State to the successor State. The Special Rapporteur cautioned, however, against the discriminatory treatment of States when continuity was disputed, considering that the distinction made between cases of dissolution and separation of a State was often based on broader political considerations rather than on objective criteria.<sup>34</sup> The report provided an analysis of claims for reparation in different categories of succession of States based on State practice, mainly agreements and decisions of international courts and tribunals, which was narrow in scope due to the limited number of cases of succession of States.<sup>35</sup> The Special Rapporteur underlined that the expression “may request” used in those draft articles would rebut any allegation of automatic succession and simply reflected the idea that a successor State was able to present a claim or request for reparation. Such an approach was in accordance with the priority generally given to agreements followed by the Commission in this topic. Further, according to draft article 14, paragraph 2, any 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, which could include the principle of unjust enrichment.<sup>36</sup>

16. In his report, the Special Rapporteur also addressed the possible succession to the right to reparation in cases where an internationally wrongful act was committed against nationals of the predecessor State, on the basis of an analysis of more extensive State practice, including agreements and the practice of international courts and tribunals and of the United Nations Compensation Commission. This analysis revealed that a claim for reparation by the successor State was neither purely theoretical nor rare, nor did it concern only inter-State relations. Instead, there were important practical consequences for the effective exercise of diplomatic protection by States in cases of injury suffered before the date of succession by individuals who subsequently became their nationals. The Special Rapporteur further observed that, in modern practice and doctrine, a change of nationality resulting from succession of States was largely accepted as an exception to the traditional rule of continuous nationality.<sup>37</sup>

17. In the debate, it was suggested that the important role of agreements should be addressed in greater detail. Further, according to some members, the relationship between a lump-sum agreement concluded before the date of succession of States and the principle of full reparation should be discussed. In this regard, the view was expressed that the existence of a lump-sum agreement did not necessarily indicate full reparation, since there were examples of decisions by national courts allowing claims for reparation despite the existence of a previous lump-sum agreement.<sup>38</sup>

18. Several members emphasized the general rule of non-succession with some exceptions. While some members supported the flexible approach of the Special Rapporteur, others underlined the need to clarify whether such an approach would deviate from the general rule of non-succession. It was suggested that the Commission could acknowledge the limited State practice in this area at the outset of its commentary or approach the topic as an effort to develop a new convention, which would be subject to support from States. It was proposed that the Commission expressly indicate that it was engaging in progressive development of international law when proposing draft articles, taking best practices into account, including considering that *lex ferenda* should be based on solid grounds and not on policy preferences. Moreover, the view was expressed that the work of the Commission was

<sup>34</sup> *Ibid.*, pp. 203–204, para. 83.

<sup>35</sup> *Ibid.*, p. 204, para. 84.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, para. 85.

<sup>38</sup> *Ibid.*, pp. 204–205, para. 90.

not adjudicatory in nature and should not seek to resolve pending disputes between States, and thus the proposed rules should be of general application.<sup>39</sup>

#### D. 2021: Fourth report of the Special Rapporteur

19. The fourth report dealt with the explanation of the methodology of the report and addressed questions related to the impact of succession of States on forms of responsibility, in particular different forms of reparation (restitution, compensation and satisfaction); the obligation of cessation; and assurances and guarantees of non-repetition.<sup>40</sup> The methodology used in the report sought to address (a) the subsidiary nature of the draft articles and the priority of agreements entered into between States concerned; (b) the importance of preserving consistency with the previous work of the Commission, in particular its draft articles on the responsibility of States for internationally wrongful acts; (c) the role of the concepts of equity, equitable proportion and distribution of rights and obligations; (d) the specificity of cases of succession of States that inevitably combine political and legal considerations; (e) the fact that neither the “clean slate” rule nor automatic succession were accepted as general rules; and (f) the need to combine codification with the progressive development of international law.<sup>41</sup>

20. The report and the draft articles proposed therein respected the continuing applicability of general rules of State responsibility with respect to a predecessor State, subject to the material impossibility of that State providing a specific form of reparation. Special circumstances that warranted certain forms of reparation by a successor State or States were also discussed. Additionally, the report contained an analysis of: (a) situations of actual succession of States to international rights and obligations arising from State responsibility; and (b) situations when the State incurred responsibility for its own internationally wrongful acts, even in the case of succession of States.<sup>42</sup>

21. Differing views were expressed pertaining to the general rule of non-succession, the “clean slate” rule and that 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 could be exceptions to the general rule of non-succession. Other members reiterated that the general rule applicable in the topic was the “clean slate” rule and that no rule of automatic succession existed as such. While the view was expressed that the proposed draft articles appeared to go in the direction of automatic succession, other members did not share that view.<sup>43</sup>

22. Caution was expressed against drawing general conclusions on matters of reparation based on lump-sum agreements or on the inconsistent, insufficient and context-specific State practice. In that connection, it was recalled that the mandate of the Commission was not limited to codification, but also included the progressive development of international law. A further suggestion was made that the commentary describe the relationship between State practice and each draft article more clearly, thus showing clearly which draft articles were supported by State practice and which constituted progressive development of international law.<sup>44</sup>

<sup>39</sup> *Ibid.*, p. 205, para. 91.

<sup>40</sup> *Report of the International Law Commission on the Work of its Seventy-second Session (A/76/10)*, chap. VII, para. 121.

<sup>41</sup> *Ibid.*, para. 126.

<sup>42</sup> *Ibid.*, para. 127.

<sup>43</sup> *Ibid.*, para. 135.

<sup>44</sup> *Ibid.*, para. 136.

## E. 2022: Fifth report of the Special Rapporteur

23. In his fifth report, the Special Rapporteur examined, among other issues, the question of a plurality of injured successor States and a plurality of responsible successor States.<sup>45</sup> The Special Rapporteur was of the view that not all categories of succession of States were equally relevant. Typical examples that occurred in practice were the dissolution of a State and the separation of a part or parts of a State. The Special Rapporteur concluded that State practice supported the priority of specific agreements. In the absence of such an agreement and where there were no special connections between one or more successor States and the injury, the solution was to be found in the application of equitable apportionment. At the same time, he noted that the responsible State could not refuse a claim by one successor State because of a plurality of injured States, since that would contravene article 46 of the draft articles on the responsibility of States for internationally wrongful acts.<sup>46</sup>

24. Concerning the plurality of responsible successor States, the Special Rapporteur observed that in all cases where a predecessor State continued to exist, an injured State would be entitled to invoke its responsibility. In cases of States uniting (merger) and incorporation, the issue of plurality did not arise *per se*. In situations of the dissolution of a State, agreement between the injured State and the relevant successor State or States was key. At the same time, as a matter of invocation, the injured State was able to rely on the rule codified in article 47 of the draft articles on the responsibility of States for internationally wrongful acts. The Special Rapporteur noted further that, in practice, owing to the application of relevant agreements or national legislation, only one successor State typically bore responsibility in cases of a plurality of responsible successor States.<sup>47</sup>

25. During the ensuing debate in the Plenary, several members agreed that there was no need to introduce a provision on a plurality of States. It was emphasized that particular aspects of the existence of a plurality of States in cases of continuing or composite acts could be resolved on the basis of the general rules of State responsibility. According to another view, it was advisable to include such a provision, along the lines of article 7 (Plurality of successor States) of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility, or to include a reference thereto. Some members were also of the view that it was unnecessary to include a “without prejudice” clause in relation to articles 46 and 47 of the draft articles on the responsibility of States for internationally wrongful acts.<sup>48</sup>

## F. Seventy-fourth session of the International Law Commission (2023)

26. Owing to the end of the term of the Special Rapporteur, a Working Group was constituted to focus the discussion on the way forward for the topic. It considered whether the Commission should continue developing a text in the Drafting Committee and proceed to conclude the first reading of the draft guidelines, or whether it should pursue a different course, as suggested in the Plenary during the Commission’s sixty-third session (2022), and convene a dedicated working group with a view to eventually producing a report on the topic to be adopted by the Commission.<sup>49</sup> In the course of a broad and inclusive discussion in the Working Group, which highlighted both the merits and the shortcomings of the earlier work carried out on the topic, two main trends emerged. According to one approach, it was preferable to proceed in an incremental manner such that the Working Group would be reconstituted at the Commission’s seventy-fifth session in 2024 to continue its deliberations on the way forward and with a clear mandate to take a decision, as far as possible within a defined time period and on the basis of a working paper to be prepared by the Chair of the

<sup>45</sup> *Report of the International Law Commission on the Work of its Seventy-third Session (A/77/10)*, para. 73.

<sup>46</sup> *Ibid.*, para. 80.

<sup>47</sup> *Ibid.*, para. 81.

<sup>48</sup> *Ibid.*, para. 82.

<sup>49</sup> *Report of the International Law Commission on the Work of its Seventy-fourth Session (A/78/10)*, para. 237.

Working Group. That paper would also situate the topic within a broader global framework, reflecting more comprehensively the diversity of State practice across regions.<sup>50</sup>

27. The alternative approach was to take a decision, at the seventy-fifth session, to discontinue the Special Rapporteur-led format of the work, and instead opt for a Working Group-driven process aimed at preparing a final report to be adopted by the Commission, for eventual submission to the General Assembly. The Working Group considered a proposal along such lines which would have involved recommending the reconstitution of the Working Group with a new mandate, and possibly with a restricted membership, precisely to prepare such a final report on the topic, within a period of two years.<sup>51</sup>

28. While the preponderance of views within the Working Group favoured the conversion of the present format into a Working Group-based process, with the goal of producing a final report as opposed to the adoption of draft guidelines, there was nonetheless a preference for the more incremental approach, whereby a decision on a way forward would be taken only at the seventy-fifth session, so as to allow more time for reflection.<sup>52</sup> Accordingly, the Working Group decided to recommend that the Commission continue its consideration of the topic, but not proceed with the appointment of a new Special Rapporteur.<sup>53</sup> It further recommended that the Working Group be re-established at the seventy-fifth session of the Commission, with the present open-ended composition, with a view to undertaking further reflection on the way forward for the topic, taking into account the views expressed and the options identified in the Working Group at the seventy-fourth session.<sup>54</sup>

## G. Seventy-fifth session of the International Law Commission (2024)

29. The Chair of the Working Group convened an online meeting of interested members of the Commission in order to discuss the issues to be addressed by the Working Group. During that intersessional meeting, a number of issues were identified as requiring further reflection by the Commission. One prominent question was whether there existed sufficient State practice in the field and, in particular, whether the State practice identified by the Commission so far was sufficiently wide and representative in order to draw any conclusions about the existence of applicable rules of customary international law. In view of the usefulness of negotiated solutions among the affected States in any given situation, the question was raised as to whether such specifically tailored solutions could form the basis for the identification of rules of customary international law.<sup>55</sup>

30. Members acknowledged the need for a more thorough examination of the distinction between the transfer of responsibility itself and the transfer of rights and obligations arising from the responsibility of a predecessor State. The question appeared to be particularly important in view of what could be perceived as differences in the provisions considered by the Commission thus far with regard to rights, on the one hand, and obligations, on the other.<sup>56</sup>

31. It seemed appropriate to distinguish more clearly between what the Commission might consider to be codification and what would be progressive development of international law in the field of State succession in respect of State responsibility. It also appeared important to emphasize more clearly the underlying policy justifications for the proposed draft guidelines.<sup>57</sup>

32. At the Commission's seventy-fifth session, and pursuant to the discussion within the open-ended Working Group, its Chairperson observed that the prevailing tendency of its members was in favour of a summary report that would describe the difficulties faced in the

<sup>50</sup> *Ibid.*, para. 238.

<sup>51</sup> *Ibid.*, para. 239.

<sup>52</sup> *Ibid.*, para. 240.

<sup>53</sup> *Ibid.*, para. 241.

<sup>54</sup> *Ibid.*, para. 242.

<sup>55</sup> *Report of the International Law Commission on the Work of its Seventy-fifth Session (A/79/10)*, para. 312.

<sup>56</sup> *Ibid.*, para. 313.

<sup>57</sup> *Ibid.*, para. 314.

work on the topic but would not go into their substance, and would be prepared with a view to concluding the work on the topic at the following session of the Commission.<sup>58</sup>

## H. Summary of the final scope of the draft articles/guidelines

33. The Drafting Committee interpreted the Plenary's instruction to mean that the previously adopted draft articles on this topic were effectively referred back for transformation into draft guidelines. The Drafting Committee had indeed had the opportunity to revisit the previously adopted provisions and had made some modifications to them.<sup>59</sup> Beyond replacing the reference to "article(s)" with "guideline(s)", in some cases the shift in form required more substantive adjustments to texts adopted at previous sessions. The Drafting Committee considered the difference between the two forms of outcomes, namely that draft guidelines were intended to provide guidance to States while draft articles were cast as directions to States, often suitable for incorporation into a treaty. Accordingly, the words "shall be" were replaced by "is" in draft guidelines, reflecting the descriptive nature of the provision.

34. Whilst the Drafting Committee was able to conduct the exercise of modifying the previously adopted draft articles into draft guidelines, it did not have time to carry out a sufficiently thorough re-examination of them and accordingly, the reformulated provisions remained before the Drafting Committee pending a final *toilettage* at the conclusion of the work on first reading. The Drafting Committee ran out of time and was unable to conclude its work on a complete set of draft guidelines to be considered for adoption by the Commission on first reading. For the convenience of the Commission, the entire set of draft guidelines provisionally adopted, including the draft guidelines modified from the previously adopted draft articles, along with the evolution of the same, is reproduced in an annex to this report.

## II. Difficulties faced during the consideration of the topic

35. This section summarizes the difficulties that were faced during the consideration of the topic and which decisively impacted the continuation of the work on the topic.

### A. Insufficiency of State practice: insufficient practice from all regions of the world

36. The absence of State practice and the need to examine the State practice of African and Asian States continued to be a significant issue for the Commission and Member States. State practice, precedents and doctrines serve as a crucial foundation for the codification process. Due to the considerable absence of enumeration and thorough analysis in the work, both the Commission and Member States expressed reservations over the general framework and substance of the recommendations. During the discussions in the Sixth Committee, concerns raised by Member States included the scarcity and inconsistency of State practice leading to challenges in drafting articles/guidelines. The diverse and context-specific nature of State practices questioning the establishment of general rules was emphasized by Poland, Portugal, the United Kingdom of Great Britain and Northern Ireland and the United States of America,<sup>60</sup> while Algeria and Viet Nam<sup>61</sup> advocated for a broader, more inclusive review of practices globally, including from regional courts. Additionally, methodological issues in

<sup>58</sup> *Ibid.*, para. 330.

<sup>59</sup> *Report of the International Law Commission on the Work of its Seventy-third Session (A/77/10)*, para. 76.

<sup>60</sup> See the statements made before the Sixth Committee at its seventy-seventh session by the United Kingdom (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_uk\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_uk_3.pdf)) and at its seventy-sixth session by Portugal (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_portugal\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_portugal_3.pdf)).

<sup>61</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Viet Nam (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_vietnam\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_vietnam_3.pdf)).

Special Rapporteur's reports were highlighted, particularly by the Netherlands,<sup>62</sup> focusing on the accuracy of reflecting Member States' positions and the balance between progressive development and codification in international law.<sup>63</sup> The examination of State practice from an international legal standpoint remained a significant issue, yet it was crucial to acknowledge that cases stemming from State succession within the national context had been analysed and national courts had rendered decisions on these matters. The persuasive value of such national case law remained to be studied.<sup>64</sup> Concerns over the asymmetry in assessing the State practices of non-European States<sup>65</sup> necessitated that all Commission work adequately consider the content and methodologies of all regions to ensure universal acceptability. The heavy reliance on academic literature added to the issue of a lack of

<sup>62</sup> See the statement made before the Sixth Committee at its seventy-fourth session by the Netherlands (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/netherlands\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/netherlands_3.pdf)).

<sup>63</sup> See the statements made before the Sixth Committee at its seventy-sixth session by Sierra Leone (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_sierraleone\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_sierraleone_3.pdf)) and Niger (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_niger\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_niger_3.pdf)).

<sup>64</sup> Cases concerning claims brought by: the Republic of Korea against Japan (*Yeo and Ors. v. Nippon Steel & Sumitomo Metal* (2012 NA 44947); *Yang and Ors. v. Mitsubishi Heavy Industries*); Namibia against Germany (*Rukoro v. Federal Republic of Germany (No. 19-609* (2d Cir. 2020) and *Hereros v. Deutsche Afrika-Linien GMBLT & Co (Case No. 06-1684)*); Kenya against the United Kingdom (*Kimathi and Others v. Foreign and Commonwealth Office (Mau mau litigation)* (2018) EWHC 2066) and *Ndiku Mutua et al. v. Foreign and Commonwealth Office* (HQ09X02666)); Indonesia against the Netherlands (*Wisah Binti Silan et al. v. The State of The Netherlands (Ministry of Foreign Affairs)* (354119 / HA ZA 09-4171)); the displaced people of the Chagos Archipelagos against the United States (*Olivier Bancoult et al. v. Robert S. McNamara et al.* (Case number 05-5049)); and Martinique against France (*Judgment No. R.G. 05/1995*, Tribunal de Grande Instance de Fort de France). As observed by C. Stahn, "Reckoning with colonial injustice: international law as culprit and as remedy?", *Leiden Journal of International Law*, vol. 33 (2020), pp. 823–835, at p. 833: "The Dutch jurisprudence on reparation in the *Rawagede*, *South-Sulawesi* and *East Java* cases has challenged the traditional view that claims regarding historical injustice are *per se* barred by evidentiary obstacles. It concerned only specific episodes of violence in the path towards decolonization, but confirmed an important principle, namely that domestic legislators may be barred by virtue of international legal principles and considerations of fairness and good faith, to silence all consequences of the colonial past through statute of limitations." The limits of statutory limitations regarding historical injustice were confirmed by two historic rulings of the Hague Court of Appeal in 2019. An attempt can be found to identify the elements of succession of States in respect of State responsibility as well as some evidentiary value to judge the existence of rule positively or negatively in M. Zoodsma and J. Schaafsma, "Examining the 'age of apology': insights from the Political Apology database", *Journal of Peace Research*, vol. 59, No. 3, pp. 436–448, available from: <https://journals.sagepub.com/doi/full/10.1177/00223433211024696>. The jurisprudence of the CARICOM (Caribbean Community) Reparations Commission is a valuable source of literature while understanding the element of succession of States in respect of State responsibility in the Caribbean region. Literature is slowly emerging and the consideration of the topic may benefit from this literature. Such studies and emerging literature merit a closer study to analyse how States have been dealing with the elements of succession of States in respect of State responsibility. See Z. Szumer, "Australia helped Indonesia cover up atrocities in East Timor: an interview with Peter Job", *Jacobin*, 15 April 2022, available from: <https://jacobin.com/2022/04/australia-indonesia-cover-up-atrocities-east-timor-suharto-annexation>; D. Sullivan and J. Hickel, "How British colonialism killed 100 million Indians in 40 years", *Aljazeera*, 2 December 2022, available from: [www.aljazeera.com/opinions/2022/12/2/how-british-colonial-policy-killed-100-million-indians](http://www.aljazeera.com/opinions/2022/12/2/how-british-colonial-policy-killed-100-million-indians); and Office of the United Nations High Commissioner for Human Rights, "Experts of the Committee on the Elimination of Racial Discrimination commend Suriname on efforts to establish an anti-discrimination law, ask questions on the effects of mercury pollution and access to education for indigenous and tribal persons", 19 August 2022, available from: [www.ohchr.org/en/news/2022/08/experts-committee-elimination-racial-discrimination-commend-suriname-efforts-establish-an-Anti-Discrimination-Law](http://www.ohchr.org/en/news/2022/08/experts-committee-elimination-racial-discrimination-commend-suriname-efforts-establish-an-Anti-Discrimination-Law).

<sup>65</sup> For example, Malaysia notes "the second report of the Special Rapporteur puts more emphasis on State practice in European countries compared to the State practice in other regions when deliberating the issue of transfer of part of the territory of a State", statement made before the Sixth Committee at its seventy-third session by Malaysia, para. 35 (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/malaysia\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/malaysia_3.pdf)). See also "Indonesia: Dutch sorry for independence war 'extreme violence'", *Aljazeera*, 18 February 2022, available from: [www.aljazeera.com/news/2022/2/18/indonesia-dutch-sorry-for-independence-war-extreme-violence](http://www.aljazeera.com/news/2022/2/18/indonesia-dutch-sorry-for-independence-war-extreme-violence).

examination of broad State practice. Besides underlining the necessity to proceed meticulously to establish the framework and material based on State practice, there was a clear danger in taking on a topic with a heavy concentration on progressive development, and that was overly based on a selection of scholarly literature.<sup>66</sup>

## B. Usefulness of negotiated solutions/agreements as evidence of customary rules

37. Another important substantive issue was the need to study the usefulness of negotiated solutions, as evidence of customary rule. The work required deliberations and extraction of customary rules from the range of negotiated solutions. States had attempted to resolve succession issues—including the transfer of rights and obligations—through various means, such as constitutional provisions;<sup>67</sup> bilateral or multilateral negotiations resulting in international instruments; and referrals to domestic or international courts and tribunals.<sup>68</sup> Injured State(s) or successor State(s) had, as would be expected, carried out negotiations of their own free will and, in most cases, in a time-bound manner. When reparation was invoked, States had used various modalities of reparation, including with respect to its forms and (in case of dissolution) its distribution among successor States. Nevertheless, it was possible that the injurious effects of an internationally wrongful act committed by the predecessor State might not be fully extinguished. As new aspects of injury emerged over time, the injured State retained the right to seek reparation. Without this possibility, there was a risk that the injured State might be left without a full remedy.

38. The dissolution of a State could give rise to different kinds of legal relations. In this regard, some successor States might have a closer connection with the wrongful act or the injury than others. Therefore, there was a need for agreement on addressing injuries that might not be equally relevant to all successor States. When a State that had committed an internationally wrongful act dissolved and ceased to exist and the parts of the territory of the predecessor State formed two or more successor States, the injured State and the relevant successor State or States should 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. This list of factors was non-exhaustive.<sup>69</sup>

39. Therefore, there was a need for flexibility for other factors also to be considered in arriving at an effective solution between the injured State and the relevant successor State or States. Indeed, States might have used, or could use, various elements in addition to the ones listed above, which could contribute to understanding the elements of negotiated solutions as evidence of a customary rule. Similarly, States tended to find solutions to international responsibility in situations involving the uniting of States, offering a degree of flexibility and freedom for States to choose the mechanisms by which they reach agreements. This practice evidenced the establishment of a customary rule.

<sup>66</sup> Romania also underlined that State practice is sparse and that the Special Rapporteur heavily relied on academic writings, especially those of the Institute of International Law, to compensate the scarcity of State practice (statement made before the Sixth Committee at its seventy-fourth session by Romania (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania_3.pdf))).

<sup>67</sup> A few select constitutional provisions and policy statements: the Protocol to the Agreement establishing the Commonwealth of Independent States, signed at Minsk on 8 December 1991 by the Republic of Belarus, the Russian Federation and Ukraine; the Alma Ata Declaration (1991); the Constitution of Kenya (Amendment) Act, 1964, sect. 26; the Namibian Constitution, art. 140, para. (3); and the Agreement relating to Malaysia, signed at London on 9 July 1963 (United Nations, *Treaty Series*, vol. 750, No. 10760, p. 3).

<sup>68</sup> See *Edwards v. Canada* [2003] F.C.J. No. 1508 (Can. Ct. App. 2003); *Edwards v. Canada*, 2002 A.C.W.S.J. 4959 (Can. Tax. Ct. 2002); *Minister of Defence v. Israel Mwandighi*, [1991] NASC 5 (Namibia); *Yangtze (London) Limited v. Barlas Brothers (Karachi) and Co.*, *Civil appeal No. 139 of 1960, Judgment of 6 June 1961*; *Eastern European Engineering v. Vijay Construction*, [2022] SCCA 58 (Seychelles); and *South Sudan v. A. Ltd*, 4A \_ 575 / 2022.

<sup>69</sup> See the statement made before the Sixth Committee at its seventy-third session by Malaysia (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/malaysia\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/malaysia_3.pdf)).

40. What elements constituted a negotiated settlement in establishing whether automatic succession or the “clean slate” principle was a customary rule, if at all? These could be derived from the practice of States that desired the freedom to opt for negotiation and select the terms of an agreement, resulting in the application of either option. The States concerned might agree that, under specific circumstances, they considered either automatic succession or the “clean slate” principle to apply. The Commission’s work, particularly draft guideline 12, paragraph 1, stated that “[w]hen an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to be entitled to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good”. This draft guideline aimed to provide legal certainty by protecting the rights of the injured State in the context of State succession in which the predecessor State continued to exist, as emphasized by the phrase “continues to be entitled to invoke”.<sup>70</sup> It was made clear that “the position of the predecessor State is not affected by State succession” and, “if the injury it has suffered has not been made good”, the link between the injury and the right of the predecessor State to invoke responsibility must be taken into account. This required a more in-depth discussion on forms of reparation with regard to the different categories of State succession, in particular leading to different solutions.<sup>71</sup>

41. Succession should be carried out on the basis of committed negotiations, of States’ own free will and in an appropriate time frame. This position was upheld by States who had commented on the matter.<sup>72</sup> Even regarding disputes or differences arising from the interpretation or application of the 1978 Vienna Convention and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983 Vienna Convention), it was noted that States had preferred to resolve their disputes through bilateral agreements. It was noted that practice in this area was typically the result of negotiation and agreement between the relevant States, rather than the application of an underlying general rule.<sup>73</sup> Furthermore, States noted that that the draft articles on this topic were subsidiary in nature and thus agreements between the States concerned should be given priority; that States must necessarily enjoy a wide margin of discretion in this area; and that States might even consent to exclude ordinary rules of responsibility to arrive at a mutually agreed solution.<sup>74</sup> In this regard, it was instructive to note that a common element in the work of the Special Rapporteur on relevant guidelines addressing the unification of States, the incorporation of one State into another and the dissolution of a State, was the idea that the injured State and the successor State should agree on how to address the injury. This implied that negotiations, and any resulting agreement, should focus on the modalities of reparation—namely, its forms and, in cases of dissolution, its distribution among the successor States. However, the very purpose and goal of such negotiations, namely the principle according to which reparation must be made that wipes out the injurious effects of an internationally wrongful act of the

<sup>70</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Cameroon (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/31mtg\\_cameroon\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/31mtg_cameroon_3.pdf)).

<sup>71</sup> Cameroon has noted that there is “a clear distinction between reparation, on the one hand, and cessation and assurances and guarantees of non-repetition, on the other” and that “a more in-depth discussion on the forms of reparation with regard to the different categories of State succession is necessary, in particular on the circumstances leading to different solutions”, *ibid.*

<sup>72</sup> The Islamic Republic of Iran stated that it “concur[s] with the Special Rapporteur’s stipulation that ‘in principle an agreement between States concerned should have priority over subsidiary general rules on succession’”, statement made before the Sixth Committee at its seventy-second session by the Islamic Republic of Iran (available from: [www.un.org/en/ga/sixth/72/pdfs/statements/ilc/iran\\_3.pdf](http://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/iran_3.pdf)). The Netherlands welcomed “the priority of the conclusion of agreements between States” and noted that “State practice as well as case law suggest that successor States are generally aware of the need to avoid the creation of a vacuum in terms of State responsibility, through the conclusion of agreements among them”, statement made before the Sixth Committee at its seventy-second session by the Netherlands (available from: [www.un.org/en/ga/sixth/72/pdfs/statements/ilc/netherlands\\_3.pdf](http://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/netherlands_3.pdf)). This view was also echoed by Slovenia, statement made before the Sixth Committee at its seventy-second session by Slovenia (available from: [www.un.org/en/ga/sixth/72/pdfs/statements/ilc/slovenia\\_3.pdf](http://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/slovenia_3.pdf)).

<sup>73</sup> See the statement made before the Sixth Committee at its seventy-third session by the United Kingdom (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf)).

<sup>74</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Sierra Leone (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/sierra\\_leone\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/sierra_leone_3.pdf)).

predecessor, could not be questioned in such negotiations. In other words, the provision should not be viewed as an expression of the “clean slate” principle, as that would risk leaving the injured State without a remedy. Thus, the position stated by States during the debates as far as internationally wrongful acts were concerned was that mutually agreed solutions prevail over any rule and as such are evidence of a customary rule. The summary of debates showed that States had given priority to agreements and that these could be considered to be reflective of customary international law in the instances of succession of States in respect of State responsibility. However, whether this was a definitive rule of international law remained unsettled.

42. The common element of three draft guidelines proposed by the Special Rapporteur dealing with uniting of States, incorporation of a State into another State and dissolution of a State, was the idea that the injured State and the successor State should agree on how to address the injury. This could mean that the negotiations (and an agreement resulting thereof) focused on the modalities of the reparation, namely its forms and (in case of dissolution) its distribution between successor States. However, as stated above, the very purpose and goal of such negotiations, namely the principle according to which reparation must be made that wipes out the injurious effects of an internationally wrongful act of the predecessor, could not be questioned in such negotiations.

### C. Automatic succession versus the “clean slate” rule

43. The Commission’s work with regard to clarifying the issue of automatic succession versus the “clean slate” rule remained inconclusive. One view held in this respect was that inconclusiveness of State practice did not imply the use of the “clean slate” rule. This was in accordance with the previous work of the Commission (as reflected in both Vienna Conventions on State succession, namely the 1978 Vienna Convention on succession of States in respect of treaties and 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts) which rarely accepted the “clean slate” rule as predominant.<sup>75</sup> In this regard, a suggestion was made to study the interaction between this area of law and State responsibility, which might fill a gap in international law.<sup>76</sup> State responsibility for internationally wrongful acts was essential to ensure the effectiveness of international law. Therefore, responsibility should not disappear in every single case where the legal personality of a State ceased to exist. In cases of State succession, the “clean slate” rule might not be the appropriate answer. At the same time, States had held that automatic succession should not be a general rule, as it did not reflect broad State practice. Application of the general rules of State responsibility in situations of succession of States should depend on a case-by-case analysis.<sup>77</sup>

44. Considering the limited State practice and keeping in view the criteria of flexibility and will of a sovereign State, the Commission’s work showed the importance of negotiations and gave States the freedom to choose the terms of the agreement to provide a balance between automatic succession and a “clean slate”. This also applied in cases of dissolution of a State. In this regard, the Commission had relied on the jurisprudence of the Permanent Court of International Justice as expressed in the case concerning *Railway Traffic between Lithuania and Poland*<sup>78</sup> and of the International Court of Justice in the case concerning the *Application of the Interim Agreement of 13 September 1995*<sup>79</sup> and the *Case concerning claims*

<sup>75</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Slovenia (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia_3.pdf)).

<sup>76</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Brazil (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_brazil\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_brazil_3.pdf)).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Railway Traffic between Lithuania and Poland, Advisory Opinion of 15 October 1931, P.C.I.J., Series A/B, No. 42.*

<sup>79</sup> *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.*

*arising out of decisions of the Mixed Graeco–German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles.*<sup>80</sup>

#### **D. Distinction between transfer of responsibility as such and the transfer of rights and obligations arising from the responsibility of a predecessor State**

45. The Commission faced a difficulty in making a clear distinction between a transfer of responsibility as such and the transfer of rights and obligations arising from the responsibility of a predecessor State. In this regard, the Commission examined the question of whether a successor State would be responsible for a wrongful act that commenced with the predecessor State and continued with the successor State. The Commission carried out a case-by-case analysis to see whether such a composite act was possible under international law. The Commission's work affirmed that the rights and obligations triggered by an internationally wrongful act concern only the State that has committed it. These rights and obligations were not transferable as a result of State succession. In this regard, further research was required on whether the disappearance of a State that had committed a wrongful act would lead to a situation where that wrongful act remains unremedied. It had been held that succession of States did not have any effect on attribution and, therefore, on the consequences of an internationally wrongful act committed by a predecessor State. An additional analysis of the interplay between the principles that apply when an internationally wrongful act had been committed by the predecessor State and, on the other hand, when the predecessor State was the injured State, was required. The rights to which the injured State was entitled under the secondary rules of State responsibility necessarily entailed corresponding obligations owed by the State that committed the internationally wrongful act. In this regard, the Commission's work had been unclear on why succession of rights would be recognized whereas succession of obligations would not.<sup>81</sup> In cases concerning the incorporation of a State, the question of the responsibility of an incorporating State that committed an internationally wrongful act prior to incorporation against the incorporated State, on the one hand, and, on the other hand, the responsibility of the incorporated State that committed a wrongful act against the incorporating State, required clarification as well a detailed case-law analysis.

46. The territorial element constituted an important part of the regime of responsibility. It played a significant role, as obligations were transferred to a successor State along with the transfer of territory. It gave rise to important questions such as whether in cases where there is a link between an organ of State A, which later became the organ of State B, the acts of the organ of State A became the responsibility of the organ of State B. The work of the Commission showed that a transfer of obligations might take place according to or in the absence of an agreement, yet whether the transfer of obligations was subject to an agreement, to one, several or all the successor States remained unanswered.

47. The discussion on the transfer of responsibility versus the transfer of rights and obligations from a predecessor State in international law involved complex considerations, with varied stances from different States. While the Nordic Countries stressed the importance of clear rules for shared responsibility in composite acts<sup>82</sup>, Belarus<sup>83</sup> advocated for a predecessor State to retain obligations, particularly when it continues to exist post-succession. A caution in presuming succession, especially when the predecessor State ceased

<sup>80</sup> *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*, UNRIAA, vol. XIX, pp. 27–64 (available from: [legal.un.org/riaa/cases/vol.XIX/27-64.pdf](http://legal.un.org/riaa/cases/vol.XIX/27-64.pdf)).

<sup>81</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Brazil (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_brazil\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_brazil_3.pdf)).

<sup>82</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Denmark on behalf of the Nordic countries (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_nordic\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_nordic_3.pdf)).

<sup>83</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Belarus (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_belarus\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_belarus_3.pdf)).

to exist, was emphasized. The United States<sup>84</sup> pointed out that decisions on liability are often driven by diplomatic and political factors, and Greece<sup>85</sup> highlighted the challenge of balancing legal and material realities in cases of State succession. Austria<sup>86</sup> strongly opposed the idea of transferring responsibility or related rights and obligations, viewing such liability as a highly personal, non-transferable aspect akin to personal treaties. Romania,<sup>87</sup> Slovakia,<sup>88</sup> the Republic of Korea<sup>89</sup> and the Netherlands<sup>90</sup> emphasized the need for case-by-case assessments and specific agreements between States in handling the transfer of rights and obligations. The Russian Federation<sup>91</sup> suggested focusing on State responsibility in succession scenarios, while Cameroon<sup>92</sup> underlined the importance of protecting the rights of nationals, arguing against the transfer of obligations for acts committed before succession. Algeria<sup>93</sup> and the Niger<sup>94</sup> called for further discussion on the general rule of non-succession and the distinction between transferring responsibility and rights and obligations. Turkey<sup>95</sup> based on its views on the continuity theory and argued against the obligation of the successor State to make restitution for the predecessor. The significant differences among States underscored the complexity and contentious nature of this issue in international law and called for balancing legal principles with political and diplomatic factors.

48. The Commission had been unable to clarify and provide definite answer as to whether a successor State would be responsible for a wrongful act that commences with the predecessor State and continues with the successor State, as such situations were dealt with on a case-to-case basis. The question was also raised as to whether such a composite act was possible under international law.

49. With regard to compensation and the transfer of the relevant obligation to the successor State, the Commission's work showed that an injured State continued to be entitled to claim compensation from the predecessor State that committed the wrongful act, as that State was always in a position to provide this form of reparation. However, there was a need for clarification on whether, in certain limited circumstances, the relevant obligation was transferred to the successor, or whether both the predecessor and successor State had the obligations to provide compensation in such a case.<sup>96</sup>

50. The Commission's work affirmed that the rights and obligations triggered by an internationally wrongful act only concern the State that had committed it. These rights and obligations were not transferable as a result of State succession. Furthermore, the work of the

<sup>84</sup> See the statement made before the Sixth Committee at its seventy-sixth session by the United States (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_us\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_us_3.pdf)).

<sup>85</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Greece (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_greece\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_greece_3.pdf)).

<sup>86</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Austria (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_austria\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_austria_3.pdf)).

<sup>87</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Romania (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_romania\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_romania_3.pdf)).

<sup>88</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Slovakia (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_slovakia\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_slovakia_3.pdf)).

<sup>89</sup> See the statement made before the Sixth Committee at its seventy-sixth session by the Republic of Korea (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_rok\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_rok_3.pdf)).

<sup>90</sup> See the statement made before the Sixth Committee at its seventy-sixth session by the Netherlands (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_netherlands\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_netherlands_3.pdf)).

<sup>91</sup> See the statement made before the Sixth Committee at its seventy-sixth session by the Russian Federation (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_russia\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_russia_3.pdf)).

<sup>92</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Cameroon (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_cameroon\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_cameroon_3.pdf)).

<sup>93</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Algeria (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_algeria\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_algeria_3.pdf)).

<sup>94</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Niger – (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_niger\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_niger_3.pdf)).

<sup>95</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Turkey (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_turkey\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_turkey_3.pdf)).

<sup>96</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Greece (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_greece\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_greece_3.pdf)).

Commission showed that the disappearance of a State that had committed a wrongful act should not lead to a situation where the wrongful act remained unremedied.

## E. Need to distinguish between codification and progressive development

51. One of the most important issues raised throughout the examination of the topic was the need for clarity on whether the work was primarily a codification or the progressive development of international law. Several States felt that evidence of State practice on this particular topic was not yet sufficiently established. Therefore, it would have been useful to indicate clearly which draft guidelines were based on State practice and which reflected progressive development of international law. For example, States expressed doubt with regard to the utility of some of the draft guidelines as the work had stopped short of proposing specific rule-based solutions in the different scenarios of succession anticipated by the guidelines.<sup>97</sup> Instead, the relevant draft guidelines merely referred to an agreement between the injured and the wrongdoing States. Furthermore, while some of the draft guidelines referred to relevant circumstances that should be taken into consideration when assessing the situation, there was a lack of general guidance on what kinds of circumstances should be considered relevant.<sup>98</sup>

52. While cases of State succession did not occur that often, it was still possible given the existence of secessionist movements in various parts of the world. In this context, the existence of clearly formulated rules was useful as these could assist both States (in case State succession did take place) as well as the courts (when proceedings related to State succession involving State responsibility). Indeed, a number of States sought to get detailed legal understanding from the Commission.<sup>99</sup> However, this clearly entailed progressive development wherein policy, rather than law and legal rationale, might be paramount. Several areas of law were still under “codification”, therefore, it was found to be inadvisable to propose rules that might be deemed to be progressive development of international law, as proposing such rules would be getting into the policy domain of States.<sup>100</sup> In this regard, the summary of the debates in the Commission and the Sixth Committee led to the conclusion that, despite the fact that progressive development might be a useful exercise, the current exercise had to be limited strictly to the codification of State practice and *opinio juris* only. The Commission indeed received comments from several States that seemed to be favourable towards progressive development and specifying rules.<sup>101</sup> However, such a venture required policy discussions, and Member States as well as the Commission itself were not convinced that the Commission would be able to determine its role in the progressive development of this topic. Any attempt at progressive development indeed required analysis of elaboration of methodology which was suitable for progressive development instead of codification.

53. The analysis of the work of the Commission (the draft guidelines and the commentaries thereto) showed that there were elements of codification and progressive development and it was difficult to classify which guidelines constituted progressive development and which constituted codification. Indeed, it was practically impossible to determine pure codification and pure progressive development. The Commission could not

<sup>97</sup> See draft guidelines 10, 10 *bis*, 11 and 14.

<sup>98</sup> See draft guidelines 11 and 14.

<sup>99</sup> See the statements made before the Sixth Committee at its seventy-sixth session by: Mexico (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_mexico\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_mexico_3.pdf)); the Netherlands (available from:

[www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_netherlands\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_netherlands_3.pdf)); and Turkey (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_turkey\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_turkey_3.pdf)).

<sup>100</sup> See the statements made before the Sixth Committee at its seventy-fourth session by: the Islamic Republic of Iran (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/iran\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/iran_3.pdf)); and the United Kingdom (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_3.pdf)).

<sup>101</sup> See the statements made before the Sixth Committee at its seventy-fourth session by: Italy (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/italy\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/italy_3.pdf)); the Netherlands (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/netherlands\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/netherlands_3.pdf)); Romania (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania_3.pdf)); and the United Kingdom (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_3.pdf)).

change the existing system of law that had been developed between two States as far as State succession was concerned. At the most, what the Commission could do was try to understand the rule and its logic. Even when these were not immediately clear, if States had reached an agreement to govern the relations between them in respect of a particular issue, then the Commission should leave it to the wisdom of the States.<sup>102</sup>

54. The Commission was called upon to express which provisions represented existing general international law and which sought to progressively develop international law.<sup>103</sup> States had expressed anxiety in this regard as the Commission's work was believed to be treading into the domain of policy norms, even though progressive development was a mandate of the Commission. Therefore, any future work on the topic should consider, as early as possible, this type of challenge and political sensitivities of the States.

55. Evidence of wide-ranging, context-specific State practice on this particular topic had yet to be sufficiently established. In this regard, the Commission needed to indicate clearly which draft guidelines were based on State practice and which reflected progressive development of international law.<sup>104</sup>

56. The debate surrounding codification versus progressive development had remained constant. The work had been perceived to have heavily relied upon academic writings and as there was a lack of wide universal State practice on the topic, the ensuing draft norms (guidelines/articles) and the commentaries thereto suffered from this fundamental methodological issue. In the process, it was found that the Commission's work had significantly moved into direction of progressive development. State succession remained one of the most politically sensitive topics and in the absence of State practice on State succession in relation to State responsibility, the legal reasoning might seem to have found less favour by the States. This topic, unlike some other non-politically sensitive and complex topics, remained a challenge for States and for the international community as a whole. The ensuing debates in the Sixth Committee showed that States were reluctant to accept draft abstract hypothetical legal norms. Another challenge was in the context of transfer of rights and obligations, as there was no clarity on whether a successor State acquired its own rights based on its own sovereignty or the rights and obligations of the predecessor State as a new successor State. Clarification in this respect could be helpful. In view of the absence of a study of broad State practice, the debate emphasized the complex nature of the topic, the need to categorize the various types of State succession, the determination of taxonomy and the definitional aspects of general concepts that could bring clarity to this topic.

<sup>102</sup> As Alain Pellet observed, “[t]he Commission is ... concerned with collecting and analysing precedents (whether judicial or practical) and doctrinal views, assembling them with a view to ascertaining evidence of practice generally accepted as being the law and to deduce the existence of new trends and elaborating drafts with a concern for reasonableness, consistency and acceptability” (A. Pellet, “Between codification and progressive development of the law: some reflections from the ILC”, *International Law FORUM du droit international*, vol. 6, No. 1 (February 2004), pp. 15–23, at p. 19).

<sup>103</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Italy (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/italy\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/italy_3.pdf)).

<sup>104</sup> See the statements made before the Sixth Committee by: Thailand at the seventy-seventh session (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/31mtg\\_thailand\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/31mtg_thailand_3.pdf)); and Estonia at the seventy-third session (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/estonia\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/estonia_3.pdf)). Estonia proposed specifying which aspects of the draft articles contained State practice and which aspects were to be considered *lege ferenda*, statement made before the Sixth Committee at its seventy-third session by Estonia (*ibid.*). Mexico also suggested clarifying which areas were codification and which were progressive development, statement made before the Sixth Committee at its seventy-third session by Mexico (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/mexico\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/mexico_3.pdf)). The United Kingdom agreed with the comments of members of the Commission indicating that it would be important for the Special Rapporteur to clarify the extent to which each of the draft articles codified customary international law, or alternatively would constitute progressive development of international law or new international law, statement made before the Sixth Committee at its seventy-third session by the United Kingdom (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf)).

## F. Policy justifications for and against succession rules as well as non-succession rules

57. The debates in the Commission and the Sixth Committee revealed the need for the solid policy justifications for and against succession rules as well as non-succession rules.<sup>105</sup> Due to the highly sensitive and complicated nature of this topic, it was observed that the Commission had to be very careful in determining whether it could develop a universal solution.<sup>106</sup> Besides the type of succession taking place, the outcome of any succession and the eventual matter of responsibility depended on various other factors such as the existence or non-existence of an agreement between the parties; the willingness of the parties to negotiate; the events preceding the State succession; the existence of a link between the wrongful act and the territory; and potential human rights violations. Neither the principle of non-succession nor that of automatic succession has been unequivocally affirmed, based on the views of States as well as literature and (national and international) case law. In view of the prevalent lack of consistent State practice, the Commission was required to preserve a balance between two distinct legal principles, since in different cases, either the principle of automatic succession based on continuity or that of the “clean slate” would prevail. This situation might change, however, based on emerging future State practice. The lack of adequate, verifiable and solid information to determine the existence of a general rule of non-transmission of responsibility in cases of succession remained a major hindrance. Practice shows that, in cases of succession, States tended to negotiate the questions related to responsibility. This indicated that States were able to agree on the way responsibility was allocated to each State “without the need of predetermined rules on this issue”.<sup>107</sup> Indeed, this showed that rules concerning succession and non-succession belonged to the realm of policy instead of an abstract legal formulation. It was underlined that “the continuity and succession of massive political and legal consequences are not definitely extricated from each other in legal terms yet, and are largely intertwined in many aspects”.<sup>108</sup> This showed the prevalence of policy and political intricacies and uncertainty over legal reasoning.<sup>109</sup> In view of these circumstances, a *lex ferenda* approach in preparing the draft articles in the initial reports, based on policy preferences instead of legal grounds, was unable to generate positive response from Member States for proceeding with the work on potential draft articles.<sup>110</sup> This reinforced the continuous concern of Member States that the Commission’s work could tread into the policy domain.

## G. Justification of a parallel between State responsibility and State debts

58. The need to ensure consistency of the Commission’s work and the 1978 and 1983 Vienna Conventions, as well as the draft articles on nationality of natural persons in relation to the succession of States remained another area of concern for Member States and the

<sup>105</sup> See the statements made before the Sixth Committee by: Sierra Leone at the seventy-sixth session (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_sierraleone\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_sierraleone_3.pdf)); the United Kingdom at the seventy-third session (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf)) and at the seventy-fourth session (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_3.pdf)); and the Islamic Republic of Iran also at the seventy-fourth session (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/iran\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/iran_3.pdf)).

<sup>106</sup> See the statements made before the Sixth Committee at its seventy-third session by: France (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/france\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/france_3.pdf)); the United Kingdom (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf)); and Israel (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/israel\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/israel_3.pdf)).

<sup>107</sup> See the statement made before the Sixth Committee at its seventy-third session by Portugal (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/portugal\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/portugal_3.pdf)).

<sup>108</sup> See the statement made before the Sixth Committee at its seventy-third session by Turkey (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/turkey\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/turkey_3.pdf)).

<sup>109</sup> See the statement made before the Sixth Committee at its seventy-third session by the United Kingdom (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf)).

<sup>110</sup> See the statement made before the Sixth Committee at its seventy-fourth session by the Islamic Republic of Iran (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/iran\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/iran_3.pdf)).

Commission. Although there existed a view in the literature that “it is easily conceivable to consider that certain financial obligations—which are most often the outcome of reparation—could be transmitted at the time of a succession of States from the predecessor State to the successor State in the same way as State debts are transferred”,<sup>111</sup> no State practice showed evidence of at least an emerging rule of international law providing for the devolution of the obligation of reparation from the predecessor State to the successor State.

59. In the *Gabčíkovo–Nagymaros Project* case, the International Court of Justice stated that “Slovakia ... may be liable to pay compensation not only for its own wrongful conduct, but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct by Hungary”.<sup>112</sup> The Court thus answered in the affirmative both the question of succession in respect of secondary obligations and secondary rights resulting from respective wrongful acts. However, this was an isolated case and might have limited persuasive value, especially as this affirmation by the Court was made in context of a bilateral treaty. Therefore, the validity and continued effect of this affirmation beyond a bilateral particular treaty in the realm of general international law must be considered with abundant precaution. Indeed, it was uncertain whether, at least in some cases, there might be devolution under international law of secondary obligations or rights deriving from a breach of an international obligation from the predecessor to the successor State. The Badinter Arbitration Committee, established within the framework of the International Conference on the Former Yugoslavia, contributed to this perception by simply stating that “[t]he rules applicable to State succession and State responsibility fell within distinct areas of international law”.<sup>113</sup> The Badinter Arbitration Committee made this remark in the context of a question relating to the incidence of damages of war in the distribution of debts, goods and archives among the successor States. Clearly, the question was not whether there was succession to war debts, but rather whether acts carried out by the successor States themselves would influence the distribution of debts and assets “inherited” from the former Yugoslavia. In sum, there was uncertainty in doctrine and State practice regarding the question of State succession to responsibility.

60. Although the 1983 Vienna Convention remained largely non-ratified, it was important to note that the Convention provided that “[n]othing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention” (art. 5). In the Convention, the section on State debts was particularly noteworthy. While the transfer of property and archives was essentially procedural—meaning it did not involve the transfer of legal obligations—State debts represented a form of financial liability. According to article 34 of the Convention, such a transfer constituted the “extinction of the obligations of the predecessor State and the arising of the obligations of the successor State”. As the Convention prescribed, if there was an agreement between the predecessor and the successor States regarding the passing of debt, then that agreement would prevail. In the absence of such an agreement, various scenarios were possible, again depending largely on the type of State succession. In this regard, a question arose as to whether cases where parts of the territory of a State were being transferred or separated, or in case of the dissolution of a State, the share(s) of debt transferred, should be proportionate to the property, rights and interests acquired by the successor State(s). Further questions remained as to whether, in the case of a uniting of States, the debt of the successor State was the sum of the debts of the predecessor States, and whether in the case of the formation of a newly independent State, the State debt passed to it as a general rule of international law. It appeared that the rules contained in the 1983 Vienna Convention mirrored those of the 1978 Vienna Convention. First, the same “clean slate” principle was applicable for newly independent States. Second, the portion of acquired territory influenced the calculation of debt that would pass to the successor State, showing that the territorial element was definitive. A pattern could already be deduced: if there was a meaningful link between the predecessor State and the successor State, the latter

<sup>111</sup> V. Mikulka, “State succession and responsibility”, in J. Crawford, *The Law of International Responsibility*, Oxford University Press, 2010, pp. 291–296, at p. 295.

<sup>112</sup> *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 81.

<sup>113</sup> Institute of International Law, 14th Commission, “State succession in matters of State responsibility: Provisional report”, p. 6.

assumed the obligations, or part of the obligations, of the former. Also, the principle that a newly established State should be able to commence its existence without assuming prior commitments should be borne in mind.

## H. Unjust enrichment and State succession

61. A set of questions concerning the concept of unjust enrichment owing to wrongful act had emerged in cases where a wrongful act was attributed to the predecessor State. Would the principle of unjust enrichment apply, and if so, in what conditions? The Commission's work showed that a successor State and an injured State "should agree on how to address the injury" but this suggested excluding a rule of automatic succession or the "clean slate" principle. The need to "address the injury" arising from the commission of a wrongful act under the principles of State responsibility did not automatically mean that a wrongful act committed by its predecessors somehow imposed obligations on it by way of succession.<sup>114</sup> The relationship between the principles of State responsibility and unjust enrichment was emphasized in the context of State succession. When a State dissolved, forming multiple successor States, factors like territorial links, benefits derived and equitable apportionment were considered. The concept of unjust enrichment was central in cases where successor States might be obligated to provide reparation for wrongful acts committed by the predecessor State, especially when they benefited from these acts. This concept was applied to prevent double recovery and ensure equitable solutions, and it played a critical role in situations such as creeping expropriations, where successor States benefited from the wrongful acts of their predecessors. However, the application of unjust enrichment in international law, particularly in the context of State succession and responsibility, was debated, with some scepticism expressed about its precision and its status as a stand-alone principle in international law. States considered that due regard should be given to the concept of unjust enrichment. It was also observed that the concept of unjust enrichment was triggered where there was a "clear direct link" between the consequences of the act and the territory or the population of the successor State, or where the author of the wrongful act was an organ of the predecessor State which became an organ of the successor State and the latter continued to benefit from the consequences of such act.<sup>115</sup> A view summarized the prevailing understanding that in such cases the successor State could be required to provide compensation based on the concept of unjust enrichment. Such a requirement could also be based on the fact that the successor State continued to enjoy the benefits of the wrongful act without any expression of eagerness to provide reparation to the injured State or its nationals, perhaps similarly to the case in which a State "acknowledges and adopts the conduct in question as its own" and hence bore responsibility for it, according to article 11 of the draft articles on the responsibility of States for internationally wrongful acts.<sup>116</sup>

62. The applicability of unjust enrichment in international law, especially regarding State succession and responsibility, and its status as a stand-alone principle and its specific contours required thorough research by any future study.<sup>117</sup>

## I. Rules governing legal consequences

63. A future study might also consider whether it should undertake additional work to clarify the rules governing legal consequences of internationally wrongful acts committed prior to the date of succession, for which the injured State did not obtain full reparation. While this might help clarify the rules governing legal consequences, intrinsically, this task

<sup>114</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Austria (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_austria\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_austria_3.pdf)).

<sup>115</sup> See the statement made before the Sixth Committee at its seventy-sixth session by Greece (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_greece\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_greece_3.pdf)).

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.* See also the statement made before the Sixth Committee at its seventy-fourth session by Italy (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/italy\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/italy_3.pdf)).

would essentially be an exercise of progressive development. Progressive development, in absence of State practice, should be pursued with great caution.<sup>118</sup>

## J. Diplomatic protection

64. A question concerning diplomatic protection in situations of the succession of States required further research. It was essential to find a balance between the interests of States in political dynamics such as succession and interests of the people affected by them and by unlawful acts of an independent nature.<sup>119</sup> The evolving work showed that the norms on State responsibility and the law on diplomatic protection as developed by the Commission raise “serious issues” in relation to succession of States.<sup>120</sup> In this regard, the validity and utility of draft article 5, paragraph 2,<sup>121</sup> of the draft articles on diplomatic protection, which provided for the situation of State succession, might be explored. It allowed a successor State to take up the claim of a person who acquired that State’s nationality upon succession of statehood. However, caution must be maintained, as such an attempt might encroach upon the redefinition of the law applicable to State succession and diplomatic protection.

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

65. The work of the Commission showed that the position of the predecessor State was not affected by the succession of States. A view was expressed that the Commission’s work had remained ambiguous about the circumstances in which a successor State might be able to invoke the responsibility of the State that committed the wrongful act due to the usage of the term “particular circumstances”.<sup>122</sup> The only situation that could be envisaged was when there is a connection between the injury to the predecessor State before the date of succession and the territory or the nationals that became those of successor State upon succession. In this regard, States were interested in clarifying any other circumstances that might warrant invocation by the successor State. This was found to be necessary because the draft guidelines prepared by the Commission lacked such specificity and because the meaning of “particular circumstances” remained important. If there was only one situation which was foreseen to occur, that situation should be spelled out with adequate clarity, otherwise the generality of the term “particular circumstances” would leave room to differing interpretations, which might pose difficulties in its implementation.<sup>123</sup> It would be useful to explore more fully the question concerning the situations in which part or parts of the predecessor State which would become the successor State could bear responsibility for international illegal acts committed

<sup>118</sup> See the statements made before the Sixth Committee by: Slovakia at the seventy-third session (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/slovakia\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/slovakia_3.pdf)), at the seventy-fourth session (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovakia\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovakia_3.pdf)) and at the seventy-sixth session (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_slovakia\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_slovakia_3.pdf)); Spain at the seventy-sixth session (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_spain\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_spain_3.pdf)); Belarus at the seventy-sixth session (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_belarus\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_belarus_3.pdf)); and Estonia at the seventy-seventh session (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_estonia\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_estonia_3.pdf)).

<sup>119</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Mexico (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/mexico\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/mexico_3.pdf)).

<sup>120</sup> A/CN.4/732, para. 87.

<sup>121</sup> “A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates ... Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of the injury ...”, *Yearbook ... 2006*, vol. II (Part Two), p. 31, draft article 5, paragraphs 1 and 2.

<sup>122</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Malaysia (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/malaysia\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/malaysia_3.pdf)).

<sup>123</sup> *Ibid.*

not only towards/against third States, but also towards/against other successor States of the former common State.

## **L. Composite act**

66. The question of composite act was addressed by the Commission and the States, but no substantive debates took place on this issue. The ensuing debates showed that “the continued application by the successor State of the illegal measures adopted by the predecessor State may be an act attributable directly to the successor State, also in cases where the composite act had already been completed by the predecessor State”.<sup>124</sup> In this regard, a question arose as to the possibility of having recourse to the general rules of State responsibility in cases of continuing or composite events. This was a prevalent suggestion in the comments of States.<sup>125</sup>

## **M. Additional issues or guidelines that require clarification**

67. The question of the finalization of the draft guidelines had obviously become moot. However, the existing reports of the Commission contained draft articles and draft guidelines and the corresponding commentaries which were helpful for understanding the evolving debates, analysis of the questions and the prevailing views of the topic.

## **N. Form of the report**

68. The Commission deliberated upon a final form of the report and considered several aspects such as the inclusion of the draft guidelines and the commentaries adopted by the Commission with a separation between the guidelines adopted orally and those which had undergone the regular process. Second, it was debated that issues that had been highlighted by Member States and the Commission might form part of an annex, either for consideration of the Commission as a new topic, or for undertaking essential research that results in a guide or paper to be attached to the annex.

69. In this regard, although several States expressed the need to clarify whether the exercise was one of codification or progressive development, it appeared that Member States were willing to have a study on codification instead of progressive development as such, and while few States expressed an interest in more normative guidance, there could be a benefit from focusing on actual State practice or case law instead of abstract, untested guidelines.

70. While undertaking any study in the future, it would be essential to assess the level of support for the continuation of the consideration of the topic among the members of the Commission and Member States, as the relative lack of support expressed in the debates within and outside the Commission would remain a decisive factor in preparing a useful product. In this regard, an interesting question arose as to whether the number of States making substantive comments was an indication of interest in the topic. Regardless, it was noteworthy that the Commission had been able to pursue a topic that was controversial and had faced criticism and objections from States and had even proceeded to adopt guidelines on such a topic.

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<sup>124</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Greece (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/31mtg\\_greece\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/31mtg_greece_3.pdf)).

<sup>125</sup> See the statements made before the Sixth Committee at its seventy-sixth session by: Denmark on behalf of the Nordic countries (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_nordic\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_nordic_3.pdf)); Estonia (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_estonia\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_estonia_3.pdf)); Greece (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_greece\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_greece_3.pdf)); India (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg\\_india\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/24mtg_india_3.pdf)); Turkey (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_turkey\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_turkey_3.pdf)); and the United States (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg\\_us\\_3.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_us_3.pdf)).

## O. Transition from draft articles to draft guidelines

71. The Commission had to address the final product of the topic. While the work continued with the preparation of draft articles and corresponding commentary until 2021, the Commission, taking into account the deliberations and views of States, made essential changes by transitioning from draft articles to draft guidelines and proceeded with the preparation of new draft guidelines.<sup>126</sup> This shift, which occurred almost toward the end of the quinquennium, coupled with the need to complete other topics, ultimately led to a scenario where the Commission ended up with a set of draft guidelines and commentaries that required a fresh examination.

## P. Consistency between the current work on the topic and earlier works of the Commission

72. A concern was expressed in the Sixth Committee debates regarding the consistency of the Commission's work on this topic with its other works. Indeed, the existence of guidelines could create a new norm which could be inconsistent with these other works. Therefore, both the Commission and Member States reiterated that the Commission's work on the topic should maintain consistency, both in terminology as well as in substance, with its previous works, including the draft articles on the responsibility of States for internationally wrongful acts.<sup>127</sup> Article 5 of the 1983 Vienna Convention had limited questions relating to the effects of a succession of States to matters provided for in that Convention, while article 39 of the 1978 Vienna Convention had expressly excluded issues regarding the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States.<sup>128</sup> This report is mindful of the complexity and sensitivity that was highlighted by States and the Commission alike and therefore refrains from stating whether the work undertaken by the Commission in the previous quinquennium is consistent with the other aforementioned works of the Commission and Conventions.<sup>129</sup> It nevertheless reiterates the necessity that the topic must preserve the integrity of, and be consistent with, existing arrangements related to State succession and State responsibility, particularly the draft articles on the responsibility of States for internationally wrongful acts and the draft articles on diplomatic protection.<sup>130</sup>

## Q. Possible issues

73. Another disadvantage of the work was the shift from draft articles to draft guidelines, as their formulation and use of terms required clarification. It could be summed up that the draft articles and the subsequent draft guidelines contained terms or phrases that were found

<sup>126</sup> In 2017, the Islamic Republic of Iran suggested that draft articles were not a good choice, especially in view of the State practice showing an inclination for bilateral agreements subsequent to the existence of the 1978 and 1983 Vienna Conventions; the Netherlands was not convinced by the draft articles and commentary approach; and the Islamic Republic of Iran, Poland, the Russian Federation, Turkey and the United States cautioned that treaties relating to State succession enjoy relatively narrow support and considered that summary conclusions or a report as the final outcome would be better. Also in 2017, Portugal viewed the work of the Commission on the effects of succession of States with respect to the two Vienna Conventions as very useful for the proposed topic.

<sup>127</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Croatia (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/croatia\\_1.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/croatia_1.pdf)).

<sup>128</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Jamaica (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/jamaica\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/jamaica_3.pdf)).

<sup>129</sup> See for example, the statements made before the Sixth Committee at its seventy-fourth session by: Croatia (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/croatia\\_1.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/croatia_1.pdf)); India (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/india\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/india_3.pdf)); Malaysia (available from: [https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/malaysia\\_3.pdf](https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/malaysia_3.pdf)); Romania (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania_3.pdf)); and Slovenia (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia_3.pdf)).

<sup>130</sup> See the statement made before the Sixth Committee at its seventy-fourth session by the Netherlands (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/netherlands\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/netherlands_3.pdf)).

to be ambiguous.<sup>131</sup> The debates in the Commission and the Sixth Committee clearly pointed to the fact that a heavy reliance on academic and doctrines could cause significant impact on the credibility and acceptance of the work by the States. The drafting process consisting of style and substance and lack of clarity could be seen to have impacted upon the necessary support for pursuing the topic with sustained enthusiasm within the Commission.

## R. Reliance on academic writings

74. The works of the Institute of International Law and the International Law Association received mixed reactions from the Commission and from Member States. For example, Israel expressed concern regarding the reliance on academic writings and the work of the Institute of International Law when seeking to reflect and codify the state of the law accurately.<sup>132</sup> It was noted that instead of relying on the achievements of the Commission on the succession of States, the work used the Institute of International Law and an academic writing as the main basis for research.<sup>133</sup> The Special Rapporteur was urged not to place undue reliance on academic writings, especially where these might be used as the basis for the inclusion of draft articles based on “new law” or progressive development of the law.<sup>134</sup> It was observed that “the paucity of State practice on this topic has led to the over-reliance on academic literature in the work of the Commission and the Special Rapporteur”.<sup>135</sup> Considering that the topic was discussed without sufficient State practice, a delegation emphasized that the Commission should take sufficient time for review, rather than drawing hasty conclusions.<sup>136</sup> Thus, as early as 2019, the lack of analysis of State practice attracted significant attention from States.

75. The topic also faced a seemingly technical yet substantively important challenge in terms of its title.<sup>137</sup> The report was influenced by suggestions to change the title to “State responsibility problems in cases of succession of States”.<sup>138</sup>

## S. Future

76. There are some significant challenges to the work of the Commission on this topic, such as the complexity of the subject of succession of States under international law, rare occasion of cases of State succession as well as diverse, context-specific and politically

<sup>131</sup> For example, draft guideline 6 had a heavy structure and contained terms that needed more precision (such as the date of succession of States). The wording “if particular circumstances so require” in draft guidelines 7 and 9 as proposed by the Special Rapporteur in his second report raised questions as to how and who would determine the existence of such circumstances. Similarly, the notion of “direct link” in draft guidelines 7, 8 and 9 or “substantive autonomy” in draft guideline 8 – as proposed by the Special Rapporteur in his second report – were not clear enough to satisfy the concerns of States.

In general, the presence of terms that required interpretation is natural for legal documents: for comparison, the draft articles on the responsibility of States for internationally wrongful acts contained terms like “essential interest” and “imminent peril” in article 25, which catalysed academic debate and were the subject of judicial pronouncements.

<sup>132</sup> See the statement made before the Sixth Committee at its seventy-third session by Israel (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/israel\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/israel_3.pdf)).

<sup>133</sup> See the statement made before the Sixth Committee at its seventy-third session by the Russian Federation (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/russian\\_3e.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/russian_3e.pdf)).

<sup>134</sup> See the statement made before the Sixth Committee at its seventy-third session by the United Kingdom (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_3.pdf)).

<sup>135</sup> See the statement made before the Sixth Committee at its seventy-fourth session by China (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/china\\_23e.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/china_23e.pdf)).

<sup>136</sup> See the statement made before the Sixth Committee at its seventy-fourth session by the Republic of Korea (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/rok\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/rok_3.pdf)).

<sup>137</sup> See the statement made before the Sixth Committee at its seventy-third session by Israel (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/israel\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/israel_3.pdf)).

<sup>138</sup> Portugal, for example, suggested that the term “problems” be replaced with “aspects” or “dimension”, although why this was not done remains to be clarified; see the statement made before the Sixth Committee at its seventy-third session by Portugal (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/portugal\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/portugal_3.pdf)).

sensitive State practice in this area. In light of this, an emerging view has been that the Commission should have more proactive consultations with the States on this topic and take into consideration more geographically diverse sources of State practice including all regions for the purposes of codification and progressive development of international law relating to succession of States responsibility in the future.<sup>139</sup>

77. The study gave rise to several questions which the Commission might consider studying as they might be useful for States and the international community in dealing with emerging situations. For example, how to address the injury caused to a successor State(s) when a successor State(s) might have a closer connection with the wrongful act or the injury than others. In such circumstances, the question arose of addressing the injury that might not be equally relevant to all successor States. Were there negotiated solutions which could, to a certain extent, evidence an emerging rule in this regard?

78. When a State that committed an internationally wrongful act dissolved and ceased to exist, and its territory was divided into two or more successor States, the injured State and the relevant successor State(s) must agree on how to address the resulting injury. They should take into account any territorial link, any benefit derived, any equitable apportionment and all other relevant circumstances. These factors for determination were non-exhaustive. Therefore, it was important to consider how to allow for flexibility so that other factors not listed could also be considered in developing an effective solution between the injured State and the relevant successor State or States.<sup>140</sup> In this regard, it would be necessary to consider issues including a plurality of States jointly responsible, a plurality of States responsible for different breaches, as well as the regime of the implication of a State in the act of another State which might have provided: (a) aid or assistance in the commission of the internationally wrongful act; (b) direction and control in the commission of an internationally wrongful act; or (c) coercion exercised over another State of articles on responsible States for internationally wrongful acts.<sup>141</sup>

79. In the context of the uniting of States, could States be encouraged to find solutions to international responsibility in situations involving the merger of States, offering a degree of flexibility and freedom in choosing the mechanisms by which they reached agreements? By considering the well-established State practice, doctrine and jurisprudence on “good faith”, could a negotiation process be established between States, with the highly desirable objective of concluding an agreement? Was it possible for a case-by-case analysis to determine how best to apply the general rules of State responsibility in situations of State succession?<sup>142</sup>

80. The work<sup>143</sup> has aimed to provide legal certainty in protecting the rights of the injured State in the context of State succession in which the predecessor State continued to exist, as emphasized by the phrase “remains entitled to invoke”. It was made clear that “the position of the predecessor State is not affected by State succession”, and “if the injury it has suffered has not been made good” the link between the injury and the right of the predecessor State to invoke responsibility should be taken into account. In view of establishing a clear distinction between reparation, on the one hand, and cessation and assurances and guarantees of non-repetition, on the other, more in-depth research on the forms of reparation with regard to the

<sup>139</sup> See the statement made before the Sixth Committee at its seventy-third session by Malaysia (available from: [www.un.org/en/ga/sixth/73/pdfs/statements/ilc/malaysia\\_3.pdf](http://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/malaysia_3.pdf)).

<sup>140</sup> See the statement made before the Sixth Committee at its seventy-fourth session by Malaysia (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/malaysia\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/malaysia_3.pdf)).

<sup>141</sup> See the statements made before the Sixth Committee by Spain at the seventy-sixth session (available from: [www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg\\_spain\\_3e.pdf](http://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/25mtg_spain_3e.pdf)); and by Slovakia at the seventy-seventh session (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_slovakia\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_slovakia_3.pdf)).

<sup>142</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Brazil (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_brazil\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_brazil_3.pdf)).

<sup>143</sup> See draft guideline 12, paragraph 1.

different categories of State succession was necessary, in particular on the circumstances leading to different solutions.<sup>144</sup>

### **Cultural property**

81. In any future work by the Commission, it would be helpful to explore the question of what should happen to property, including cultural property or other objects, illegally removed from a territory coming under the jurisdiction of a successor State, especially with regard to the connection between the injury to the predecessor State before the date of succession and either the territory or the nationals that became those of the successor State.

82. In cases of incorporation of a State into another State, was the incorporating State required to negotiate in good faith with the injured State for purposes of reaching an agreement, as the “incorporation does not diminish the responsibility of the State that committed the wrongful act”?<sup>145</sup>

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<sup>144</sup> See the statements made before the Sixth Committee at its seventy-fourth session by: Romania (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/romania_3.pdf)); and Sierra Leone (available from: [www.un.org/en/ga/sixth/74/pdfs/statements/ilc/sierra\\_leone\\_3.pdf](http://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/sierra_leone_3.pdf)).

<sup>145</sup> See the statement made before the Sixth Committee at its seventy-seventh session by Malaysia (available from: [www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg\\_malaysia\\_3.pdf](http://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/30mtg_malaysia_3.pdf)).

## Annex

### A. Summary of the evolution of draft articles to draft guidelines

#### 1. Sixty-ninth session (2017)<sup>1</sup>

The first report (A/CN.4/708) on the topic “Succession of States in respect of State responsibility”, by Mr. Pavel Šturma, Special Rapporteur, was considered by the International Law Commission at its 3374th to 3381st meetings, from 13 to 25 July 2017. In his first report, the Special Rapporteur proposed four draft articles, namely, draft article 1 (Scope); draft article 2 (Use of terms); draft article 3 (Relevance of the agreements to succession of States in respect of responsibility); and draft article 4 (Unilateral declaration by a successor State). At the same session, the Drafting Committee provisionally adopted draft articles 1 and 2. The remaining two draft articles (3 and 4) remained in the Drafting Committee for further discussion until further reports of the Special Rapporteur had been examined. With respect to the final form that the work on the topic should take, the Special Rapporteur had preferred draft articles, citing the need to include codification and development of new norms. The Drafting Committee limited itself to the consideration of draft articles 1 and 2. Further, based on the recommendation by the Special Rapporteur, draft articles 3 and 4 remained in the Drafting Committee until the seventieth session as members of the Commission would, in the second report, have a clearer picture of residual rules on non-succession and succession. Draft article 1 was provisionally adopted, with a single change. Draft article 2 was provisionally adopted, but subparagraph (e) on the definition of the term “international responsibility” was not retained.

#### 2. Seventieth session (2018)<sup>2</sup>

At the seventieth session of the Commission, the Special Rapporteur proposed draft article 5 (Cases of succession of States covered by the present draft articles); draft article 6 (General rule); draft article 7 (Separation of parts of a State (secession)); draft article 8 (Newly independent States); draft article 9 (Transfer of part of the territory of a State); draft article 10 (Uniting of States); and draft article 11 (Dissolution of a State). The Drafting Committee, at the request of the Special Rapporteur, did not consider draft articles 3 and 4, and postponed their consideration to a later stage after addressing the draft articles proposed in the second report. A new paragraph was adopted in draft article 1, in order to clarify the subsidiary nature of the draft articles. Draft article 5 was provisionally adopted, with no changes to the formulation proposed. Draft article 6 was provisionally adopted; however, in view of the discussions, it was decided to revisit the text and placement of the draft article at a later stage.

#### 3. Seventy-first session (2019)<sup>3</sup>

At the Commission’s seventy-first session, the Special Rapporteur proposed draft article 2 (f) (Use of the term “States concerned”); the title of Part II (Reparation for injury resulting from internationally acts committed by the predecessor State); draft article X (Scope of Part II); the title of Part III (Reparation for injury resulting from internationally wrongful acts committed against the predecessor State); draft article Y (Scope of the present Part); 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 article 15 (Diplomatic protection). The Drafting Committee, at the same session, referred to draft articles 7 to 11, alongside the draft articles proposed in the third report of the Special Rapporteur. While draft articles 3 and 4 still remained in the Drafting Committee for consideration at a later stage, draft articles 7, 8 and 9 were provisionally adopted.

<sup>1</sup> *Yearbook ... 2017*, vol. II (Part Two), chap. IX, pp. 140 *et seq.*

<sup>2</sup> *Yearbook ... 2018*, vol. II (Part Two), chap. X, pp. 187 *et seq.*

<sup>3</sup> *Yearbook ... 2019*, vol. II (Part Two), chap. VII, pp. 202 *et seq.*

#### 4. Seventy-second session (2021)<sup>4</sup>

The Special Rapporteur proposed draft article 7 *bis* (Composite acts); draft article 16 (Restitution); draft article 17 (Compensation); draft article 18 (Satisfaction); and draft article 19 (Assurances and guarantees of non-repetition). The Drafting Committee referred to draft articles 10, 10 *bis* and 11, and draft articles 3 and 4 remained in the Drafting Committee for consideration at a later stage. Draft article 6, provisionally adopted, would also be revisited at a later stage. Although the Commission had referred draft articles 7 *bis*, 16, 17, 18 and 19 to the Drafting Committee, these could not be discussed due to a lack of time. Draft article 10 was split into two separate provisions, draft articles 10 and 10 *bis*, and was provisionally adopted with modifications to the original proposal of the Special Rapporteur. Draft article 10 *bis* on “Incorporation of a State into another State” was provisionally adopted and the order of the two paragraphs was reversed as proposed by the Special Rapporteur. Draft article 11 was provisionally adopted, with modifications.

#### 5. Seventy-third session (2022)<sup>5</sup>

The fifth report by the Special Rapporteur was his last report on the topic. In his previous four reports, he had proposed over 24 draft articles, albeit, some of them of a technical character or awaiting eventual renumbering. By the Commission’s seventy-second session in 2021, the Drafting Committee had adopted 10 of these draft articles (1, 2, 5, 6, 7, 8, 9, 10, 10 *bis* and 11), with amendments to some. 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 omitted. Draft article Y (Scope of Part III) and the title of Part IV (Content and forms of obligations arising from State responsibility in the context of succession of States) were amended.

The Special Rapporteur proposed renumbering the draft articles. Accordingly, in Part I (General provisions), the numbering of draft articles 1 and 2 remained the same, while draft articles 5, 6, 7, 7 *bis* and 8 were renumbered as draft articles 3, 4, 5, 6 and 7 respectively. In Part II (Reparation for injury resulting from internationally wrongful acts committed by the predecessor State), draft article X was renumbered as draft article 8. The numbering of draft articles 9 and 10 remained the same, while draft articles 10 *bis* and 11 were renumbered as draft articles 11 and 12 respectively. In Part III (Reparation for injury resulting from internationally wrongful acts committed against the predecessor State), draft articles Y, 12, 13, 14 and 15 were renumbered as draft articles 13, 14, 15, 16 and 17 respectively. In Part IV (Content and forms of obligations arising from State responsibility in the context of succession of States), draft articles 16, 17, 18 and 19 were renumbered as draft articles 18, 19, 20 and 21 respectively. Draft articles 3 and 4 were omitted in their entirety.

At the Commission’s seventy-third session, the Drafting Committee proceeded to prepare draft guidelines in view of the Commission’s decision during its 3583rd meeting pertaining to the outcome of its work. In this regard, the Drafting Committee decided the following: draft articles 3, 4, 2 (f), X and Y as proposed were no longer pursued. All references to “articles” were replaced with “guidelines”. The words “shall be” were replaced with “is” in draft guideline 8, paragraph 1. The word “shall” was replaced with “should” in draft guideline 9, paragraph 2; draft guideline 10; draft guideline 10 *bis*, paragraph 1; and draft guideline 11. Draft guidelines 1, 2, 5, 7, 8 and 9 were yet to be provisionally adopted by the Drafting Committee. Draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis* were provisionally adopted by the Drafting Committee. The Drafting Committee had not, however, thoroughly re-examined the previously adopted text and considered undertaking a final *toilettage* of the reformulated provisions at the conclusion of the work on the first reading.

At its 3583rd meeting, held on 17 May 2022, the Commission had decided in principle to have the work take the form of draft guidelines rather than of draft articles in view of comments from States and a number of members of the Commission. The Drafting

<sup>4</sup> *Report of the International Law Commission on the Work of its Seventy-second Session (A/76/10)*, chap. VII.

<sup>5</sup> *Report of the International Law Commission on the Work of its Seventy-third Session (A/77/10)*, chap. VII.

Committee considered draft guidelines to be a form providing guidance to States while draft articles were cast as directions to States.

## B. Status of draft articles and draft guidelines

### *Text of draft articles*

#### **Draft article 1 (Scope)**

1. The present draft articles apply to the effects of a succession of State 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.

Status: proposed in the first report of the Special Rapporteur for the Commission's sixty-ninth session. Referred to the Drafting Committee and provisionally adopted. Draft article 1, paragraph 2, was proposed in the Drafting Committee and adopted at the Commission's seventieth session.

#### **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;

Status: proposed in the first report of the Special Rapporteur for the Commission's sixty-ninth session, referred to the Drafting Committee and provisionally adopted. Draft article 2 (f) proposed in the Special Rapporteur's third report was later omitted.

Draft article 3 was proposed by the Special Rapporteur in his first report at the Commission's sixty-ninth session, referred to the Drafting Committee and subsequently omitted in its entirety.

Draft article 4 was proposed by the Special Rapporteur in his first report at the Commission's sixty-ninth session, referred to the Drafting Committee and subsequently omitted in its entirety.

### *Text of draft guidelines*

#### **Draft guideline 1 (Scope)**

1. The present draft guidelines concern the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.

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

Status: the Drafting Committee presented draft guideline 1 in its fifth report, at the Commission's seventy-third session. However, it was yet to be provisionally adopted by the Drafting Committee.

#### **Draft guideline 2 (Use of terms)**

For the purposes of the present draft guidelines:

(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;

Status: the Drafting Committee presented draft guideline 2 in its fifth report, at the Commission's seventy-third session. However, it was yet to be provisionally adopted by the Drafting Committee.

**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.

Status: proposed in the second report of the Special Rapporteur for the Commission's seventieth session, referred to the Drafting Committee and provisionally adopted.

**Draft article 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.

Status: proposed in the second report of the Special Rapporteur for the Commission's seventieth session, referred to the Drafting Committee and redrafted and provisionally adopted.

**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.

Status: proposed in the second report of the Special Rapporteur for the Commission's seventieth session. Referred to the Drafting Committee and provisionally adopted at the Commission's seventy-first session.

Draft article 7 *bis* was proposed by the Special Rapporteur in his fourth report for the Commission's seventy-second session and was referred to the Drafting Committee and provisionally adopted at the Commission's seventy-third session.

**Draft guideline 5 (Cases of succession of States covered by the present draft guidelines)**

The present draft guidelines 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.

Status: the Drafting Committee presented draft guideline 5 in its fifth report, at the Commission's seventy-third session. However, it was yet to be provisionally adopted by the Drafting Committee.

**Draft guideline 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.

Status: the Drafting Committee presented draft guideline 6 in its fifth report, at the Commission's seventy-third session and it was provisionally adopted by the Drafting Committee.

**Draft guideline 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.

Status: the Drafting Committee presented draft guideline 7 in its fifth report, at the Commission's seventy-third session. However, it was yet to be provisionally adopted by the Drafting Committee.

**Draft guideline 7 *bis* (Composite acts)**

1. When a predecessor State continues to exist, the breach of an international obligation by that State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the predecessor State occurs after the date of succession which, taken with its actions or omissions, is sufficient to constitute the wrongful act.

2. The breach of an international obligation by a successor State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the successor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful 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.

Status: proposed in the second report of the Special Rapporteur for the Commission's seventieth session. Referred to the Drafting Committee and provisionally adopted at the Commission's seventy-first session.

Draft article X was proposed by the Special Rapporteur in his third report for the Commission's seventy-first session, referred to the Drafting Committee and subsequently omitted in its entirety.

**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.

3. The provisions of paragraphs 1 and 2 are without prejudice to whether the breach of an international obligation by a successor State may occur through a series of actions or omissions defined in aggregate as wrongful that commences with the predecessor State and continues with the successor State.

Status: the Drafting Committee presented draft guideline 7 *bis* in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

**Draft guideline 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 is 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.

Status: the Drafting Committee presented draft guideline 8 in its fifth report, at the Commission's seventy-third session. However, it was yet to be provisionally adopted by the Drafting Committee.

**Draft guideline 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.

*Text of draft articles*

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.

Status: proposed in the second report of the Special Rapporteur for the Commission's seventieth session. Referred to the Drafting Committee and provisionally adopted at the Commission's seventy-first session.

**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.

Status: proposed in the second report of the Special Rapporteur for the Commission's seventieth session. Referred to the Drafting Committee and provisionally adopted at the Commission's seventy-second session.

**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.

Status: emerged in the Drafting Committee during the Commission's seventy-second session after a proposal to split draft article 10 and provisionally adopted.

**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.

Status: proposed in the second report of the Special Rapporteur for the Commission's seventieth session. Referred to the Drafting Committee and provisionally adopted at the Commission's seventy-second session.

*Text of draft guidelines*

2. In particular circumstances, the injured State and the successor State should 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.

Status: the Drafting Committee presented draft guideline 9 in its fifth report, at the Commission's seventy-third session. However, it was yet to be provisionally adopted by the Drafting Committee.

**Draft guideline 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 should agree on how to address the injury.

Status: the Drafting Committee presented draft guideline 10 in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

**Draft guideline 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, the injured State and the incorporating State should 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.

Status: the Drafting Committee presented draft guideline 10 bis in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

**Draft guideline 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 from two or more successor States, the injured State and the relevant successor State or States should 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.

Status: the Drafting Committee presented draft guideline 11 in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

*Text of draft articles**Text of draft guidelines*

Draft article Y was proposed by the Special Rapporteur in his third report for the Commission's seventy-first session, referred to the Drafting Committee and subsequently omitted in its entirety.

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

1. In the cases of succession of States:
  - (a) when part of the territory of a State, or any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State; or
  - (b) when a part or parts of the territory of a State separate to form one or more States, while the predecessor State continues to exist; or
  - (c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

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

2. Notwithstanding paragraph 1, the successor State may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State.
3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the predecessor State and successor State.

Status: draft article 12 was proposed by the Special Rapporteur in his third report for the Commission's seventy-first session and referred to the Drafting Committee.

**Draft article 13 (Uniting of States)**

1. When two or more States unite and so form one successor State, the successor State may request reparation from the responsible State.
2. Paragraph 1 applies unless the States concerned otherwise agree.

Status: draft article 13 was proposed by the Special Rapporteur in his third report for the Commission's seventy-first session and referred to the Drafting Committee.

**Draft guideline 12 (Cases of succession of States when the predecessor State continues to exist)**

1. When an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good.
2. In addition to paragraph 1, a successor State may, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act.
3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State.

Status: the Drafting Committee presented draft guideline 12 in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

**Draft guideline 13 (Uniting of States)**

When two or more States unite and so form one successor State, and any of the predecessor States was injured by an internationally wrongful act of another State, the successor State may invoke the responsibility of that other State.

Status: the Drafting Committee presented draft guideline 13 in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

**Draft article 14 (Dissolution of States)**

1. When parts of the territory of the State separate to form two or more States and the predecessor State ceases to exist, one or more successor States may request reparation from the responsible State.
2. Such claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors.
3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the successor States.

Status: draft article 14 was proposed by the Special Rapporteur in his third report for the Commission's seventy-first session and referred to the Drafting Committee.

**Draft article 15 (Diplomatic protection)**

1. The successor State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of a predecessor State or lost his or her nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.
2. Under the same conditions set in paragraph 1, a claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession by the successor State.
3. Paragraphs 1 and 2 are without prejudice to application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection.

**Draft guideline 13 bis (Incorporation of a State into another State)**

1. When an internationally wrongful act has been committed against a State prior to its incorporation into another State, the incorporating State may invoke the responsibility of the wrongdoing State.
2. When an internationally wrongful act has been committed against a State prior to incorporating another State, the injured State continues to be entitled to invoke the responsibility of the wrongdoing State.

Status: the Drafting Committee presented draft guideline 13 bis in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

**Draft guideline 14 (Dissolution of a State)**

1. When a State that has been injured by 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, one or more of the successor States may, in particular circumstances, be entitled to invoke the responsibility of the wrongdoing State.
2. The wrongdoing State and the relevant successor State or States should endeavour to reach agreement for addressing the injury. They should take into account any territorial link, any loss or benefit derived for nationals of the successor State, any equitable proportion and all other relevant circumstances.

Status: the Drafting Committee presented draft guideline 14 in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

**Draft guideline 15 (Diplomatic protection)**

The present draft guidelines do not address the application of the rules of diplomatic protection in situations of the succession of States.

Status: the Drafting Committee presented draft guideline 15 in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

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*Text of draft articles*

*Text of draft guidelines*

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Status: draft article 15 was proposed by the Special Rapporteur in his third report for the Commission's seventy-first session and referred to the Drafting Committee.

**Draft guideline 15 *bis* (Cessation and non-repetition)**

1. A predecessor State that is responsible for an internationally wrongful act that occurred before the date of succession of States, and that continues to exist after the date of succession, remains under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. A State that is responsible for an internationally wrongful act in accordance with draft guideline 7 or with draft 7 *bis*, paragraph 1 or paragraph 2, is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Status: the Drafting Committee presented draft guideline 15 *bis* in its fifth report, at the Commission's seventy-third session, and it was provisionally adopted by the Drafting Committee.

Status: draft articles 16, 17, 18 and 19 were proposed by the Special Rapporteur in his fourth report for the Commission's seventy-second session and referred to the Drafting Committee.

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