Institut de Droit international

14th Commission

State Succession in Matters of State Responsibility
La succession d'Etats en matière de responsabilité internationale

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Provisional Report

A. Introduction

1. The Commission was created during the Bruges Session in 2003 and the rapporteur was appointed following his election as Associate Member in 2007. The Commission met at the Naples Session in 2009 and discussed the general issues that should be covered by its work. The rapporteur distributed a first version of his Preliminary Statement which was discussed by the Commission at the Rhodes Session in 2011. As a result of the discussion, a new version of the Preliminary Statement, including a questionnaire which took into consideration a variety of concerns raised by the rapporteur as well as other members of the Commission, was issued on 31 August 2011. Seven members of the Commission responded to that questionnaire. The questionnaire and the answers are attached to the present report as Annex 2.

2. Although the Commission is conscious of the sensitive political aspects involved in some aspects of the problem of State succession to international responsibility, the rapporteur considered that an attempt to codify the subject-matter is in order, and that the task of the Commission would not only be to take into consideration the practice followed by States and international bodies, but

also to propose the solutions that logically seem to be most appropriate, particularly where practice is scarce or does not provide solutions generally followed in a particular situation.

3. During the discussion on the adoption of the topic in the Bruges Session in 2003, some doubts were raised – including by some members of the Institute who later became members of the Commission – over the possibility for the Institute to adopt a text on the matter. The present provisional report intends to show that there is room for the codification and progressive development of the law in the form of a set of articles. The task is all the more in order given that until the present day the relationship between State responsibility and State succession is one that has consciously been put aside in the codification work undertaken by the ILC, no doubt due to its complexity, as will explained below.

4. This report presents a general overview of the matter, the way to approach it, the different hypotheses to be considered and the variables to take into consideration in order to find concrete solutions. The report ends with a draft resolution in the form of articles summarising the possible solutions to be followed in the field of international responsibility with regard to the different cases of State succession.

B. Codification work and the lack of analysis of State succession in matters of State responsibility

5. State succession has become a neglected topic of international law after the most important wave of decolonisation reached its peak towards the end of the 1970s. The subject of State succession again attracted the interest of scholars after the fall of the Berlin Wall with the emergence of new States, mainly as a result of the collapse of the so-called socialist federal States, such as the Soviet Union, Yugoslavia and Czechoslovakia, or the unification of other States, such as Germany and Yemen. The end of the overly lengthy processes of decolonisation in Namibia in 1991 and in Timor Leste in 2002 likewise contributed to renewed interest in the topic. The separation of Eritrea from Ethiopia (1993) led to the emergence of important disputes and to a bloody armed conflict. An attempt at creating an independent State was also made with respect to Kosovo in February 2008, and similarly with respect to Southern

Ossetia and Abkhazia some months later. In January 2011, in a referendum held in South Sudan on the basis of the Peace Agreement of 2005 between the Sudanese government and the Sudan People's Liberation Movement/Army, the overwhelming majority of participants decided in favour of the creation of a new State,[1] which came into being on 9 July 2011, and was the last member to be admitted to the United Nations[2]. Palestine, whose statehood has been challenged although the unanimous view is that it has the right to be a State, requested its admission as a Member State to the United Nations Organisation on 20 September 2011. The Security Council failed to take any decision with regard to this application, and on 29 November 2012, Palestine was granted non-member observer State status by the General Assembly[3]. The exercise of the right to self-determination by the people of Western Sahara, which includes the possibility of independent statehood, is still on the international agenda. With all these cases coming to the forefront, in addition to a number of different secessionist attempts around the world, it may be asked whether international law is well equipped to address the different aspects of State succession that thereby arise in general, and the question which is the subject-matter of this Commission in particular.

6. The two areas of international law relevant to answering this question have been on the agenda of the International Law Commission (ILC) for many years, even decades. In the field of State responsibility for internationally wrongful acts, the ILC produced a set of articles that are largely regarded and employed in practice and case law as reflecting general international law.[4] The subject of succession of States has been analysed by the ILC and partially codified in two treaties: the Vienna Convention of 1978, dealing with State succession in respect

[1] The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan's People's Liberation Movement/Sudan People's Liberation Army is available on the website of the United Nations Mission in Sudan at http://unmis.unmissions.org. The results of the referendum of 9 January 2011 are discussed in the Report of the Secretary-General on the Sudan, 12 April 2011, UN doc. D/2011/239.
[2] United Nations General Assembly Resolution 65/308 of 14 July 2011.
[3] United Nations General Assembly Resolution 67/19 of 29 November 2012.
[4] International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two); annexed to United Nations General Assembly resolution 56/83 of 12 December 2001, UN Doc. A/56/49(Vol. I)/Corr.4.

of treaties,[5] and the Vienna Convention of 1983 concerning State property, archives and debts.[6] In 1993, soon after the end of the Cold War, the ILC undertook a study on the issue of State succession in matters of nationality of natural and legal persons, adopting a set of articles in this respect.[7] It has been discussed at length whether these instruments, and particularly the two Vienna Conventions, reflect general international law and/or propose adequate solutions for the questions at issue.[8]

7. The Institute has already devoted its attention to matters of State succession or ancillary matters in the past. In 1952, it adopted a Resolution on '*Les effets des changements territoriaux sur les droits patrimoniaux*',[9] and in 2001 another on 'State Succession in Matters of Property and Debts'.[10]

8. The question of the impact of matters of State responsibility on situations of State succession has remained neglected; no attempt at codifying this question was pursued in the work of the ILC in either the area of State responsibility or the area of State succession. At the beginning of the work of the ILC on the latter issue, it had been proposed to include the question of succession with respect to responsibility for torts,[11] but it was decided not to deal with this matter.[12] Furthermore, the 1978 Vienna Convention contained a clause that explicitly removed the question from the ambit of the treaty.[13] Similarly, the

[5] Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, entered into force on 6 November 1996, 1946 UNTS 3.
[6] Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 8 April 1983, not yet in force, *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts*, vol. II (United Nations publication, Sales No. E.94.V.6).
[7] International Law Commission, Nationality of Natural Persons in relation to the Succession of States, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10*, UN doc. A/54/10; annexed to United Nations General Assembly resolution 55/153 of 12 December 2000.
[8] See Final Report on Aspects of the Law of State Succession (Co-rapporteurs Władysław Czapliński and Marcelo Kohen), International Law Association, *Report of the Seventy-Third Conference*, Rio de Janeiro, 2008, pp. 250-363.
[9] Annuaire de l'Institut de Droit international, 1952, vol. 44-II, p. 471.
[10] Annuaire de l'Institut de Droit internatrional, 2000-2001, vol. 69, p. 712.
[11] Proposal by the Chairman of the ILC Sub-committee on Succession of States and Governments, Manfred Lachs. ILC Yearbook 1963, vol. II, p. 260.
[12] Ibid., p. 299.
[13] Article 39 of the 1978 Vienna Convention provides: 'The provisions of the present Convention shall not prejudge any question that may arise in regard to 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'.

1983 Vienna Convention contained a general article setting out the scope of its provisions, thereby also excluding matters of State responsibility.[14]

9. Notwithstanding the general provisions contained in the codification conventions on State succession, and the position taken by the ILC in its commentary to the Articles on State Responsibility, some situations in which international wrongful acts were committed before the date of succession have already been addressed by these codification texts. These situations are a) the acts committed by an insurrectional movement leading to the subsequent creation of a new State, b) wrongful acts having a continued character occurring both before and after the date of the succession, and c) acts allowing for the exercise of diplomatic protection committed against the predecessor State. In cases a) and c), the ILC took a stance on matters related to State succession; in other cases it referred to them, but left the questions open. This report takes into account the solutions found by the ILC in these matters and includes them in the draft Resolution.

10. For decades, the interaction between State succession and State responsibility has aroused little interest in the literature, with some important exceptions.[15] In the context of the elaboration of the final ILC articles on State responsibility, the last Special Rapporteur, Professor James Crawford, highlighted the difficulties and uncertainties surrounding the question of the interaction between State succession and international responsibility: '[i]t is unclear whether a new State succeeds to any State responsibility of the

[14] Article 5 of the 1983 Vienna Convention: 'Nothing 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'.

[15] Cecil Hurst, 'State Succession in Matters of Torts', 5 *BYBIL* 1924, 163-178; Jean-Philippe Monier, 'La succession d'Etats en matière de responsabilité internationale', 8 *AFDI* 1962, 65-90; Władysław Czapliński, 'State Succession and State Responsibility', 28 *Canadian Yearbook of International Law* 1990, 339-359; Volkovitsch, Michael, 'Righting Wrongs: Toward a New Theory of State Succession to Responsibility of International Delicts', 92 *Columbia Law Review* 1992, 2162-2214; Brigitte Stern, 'Responsabilité internationale et succession d'Etats' in: Laurence Boisson de Chazournes & Vera Gowland (eds), *The International Legal system in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab* (Leiden: M. Nijhoff, 2001), 327-355; Vaclav Mikulka, 'State Succession and Responsibility', in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010) 291-296 and V. Mikulka, 'Succession of States in Respect of Rights of an Injured State', in: *ibid.*, 965-967.

predecessor State with respect to its territory'.[16] The Badinter Commission, established in the framework of the Peace Conference for 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.'[17] It did so in the framework 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. This is enough to demonstrate some of the uncertainty evident in both doctrine and practice surrounding the problem. A remarkable book by Patrick Dumberry, the result of his PhD studies at the Graduate Institute in Geneva, fills this important analytical gap and sheds some very welcome light on this apparently controversial subject.[18]

C. Preliminary questions relating to the scope of the work of the Commission

11. The Commission discussed some preliminary questions in relation to the scope and content of its work. A first question arose as to whether the Commission should confine itself to the analysis of responsibility for internationally wrongful acts or, on the contrary, whether the work of the Commission should also cover issues relating to so-called '*responsabilité objective*' or 'liability'. The Commission overwhelmingly supported the idea of keeping the analysis of matters of State responsibility for internationally wrongful acts only, at least at an initial stage. Among the reasons advanced, one may be highlighted according to which the rules relating to responsibility for internationally wrongful acts are of "secondary" character (in the sense employed by Roberto Ago when he acted as ILC rapporteur on matters of State

[16] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at Its Fifty-Third Session (2001), *Report of the International Law Commission on the Work of Its Fifty-third Session. Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 119, para. 3.
[17] International Conference on the Former Yugoslavia, Arbitration Commission, Opinion No 13, 16 July 1993, reported at 96 ILR 727, p. 727.
[18] Patrick Dumberry, *State Succession to International Responsibility* (Leiden: M. Nijhoff, 2007), 517p.

responsibility[19]), and hence applicable no matter the content of the obligation breached, whereas the rules relating to liability for injurious consequences arising out of acts not prohibited by international law are "primary" rules. Some members also mentioned the fact that the rules relating to liability are controversial with regard to their content and in some cases even their existence in positive international law is a matter surrounded by uncertainty.

12. Another member of the Commission also mentioned the fact that the Institute had the occasion to distinguish the specificity of both kinds of responsibility in its "Resolution on Responsibility and Liability under International Law for Environmental Damage" of Strasbourg of 1997.[20] However, the same member noticed that in both cases the injured State has a right to be repaired, and this would constitute a point of junction between the two kinds of responsibility.

13. If the Institute, as will be explained later on, follows the proposal that the matter under study should be addressed with regard to the succession (or not) to the rights and obligations stemming from an internationally wrongful act and not envisage the matter as one of succession to the international responsibility of the State, it might then be that the conclusions reached with regard to these rights and obligations could also be transposable to the question of the rights and obligations stemming from the liability for injurious consequences arising out of acts not prohibited by international law. The rapporteur is sympathetic with this opinion. However, given the sound preference exposed by the other members of the Commission and the possible difficulties that such an explicit extension of scope could provoke, it seems preferable to keep the matter explicitly within the realm of the responsibility for internationally wrongful acts and leave open the possibility to consider whether the rules depicted in the Resolution are also applicable to obligations stemming from international liability for the injurious consequences of acts not prohibited by international law.

14. With one exception, the general position of the Commission was that the work would be focused on the succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor

[19] *Yearbook of the International Law Commission*, 1970, vol. II (Part Two), p. 306, para. 66 (c).
[20] Resolution on *Responsibility and Liability under International Law for Environmental Damage*, Session of Strasbourg, 4 September 1997. Annuaire de l'Institut de Droit international, vol. 67, Part II, pp. 486-513.

State, instead of the succession to the status or quality of being an injured or a responsible State. This is also the prevalent view in doctrine. Given the importance of this question for the content of the draft resolution, it is addressed in more detail below.

15. The typology of cases of State succession that the Report should have to cover was also discussed. The majority of the members expressed the view that the categories employed by the 1978 and 1983 Vienna Conventions should be employed, at least as a starting point, without prejudice to their test against the facts and to their non-exhaustive character. Two members cast doubts about continuing to refer to the category of "newly independent States". The main reason invoked was that this notion, reserved to former colonies and other dependent territories, would no longer be relevant. One member expressed her hesitation with regard to this category being an autonomous one. The fact that the ILC Articles on nationality of natural persons in relation to the succession of States did not refer to this category was also referred to.

16. In contrast to the outcome of the work of the Institute on State succession in matters of property and debts,[21] the rapporteur considers it indispensable, in order to have a complete picture of the different cases of State succession with regards to matters of responsibility, to include newly independent States as a specific category. The ground for his choice is threefold. *First*, as some cases mentioned at the beginning of this report show, there can still be cases of emergence of new States that could fall within the realm of the category of newly independent States, as defined in the 1978 and 1983 Conventions. *Second*, as a very recent judicial decision in the United Kingdom demonstrates, problems relating to the commission of internationally wrongful acts during colonial times and the question of responsibility of the predecessor or the successor States may emerge even long after the acts have occurred.[22] Hence, cases of State succession giving rise to the emergence of a newly independent State that occurred in the past may have still kept open situations related to international responsibility. *Third*, as for treaties, archives, debts and property, the subject matter of the consequences of internationally wrongful acts committed before the date of State succession also

[21] *Annuaire de l'Institut de Droit international*, vol. 69, 2000-2001, p. 121.
[22] See, below, para. 91.

appeals for a specific treatment of succession with regards to States having been dependent territories before coming into existence. Given the particular territorial status prior to independence, the cases of newly independent States cannot be assimilated to those of the separation of a State, either by agreement or not.

17. During the oral discussions, a member of the Commission suggested adding the category of 'failed States' to those already generally accepted. In the rapporteur's view, this is a category that describes a factual situation in which the State apparatus is unable to perform its usual function rather than a legal category. Furthermore, questions arising from international responsibility in this situation are not governed by matters of State succession, but rather by the notions of continuity or identity.[23]

18. Another member suggested that the role of unjust enrichment in the determination of the relevant rules of State succession should be examined. The rapporteur agrees, and consequently proposes to take into account the need to avoid unjust enrichment in cases in which equitable considerations must be employed in order to determine an equitable apportionment of rights or obligations in cases of a plurality of successor States.[24]

19. During the discussions, some members of the Commission also raised other questions relating to the scope of its work. It was proposed to examine whether in cases of a radical change of government, such as the transition from a dictatorship to a new democratic government, the democratic State should be considered responsible for the internationally wrongful acts committed during the dictatorship. In the view of the rapporteur, this question falls outside the scope of the Commission's work, since this is not a case of State succession but one of change of regime in the framework of the continuity of the legal personality of the State.[25]

20. Another member of the Commission raised the issue of the wrongful acts committed as a result of State succession *per se* or in cases of a disregard for the rules governing State succession itself. Again, in the rapporteur's view, these are questions emerging *after* the date of the State succession, and as such

[23] See Article 8 of the draft Resolution.
[24] See Article 4, paragraph 2 of the draft Resolution.
[25] See Article 8 of the draft Resolution.

are not regulated by the rules of State succession themselves. Furthermore, the rapporteur considers that, as stated in both Vienna Conventions on State succession, the relevant rules apply to cases of State succession that occurred in accordance with international law.[26] Illegal entities claiming to be a State, as was the case of Southern Rhodesia, for example, are not cases of State succession, since the entity concerned cannot claim to be a State. The rapporteur considers that it will be enough to repeat in the Resolution that the Institute will adopt an article similar to those of Article 6 of the 1978 Vienna Convention and Article 3 of the 1983 Vienna Convention, i.e., that the rules 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.[27]

D. The question is one of succession to the rights and obligations emerging from an internationally wrongful act and not of succession with regard to responsibility

21. The main difficulty in doctrine and practice to appraise the matter under examination has been the identification of the subject matter which a situation of State succession could impact. The first approach consisted in affirming that responsibility is an *intuitu personae* phenomenon, i.e. intrinsically linked to the personality of the State, and consequently there cannot be succession in this field. This is the classical view that prevailed for many years.[28] Indeed, it was a position that was not adopted specifically in relation to the field of international responsibility. It was first advanced to deny the very existence of the phenomenon of State succession.[29] The position of those accepting State

[26] Article 6, Vienna Convention on succession of States with respect to treaties; Article 3, Vienna Convention on succession of States in respect of State property, Archives and Debts. The same provision is included in Article 2 of the draft Resolution.
[27] See Article 2 of the draft resolution.
[28] For a list of authors maintaining this position, as well as the different arguments in support thereof, see: Patrick Dumberry, op. cit. at pp. 35-52 and Brigitte Stern, op. cit. at pp. 327-330.
[29] Notably those adhering to volontarist positivism. See the analysis by Santiago Torres Bernárdez, 'Succession d'Etats', *in:* M. Bedjaoui (ed.), *Droit international. Bilan et perspectives* (Paris: Pedone/Unesco), 1991, vol. 1, pp. 405-423 at 409.

succession in other fields, but rejecting it for international responsibility, is influenced by a criminal law perspective. As is known, criminal law is based on the personal and non-transferable nature of responsibility and punishment. State responsibility in international law, however, does not take the form of criminal responsibility, and the analogy is consequently misleading.[30]

22. Furthermore, this perception, analogous to a kind of generalised non-succession rule, does not take into consideration both the crucial importance of responsibility in international law and the need for important changes in the international community such as those produced by situations of State succession not to affect the stability of international relations. Without international responsibility, international law would not be a legal system – hence the need for rules establishing consequences for the commission of an internationally wrongful act. A kind of "clean slate" rule applicable to all cases of State succession in the field of international responsibility would imply the existence of a vast field of situations in which the consequences of illegality are simply erased. This idea flies in the face of the stability of international relations governed by law and the very idea of equity and justice. It goes against the interest of any State in cases of State succession, no matter whether the successor State, the predecessor State or a third State. It crucially affects the interest of the holder of a right as an injured subject, be it the predecessor, the successor or a third State. The non-succession rule leads to situations in which the victim actually ceases to have the possibility of obtaining reparation, in what constitutes a rather unusual way to end a relationship of responsibility.

23. Judge van Eysinga, in his dissenting opinion in the *Panevezys-Saldutiskis Railway Case*, when commenting on the effects of the application of the continuing nationality claim to situations of State succession as espoused by Lithuania and applied by the Court, asserted:

> "the question arises whether it is reasonable to describe as an unwritten rule of international law a rule which would entail that, when a change of sovereignty

[30] See G. Abi-Saab, 'The Uses of Article 19', *European Journal of International Law*, 1999, vol. 10, pp. 339-351 at 344-346, and 'Que reste-t-il du « crime international »', in: *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon,* (Brussels, Bruylant, 2007), pp. 69-91; and A. Pellet, 'Le crime international de l'Etat: un phœnix juridique', in: Kalliopi Koufa (ed.), *The New International Criminal Law: 2001 International Law Session*, Thessalonique, Sakkoulas, 2003, pp. 281-351.

> takes place, the new State or the State which has increased its territory would not be able to espouse any claim of any of its new nationals in regard to injury suffered before the change of nationality. It may also be questioned whether indeed it is any part of the Court's task to contribute towards the crystallization of unwritten rules of law which would lead to such inequitable results."[31]

24. Consequently, the general position followed in this report and in the draft Resolution is one which favours questions related to international responsibility that remained open at the time of State succession finding solutions that imply the existence of a State assuming the obligations stemming from an internationally wrongful act.

25. However, the relevant question is not whether there is succession of States with respect to *responsibility per se*, but instead whether there is succession to the *rights and obligations arising from internationally wrongful acts* committed or suffered by the predecessor State. In other words, the main issue is whether or not the successor (or one of a number of successors) or the continuator State (if it still exists) has – after the date of succession – an obligation to repair or a right to reparation in relation to unlawful acts committed before the date of succession involving the predecessor State. A parallel can be drawn here with the rule incorporated in Article 11 of the 1978 Vienna Convention: rather than succession with regard to the treaties establishing boundaries, this article consecrates a rule of *succession to the boundaries established by treaties*. In other words, even if there is no succession to the boundary treaty concerned (which is just one possibility, with the inverse also being possible), the boundary remains in place after the new situation of State succession is established.[32]

26. Even considering that the question of succession does not relate to the quality of the injured or responsible State, but rather to the rights and obligations arising from the commission of an internationally wrongful act prior to the date of State succession (which, according to the terminology employed by Roberto Ago would form part of the *secondary rules*[33]), there is still room for some scepticism about the need to search for a separate analysis of the question. Thus,

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[31] *Panevezys-Saldutiskis Railway Case*, PCIJ, Series A/B No. 76, p. 35.
[32] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994*, pp. 38 and 40, para. 75.
[33] See supra, footnote 19.

it may be the case that following an internationally wrongful act, the scope and content of any responsibility was already determined by the injured State and the wrongdoer by way of agreement before the date of the succession. In such a case, the rules governing succession in respect of treaties would apply.

27. It may also be the case that after the commission of the wrongful act, the adequate form of reparation is the payment of compensation or indemnification. In this latter case, the rules relating to the succession to debts would be applicable. Indeed, in a leading case between the United States of America and the United Kingdom, the claim of the former State for reparation was based on the succession by the United Kingdom to the debts of Transvaal, including responsibility for the commission of an internationally wrongful act against an American citizen.[34] These two hypothetical situations – the matter settled by treaty or the obligation to pay compensation and succession to treaties or to debts – may indeed cover certain situations and, depending on the approach adopted, may well offer the solution to the matters at stake.

28. However, it could also be argued that treaties related to the new obligations created by internationally wrongful acts, as well as debts resulting from them, should be governed by the *lex specialis* and solutions may then differ from the general rules that are otherwise applicable in both fields of international law.

29. Regardless of the solution adopted, the two situations mentioned above do not cover all possible scenarios that may arise if a State succession occurs. The range of possible situations is extensive. As a matter of course, a considerable number of situations could exclusively involve breaches of obligations having their source in customary rules only. In other situations involving the commission of an internationally wrongful act prior to the date of State succession, the determination of the form and extent of reparation may still be pending. In yet another case, the form of reparation may not necessarily be a pecuniary compensation, but adopts the form of restitution in kind or

[34] *Anglo-American Pecuniary Claims Arbitration Award (Brown Case)* 23 November 1923, reported at 5 *BYBIL* 1924, pp. 210-221. The award was in line with the British position, which insisted on the non-transferable character of responsibility for torts.

satisfaction. Hence, it becomes evident that there is a need to address these and other issues that in any event remain unaddressed.

E. The notion of State succession and the cases envisaged

30. There is general acceptance of the definition of State succession adopted by the different instruments dealing with the issue, including the Resolution adopted by our Institute in 2001. Consequently, the draft Resolution follows exactly the definition adopted in previous instruments, as well as those related to the predecessor and successor States, the date of State succession and that of newly independent States.[35]

31. The reference to succession to the "responsibility for the international relations of the territory" generally involves a change of sovereignty, but this is not always the case. Thus, this reference also includes cases of succession in which there is no change in sovereignty. This has particularly been the case in the situation of the end of the different forms of protectorate. The protected State was the sovereign of the territory although some important State functions, including “the responsibility for the international relations of the territory”, were delegated to the protector State. There have also been theoretical discussions whether "succession" to sovereignty is possible. According to one view, sovereignty is always original. Hence, no succession is possible and what is called "succession" is in reality characterized by the extinction of rights and obligations of one subject of international law (the predecessor), and the creation of corresponding rights and obligations of another subject of international law (the successor). Another view is that there is no contradiction between the

[35] See Article 1 of the draft Resolution: Use of Terms.

notions of sovereignty and international personality on the one hand, and the possibility of transfer of rights and obligations on the other. The current accepted definition of State succession which is followed here avoids this kind of abstract discussion.

32. The two Vienna Conventions on State succession distinguished four basic types of succession: a) cession, that is, the transfer of part of the territory of one State to another State;[36] b) separation of a part of the State's territory,[37] i.e. cases of secession/devolution or dismemberment/disintegration of the State; c) A uniting of two or more existing States;[38] and d) succession in the context of decolonization ("newly independent States").

33. The classification adopted by the Vienna Conferences does not fully or accurately depict the different hypotheses of State succession.[39] Moreover, the 1978 Vienna Convention does not even distinguish between separation and unification, providing for the same rules in both cases.[40] It also departs from what the International Law Commission had proposed in 1972, distinguishing between secession and dissolution.[41]

34. It is possible to distinguish cases of separation of part of the territory and population of a State in order to create a new State on the basis of the existence of consent of the dismembered (and predecessor) State and cases in which this consent is lacking. The former case is sometimes called "devolution", whereas the former is a case of secession strictly so called. Cases of dissolution

[36] Article 15 of the Vienna Convention on Succession of States in respect of Treaties; Article 14, paragraph 1 of the Vienna Convention on Succession of States in respect of State property, Archives and Debts (1983).
[37] Article 34, paragraph 1, Vienna Convention on Succession of States in respect of Treaties; Article 30, paragraph 1 of the Vienna Convention on Succession of States in respect of State property, Archives and Debts.
[38] Article 31, paragraph 1 of the Vienna Convention on Succession of States in respect of Treaties; Article 16 of the Vienna Convention on Succession of States in respect of State property, Archives and Debts.
[39] R.Y.Jennings, A.Watts, *Oppenheim's International Law*, vol. I, (1992, Harlow), at. 210; G.Dahm, J.Delbrück, R.Wolfrum, *Völkerrecht,* 1989, N°1, vol. I, p.158 and ff; U.Fastenrath, *Das Recht der Staatensukzession, Berichte,* DtGVR, 1995, vol. 35, p. 14.
[40] See Art. 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties.
[41] Draft Articles 27 and 28 Yearbook of the International Law Commission, 1972, vol. II, at. 292-298.

of States leading to the creation of new ones can also be distinguished depending upon whether this dissolution occurs consensually among the different components of the State or, on the contrary, without such an agreement. The latter case, as the Yugoslavian example shows, may raise the question about the qualification of the whole situation as one of secession or of dissolution. In the former case, one of the components would keep the legal personality of the dissolved State whereas the other or others would be successors. There is no need at all to discuss this issue here. The present report will make proposals of a general character referring to cases of separation or dissolution, without any need to identify whether a particular case would fall within one or another category.

35. International practice also draws a clear distinction between unification of States and incorporation of one State into another. In the former case, the predecessor State ceases to exist, whereas in the latter case only the incorporated State ceases to exist and the enlarged (successor) State continues its prior legal personality.

36. Cession of a part of territory from one State to another State is a case which normally does not bring major practical or theoretical difficulties. In this case, both States continue to exist. Generally, each of them would have to assume the rights or obligations stemming from internationally wrongful acts committed before the date of the cession. However, the question may arise about the succession to the rights or obligations stemming from an internationally wrongful act committed from, in, or with regard to the territory or the population concerned.

37. As stated above, the category of "newly independent States" finds its justification in the dependent nature of the territory and the population concerned. This situation explains that this particular case must be distinguished from those of separation of parts of the State, either with or without consent of the latter State, in order to create a new one.

F. Subsidiary character of the solutions proposed and agreements concluded to govern the matter

38. Rules relating to State succession do not possess a peremptory character. They may be substituted by other rules if so agreed by the interested parties. Thus, the draft Resolution submitted with this report indicates from the outset the subsidiary character of the rules proposed to govern the different cases of State succession.[42] However, in the exercise of the sovereign autonomy of their will, the interested parties cannot adopt solutions that would be in contradiction with *ius cogens*. Like any other agreement, those regulating situations related to the consequences of international wrongful acts in cases of State succession must not conflict with a peremptory norm of general international law. Grave violations of fundamental norms of human rights or the permanent sovereignty over natural resources, for example, may be at stake in these situations. Consequently, it is important to explicitly include this caveat in the Resolution, following the examples of the 1978 and 1983 Vienna Conventions but improving their content.[43]

39. One specificity in the field of agreements related to State succession is the fact that these agreements may in some cases be concluded by non-State actors in the process that leads to the creation of new States. Like inter-State treaties, these agreements concluded with non-State actors must also be subjected to the rules relating to the validity of treaties or the consent of the parties to be bound by these agreements. The situations in mind involve agreements concluded by the predecessor or another State with a national liberation movement representing a people entitled to self-determination, or with other entities that later become the organs of the new State, including existing autonomous entities within the predecessor State that later become new States. Since these kind of agreements are not governed by the Vienna Convention on the Law of Treaties or by customary law applicable to inter-State relations, it is important to explicitly indicate in the Resolution that the Institute will adopt that the so-called devolution agreements concluded with non-State actors must also respect the rules relating to the validity of treaties and consent of the parties.[44]

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[42] See Article 3, paragraph 1 of the draft Resolution.
[43] Article 13 of the Vienna Convention on succession of States with respect to treaties; Article 15, paragraph 4 and Article 38, paragraph 2 of the Vienna Convention on succession of States in respect of State property, Archives and Debts.
[44] See Article 3, paragraph 2 of the draft Resolution.

40. In the field of international responsibility, the question arises as to which are the interested parties that are in a position to conclude an agreement governing issues of succession to the rights and obligations stemming from the commission of an international wrongful act before the date of the succession. In other words, what must be determined is which are the parties concerned by the possible change in the subjective element of the "secondary" obligation arising from an international wrongful act that are in a position to decide upon the matter. Different scenarios are possible. Again, the continued existence or not of the predecessor State after the date of State succession is of relevance. Whether these agreements are concluded before or after that date also plays a role.

41. Agreements concluded by the predecessor and the successor States about the modalities of exercise of rights and obligations stemming from international wrongful acts committed before the date of State succession must respect the rights of the third States concerned by these agreements. In any event, the rules related to treaties providing for rights and obligations for third States, as embodied in Articles 35 and 36 of the Vienna Convention on the Law of Treaties, are applicable insofar as the third State, as author or injured State, is not a party to these agreements.

42. In particular, it is necessary to indicate that the obligations of a predecessor State in respect of an international wrongful act committed by it before the date of a State succession do not become the obligations of the successor State towards the injured State by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State. This proposition is in consonance with the rule established in Article 8, paragraph 1 of the 1978 Vienna Convention with regard to treaties.[45] If the predecessor State continues to exist after the date of State succession, the injured State must have the possibility to express its view on the question of the holder of the obligation in its favour. If no agreement is reached, the solutions advanced for the particular categories of State succession are applicable.

[45] See Article 3, paragraph 1 of the draft Resolution.

43. In cases in which the predecessor State ceases to exist, the situation is different. Successor State(s) will assume the rights and obligations stemming from an international wrongful act suffered or committed by the predecessor State, no matter whether an agreement between them provides so. It has been discussed whether the Treaty on the establishment of German Unity contains a provision of this sort with regard to torts involving the German Democratic Republic.[46] In any event, what is clear is that the predecessor and the successor State cannot decide on their own that the obligations emerging from an international wrongful act committed by the former State will cease with its disappearance, and will not pass to the successor State without the consent of the third injured State.

44. In the case of the emergence of a plurality of successor States as a result of the disappearance of the predecessor State, agreements concluded between the successor States must be distinguished depending on whether rights or obligations are at stake. Agreements able to decide upon the identity of the beneficiary successor State(s) or the apportionment of the rights of the successor must include all successor States. For instance, the Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia was concluded by all the successor States. Article 1 of Annex F of this Agreement establishes that rights that belonged to the SFRY will be shared by the successor States.[47]

45. In the case of succession to the obligations arising from an international wrongful act committed by the predecessor State, any agreement with regard to the successor State that holds the obligation or to the apportionment of the obligation among the successor States must require the consent of the third injured State. If no agreement is reached under these conditions, the solutions advanced in the particular cases are applicable. This proposition is reflected in Article 4 of the draft Resolution.

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[46] Article 24, paragraph 1 of the Treaty on the Establishment of German Unity of 31 August 1990, I.L.M., 1991, vol. 30, p. 457. In favour of considering this provision as the acceptance by the FRG of the obligations arising from international wrongful acts committed by the GDR: Oeter, Stefan, "German Unification and State Succession", ZaöRV, 1991, vol. 51, p. 381; Volkovitsch, Michael, op. cit., p. 2177; Brigitte Stern, op. cit., p.352, Patrick Dumberry, op. cit., p. 86. Contra: Ulrich Fastenrath, "Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", ÖZöRV, 1992, vol. 44, p. 39

[47] Agreement on Succession Issues of 29 June 2001, ILM 2002, vol. 41, p. 34. For a discussion on the scope of this provision, see Patrick Dumberry, op. cit., pp. 322-323.

46. Agreements concluded after the date of State succession between the third State, either as the author of the international wrongful act or as the injured State, and the successor States, providing for the modalities of the succession to these rights or obligations, will prevail over the rules established in the Resolution for the specific categories, insofar as these agreements or the consent that lead to them are valid.

G. Elements to be taken into consideration in order to determine solutions

47. As mentioned above, a fundamental goal that guides this report is to avoid situations of State succession leading to an avoidance of the consequences of international wrongful acts, particularly in the form of the extinction or disappearance of the obligation to repair, by virtue of the mere fact of the State succession. This purpose excludes *per se* the doctrinal and old case law perception of a general rule of non-succession, although the main reasons for discarding this general "clean slate" position is based on other, more fundamental, considerations explained above.[48]

48. The purpose of ensuring that obligations stemming from the commission of international wrongful acts must be carried out even in cases of State succession must not lead, however, to the adoption of an opposite, general rule of succession to these obligations in all cases. Different categories of succession may be subject to specific solutions. The fact that the predecessor State continues to exist after the date of succession has more important consequences with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility than in the cases of treaties or other issues. All members of the Commission who answered the questionnaire agreed with the idea that the continued existence of the predecessor State after the date of State succession is a relevant circumstance.

49. A crucial element to be taken into consideration for the determination of solutions relating to the succession to rights and obligations arising from international wrongful acts committed before the date of the succession is the

[48] See above, paragraphs 21-24.

category of State succession that is at stake. The present section analyses the cases in which the predecessor State continues to exist and advances the general rule and its possible exceptions. The following section will examine the different categories of State succession and indicates the solutions proposed for each of them.

a) General rule: non-succession if the predecessor State continues to exist

50. The general, though not absolute, rule proposed is that in cases in which the predecessor State continues to exist, it is this State that continues the enjoyment of rights and the assumption of obligations arising from the international wrongful acts in which it was involved before the date of State succession. It appears normal that the same subject that has been the victim or the author of an international wrongful act holds the rights or obligations arising from this act, no matter whether its territory and population have diminished. This is the general proposition made in the draft Resolution in all cases in which the predecessor State continues to exist, i.e. the cases of transfer of part of the territory of a State to another State (Article 9), separation of parts of a State in order to form one or more States (Article 10) and newly independent States (Article 14).

b) Exception: intrinsically direct link of the consequences of the wrongful act with the territory or the population concerned

51. This general non-succession rule in cases in which the predecessor State continues to exist after the date of State succession may contain some exceptions. The question of where the wrongful act took place is not, in the rapporteur's view, necessarily decisive.[49] Acts committed within or in relation to a given territory can be the result of centrally controlled organs, and not necessarily those of the territorial unit in which those acts were performed. Moreover, international wrongful acts can be committed inside or outside the territory of the author or the injured State, and the place where the acts were committed is irrelevant, unless the spatial element forms part of the elements of the primary obligation that has been violated.

[49] For the doctrinal discussion about this point, see Patrick Dumberry, op. cit., pp. 285-287.

52. What is essential in the field of international responsibility is the personal or subjective element – i.e. the attribution of an illegal conduct to a State or other subject of international law – and not the spatial element. An exception would be the violation of obligations related to territorial regimes, which, by definition, includes rights and obligations attached to a given territory.[50] This is probably the clearest example in which the primary obligation contains a spatial element.

53. The case concerning the *Gabcikovo-Nagymaros Project* is a relevant case here, even though it concerned a case of dissolution of a State. The agreement concerning the project was concluded with Hungary by the then Socialist Republic of Czechoslovakia in 1977. On the Czechoslovakian side, the project was located on Slovakian territory. After the dissolution of the Czech and Slovakian Federal Republic in 1992, Slovakia solely took over the rights and obligations stemming from the conduct of the predecessor State.[51]

54. Another essential element of international wrongful acts lies in their consequences. For these reasons, what is proposed here as the main exception to the non-succession rule in case of the continued existence of the predecessor State is not the spatial element of where the wrongful act occurred, but instead the existence of an intrinsically direct link between the consequences of the international wrongful act and the territory or the population that becomes part of the territory or the population of the successor State.

55. The reasons for stressing the intrinsically direct link between the consequences of the wrongful act and the territory and population are twofold. First, it must be recalled that succession in this field only concerns the rights and obligations arising from an international wrongful act and not the quality of author or injured State. In other words, what is at stake is the consequence of the act and not the characterisation of the successor as author or injured State. Wrongful acts whose core element is territory, such as in the case of violations of obligations stemming from territorial regimes or in relation to acts that must essentially be accomplished within a given territory, for its benefit or as a burden

[50] See Article 12 of the 1978 Vienna Convention on Sucession of States in Respect of Treaties.

[51] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 7.

to it (for example, works benefitting a specific area, rights of passage on a given territory, fishing rights in a given waterway), deserve an exceptional treatment.

56. The same reasoning applies to the existence of an intrinsically direct link between the consequences of the wrongful act and the population concerned. Putting aside the fact that territorial rights are in general for the benefit of a given population, even though the legal holder may be the State concerned, it may occur that the wrongful act has as a direct victim a specific population. This is particularly relevant in cases of violations of human or minority rights. If the population directly concerned by the wrongful act becomes the population of the successor State, the situation also deserves to constitute an exception to the non-succession rule in cases in which the predecessor State continues to exist.

c) Possible exception: wrongful act committed by an entity of the predecessor State that later becomes the successor State

57. Another possible exception to the non-succession rule when the predecessor State continues to exist is the case of one of its composing entities (for example, federated entities, autonomous communities) that later becomes independent. If the wrongful act was committed by the composing entity before the date of succession, it is possible that the same entity later becoming independent (or part of another State) assumes the rights and obligations arising from that act.

58. Cases in which the entity enjoyed a great amount of autonomy within the predecessor State, and its central organs did not play a role in the decision or execution of the international wrongful act, would be candidates for the application of this exception to the non-succession rule. In the *Lighthouse Arbitration* case between France and Greece, the 1956 award decided with regard to claim No 4 that Greece (the successor State) should be responsible for

the acts committed by the *de facto* autonomous government of Crete (part of the Ottoman Empire) before the date of the succession.[52]

59. However, it is difficult to assert this proposition in all circumstances. The State is responsible for the acts of all its components, no matter what place or function they possess or perform within the State. There must be cases in which the central organs delegate the accomplishment of these acts to the local authorities, or the benefits of these acts do not rest at the local level. For these reasons, the draft Resolution only considers that if the author of the international wrongful act was the organ of an administrative unit of the predecessor State that later becomes the organ of the new State, the possibility might exist that the latter succeeds to the obligations stemming from that act. Different circumstances which are not possible to determine beforehand may lead to the opposite solution.[53]

d) Possible exception: acceptance by the successor State of fulfilling the obligations

60. The acceptance by a successor State of the obligations stemming from a wrongful act committed by the predecessor State (or even endorsing its responsibility) may constitute another exception to the non-succession rule in case of subsistence of the predecessor State after the date of State succession. This situation must be distinguished from that envisaged by the ILC in Article 11 of its Articles on State Responsibility ("Conduct acknowledged and adopted by a State as its own"), which essentially relates to the conduct of private individuals which is subsequently endorsed by a State. The interest of the acceptance by the successor State is related to the possibility of excluding the otherwise applicable rule by which it is the predecessor State that must comply with the obligations arising from its conduct.

61. Article 140 (3) of the Namibian Constitution, stating that anything done in accordance with the South African Laws by South African organs prior

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[52] *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, 24/27 July 1956, RIAA, vol. XII, pp. 191-200.

[53] See Article 9, paragraph 3, Article 10, paragraph 3, and Article 13, paragraph 3 of the draft Resolution.

to the date of independence of Namibia shall be deemed to have been done by the Government of Namibia,[54] has been perceived as an example.[55] Putting aside the fact that South Africa could only be considered as the predecessor State until such time as the United Nations declared the Mandate terminated, the position of the Namibian governmental bodies (i.e. Ministry of Defence) was that this provision did not derogate from the general international law rule of non-succession, although the judicial organs of Namibia perceived the matter otherwise.[56] Irrespective of its merits, what this case shows is the possibility of derogation from the general international law rule.

62. Acceptance by the successor State under the circumstances depicted above does not automatically produce the effect desired by the successor State. The situation resembles that of State succession to treaties. In cases of State succession to treaties, the will of the successor State to succeed to a given treaty is not *per se* a condition for that succession to occur. If one follows the logic of the 1978 Vienna Convention, only newly independent States would have the possibility to unilaterally decide whether they succeed to multilateral treaties or not.[57] This possibility does not even exist in the cases of treaties creating international organizations. In general, the rule is that a successor State must apply for membership. Following this reasoning, a unilateral undertaking by the successor State to the effect that it will succeed to the obligations stemming from a tort committed before the date of the succession will not be enough for succession to apply with respect to that tort. As indicated above in the case of an agreement between the predecessor and the successor States in this same vein, the acceptance of this undertaking by the other party to the responsibility relationship – the injured State – is required.[58] Consequently, the draft Resolution includes a similar provision for the unilateral acceptance of obligations by the successor State.

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[54] Constitution of Namibia of 9 February 1990 (UN Doc. S/20967/Add.2).
[55] See Patrick Dumberry, op. cit., pp. 192-194 and the authors cited.
[56] See *Mwandinghi* case, High Court of Namibia, 14 December 1990 (ILR vol 91, p. 343) and Supreme Court of Namibia, 25 October 1991 (ILR vol. 91, p. 358).
[57] Article 16, Vienna Convention on succession of States in respect of treaties. As is well known, the practice followed by the Secretary-General of the United Nations as well as other depositaries has not been consistent with the 1978 Vienna Convention and declarations of succession have been requested from other categories of successor States than newly independent States.
[58] Supra, paras. 41-45.

63. As a matter of course, if the acceptance by the successor State is manifested in a case in which the general international law rule imposes the same solution, this acceptance merely amounts to a confirmation of the existing legal situation, not to a change of it.

H. The different categories of State succession and their proposed rules

64. The different categories State succession may assume are of particular importance in order to establish the applicable rules with regard to the succession to rights and obligations stemming from an international wrongful act. The present section addresses the situation with regard to six different forms of State succession: a) transfer of part of the territory of a State, or territory under its administration, to another State, b) separation of parts of a State to form a new State, c) uniting of States aiming at the creation of a new State, d) incorporation of a State into another existing State, e) dissolution of a State and creation of new States, and f) newly independent States.

a) Transfer of part of the territory of a State, or territory under its administration, to another State

65. Article 9 of the draft Resolution refers to the situation of transfer of territory under the sovereignty of one State to another State, but also the case in which a State that only bears the responsibility for the international relations of a territory, without being its sovereign, transfers the territory, or part of it, to another State. Evidently, the latter case presupposes that the State operating the transfer possesses the legal capacity to transfer the territory concerned. The wording employed here is similar to that of Article 15 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

66. As mentioned before, in this case the predecessor State continues to exist after the transfer or cession, and the successor State already existed at the time of the succession. No creation of a new State is involved. For the reasons

set out in the preceding section, this is a clear case in which the non-succession rule applies. The exception to this general rule consisting in the existence of an intrinsically direct link between the consequences of the international wrongful act and the territory and the population concerned also applies. The possible exception motivated by the author of the international wrongful act being the organ of the territorial unit that is the object of the transfer can also be mentioned.

67. The Franco-Greek *Lighthouses Arbitration* seems to be the leading case with regard to this category. It concerned lighthouse concessions granted to a French company by the Ottoman government in Crete and Samos. After the Balkan wars, these islands were transferred to Greece. The question arose regarding certain breaches of the contractual concessions grants committed against the French company before the date of State succession, in the context of the exercise of diplomatic protection by France.

68. The arbitral tribunal distinguished acts of which the Ottoman government was the direct author from those accomplished by Crete's autonomous government. In the first cases, the tribunal applied the general rule of non-succession, whereas in the latter case, as mentioned above, Greece, as a successor State, had to assume the obligations arising from the illegal conduct followed by the autonomous government of Crete at the time the island formed part of the Ottoman Empire.[59]

b) Separation of parts of a State to form a new State

69. In the case of separation of parts of a State to form a new State or new States, the predecessor State continues to exist, although diminished in its population and territory. This category involves cases of secession, i.e. separation without the initial agreement of the predecessor State, and cases of separation occurring with the agreement of the predecessor State. An example of the former is Bangladesh, and an example of the latter is the separation of Singapore from Malaysia, or that of Montenegro from Serbia and Montenegro.

[59] Cf. the decision of the arbitral tribunal with regard to claims 4, 11 and 12 a, in: *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, 24/27 July 1956, RIAA, vol. XII, pp. 188-200.

70. For the reasons explained above, Article 10 of the draft Resolution applies the general rule of non-succession, with the exception of the cases of existence of an intrinsically direct link between the consequences of the wrongful act and the population or the territory concerned, and possible cases in which the author of the wrongful act is an organ of the administrative unit of the predecessor State that later became the organ of the successor State.

71. In the *Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* case, after the separation of Montenegro on 3 June 2006, Serbia continued the personality of Serbia and Montenegro, which in turn was the same State previously called the Federal Republic of Yugoslavia, and Montenegro became a successor State to it, by virtue of Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro. Bosnia and Herzegovina was of the view that both Serbia, as the continuator, and Montenegro, as the successor of Serbia and Montenegro, 'jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case'.[60] Montenegro considered that this was not the case, and Serbia left the matter up to the Court to decide. The latter established that Montenegro was not a party to the case by virtue of the fact that the continuator of the Respondent was Serbia. Consequently, the findings that the Court made in the operative part of its judgment were addressed only to Serbia. The Court recalled that Montenegro, like any other State party to the Genocide Convention, has undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.[61]

72. The Court did not address the possibility of joint and several responsibility of Serbia and of Montenegro, let alone any kind of obligation incumbent on Montenegro for the international wrongful act committed by its predecessor State. What is beyond doubt in the Court's reasoning is that the continuator State has to assume the obligations of international wrongful acts

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[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 74, para. 71.

[61] *Ibid.*, pp. 74-76, paras. 71-77. The Court, nevertheless, indicated that "it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro" (Ibid., p. 76, para. 78).

committed before the date of State succession as a result of the separation of part of its population and territory in order to constitute a new State.

73. It may be, under special circumstances, that reasons akin to those invoked to depart from the general non-succession rule may also lead to the sharing of the consequences of an international wrongful act by both the predecessor and the successor State(s). This situation would for instance occur if the wrongful acts were committed by both the central organs of the predecessor State and the local organs that later became the organs of the successor State, or if the consequences of the wrongful act benefitted both the predecessor and the successor State, or if the consequences were intrinsically linked to both territories and populations. The Resolution proposed is drafted in such a way that this exceptional solution will only apply if the special circumstances are present.

74. There exists another situation related to State responsibility in cases of separation of parts of a State to form one or more States that deserves consideration. It has already been addressed by Article 10 of the Articles on State Responsibility elaborated by the International Law Commission. It refers to the situation in which a secessionist movement succeeds in its endeavour to create a new State. According to Article 10, paragraph 2 of these Articles, in such a situation the conduct of a victorious insurrectional movement undertaken against the central government is attributable to the new State once the movement comes into power.[62]

75. Indeed, this is a particular situation in which there is no succession to rights or obligations of the predecessor State. Nevertheless, the question falls within the realm of the matter under consideration here, since the problem would be one of determining whether the predecessor or the successor State bears responsibility for such conduct. The commentary by the ILC to Article 10 explains its choice in the following terms:

> "the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has

[62] Article 10, paragraph 2, Articles on State Responsibility.

> given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment."[63]

76. The ILC position is based on a logical inference rather than on established practice. Indeed, the relevant case law only referred to situations of an insurrectional movement becoming the government of the State or cases of State succession in which the person concerned had acquired the nationality of the same State having caused the injury, not cases of secession or decolonisation.[64] The draft Resolution follows this pattern and includes in paragraph 6 of Article 10 the same provision as that of Article 10, paragraph 2 of the ILC Articles on State Responsibility.

77. The ILC did not specifically address the responsibility of the predecessor State for its own acts accomplished in the situation envisaged in Article 10, paragraph 2 of its Articles on State responsibility. The inference is that its obligations to repair continue after the date of State succession. Article 8 of the draft Resolution, which contains a clause related to the responsibility of the State continuing its personality in cases of State succession, covers this situation.

c) Uniting of States

78. The category of uniting of States refers to the case when two or more States unite and so form one successor State and, as a consequence of the unification, the predecessor States cease to exist. This particular category does not offer particular problems. Quite logically, the rights and obligations stemming from the commission of an international wrongful act in relation to which a predecessor State has been the author or the injured State pass to the successor State. Article 11 of the draft Resolution reflects this solution.

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[63] Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10*, UN doc. A/56/10, ch. IV.E.2, 2001, p. 114 para. (6).

[64] See the examples cited in the ILC commentary to Article 10, ibid., pp. 116-118, paras. (12)-(14).

79. The Agreement concluded between the United Kingdom and the United Arab Republic (UAR) of 28 February 1959 furnishes an example.[65] The UAR was the result of the merger of Egypt and Syria in 1958. The treaty concerned referred to the Suez Canal Crisis of 1956, hence facts occurred before the date of unification and with regard to one of the predecessor States. By this agreement, the UK and the UAR waived their claims respectively for war damages and for compensation of Egypt's seizure of the Suez Canal. Even though both sides did not admit "liability in respect of any of these claims", it is evident from the conclusion of the agreement itself that both envisaged the possibility of the succession of the UAR to the rights and obligations arising from allegedly international wrongful acts either committed or suffered by one of its predecessor States.

d) Incorporation of a State into another existing State

80. The incorporation of a State into another existing State is a case in which only the former – predecessor – State ceases to exist. The existing State is its successor, but its personality remains unchanged. Again, this case offers no difficulty in affirming that the rights and obligations stemming from the commission of an international wrongful act in relation to which the predecessor State has been the author or the injured State pass to the successor State. Article 12 of the draft Resolution reflects this solution.

81. The Treaty on the Establishment of the German Unity between the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) of 31 August 1990 offers an example.[66] By this treaty, the five Ländern composing the GDR were incorporated to the FRG and the GDR ceased to exist on 3 October 1990. As mentioned above,[67] Article 24, paragraph 1 is considered to be a recognition of the succession of the FRG to the claims and liabilities of the GDR.

e) Dissolution of a State

[65] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt, UNTS, vol. 343, N° 4925, p. 159.
[66] ZaöRV, 1991, vol. 51, p. 494; ILM, 1991, vol. 30, p. 463.
[67] Supra, para. 43.

82. The category of dissolution applies when a State ceases to exist and from the territory of this, the predecessor State, two or more successor States are formed. Article 13 of the draft Resolution establishes the succession rule, i.e. that the rights and obligations stemming from the commission of an international wrongful act in relation to which the predecessor State has been the author or the injured State pass to the successor States.

83. The fact of the existence of a plurality of successor States requires the determination of which of them becomes holder of the rights or of the obligations arising from the international wrongful act committed before the date of the succession. A distinction may be made between rights and obligations, i.e. depending whether the predecessor State was the author or the injured State.

84. As explained above, in cases of a plurality of successor States, the existence of an intrinsically direct link between the consequences of the international wrongful act committed against the predecessor State and the territory or the population of the successor State or States will be a relevant factor.

85. In addition to this factor, in order to determine which of the successor States becomes the holder of the obligations, the fact that the author of the international wrongful act was an organ of an administrative unit of the predecessor State that later became the organ of the successor State may also be a relevant factor.

86. The *Gabčíkovo/Nagymaros Project* case offers an example of a situation of dissolution in which questions related to the consequences of the commission of international wrongful acts (both by and against the predecessor State) before the date of State succession are at issue. The parties explicitly stipulated in their special agreement that 'the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project'.[68] This ascertainment can be considered as declarative of the existing legal situation.

87. The Court, taking into account the above, decided that 'Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage

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[68] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 11, para. 2.

sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary'.[69]

f) Newly Independent States

88. This report has already elaborated on the reasons to include this category of State succession as a separate one.[70] This inclusion also commands, as a logical necessity, the conclusion according to which there is no succession to the obligations arising from an international wrongful act committed by the predecessor State. This is reflected in Article 14, paragraph 1 of the draft Resolution.

89. Some domestic case law may be mentioned as examples of the application of this non-succession rule. Belgian courts confirmed Belgium's responsibility for international wrongful acts committed before the independence of the Congo by the predecessor State.[71]

90. Despite the existence of some contradictory interpretations of the Declaration of Principles Related to the Financial and Economic Cooperation between Algeria and France (an agreement forming part of the Evian Accords), France assumed its obligations from wrongful acts committed before the date of State succession with regard to acts addressed to prevent Algerian independence.[72] Equally, it provided reparation to foreigners with regard to acts committed against them before the date of the Algerian independence.[73]

91. In a recent case decided in the United Kingdom, the High Court rejected the position taken by the Foreign Office according to which the British Government is not responsible for acts of torture committed by the Colonial

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[69] *Ibid.*, p. 81, para. 151.
[70] See above, paras. 15-16.
[71] Crépet c. Etat belge et Société des forces hydro-électriques de la colonie (Civil Tribunal of Brussels, 30 January 1962, Journal des tribunaux, 1962, p. 242); Pittacos c. Etat belge (Brussels Court of Appel (2nd Chamber), 1 Decemebr 1964, Journal des tribunaux, 1965, p. 9; and Cour de cassation, 26 May 1966, Pasicrisie belge, 1966 Part I, p. 1221, also in ILR, vol. 48, p. 22).
[72] Ministry of Foreign Affairs to Conseil d'Etat, 13 February and 30 July 1963, extracts in: Conseil d'Etat, 5 mars 1965, Union régionale d'Algérie de la C.F.T.C_D.S. 1965, p. 434 (Commentaire Roger Pinto), JDI (Clunet), 1967-2, pp. 389-390. See the analysis in Patrick Dumberry, op. cit., pp. 177-181.
[73] For example, cases concerning Swiss citizens victims of corporal or material damages in Algeria before the date of independence (P, Guggenheim, La pratique suisse 1965, *Annuaire suisse de droit international*, 1966, vol. XXIII, p. 87)

Government in Kenya during the Mau-Mau rebellion in the 1950s and therefore Kenya should be liable for those acts which occurred before its independence on 12 December 1963. The High Court considered that it was for the independent Kenyan Government to decide whether it assumed the liabilities of the British Colonial Administration or not, and it did not in these circumstances. A first judgment then opened the way for an examination of the responsibility of the British Government for the alleged acts at the merits stage.[74]

92. The situation may be different with regard to the rights stemming from an international wrongful act committed by a third State against the predecessor State in relation to the territory that later becomes a newly independent State. As a matter of fact, what is at stake are rights derived from the control by the predecessor State of the dependent territory. If that act or its consequences has a direct connection with the territory or the population of the newly independent State, then the rights stemming from it pass to the successor State. This solution is in line with what the 1983 Vienna Convention established with regard to property and archives.[75]

93. Since contemporary international law recognises legal subjectivity to peoples entitled to self-determination, questions related to the conduct of these peoples and their representatives prior to the establishment of their newly independent States may arise. These peoples and their representatives may be involved in international wrongful acts, either as an injured subject or as an author. Even though this is not strictly speaking a question of State succession, it is nevertheless fundamentally correlated to the situation under analysis. The draft Resolution addresses both situations, i.e. the conduct of a national liberation movement representing a people entitled to self-determination constitutive of an international wrongful act, and the conduct of the predecessor or other States constitutive of an international wrongful act against the people concerned or the individuals composing them.

94. The conduct, prior to the date of State succession, of a national liberation movement which succeeds in establishing a newly independent State, shall be

[74] See the judgments of the High Court of Justice (Justice McCombe) in Mutua et al. v. The Foreign and Commonwealth Office of 21 July 2011, [2011] EWHC 1913 (QB) and of 5 October 2012, [2012] EWHC 2678 (QB).

[75] See Article 15 and 28 of the Vienna Convention on succession of States in respect of State property, Archives and Debts.

considered an act of this new State under international law. This is in line with the traditional position taken with regard to belligerents who succeed in becoming the government of an existing State or in creating a new one. As seen before, this situation is contemplated in the ILC Articles on State responsibility, and is reflected here.[76] As a result, the consequences of an international wrongful act committed by the national liberation movement pass to the newly independent State.[77]

95. On the other side, torts committed against the people concerned before their constitution as a newly independent State generate rights that can be exercised by this State once it is constituted.[78]

96. The *Certain Phosphate Lands in Nauru* case before the ICJ offers an example in this regard. In its application against Australia, Nauru invoked alleged international wrongful acts committed by Australia as the Administering Power at the time Nauru was a UN Trust Territory. In its Memorial, Nauru submitted that "[t]he emergence of a new State from the status of a trust territory in accordance with the principle of self-determination embodied in the trusteeship arrangements is not the emergence *ab initio* of an entirely new legal entity, but the emergence from a state of dependence of a people whose rights and status are already distinctly recognized, and to which the predecessor State is in principle accountable".[79]

97. Australia challenged the jurisdiction of the Court, but not on the ground that Nauru was not in a position to advance claims for the conduct of the Administering Power before Nauru's existence as independent State. On the contrary, Australia invoked the fact that the Nauruan authorities had allegedly waived all claims relating to the rehabilitation of the phosphate lands even before independence.[80] The Court considered that it had jurisdiction and that the application was admissible, although the case did not go to the merits stage since the parties reached an agreement by which Australia made an *ex gratia* payment

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[76] Article 10, paragraph 2 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.
[77] See Article 14, paragraph 3 of the draft Resolution.
[78] See Article 14, paragraph 4 of the draft Resolution.
[79] *Certain Phosphate Lands in Nauru*, Memorial of Nauru, vol. I, p. 169, para. 467.
[80] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 247, para. 12.

andthe parties would require the Court to discontinue the proceedings.[81]

98. State practice also includes treaties concluded after the Second World War by which defeated States agreed to pay compensation for acts occurred during that war whose victims were peoples that only constituted independent States later on. The Federal Republic of Germany concluded a reparation agreement with the State of Israel on 10 September 1952.[82] Japan concluded such treaties with Indonesia (on 20 January 1958), with Malaysia (on 21 September 1967) and with Singapore (on 21 September 1967).[83]

I. Special situations related to the nature of the international wrongful act or measures taken by the Security Council

99. Particular situations exist that can be present irrespective of the category of State succession concerned. They are rather related to the nature of the international wrongful act. On the one hand, there can be cases of international wrongful acts having a continuing or composite character performed or completed after the date of State succession. On the other hand, there are international wrongful acts committed with regard to the minimum standard of treatment granted by international law to foreigners in situations in which these persons change their nationality by reason of a State succession.

100. Measures taken by the Security Council by virtue of the powers conferred upon it by Chapter VII of the United Nations Charter are generally – although not always – adopted in situations in which international wrongful acts have been committed. In general – although not always –, States against which these measures are taken are responsible for the illegal conduct or for the threats to international peace or security. The question may also arise of the fate of these measures in cases in which the States concerned are involved in situations of State succession. This issue is also addressed here.

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[81] Agreement between Australia and Nauru of 10 August 1993, I.L.M., vol. 32, pp. 1471-1479. *Certain Phosphate Lands in Nauru (Nauru v. Australia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 322.

[82] Agreement between the State of Israel and the Federal Republic of Germany on Compensation of 10 September 1952, UNTS, vol. 162, N° 2137 , p. 205.

[83] Treaty of Peace between Japan and the Republic of Indonesia, UNTS, vol. 324, N° 4688, p. 227; Treaty of Peace between Japan and Malaysia, UNTS, vol. 683, N° 9719, p. 67; Treaty of Peace between Japan and Singapore, UNTS, vol. 683, N° 9720, p. 81.

a) International Wrongful Acts of a Continued or Composite Nature

101. The ILC Articles on State Responsibility for International Wrongful Acts distinguish between acts having been completed at the relevant time, acts having a continuing character, and acts possessing a composite character.[84] An instantaneous act takes place at the moment when it occurs. In the context of the present *problématique*, it can occur either before or after the date of State succession. The same is true with regard to a wrongful act, no matter its nature, that has occurred and ceased as such. The report's analysis took into consideration international wrongful acts occurred before the date of the State succession only. However, acts having a continuing or composite character, since they occur over a given period of time and constitute a wrongful act during such a period, may occur in a process covering a lapse of time both before and after the date of State succession. These situations require the determination of which of the predecessor or successor States has to meet with the consequences of that breach of an international obligation having a continuing or composite character.

102. In its commentary to Article 11, the ILC envisages three possibilities in which a State acknowledges and adopts the conduct in question as its own, including that of succession. "[I]f the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it."[85] The draft Resolution follows this ILC-elaborated solution.

103. The question remains, however, if there is joint responsibility shared by the predecessor State (if it continues to exist) and the successor State, if each State is responsible for the relevant period of time in which it actually committed the wrongful act or if there is succession/responsibility for the entire continuing act by the successor State. The ILC left this question open. The formula proposed in the draft Resolution contemplates the responsibility of the successor State for its own conduct since the date of the State succession and for the whole

[84] Articles 14 and 15 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.
[85] ILC commentary to Article 11, ibid., p. 119, para. (3).

period during which the act continues and remains not in conformity with the international obligation concerned.[86] Indeed, in this situation we are not facing a problem related to State succession. It is simply the attribution of an international wrongful act to its author and its consequent responsibility for such conduct. The rapporteur considers that with regard to the situation prior to the date of State succession, the specific rules for each category apply.

104. A breach consisting of composite acts comprises a series of actions or omissions defined in aggregate as wrongful. The breach only occurs when a given act is accomplished that, taken with the other actions or omissions, is sufficient to constitute the wrongful act. However, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation, in accordance with Article 15 of the ILC Articles on State Responsibility. Examples include the obligations concerning genocide, apartheid or crimes against humanity.

105. When a successor State completes a series of actions or omissions initiated by the predecessor State, in the sense that the composite wrongful act is performed, it bears international responsibility. Consistently with the ILC's definition of composite acts, the breach extends over the entire period starting with the first of the actions or omissions of the series (accomplished by the predecessor State), and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation. This provision is without prejudice to the responsibility incurred by the predecessor State if it continues to exist.[87]

b) State succession in cases of diplomatic protection

106. The question of the possibility of State succession to claims arising from breaches to international obligations relating to the treatment to be granted to foreigners was addressed by the ILC in its Articles on Diplomatic Protection. The question arose with regard to the continuous nationality rule, which was the

[86] Article 5, paragraph 1 of the draft Resolution.
[87] Article 5, paragraph 2 of the draft Resolution.

prevailing view in the matter up until the discussion before the ILC. According to the ILC, a State is only entitled to exercise diplomatic protection in respect of a person who has its nationality continuously from the date of the injury to the date of the presentation of the claim by the State.[88] The ILC took this as a general rule, but rightly included some important exceptions. Article 5, paragraph 2 of the Articles on Diplomatic Protection envisages such an exception in the situation of a change of nationality as a result of State succession in the following way:

> "A State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State."[89]

107. Article 10, paragraph 1 of the ILC Articles on Diplomatic Protection envisages the possibility of a change of nationality of corporations as a result of a situation of State succession in a similar manner:

> "A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim."[90]

108. In the view of this rapporteur, this is a positive development that overcomes the extremely rigid approach followed by the Permanent Court of International Justice in the *Panevezys-Saldutiskis* case,[91] which did not take into consideration the succession to the nationality of a Russian corporation, dismissing the Estonian diplomatic protection claim for an alleged international wrongful act committed against the person of the then Estonian corporation at a time when it held the predecessor State's nationality.

109. This solution is also in line with what the Institute had declared in its Article 1 of the Resolution entitled « Le caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu »:

> « a) Une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu peut être rejetée par l'Etat auquel elle est présentée si elle ne possède pas le caractère national de l'Etat requérant à la date de sa présentation comme à la date du dommage. Devant la

[88] Or even, in the extreme position, until the end of the procedure open for the diplomatic protection exercised by the State. See on this: E. Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international* (Paris: PUF, 1990).
[89] GA Res. 62/67, 8 January 2008 (Diplomatic Protection), Annex.
[90] *Ibid*.
[91] *Panevezys-Saldutiskis Railway Case*, PCIJ, Series A/B No. 76, pp. 16-17.

juridiction saisie d'une telle réclamation, le défaut de caractère national est une cause d'irrecevabilité.
b) Une réclamation internationale présentée par un Etat nouveau en raison d'un dommage subi par un de ses nationaux avant l'accession à 1'indépendance de cet Etat, ne peut être rejetée ou déclarée irrecevable en application de 1'alinéa précédent pour la seule raison que ce national était auparavant ressortissant de l'ancien Etat. »[92]

110. Then, according to the ILC Articles, if the date of State succession occurred between the date of the injury and the date of the official presentation of the claim by the successor State, this is not an obstacle for the exercise of diplomatic protection. Consequently, there is succession to the rights and obligations stemming from an international wrongful act committed against a natural or legal person in violation of the international minimum standard recognized with respect to foreigners.

111. The draft Resolution follows exactly the same approach as the ILC. A successor State may exercise diplomatic protection in respect of a person or a corporation 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 previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.[93]

112. The draft Resolution also envisages the possibility that the claim in exercise of diplomatic protection has been initiated by the predecessor State and the question remains open at the time of State succession. In this case, the claim may be continued by the successor State under the same conditions set out above.[94]

113. Diplomatic protection in the context of State succession must also be examined the other way round, i.e. in case of a claim in exercise of diplomatic protection initiated by a third State against the predecessor State before the date

[92] « Le caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu » (Session de Varsovie – 1965), Annuaire de l'Institut de Droit international, vol. 51-II, pp. 260-261.
[93] Article 6, paragraph 1 of the draft Resolution.
[94] Article 6, paragraph 2 of the draft Resolution.

of State succession. Coherently with the solutions envisaged earlier, it is proposed that if the predecessor State has ceased to exist, the claim may be continued against the successor State. In case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. In cases in which it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 4, paragraph 2 of the draft Resolution, containing provisions for an equitable apportionment, apply *mutatis mutandis* in this case.[95]

c) ***Measures adopted by the Security Council under Chapter VII of the Charter of the United Nations***

114. Since the end of the Cold War, the Security Council has been very active in adopting the measures envisaged in Chapter VII of the Charter of the United Nations, including in cases involving situations of State succession. It cannot be disregarded that other situations of this kind may occur in the future. The question is whether there is succession to the rights or obligations stemming from measures adopted by the Security Council under Chapter VII.

115. The situation examined here is different from that of the commission of an international wrongful act. The *intuitu personae* character of sanctions distinguishes both situations. It is not possible to separate this character from the consequences of sanctions. Moreover, in order to find solutions, what must be taken into consideration are the rules existing with regard to membership of international organisations. The generalised practice and rule is that there is no succession to the quality of member of international organisations. In general, successor States of members of an international organisation must apply for new membership.

116. Consequently, the rule proposed is that there is no succession to the rights and obligations arising from measures adopted by the Security Council under Chapter VII. If such measures were adopted against a predecessor State that ceased to exist, it belongs to the Security Council to decide in a new

[95] Article 6, paragraph 3 of the draft Resolution.

resolution whether the sanctions will be applied to any successor State. If the predecessor State continues to exist, this is the only State to which the measures continue to be imposed.

117. An example is found in the Constitutional Charter of the State Union of Serbia and Montenegro. Article 60 of the Constitutional Charter envisaged the possibility of the breakdown of the State. In the case of separation by Montenegro, it was explicitly envisaged that UN SC Resolution 1244 (1999), relating to Kosovo, would concern and apply in its entirety to Serbia.[96] Serbia was considered to be the continuator of the State of Serbia and Montenegro. For its part, Montenegro is a successor State. Consequently, Serbia kept its place as UN member, whereas Montenegro had to apply for membership.

118. Successor States that become new members of the United Nations are obliged to comply with resolutions of the United Nations in the same manner as any other member State.[97]

H. The draft Resolution

119. The draft Resolution submitted for consideration starts with a preamble and has three parts.

120. The preamble follows the general considerations already mentioned in other instruments related to State succession, such as the 1978 and 1983 Vienna Conventions, the ILC Articles on succession of States in matters of nationality and the Institute's Resolution "State Succession in Matters of Property and Debts". In particular, references are made to the fundamental principles and rules of international law that must be taken into consideration in its interpretation and application. Considerations relating to the need to formulate guidelines in the situations of State succession in the field of international responsibility are also mentioned.

121. The first part contains general provisions, in particular the use of terms and the fact that the cases covered by the Resolution are those of State

[96] Text available at: http://www.worldstatesmen.org/SerbMont_Const_2003.pdf
[97] Article 7 of the draft Resolution.

succession occurring in conformity with international law. The definitions of terms employed follow the previous instruments related to State succession and State responsibility.

122. The second part contains common rules applicable irrespective of the categories of State succession. It beings by indicating the subsidiary character of the guidelines contained in the Resolution and the conditions that must be respected by the agreements concluded with the aim at governing the matters covered by the text. It also addresses the questions emerging from the existence of a plurality of successor States, and the way to determine an equitable apportionment of the rights and obligations concerned, if necessary. It contains guidelines relating to cases of international wrongful acts having a continuing or composite character, to the exercise of diplomatic protection and with regard to measures taken by the Security Council. It also contains a "without prejudice" clause applicable to States that possess the character of continuator States in the context examined by the Resolution.

123. The third part of the text contains the guidelines relating to the specific categories of State succession, which include transfer of part of the territory of a State, separation of parts of a State to form one or more independent States, unification, incorporation of a State into another State, dissolution and newly independent States.

124. The draft Resolution is submitted in English and French. Both are authoritative texts.

Geneva, 9 August 2013

ANNEX 1: DRAFT RESOLUTION/PROJET DE RESOLUTION

State Succession in Matters of State Responsibility

(14th Commission, Rapporteur: Prof. Marcelo Kohen)

The Institute of International Law,

Considering the transformation of the international community brought about by the emergence of new States and other forms of succession of States,

Considering that other situations involving State succession may occur in the future,

Considering that pending issues related to State responsibility may exist in situations involving State succession occurred in the past,

Noting that the work of codification and progressive development carried out in the field of State succession has not covered matters related to State responsibility,

Noting also that the work of codification and progressive development carried out in the field of State responsibility has put aside matters related to State succession,

Convinced of the need for the codification and progressive development of the rules related to State succession in matters of international responsibility of States, as a means to ensure greater legal security in international relations,

Bearing in mind that situations involving succession of States should not constitute a reason not to implement the consequences stemming from international wrongful acts,

Taking into account that different categories of State succession and particular circumstances within them may lead to different solutions,

Considering that, in this regard, what needs to be determined is the situation, after the date of the State succession, of the rights and obligations arising from international wrongful acts committed or suffered by the predecessor State,

Noting that the principles of free consent, good faith, equity and *pacta sunt servanda* are universally recognized,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force, and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Recalling that respect for the territorial integrity and political independence of any State is required by the Charter of the United Nations,

Adopts the following guiding principles relating to the succession of States in respect of matters of State responsibility:

Part One: General Provisions

Article 1: Use of terms

"**Succession of States**" means the replacement of one State by another in the responsibility for the international relations of territory.

"**Predecessor State**" means the State which has been replaced by another State on the occurrence of a succession of States.

"**Successor State**" means the State which has replaced another State on the occurrence of a succession of States.

"**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.

"**Newly independent State**" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

Internationally wrongful act: There is an internationally wrongful act when conduct consisting of an action or omission: (a) is attributable to the State or another subject under international law; and (b) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act of as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Article 2: Cases of succession of States covered by the present Resolution

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

Part Two: Common rules

Article 3: Subsidiary character of the guiding principles

1. The present guiding principles have a subsidiary character. The parties concerned by the change in the subjective relationship emerging from the commission of an international wrongful act as a result of a situation of State succession may agree upon specific solutions.

2. Devolution agreements concluded between the predecessor State and an entity or a national liberation movement representing a people entitled to self-determination before the date of State succession are also subjected to the rules related to the validity of treaties or of the consent of the parties to be bound by these agreements, as depicted in the Vienna Convention on the Law of Treaties. The same rule applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.

3. The obligations of a predecessor State in respect of an international wrongful act

committed by it before the date of a succession of States do not become the obligations of the successor State towards the injured State by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

4. The obligations of a predecessor State in respect of an international wrongful act committed by it before the date of a succession of States do not become the obligations of the successor State towards the injured State by reason only of the fact that the successor State has accepted that such obligations shall devolve upon it.

Article 4: Plurality of successor States

1. In cases of succession to the rights or obligations stemming from the commission of an international wrongful act in which it is not possible to determine a single successor State on the basis of the following articles, and unless otherwise agreed by the interested States, all the successor States will enjoy the rights or assume the obligations in an equitable manner.

2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the extent of the territory and the amount of population, the respective parts in the Gross National Product of the States concerned at the date of the State succession, the avoidance of unjust enrichment and any other relevant circumstance to the case.

3. For the purposes of this Article, "interested States" are:

a) in the case of an international wrongful act committed by the predecessor State, the injured State and all the successor States;

b) in the case of an international wrongful act committed against the predecessor State, all the successor States.

Article 5: International wrongful acts having a continuing or composite character performed or completed after the date of the State succession

1. When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, it bears international responsibility for the entire period during which the act continues and remains not in conformity with the international obligation.

2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in aggregate as a breach of an international obligation, it bears international responsibility. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation. This provision is without prejudice to the responsibility incurred by the predecessor State if it continues to exist.

Article 6: Diplomatic protection

1. A successor State may exercise diplomatic protection in respect of a person or a corporation 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 previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.

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

3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. In cases in which it is not possible to determine a single successor State having such direct connection, the claim may be continued against all the successor States. The provisions of Article 4 apply *mutatis mutandis*.

Article 7: Measures adopted by the Security Council under Chapter VII of the Charter of the United Nations

There is no succession to the rights or obligations stemming from measures adopted by the Security Council under Chapter VII of the Charter of the United Nations. If such measures were adopted against a predecessor State that ceased to exist, it belongs to the Security Council to decide in a new resolution whether the sanctions will be applied to any successor State. Successor States that become new members of the United Nations are obliged to comply with resolutions of the United Nations in the same manner as any other member State.

Article 8: Continuity of States

1. The present articles are without prejudice to the rights and obligations stemming from an international wrongful act of the State whose legal personality continues or is identical to the predecessor State after a situation involving State succession.

2. The present articles do not apply to situations involving political changes within a State. This provision includes change of regime or name of the State.

Part Three: Provisions concerning specific categories of succession of States

Article 9: Transfer of part of the territory of a State

1. When part of the territory of a State, or when 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, the rights and obligations stemming from the commission of an international wrongful act in relation to which the

predecessor State has been the author or the injured State do not pass to the successor State.

2. Notwithstanding the preceding paragraph, if there exists an intrinsically direct link between the consequences of the international wrongful act committed against the predecessor State and the territory transferred and/or its population, the rights arising from that act pass to the successor State.

3. Notwithstanding paragraph 1 of the present article, if special circumstances so require, if the author of the international wrongful act was an organ of the territorial unit of the predecessor State that is transferred to the successor State, the consequences of the international wrongful act committed by the predecessor State pass to the successor State.

Article 10: Separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist, the rights and obligations stemming from the commission of an international wrongful act in relation to which the predecessor State has been the author or the injured State do not pass to the successor State or States.

2. Notwithstanding the preceding paragraph, if there exists an intrinsically direct link between the consequences of the international wrongful act committed against the predecessor State and the territory or the population of the successor State or States, the rights arising from that act pass to the successor State or States.

3. Notwithstanding paragraph 1 of the present article, if special circumstances so require, if the author of the international wrongful act was an organ of an administrative unit of the predecessor State that later became the organ of the successor State, the consequences of the international wrongful act committed by the predecessor State pass to the successor State.

4. If special circumstances as indicated in paragraphs 2 and 3 of this Article so require, the consequences of an international wrongful act occurred before the date of the State succession are assumed by the predecessor and the successor States.

5. In order to determine an equitable apportionment of the rights or obligations of the continuator and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the extent of the territory and the amount of population, the respective parts in the Gross National Product of the States concerned at the date of the State succession, the avoidance of unjust enrichment and any other relevant circumstance to the case.

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

Article 11: Uniting of States

When two or more States unite and so form one successor State and as a consequence of the unification the predecessor States cease to exist, the rights and obligations

stemming from the commission of an international wrongful act in relation to which a predecessor State has been the author or the injured State pass to the successor State.

Article 12: Incorporation of a State into another existing State

When a State ceases to exist and is incorporated into another State, the rights and obligations stemming from the commission of an international wrongful act in relation to which the predecessor State has been the author or the injured State pass to the successor State.

Article 13: Dissolution of a State

1. When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the rights and obligations stemming from the commission of an international wrongful act in relation to which the predecessor State has been the author or the injured State pass to the successor States.

2. In order to determine which of the successor States becomes holder of the rights depicted in the preceding paragraph, the existence of an intrinsically direct link between the consequences of the international wrongful act committed against the predecessor State and the territory or the population of the successor State or States will be a relevant factor.

3. In order to determine which of the successor States becomes holder of the obligations depicted in paragraph 1, in addition to the factor mentioned in paragraph 2, the fact that the author of the international wrongful act was an organ of an administrative unit of the predecessor State that later became the organ of the successor State will also be a relevant factor.

Article 14: Newly independent States

1. When the successor State is a newly independent State, the obligations stemming from an international wrongful act committed by the predecessor state shall not pass to the successor State.

2. When the successor State is a newly independent State, the rights stemming from an international wrongful act committed against the predecessor state pass to the successor State if that act has a direct connection with the territory or the population of the newly independent State.

3. The conduct, prior to the date of State succession, of a national liberation movement which succeeds in establishing a newly independent State, shall be considered an act of the new State under international law. The consequences of the international wrongful act committed by the national liberation movement pass to the successor State.

4. The rights stemming from an international wrongful act committed by the predecessor State or any other State against a people entitled to self-determination before the date of the State succession may be exercised by the newly independent State created by that people after that date.

(Geneva, 9 August 2013)

Succession d'Etats et responsabilité internationale

(14e Commission, Rapporteur: Prof. Marcelo Kohen)

L'Institut de Droit international,

Considérant que l'émergence de nouveaux Etats et d'autres formes de succession d'Etats ont entraîné une transformation de la communauté internationale,

Considérant que d'autres situations impliquant des successions d'Etat pourraient émerger à l'avenir, Considérant que des questions en suspens relatives à la responsabilité de l'Etat pourraient exister dans des situations où une succession d'Etats s'est produite dans le passé,

Constatant que le travail de codification et développement progressif réalisé dans le domaine de la succession d'Etats n'a pas visé des questions en matière de responsabilité de l'Etat,

Constatant en outre que le travail de codification et développement progressif réalisé dans le domaine de la responsabilité de l'Etat n'a pas examiné les questions relatives à la succession d'Etats,

Convaincus de la nécessité de codifier et développer progressivement les règles relatives à la succession d'Etats en matière de responsabilité internationale de l'Etat, en tant que moyen de garantir une plus grande sécurité juridique dans les relations internationales,

Ayant présent à l'esprit que les cas de succession d'Etats ne doivent pas constituer une raison pour ne pas mettre en œuvre les conséquences qui découlent d'un fait internationalement illicite,

Compte tenu que les différentes catégories de succession d'Etats ainsi que leurs circonstances particulières peuvent conduire à des solutions différentes,

Considérant que, à cet égard, la question à déterminer est celle de la situation,, après la date de succession d'Etats, des droits et des obligations qui découlent des faits internationalement illicites commis ou subis par l'Etat prédécesseur,

Constatant que les principes du libre consentement, de la bonne foi, de l'équité et *pacta sunt servanda* sont universellement reconnus,

Conscients des principes de droit international incorporés dans la Charte des Nations Unies, tels que les principes concernant l'égalité des droits des peuples et leur droit à disposer d'eux-mêmes, l'égalité souveraine et l'indépendance de tous les Etats, la non-ingérence dans les affaires intérieures des Etats, l'interdiction de la menace ou de l'emploi de la force et le respect universel et effectif des droits de l'homme et des libertés fondamentales pour tous,

Rappelant que le respect de l'intégrité territoriale et de l'indépendance politique de tout Etat est exigé par la Charte des Nations Unies,

Adopte les principes directeurs suivants relatifs à la succession d'Etats en matière de responsabilité de l'Etat :

Première Partie : Dispositions générales

Article premier : Expressions employées

L'expression « **succession d'Etats** » s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire.

L'expression « **Etat prédécesseur** » s'entend de l'Etat auquel un autre Etat s'est substitué à l'occasion d'une succession d'Etats.

L'expression « **Etat successeur** » s'entend de l'Etat qui s'est substitué à un autre Etat à l'occasion d'une succession d'Etats.

L'expression « **date de la succession d'Etats** » s'entend de la date à laquelle l'Etat successeur s'est substitué à l'Etat prédécesseur dans la responsabilité des relations internationales du territoire auquel se rapporte la succession d'Etats.

L'expression « **Etat nouvellement indépendant** » s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales.

L'expression « **Fait internationalement illicite »** s'entend lorsqu'un comportement consistant en une action ou une omission : (a) est attribuable à l'Etat ou à un autre sujet en vertu du droit international; et (b) constitue une violation d'une obligation internationale de l'Etat ou de l'autre sujet. La qualification du fait comme internationalement illicite relève du droit international. Une telle qualification n'est pas affectée par la qualification du même fait comme licite par le droit interne.

Article 2 : Cas de succession d'Etats visés par la présente Résolution

La présente Résolution s'applique uniquement aux effets d'une succession d'Etats se produisant conformément au droit international, et plus particulièrement aux principes du droit international incorporés dans la Charte des Nations Unies.

Deuxième Partie : Règles communes

Article 3 : Caractère subsidiaire des principes directeurs

1. Les présents principes directeurs ont un caractère subsidiaire. Les parties concernées par un changement dans la relation subjective qui découle de la commission d'un fait internationalement illicite résultant d'une situation de succession d'Etats peuvent décider d'un commun accord des solutions spécifiques.

2. Les accords de dévolution conclus avant la date de succession d'Etats entre l'Etat prédécesseur et une entité ou mouvement de libération nationale qui représente un peuple qui a le droit de disposer de lui-même sont aussi soumis aux règles relatives à la validité des traités ou du consentement des parties à être liés par ces accords, comme énoncé par la Convention de Vienne sur le droit des traités. La même règle s'applique aux accords de dévolution conclus entre l'Etat prédécesseur et une de ses entités autonomes qui plus tard deviendrait un Etat successeur.

3. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis avant la date d'une succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat lésé du seul fait que l'Etat prédécesseur et l'Etat successeur ont conclu un accord stipulant que lesdites obligations sont dévolues à l'Etat successeur.

4. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis avant la date d'une succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat lésé du seul fait que l'Etat successeur ait accepté que lesdites obligations lui soient dévolues.

Article 4 : Pluralité d'Etats successeurs

1. Dans les cas de succession aux droits ou obligations découlant de la commission d'un fait internationalement illicite dans lesquels il n'est pas possible d'identifier un Etat successeur unique sur la base des articles suivants, et à moins qu'il n'en soit convenu autrement par les Etats concernés, tous les Etats successeurs seront bénéficiaires de ces droits ou assumeront ces obligations d'une manière équitable.

2. Pour établir une répartition équitable des droits ou obligations entre les Etats successeurs, pourront être prises en considération l'existence de liens spéciaux avec l'acte qui engage la responsabilité internationale, l'étendue du territoire et la quantité de population, les participations respectives dans le Produit national brut des Etats concernés à la date de la succession de l'Etat, la nécessité d'éviter toute situation d'enrichissement sans cause et toute autre circonstance pertinente.

3. Aux fins du présent article, les « Etats intéressés » sont :

a) dans le cas d'un fait internationalement illicite commis par l'Etat prédécesseur, l'Etat lésé et tous les Etats successeurs ;

b) dans le cas d'un fait internationalement illicite subi par l'Etat prédécesseur, tous les Etats successeurs.

Article 5 : Faits internationalement illicites à caractère continu ou composite produits ou complétés après la date de succession d'Etats

1. Quand un Etat successeur poursuit la violation d'une obligation internationale par un fait à caractère continu de l'Etat prédécesseur, il lui incombe la responsabilité internationale pour toute la période durant laquelle le fait se poursuit et reste non conforme à l'obligation internationale.

2. Quand l'Etat successeur complète une série d'actions ou omissions initiées par l'Etat prédécesseur définies dans son ensemble comme illicite, il lui en incombe la responsabilité internationale. Dans un tel cas, la violation s'étend sur toute la période débutant avec la première des actions ou omissions de la série et dure aussi longtemps que ces actions ou omissions se répètent et restent non conformes à ladite obligation internationale. Cette disposition est sans préjudice de toute responsabilité qui incombe à l'Etat prédécesseur si ce dernier continue d'exister.

Article 6 : Protection diplomatique

1. Un Etat successeur est en droit d'exercer la protection diplomatique à l'égard d'une personne ou d'une société qui a sa nationalité à la date de la présentation officielle de la réclamation mais qui n'avait pas cette nationalité à la date du préjudice, à condition que la personne ou société ait eu la nationalité de l'État prédécesseur ou qu'elle ait perdu sa première nationalité et acquis, pour une raison sans rapport avec la présentation de la réclamation, la nationalité de l'État successeur d'une manière non contraire au droit international.

2. Une réclamation en l'exercice de la protection diplomatique présentée par l'Etat prédécesseur est en droit d'être poursuivie après la date de la succession d'Etats par l'Etat successeur selon les mêmes conditions énoncées au paragraphe premier.

3. Une réclamation en l'exercice de la protection diplomatique présentée par un Etat contre l'Etat prédécesseur peut être poursuivie contre l'Etat successeur si l'Etat prédécesseur a cessé d'exister. Dans le cas d'une pluralité d'Etats successeurs, la réclamation sera adressée à l'Etat successeur ayant la connexion la plus directe avec le fait qui donne lieu à l'exercice de la protection diplomatique. Dans les cas où il n'est pas possible d'identifier un Etat successeur unique ayant cette connexion directe, la réclamation pourra être continuée contre tous les Etats successeurs. Les dispositions énoncées à l'Article 4 s'appliquent *mutatis mutandis*.

Article 7 : Mesures prises par le Conseil de Sécurité en vertu du chapitre VII de la Charte des Nations Unies

Il n'y a aucune succession aux droits ou obligations découlant des mesures prises par le Conseil de sécurité en vertu du chapitre VII de la Charte des Nations Unies. Si ces mesures ont été adoptées contre un Etat prédécesseur qui a cessé d'exister, il incombe au Conseil de sécurité de décider dans une nouvelle résolution si les sanctions s'appliqueront à un quelconque Etat successeur. Les Etats successeurs qui deviennent nouveaux membres des Nations Unies ont l'obligation de respecter les résolutions des Nations Unies de la même façon que tout autre Etat membre.

Article 8 : Continuité de l'Etat

1. Les présents articles sont sans préjudice des droits et obligations qui découlent d'un fait internationalement illicite d'un Etat dont la personnalité juridique continue ou est identique avec celle de l'Etat prédécesseur après une situation qui comporte la succession d'Etats.

2. Les présents articles ne s'appliquent pas à des situations concernant des changements politiques à l'intérieur de l'Etat. Cette disposition inclut le changement de régime ou de nom de l'Etat.

Troisième Partie : Dispositions concernant des catégories spécifiques de succession d'Etats

Article 9 : Transfert de partie du territoire d'un Etat

1. Lorsqu'une partie du territoire de l'Etat, ou tout territoire, pour lequel un Etat a la responsabilité des relations internationales, ne faisant pas partie du territoire de cet Etat, devient partie du territoire d'un autre Etat, les droits et les obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat successeur.

2. Nonobstant le paragraphe précédent, s'il existe un lien intrinsèquement direct entre les conséquences du fait internationalement illicite commis contre l'Etat prédécesseur et le territoire transféré et/ou sa population, les droits qui découlent de ce fait passent à l'Etat successeur.

3. Nonobstant le premier paragraphe du présent article, si des circonstances spéciales l'exigent, si l'auteur du fait internationalement illicite était un organe de l'une unité territoriale de l'Etat prédécesseur qui est transféré à l'Etat successeur, les conséquences du fait internationalement illicite commis par l'Etat prédécesseur passent à l'Etat successeur.

Article 10 : Séparation de parties d'un Etat

1. Lorsqu'une partie ou plusieurs parties du territoire d'un Etat s'en séparent pour former un ou plusieurs Etats et que l'Etat prédécesseur continue d'exister, les droits et les obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat ou aux Etats successeurs.

2. Nonobstant le paragraphe précédent, s'il existe un lien intrinsèquement direct entre les conséquences du fait internationalement illicite commis contre l'Etat prédécesseur et le territoire ou la population de l'Etat successeur, les droits et obligations qui découlent de ce fait passent à l'Etat ou aux Etats successeurs.

3. Nonobstant le premier paragraphe du présent article, si des circonstances spéciales l'exigent ou si l'auteur du fait internationalement illicite était un organe d'une unité administrative de l'Etat prédécesseur qui plus tard est devenu organe de l'Etat successeur, les conséquences du fait internationalement illicite commis par l'Etat prédécesseur passent alors à l'Etat successeur.

4. Si les circonstances spéciales indiquées aux paragraphes 2 et 3 du présent article l'exigent, les conséquences du fait internationalement illicite commis avant la date de la succession d'Etats sont assumées par l'Etat prédécesseur et l'Etat successeur.

5. Pour établir une répartition équitable des droits ou obligations des Etats prédécesseur et successeur, pourront être prises en considération l'existence de liens spéciaux avec l'acte qui engage la responsabilité internationale, l'étendue du territoire et la quantité de population, les participations respectives dans le Produit national brut des Etats concernés à la date de la succession de l'Etat, la nécessité d'éviter l'enrichissement sans cause et toute autre circonstance pertinente.

6. Le comportement d'un mouvement, insurrectionnel ou autre, qui parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous son administration est considéré comme un fait de ce nouvel Etat d'après le droit international.

Article 11 : Unification d'Etats

Lorsque deux ou plusieurs Etats s'unissent et forment ainsi un Etat successeur, et par conséquence de cette unification les Etats prédécesseurs cessent d'exister, les droits et obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel un Etat prédécesseur a été l'auteur ou l'Etat lésé passent à l'Etat successeur.

Article 12 : Incorporation d'un Etat dans un autre Etat existant

Quand un Etat cesse d'exister et est incorporé dans un autre Etat, les droits et les obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé passent à l'Etat successeur.

Article 13 : Dissolution d'un Etat

1. Lorsqu'un Etat se dissout et cesse d'exister et que les parties du territoire de l'Etat prédécesseur forment deux ou plusieurs Etats successeurs, les droits et les obligations découlant de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé passent aux Etats successeurs.

2. Afin de déterminer lequel des Etats successeurs devient le bénéficiaire des droits énoncés au paragraphe précédent, l'existence d'un lien intrinsèquement direct entre les conséquences du fait internationalement illicite commis contre l'Etat prédécesseur et le territoire ou la population de l'Etat ou des Etats successeurs sera un facteur pertinent.

3. Afin de déterminer lequel des Etats successeurs devient le titulaire des obligations énoncées au paragraphe premier, et outre le facteur énoncé au paragraphe 2, le fait que l'auteur du fait internationalement illicite ait été un organe d'une unité administrative de l'Etat prédécesseur qui plus tard est devenu un organe de l'Etat successeur est aussi un facteur pertinent.

Article 14 : Etats nouvellement indépendants

1. Quand l'Etat successeur est un Etat nouvellement indépendant, les obligations découlant d'un fait internationalement illicite commis par l'Etat prédécesseur ne passeront pas à l'Etat successeur.

2. Quand l'Etat successeur est un Etat nouvellement indépendant, les droits découlant d'un fait internationalement illicite commis contre l'Etat prédécesseur passeront à l'Etat successeur si ce fait a une connexion directe avec le territoire ou la population de l'Etat nouvellement indépendant.

3. Le comportement, avant la date de succession d'Etats, d'un mouvement de libération nationale qui parvient à créer un Etat nouvellement indépendant, sera considéré comme fait de ce nouvel Etat d'après le droit international. Les conséquences du fait internationalement illicite commis par le mouvement de libération nationale passent à l'Etat successeur.

4. Les droits qui découlent d'un fait internationalement illicite commis par l'Etat prédécesseur ou un autre Etat contre un peuple bénéficiant du droit de disposer de lui-

même avant la date de succession d'Etats peuvent être exercés après cette date par l'Etat nouvellement indépendant créé par ce peuple.

(Genève, le 9 août 2013)

ANNEX 2: QUESTIONNAIRE AND ANSWERS

THE QUESTIONNAIRE

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1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act

preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

ANSWERS TO THE QUESTIONNAIRE

Mr. Degan

Dear Confrere, It is expected that, together with you in the capacity of the Rapporteur, all member of our Commission engage their knowledge and experience in order carefully to examine the problems that appear before our Commission. Here are my observations to this end.

1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

I am not familiar with any case from practice in which liability or "*responsabilité objective*" was decisive factor in settling the problems under discussion of our Commission. In case that there were such cases they should be carefully examined. But this seems not to be a question seeking a general conclusion.

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

I agree with the view of our Rapporteur. The alternative position could narrow the perspective of our research.

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

I discussed in my subsequent explanation all the categories of State succession, or rather types of territorial changes. The Rapporteur is free to search for other categories or types, which he should prove as to be distinct from others.

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

The continuous existence of a predecessor State can be of an importance, but depending on circumstances it is not always decisive factor. In some situations the predecessor State, or all of them, disappear, but the question of responsibility still exists.

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

I agree with the view of our Consœur Maria Teresa Infante that the categories established by the ILC can provide a good basis for our study.

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

The matter is here of an analogy with the succession of the so-called allocated State debts. The analogy can in some situations be misleading if the territorial entity of a federation of States acts on behalf of the central government. Such situations are not infrequent and they are not always clear in practice. Hence, this problem does not seem to be suitable for a general conclusion. As usual, inductive approach to it is more adequate that the deductive one.

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

This is also not a question appropriate for general conclusions, and still less of a rule of positive or even of potential law (*lex ferenda*). At the first glance it seems adequate in cases of peaceful and orderly dissolution of a predecessor State in order to avoid the unjust enrichment of same of States taking part in the succession process. However, this solution is entirely inadequate in cases of territorial changes preceding the suppression of movements for independence,

such as separation of Eritrea from Ethiopia, of Timor Leste from Malaysia, of South Sudan, of Kosovo from Serbia, etc.

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

Here in question are not internationally wrongful acts directed against a foreign State or its citizens. The matter is of such unlawful acts, and very often of international crimes, against nationals of a State, occurring before the date of State succession. Strictly in law, we cannot ignore this problem even in cases of dissolution of a State (such as the SFRY) in which no predecessor State remains. Nevertheless, in my experience the UN Security Council in its political efforts to find a peaceful solution acceptable to all parties in a conflict actually prevents the injured State or States to seek reparation. Then the injured State and individual victims of crimes have no means of redress.

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

Concerning this question, such an obligation does not exist in law in respect to any State which is not responsible for wrongdoing acts against a population. But in all cases in which the predecessor or other responsible State fails to do it, the territorial State has no option but to support its population in its right to survival.

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

Such situations are not frequent in practice. In case of orderly territorial changes it can play a role if it really occurs. In cases of attempts to suppress a national liberation movement which becomes a new State later on that successor State cannot be blamed for internationally wrongful acts of the predecessor State even in respect of third States and their nationals.

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

I do not believe that a general conclusion on this subject matter is of any use. This is to decide by the parties in negotiations if any, or in a judicial procedure which has slim chances to occur.

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

These are factors that can be of importance in an international adjudication. However, in the light of the right of free choice of means of settlement, any party can refuse an arbitral or judicial procedure and it will not violate by its refusal any of its legal obligation. Because one of disputing parties is usually a new or newly independent State (except in some cases of cession of territories), such a State had no time enough to assume obligations for judicial settlement in respect of future disputes.

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

Such a situation is also rare in practice. In case that it happens, all States to a succession process should be normally obliged by such an award. Nevertheless, "newly independent States" could perhaps have the right to refuse this obligation in the light of their privileged position provided in Article 16 of the 1978 Vienna Convention on Succession of States in respect of Treaties. Hence, I have not a clear answer to this question.

Other problems that appear

Now I want to raise some other issues which should be discussed in our Commission in all their aspects.

In examining the problems before our Commission one should follow codifying texts which are believed to reflect rules of general customary international law. Draft Articles on State Responsibility, adopted by the ILC in 2001, are based on a division between primary and secondary rules. Primary rules are only indicated in its Article 12, according to which: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character". This qualification seems to be too large when the matter is of succession of responsibility of the predecessor State. Secondary rules are contained in most other provisions, especially in Article 1, according to which: "Every internationally wrongful act of a State entails the international responsibility of that State".

But the question of the so-called "tertiary rules", how an injured State can obtain reparation for the injury caused to it or to its citizens by an internationally wrongful act, are in these Draft Articles willfully neglected. Here are reflected deficiencies in the world legal order. Article 43 provides notice of claim by an injured State, and Articles 49 to 53 set out very restrictive rules on legitimate countermeasures against a State which is responsible of an internationally wrongful act.

Our Rapporteur has envisaged in his proposed text the case of an agreement for wrongful acts committed between the injured State and the wrongdoing predecessor State before the date of State succession, but which has not been fully implemented. I agree with the Rapporteur that in these situations (I do not know the cases it actually happened), the rules governing succession of States in respect of treaties would apply. I would add that sometimes some other rules of the law of treaties can be pertinent too, such as Articles 61 and 62 of the 1969 Vienna Convention on the Law of Treaties.

However, opposite situations are extremely sensitive. According to the text of these Draft Articles if it applies to State succession in matters of State responsibility, a would-be injured State could claim reparation for any act by the predecessor State committed before the date of State succession, it pretends to be internationally wrongful, from all or some of States taking part in the succession process. The matter is not only of violation of a treaty which was during a period of time in force, or of payment of debts on which there is also enough evidence. Any internationally wrongful act in the mind of a State which pretends to suffer injury by it can be the matter of its claim. Such a State can even raise the violation of customary rules for which there is not enough evidence of practice and *opinio juris*.

The task of our Commission could probably be easier if the matter was only of State succession in respect of international crimes committed by the predecessor State before the date of State succession. Then, a certain inspiration could offer the rules from the Rome Statute concerning criminal responsibility of individuals (not States), as well as its amendments adopted in Kampala (Uganda) concerning the crime of aggression. The UN Security Council, acting on behalf of Chapter VII of the Charter will have here a central role. But it is not a judicial organ. On the other hand, the ILC deleted from its Draft Articles former Article 19 concerning the definition of international crimes.

Hence, unilateralism plays here an excessive role in case that we try to apply the present rules on State responsibility to situations of succession of States. Some unilateral acts by States consist in sources of international law. i.e. sources of their legal rights and obligations, in spite of the fact that they are not provided in Article 38 of the Statute of the ICJ as such. The matter is here of promise, waiver and of some acts creative of new legal rights but only if not exceeding or infringing particular requirements in general international law.[98]

The above mentioned Article 43 of the ILC Draft Articles provides some non-compulsory rules of notification by an injured State to the potential wrongdoing State, actor of an internationally wrongful act directed against it. Notification, which is not a source of international law, is only a mode of manifestation of will of its author, specifically in written form. Its merit is that its addressee cannot pledge ignorance of notified claim or fact latter on. But as such, it cannot create any legal rights in favour of its author.[99]

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[98] Most of unilateral acts of this kind are envisaged in some rules codified by the 1982 UN Law of the Sea Convention.

[99] See, V.D. DEGAN: *Sources of International Law*, Martinus Nijhoff Publishers 1997, pp.283-286.

In respect of settlement of disputes of this kind with most unilateral elements a world-wide compulsory universal jurisdiction could fit the best. But it must be doubted that the present-date international community of sovereign States will transform into a federation with a network of federal compulsory judicial organs, like that within the United States of America. On the contrary, one of rules of positive international law is that of free choice of means of settlement endorsed in Article 33 of the UN Charter. Any kind of settlement, and especially arbitral and judicial procedures cannot be imposed by one of the disputing party to the other against its will.

The same is with bringing of an actual dispute concerning State succession in matter of State responsibility to the UN Security Council. It must be potentially dangerous for maintenance of international peace and security (Article 33(1) of the Charter). According to Chapter VI, the Security Council cannot order a solution of a dispute against the free will of any of its parties. It can exercise the function of good offices and recommend to the parties appropriate procedures or methods of adjustment (Article 36 (1) of the Charter). Its eventual proposal of the terms of settlement according to Article 37(2) of the Charter is not obligatory to them in law. Any attempts of a permanent Member to impose its will on another State will probably be opposed by the majority in the Council, or by the right of veto of its another permanent Member.

In light of above deficiencies in international legal order our Commission should discuss possible restrictions of the concept of internationally wrongful acts that could be claimed in situations of State succession, and also some requirement that the injured State could reasonably claim reparation from successor States for such acts committed by the predecessor State before the date of State succession. Hence, the unilateralism should be confined by precise legal requirements *de lege ferenda* in order to prevent abuses, just as in case of rules on legitimate countermeasures.

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The second aspect that involves our task is State succession. Both Vienna Conventions, that of 1978 and that of 1983, provide the definition of this legal phenomenon in the same terms. Article 2 (1b) of the first and Article 2 (1a) of the latter Convention provides that: "...'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory".

This definition seems to be hard to understand and too narrow at the same time. It seems more appropriate to comprehend the State succession as *a situation* (or rather a new situations) of territorial changes to which the rules of international law apply. However, the rules of positive international law applicable to these situations of territorial changes are scarce and insufficient.

Nevertheless, in all these situations of territorial changes it is to be distinguished between a "*predecessor State*" (and more of them), "which has been replaced by

another State on the occurrence of a succession of States", and one or more "*successor States*", which have replaced predecessor State (or predecessor States) on the same occurrence.[100]

The most important for our topic are main types of territorial changes that result in application of the rules on State succession, and some precepts of positive law or at least of *lex ferenda* that can be suitable in resolving the succession of States in respect of State responsibility. They are as follows:

(i) The first type is cession. An existing predecessor State transfers a part of its territory to an existing successor State. Cession can be the result of purchase of territories, such as these by the United States of Louisiana from France in 1803, of Alaska from Russia in 1867, and of islands St.Thomas, St.John and St.Croix in West Indies from Denmark in 1916. In 1899 Germany purchased from Spain the Caroline Islands in the Pacific. In these cases purchased territories, together with their population, were rather treated as the object of transactions. Territorial increase or decrease of respective States did not affect the problem of succession of their responsibility in respect of third States.

Most of other kinds of cession of territories were results of defeats in wars. Then treaties of peace as being *lex specialis* resolve all problems of State succession. There would not be very helpful to quote here numerous boundary clauses from many of peace treaties, but no rules of general character from such analysis could be discerned.

(ii) The second and third types of territorial changes are association and uniting. In case of association, i.e. assimilation, the predecessor State wholly becomes a part of another already existing successor State and as a consequence it disappears. The recent example is the German Democratic Republic which in 1990 associated with the Federal Republic of Germany and ceased to exist as an international person. In such a situation it is the successor State which extends its territory and continues its existence as the same legal person.[101]

In case of uniting two or more formerly independent predecessor States unite and form quite a new and larger successor States. An example of this was the uniting of Tanganyika and Zanzibar in 1964 into the Federation of Tanzania. A more recent example was the uniting in 1990 of the Arab Republic of Yemen and the Democratic People's Republic of Yemen into the new State: the Republic of Yemen. In these cases all predecessor States cease to exist as international persons. But unlike an association, the uniting gives rise to quite a new successor State.

In both above situations only one successor State remains and all predecessor States vanish. These are the only situations in which some rules on succession of

[100] *Cf.*, Article 2, 1(c) and (d) of the 1978 Convention, and Article 2, 1(b) and (c) of the 1983 Convention.

[101] In former times there were subjugations of independent States in aggressive wars. Such was the subjugation of Transvaal and Orange by Great Britain in the Boer War between 1899 and 1902.

State responsibility can be of use. In normal circumstances, the unique successor State assumes all assets, liabilities and archives of all predecessor States, and it should by analogy assume responsibility for their acts directed before the date of State succession against third States and their citizens.

Nevertheless, we should examine whether in some circumstances that State could lawfully decline these obligations. Our Rapporteur noted a radical change of government such as transition from a corrupt dictatorship to a new democratic government as a probable cause of refusal of its responsibility for internationally wrongful acts committed during the dictatorship. This is in fact not the problem of succession of States, but of change of government in an existing State. However, a parallel could be perhaps drawn from succession of some kinds of State debts, which Charles Rousseau called "*les dettes de régime*",[102] and Paul Guggenheim "*les dettes de guerre*".[103]

(iii) Separation. On a part of the territory of the predecessor State which continues to exist although territorially reduced, appear one or more new successor States. The process of decolonization in the wake of World War II led to the emancipation of a great number of formerly non-self-governing territories, which dissociated themselves from the United Kingdom, France, the Netherlands, Belgium and finally in 1964 from Portugal. Other examples of separation include: Singapore from Malaysia in 1965; and Bangladesh from Pakistan in 1971. The most recent example is the separation of Eritrea from Ethiopia in 1993. In some situations separation was preceded by a bloody conflict with the colonial power.

I do not know the cases in which even larger former non-self-governing territories, such as Indonesia, India, Algeria, etc, assumed after emancipation any obligation to take part in reparations for internationally wrongful acts of their former master States. If such cases have occurred, they should be examined.

(iv) Dissolution.[104] A larger predecessor State dissolves and ceases to exist. In parts of its former territory appear two or more new successor States. That happened with the Austro-Hungarian and the Ottoman Empires after World War I, and more recently with the demise of Yugoslavia, the Soviet Union and Czecho-Slovakia since 1991. Unlike separation, the predecessor State ceases to exist by its dissolution, and all its successor States are new States.[105]

Here two situations are possible. One is of orderly dissolution by peaceful means and on the basis of agreements between interested States. That was the case for

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[102] Cf., Charles ROUSSEAU: *Droit international public*, tome III: Les compétences, Paris 1977, pp.458-463.
[103] Paul GUGGENHEIM: *Traité de Droit international public*, Tome I, Genève 1953, pp.471-472.
[104] We can neglect in the present analysis **partition,** in which several successor States divide the territory of the predecessor State, which as a consequence ceases to exist. The most notorious historic example was the third and final partition of Poland by Prussia, Austria and Russia in 1795. This type of territorial changes is hardly imaginable today.
[105] Nevertheless, the Russian Federation still preserved its identity and continuity with the former Soviet Union.

instance of dissolution of the Union of Sweden and Norway in 1905, of Czecho-Slovakia in 1992, and of the Union of Serbia and Montenegro in 2006.

On the contrary, dissolution with many cases of separation can be the result of a bloody conflict with many casualties, such as this of the SFRY. Most States endeavour to keep their territorial integrity and political independence against any internal or foreign threat. For this reason any attempts of separation from actual States and of creation of new States meet at least in the beginning the disapprovals by most other States, including those which gained their independence quite recently. This is in fear not to encourage the tendency of secession by some of their own territorial sub-divisions.

It is not unusual that the government in the existing State tries to suppress the rebellion of the national liberation movement seeking independence by the cruelest means at its disposal. At the outset, these criminal acts do not meet the opposition in the international community, including the UN organs.

The national liberation movement in question invokes the right of its "people" to self-determination on its behalf, and it reacts to the crimes already committed by its own unlawful practices. Hence, such a "non-international armed conflict" (or civil war) rapidly deteriorates into a chain of serious breaches of international humanitarian law that affect all the population regardless of their ethnic origin or religious or linguistic differences. It creates the problem of a huge number of refugees to other States or displaced persons inside the State affected by the conflict. It imposes costly measures of relief to civilians and cannot be ignored by the international community anymore. Something similar occurred in the former Yugoslavia.

The problem is of priorities between possible claims of a third State for succession of responsibility by the predecessor State for acts committed against it and its citizen, with claims by victims of genocide, crimes against humanity and large scale war crimes in such a conflict that occurred before and after the date of State succession. Even in case that we agree on a resolution containing "legal inferences" in this subject-matter, should we neglect the compensation to victims of international crimes by the responsible successor State? Or we should clearly establish in our resolution that the claims of these victims have priority over claims by third States for internationally wrongful acts of the predecessor State before the date of State succession.

In conclusion, our proposal to the Institute should take into account all actual legal rules and the political environment in which they should apply. Otherwise, it should be rather an empty nutshell and as such not suitable for a resolution of our Institute.

Mr. Hafner

Before embarking on the questions, I would like to raise or emphasize that some fundamental questions have first to be addressed such as:

a) The distinction between
    a. succession on the side of the responsible State and
    b. succession on the side of the injured State.

Apparently, the right of a successor State to invoke the responsibility of a State that continues to exist considerably differs from the duty of a successor State to answer for injuries of the predecessor State with regard to the injured State that continues to exist.

b) A further issue is the need to distinguish between injuries inflicted upon the State and those inflicted upon individuals. In the latter case, one must take into account the Draft articles on Diplomatic Protection submitted by the ILC to the General Assembly as is already indicated in para 27 of the Preliminary Statement.
c) In this connection, one has also to take into account the existing legal regimes that could have an impact on this issue as is already referred to in para 13 of the Preliminary Statement. Article 33 of the Vienna Convention on the Succession of States in respect of State Property, Archives and Debts of 1983 defines as "State debt" "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law". A duty of compensation under the law of State responsibility certainly falls within this definition. Once the responsibility of a State entailing a duty of compensation has been established, the successor State or States would then be obliged to follow these rules (though this Convention has not yet entered into force, it seems to reflect customary international law to a certain extent), including that on equitable sharing.

1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

The topic covered by the Commission should first be limited to the legal effects of State succession in matters of responsibility for internationally wrongful acts. This is already a daunting task. The enlargement to consequences of not illicit acts would certainly make the task much more complicated and should be reserved for a later stage. Even the Articles on State responsibility left the issue of consequences of such acts open so that any attempt to define the succession in a duty of compensation would first require a definition on whether such a duty does exist.

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

The first approach is the preferred one, irrespective of the need to distinguish between the two categories of States involved. This distinction could also be

couched in the terms of a distinction between succession in the rights and succession in the obligations resulting from state responsibility. Accordingly, it would seem to be useful to stress more strongly the distinction between two cases, namely a) the succession of states in respect of obligations flowing from the wrongful act of the predecessor state and b) the succession of states in respect of rights of the predecessor state flowing from the wrongful act of a third state.[106]

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

The Institut should adopt the notions and categories of State succession employed in the codification work of the ILC to the extent that they are confirmed by subsequent developments in state practice. This seems particularly called for in light of the specific context in which the ILC completed its work (Cold War, latest/final period of decolonization). Thus, the 1983 Convention, which has not yet entered into force, is by some considered to 'neither fully reflect customary law, nor [to have made] new law that would be generally acceptable.'[107] As to whether the Institut should maintain the category of newly independent States depends very much on the scope of application ratione temporis of the draft articles. If they are only future oriented then this category seems redundant. However, if the draft articles should also apply to the past, this category seems necessary.

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

Theory as well as practice seems to confirm that the continuation of the predecessor State has an impact on the regime of State succession and constitutes a particular circumstance in this regime. In this respect, the question around the change from the Soviet Union to the Russian Federation and the emergence of new States most of which now belong to the CIS seems to serve as a particular example.

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by

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[106] See V. Mikulka, 'State Succession and Responsibility', in: J. Crawford/A. Pellet/S. Olleson (eds.), *The Law of International Responsibility* (OUP 2010) 291-296 and V. Mikulka, 'Succession of States in Respect of Rights of an Injured State', in: J. Crawford/A. Pellet/S. Olleson (eds.), *The Law of International Responsibility* (OUP 2010) 965-967.

[107] A. Aust, Introductory Note: Vienna Convention on the Succession of States in respect of State Property, Archives and Debts (available at: http://untreaty.un.org/cod/avl/pdf/ha/vcssrspad/vcssrspad_e.pdf, retrieved in March 2012). Aust criticizes the Convention's 'heavy reliance throughout on equity as a guiding, but supplementary, principle for the distribution and apportionment of tangible property' and the 'undue emphasis on succession of States in the simple case of independence, typically from a colonial power'.

the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

The categories of international wrongful acts as finally codified by the ILC should be maintained. However, they need an adjustment to the particular situations of State succession.

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

In principle, the respective organ of the unit or administrative division becomes a different organ of a new State so that the general rule should apply. However, the question may be raised as to whether there is something like a "localized responsibility" like the "localized debts" insofar as the origin of the responsibility is attached to a certain territory that becomes the new State. A particular issue is the federal State that is dissolved and the individual units become new States. In the framework of State immunity these units are seen as acting on the basis of their own sovereign power (See Article 2(1)(b)(ii) of the UN Convention on Jurisdictional Immunities of States and Their Property of 2004). Transferred to responsibility, that would amount to the possibility of attributing the authorship of responsibility to this unit that once it gained independence would have to assume responsibility for these acts, provided some sort of succession in State responsibility is accepted.

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

One must proceed from the possibility of a joint and several responsibility as it seems that in certain cases this solution seems unavoidable. So, for instance, once the injured State has already invoked the responsibility and claimed compensation and the responsible State has been dissolved, the successor States could come in a situation where they would have to assume such form of responsibility.

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

This question deals with different subjects of international law. On the one hand, there is the people enjoying the right of self-determination, on the other there is the new State and, third, there is the State against which the claim is presented. Accordingly, it Is difficult to give a clear answer. Irrespective of the fact that the right to self-determination is a collective right one could argue that the new State that is formed by the relevant people as a historical consequence of the invocation of this right to self-determination exercise some sort of a right of

diplomatic protection in the interest of these people. But very much depends on against which State this right would be exercised.

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

The question requires first an answer to the question whether this report should also deal with succession in responsibility towards individuals. One could even wonder whether the rights enjoyed by the relevant individual and ensuing from such injury would come close to "acquired rights".

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

The continuing or composite character of an internationally wrongful act plays a certain role. In particular, there are cases where the wrongful act that has been started by the predecessor State is continued by the successor State so that the latter has to assume responsibility for its own acts. It is then to discuss whether the acts performed by the predecessor taken as such already complete the wrongful act. In the affirmative case, the usual rule on State succession in responsibility would apply. The only problem arises if neither the acts performed by the predecessor State nor that by the successor State constitute a wrongful act, but the wrongful act only results from a combination of both. In such a situation very much depends on whether both acts are so interconnected that a separate treatment is excluded. But this depends very much on the individual case.

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

The fact of the State succession can differently influence the different elements of State responsibility insofar as the different cases of State succession can have a different influence on the amount of the responsibility. The different categories of succession must by analyzed separately in order to establish whether succession occurs and in the affirmative case in which manner. If succession in responsibility is envisaged, the result would very much differ depending on whether succession results from a merger, incorporation or dissolution etc.

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

These notions must undoubtedly be taken into account, similar to the succession in debts.

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

Once a judicial decision involving financial compensation has been delivered, a situation arises similar to that of a succession in debts.

Ms. Infante Caffi

1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

I support the idea of widening the scope of our work and to encompass the question of succession in case of damage derived from acts not prohibited under international law.

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

Rights and obligations are a consequence of the hypothesis of international responsibility. Rights and obligations are incumbent on the successor State because of the transmission of responsibility, derived from a contractual situation or from an international wrongful act.

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

This is rather a methodological question and I would suggest to follow the ILC categories as a basis for the study and to incorporate other categories that may seem appropriate in the light of the current practice.

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

It is very relevant, mostly for determining which is the State injured and to whom is the responsibility attributable before the date of succession.

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

I think those categories provide a good basis for our study.

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

It would depend on the circumstances of the case and the structural relationships previously entertained between the latter State and such unit or division.

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

It can. Whenever there has been a benefit or enrichment for a plurality of States.

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

It may be the case of obligations of odious character.

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

In case the predecessor State ceases to exist and the injury has not been satisfied.

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

This situation should not impair the succession to the rights and obligations emerging from the continuing wrongful act.

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

It may be a relevant factor, but I cannot assert at this stage whether the determination of the content and form of the responsibility of a State depends principally from this fact.

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

Yes, they can. I would prefer the use of the concept fair and equitable.

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

This is a very important matter and I would favor the idea that the arbitral or judicial decision is opposable to the successor State.

Mr. Kamto

Cher Marcelo, Merci pour ton rapport préliminaire fort riche et qui laisse clairement apparaître les orientations que vous voulez donner à ce constitue manifestement un des derniers pans du droit international général n'ayant pas encore fait l'objet d'importants travaux de codification.

1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

Si l'on envisage la question uniquement sous l'angle des conséquences de la responsabilité, à savoir l'obligation de réparer, il n'y aurait pas lieu de séparer la responsabilité pour fait illicite de la responsabilité sans acte illicite. Mais le vrai problème est ailleurs.
Pour la responsabilité pour acte illicite, la codification porte pour l'essentiel sur les règles secondaires, alors que pour la responsabilité sans acte illicite il s'agira de formuler pour l'essentiel des règles primaires. C'est ce qui avait amené la CDI à séparer comme vous le savez, la codification des deux types de responsabilité et à les confier à deux rapporteurs spéciaux différents. Comme vous le savez également, la responsabilité sans acte illicite a donné un résultat moins ferme consistant pour l'essentiel en des principes généraux assez souples privilégiant la coopération. Je me demande si en élargissant le sujet à cet aspect-là on ne courrait pas le risque de proposer dans un corpus unique des règles pour régir des responsabilités de source très différentes. Tchernobyl et Fukushima sont des catastrophes environnementales en raison de la propagation des substances radioactives causée dans l'un et l'autre cas ; pour autant ils ne sauraient tomber dans le même régime de responsabilité : dans un cas il est possible de démontrer un fait illicite (négligence, défaut d'entretien par ex.) ; dans l'autre on est face à un phénomène totalement imprévu ou imprévisible). Les deux situations ne sauraient être traitées de la même manière sur le plan de la responsabilité. C'est

pourquoi je suis assez réservé à l'idée de couvrir les deux aspects de la responsabilité dans une seule et même étude.

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

La réponse à cette question dépend de la réponse à la première question.

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

On devrait partir des catégories de la CDI et voir s'il y a lieu à enrichissement au regard de la spécificité du sujet ici traité.

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

Le fait que l'Etat prédécesseur continue d'exister après la date de la succession est un élément très important à prendre en compte, car dans la détermination de l'Etat auteur de l'acte illicite et donc dans l'établissement de la personne responsable.

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

Le travail de la CDI est une base importante et ne devrait d'ailleurs être modifié que pour de très bonnes raisons.

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

Tout dépendra des cas concrets, par exemple du degré d'intégration de ces structures administratives dans la direction de l'Etat prédécesseur, ou au contraire de leur autonomie ; ou encore du fait qu'elles avaient déjà en projet ou non d'accéder un jour à la qualité d'Etat en se détachant de l'Etat prédécesseur.

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

La question est complexe et mérite un examen approfondie, car les réponses peuvent varier au cas par cas.

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

Oui. Il faudrait en étudier minutieusement le régime.

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

Il faudrait éviter toute réponse générale à cette question. Les situations peuvent être très complexes tant en ce qui concerne les victimes que les Etats successeurs.

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

Il faudrait distinguer ici entre deux situations : celle où l'Etat prédécesseur continue d'exister et celle où il a cessé d'exister. Dans le premier cas, il devrait assumer la responsabilité pour le préjudice découlant de l'acte illicite continu ou composé. Dans le second cas la question sera de savoir si l'Etat successeur a agit ou non pour mettre un terme à la violation dont il aura en quelle que sorte « héritée ».

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

Oui, si le fait ou le comportement en question a une influence sur le cours de l'acte illicite ; voir par exemple le cas que nous venons d'envisager dans la réponse à la question précédente.

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

Oui.

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

Toute réponse générale à une question serait hasardeuse et même trompeuse, car elle renvoie à une variété de situations possibles. Cela dépendra en effet de divers éléments tel s que le type de succession (décolonisation ? sécession ? autodétermination ?), de l'objet du litige, des parties à celui-ci, de la survivance ou non de l'Etat prédécesseur etc. Je serai assez réservé à l'idée d'une opposabilité automatique à l'Etat successeur. On peut parfaitement envisager que l'exécution de la sentence arbitrale en question passe par la négociation entre l'Etat successeur et les ceux qui ont obtenus gain de cause devant l'instance arbitrale.

Ms. Lamm

1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

I would suggest to focus only to the responsibility for international wrongful acts and not to deal with the questions of acts not prohibited under international law.

There are considerable theoretical and practical differences between responsibility for international wrongful acts and liability for acts not prohibited under international law. That was reflected in the ILC's Articles on State Responsibility. Several liability issues (e.g. liability for space activities, nuclear liability, etc.) are dealt by international conventions, thus the matter of State succession for these acts not prohibited by international law should be covered by the Convention on State succession in the matter of treaties.

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

I strongly recommend focusing on the approach of the succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State.

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

As a starting point one could depart from the classification of different types of State succession used by ILC and the Institute, however, with much caution and it would be advisable to revise these categories. Especially because the examples are much more complicated than it was reflected in the documents adopted by the above mentioned institutions relatively long ago.

One could have some doubts whether the notion of newly independent State could be used nowadays, and whether this is a distinct category. It is well known that this notion was usually reserved for former colonies achieving independence recently and the ILC conventions on the succession of States by using the clean slate doctrine provided a preferential treatment to those States (with the exception of the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States). Taking into consideration the disappearance of colonial territories and the special circumstances how these territories attained independence; one could see no reason to maintain that special category of State succession.

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

In some cases after the date of succession the predecessor State continue to exist [(see the situation of Serbia and the Genocide case (Bosnia and Herzegovina vs. Serbia)], that could have a particular effect on any succession to the rights and obligations arising from international responsibility.

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

The categories of international wrongful acts as finally codified by the ILC should be maintained.

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

This is a delicate question, and depends on the constitutional system of the predecessor State before the date of State succession. However, if the responsibility of the former administrative unit could be clearly established after the succession it could be held responsible for the consequences of the commission of the wrongful acts.

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

One should be very cautions with joint and several responsibility among the predecessor and the successor(s) States, especially taking into consideration the meaning of the notion of joint and several responsibility in civil law. In international law it is difficult to envisage such cases when the joint and several responsibility of the predecessor and the successor(s) States prevail.

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

In that case one could refer to the international wrongful acts committed either by the predecessor State or by a third State. I do not think that these issues should be covered by general rules and this should be left to the arrangements between the predecessor and the successor State. If there is a general rule the time factor could have a special importance since the question raises, how far should we go back in the history of relations between the predecessor State and the successor State.

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

Here one could envisage two situations depending on who are the victims of the human rights violations, the citizens of a third State or the citizens of the successor State. The answer depends also on whether the predecessor State continues to exist; time factor should be taken into consideration as well.

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

In principle yes, however, different scenarios could be envisaged.

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

Again it depends on the different cases of State succession.

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

Would be cautious with unjust enrichment, but equity could play a role.

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

Yes, provided that there is a succession to the rights and obligations.

Mr. Mahiou

Il s'agit là de remarques très préliminaires pour répondre aux différentes questions posées par notre distingué rapporteur et elles sont de nature à évoluer dans l'avenir. Par ailleurs, loin d'apporter des réponses à toutes les questions posées, elles en ajoutent au contraire d'autres, ce qui montre les incertitudes de la matière et, par conséquent, la complexité et la difficulté du sujet à traiter

1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

La première question relative au champ d'application du sujet à traiter est en quelque sorte la question préalable, car il convient d'abord de délimiter ou baliser le terrain afin de savoir de quoi il s'agit. C'est donc à juste titre que le rapporteur la pose et sollicite le point de vue des autres membres de la Commission avant d'aller plus loin dans son travail d'exploration du sujet.

En même temps, cette question nous renvoie à un débat aussi important qu'ancien, notamment celui qui a lieu au sein de la Commission du droit international et qui a été tranché sur la base des propositions du professeur Roberto Ago en 1969-1970, lorsque le Commission s'est attelé à la responsabilité des Etats. Le rapporteuri avait proposé de s'en tenir, dans un premier temps, au seul aspect de la responsabilité pour acte illicite, renvoyant à plus tard le problème de la responsabilité pour les actes non interdits par le droit international[108]. La Commission l'a suivi dans cette démarche et elle s'est donc préoccupée de cet aspect pour aboutir, à l'issue de très longs travaux (près d'un demi-siècle) et avec la succession de trois autres rapporteurs (W. Riphagen, G. Arrangio-Ruiz et J. Crawford) à l'élaboration du projet adopté en 2001.

Au vu de cette expérience, il semble plus sage d'adopter la même démarche. A l'appui de cette approche, il convient de mentionner les motifs suivants :

- Le thème de la succession d'Etats en matière de responsabilité additionne deux aspects majeurs du droit international, succession d'Etats et responsabilité, qui sont déjà en eux-mêmes à la fois vastes et difficiles.

- Si le droit de la responsabilité pour acte illicite est assez bien circonscrit et permet d'identifier la plupart des règles régissant la matière, il en va différemment du droit de la responsabilité pour les actes non interdits par le

[108] En 1973, la Commission a estimé qu'elle pourrait éventuellement se préoccuper du sujet de la responsabilité dite pour risque, soit après avoir mené à bien le premier travail, soit parallèlement mais de façon séparée (Annuaire de la CDI, 1973vol. II, A/9010/Rev.1, par. 39).

droit international, comme en témoigne l'état des travaux de la Commission du droit international[109].

- Certes, le droit de la succession d'Etats a été codifié, mais on sait que cette codification n'a pas encore recueilli une adhésion suffisante de la communauté internationale pour constituer une base incontestable sur lesquelles pourrait se greffer une réflexion d'ensemble sur les relations à établir entre les règles de la succession d'Etats et celles de la responsabilité internationale au sens large. En effet, alors que les deux conventions ont «été adoptées respectivement en 1978 (succession d'Etats en matière de traités) et 1983 (succession d'Etats dans les matières autres que les traités), elles n'ont obtenu respectivement qu'un peu plus d'une vingtaine de ratifications pour l'une et moins d'une dizaine de ratifications pour l'autre, alors que la communauté internationale compte actuellement près de 200 Etats. Il y a là une donnée préoccupante que l'on ne peut ignorer dès lors que l'on envisage de réfléchir sur les liens entre la succession d'Etats et la responsabilité internationale.

- Inclure la responsabilité pour les actes non interdits par le droit international aboutirait à additionner des règles inachevées et incertaines[110] aux difficultés propres de la succession d'Etats, au lieu de sérier et de traiter ces difficultés les unes après les autres.

Pour l'ensemble de ces raisons, il serait très avisé de faire preuve d'une grande prudence et de faire comme la Commission du droit international en 1970, en traitant d'abord le sujet de la succession d'Etats en matière de responsabilité pour actes illicites. Si, au cours des travaux, il apparaît utile et pertinent de se préoccuper également de l'autre aspect de la responsabilité, l'Institut de droit international aura tout loisir de le faire, parallèlement ou ultérieurement, en fonction de l'expérience tirée de la première étape.

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

On peut se demander si, à ce stade préliminaire, on peut d'ores et déjà distinguer les deux approches et leur portée pratique ou s'il n'est pas prématuré de vouloir y répondre. Il me semble que d'un point de vue théorique, il serait normal d'avoir en perspective les deux aspects, mais que d'un point de vue logique et pratique il faudrait privilégier la première approche. La raison est simple parce que, pour déterminer la qualité d'Etat lésé ou celle d'Etat responsable, il faut au préalable savoir si l'Etat concerné dispose d'un titre pour succéder aux droits et

[109] Voir *La Commission du droit international et son œuvre*, Nations Unies, sixième édition, vol. I, Nations Unies ? New York, 2005, p. 196 et suivantes.

[110] La CDI a finalement décidé de limiter le sujet aux activités dangereuses et de le scinder en deux pour traiter, d'une part, l'aspect prévention des dommages transfrontières (un projet de texte a été adopté et soumis, en 2001, en vue de l'adoption d'une convention à l'Assemblée générale des Nations Unies, laquelle s'est contentée d'en prendre acte) et, d'autre part, l'aspect responsabilité proprement dit mais restreint aux pertes causées par des dommages transfrontières

obligations découlant d'un acte internationalement illicite et revendiquer les conséquences qui en résultent.

Si l'on se reporte à la définition retenue par les deux conventions de 1978 et 1983, il est dit que l'expression succession d'Etats « s'entend de la substitution d'un Etat à un autre Etat dans la responsabilité des relations internationales d'un territoire » (article 2. § 1. al. b). On voit que la définition est plutôt assez vaste et que l'expression « responsabilité des relations internationales » peut correspondre à des situations très diverses. On peut d'ailleurs se demander si la situation est la même selon qu'il s'agit de la succession aux traités ou de la succession dans les autres matières que les traités.

A première vue et sous réserve d'une réflexion plus approfondie, la succession aux traités semble relever davantage de la première approche alors que la succession aux biens, archives et dettes semble relever davantage de la seconde approche.

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

La première observation relative à cette question est qu'elle est formulée de façon trop abstraite et générale, en visant *a priori* toutes les notions et catégories, qu'il est malaisé de répondre de la même façon. En effet, il n'est pas sûr que le problème se pose ou se pose de la même façon pour toutes les notions et catégories.

Donc, si je devais donner une réponse abstraite et générale, il me semble que, même si les notions et catégories utilisées dans les travaux de codification de la CDI sur la succession d'Etats peuvent prêter à discussion, elles demeurent valables et en partie opérationnelles jusqu'à preuve du contraire pour appréhender les effets de la succession d'Etats sur la responsabilité.

Il reste que si, au cours des travaux de l'IDI, des dysfonctionnements ou inadaptations dans l'utilisation de certaines de ces notions et catégories apparaissent effectivement, c'est à ce moment là que l'on pourrait s'interroger sur les voies et moyens d'y faire face.

Par ailleurs, à supposer que certaines notions ou catégories ne soient pas valables ou opérationnelles, il y a un problème de méthode et de démarche pour y remédier. Dès lors qu'il s'agit de révision, comment va-t-on réviser les deux conventions existantes ? Va-t-on les réviser indirectement et par une voie oblique, en élaborant un projet sur la succession en matière de responsabilité ou faudrait-il réviser les conventions elles-mêmes ?

En outre le problème devient encore plus délicat pour la convention de 1978 ; en effet, celle-ci est entrée en vigueur et la révision relève désormais du pouvoir des parties – au demeurant fort peu nombreuses - à cette convention. Enfin, s'il s'agit seulement d'un nombre réduit de notions ou de catégories nécessitant d'être

réexaminées, il me semble possible de les emprunter, mais en les adaptant en fonction des solutions exigées par les règles propres à la succession d'Etats en matière de responsabilité, ce qui permet de maintenir l'intégrité des conventions existantes. Après tout, chaque convention peut déterminer assez librement le sens et la portée à accorder à certaines définitions et expressions pour ses besoins spécifiques. Il n'y aurait apparemment pas d'illogisme ou d'incohérence à procéder de la sorte.

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

Le maintien de l'Etat prédécesseur ne peut pas être neutre sur le sort des droits et obligations découlant d'un acte internationalement illicite et il constitue donc une circonstance particulière à prendre en considération. L'hypothèse d'un partage responsabilité est possible et le problème a été évoqué par la Cour internationale de Justice dans l'affaire du génocide opposant la Bosnie-Herzégovine à l'ex-Yougoslavie sans se prononcer. O en parlera plus longuement en réponse à la dernière question.

Par ailleurs cette quatrième question a un lien avec la dixième question où ma réponse évoque une situation particulière dans le dernier alinéa.

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

Ma réponse sera brève sur cette question puisqu'elle soulève le même problème que celui évoqué à la question 3 et elle appelle donc, toute proportion gardée, la même approche que celle indiquée dans les observations dur la question 3. La différence est que les textes de 1978 et 1983 sont des conventions alors que le texte sur la responsabilité n'a pas un tel statut, ce qui peut faciliter un éventuel réexamen des catégories codifiées par la CDI.

Toutefois, en raison des énormes difficultés que la CDI a dû surmonter et du temps consacré à cette tâche pour aboutir à la codification du sujet de la responsabilité, il n'apparaît pas opportun - du moins à ce stade préliminaire des travaux de l'IDI - de rouvrir le débat sur le relatif consensus et le délicat équilibre ayant présidé aux conclusions de la CDI. Il serait plus avisé, à mon sens, de revenir sur le problème plus tard, dans la mesure où l'on se rendra compte qu'il y a réellement des soucis, avec telle ou telle catégorie élaborée par la CDI, et que ces soucis sont tellement sérieux que les travaux de l'IDI ne pourraient pas avancer.

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later

becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

Il est permis de douter qu'il y ait une réponse univoque à cette question. En l'état actuel du droit international il n'existe pas de solution générale en la matière ; les situations pouvant se présenter sont si diverses qu'il est difficile, voire impossible, de conclure qu'une solution intervenue dans un cas d'espèce est transposable telle quelle à d'autres cas. Les solutions ne peuvent être que pragmatiques en fonction des circonstances de chaque affaire et de ses mérites propres débouchant sur des conclusions pouvant être convergentes ou divergentes.

On peut évoquer à cet égard l'affaire franco-hellénique des phares qui a d'abord fait l'objet de deux arrêts de la Cour permanente de Justice internationale (17 mars 1931 et 3 octobre 1937) avant d'être tranchée par une sentence arbitrale du 24 juillet 1956 ; celle-ci a donné des solutions divergentes pour des comportements d'organes comparables en matière de concession de phares ; en fait, l'analyse des circonstances précises de chaque réclamation a montré que l'identité n'est qu'apparente et que des différences notables impliquaient des approches appropriées et des conclusions divergentes, voire opposées.

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

La réponse à la question 7 est clairement affirmative pour, à peu près, les mêmes raisons que celles évoquées dans ma réponse aux questions 4 et 8. Cela étant, il est fort malaisé d'identifier les circonstances exactes devant prévaloir, tant sur le plan du droit que sur le plan des faits, pour impliquer une pluralité de responsabilités. C'est sans doute à la lumière de la pratique et d'exemples concrets que l'on pourrait envisager les circonstances pertinentes.

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

Cette question appelle au moins trois remarques.

En premier lieu, elle n'est pas suffisamment claire parce qu'elle n'indique pas expressément à l'encontre de quel autre Etat un droit à réparation peut être invoqué. Il est permis de penser que c'est l'Etat (colonisateur ou occupant) qui dominait ce peuple (colonisé ou occupé). Toutefois il est possible qu'un autre ou plusieurs autres Etats puissent être impliqués, à un titre ou un autre, dans cette atteinte au droit à l'autodétermination (cas des membres d'une Alliance militaire intervenant directement ou fournissant une aide pour réprimer un mouvement de libération nationale).

En second lieu, on ne voit pas très bien sur quelle base un nouvel Etat pourrait invoquer un droit à réparation à l'encontre d'un autre Etat par référence à la

notion de peuple. Certes, le droit international reconnaît à chaque peuple le droit à l'autodétermination qui est à la fois un principe politique et un principe juridique que l'on considère maintenant comme une règle impérative du droit international, mais il ne reconnaît pas en soi un droit à réparation pour une atteinte au droit à l'autodétermination. En effet, la réparation vise davantage des individus nommément désignés ou des communautés nettement circonscrites (peuples autochtones, minorités protégées) qui ont subi un dommage clairement identifié et résultant d'actes illicites concrets commis par l'Etat dont la responsabilité est invoquée.

En troisième lieu, il est vrai cependant qu'il y a des biais par lesquels le peuple, en tant qu'entité juridique abstraite, peut se voir reconnaître des droits plus concrets que le classique droit à l'autodétermination et à l'indépendance. C'est le cas où il y a une atteinte au droit du peuple à disposer de ses richesses et ressources naturelles. Ce problème a été porté à l'attention de la Cour internationale de Justice, avec l'affaire des Phosphates de Nauru, lorsque le nouvel Etat a mis en cause la responsabilité de l'Australie à propos de la manière dont ce pays avait géré les gisements de phosphates en tant que puissance mandataire. Toutefois, alors que la Cour a reconnu sa compétence pour trancher la question, l'action n'a pas prospéré puisque les deux Etats sont parvenus à un accord et au désistement.

En quatrième lieu, il y a peut-être un autre biais par lequel le droit du peuple est susceptible de se manifester indirectement, celui des droits de l'homme notamment lorsqu'ils sont l'objet d'une violation massive. C'est le point abordé avec la question 9.

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

On peut, en effet, se poser la question de savoir si un nouvel Etat est en droit de prendre en charge la protection de la partie du peuple victime d'une violation massive des droits de l'homme en vue demander réparation à l'Etat auteur.

Le domaine des droits de l'homme est maintenant assez bien encadré par le droit international, qu'il soit universel ou régional ; il fournit et perfectionne de plus en plus les voies et moyens permettant aux individus ou à certaines communautés de mettre en œuvre des recours pour assurer la protection de leurs droits. Pour le moment ce droit d'action est reconnu aux individus ou communautés et non à l'Etat en tant que tel. L'Etat n'a la possibilité d'intervenir que par le biais de la protection diplomatique qui lui donne le droit de faire valoir les droits de ses ressortissants en cas d'atteinte à ses droits et intérêts vis-à-vis de l'Etat auteur.

Toutefois, en cas de succession d'Etats, un problème particulier se pose, celui du lien de nationalité et des effets de la succession d'Etats sur ce lien, dans la mesure où la personne dont les droits ont été violés a changé de nationalité pour devenir ressortissant du nouvel Etat. Est-ce que ce nouvel Etat peut prendre fait

et cause pour un national qui aurait été lésé par un acte intervenu avant d'acquérir sa nouvelle nationalité ? Il ne semble pas qu'il y ait de solution générale en l'état actuel du droit international et les règles demeurent encore incertaines; bien que des conventions aient tenté d'appréhender le problème. Qu'il s'agisse des deux conventions générales sur la succession d'Etats ou de textes plus particulières comme ceux portant sur la protection diplomatique ou sur la nationalité des personnes physiques en relation avec la succession d'Etats, il n'y a pas encore une base d'accord suffisante pour aboutir à des conventions. Au demeurant, le second volet relatif à la nationalité des personnes morales n'a pas retenu l'attention de l'Assemblée générale des Nations Unies et a finalement été abandonné.

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

Il est normal et logique que le caractère continu d'un acte illicite produise des effets sur les droits et obligations susceptibles d'en découler. Il est déjà clair que, dans le cas où l'acte illicite commis par l'Etat prédécesseur se poursuit avec l'Etat successeur, cela veut dire qu'il y a une succession assumée ; cela ne pose pas normalement de difficulté, dans la mesure où chacun des deux Etats doit assumer la part de responsabilité qui lui incombe pour les dommages causés à un autre Etat.

La situation semble également assez claire dans le cas où l'Etat successeur refuse légitimement toute succession ; ne succédant à aucun droit et à aucune obligation, l'acte illicite de l'Etat prédécesseur ne concerne plus l'Etat successeur.

La situation devient plus complexe si l'acte illicite lui-même a cessé, alors que ses conséquences continuent de se déployer dans le chef de l'Etat successeur. La solution dépendra sans doute de la nature du droit ou de l'obligation en cause et du comportement de l'Etat successeur vis-à-vis de ce droit ou de cette obligation ; selon le cas, la responsabilité de celui-ci pourrait se trouver engagée ou déliée.

Il y a aussi un autre aspect qu'il faudrait envisager, selon que l'Etat successeur est identique à l'Etat prédécesseur ou s'il est simplement continuateur pour certains droits et obligations. Cette distinction entre « identité » et « continuité », assez controversée en droit international, peut resurgir ici et mériter une certaine attention au regard des problèmes de responsabilité.

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

J'avoue ne pas bien voir la portée de cette question et, à ce stade, je n'ai pas de réponse à lui apporter. Si j'ai d'autres idées qui me viennent à l'esprit plus tard, je les indiquerai en temps utile.

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

Bien que les notions d'enrichissement sans cause et d'équité soient très discutées, il me semble normal d'envisager la possibilité de les invoquer dans les cas de succession d'Etats en matière de responsabilité. Il convient de voir si elles sont susceptibles d'avoir quelque utilité ou pertinence, notamment dans les situations où il serait question de réparation en matière biens et de patrimoine impliquant l'Etat prédécesseur et l'Etat successeur.

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

Il me semble que la réponse à cette question a un lien avec la réponse à la quatrième question dont elle constitue, à bien des égards, un aspect plus spécifique en s'attachant aux effets d'une décision judiciaire.

Dans la mesure où il n'existe pas actuellement de règle régissant ce domaine, il faudrait d'abord étudier la pratique des Etats pour savoir si l'on peut repérer des situations concrètes de ce type pour, ensuite, examiner avec toute l'attention requise les éventuelles solutions. N'ayant pas fait personnellement d'investigations particulières, le seul cas que je connaisse où le problème aurait pu se poser est celui de la succession d'Etats née de l'ex-Yougoslavie que je voudrais évoquer ci-dessous.

On sait que l'ex-Yougoslavie a éclaté progressivement pour donner naissance à plusieurs autres Etats dont le dernier en date est le Monténégro qui n'est devenu indépendant qu'en 2006. Autrement dit, à la veille de l'arrêt rendu par la Cour en 2007, le Monténégro était encore impliqué dans le procès puisque c'était la Serbie et Monténégro qui était encore partie. Le dispositif de l'arrêt concerne la Serbie, car il doit viser l'Etat qui est défendeur à la date de l'arrêt rendu par la Cour. A cette date c'est donc bien la Serbie qui est visée en tant qu'Etat continuateur de la Serbie-et-Monténégro, tout comme la Serbie-et-Monténégro a été le continuateur de la RFY. Les comportements examinés et jugés dans cette affaire sont successivement ceux de la RFY, de la Serbie-et-Monténégro et, enfin, de la Serbie à laquelle incombe en conséquence la responsabilité qui en découle.

Cependant, il est intéressant noter que la Cour mentionne expressément, dans son arrêt, la République du Monténégro qui a accédé à l'indépendance le 3 juin 2006, après la clôture des audiences publiques, et qui a indiqué à la Cour, par une lettre du 29 novembre 2006, que ce nouvel Etat n'entendait pas être défendeur dans l'affaire en cause. Il est utile de citer les paragraphes pertinents qui méritent réflexion :

76 « (…). Il résulte clairement des événements relatés aux paragraphes 67 à 69 ci-dessus que la République du Monténégro ne continue pas la personnalité juridique de la Serbie-et Monténégro; elle ne saurait donc avoir acquis, à ce titre, la qualité de partie défenderesse dans la présente instance. Par ailleurs, il ressort de la lettre du 29 novembre 2006 citée au paragraphe 72 ci-dessus qu'elle ne consent pas à la compétence de la Cour, à son égard, aux fins du présent différend. En outre, le demandeur n'a pas prétendu, dans sa lettre du 16 octobre 2006, que le Monténégro serait toujours partie à la présente espèce, se limitant à rappeler sa thèse d'une responsabilité conjointe et solidaire de la Serbie et du Monténégro.
77. La Cour relève donc que la République de Serbie demeure défenderesse en l'espèce ; à la date du présent arrêt, elle constitue, en vérité, l'unique défendeur. En conséquence, toute conclusion à laquelle la Cour parviendrait dans le dispositif du présent arrêt ne pourra être dirigée qu'à l'endroit de la Serbie.
78. Cela étant dit, il convient toutefois de garder à l'esprit que toute responsabilité établie dans le présent arrêt à raison d'événements passés concernait à l'époque considérée l'Etat de Serbie-et-Monténégro.
79. La Cour fait observer que la République du Monténégro est partie à la convention sur le génocide. Toute partie à celle-ci s'est engagée à respecter les obligations qui en découlent, en particulier celle de coopérer aux fins de punir les auteurs d'un génocide ».

Ce paragraphe rappelle les obligations qui s'imposent à la République du Monténégro et peuvent être interprétés comme signifiant que, quand bien même la République du Monténégro n'est pas visée directement par le dispositif, elle n'en demeure pas moins responsable, au titre du droit international, renvoyant ainsi le problème aux règles régissant la responsabilité internationale des Etats, la succession d'Etats en matière de traités et la succession d'Etats en matière de biens, archives et dettes de l'Etat. On peut regretter que la Cour ne soit pas plus précise dans le rappel des obligations de la République du Monténégro, compte tenu des circonstances propres à la présente affaire. En effet, la République du Monténégro est partie à la convention sur le génocide qui lui impose de respecter toutes les obligations y afférentes, notamment celle de poursuivre ou de punir les auteurs d'actes de génocide. Par ailleurs, elle succède aux accords de Dayton qui l'engagent à apporter sa pleine coopération pour la réalisation des objectifs définis dans ces accords. Sans doute, comme le demandeur (la Bosnie-Herzégovine) n'a pas estimé que le Monténégro était toujours partie dans l'affaire, le Cour n'a pas été incitée à aller plus loin dans l'examen du problème de la succession d'Etat et de ses conséquences au regard des actes illicites commis par l'Etat prédécesseur. Par conséquent le problème reste entier.

Mr. Salmon

Cher collègue et ami,

C'est avec plaisir que j'ai pris connaissance de votre rapport préliminaire. L'étude de cette question prenait enfin forme. Vous savez que contrairement à une partie de la doctrine, j'estime depuis longtemps (mon cours polycopié sur la responsabilité internationale de 1985-1986) qu'il y a place à une codification de

la matière de la succession à la responsabilité, même si les sources en sont dispersées et, reconnaissons-le, disparates. C'est ce qui m'a conduit à proposer à la Commission des travaux ce sujet pour mise à l'ordre du jour des travaux de l'Institut. Je me réjouis que l'on vous ai choisi comme rapporteur. N'aviez vous pas dirigé la remarquable thèse de Patrick Dumberry sur la question.

Je partage dans les grandes lignes les observations générales de votre rapport préliminaire : le rejet de la théorie de la personnalisation de la succession ainsi que des analogies tirées du droit pénal interne ou de la notion de tort. Les paramètres que vous indiquez au § 33 me semblent une bonne voie pour explorer la matière.

Ma compréhension de votre questionnaire est que vous attendez de nous plus une confirmation des directions que vous entendez donner à votre rapport général que des vues détaillées sur des questions controversées, puisque nous nous trouvons, dans la procédure travail de l'Institut, avant le rapport par lequel vous allez nous présenter les options possibles en cas de controverses et éventuellement nous soumettre vos positions.

Ceci explique la brièveté générale de mes réponses.

1) Do you consider that the work of the Commission should be confined to the legal effects of State succession in matters of responsibility for international wrongful acts or, rather, should it be extended to encompass questions arising from the damage caused by and other consequences of acts that are not prohibited under international law?

Vous n'avez pas, me semble–t-il, abordé cette question dans vos commentaires. Néanmoins, je tâcherai d'y répondre. La question est en réalité de savoir si le problème de la succession à la responsabilité se pose dans l'hypothèse de la responsabilité sans acte illicite en d'autres termes que ceux de la responsabilité pour acte illicite.

Lors de sa résolution de Strasbourg de 1997 relative à la responsabilité en droit international en cas de dommages à l'environnement, l'Institut a eu l'occasion de bien distinguer la spécificité des ces deux types de responsabilité. Je crois utile de rappeler quelques extraits de cette résolution.

« *Responsabilité internationale pour fait illicite*
Article 3 Les principes du droit international qui régissent la responsabilité internationale pour fait illicite s'appliquent également aux obligations de protection de l'environnement. (…)

Responsabilité pour simple préjudice
Article 4 Les normes de droit international peuvent également prévoir la mise en jeu de la responsabilité de l'Etat pour simple préjudice. Ce type de responsabilité est particulièrement adéquat en cas d'activités ayant un caractère très dangereux et d'activités impliquant un risque ou présentant d'autres caractéristiques similaires.

Le fait qu'un Etat n'adopte pas les règles et n'institue pas les contrôles appropriés prescrits par les régimes en matière d'environnement, même si cette omission n'équivaut pas en tant que telle à un manquement à une obligation, peut engager sa responsabilité pour simple préjudice s'il en résulte des dommages et notamment des dommages provoqués par des opérateurs qui exercent leurs activités sous la juridiction ou sous le contrôle de cet Etat. (…) »

Il en résulte que si dans le cas de la responsabilité pour acte illicite, les conséquences : cessation, réparation, etc. sont des normes secondaires alors que dans la responsabilité sans acte illicite, il s'agit de normes primaires, elles se rejoignent dans l'obligation de réparer. Elles créent donc, l'une et l'autre, des droits pour la victime du dommage, des obligations pour celui qui en est la cause. Il ne semble donc pas que la question de la succession se pose en des termes différents. Ainsi, par exemple, il n'y a pas de différence de ce point de vue entre les demandes faites aujourd'hui contre la Russie à propos des emprunts russes d'avant 1917, et les demandes qui pourraient être présentées contre la Russie à propos des conséquences dommageables résultant de l'accident de Tchernobyl. En conséquence j'estime qu'il faut répondre par l'affirmative à votre question 1.

2) Do you agree with the approach of considering whether there is succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State, instead of whether there is succession to the status or quality of being an injured or a responsible State?

Il me paraît, en effet, plus clair de parler de succession aux droits et obligations résultant d'une succession d'État. Selon les circonstances, il s'agira de droits et obligations de l'État successeur ou de l'État prédécesseur, résultant d'un acte illicite ou – si l'on répond affirmativement à la première question – résultant de la mise en jeu de responsabilité pour simple dommage.

3) Do you consider that the notions and categories of State succession employed in the codification work of the ILC and that of the Institute must be adopted as such, or whether a revision of them may be deemed necessary?

Ce qui caractérise la question dont nous sommes saisis est la grande variété des situations et surtout des catégories juridiques par lesquelles on peut dénicher des hypothèses où la question de savoir si une succession à des droits ou des obligations peut se poser. Ces hypothèses n'ont pas vraiment de rapport les unes avec les autres et relèvent le plus souvent de chapitres divers du droit international.
Ainsi : - acceptation conventionnelle ou unilatérale de la succession relevant de rapports conventionnels ou de la théorie générale de l'accord ;
- permanence de la personnalité juridique de l'État auteur de l'acte illicite ou de l'acte dommageable ou disparition de cette personnalité ;
- la typologie de la CDI dans les conventions sur la succession d'État et l'application de certaines hypothèses comme la succession aux dettes ou l'impact de la liaison avec le territoire de l'objet (par exemple patrimoine culturel) ou de

la cause (par exemple accident portant atteinte à l'environnement) de la succession ;
- les cas découlant des articles sur la responsabilité pour acte illicite (par exemple mouvements insurrectionnels ; l'acte illicite ou l'acte dommageable maintenu par l'État prédécesseur ou successeur) ;
- des principes généraux comme l'équité ou l'enrichissement sans cause ;
- voyez encore les pistes données par le paragraphe 33 de votre rapport et votre liste de paramètres.

En conséquence, les catégories de la CDI ou de l'IDI sont des voies à explorer, mais elles n'ont aucun caractère exhaustif.

4) In your view, the fact that the predecessor State continues to exist after the date of succession is a particular relevant circumstance with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility?

Il s'agit incontestablement d'un facteur à prendre en considération mais qui peut jouer dans des sens divers selon que l'État prédécesseur ait été l'auteur de l'acte illicite ou de l'acte dommageable ou qu'il ait été la victime de ces actes, fait à conjuguer avec le type de succession d'État envisagé : création d'un État successeur par sécession, décolonisation ou transfert d'une partie du territoire de l'État prédécesseur et enfin l'intervention ou non d'un État tiers comme bénéficiaire d'un droit ou débiteur d'une obligation.

5) Do you consider that the categories of international wrongful acts according to the period of time in which they were/are being committed as finally codified by the ILC should be adopted as such, or whether a revision of them may be necessary, insofar as they relate to the subject matter of the Commission?

Pour autant que votre question se réfère à l'article 14 des Articles sur la responsabilité de l'État pour fait internationalement illicite, il me semble, jusqu'à plus ample informé, qu'il faut en tenir compte. Particulièrement le concept de délit continu peut jouer un rôle, encore que de manières diverses : si l'acte illicite de l'État prédécesseur persiste après la succession, l'État successeur victime peut exiger l'exécution de l'obligation sans avoir à invoquer la succession d'État ; s'il fait sien l'acte illicite c'est un cas de succession qui trouve sa source plus dans son propre comportement que dans la succession d'État, celle-ci ne jouant un rôle que si on impute à l'État successeur les dommages antérieurs à la succession.

6) If the responsibility of the predecessor State is engaged for an act accomplished by an organ of one unit or an administrative division, and this unit or division later becomes a successor State, is the latter State obliged to assume the consequences of the commission of the wrongful acts in question?

Il y a une pratique en ce sens dont les contours doivent certainement être examinés

7) Can the possibility of joint and several responsibility among the predecessor and the successor(s) States or between a plurality of successor States be envisaged? If yes, under which circumstances?

La possibilité est envisageable (accords de dévolution par exemple ; situations classiques de responsabilité conjointe). Je suppose que votre rapport contiendra des suggestions à ce propos.

8) Can a newly independent State, created by a people holder of the right of self-determination, invoke a right to reparation for international wrongful acts committed against this people before the date of the State succession?

Cette question telle qu'elle est posée a un caractère général. Je suppose qu'elle se réfère aussi bien à la situation où l'acte illicite a été accompli avant l'indépendance par l'État prédécesseur qui administrait le territoire ayant droit à l'autodétermination que par un État tiers ? La question est complexe et demande un examen approfondi avant de se prononcer. Plusieurs cas concernent des situations où le territoire possédait déjà une personnalité internationale limitée avant sa complète indépendance et s'est vu reconnaître des droits à réparation (ainsi les anciens mandats ou des territoires sous tutelle : Namibie, Palestine, etc.). D'autres situations sont plus problématiques ou résultent de décisions conventionnelles ou unilatérales de l'État prédécesseur à l'égard de son ancienne colonie. [111] à défaut, l'ancienne puissance administrante n'est guère encline à indemniser les victimes des guerres coloniales sur base de l'analogie avec le droit pour un État de réprimer une insurrection. Les accords d'Évian rendait l'Algérie indépendante responsable des actes « terroristes » du FLN, position compatible avec la position de la CDI sur l'imputation des actes illicites des insurgés qui triomphent, mais pas l'inverse. Les violations du droit humanitaire ou de la prohibition de la torture et plus largement des droits de l'homme pourraient aujourd'hui jouer un rôle accentué.

9) Can a successor State be obliged to provide reparation for human rights violations committed by the predecessor State before the date of the State succession? If yes, under which circumstances?

La question fait supposer qu'un des paramètres par lequel il faut approcher la question de succession aux droits et obligations de la responsabilité internationale pourrait être *la matière* sur laquelle porterait l'acte illicite. Je ne vois pas, pour ma part, sur quel fondement, on pourrait distinguer les obligations découlant des violations des droits de l'homme, en tant que tels, des autres obligations.
Ceci étant, quelques distinctions semblent devoir être opérées. La responsabilité de l'État successeur ne paraît pouvoir être engagée que dans le cas où l'État prédécesseur n'existe plus, sinon c'est la responsabilité de ce dernier qui perdure.

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[111] Incidemment je n'ai pas compris sur quoi portait exactement votre critique elliptique dans votre rapport préliminaire au paragraphe 15 à propos de la résolution de l'Institut de 2001 sur la succession en matière de biens et de dettes.

Tout dépend aussi de savoir qui est la victime de l'acte illicite avant la date de succession :
a) lorsque c'est un ressortissant d'un État tiers : l'État successeur reprend les droits et obligations de l'État prédécesseur dans diverses situations
- en cas d'unification, de dissolution ou d'incorporation ;
- s'il les accepte par traité ou autrement ;
- s'il maintient l'acte illicite (délit continu) :
- s'il est bénéficiaire de la violation (par exemple confiscation, réquisition de biens, spoliation), etc.
b) lorsqu'il s'agit d'un ressortissant du nouvel État indépendant, on tombe dans l'hypothèse des droits d'un ressortissant agissant contre son propre État ce qui suppose des circonstances particulières (convention générale de protection des droits de l'homme).

10) Can the fact that an internationally wrongful act has a continuing or composite character, where the starting date of this internationally wrongful act preceded the date of the State succession and continued or was performed after this date, play a role in the State succession of rights and obligations emerging from it?

Acte illicite continu ou composé commençant avant la date de la succession et se poursuivant ou prenant sa forme définitive après la succession.

La question ne précise pas s'il s'agit d'un acte de l'État prédécesseur ou d'un État tiers. Je suppose que seule la première éventualité est envisagée. Cet acte est donc complètement étranger à l'État successeur sauf si ce dernier le fait sien d'une manière ou d'une autre, chaque État étant responsable de ses propres actes illicites.
Si l'acte illicite de l'État prédécesseur a un caractère continu car il se poursuit après la date de succession et que l'État prédécesseur continue à exister, il est, en principe seul responsable. A fortiori s'il s'agit d'une succession de comportements qui ne deviennent un acte illicite que postérieurement à la date de succession.
Si l'État prédécesseur cesse d'exister et que l'État successeur poursuit la violation il est responsable de ses propres actions. À défaut, ce n'est que par consentement pour éviter un déni de justice que le successeur pourrait indemniser la victime.

11) Can the fact of the State succession itself influence the determination of the content and forms of the responsibility engaged? In other words, can the content and form change by virtue of the State succession?

La formulation de la question est très abstraite et, je l'avoue, assez obscure. Qu'entendez-vous par « contenu de la responsabilité » ? Les articles 28 à 41 des Articles de la CDI (2001) ? Soit les conséquences de la responsabilité ? Quid des « formes de la responsabilité » ? Je ne vois pas non plus à quels paragraphes de votre exposé préliminaire cette question se rapporte ni la portée concrète de cette question. Je suppose que vous reviendrez sur la question de manière plus précise.

12) Can the notions of unjust enrichment and equity play a role in the matter under consideration?

Oui cela me paraît être une solution subsidiaire équitable, à défaut d'autre moyen pour obtenir une réparation. Voyez, par exemple la résolution de l'IDI à Vancouver sur la succession d'États en matière de biens et de dettes, articles 8, 11 et 13.

13) If, before the date of State succession, an arbitral award or a judgment has determined the content and form of the responsibility emerging from an internationally wrongful act and the decision has not yet been executed, could this decision in the award or judgment be opposable to the successor State, assuming there is succession to the rights and obligations emerging from the international wrongful act in question?

Cela dépend du type de succession, des parties à cet arbitrage, du maintien ou non de la personnalité de l'État prédécesseur, etc. En matière de succession aux dettes c'est un moyen de rendre celles-ci liquides, pour autant que cela soit pertinent en l'espèce.

N.B je vous rappelle, en liaison avec le § 27 de votre exposé préliminaire, l'article 1 de la résolution de l'Institut de droit international sur « Le caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu » (Session de Varsovie – 1965)

« a) Une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu peut être rejetée par 1'Etat auquel elle est présentée si elle ne possède pas le caractère national de 1'Etat requérant à la date de sa présentation comme à la date du dommage. Devant la juridiction saisie d'une telle réclamation, le défaut de caractère national est une cause d'irrecevabilité.
b) Une réclamation internationale présentée par un Etat nouveau en raison d'un dommage subi par un de ses nationaux avant l'accession à 1'indépendance de cet Etat, ne peut être rejetée ou déclarée irrecevable en application de 1'alinéa précédent pour la seule raison que ce national était auparavant ressortissant de l'ancien Etat. »

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