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Fourth report on succession of States in respect of State responsibility

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Contents

Page

Part One – Introduction . . . 2
I. Overview of the work on the topic . . . 2
A. Summary of the debate in the Sixth Committee . . . 3
B. General approach (methodology) of the report . . . 5
Part Two – Impact of succession of States on forms of responsibility . . . 7
II. General issues . . . 7
III. Impact of succession of States on forms of responsibility . . . 10
A. Problems arising in relation to different forms of reparation . . . 10
1. Restitution . . . 10
2. Compensation . . . 14
3. Satisfaction . . . 19
B. Cessation and non-repetition . . . 26
1. Cessation . . . 27
2. Excurse: composite acts . . . 29
3. Assurances and guarantees of non-repetition . . . 32
Part Three – Future work . . . 36
IV. Future programme of work . . . 36
Annex – Text of the draft articles proposed in the fourth report . . . 37

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Part One – Introduction

I. Overview of the work on the topic

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

2. In the light of the debate in the Commission and in the Sixth Committee in 2017, for the seventieth session (2018), the Special Rapporteur prepared his second report which included seven new draft articles,[2] namely draft article 5 (Cases of succession of States covered by the present draft articles), draft article 6 (General rule), draft article 7 (Separation of parts of a State), draft article 8 (Newly independent States), draft article 9 (Transfer of part of the territory of a State), draft article 10 (Uniting of States) and draft article 11 (Dissolution of State). Those articles mainly address the issue of the possible transfer of obligations arising from internationally wrongful acts of the predecessor State. At both the sixty-ninth and seventieth sessions, the Commission considered the reports during the second part of its session, in July 2017 and 2018 respectively, and referred all draft articles to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft articles 1, 2, 5 and 6, as provisionally adopted by the Committee.

3. At its seventy-first session (2019), the Commission considered the third report of the Special Rapporteur.[3] In that report, the Special Rapporteur discussed, in addition to certain general issues (Part One), questions of reparation for injury resulting from internationally wrongful acts committed against the predecessor State, as well as against the nationals of the predecessor State. Consequently, he proposed draft article 12 (Cases of succession of States when the predecessor State continues to exist), draft article 13 (Uniting of States), draft article 14 (Dissolution of States) and draft article 15 (Diplomatic protection). Further, the Special Rapporteur made technical proposals in relation to the structure of the draft articles, including new draft articles X and Y (to be renumbered eventually) that concerned the scope of Part II and the scope of Part III. All the proposals were referred to the Drafting Committee.

4. Members of the Commission generally welcomed the third report and expressed appreciation for the memorandum by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.[4] Regarding the methodology and general aspects of the report, several members commended the Special Rapporteur's survey of relevant State practice, jurisprudence and doctrine,

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

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

[3] Third report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur (A/CN.4/731).

[4] Succession of States in respect of State responsibility: information on treaties which may be of relevance to the future work of the Commission on the topic: memorandum by the Secretariat (A/CN.4/730).

while others called for caution against overreliance on academic literature. Members agreed with the Special Rapporteur on the subsidiary nature of the draft articles and on the priority to be given to agreements between the States concerned. While some members supported the flexible approach of the Special Rapporteur, others underlined the need to clarify whether such an approach would deviate from the so-called "general rule" of non-succession. It was also proposed that the Commission expressly indicate that it was engaging in progressive development of international law when proposing draft articles. Some members also reiterated the importance of maintaining consistency, in terminology and substance, with the previous work of the Commission, in particular in relation to provisions in the 1978 Vienna Convention on succession of States in respect of treaties,[5] and the 1983 Vienna Convention on succession of States in respect of State property, archives and debts,[6] as well as the articles on responsibility of States for internationally wrongful acts[7] and the articles on diplomatic protection.[8] As to the title of the topic, several members suggested changing the title to "State responsibility problems/aspects in cases of succession of States", as suggested in a debate in the Sixth Committee, or to "Succession of States in matters of international responsibility", as used by the Institute of International Law. Several other members indicated their preference for retaining the current title of the topic.

5. Although in 2019 the Commission had considered the Special Rapporteur's third report only during the second part of its session, it had reverted, at the Special Rapporteur's request, to its traditional method of work. Since the Special Rapporteur had prepared some draft commentaries between sessions, the Commission was able to adopt provisionally draft articles 1, 2 and 5, with commentaries thereto.[9] Further, the Drafting Committee continued, but did not complete – due to a lack of time – its consideration of other draft articles referred to it thus far. Before the end of the 2019 session, the Chair of the Drafting Committee presented an interim report on draft articles 7 (Acts having a continuing character) and 8 (Attribution of conduct of an insurrectional or other movement), as well as on draft article 9, which had resulted from a merger of three originally proposed articles addressing cases of succession of States when the predecessor State continues to exist.[10]

A. Summary of the debate in the Sixth Committee

6. In the course of the debate in the Sixth Committee of the General Assembly in 2019, a number of delegations commented on the Commission's report on the topic, including the third report of the Special Rapporteur, as well as the future programme of work on the topic.[11] The delegations that took the floor with respect to this topic generally welcomed the third report. In particular, most States agreed with the Special Rapporteur's approach based on the view that the draft articles were subsidiary in nature and that priority should be given to agreements between the States concerned, as stated in draft article 1, paragraph 2.

[5] United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.
[6] A/CONF.117/14.
[7] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.
[8] *Yearbook ... 2006*, vol. II (Part Two), p. 26, para. 50.
[9] See the report of the Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 117–118.
[10] See the 2019 statement of the Chair of the Drafting Committee, available from the website of the Commission, documents of the seventy-first session: https://legal.un.org/ilc/ilcsessions.shtml.
[11] See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session, prepared by the Secretariat (A/CN.4/734).

7. It is noteworthy that all delegations that expressed their views regarding draft articles 1, 2 and 5, as provisionally adopted with commentaries, supported them. This positive view on both the traditional method of work (facilitating transparent and inclusive cooperation between the Commission and the Sixth Committee)[12] and the content of the above draft article is important, notwithstanding the statement of one country that welcomed draft article 1 and had no objection to other draft articles, noting that they did not touch upon potentially problematic aspects of the topic.[13]

8. Most delegations (Cuba, Egypt, India, the Islamic Republic of Iran, Jamaica, the Netherlands, the Republic of Korea, Romania, Slovakia, Slovenia, Sudan and Turkey) pointed out that the work of the Commission should maintain consistency, in terminology and substance, with its earlier work, namely with the Vienna Convention on succession of States in respect of treaties and the Vienna Convention on succession of States in respect of State property, archives and debts, as well as other outcomes, including the articles on responsibility of States for internationally wrongful acts and the articles on diplomatic protection. Indeed, this is also the intention of the Special Rapporteur, who will address that point in the next section of the report. More specifically, with respect to the structure of draft articles, one delegation suggested that the Commission should take its cue from the Vienna Convention on succession of States in respect of State property, archives and debts, which was organized by categories of succession.[14]

9. Another general issue that was raised in the debate concerns the scarcity and diversity of State practice and, consequently, the nature of the rules reflected in the draft articles. While most delegations shared the view, recognized also by the Special Rapporteur, that relevant State practice was sparse and context-specific, they arrived at different conclusions. Some delegations supported the balanced and prudent approach of the Special Rapporteur (Estonia, Jamaica, Malaysia, Mexico, the Nordic countries, Portugal, Sierra Leone, Slovakia, Slovenia and Viet Nam). Other delegations (Cuba, the Islamic Republic of Iran, Italy, the Netherlands, Romania and the United States of America) seemed to recognize the usefulness of the topic as a matter of progressive development of international law. Finally, few delegations (Austria, the Russian Federation[15] and the United Kingdom of Great Britain and Northern Ireland[16]) expressed doubts about the existence of trend towards the formation of rules of international law in respect of the topic.

10. However, the statement by Austria seems to be based on a presumably proposed rule of automatic succession.[17] On balance, some other delegations did not interpret the report and proposed draft articles in this manner (Cuba, Jamaica, the Netherlands, the Nordic countries, Portugal, Slovenia and Viet Nam). Instead, they appreciated that the report did not assert any automatic succession to rights and obligations arising from internationally wrongful acts. One delegation even found some proposed solutions insufficient, as it interpreted draft article 9, paragraph 2, as amended by the Drafting Committee, as an expression of the "clean slate" principle.[18] The Special

[12] As expressed, for example, by Norway, speaking on behalf of the Nordic countries (*Official Records of the General Assembly, Seventy-fourth session, Sixth Committee, 31st meeting* (A/C.6/74/SR.31), para. 66).

[13] Statement by the Russian Federation (*ibid., 32nd meeting* (A/C.6/74/SR.32), para. 72).

[14] *Ibid.*, para. 74.

[15] *Ibid.*, para. 67.

[16] *Ibid.*, paras. 9–10.

[17] *Ibid., 31st meeting* (A/C.6/74/SR.31), paras. 80–83.

[18] See the statement by the Czech Republic: "It would be wrong to suggest that, in such situations, talks between the injured State and the successor State should start from a 'clean slate'. Paragraph 2 was thus disappointing and should be revisited, to strengthen and protect the position of the injured State" (*ibid.*, *32nd meeting* (A/C.6/74/SR.32), para. 101).

Rapporteur will of course take into consideration all comments and address them in the general and methodological section of the report.

11. Regarding the form of the final outcome, some States clearly supported the form of draft articles, did not question it or preferred to leave a decision on their form to a later stage of the work (the Czech Republic, Cuba, Italy, Mexico, the Netherlands, the Nordic countries, Portugal, Sierra Leone, Slovakia and Sudan). Other delegations suggested another form, such as draft guidelines or principles (the Islamic Republic of Iran, Romania and the United States), guidelines or conclusions (Belarus) or an analytical report (the Russian Federation).

12. As to comments on individual draft articles contained in the third report, divided views were expressed on the proposal of draft article 15 (Diplomatic protection). Delegations generally supported this provision, while some delegations stressed that it was crucial to maintain consistency with the articles on diplomatic protection (Estonia, India, Malaysia and Slovakia). A few delegations were against the inclusion of this draft article (Austria and the Netherlands).

B. General approach (methodology) of the report

13. In the light of some views expressed during the debate on the topic during the Commission's seventy-first session (2019), and views expressed by some delegations in the Sixth Committee during the consideration of the topic, the Special Rapporteur finds it useful to revert to some general aspects of the topic. The Special Rapporteur welcomes all comments: they are an indispensable part of the rigorous analysis of complex legal issues inherent to the topic and contribute to the advancement of the work. They provide invaluable feedback and guidance for future work. They may also be indicative of the need for further clarifications and elimination of possible misunderstandings. The Special Rapporteur will address these comments and suggestions when dealing with the issues to which they primarily relate. At this point, he wishes to touch upon those that have broader ramifications for the topic.

14. At the outset, the Special Rapporteur recalls the general considerations summarized in seven points in his third report to inform further work on the topic.[19] They remain fully relevant even for the present report. Of course, they are without prejudice to the continuing work of the Drafting Committee on the draft articles referred to it during past sessions of the Commission.

15. The first conclusion on the subsidiary nature of draft articles and priority of agreements between the States concerned has been largely supported by members of the Commission and States in the debate in the Sixth Committee. This is also fully reflected in draft article 1, paragraph 2, provisionally adopted by the Commission. In these circumstances, there is no need to revisit this consideration.

16. This is also true, to a large extent, for the second conclusion that this topic must preserve consistency, in terminology and substance, with the previous works of the Commission. This sentiment was expressed by many delegations in the Sixth Committee. It is important to point out that such consistency is fully evident in draft articles 1, 2 and 5, as provisionally adopted by the Commission. With respect to the other articles already proposed, the continuing debate in the Drafting Committee and the outcome thereof will certainly assuage some doubts, for example, regarding draft article 15 (Diplomatic protection).

[19] Third report on succession of States in respect of State responsibility (A/CN.4/731), paras. 17–23.

17. Nevertheless, the point on consistency has also much broader ramifications. For example, the rules of the Vienna Convention on succession of States in respect of State property, archives and debts may be viewed as closely related to those on obligations arising from internationally wrongful acts. It is worth noting that such rules provide that the issue is to be settled by agreement between the States concerned. In the absence of such an agreement, in cases of dissolution of States, separation, cession and transfer of territory, the debts of the predecessor State "pass to the successor State[s] in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State[s] in relation to that State debt".[20]

18. The concept of equity, equitable proportion or distribution of rights and obligations seems to be important. It was even described as "the key … to the entire problem of State succession".[21] Even though the Special Rapporteur does not assert, under the argument of consistency, a mechanical transposition of rules applicable to State debts to those on succession in respect of State responsibility, such rules, in particular the concept of equitable proportion, may inform not only the continuing debate in the Drafting Committee, but also the new draft articles proposed in the present report.

19. More importantly, the topic will be consistent with the articles on responsibility of States for internationally wrongful acts that are largely considered as reflecting customary international law.[22] As the Special Rapporteur had pointed out in his third report, the non-conclusiveness of State practice does not mean that the responsibility for an internationally wrongful act "stops at the door of succession of States".[23] On the contrary, such rules continue to apply but their application may be affected by succession of States. While the second and third reports dealt with the question of if and under which circumstances obligations and rights arising from internationally wrongful acts may pass to a successor State or States, the present report will address the content and forms of State responsibility. It builds on general rules of State responsibility. However, the report and new draft articles to be proposed must shed more light on the impact of succession of States on legal consequences of State responsibility, in general, and various forms of reparation, in particular.

20. This also relates to the third general point aimed at clarifying the Special Rapporteur's approach. The acknowledgment of the fact that "State practice is diverse, context-specific and sensitive" should not be abused in a way that makes virtually impossible not only codification, but also any meaningful debate on succession of States in relation to international responsibility. The occurrence of succession of States is relatively rare or at least less frequent than, for example, diplomatic relations, treaty practice or other transactions usual in inter-State relations. It implies, quite obviously, that the requirement of general practice as an element of

[20] Articles 37, 40 and 41 of the Vienna Convention on succession of States in respect of State property, archives and debts.

[21] See D. P. O'Connell, *The Law of State Succession*, Cambridge University Press, 1956, p. 268. See also V. D. Degan, "Equity in matters of State succession", in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya*, Dordrecht, Martinus Nijhoff, 1993, pp. 201–210, at p. 207; and W. Czaplinski, "Equity and equitable principles in the law of State succession", in M. Mrak (ed.), Succession of States, The Hague, Martinus Nijhoff, 1999, pp. 61–73, at p. 72.

[22] See, for example, *Archer Midland Company and Tate and Lyle Ingredients Americas, Inc.* v. *The United Mexican States, Case No. ARB(AF)/04/05, Award of 21 November 2007*, International Centre for Settlement of Investment Disputes (ICSID), para. 116; and *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania, Case No. ARB/05/22, Award of 24 July 2008*, ICSID, paras. 773–774. See also P. Daillier, "The development of the law of responsibility through the case law", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 37–44, at pp. 41–44.

[23] Third report on succession of States in respect of State responsibility (A/CN.4/731), para. 19.

identification of customary international law cannot be applied too strictly. Otherwise, no codified rules on succession of States would be possible even in other areas, such as succession in respect of treaties or in respect of State property, archives and debts.

21. In particular, one cannot but reiterate the fact that the paucity or non-conclusiveness of State practice does not allow the existence of the "clean slate" principle to be asserted as a legal basis governing the relations between States in general,[24] nor is the opposite principle of automatic succession acceptable as a general rule. This does not question in any way the applicability of the "clean slate" principle when the successor State is a newly independent State, unless an agreement between them provides otherwise.[25]

22. The specific feature of law of State succession is that, in most cases, a solution of difficult legal problems was reached by agreements. Such agreements are numerous, as evidenced in the memorandum by the Secretariat,[26] and constitute State practice. They should not be discarded by labeling them as specific to the historical, political and cultural contexts. This exclusion would be one-sided and objectionable, as it omits the existence of other possible motives, such as peaceful settlement of disputes, equity and reasonableness. Moreover, such an argument could easily apply to any treaty and even any customary rule of international law. All rules of international law have been driven by more or less express political motivations or considerations without losing their legal nature.[27] In spite of their specificity, such agreements make it possible to discern certain common elements that can provide a basis for general but subsidiary rules that apply only in the absence of a special agreement between the States concerned.

Part Two – Impact of succession of States on forms of responsibility

II. General issues

23. The present report will focus on the impact of succession of States on forms of international responsibility of States. Consistent with the 2001 articles on responsibility of States for internationally wrongful acts, this report will address all forms of responsibility and all legal consequences that may be applicable even in situations of succession of States. These consequences are described as giving rise to a "new legal relationship which arises upon the commission by a State of an internationally wrongful act".[28]

24. Obviously, the present topic will focus primarily on forms of reparation, as this is the key issue in situations of succession of States. The applicability of different

[24] *Ibid.*, para. 19.

[25] See article 38 of the Vienna Convention on succession of States in respect of State property, archives and debts. See also draft article 9 of the present draft articles (Cases of succession of States when the predecessor State continues to exist), where the solution for a newly independent State is consistent, in substance, with article 38 of the Vienna Convention on succession of States in respect of State property, archives and debts.

[26] Succession of States in respect of State responsibility: information on treaties which may be of relevance to the future work of the Commission on the topic: memorandum by the Secretariat (A/CN.4/730).

[27] On a theoretical level, see M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument*, reissue with a new epilogue, Cambridge University Press, 2005, pp. 590–591 and 613–615.

[28] *Ibid.*, p. 86, para. (1) of the commentary to Part Two of the articles on responsibility of States for internationally wrongful acts.

forms of reparation *in concreto* largely depends, not only on the transfer or not of obligations and rights arising from responsibility (which was discussed in the second and third reports and the draft articles proposed thus far), but also on the material (factual) possibility of responsible States providing reparation in a given form. In other words, the analysis and new draft articles in the report should duly take into account both *legal* limitations and *material reality* arising from the fact of succession. Both factors have an impact on the feasibility of different forms of reparation by a predecessor State and/or a successor State or States.

25. Put differently, the report aims to maintain consistency with the articles on responsibility of States for internationally wrongful acts, including the rules concerning forms of responsibility. It bears on conclusions from the debate on a possible transfer of obligations or rights in different categories of succession of States. First, it respects the continuing applicability of general rules of State responsibility with respect to a predecessor State, subject to material impossibility for that State to provide a specific form of reparation. Second, it recognizes special circumstances that warrant certain forms of reparation by a successor State or States.

26. The sections of the report and respective draft articles do not mirror the categories of succession or the distinction between the cases where the predecessor State does or does not continue to exist. Instead, they follow general forms of legal consequences of internationally wrongful acts. Consequently, the draft articles and the underlying analysis should reflect that there are two sets of consequences under the modern law of State responsibility, which suggests distinguishing between reparation in the narrow sense[29] and its three forms – restitution, compensation and satisfaction[30] – and the obligation of cessation and non-repetition.[31] In its judgment in *Armed Activities on the Territory of the Congo*, the International Court of Justice clearly distinguished the question of the offering of assurances and guarantees of non-repetition from the question of reparation of the injury suffered.[32]

27. Unlike the articles on State responsibility for internationally wrongful acts, this report will focus on the three forms of reparation first, as they are generally applicable. On the one hand, even in situations of succession of States, a predecessor State or successor State or both, if appropriate, should be under obligation to make reparation in one or more forms. Which forms, if any, can be meaningfully invoked by or against a predecessor or successor State depends on factual circumstances of the case. On the other hand, the obligations of cessation and assurances and guarantees of non-repetition require more in-depth analysis as to whether they may apply in situations of succession of States. This is because they are contingent on several legal and factual conditions, such as whether the obligation breached continues to be in force for the State in question and whether the wrongful act is of a continuing nature.

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[29] See article 31 of the articles on responsibility of States for internationally wrongful acts:
"1. The responsible State is under an obligation to make full reparation for the injury caused the internationally wrongful act.
"2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State" (*ibid.*, p. 91).

[30] See articles 35, 36 and 37 of the articles on responsibility of States for internationally wrongful acts, *ibid.*, pp. 96–107. Their content will be addressed later.

[31] See article 30: "The State responsible for the internationally wrongful act is under an obligation:
"(*a*) to cease that act, if it is continuing;
"(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require" (*ibid.*, p. 88).

[32] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports*, 2005, p. 168, at pp. 255 *et seq*. See also *LaGrand (Germany* v. *United States of America), I.C.J. Reports 2001*, p. 466, at p. 513, para. 125.

28. Therefore, the present report will focus first on forms of reparation in situations of succession of States. Then, it examine the possible impact of succession of States on other obligations arising from internationally wrongful acts.

29. Before addressing the forms of reparation, one general issue warrants a brief comment. It is an alleged contradiction between the principle of full reparation, firmly embodied in the law of State responsibility,[33] including in the articles on responsibility of States for internationally wrongful acts,[34] and the practice of lump sum agreements. The question was also raised in the plenary debate of the Commission during its seventy-first session in 2019. According to some members of the Commission, the relationship between a lump sum agreement concluded before the date of succession of States and the principle of full reparation should be discussed. In this regard, the view was expressed that the existence of a lump sum agreement did not necessarily indicate full reparation.[35]

30. This is relevant because, in cases of succession of States, more often than not, agreements reached between the States concerned do not provide for full reparation but rather for a settlement typical of lump sum agreements. Indeed, lump sum agreements, where a sum of money is paid in settlement of the whole claim, are relatively frequent in international practice.[36] This is also true in many cases that are not related to the succession of States.

31. On a general level, two observations can be made. First, while such agreements also constitute State practice, that practice varies and is driven by many non-legal considerations. Therefore, although they are valid international agreements, it may be difficult to draw inferences on customary international law from such agreements.[37] Second, while the principle of full reparation remains a general rule of customary international law, the rule is of dispositive and not of peremptory (*jus cogens*) nature. Therefore, the States concerned are free to arrive at an agreement that provides less than full reparation. In particular, the position of the injured State is key, as it is *dominus negotii*. It can waive its claims entirely or present them only for a certain quantum.[38]

32. This consideration is fully applicable even in situations of succession of States. Moreover, in this particular topic, the subsidiary nature of draft articles and priority of agreements between the States concerned must be reiterated. Any solutions reached by the States concerned do not revise or put in question general rules of State responsibility. Even the proposed draft articles, while preferring full reparation, also accept, as a matter of *lex specialis*, various kinds of agreements between the States

[33] This is notwithstanding the rather soft formula in the *Chorzów Factory* case: "It is a principle of international law that the breach of an engagement involves the obligation to make reparation in an adequate form" (*Case concerning the Factory at Chorzów, Judgment No. 8 (Claim for Indemnity) (Jurisdiction) of 26 July 1927, P.C.I.J., Series A*, No. 9, p. 1, at p. 21). The principle of full reparation was upheld in, for example, *Armed Activities on the Territory of the Congo* (see footnote 32 above), at p. 257, para. 259; or in *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011*, ITLOS Reports 2011, p. 10, at p. 62, para. 194.

[34] See article 31 of the articles on responsibility of States for internationally wrongful acts (footnote 29 above).

[35] See the report of the Commission on the work of its seventy-first session (footnote 9 above), p. 301, para. 90.

[36] See, for example, R. B. Lillich and B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements*, vols. 1–2, New York, University Press of Virginia, 1975; and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975–1995*, Ardsley (NY), Transnational Publishers, 1999.

[37] See R. Kolb, *The International Law of State Responsibility: an Introduction*, Cheltenham, Elgar, 2017, p. 155.

[38] *Ibid.*, p. 149.

concerned on how to address the injury for which the injured State did not receive full reparation before the date of succession of States.

33. The present topic does not envisage the succession of States in respect of State responsibility as a transfer of the responsibility as such, but as a transfer of rights and obligations arising from international responsibility of a predecessor State.[39] Judge *ad hoc* Kreća reached the same conclusion in his separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*.[40] This conclusion is also supported by draft article 6 (No effect upon attribution), provisionally adopted by the Drafting Committee. In addition, this is not an automatic succession (as the responsibility generally rests with the predecessor State), but rather a transfer depending on the existence of special circumstances.

III. Impact of succession of States on forms of responsibility

A. Problems arising in relation to different forms of reparation

34. The topic addressing the forms of responsibility in situations of succession of States should focus primarily on the impact of succession on reparation in all its forms. The principle of full reparation and primacy of restitution was set out, in a classical form, in the *Chorzów Factory* case. According to this judgment, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if it is not possible, payment of a sum corresponding to the value which a restitution in kind would bear".[41]

1. Restitution

35. The primary remedy or priority form of reparation in international law is restitution.[42]

36. This traditional doctrine was, in principle, reaffirmed by the Commission in its articles on responsibility of States for internationally wrongful acts, in particular in its article 35.[43] However, the wording of article 35, namely the exceptions of "material impossibility" and "burden out of all proportion", indicates the adoption of a flexible approach. This is reflected also in the commentary where the Commission, despite its

[39] See the first report of the Special Rapporteur on succession of States in respect of State responsibility (A/CN.4/708), para. 75.

[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, Separate Opinion of Judge* ad hoc *Kreća, I.C.J. Reports 2015*, p. 3, at pp. 491–492, para. 65.4: "Succession to responsibility *in personam* is not *stricto sensu* legally possible. … Even if responsibility of a State for acts or omissions of another State is established on the basis of consented succession to responsibility, it is not *strict sensu* a matter of succession to responsibility as subjective, of the *intuitu personae* category, but of assuming the *consequences* of responsibility in a proper form."

[41] *Case concerning the Factory at Chorzów, Judgment No. 13 (Merits) of 13 September 1928, P.C.I.J., Series A*, No. 17, p. 1, at p. 47.

[42] C. Gray, "The different forms of reparation: restitution", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (see footnote 22 above), pp. 589–598.

[43] Article 35 reads as follows: "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
"(*a*) is not materially impossible;
"(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation" (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 96).

commitment to primacy of restitution, repeatedly concedes that restitution is often impossible or unavailable.[44]

37. In the present report, the Special Rapporteur adopts an approach which is consistent with that of the Commission in its articles on responsibility of States for internationally wrongful acts, and bears on the criterion of "material impossibility". However, he argues that material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations.[45] Therefore, the impossibility to make restitution (at least without cooperation of a successor State) may also arise as a result of territorial changes in cases of succession of States.

38. Before arriving at specific proposals, it may be useful to recall the different forms of restitution. It is known that restitution takes two main forms: material and legal.[46] Material restitution may involve the liberation of individuals illegally seized or detained, the restoration of property or of territory illegally taken or occupied, or the return of a ship or documents seized. For example, in *British Claims in the Spanish Zone of Morocco*, the Arbitral Tribunal ordered Spain to replace consular premises unlawfully destroyed.[47]

39. Material restitution (restoration of property) also occurs in situations of succession of States. For example, in 1958, France and the United Arab Republic "desiring to settle the problems which arose between them following the events of October and November 1956 and prompted by the desire to re-establish cultural, economic and financial relations between the two countries", concluded the General Agreement.[48] Pursuant to its preamble, the Agreement, "as regards the United Arab Republic, shall apply solely to Egyptian territory".[49] Article 5 of the Agreement provides that "[t]he reconsignment and restoration of property and rights to their owners, or payment of the equivalent value of any such assets which are not restored, shall be effected in the manner laid down in Protocol No. II, which forms an integral part of this Agreement".[50]

40. Legal restitution means the alteration or revocation of a legal measure taken in violation of international law, whether an administrative or judicial decision or an act of legislation.[51] There are some examples in practice. One of them is the *Martini* decision where the Arbitral Tribunal decided that Venezuela was obliged to annul the judgment of a domestic court passed in violation of treaty obligations owed to Italy.[52] In the *LaGrand* case, Germany originally sought legal restitution in the form of the

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[44] See paragraphs (3)–(4) of the commentary to article 35 of the articles on responsibility of States for internationally wrongful acts, *ibid.*, pp. 96–97.

[45] See *Affaire des forêts du Rhodope central* [*Forests of Central Rhodopia*], *Arbitral Award of 29 March 1933*, United Nations, *Reports of International Arbitral Awards* (UNRIAA), vol. III, pp. 1405–1436, at p. 1432.

[46] See C. Gray, "The different forms of reparation: restitution" (footnote 44 above), at p. 590.

[47] *Affaire des biens britanniques au Maroc espagnol* [*British Claims in the Spanish Zone of Morocco*], *Arbitral Award of 1 May 1925*, UNRIAA, vol. II, pp. 615–742, at p. 722.

[48] General Agreement [between France and the United Arab Republic], signed at Zurich on 22 August 1958, United Nations, *Treaty Series*, vol. 732, No. 10511, p. 85, preamble. See also Succession of States in respect of State responsibility: information on treaties which may be of relevance to the future work of the Commission on the topic: memorandum by the Secretariat (A/CN.4/730), paras. 73–78.

[49] General Agreement, preamble. According to article 3 of the General Agreement, "[t]he Government of the United Arab Republic undertakes to terminate on the date of entry into force of this Agreement the special measures taken against French nationals or in respect of their property and rights, in accordance with the provisions of this Agreement and of the annexes thereto."

[50] *Ibid.*, art. 5.

[51] See C. Gray, "The different forms of reparation: restitution" (footnote 44 above), at pp. 591–593.

[52] *Martini (Italy* v. *Venezuela*), *Arbitral Award of 3 May 1930*, UNRIAA, vol. II, p. 975.

revocation of a national court judgment because, it claimed, the United States had detained, tried and sentenced to death two German nationals without providing consular access.[53] Further, in *Arrest Warrant of 11 April 2000*, the International Court of Justice accepted the claim of the Democratic Republic of the Congo and required that Belgium recall and cancel the international arrest warrant in question.[54] In some cases, both material and legal restitution may be involved.[55]

41. However, both material and legal forms of restitution may become virtually impossible in certain situations of succession of States. Even if a predecessor State continues to exist, that State may not be in position to make restitution because the property at issue might no longer be located in its territory but instead in the territory of a successor State. This was the case where Montenegro (the successor State) was directed to perform an obligation after its separation from the State Union of Serbia and Montenegro.[56]

42. In contemporary international law, certain agreements (such as peace agreements) that provide for restitution (as well as other forms of reparation) also address the direct rights of individuals, in spite of the fact that succession of States occurred. For example, the General Framework Agreement for Peace in Bosnia and Herzegovina expressly addressed the right to return home and the right to return of property to individuals affected by the war in the former Yugoslavia. Article 1 of annex 7 of the Agreement provides that "[a]ll refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them".[57]

43. Similarly, in cases concerning constructions of dams, channels or the use of shared natural resources, it may happen that only a successor State is in a position to make restitution because the object in question is located in its territory. In the *Gabčíkovo – Nagymaros Project* case,[58] for example, Hungary addressed its claim only to one of the successor States, because only Slovakia would have been able to stop the diversion of water from Danube into a bypass channel.

44. This may also apply to legal restitution by means of legislative, executive or judicial measures, where appropriate. It appears evident that the organs of a successor State may be required to amend a law passed by a predecessor State that continues to discriminate against foreign nationals in the territory of the successor State. That State may also restore or renew a concession illegally taken or breached by its predecessor

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[53] *LaGrand* (see footnote 32 above), p. 466.

[54] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 31–32, para. 76.

[55] See, for example, *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment of 15 December 1933*, Permanent Court of International Justice, *Series A/B*, No. 61, p. 207. In that case, the Court held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question" (*ibid.*, at p. 249).

[56] See *Bijelić* v. *Montenegro and Serbia, Application no. 11890/05, Judgment of 28 April 2009*, Second Section, European Court of Human Rights; and *Mytilineos Holdings SA* v. *1. The State Union of Serbia and Montenegro, 2. Republic of Serbia, Partial Award on Jurisdiction of 8 September 2006*, United Nations Commission on International Trade Law, para. 158.

[57] General Framework Agreement for Peace in Bosnia and Herzegovina, initialled on 21 November 1995 at Dayton, and signed on 14 December 1995 at Paris, Annex 7: Agreement on Refugees and Displaced Persons, article 1. See also E.-C. Gillard, "Reparation for violations of international humanitarian law", *International Review of the Red Cross*, vol. 85, No. 851 (September 2003), pp. 529–553, at p. 544.

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

when it comes to the business activities in the territory of the successor State. Similarly, courts of the successor State may allow revocation of a judicial decision if that decision constituted an internationally wrongful act and the original court no longer exists or can no longer exercise any jurisdiction with respect to the territory or nationals of a new State. This is also true when it comes to enforcement measures.[59]

45. Finally, it is generally recognized that it is the injured State that has the choice as to the form of reparation. This is stipulated in the articles on responsibility of States for internationally wrongful acts, in particular in article 43, paragraph 2 (*b*).[60] The commentary to article 43 also notes that the provision of each of the forms of reparation can be "affected by any valid election that may be made by the injured State".[61] Therefore, and in this context, the use of wording "may request restitution" seems to be fully justified.

46. This is also true when an injured State is a successor State that continues to bear injurious consequences of an internationally wrongful act against its predecessor State. This issue was discussed in the Special Rapporteur's third report on succession of States in respect of State responsibility, which also included examples of agreements and cases where a successor State, alone or together with the continuing State, was entitled to reparation for injury from internationally wrongful acts committed before the date of succession of States.[62] However, in view of the particular features of restitution (for example, the reconstruction of damaged construction, the return of objects of art, or the repatriation of illegally detained nationals), the possibility to request restitution needs to be limited only to cases where the injury caused by the internationally wrongful act continues to affect the territory or persons which, after the date of succession of States, are under the jurisdiction of the successor State.

47. In view of the above, the following draft article is proposed:

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[59] See *Bijelić* v. *Montenegro and Serbia* (footnote 59 above), in particular at para. 62 ("Serbia could not, within the meaning of [a]rticle 46 of the [European Convention on Human Rights], realistically be expected to implement any individual and/or general measures in the territory of another State. In view of the above, the Serbian Government concluded that the application as regards Serbia was incompatible *ratione personae* and maintained that, to hold otherwise, would be contrary to the universal principles of international law") and paras. 69–70 ("In view of the above, given the practical requirements of [a]rticle 46 of the Convention, as well as the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession …, the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro … . Lastly, given the fact that the impugned proceedings have been solely within the competence of the Montenegrin authorities, the Court, without prejudging the merits of the case, finds the applicants' complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto").

[60] Art. 43, para. 2 (*b*), reads as follows: "The injured State may specify in particular: …
"(b) what form reparation should take in accordance with the provisions of Part Two"
(*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 119.)

[61] *Ibid.*, p. 96, para. (4) of the commentary to article 34. On the issue of relation between restitution and compensation, see also Y. Kerbrat, "Interaction between the forms of reparation", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (footnote 22 above), pp. 573–587, at pp. 574–576; and C. Gray, "The choice between restitution and compensation", *European Journal of International Law*, vol. 10, No. 2 (1999), pp. 413–423.

[62] See the third report on succession of States in respect of State responsibility (A/CN.4/731), paras. 52–82.

Draft article 16
Restitution

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

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

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

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

48. This proposal aims to strike a balance between the continuing applicability of general rules on forms of reparation (with a priority of restitution) and a material impossibility of restitution as a result of succession of States. It is without prejudice to other forms of reparation.

2. Compensation

49. Compensation is one of the forms of reparation. While restitution was called the priority form of reparation in international law, compensation is a prevalent remedy in practice.[63] This obligation of the responsible State can arise alone or in addition to restitution if damage caused by the wrongful act is not made good by restitution.[64]

50. Compensation is an appropriate form of reparation with respect to material damage. This is reflected in the wording "any financially assessable damage" in article 36, paragraph 2, of the articles on responsibility of States for internationally wrongful acts.[65] In other words, it includes all kinds of losses and damage that can be formulated in a sum of money. However, the compensation need not only occur through the use of money, which is the most common form, but can also consist of the cession of assets or goods.[66]

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[63] See, for example, J. Barker, "The different forms of reparation: compensation", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (footnote 22 above), pp. 599–611.

[64] As the articles on responsibility of States for internationally wrongful acts made it clear in article 36:
"1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
"2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established" (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 98).

[65] *Ibid.*

[66] See Kolb (footnote 37 above), pp. 159–160; and J. Verhoeven, "Considérations sur ce qui est commun : cours général de droit international public", *Collected Courses of the Hague Academy of International Law*, vol. 334 (2002), at p. 190.

51. Regarding compensation, there are several important principles that are generally applicable. Therefore, they are relevant even in the context of succession of States and may inform the present draft articles.

52. The first principle is *full reparation* (or integral indemnity), derived from the decision in the *Chorzów Factory* case,[67] and reflected in articles 34 to 36 of the articles on responsibility of States for internationally wrongful acts, as well as in more recent case law of the International Court of Justice.[68] The principle has also been affirmed in decisions of regional courts[69] and arbitral tribunals.[70] That is why the present draft articles adhere to this principle both in draft articles X and Y, as proposed in the third report,[71] and in new proposals contained in this report.

53. Next, the principle of *causality* needs be taken into consideration. The concept of "adequate compensation" means, according to some decisions and views of the doctrine, that only loss reasonably proximate to the internationally wrongful act can be compensated.[72] This allows State to reject compensation in claims where causes are too indirect, remote or uncertain. Although this condition is generally applicable, it may play a particularly important role in the context of succession of States. In particular, when it comes to claims for compensation made against or by a successor State, it should be allowed only if there is a clear direct link between loss or damage and the acts of organs or a territory or nationals that became the organs, the territory or the nationals of the successor State.

54. *Contribution* to injury is another principle of the law of State responsibility, which is of general application. According to article 39 of the articles on responsibility of States for internationally wrongful acts, "[i]n the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought".[73] The rule thus makes it possible to limit the amount of compensation, which is for some authors the question of equity.[74] While it does not need to be expressly reflected in the present draft articles, it will apply, *mutatis mutandis*, even in situations of succession of States. Indeed, it would be contrary to any consideration of equity if a successor State that may be exceptionally required to pay compensation paid more than a predecessor State might have been obliged to pay.

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[67] See *Chorzów Factory (Merits)* (footnote 43 above), at p. 47.

[68] See, for example, *Gabčíkovo – Nagymaros Project* (footnote 61 above), at p. 81, para. 152; and *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, at pp. 338 and 342–343.

[69] See, for example, *Papamichalopoulos and Others* v. *Greece, Application no. 14556/89, Judgment of 31 October 1995*, European Court of Human Rights, *Judgments and Decisions, Series A*, No. 330-B, para. 36; and *Velásquez-Rodríguez* v. *Honduras, Judgment of 21 July 1989 (Reparations and Costs)*, Inter-American Court of Human Rights, *Series C*, No. 7.

[70] See, for example, *CME* v. *Czech Republic, Partial Award of 13 September 2001*, ICSID, *ICSID Reports*, vol. 9, p. 113, at pp. 238–239, paras. 615–618; *S. D. Myers Inc*. v. *Canada, First Partial Award on Liability of 13 November 2000*, *ibid.*, vol. 8, p. 3; and *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc.* v. *Argentina, Case No. ARB/02/1, Award on Damages of 25 July 2007*, ICSID, para. 31.

[71] See the third report on succession of States in respect of State responsibility (A/CN.4/731), paras. 66 and 143.

[72] See, for example, *Lusitania, Award of 1 November 1923*, UNRIAA, vol. VII, pp. 32–44; or the advisory opinion on *Responsibilities and obligations of States with respect to activities in the Area* (footnote 33 above), at p. 59, para. 181. See also J. Crawford, *State Responsibility: the General Part*, Cambridge University Press, 2013, pp. 492 *et seq*.; and Kolb (footnote 37 above), p. 161.

[73] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 109.

[74] See Kolb (footnote 37 above), p. 163.

55. Finally, the role of *equity* needs to be underlined. It appears on several levels. First, it may be reflected in the solution arrived at by the parties concerned in a lump sum or another agreement.[75] Second, it also gives the margin of appreciation to judges and arbitrators in the calculation of compensation where it is difficult to determine the exact amount of damage. In such cases, they refer to "reasonable and equitable assessment".[76] Third, this concept seems to relate to the prohibition of *unjust enrichment*. Indeed, no State, including a successor State, should benefit from an internationally wrongful act.

56. All these principles and considerations are also relevant in the context of succession of States. Consistently with the previous reports on the topic and the draft articles provisionally adopted by the Commission so far, even claims for compensation have to take into account whether a predecessor State continues or ceased to exist. In principle, when the predecessor State continues to exist, an injured State is entitled to request compensation from that State even after the date of succession of States.

57. There may be some limited exceptions to this rule. In contrast to restitution, where a shift of obligation from a predecessor State to a successor State was justified by a material impossibility, compensation does not involve the same problem. However, a State injured by an internationally wrongful act of the predecessor State may only request compensation from a successor State if particular circumstances so require. Such particular circumstances, as explained also in the previous reports, are a direct link between the consequences of a wrongful act and the territory or the population of a new State or States, or the fact that the author of a wrongful act was an organ of the predecessor State that later became an organ of the successor State.

58. The example of a territorial link can be seen in case of damage caused to foreigners in Antwerp by the predecessor State (the Netherlands) in 1830, where the successor State (Belgium) was obliged to pay compensation for damage that occurred before independence in its territory.[77]

59. Another example of compensation can be seen in the Agreement between the Republic of Italy and the United Kingdom of Libya on economic cooperation and settlement of issues arising from Resolution 388 (V) of 15 December 1950 of the General Assembly of the United Nations.[78] The Agreement concluded between Italy and the Libyan Arab Republic provides in article 5 that "[t]he Libyan Government, as the successor to the Italian State in the property rights referred to in the preceding article, declares that it recognizes the property rights of third parties, who consequently may not bring any claim against the Italian State in respect of those rights". By an exchange of notes dated 2 October 1956, the parties further confirmed that "the Libyan Government declares that it assumes responsibility for any compensation still owed to Libyan nationals as a result of expropriations carried out by the Italian Government and the former Italian administration in Libya."[79]

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[75] See paragraphs 31–33 of this report, above.

[76] See, for example, *Ahmadou Sadio Diallo* (footnote 71 above), at pp. 336–338, paras. 27–36; and *Aminoil* v. *Kuwait, Arbitral Award of 24 March 1982, International Legal Materials*, vol. 21, No. 5 (September 1982), pp. 976–1053.

[77] See J. B. Moore, *Digest of International Law*, vol. VI, Washington D.C., 1906, p. 929. See also M. G. Kohen and P. Dumberry, *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2019, pp. 101–102.

[78] United Nations, *Treaty Series*, vol. 2328, p. 149.

[79] *Ibid.*, notes I (A) and II (A). See also Succession of States in respect of State responsibility: information on treaties which may be of relevance to the future work of the Commission on the topic: memorandum by the Secretariat (A/CN.4/730), para. 63.

60. However, more recent cases support the transfer of obligation based on the fact that an internationally wrongful act was committed by an organ of a territorial unit that later became an organ of the successor State.[80] It is noteworthy to recall the arguments of the Government of Serbia before the European Court of Human Rights in the *Bijelić* v. *Montenegro and Serbia* case. It noted that "each constituent republic of the State Union of Serbia and Montenegro had the obligation to protect human rights in its own territory … . Secondly, the impugned enforcement proceedings were themselves solely conducted by the competent Montenegrin authorities. Thirdly … , Serbia cannot be deemed responsible for any violations of the Convention which might have occurred in Montenegro prior to its declaration of independence".[81] The Court held that Montenegro was responsible for violations of the European Convention on Human Rights and decided that the Government of Montenegro must enforce a domestic decision and pay to the applicants a sum of money for non-pecuniary damage.[82]

61. The fact that compensation is an appropriate form of reparation, even in situations of succession of States, can best be illustrated in the practice of the United Nations Compensation Commission (UNCC). One decision of the UNCC Governing Council took the view that "[t]he claims were initially submitted by the Czech and Slovak Federal Republic", but that for reasons not even indicated in its decision, "[t]he award of compensation is to be paid to the Government of the Slovak Republic".[83] In another decision, the Governing Council mentioned that "[t]hese claims were submitted before the Czech and Slovak Federal Republic ceased to exist. Awards of compensation are to be paid to the Governments of the Czech Republic and the Slovak Republic, respectively".[84] Similar provisions were adopted by the UNCC during the succession processes in the former Yugoslavia and in the Union of Soviet Socialist Republics.[85]

62. Reparation in the form of compensation, in spite of its wide application, includes some legal problems in general, and in particular with respect to cases of succession of States. On a general level, while the principle of full reparation – both the actual loss or damage (*damnum emergens*) and the loss of profits (*lucrum cessans*) – is recognized, the practical problem involves a valuation of loss and damage. This was well reflected in the commentary to article 36 of the articles on responsibility of States

[80] See *Bijelić* v. *Montenegro and Serbia* (footnote 59 above).

[81] *Ibid.*, para. 62.

[82] *Ibid.*, paras. 92–99. See B. E. Brockman-Hawe, "European Court of Human Rights *Bijelic* v. *Montenegro and Serbia* (Application No. 19890/0), Judgment of 11 June 2009", *International and Comparative Law Quarterly*, vol. 59, No. 3 (July 2010), pp. 845–867, at pp. 853–854; and M. Milanovic, "The spatial dimension: treaties and territory", in C. J. Tams, A. Tzanakopoulos and A. Zimmermann (eds.), *Research Handbook on the Law of Treaties*, Cheltenham, Edward Elgar, 2014, pp. 186–221, at p. 220.

[83] UNCC Governing Council, Decision concerning the first instalment of claims for serious personal injury or death (category "B" claims) taken by the Governing Council of the United Nations Compensation Commission at its 43rd meeting, held on 26 May 1994 in Geneva (S/AC.26/Dec.20 (1994)), p. 2, footnote 2.

[84] UNCC Governing Council, Decision concerning the first instalment of claims for departure from Iraq or Kuwait (category "A" claims) taken by the Governing Council of the United Nations Compensation Commission at its 46th meeting, held on 20 October 1994 in Geneva (S/AC.26/Dec.22 (1994)), p. 2, footnote 2.

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

for internationally wrongful acts[86] and in writings.[87] In particular, as pointed out by the ICSID Arbitral Tribunal in *Archer Daniels Midland Company*, referring to article 36, "[a]ny determination of damages under principles of international law requires a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury".[88]

63. In the context of succession of States, the requirement of a sufficiently clear direct link should apply *mutatis mutandis*. The pecuniary nature of compensation means the request can be addressed to a predecessor State if it continues to exist. In exceptional cases, however, a clear direct link between the wrongful act of an organ of a territorial unit and the damage, or between the damage and the territory or the population of a successor State, suggests another, more equitable, solution. It is possible for compensation to be requested against or by the successor State provided that this State continues to benefit from or to bear injurious consequences of the internationally wrongful act. The formulation is broad enough to capture various situations and to give effect to the general principle of prohibition of unjust enrichment. However, the explanation of a clear direct link needs to be given at least in the commentary.

64. Considerations of equity also underpin a "without prejudice" clause concerning any apportionment or other agreement between the successor State and the predecessor State or another successor State.

65. In view of the above, the following draft article is proposed:

Draft article 17
Compensation

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

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

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

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

66. Indeed, compensation seems to be the most common form of reparation in cases where responsibility for internationally wrongful acts was affected by the occurrence of succession of States. Nevertheless, there are some cases of injury other than

[86] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, commentary to article 36, p. 100, para. (7), and pp. 104–105, paras. (27)–(34).

[87] See, for example, I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford University Press, 2009.

[88] *Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc.* v. *the United Mexican States, Case No. ARB(AF)/04/05, Award of 21 November 2007*, ICSID, para. 282.

material damage that cannot be made good by restitution or compensation. Such cases of moral or legal injury have to be addressed under the form of satisfaction.

3. Satisfaction

67. It appears, at first sight, that satisfaction can hardly have a place in the context of succession of States. Since an international wrongful act committed by a predecessor State and succession of States has no effects upon attribution of the act to that State, it is not easy to find situations where it would be appropriate for a successor State to provide satisfaction. Nevertheless, it is useful to analyse specific forms of non-material injury having persisting effects and directly related to a territory or organs that became the territory or the organs of the successor State.

68. At the same time, if other forms of reparation do not stop at the doors of succession of States, one cannot see why a priori this form of reparation – satisfaction – ought to be excluded. It is one of the standard and long-established forms of reparation,[89] as indicated in article 37 of the articles on responsibility of States for internationally wrongful acts.[90] Although the wording of the article is very general, it captures some important elements, namely the concept of injury, an open-ended list of forms of satisfaction and proportionality. These need to be addressed in commentaries.

69. The first issue concerns the *nature of the injury* that has to be made good by satisfaction. On a general level, the Commission explains in its commentary that satisfaction "is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned".[91]

70. While the common understanding is the non-material nature of injury, the doctrinal approach to that concept has evolved over time. On the one hand, according to the classic approach, "satisfaction was intended to redress the injuries caused to the honour, dignity or reputation of the State". It means that the injury, characterized as "moral and political", related essentially to violations of the State's sovereignty.[92] As some authors rightly pointed out, that conception of State relied on the transposition of qualities (honour and dignity), which were attached to natural persons in municipal law.[93] From this perspective, such a moral injury seems to be closely linked to bilateral relations of the States concerned and to their personality. Consequently, in situations of succession of States that involves a change of sovereignty, satisfaction could hardly be claimed against or by a successor State.

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[89] See the *Case concerning the difference between New Zealand and France concerning the interpretation of application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair, Decision of 30 April 1990*, UNRIAA, vol. XX, pp. 215–284, at pp. 272–273, para. 122.

[90] "1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for injury caused by that act insofar as it cannot be made good by restitution or compensation.

"2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

"3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State" (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 105).

[91] *Ibid.*, p. 106, para. (3) of the commentary to article 37.

[92] See E. Wyler and A. Papaux, "The different forms of reparation: satisfaction", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (footnote 22 above), pp. 623–637, at p. 625.

[93] *Ibid.*, p. 625.

71. On the other hand, the modern conception of responsibility of States, which is detached from municipal analogies (personalization of the State, intention, negligence), bears on objective responsibility that builds on a breach of obligation. Such breach of law always includes a kind of "legal injury". In contrast to the moral or political injury that is linked to the victim of a wrongful act, the concept of legal injury makes it possible to overcome the purely bilateral relations between the responsible State and the injured State. It allows the extension of legal relations arising from State responsibility (at least in some aspects) to a larger group of States or to all States of the international community, depending on the nature of the obligation breached by a wrongful act.[94]

72. The above-mentioned situations are related to breaches of obligations that are not bilateral but have the character of "interdependent" and "integral" obligations. In particular integral obligations, which protect essential collective interests of a group of States or the international community of States, are included in multilateral treaties and customary international law, or even in peremptory norms of general international law (*jus cogens*). Such collective interests include the protection of human rights or the prevention and punishment of crimes under international law. As was expressed by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".[95]

73. The objective character of such obligations that have effect *erga omnes* also means that their breach entails legal consequences of State responsibility going beyond the mere reparation for a moral damage (to the honour and dignity) of one State. If the non-material (legal) injury concerns all States, satisfaction in an appropriate form may be claimed and no State, even a successor State, should be excluded.

74. The second issue concerns the appropriate *form of satisfaction*. While the classical forms of satisfaction bear on apologies and statements of regret, the modern forms may include other appropriate modalities. They are mentioned in the commentary to article 37 of the articles on responsibility of States for internationally wrongful acts. It is worth recalling that "[t]he appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. [They include] due inquiry into the causes of an accident resulting in harm or injury, a trust fund to manage compensation payments in the interest of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act".[96]

75. In particular, investigation and punishment of responsible persons seems to be the most appropriate form of satisfaction in cases of serious violations of obligations

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[94] See P.-M. Dupuy, "Faits générateurs et évolution de la légalité internationale", *Collected Courses of the Hague Academy of International Law*, vol. 188 (1984), pp. 78–110, at p. 91; P.-M. Dupuy, "A general stocktaking of the connections between the multilateral dimension of obligations and codification of the law of responsibility", *European Journal of International Law*, vol. 13, No. 5 (2002), pp. 1053–1081, at p. 1070; and E. Wyler and A. Papaux, "The different forms of reparation: satisfaction", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (footnote 22 above), pp. 623–637, at pp. 626–627.

[95] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996*, p. 595, at pp. 611–612, para. 22, citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15, at p. 23.

[96] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 106, para. (5) of the commentary to article 37.

erga omnes, namely if involving crimes under international law. The obligations to punish acts of genocide (or any other acts proscribed by article III of the Convention on the Prevention and Punishment of the Crime of Genocide), to transfer individuals accused of genocide or any of those other acts to the International Tribunal for the Former Yugoslavia, and to cooperate fully with that Tribunal were clearly confirmed by the International Court of Justice.[97]

76. Given the legal interest of all States (and the interests of victims), the wrongs committed do not disappear because of succession of States and may give rise to satisfaction (in the form of penal action) even after the date of succession. While such situations are not an everyday occurrence, they do happen.

77. No doubt the most significant recent situation of succession of States, involving at the same time commission and punishment of crimes under international law, is the dissolution of the Socialist Federal Republic of Yugoslavia. The process of dissolution took place in 1991 and 1992.[98] The Arbitration Commission of the European Community peace conference on Yugoslavia (also called the "Badinter Commission") declared in its Opinion No. 1 (29 November 1991) that the Socialist Federal Republic of Yugoslavia was in a "process of dissolution"[99] and in its Opinion No. 8 (4 July 1992) that this process was now completed and that the Socialist Federal Republic of Yugoslavia no longer existed.[100] In fact, the process of dissolution started with the declarations of independence by Croatia and Slovenia on 25 June 1991. In a sense, this process can be deemed completed on 27 April 1992 when two former federal republics (Montenegro and Serbia) established the Federal Republic of Yugoslavia (later renamed the State Union of Serbia and Montenegro).

78. For this analysis, it is important to note that crimes under international law took place in the territory of the former Yugoslavia both before and after 27 April 1992. Some of them were tried before the International Tribunal for the Former Yugoslavia, others before national courts of the successor States (former republics of the Socialist Federal Republic of Yugoslavia). For the purposes of this report, a distinction should be made between the cases referred to national courts by the International Tribunal for the Former Yugoslavia and the cases tried by national courts on their own.

79. The first category of cases relates to the completion strategy for the International Tribunal for the Former Yugoslavia, adopted by the Security Council in 2003.[101] Under its completion strategy, the Tribunal has concentrated on the prosecution and trial of the most senior leaders while referring other cases to national courts. This was

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[97] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 234–236, paras. 463–465, and pp. 237–239, para. 471.

[98] This process of dissolution does not include the separation of Montenegro from Serbia and Montenegro (in June 2006) nor that of Kosovo (in February 2008).

[99] *Opinion No. 1 of 29 November 1991*, Conference on Yugoslavia, Arbitration Commission, *International Law Reports*, vol. 92 Second report on succession of States in respect of State responsibility (A/CN.4/719), para. 191. (1993), pp. 162–166, at p. 166.

[100] See *Opinion No. 8 of 4 July 1992, ibid*., pp. 199–202, at p. 202. See also B. Stern (ed.), *Le statut des États issus de l'ex-Yougoslavie à l'ONU: documents rassemblés et présentés par Brigitte Stern*, Paris, Montchrestien, 1996; A. Pellet, "Note sur la Commission d'arbitrage de la Conférence Européenne pour la paix en Yougoslavie", *Annuaire français de droit international*, vol. 37 (1991), pp. 329–348; and M. C. R. Craven, "The European Community Arbitration Commission on Yugoslavia", *British Yearbook of International Law*, vol. 66, No. 1 (1995), pp. 333–413.

[101] See Security Council resolutions 1503 of 28 August 2003 and 1534 of 26 March 2004.

made possible under the amended Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (Rule 11 *bis*).[102]

80. A total of eight cases involving 13 persons (out of 161 individuals indicted by the International Tribunal for the Former Yugoslavia) have been referred to courts in the successor States of the former Yugoslavia, mostly in Bosnia and Herzegovina.[103] The *Prosecutor* v. *Radovan Stanković* case is a useful illustration. Mr. Radovan Stanković was charged with enslavement and rape as crimes against humanity under article 5 of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, and rape and outrages upon personal dignity as violations of the laws or customs of war under article 3 of that Statute. The indictment alleged that the crimes were committed between April and November 1992 in the municipality of Foča. In accordance with the completion strategy, on 21 September 2004, the Prosecution requested the referral of the case to the authorities of Bosnia and Herzegovina.[104] On 17 May 2005, the Referral Bench ordered, pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, that the case be transferred to the authorities of Bosnia and Herzegovina.[105] On 14 November 2006, the State Court of Bosnia and Herzegovina found Stanković guilty on four counts of crimes against humanity. He was sentenced to 16 years of imprisonment.[106] On 17 April 2007, the Appellate Panel of that Court dismissed Stanković's appeal, granted the State Prosecutor's appeal on sentencing, and increased Stanković's sentence to 20 years of imprisonment.[107] The case ended in 2014 with the decision of the International Residual Mechanism for Criminal Tribunals, whose Appeals Chamber dismissed the revocation of referral to the authorities of Bosnia and Herzegovina.[108]

81. The second category of cases concerns a number of investigations and prosecutions of crimes under international law taking place before national authorities of Croatia, Bosnia and Herzegovina, as well as Serbia, on an independent basis, without any referral from the International Tribunal for the Former Yugoslavia. While the referred cases can be interpreted as the implementation of decisions relying on the powers of the Security Council that established both the International Tribunal for the Former Yugoslavia and the International Residual Mechanism for Criminal Tribunals, those cases are potentially more relevant for the purpose of the present report.

82. The next paragraphs will sum up the research on the domestic prosecution of crimes under international law in Croatia, Serbia, and Bosnia and Herzegovina.

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[102] Rule 11 *bis* (Referral of the Indictment to Another Court), adopted on 12 November 1997, revised 30 September 2002 and amended several times thereafter, document IT/32/Rev.26.

[103] See Transfer of Cases, from the website of the International Tribunal for the Former Yugoslavia, at: www.icty.org/en/cases/transfer-cases.

[104] *See Prosecutor* v. *Radovan Stanković, Case No. IT-96-23/2-PT, Request by the Prosecutor under Rule 11* bis *of the Rules of Procedure and Evidence (RPE) for Referral of the Indictment to the State of Bosnia and Herzegovina, 21 September 2004*, International Tribunal for the Former Yugoslavia. See *ibid., Preliminary Order in Response to the Prosecutor's Motion under Rule 11* bis*, 27 September 2004*, International Tribunal for the Former Yugoslavia; and *ibid., Case No. MICT-13-51, Decision on Stanković's Appeal against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, 21 May 2014*, Appeals Chamber, International Residual Mechanism for Criminal Tribunals.

[105] *Ibid., Decision on Referral of Case Under Rule 11* bis (*partly confidential and* ex parte), *17 May 2005*, Referral Bench, International Tribunal for the Former Yugoslavia, para. 96.

[106] *Ibid., Case No. X-KR-05/70, Verdict of 14 November 2006*, Court of Bosnia and Herzegovina.

[107] See *Prosecutor* v. *Radovan Stanković, Case No. MICT-13-51, Decision on Stanković's appeal against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, 21 May 2014,* Appeals Chamber, International Residual Mechanism for Criminal Tribunals.

[108] *Ibid*.

(a) Croatia

83. Croatia declared independence on 25 June 1991 and its declaration became effective on 8 October 1991. There are several criminal codes that may have effect on the domestic prosecution of crimes under international law in the country in the relevant period (from the start of the war till now). The first was the Criminal Code of the Socialist Federal Republic of Yugoslavia,[109] which remained in force in Croatia until 1991 and was adopted into domestic Croatian legislation as the Basic Criminal Code.[110] The Basic Criminal Code thus punished crimes such as genocide (art. 119), war crimes against the civilian population (art. 120) and war crimes against prisoners of war (art. 122).[111] In 1998, a new Criminal Code entered into force[112] and was later replaced by the 2011 Criminal Code.[113]

84. The Criminal Code of the Socialist Federal Republic of Yugoslavia defined the Criminal Acts against Humanity and International Law in its Chapter 16, whereas it contained the definition of, *inter alia*, genocide (art. 141),[114] war crimes against the civilian population (art. 142)[115] and war crimes against prisoners of war (art. 144).[116]

85. In its article 141, the Constitution of Croatia[117] provides that international treaties that have been ratified are part of the domestic legal order. Croatia also

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[109] English text available from: www.refworld.org/docid/3ae6b5fe0.html.

[110] I. Josipović, "Responsibility for war crimes before national courts in Croatia", *International Review of the Red Cross*, vol. 88, No. 861 (March 2006), pp. 145–168, at p. 155.

[111] See Organization for Security and Co-operation in Europe (OSCE), "Mission to Croatia: supplementary report: war crime proceedings in Croatia and findings from trial monitoring", 22 June 2004, p. 3 (available from: www.osce.org/zagreb/33877).

[112] English text available from: www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Criminal-Code.pdf.

[113] English text available from: www.legislationline.org/download/id/7896/file/Croatia_Criminal_Code_2011_en.pdf.

[114] "Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty" (English text available from: www.refworld.org/docid/3ae6b5fe0.html).

[115] "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty" (*ibid*.).

[116] "Whoever, in violation of the rules of international law, orders murders, tortures or inhuman treatment of prisoners of war, including therein biological experiments, causing of great sufferings or serious injury to the bodily integrity or health, compulsive enlistment into the armed forces of an enemy power, or deprivation of the right to a fair and impartial trial, or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty" (*ibid*.).

[117] An English version of the text with amendments through 2010 is available from: www.constituteproject.org/constitution/Croatia_2010.pdf?lang=en.

adopted a special act pertaining to the prosecution of crimes under international law: the Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law.[118] While this Law is only partially applicable to crimes punishable in front of the International Criminal Court,[119] its various articles apply generally. Interestingly, article 2 defines crimes as "*crimes under Article 5 of the Statute* [of the International Criminal Court], *any crimes against international law of war and humanitarian law under the Croatian law* … and other crimes within the jurisdiction of international criminal courts, *including crimes against international justice*" (emphasis added).

(i) The crime of genocide

86. As is clear from article 119 of the Basic Criminal Code, with the exception of being broader in terms of "forcible population displacement", it in fact reflects the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[120] The crime was prosecuted in Croatia; however, it is not certain that these acts would have been qualified as genocide had they been tried before an international tribunal.[121]

87. Despite the fact that the original charge was later changed, there was an attempt to prosecute genocide committed in the so-called "Crime in Tovarnik".[122] Another domestic prosecution of genocide occurred in Croatia in the "Mikluševci case".[123] There was no conviction for genocide however, after turbulent changes in the charges. Two defendants were acquitted, and others were convicted for war crimes instead.[124]

(ii) War crimes

88. The prosecution of war crimes is obviously much more widespread than the prosecution of the crime of genocide. On the other hand, not all of the cases involve prosecution of (alleged) crimes committed before the secession of Croatia from Yugoslavia. The war crime against civilians under article 120 of the Basic Criminal Code was prosecuted (although the results vary, of course) in, for example, *Stojan Pavlovic and others*[125] or the case of *Mitar Arambašić and others*[126] (in relation to the

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[118] *Official Gazette* No. 175/2003. A provisional English translation of the text is available from: www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Implementation-Statute-International-CCPCI.pdf.

[119] See article 45 of the Law on the Implementation of the Statute of the International Criminal Court and the Prosecution of Crimes against International Law of War and Humanitarian Law.

[120] United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[121] See OSCE, "Mission to Croatia: background report: domestic war crime trials 2004", 26 April 2005, p. 22 (available from: www.osce.org/zagreb/14425).

[122] Against Miloš Stanimirović and others. For a description of these proceedings and links to some relevant documents, see Documenta, "Crime in Tovarnik", available from: www.documenta.hr/en/crime-in-tovarnik.html.

[123] For a description and links to official documents, see *ibid*., "Crime in Mikluševci", available from: www.documenta.hr/en/crime-in-miklu%C5%A1evci.html; and War Crimes, "Verdicts map: Jugoslav Misljenovic …", available from: https://warcrimesmap.balkaninsight.com/verdicts/jugoslav-misljenovic-milan-stankovic-dusan-stankovic-petar-lendjer-zdravko-simic-joakim-bucko-mirko-zdinjak-dragan-ciric-zdenko-magoc-jovan-djuro-krosnjar-and-janko-ljikar/.

[124] See International Criminal Law Services, "Training materials: genocide", section 6.7.2.2, pp. 60–61 (available from: https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-6-genocide.pdf).

[125] For a description and links to official documents, see Documenta, "Crime in Popovac", available from: www.documenta.hr/en/crime-in-popovac.html; and War Crimes, "Verdicts map: Stojan Pavlovic …", available from: https://warcrimesmap.balkaninsight.com/verdicts/stojan-pavlovic-djuro-urukalo-branko-berberovic/.

[126] For information, see Center for Peace, Nonviolence and Human Rights–Osijek, "Crime by the so-called Peruča Group", available from: www.centar-za-mir.hr/en/ps/zlocin-tzv-perucke-grupe/.

other accused persons the case also included prosecution of war crime against prisoners of war under article 122 of the Basic Criminal Code).

89. Also relevant are the cases of *Ivica Kosturin and Damir Vrban*,[127] *Jablan Kejic*,[128] and *Miroslav Jovic and Milan Stanojevic*.[129]

(b) Serbia

90. The Federal Republic of Yugoslavia declared its independence on 27 April 1992. The Federal Republic of Yugoslavia retained the old Criminal Code of the Socialist Federal Republic of Yugoslavia. It was adopted by Serbia as the Serbian Basic Criminal Code. Serbia also adopted the Law on Organization and Competence of Government Authorities in War Crimes Proceedings.[130] Article 2 states that: "*This Law shall apply in detecting, prosecuting and trying: 1) crimes against humanity and international law set forth in Chapter XVI of the Basic Criminal Code*; 2) serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 stipulated in the Statute of the International Criminal Tribunal for the former Yugoslavia" (emphasis added).

91. It is also worth mentioning that, according to article 3 of the same Law, the jurisdiction of Serbian authorities to prosecute these crimes extends to the whole territory of the former Yugoslavia.

(i) War crimes

92. The war crime against civilians according to article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia was prosecuted, for example, by the Higher Court in Belgrade in the *Stanko Vujanović* case.[131] The war crime against prisoners of war under article 144 of the that Criminal Code was prosecuted in the *Miroljub Vujović*, et al. case[132] against many accused persons. Many other cases were prosecuted as well, however they involved acts committed subsequently to the succession effects.

(ii) The crime of genocide

93. Unlike war crimes, as of 2007, no one has been indicted for the crime of genocide (art. 141 of the Federal Criminal Code of Yugoslavia).[133]

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[127] For details and links to judgments, see War Crimes, "Verdicts map: Ivica Kosturin and Damir Vrban", available from: warcrimesmap.balkaninsight.com/verdicts/ivica-kosturin-damir-vrban/.

[128] For details and links to judgments, see War Crimes, "Verdicts map: Jablan Kejic", available from: https://warcrimesmap.balkaninsight.com/verdicts/jablan-kejic/.

[129] For details and links to official documents, see War Crimes, "Verdicts map: Milan Stanojevic and Miroslav Jovic", available from: https://warcrimesmap.balkaninsight.com/verdicts/milan-sanojevic-miroslav-jovic/.

[130] OSCE Mission to Serbia and Montenegro, "Law on Organisation and Competence of Government Authorities in War Crimes Proceedings" (English translation), available from: www.osce.org/serbia/18571.

[131] For more information, see Documenta, "Crime committed in the home of the Sever family in Vukovar", available from: www.documenta.hr/en/crime-committed-in-the-home-of-the-sever-family-in-vukovar.html.

[132] For details, see Documenta, "Crime in Ovčara (*Miroljub Vujović* et al. case), available from: www.documenta.hr/en/crime-in-ov%C4%8Dara-miroljub-vujovi%C4%87-et-al.-case.html.

[133] B. Ivanišević, *Against the Current—War Crimes Prosecutions in Serbia*, International Center for Transitional Justice, 2007, pp. 4–5 (available from: www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Crimes-Prosecutions-2007-English_1.pdf).

(c) Bosnia and Herzegovina

94. The Criminal Code applicable to the period of war in Bosnia and Herzegovina is the former Criminal Code of the Socialist Federal Republic of Yugoslavia mentioned above. As such, crimes like genocide (art. 141), war crimes against civilian population (art. 142) and others apply. The available resources do not however provide information as to whether there was prosecution of crimes under international law committed prior to the succession of Bosnia and Herzegovina.

95. There are many more cases of domestic prosecution of crimes under international law in the countries under scrutiny. However, most of them fall into the period after the date of succession of States, and thus they cannot be included in this analysis.

96. Nevertheless, the State practice analysed seems to confirm that the above-mentioned successor States are able to prosecute and, in some cases, did prosecute certain crimes under international law even if committed prior to the date of succession, at least partly. Of course, they were investigated, indicted and tried on the basis of the applicable national criminal acts, but these often adopt the definitions of international crimes. The national courts do not need to address issues of international law, in particular that of succession of States. On balance, most prosecutions concern crimes committed after the succession of States, and they are therefore not conclusive. This warrants adopting rather cautious and flexible approach in the formulation of a draft article.

97. In view of the above considerations, the following draft article is proposed:

Draft article 18
Satisfaction

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

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

B. Cessation and non-repetition

98. This subchapter seeks to explore the possible impact of succession of States on legal consequences of State responsibility other than the three forms of reparation. The second set of consequences is constituted of the obligation of cessation of the internationally wrongful act and of assurances and guarantees of non-repetition. Both obligations, reflected in article 30 (Cessation and non-repetition) of the articles on responsibility of States for internationally wrongful acts,[134] are inherent to the contemporary concept of State responsibility going beyond the mere reparation of material (and possibly moral) injury.

[134] Article 30 reads as follows: "The State responsible for the internationally wrongful act is under an obligation:
"(*a*) to cease that act, if it is continuing;
"(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require" (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 88).

99. Both the obligations of cessation and non-repetition bear on and underpin the continued duty to perform the obligation breached.[135] Without entering into an interesting theoretical debate on the primary or secondary nature of these obligations,[136] the Special Rapporteur wishes to confirm what, in his view, results from the previous works of the Commission, in particular the articles on responsibility of States for internationally wrongful acts. Consequently, the duty to perform the obligation breached is a normal, logical manifestation of a primary rule that, under modern international law, does not terminate or disappear (at least not automatically) by the mere fact of its breach. Therefore, this obligation does not relate to the present topic, which deals with the possible impact of succession of States on secondary rules of State responsibility. While general rules of customary international law continue to bind all States, including a successor State or States, the duty to perform treaty obligations is subject to the rules on succession of States in respect of treaties.

100. Put differently, in the words of the Commission, "[t]he continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant".[137]

101. In contrast, the obligations of cessation and assurances and guarantees of non-repetition are secondary rules. This is because the question of cessation (and that of assurances and guarantees of non-repetition) only arises in the event of a breach.[138] Therefore, it should be addressed in the present report. It is still important to distinguish two separate obligations, not only because of their substance, but also from the point of view of succession of States.

1. Cessation

102. The obligation of cessation is less impacted by problems of succession of States on this secondary rule. Any responsible State is under the obligation "to cease that act, if it is continuing". In principle, the obligation of cessation binds a predecessor State responsible for its wrongful act if it continues in that act after the date of succession of States. When it comes to a successor State, it has to bear all the consequences of its own act after the date of succession of States. It also implies that the successor State is under an obligation to cease that act (its own act) if it is continuing. Obviously, this is based on general rules on State responsibility, which are fully applicable.[139]

103. This implies that cessation is no longer applicable to an instantaneous or completed wrongful act, while for a continuing act, cessation is required as long as

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[135] See article 29 of the articles on responsibility of States for internationally wrongful acts: "The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached" (*ibid*.).

[136] See, for example, the preliminary report on State responsibility by Special Rapporteur Gaetano Arangio-Ruiz, *Yearbook … 1988*, vol. II (Part One), document A/CN.4/416 and Add.1, p. 13, para. 31; C. Dominicé, "Observations sur les droits de l'État victime d'un fait internationalement illicite", in P. Weil (ed.), *Droit international*, vol. II, Paris, Pedone, 1982, p. 27; O. Corten, "The obligation of cessation", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (footnote 22 above), pp. 545–549, at p. 546; and K. Zemanek, "La responsabilité des États pour faits internationalement illicites ainsi que pour faits internationalement licites", in P. Weil (ed.), *Responsabilité internationale*, Paris, Pedone, 1988, p. 65.

[137] Paragraph (1) of the commentary to article 30 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 88.

[138] See paragraph (6) of the commentary to article 30 of the articles on responsibility of States for internationally wrongful acts, *ibid*., p. 89.

[139] However, this does not deny a link to the issue of acts having a continuing character (see draft article 7 as provisionally adopted by the Drafting Committee in 2019 (A/CN.4/L.939/Add.1)) and to that of acts having a composite character (to be further discussed).

the breach continues. In *United States Diplomatic and Consular Staff in Tehran*, the International Court of Justice highlighted that "paragraphs 1 and 3 of [article 22 of the Vienna Convention on Diplomatic Relations] have also been infringed, and continue to be infringed, since they forbid agents of the receiving State to enter the premises of a mission without consent … . [T]hey constitute continuing breaches of [a]rticle 29 of the same Convention which forbids any arrest or detention of a diplomatic agent".[140]

104. The obligation of cessation was confirmed in some judgments of the International Court of Justice, such as *United States Diplomatic and Consular Staff in Tehran*,[141] mentioned above, *and Military and Paramilitary Activity in and against Nicaragua*.[142] The obligation is generally recognized as a part of general customary international law. It may even be considered a general principle of law.[143]

105. Similarly, in the *Rainbow Warrior* arbitration, the Tribunal addressed the obligation of cessation. It stressed "two essential conditions intimately linked" for the obligation of cessation to be applicable: "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[144] These conditions are very important even in the context of succession of States. They concern equally predecessor and successor States to the extent they are responsible for a given internationally wrongful act.

106. For a predecessor State, the obligation of cessation applies if it continues to exist and continues in its wrongful act even after the date of succession of States. The next condition is that the violated rule is still in force. When it comes to a successor State, it has the obligation of cessation with respect to its own act of continuing character after the date of succession of States if the violated rule is still in force for that State.

107. The condition that the primary obligation remains in force and is applicable for a predecessor State or a successor State (or both of them) envisages various hypotheses. It may happen that the primary obligation breached by a wrongful act is no longer in force (or at least not applicable) because it has extinguished, suspended or been made temporarily inapplicable by virtue of a circumstance precluding wrongfulness.[145] In addition to these circumstances that may occur in any case, the situation of succession of States may bring another one, namely that a violated treaty rule is not applicable for the successor State because of the lack of succession in respect of that treaty.

108. It should be reiterated that the obligation of cessation applies by virtue of normal rules of State responsibility and only regarding acts of a continuing character. In principle, the existing rules of State responsibility are sufficient and there is no need to formulate new draft articles under the present topic. Moreover, acts having a continuing character were discussed in the second report of the Special Rapporteur[146]

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[140] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 36, para. 77.

[141] *Ibid*., at pp. 44–45, para. 95.

[142] *Military and Paramilitary Activity in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 149, para. 292 (12).

[143] See Corten, "The obligation of cessation" (footnote 139 above), at p. 546.

[144] *Case concerning the difference between New Zealand and France concerning the interpretation of application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, Decision of 30 April 1990* (see footnote 92 above), at pp. 270–271, para. 114.

[145] *Ibid*., pp. 269–270, paras. 113–114. See also Corten, "The obligation of cessation" (footnote 139 above), p. 547.

[146] See the second report on succession of States in respect of State responsibility (A/CN.4/719), paras. 53–62.

and are covered in draft article 7.[147] However, the wording of this draft article clearly points to consequences of an internationally wrongful act other than the obligation of cessation; it focuses instead on reparation. Therefore, the implications of succession of States on the obligation of cessation should be explained at least in the commentary.

2. Excurse: composite acts

109. The strict conditions of application of the obligation of cessation (a continuing character of the wrongful act) give also rise to the question of composite acts. The commentary to article 30 of the articles on responsibility of States for internationally wrongful acts notes that "while the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act, article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions"[148] According to the Commission's view, the phrase "if it is continuing" is intended to cover both situations.

110. Therefore, the issue of "composite acts", briefly addressed in the second report, needs to be discussed more thoroughly. The particular nature of composite acts may have an impact on certain forms of international responsibility of States, including the obligation of cessation. Article 15, paragraph 1, of the articles on responsibility of States for internationally wrongful acts dealt with a composite act as follows: "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other action or omissions, is sufficient to constitute the wrongful act." As the Commission's commentary to this article makes clear, "composite acts" are limited to breaches of obligations that concern an aggregate of conduct, and not individual acts as such.[149]

111. Composite acts involve situations where a chain of actions or omissions will reveal a breach only when looked at in a sequence.[150] According to the Commission's commentary, some of the most serious internationally wrongful acts are defined in terms of their composite character. Examples include "the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.". The importance of these obligations justifies the separate treatment of composite act in article 15 of the articles on responsibility of States for internationally wrongful acts.[151]

112. In other words, the concept of "composite acts" conveys the idea of a situation where the wrongful act consists not of an isolated act, but of a "practice" or "policy" that is systematic in character. In *Ireland* v. *the United Kingdom*, the European Court of Human Rights defined a practice that is incompatible with the Convention for the

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[147] See draft article 7 as provisionally adopted by the Drafting Committee in 2019 (A/CN.4/L.939/Add.1): "When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act."

[148] Paragraph (3) of the commentary to article 30 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 89.

[149] Paragraph (2) of the commentary to article 15 of the articles on responsibility of States for internationally wrongful acts, *ibid*., p. 62.

[150] See Kolb (footnote 37 above), p. 51.

[151] Paragraph (2) of the commentary to article 15 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 62.

Protection of Human Rights and *Fundamental* Freedoms (European Convention on Human Rights) as consisting "of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches".[152]

113. The special character of a composite act (and also a difference comparted to continuing acts) consists in the fact that the act is not accomplished at the time the first action or omission of the series takes place, but only later, after a series of actions or omissions. However, the number of actions or omissions that must occur to constitute a breach of the obligation is determined by the formulation and purpose of the primary rule.[153]

114. At the same time, while composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act could be wrongful in accordance with another international obligation.[154] When it comes to the relationship between single acts and composite acts, it seems that there are three possibilities: (*a*) the single item of conduct is not prohibited under international law (for example, an isolated act of xenophobia) while a practice of the same act would be prohibited; (*b*) the single items of conduct are unlawful and of the same character as the global conduct that is also incriminated as a practice (such as slavery, extermination, forced disappearance or persecution); or (*c*) the single items of conduct are wrongful and of a different character than the global conduct, such as the case of genocide, *apartheid*, crimes against humanity or ethnic cleansing, where the breaches (crimes) are legally qualified as different (more serious) than the underlying single acts (for example, murder, kidnapping, arbitrary arrests or expulsion).[155]

115. This distinction is very important. It implies that in some cases both single acts and composite acts constitute distinct internationally wrongful acts and may give rise to the responsibility of one or more States. In particular, in situations of succession of States, it is key to distinguish single acts that constitute in aggregate a composite act. As succession of States has no impact upon the attribution of acts, general rules of State responsibility apply. Consequently, some single acts may be attributable to a predecessor State, while other single acts may be attributable to a successor State. Nevertheless, each of them incurs international responsibility for its own actions or omissions.

116. Two cases on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* before the International Court of Justice can only indirectly inform this analysis. In the first case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*), the Court found that the only acts of genocide were committed in and around Srebrenica from about 13 July 1995.[156] Based on that date, no issue of succession of States arises. In addition, the Court admitted that other serious atrocities committed in the territory of Bosnia and Herzegovina (save in the

[152] *Ireland* v. *the United Kingdom, Application no. 5310/71, Judgment of 18 January 1978*, European Court of Human Rights, *Reports of Judgments and Decisions, Series A*, No. 25, para. 159.

[153] Paragraphs (7)–(8) of the commentary to article 15 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 63.

[154] *Ibid*., para. (9) of the commentary to article 15.

[155] See J. Salmon, "Duration of the breach", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (footnote 22 above), p. 392.

[156] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 166, para. 297.

case of Srebrenica) did not constitute genocide.[157] In the second case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*), the question of responsibility of Serbia for acts occurred before the date of succession (27 April 1992) was expressly addressed. However, the Court did not have to answer it because it did not find any violation of the prohibition of genocide.[158]

117. An especially interesting question for the present topic is whether a series of actions or omissions committed before or after the date of succession of States is sufficient to constitute a wrongful act of a composite character. Or, conversely, if only a series of actions or omissions, commenced before and continued after the date of succession of States, taken in aggregate, constitutes that wrongful act. This is the exceptional situation that arises when rules of State responsibility meet succession of States.

118. Thus, it is important to take into account the rule in article 15, paragraph 2, of the articles on responsibility of States for internationally wrongful acts, which deals with the extension in time of a composite act.[159] The present draft articles should be in conformity with that rule, even if the composite act was completed only after the date of succession of States. However, there is one self-evident condition. As in cases of acts having a continuing character, it is necessary that the obligation breached remain in force and binding on a successor State. The wording "remain not in conformity with the international obligation" serves this purpose.

119. Finally, as the issue of composite acts was reopened in the present report, in the context of the obligation of cessation, it raises the question of whether a special draft article is necessary. In the view of the Special Rapporteur, it is not. Like in cases of continuing acts, the obligation of cessation incurs for the State that actually acts (continues to act) in violation of its obligation. Such obligation may incur for a predecessor State or a successor State on the basis of general rules of State responsibility.

120. However, the nature of composite acts and the possible impact of succession of States partly differ from that of continuing acts, covered by draft article 7, provisionally adopted by the Drafting Committee at the seventy-first session of the Commission. Therefore, and for the sake of consistency with the previous work of the Commission (its articles on responsibility of States for internationally wrongful acts), a new draft article should be proposed. A similar provision on composite acts also appears in article 9, paragraph 2, of the 2015 Tallinn resolution of the Institute of

[157] *Ibid*., at p. 198, para. 376.

[158] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, (see footnote 40 above), at pp. 128–129, paras. 441–442: "It follows from the foregoing that Croatia has failed to substantiate its allegation that genocide was committed. Accordingly, no issue of responsibility under the Convention for the commission of genocide can arise in the present case. … Consequently, the Court is not required to pronounce on the inadmissibility of the principal claim as argued by Serbia in respect of acts prior to 8 October 1991. Nor does it need to consider whether acts alleged to have taken place before 27 April 1992 are attributable to the [Socialist Federal Republic of Yugoslavia], or, if so, whether Serbia succeeded to the [responsibility of the Socialist Federal Republic of Yugoslavia] on account of those acts."

[159] "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" (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 62).

International Law on "State succession in matters of international responsibility".[160] It could be placed next to draft article 7 in the general part of the present draft articles.

121. In view of the above considerations, the following draft article 7 *bis* is proposed:

Draft article 7 *bis*
Composite acts

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

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

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

3. Assurances and guarantees of non-repetition

122. Next, assurances and guarantees of non-repetition need to be addressed. This is the second consequence of an internationally wrongful act appearing under article 30 (*b*) of the articles on responsibility of States for internationally wrongful acts. According to this provision, the responsible State is under an obligation "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require".

123. It is noted that guarantees of non-repetition serve a function that is distinct from other forms of reparation, including apology: other forms of reparation are meant to remedy past wrongs, yet a guarantee of non-repetition is focused, in form and in content, on preventing the occurrence of future breaches.[161] Similarly to the obligation of cessation (and unlike reparation), this obligation is concerned with the future. Both obligations seek to prevent the commission by the responsible State of analogous breaches.[162] Here, again, the primary obligation must still subsist and be in force.[163] The main difference lies in the character of an internationally wrongful act. It can be a single (instantaneous) act and not a continuing act. In other words, the internationally wrongful act has to be completed in order to give rise, in certain circumstances, to the obligation to offer appropriate assurances and guarantees of non-repetition.

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[160] Institute of International Law, Session of Tallinn (2015); the final text is available from www.idi-iil.org, Resolutions). See also Kohen and Dumberry (footnote 80 above), pp. 58–64.

[161] See C. J. Tams, "Recognizing guarantees and assurances of non-repetition: *LaGrand* and the law of State responsibility", *The Yale Journal of International Law*, vol. 27 (2002), pp. 441–444, at p. 443, available from: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1185&context=yjil.

[162] See S. Barbier, "Assurances and guarantees of non-repetition", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (footnote 22 above), pp. 551–561.

[163] See Kolb (footnote 37 above), p. 151.

124. At the same time, the use of the wording "appropriate" and "if circumstances so require" in subparagraph (*b*) of article 30 of the articles on responsibility of States for internationally wrongful acts means that assurances and guarantees of non-repetition involve much more flexibility and are not required in all cases. They are usually sought when the injured State has reason to believe that mere reparation (in the form of restitution or compensation) does not protect it satisfactorily.[164]

125. For the first time, the International Court of Justice granted guarantees of non-repetition in the *LaGrand* case. The Court noted that "an apology [to the LaGrand brothers] is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under [a]rticle 36, paragraph 1, of the Vienna Convention [on Consular Relations[165]] and have been subjected to prolonged detention or sentenced to severe penalties".[166]

126. The Court went on to hold that "it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the [Vienna Convention on Consular Relations]",[167] thus responding to the request by Germany for guarantees. The Court stated that "the commitment [undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under article 36, paragraph 1 (*b*) of the Vienna Convention on Consular Relations] must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition".[168]

127. The assurances and guarantees of non-repetition were also sought in other cases before the International Court of Justice. However, in three cases the Court considered that such a request could not be upheld.[169] In two other cases, the Court decided that the request for guarantees of non-repetition had been satisfied by the commitments undertaken by the respondent States.[170] It is worth noting that, in these cases, the Court did not question the right of the injured State to obtain guarantees of non-repetition, nor the obligation of the responsible State to offer such assurances or guarantees.[171] Rather, it confirmed the Commission's approach, embodied in the wording of article 30 (*b*) of the articles on responsibility of States for internationally wrongful acts, that the responsible State has the obligation to offer such assurances and guarantees only "if circumstances so require", which is not always the case.

128. Moreover, in practice, assurances and guarantees of non-repetition are always treated as a fully autonomous consequence of the internationally wrongful act. In particular, the relationship between assurances and guarantees of non-repetition and satisfaction remains ambiguous.[172] The Commission in its commentary admits that "[a]ssurances or guarantees of non-repetition may be sought by way of satisfaction

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[164] See paragraph (9) of the commentary to article 30 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 89–90.

[165] United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

[166] *LaGrand* (see footnote 32 above), at p. 512, para. 123.

[167] *Ibid*., at pp. 513–514, para. 125.

[168] *Ibid*., at pp. 512–513, para. 124, and p. 516, para. 128 (6).

[169] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 452, para. 318; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (see footnote 159 above), *Judgment, I.C.J. Reports 2007*, at pp. 235–236, para. 466; and *Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 267, para. 150.

[170] See *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at p. 73, para. 153 (10); and *Armed Activities on the Territory of the Congo* (footnote 32 above), at p. 256, para. 257.

[171] See Barbier (footnote 165 above), p. 554.

[172] *Ibid*., p. 556.

(e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice".[173]

129. The question relevant for the present topic is whether assurances and guarantees of non-repetition may also take place in the context of succession of States. It is noteworthy that guarantees of non-repetition had been argued as a consequence of a wrongful act by Hungary and Slovakia in the *Gabčíkovo–Nagymaros Project* case, but the Court did not pronounce on it.[174] Of course, this judgment was issued before the Commission had adopted on second reading its draft articles on responsibility of States for internationally wrongful acts in 2001 and before the *LaGrand* case in which the Court first recognized guarantees of non-repetition.

130. While there are not many inter-State cases in which the International Court of Justice granted or pronounced on assurances and guarantees of non-repetition, those forms of consequences of responsibility are more frequent in State practice and mainly in the practice of international courts and treaty bodies in the field of human rights. In particular, the Human Rights Committee has reiterated that the State responsible for a breach of the International Covenant on Civil and Political Rights[175] is "under an obligation to take effective measures" to ensure that similar violations do not reoccur in the future.[176]

131. Assurances and guarantees of non-repetition can have various forms.[177] Although the form is not specified in article 30 (*b*), the Commission explains in its commentary that "[a]ssurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform".[178]

132. In addition to general assurances and guarantees, the responsible State may be requested to adopt specific measures, for example, to give specific instructions to its agents and to adopt or abrogate certain legislative provisions. Such far-reaching preventive measures were developed mainly in the practice of international human rights bodies, such as the Human Rights Committee.[179] Such measures were

[173] Paragraph (11) of the commentary to article 30 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 90.

[174] *Gabčíkovo–Nagymaros Project* (see footnote 61 above), at pp. 74–75, paras. 127 and 129.

[175] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[176] For example, in the following decisions: *Ratiani* v. *Georgia*, Communication No. 975/2001, Report of the Human Rights Committee, vol. II, *Official Records of the General Assembly, Sixtieth session, Supplement No. 40* (A/60/40), annex V.J, p. 88, para. 13; *Platonov* v. *Russia*, Communication No. 1218/2003, *ibid., Sixty-first session, Supplement No. 40* (A/61/40), annex V.NN, p. 339, para. 9; and *Immaculate Joseph*, et al. v. *Sri Lanka*, Communication No. 1249/2004, *ibid*., annex V.PP, p. 354, para. 9.

[177] See Barbier (footnote 165 above), pp. 559–561.

[178] Paragraph (12) of the commentary to article 30 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 90.

[179] See, for example: *Blazek* et al. v. *The Czech Republic*, Communication No. 857/1999, Report of the Human Rights Committee, vol. II, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 40* (A/56/40), annex X.P, p. 173, para. 7; *Fijalkowska* v. *Poland*, Communication No. 1061/2002, *ibid., Sixtieth session, Supplement No. 40* (A/60/40), annex V.L, p. 109, para. 10; and *Lee* v. *The Republic of Korea*, Communication No. 1119/2002, *ibid*., annex X.U, p. 179, para. 9.

sometimes decided also by the Inter-American Court of Human Rights[180] and the European Court of Human Rights.[181]

133. In particular, the case *Blazek*, et al. is fully relevant in the context of the present topic (succession of States) because the measures that gave rise to discrimination against several former Czechoslovak citizens (contrary to article 26 of the International Covenant on Civil and Political Rights) had taken place before the date of succession of States (before 1 January 1993). The Human Rights Committee did not even discuss the fact of succession, but held that the Czech Republic "is under an obligation to provide the authors with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The Committee further encourages the State party to review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the [International Covenant on Civil and Political Rights]".[182]

134. Therefore, it seems that assurances and guarantees of non-repetition can apply, though exceptionally, if circumstances so require, even in situations of succession of States. It may be relevant, in particular, in cases where the breach of an international obligation results from national legislation or established administrative practices and where an organ of a territorial unit of the predecessor State became an organ of the successor State. In addition, the general condition that the obligation breached by an internationally wrongful act remain in force fully applies. Moreover, keeping in mind the rather exceptional character of measures offered or requested under "assurances and guarantees of non-repetition", the Special Rapporteur proposes rather flexible language and the use of the words "may request".

135. The draft article does not specify the relationship between assurances and guarantees of non-repetition and other forms of responsibility. It is possible that other forms, including satisfaction, may prove to be sufficient redress. The consistent use of the wording "if circumstances so require" serves this purpose by conveying the idea of special circumstances that only give rise to that form of legal consequences for an internationally wrongful act. Those circumstances will be explained in commentaries.

136. In view of the above considerations, the following draft article is proposed:

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[180] See, for example, *Castillo Petruzzi* et al. v. *Peru, Judgment of 30 May 1999*, Inter-American Court of Human Rights, *Series C*, No. 52 (1999), para. 22.

[181] See, for example, *Broniowski* v. *Poland*, *Application no. 31443/96, Judgment of 22 June 2004*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2004-V*, paras. 192 and 200.4; and *D. H. and Others* v. *The Czech Republic, Application no. 57325/00*, Judgment of 13 November 2007, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2007-IV*, para. 216: "The Court reiterates, firstly, that by virtue of Article 46 of the [European Convention on Human Rights] the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under [a]rticle 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. However, the respondent State remains free to choose the means by which it will discharge its legal obligation under [a]rticle 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment".

[182] *Blazek* et al. v. *The Czech Republic* (see footnote 182 above), at p. 173, para. 7.

Draft article 19
Assurances and guarantees of non-repetition

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

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

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

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

Part Three – Future work

IV. Future programme of work

137. Regarding the future programme of work on the present topic, the Special Rapporteur will continue to observe the programme of work outlined in his first report[183] and complemented in the second report.[184] In particular, the fifth report will focus on the legal problems arising in situations where there are several successor States – the problem of a plurality of injured successor States and a plurality of responsible successor States. In this context, the fifth report could also address the issue of shared responsibility and inquire into the question if and to what extent that concept may provide a guidance for the application of rules of State responsibility in situations of succession of States. In addition, the fifth report may include some miscellaneous and technical issues, such as renumbering and a final structure of the draft articles.

138. Depending on the progress of the debate on the reports of the Special Rapporteur, in particular the draft articles referred to the Drafting Committee, the entire set of draft articles could be adopted on first reading in 2021.

[183] First report on succession of States in respect of State responsibility (A/CN.4/708), para. 133.
[184] Second report on succession of States in respect of State responsibility (A/CN.4/719), para. 191.

Annex

Text of the draft articles proposed in the fourth report

Draft article *7 bis*
Composite acts

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

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

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

Draft article 16
Restitution

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

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

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

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

Draft article 17
Compensation

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

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

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

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

Draft article 18
Satisfaction

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

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

Draft article 19
Assurances and guarantees of non-repetition

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

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

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

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