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SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY: TOWARDS YET ANOTHER VIENNA CONVENTION?

RGSL RESEARCH PAPER
No. 23

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ISSN 1691-9254

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This publication is based on a distinction-awarded Master's thesis.

Abstract

The end of the twentieth century was characterised by a series of state dissolution cases, such as the breakup of Czechoslovakia, the Socialist Federalist Republic of Yugoslavia, and the Soviet Union. In that context, the rules on state succession regained relevance, with the issue of state succession in respect of international responsibility becoming central. The topic first attracted the attention of the academic community and subsequently was chosen by the International Law Commission for study and codification.

The present article examines the historical evolution of the rules on the succession of states, providing a review of case law where the Court referred to the concept of state succession to international responsibility, expressly or by implication. The author analyses the wording of the proposed Draft Articles and attempts to establish whether and how the principles of automatic succession and non-succession apply in different circumstances based on the newly developed provisions. The purpose of the study is to identify the advantages and disadvantages of the proposed Draft Articles as well as to discuss whether there is a need for codification of such rules.

Key words: state succession; state responsibility; state succession in respect of state responsibility; Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001); International Law Commission; attribution of responsibility

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TABLE OF ABBREVIATIONS

ARSIWA Draft Articles 2001 Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
ICJ	International Court of Justice
ILC Commission	International Law Commission
United Nations	UN
1978 Convention	Vienna Convention on Succession of States in respect of Treaties
1983 Convention	Vienna Convention on Succession of States in respect of State Property, Archives and Debts

INTRODUCTION

The end of the Second World War in 1945 became the beginning of a profound transformation of international law. This period was characterised by the creation of substantive rules of state conduct and the establishment of international organisations. Put simply, these primary rules contained provisions on how should states *behave,* or what are the expected actions, and described what happens when states *misbehave*, i.e. when their actual behaviour does not match the prescribed behaviour. Later, the international legal community faced another question: what happens when international law is violated by a state, but the primary rules do not provide for an evident solution?

This is how the work of the International Law Commission (ILC) on codification of the rules on state responsibility began. As a result of this work, a set of secondary rules, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA, or the Articles), was adopted in 2001.[1] The document provides a comprehensive set of rules governing the whole process of determination of state responsibility, including establishment of the existence of a breach of an obligation, its attribution to a state and the legal consequences of an internationally wrongful act. As to attribution, the 2001 Articles cover a wide range of cases: from relatively simple ones, when the wrongful act was perpetrated by an official state organ, to more complicated ones, when the wrongdoer is an entity that is not formally a part of the machinery of the state but is under its control. However, imagine a situation involving state succession, when organs of state A commit an internationally wrongful act, and afterwards state A dissolves into two separate states – B and C. If there is an agreement between the new states as to who inherits international responsibility, it would apply. In the absence of a solution, secondary rules would step in.

It is especially important to emphasise the secondary nature of the law on state responsibility here. The law on state succession regulates areas which states have themselves decided to regulate: several conventions were adopted in the preceding decades. As yet, no *primary* rules on state succession in respect of state responsibility exist, but the International Law Commission (ILC) has recently undertaken the task of developing secondary rules on that matter. These would provide guidance in the absence of primary rules but would not hinder their creation. Thus, in 2017 the ILC included the topic in the long-term programme of work, with Pavel Šturma being appointed a Special Rapporteur on the matter.[2] So far, the wording of 15 Draft Articles has been proposed, and it is believed that the whole set will be adopted in 2020-2021.[3] In comparison with the codification of ARSIWA that took 52 years, this time the ILC has progressed at an impressive pace.

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[1] Draft Articles on the Responsibility of States for Internationally Wrongful Acts. 2001. *ILC Yearbook* 2001, vol. II, part 2, pp.26-30. Available at: http://bit.ly/2W9TtI8 (last visited: 14 May 2020).
[2] Provisional summary record of the 3354th meeting of the ILC. Sixty-ninth session, 9 May 2017, A/CN.4/SR.3354, p.10. Available at: https://bit.ly/2TtSvlF (last visited: 14 May 2020).
[3] Third report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, A/CN.4/731 (2019), p.40. Available at: https://bit.ly/2y5gnqe (last visited: 14 May 2020).

The purpose of this study is to trace the evolution of the rules on state succession in general and specifically in relation to state responsibility and to offer a critical view of developments in the field. Two research questions will be answered. First, is there a real necessity for a new written set of rules, or could state succession in respect of state responsibility take place by applying the existing legal rules? Second, what are the advantages and possible criticism of the newly proposed Draft Articles?

Section One offers a historical overview together with the current legal framework governing the area of state succession. The author aims to identify whether a certain pattern is common to both Vienna Conventions on state succession, which may be used in cases of succeeding to international responsibility. Section Two focuses on the second element, i.e. state responsibility, discussing the 2001 ILC Articles and their potential application in cases of succession. Section Three provides an overview of selected judicial pronouncements: the *Gabčíkovo-Nagymaros* case, two so-called *Genocide* cases as well as the case of *Bijelić v. Montenegro and Serbia*. The latter was adjudicated by the European Court of Human Rights (ECtHR), while the former three by the International Court of Justice (ICJ). The choice is deliberate, seeking to provide a comparison of the different courts' approaches. Section Four turns to the recent work of the ILC, providing an analysis of the proposed Articles. Section Five discusses the necessity for adoption of the new Draft Articles, their imperfections and the benefits they might bring to the international legal system.

The ILC-proposed Draft Articles will be examined from four perspectives: historical (description of evolution of the field), literal (analysis of the wording), systemic (review of case-law) and teleological (identification of the purpose of adoption). Finally, conclusions will be drawn, reflecting the analysis.

1. THE STARTING POINT: CONCEPTUALISING STATE SUCCESSION

1.1. Historical background

No attempt was made to codify the rules on succession of states up until the late 1940s-early 1950s when the title first appeared in the works of the newly established International Law Commission.[4] Before that, transfer of sovereignty usually took place through war, and the process of newly independent states appearing on the international plane in the early 20th century was yet again disrupted by the two world wars, leaving virtually no possibility for codification. Despite that, the evolution of international legal *thinking* began much earlier: in 1899 and 1907, two Hague Conferences took place, promoting amicable settlement; in 1928, war as a method of

[4] Survey of International Law in Relation to the Work of Codification of the ILC, A/CN.4/1/Rev.1 (1949), p.28. Available at: https://bit.ly/2HTxEXr (last visited: 12 May 2020).

dispute settlement was renounced by the Kellogg–Briand Pact,[5] and that very principle was later incorporated in the Charter of the United Nations.[6] With the establishment of the ILC, the topic of state succession immediately appeared on the list of fourteen topics provisionally selected for codification.[7]

In the early 1960s, work on codification started, taking numerous paths: the succession of States in relation to membership in the United Nations was considered separately, as it was primarily a political matter and mostly depended upon objections (or lack thereof) on the part of governments. Its legal aspect was not discussed, and this topic may offer little to the present study.[8]

Interestingly, international responsibility was recognised as relevant in the context of state succession even in the earliest works of the ILC. This matter was not forgotten but rather intentionally excluded from the scope of codification at the time to avoid overlap with the work of the Sub-Committee on State Responsibility.[9] Indeed, before turning to the question of whether a newly established government should be liable for the actions of the previous government, the question about succession to *legal obligations* – preceding responsibility – should have been answered. Consequently, this became the focus of the Commission and was further divided into two categories: succession in respect of treaties, and succession in respect or rights and duties resulting from sources other than treaties. This divide became fundamental as work undertaken in these two areas has resulted in the adoption of separate legal documents.

1.2. Existing law on state succession

1.2.1. Vienna Convention on Succession of States in respect of Treaties

The subject-matter that first drew the attention of the ILC was state succession in respect of treaties. As a related topic – the law of treaties – was then on the agenda for codification, it was reasonable to undertake work on succession to treaty obligations.[10] To do that, the Secretariat prepared numerous studies on state practice relating to bilateral and multilateral treaties of various subject-matters,

[5] Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy (also known as the Kellogg-Briand Pact), 1928. Available at: https://bit.ly/2Zb9cFI (last visited: 14 May 2020).

[6] Charter of The United Nations and Statute of the International Court of Justice, 1945. Available at: https://bit.ly/1PS7npG (last visited: 14 May 2020).

[7] Report of the ILC on the work of its first Session, 12 April 1949, A/CN.4/13 and Corr. 1-3, *ILC Yearbook* 1949, vol. I, p.281, para.16(2). Available at: https://bit.ly/2rouvUz (last visited: 14 May 2020).

[8] The Succession of States in relation to Membership in the United Nations. A/CN.4/149 and Add. l., ILC Yearbook 1962, vol. II. Available at: https://bit.ly/2DU41RP (last visited: 14 May 2020).

9 Report by Manfred Lachs, Chairman of the Sub-Committee on the Succession of States and Governments. ILC *Yearbook 1963,* vol. II, p.261, para.11. Available at: https://bit.ly/2Sh76o0 (last visited: 14 May 2020).

[10] Report of the ILC on the work of its nineteenth session, A/6709/Rev.1 and Corr.1, *ILC Yearbook* 1967, vol. II, p.368, para.39. Available at: https://bit.ly/2Ss9GGU (last visited: 14 May 2020).

ranging from protection of artistic and literary work[11] to air transport agreements.[12] The work on codification began in 1968, resulting in adoption of the Vienna Convention on Succession of States in respect of Treaties in 1978.[13]

Although it does not deal with state responsibility, several provisions present some interest for this research. Article 2, which provides a definitional infrastructure, defines the succession of states as "replacement of one State by another in the responsibility for the international relations of territory."[14] The use of the word "responsibility" might be somewhat misleading here, as it usually refers to a *legal* type of liability. It might be mistakenly read as if the succeeding state automatically assumes responsibility for wrongdoing committed by the predecessor state. Accordingly, several governments – those of Cuba, Turkey, Sweden, and the United Kingdom[15] – expressed concerns about this wording. The *travaux*,[16] however, clarify this matter:

> [t]he word "responsibility" should be read in conjunction with the words "for the international relations of territory" and does not intend to convey any notion of "State responsibility […]"[17]

Further reading of the Convention suggests one more provision that "distances" it from state responsibility by limiting the scope:

> The provisions of the present Convention shall not prejudge any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State [...][18]

A similar provision can be found in the Vienna Convention on the Law of Treaties,[19] to which the present Convention is in a way a "sequel". The reason for that Article appearing in both documents is unwillingness to include a topic that was a subject of a separate codification process. At the time, the wish to avoid overlap by limiting the scope of both Conventions was an explicable move; however, today, when codification of these matters has been accomplished, this divide seems somewhat artificial. In other words, while the reasons for excluding state responsibility back

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[11] See Succession of States to multilateral treaties (study prepared by the Secretariat), A/CN.4/200 & Corr.1 and Add.1 & 2, *ILC Yearbook* 1968, vol. II. Available at: https://bit.ly/2SxQveU (last visited 14 May 2020).

[12] See Succession of States in respect of bilateral treaties (study prepared by the Secretariat), A/CN.4/243 and Add.1, *ILC Yearbook* 1971, vol. II, part 2. Available at: https://bit.ly/2RMit1S (last visited 14 May 2020).

[13] Vienna Convention on Succession of States in respect of Treaties. United Nations, 1978. Available at: https://bit.ly/2Sgw3zz (last visited: 14 May 2020).

[14] *Ibid.,* Article 2, para.b.

[15] First report on succession of States in respect of treaties by Sir Francis Vallat, Special Rapporteur, A/CN.4/278 and Add.1-6, *ILC Yearbook* 1974, vol. II, part 1, pp.24-25. Available at: https://bit.ly/2RUlgGp (last visited: 14 May 2020).

[16] *Travaux préparatoires* (French: preparatory works) consist of official records of negotiations, minutes of meetings, protocols of discussions, etc. Based on Article 32 of the Vienna Convention on the Law of Treaties (1969), the *travaux* may be used as a source of legal interpretation, usually with an aim of clarifying the original intentions of the drafters.

[17] Report of the ILC on the work of its twenty-fourth session, A/8710/Rev.1, *ILC Yearbook* 1972, vol. II, p.231, para.4. Available at: https://bit.ly/2HZc4Rh (last visited: 14 May 2020).

[18] Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 39.

[19] Vienna Convention on the Law of Treaties. United Nations, 1969, Article 73. Available at: https://bit.ly/2mhLNme (last visited: 14 May 2020).

then are still valid, it is no longer possible to achieve strict separation, since different areas of international law have become intertwined to the highest degree.

1.2.2. Vienna Convention on Succession of States in respect of State Property, Archives and Debts

Another subject of codification in the field of state succession, as noted above, was matters other than treaties. Generally, such matters form a non-exhaustive list, including the legal regime of the predecessor state (together with its legislation or pending court cases), state property, public debts, certain territorial rights – to name just a few. However, the Vienna Convention on Succession of States in respect of State Property, Archives and Debts[20] adopted in 1983 has limited the scope in just three areas, as appears from the title.

Interestingly, the 1983 Convention does not contain a clause similar to Article 39 of the 1978 Convention, which *explicitly* excludes state responsibility from the scope. There is no direct reference to state responsibility at all; nor was it discussed in the preparatory documents. Furthermore, Article 5 of the 1983 Convention precisely defines its scope, stating that its provisions are only limited to the three areas – property, archives, and debts:

> Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention.[21]

Unlike in the 1978 Convention, there apparently was no intention specifically to *exclude* state responsibility from the scope, but rather to *narrow* it, limiting it to specific matters.

1.2.3. Rules of the two Vienna Conventions: whether the same pattern can apply to state responsibility

Both Vienna Conventions leave the issue of state responsibility out of their scope, either expressly or implicitly. Despite that, it might be useful to identify the general patterns used in both Conventions and the logic behind them to potentially apply that logic in cases of succession to state responsibility.

To start with, the 1978 Vienna Convention distinguishes various types of state succession, all leading to different outcomes. In cases when a part of the predecessor state's territory is transferred and becomes part of successor state, it switches from the legal regime of the predecessor state to that of the successor state, meaning that treaties of the former no longer apply to it, while those of the latter – do.[22] When a new independent state is proclaimed, it is not bound by any prior obligations.[23] In the case of uniting of states – when two or more states merge into one – all treaties in force remain in force for the separate parts of the newly

[20] Vienna Convention on Succession of States in respect of State Property, Archives and Debts. United Nations, 1983. Available at: https://bit.ly/2Ss8wvS. (last visited: 14 May 2020).
[21] *Ibid.,* Article 5.
[22] Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 15.
[23] *Ibid.*, Article 16.

formed state, but only for the territories of each of them.[24] In other words, if states A and B merge, treaties will continue to be in force within the (former) borders of these states. Similarly, in the case of dissolution of states, treaties in force for the predecessor states continue to be in force for the separated parts.[25]

Overall, the rules of the 1978 Convention are highly technical and detailed since account should be taken not just of the type of state succession, but also of the status of the treaty (e.g., in force, not in force, awaiting ratification), the type of treaty (bilateral or multilateral) and its subject-matter. The difficulty is that, even in the presence of detailed and seemingly clear rules, a percentage of cases will remain "uncovered", for example, when further application of the treaty might be incompatible with its objects and purposes, or simply unrealistic. Hence, the purpose of this exercise is not to paraphrase the rules of the two Conventions but rather to identify the main elements.

It has been identified that high importance is attached to the territorial element. Thus, in the case of both dissolution and uniting of states, treaties in force continue to apply in the territories where they used to apply when concluded. Another important feature is the "clean slate" principle: a new state should not be bound by the burden of obligations it did not assume.

In the 1983 Convention, it is particularly the part on state debts that presents interest: while passing of property and archives are essentially procedural matters – i.e. they do not involve transfer of legal obligations – state debts represent a form of financial liability. As Article 34 puts it, such transfer represents an "extinction of the obligations of the predecessor State and the arising of the obligations of the successor State".[26] As the Convention prescribes, if there is an agreement between the predecessor and the successor states regarding the passing of debt, then that agreement would prevail. In the absence of such an agreement, various scenarios are possible, again depending largely on the type of state succession.

In the case when parts of the territory of a state are being transferred or separated, or in the case of dissolution of a state, the share(s) of debt transferred should be proportionate to the property, rights and interests acquired by the successor state(s).[27] In the case of uniting of states, the debt of the successor state is the sum of the debts of the predecessor states.[28] In the case of formation of a newly independent state, as a general rule no state debt passes to it.[29]

It appears that the rules contained in the 1983 Convention mirror those of the 1978 Convention. First, the same "clean slate" principle is applicable for newly independent states. Second, the portion of acquired territory influences the calculation of debt that would pass to the successor state, showing that the territorial element is definitive.

[24] *Ibid.*, Article 31.
[25] *Ibid.*, Article 34.
[26] Vienna Convention on Succession of States in respect of State Property, Archives and Debts, *supra* note 20, Article 34.
[27] *Ibid.,* Articles 37, 40 and 41, respectively.
[28] *Ibid.,* Article 39.
[29] *Ibid.,* Article 38.

A pattern can already be deduced: if there is a meaningful link between the predecessor state and the successor state, the latter assumes the obligations, or part of the obligations, of the former. Also, the principle that a newly established state should be able to commence its existence without assuming prior commitments should be borne in mind.

1.2.4. A note on the "clean slate", continuity, and their relevance to responsibility

The "clean slate" principle deserves some further explanation. The principle has gained relevance in the context of decolonisation during the second half of the 20th century: the newly independent states argued that this principle reflects their right to self-determination and allows them not to retain ties with their former colonial rulers.[30] This was supported by the ILC and the majority of states[31] and hence found its place in Article 16 of the 1978 Vienna Convention, establishing a general rule according to which newly independent states are not automatically bound by the legal obligations of the predecessor state.

The "clean slate" principle in its classical meaning was used specifically during decolonisation. However, there were attempts to rely on it also in later cases of succession. One of the most complicated dissolution processes in the late 20th century – the breakup of the Soviet Union – serves as an example. Some former Soviet Republics adopted the "pick and choose" approach, deciding which obligations they would be willing to succeed to, and to which – not; instead of automatically assuming all legal obligations of their predecessor, they acceded to chosen treaties as *new* states.[32]

The concurring principle – that of continuity – leads to the successor state inheriting the treaty obligations of the predecessor. This approach is also found in the 1978 Convention and it was generally favoured during the dissolution processes in Yugoslavia, Czechoslovakia and the Soviet Union.[33] It is directly applicable in the context of territorial/localised treaties and treaties of a personal nature, such as human rights treaties:[34] in these cases, the "clean slate" argument would not work due to the nature of the obligations in question.

The 1978 Convention thus contains both principles, and the defining factor is the type of succession: in the case of newly independent states, the "clean slate" formula is applicable, while in all other cases, continuity prevails.[35] This is

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[30] Dumberry, Patrick. "The Controversial Issue of State Succession to International Responsibility Revisited in Light of Recent State Practice". *German Yearbook of International Law*, vol. 49 (Berlin: Duncker & Humblot, 2006), p.39.

[31] Schachter, Oscar. "State Succession: The Once and Future Law". *Virginia Journal of International Law,* vol.33 (1993), p.256.

[32] Ziemele, Ineta. *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2005), p.137, note 190.

[33] Schachter, *supra* note 31, p.257.

[34] Ziemele, *supra* note 32, p.136.

[35] Beato, Andrew M. "Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union." *American University International Law Review*, vol.9, issue 2 (1994), p.529.

problematic. First, distinguishing between the two types is not always an easy task. The situation where the type of succession determines the applicable legal principle is, as Beato puts it, "a matter of form over substance".[36] There is no objective test that would facilitate determination of the type of succession; the existing test provided in the definition uses as a criterion the degree of dependence of the newly independent/successor state on the predecessor:

> a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;[37]

This test is subjective and debatable, so we find ourselves in a situation where the 1978 Convention contains two mutually exclusive principles yet does not provide an "unambiguous mechanism",[38] allowing resolution of the legal tension created by their competing coexistence. An illustration of this ambiguity is again the Soviet Union, which formally ceased to exist based on the Minsk Agreement of 1991, followed by the Alma-Ata Protocols, forming the Commonwealth of Independent States. In purely legal terms, this was a case of dissolution of a single state and further emergence of newly independent states,[39] which consequently makes application of the "clean slate" principle justified. However, actual state practice showed that Russia considered itself – and the former Soviet Republics viewed it – as a continuator of the Soviet Union:[40] this characterises the situation more as a series of secessions, leading to the principle of continuity.

How is this relevant in terms of state responsibility? Despite the fact that the continuity principle was favoured for succession to treaty obligations, views on succession to state responsibility might differ. The doctrine of non-succession is more often found in scholarly writings: it is, or used to be, a generally accepted rule that the state should not be held responsible for actions it has not committed, i.e. for the conduct of another state.[41] Dumberry, however, dismisses this, stating that it is not just responsibility for an internationally wrongful act that passes to the successor state, but the international obligation of the predecessor, too.[42] According to him, the state becomes responsible not so much for an act committed by the predecessor state, but rather for its *own* failure to observe an international obligation it has inherited.

The "clean slate" principle is a special example of the principle of non-succession: a newly established state does not inherit the rights and obligations of the predecessor state. On the one hand, the reasoning appears logical, since it would be wrong, both legally and morally, to make a *completely* new state repair a wrong

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[36] *Ibid.*
[37] Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 2(f).
[38] Gordon, Andrea. "New States: Chained to Old Treaty Obligations or Clean Slate?" *North Carolina Journal of International Law*, vol.41, issue 3 (2016), p.546.
[39] Dumberry, Patrick and Daniel Turp. "State Succession with Respect to Multilateral Treaties in the Context of Secession: From the Principle of Tabula Rasa to the Emergence of a Presumption of Continuity of Treaties." *Baltic Yearbook of International Law*, vol.13 (2013), p.47.
[40] Stern, Brigitte (ed.). Dissolution, Continuation, and Succession in Eastern Europe. (The Hague; Boston; London: Martinus Nijhoff Publishers, 1998), p.11.
[41] Dumberry, *supra* note 30, p.416.
[42] *Ibid.*

that it did not commit; on the other hand, realistically, it is doubtful that today a state can emerge from nowhere, with no link to any predecessor state whatsoever. With no *terra nullius* left, a new state would certainly have some connection to its predecessor (be it existing or dissolved) and would thus inherit certain legal obligations from it. Craven supports this, writing that:

> [i]n very few cases have newly emergent states discarded, in their entirety, all rights and duties that were formerly incumbent upon the previous sovereign. Even those states emerging from a process of decolonization tended to accept a certain number of treaties entered into on their behalf by former colonial powers.[43]

This matter is left to the International Law Commission to resolve, and analysis of the work done so far will show whether any approach was expressly favoured.

1.2.5. The "who or what" dilemma of state succession

Finally, a note should be made on existing differences in approaches of international scholars to the matter of state succession as such. When drafting the 1978 Vienna Convention, the ILC drew:

> a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State.[44]

Consequently, one group of scholars emphasises the state succession element, i.e. prioritising the question of *who* is the subject of state succession and therefore inherits treaty obligations; in contrast, another group emphasises *what* is the object of succession, i.e. which legal obligations are to be succeeded to. The first question revolves around statehood (when and how a state is created and when it ceases to exist) and legal identity of states; the second lies in the realm of the law of treaties.

Craven notes that when Sir Humphrey Waldock started work on the topic of succession to treaties, he shifted the focus of the Commission: instead of approaching it from the general law perspective, he proposed the treaty law perspective.[45] Craven states that "neither the principle of universal succession nor that of the clean slate was helpful",[46] so Waldock proposed to move away from the old/new state distinction and instead focus on the consensual nature of treaty relations with other states.[47]

The very same dilemma might appear relevant in the context of state responsibility: while one group of scholars would focus on the question of who

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[43] Craven, Matthew C.R. "The Problem of State Succession and the Identity of States under International Law", *European Journal of International Law,* no.9, p.149.
[44] Report of the ILC on the work of its twenty-sixth session, A/9610/Rev. l, *ILC Yearbook 1974,* vol. II, part 1, p.167, para.49. Available at: http://bit.ly/2Jhd4jN (last visited: 13 May 2020).
[45] Craven, Matthew. *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2009), p.113.
[46] *Ibid.*
[47] First Report on Succession of States and Governments in respect of treaties by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/202. *ILC Yearbook 1968*, vol. II, p.90, para.14. Available at: https://bit.ly/2V7EryE (last visited: 14 May 2020).

inherits responsibility (arising out of inherited legal obligations), the other would first seek to determine the precise content of the legal obligations to be inherited. These complex legal dilemmas reflect the contradictory nature of international law and partly explain the absence of general codified rules governing state succession.

1.3. Absence of general codified rules on state succession

The two Vienna Conventions discussed above are the only existing *codified* legal rules on state succession. The question is whether this should be viewed as a problem: should the codification effort be stronger, also covering other areas of state succession?

There are at least three reasons why codification of matters related to state succession is more complicated than in other areas of law. The first is methodological: when a topic for codification is chosen by the ILC, the actual drafting is preceded by a profound study of the topic, including both examination of scholarly writings and state practice. Even though the phenomenon of state succession is not new, there is no *continuous and consistent* practice,[48] which complicates the process of identification of rules. In other words, the materials that the codification process is to be based on are not coherent enough to serve as a solid basis. As a member of the ILC Milan Bartoš pointed out:

> [r]ealities must not be ignored, but the international order, international jus cogens, had undergone so many changes that the nineteenth and the early twentieth century could not always be accepted as the only guide.[49]

The second difficulty lies in the very nature of state succession. One cannot ignore that it has always been a politicised area since the transfer of sovereignty is involved; in determining the existence of general practice, one has to distinguish between cases where the outcomes were politically driven from those where the outcomes are legally reasoned.[50]

State succession is a complex, multi-dimensional subject because it involves the passing of rights, interests, obligations and responsibilities of various types and on various levels. The problem lies *both* in the transfer from predecessor state(s) to successor state(s) *and* in the effect that this transfer has on relations with third parties and the international community as a whole.[51] In this sense, codification is an attempt to create absolute rules that would apply to essentially non-absolute – i.e., relative – circumstances and situations.

This leads to the third reason, a structural one – the consensual nature of international law.[52] Legal relationships between two or more states are based on their consent to be bound by created obligations, and state succession poses a dilemma here: on the one hand, if a new state, which has a different legal personality from the predecessor state, becomes automatically bound by obligations

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[48] Summary record of the 702nd meeting, A/CN.4/SR.702, *ILC Yearbook 1963*, vol. I, p.190, para.12. Available at: https://bit.ly/2V0SgP8 (last visited: 15 May 2020).
[49] *Ibid.,* p.192, para.31.
[50] First Report, Waldock, *supra* note 47, p.90, para.16.
[51] *Ibid.,* p.194, para.59.
[52] Craven, "The Problem of State Succession…", *supra* note 43, p.150.

assumed by the latter, the new state becomes bound without its consent. If, on the other hand, it is not bound by such obligations, then relations between the predecessor state and third state(s) essentially disappear because the predecessor state has ceased to exist.

These three reasons, however, do not render codification in the area of state succession completely useless. Codification may serve – not the purpose of formulating the rules, but of categorising various types of state succession, creating a kind of taxonomy, and bringing clarity to the whole area.[53] While these rules have potential for providing more questions than answers, they serve as written evidence of matters on which states agree, such as definitions or general concepts.[54] Where provisions do not enjoy unanimous support, they become a starting point for legal debate, which contributes to the development of international law.

Neither of the two Vienna Conventions became authoritative legal instruments (the number of ratifications was relatively low, and application uncommon) mainly because of the timing that was chosen for codification. Sarvarian points out that:

> [c]odification in the teeth of epoch-changing crises such as decolonization or desovietization – however much there may be demand for normativity – considerably hampers efforts to codify in a technocratic, depoliticized fashion. In particular, efforts to influence the very practice that is materializing at the time of codification inevitably shifts the focus away from the systemic generality that codification embodies.[55]

The answer as to whether codification is desirable depends on its aims and purposes. If the purpose is to draft a universally applicable set of absolute rules, codification is unable to attain that due to methodological and structural reasons, including the nature of this field of law, the architecture of the international legal system, and so forth. If, however, the purpose is to proclaim generally accepted norms, bring more clarity to the question and draw the contours of the rules that would then crystallise on their own, the effort is reasonable. In this sense, while "the means" remain the same, it is "the ends" that determine the success of the drafting endeavour.

2. EXISTING LAW ON STATE RESPONSIBILITY

The topic of state responsibility was put on the agenda for codification simultaneously with state succession, in 1949.[56] During the drafting process, there were a few instances when state succession was discussed specifically in relation to international responsibility. One of the early drafts of the ARSIWA contained then Article 15 titled "Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State" that provided as follows:

[53] *Ibid.,* p.151.
[54] Sarvarian, Arman. "Codifying the Law of State Succession: A Futile Endeavour?" *The European Journal of International Law,* vol.27, no.3, p.803.
[55] *Ibid.*, p.809.
[56] Survey of International Law, *supra* note 4, p.56.

> 1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.
>
> 2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.[57]

As Roberto Ago, at that time Special Rapporteur on state responsibility, explained in his commentary to the draft Article 15, when an insurrectional movement, by way of using the existing structures of a former (predecessor) state, proclaims a state of its own, it is because of this link, i.e. because of the continuity between the two states that wrongful conduct can be attributed to the successor state.[58] This, however, only relates to a situation when the successor state inherits the structures and a part of the identity of the predecessor state. In cases when the predecessor state ceases to exist and a new state is born with a separate legal personality, responsibility for acts committed by the predecessor state would not be attributed to the new state due to the lack of continuity between them.[59]

An apparent counter-argument to the second situation would be as follows: while in theory, establishing a "brand new state" is possible, in practice, there is a small (if any at all) probability that an insurrectional movement will establish a state not based on previously existing state structures. It is much more likely that this new state will be established by way of adjusting and re-organising the existing (or the remaining) machinery of the predecessor state.

A note should also be made on the importance of establishing a link between the predecessor state and the successor state to enable transfer of responsibility from the former to the latter. Even though Article 15 was not retained in the final document in its initial wording, it is worth noting that this continuity element recalls the provisions of the two Vienna Conventions.

However, one of the preparatory documents of the ARSIWA contains an explanatory footnote, stating:

> It is controversial in what circumstances there can be succession to State responsibility. The draft articles do not address that issue, which is an aspect of the law of succession rather than of responsibility.[60]

With this, the question of state succession in respect of state responsibility was mildly put aside from the scope of codification. This might be explained by the timing: the referenced report was produced in 2000 when the drafting process was

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[57] Report of the ILC on the work of its thirty-second session, A/35/10, *ILC Yearbook 1980*, vol. II, part 2, p.31. Available at: https://bit.ly/2ttHANi (last visited: 14 May 2020).
[58] Fourth report on State responsibility by Mr. Roberto Ago, Special Rapporteur, A/CN.4/264 and Add. l, *ILC Yearbook* 1972, vol. II, p.144, para.194. Available at: https://bit.ly/2GVRQFT (last visited: 14 May 2020).
[59] *Ibid.,* para.195.
[60] Third report on State responsibility by Mr. James Crawford, Special Rapporteur, A/CN.4/507 and Add. 1–4 (2000), p.111, footnote 855. Available at: https://bit.ly/2E1psza (last visited: 14 May 2020).

moving towards an end; raising such a complex legal issue might have prolonged the process for another decade.

Ultimately, the ARSIWA were adopted in 2001; the document is divided into conceptual chapters, covering the notion of an internationally wrongful act, different cases of attribution, the concept of breach of international obligations, the consequences of breach, and so on. We shall focus on attribution: two provisions allow us to tie the topic of succession to responsibility.

The first is Article 10, "Conduct of an insurrectional or other movement", which reads:

> 1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
>
> 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
>
> 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.[61]

Several changes have been made to its wording, compared with the initial version discussed above. It provides two options: when an insurrectional movement establishes a new *government* in a pre-existing state, that state would be liable. If a *new state* is formed in part out of the territory of a pre-existing state, then international responsibility becomes attributable to the new state. As official commentaries opine, the reasoning behind both is continuity, although it might seem that the two options are somewhat different. [62]

To explain, when an insurrectional movement replaces the previous government, a new state is not being formed. It is the *government* that changes: the link rather exists between the new government and the insurrectional movement; this link allows attribution of wrongful acts to essentially the same state. In cases when *a new state is formed* from part of a predecessor state, the link is again between the insurrectional movement and the new state (as a new subject of international law), so wrongful acts will be attributed to the new state. In short, continuity is decisive.

Further, Article 11 titled "Conduct acknowledged and adopted by a State as its own" is relevant. It states:

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.[63]

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[61] ARSIWA, *supra* note 1, Article 10.
[62] Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *ILC Yearbook 2001*, vol. II, part 2, p.50, para.6. Available at: https://bit.ly/1MIyM9V (last visited: 14 May 2020).
[63] ARSIWA, *supra* note 1, Article 11.

On that basis, an internationally wrongful act that is otherwise not attributable to a state but was nevertheless accepted by a state as its own shall be attributed to this state. As Crawford puts it, if a state endorses wrongful conduct, it thus assumes responsibility for it.[64] The wording "to the *extent* that the State acknowledges and adopts the conduct as its own", however, sets a limitation: responsibility is attributed to the acknowledging state only in part, namely as much as the state agrees to assume. How the extent of responsibility is determined – i.e. *how much* responsibility should be attributed – is an open question. The classic proportionality test might be useful.

Since the 2001 Articles do not *expressly* refer to cases of state succession, it is natural that the topic found itself on the agenda of the ILC: cases of state succession of the late 20th century would eventually raise questions not just of a political, but also of a legal nature.

3. SELECTED CASES ON STATE SUCCESSION

3.1. The *Gabčíkovo-Nagymaros* case

3.1.1. Factual background and findings of the Court

In 1997, not long after the dissolution of Czechoslovakia, the International Court of Justice pronounced on a dispute between the Republic of Hungary and the Slovak Republic. The dispute concerned implementation and termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, which was signed between Hungary and Czechoslovakia in 1977. The subject-matter of the treaty was the construction and operation of a system of locks on the Danube river that bordered both counties, with the main locks located in Gabčíkovo (in Czechoslovak territory) and Nagymaros (in Hungarian territory). The project had multiple purposes, such as flood prevention, hydroelectricity production, and improved river navigation. The works started in 1978. However, in 1989, the Hungarian government suspended them due to criticism that the project was facing. It was later decided to completely terminate the works in Nagymaros. This led to disagreement between Hungary and (then) Czechoslovakia. During negotiations, one of the alternatives – so-called Variant C – was proposed. This required diversion of the river by Czechoslovakia on its own territory. In 1991, implementation of Variant C began. Negotiations meanwhile continued, but, being unable to find an alternative acceptable to both parties, Hungary notified Czechoslovakia of termination of the treaty with effect from 25 May 1992. Not long afterwards, in 1993, the dissolution of Czechoslovakia took place, with Slovakia becoming a separate independent state.[65]

During the proceedings, Hungary contended, *inter alia*, that it was entitled to terminate the 1977 Treaty, that the Treaty was never in force between it and the

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[64] Report of the ILC on the work of its fifty-third session, A/56/10, *ILC Yearbook 2001*, vol. II, part 2, p.52, para.3. Available at: https://bit.ly/2SVrrj3 (last visited: 14 May 2020).

[65] *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 25 September 1997. ICJ Reports 1997, p.8.

newly formed Slovakia, and that the latter bore responsibility for unilateral application of the provisional solution. Slovakia, on the other hand, argued that it was a successor to the Treaty, which remained in force between it and Hungary, that Hungary's notification of termination of the Treaty had no legal effect, and that application of Variant C was lawful.[66]

It is worth noting that, even before turning to discussion on the merits, the Court made the following statement:

> [...] Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility […] as those two branches of international law obviously have a scope that is distinct.[67]

With that, the Court drew a dividing line between the two areas of law, based on exclusion of matters of state responsibility contained in Article 73 of the 1969 Vienna Convention on the Law of Treaties.[68] Thus, the Court had first to examine questions regulated by the primary rules: whether the treaty was in force between the parties, whether its suspension by Hungary was lawful and whether the application of Variant C was or was not a violation. Then – had a violation of primary rules by either party been established – the Court would turn to the question of responsibility.

The Court held that the initial suspension of works by Hungary was unlawful; Czechoslovakia was also found in violation of the 1977 Treaty as it had implemented Variant C.[69] Regarding the question whether the Treaty remained in force upon notification of termination by Hungary, the Court concluded that this notification had no effect of terminating the Treaty.[70]

Moving on to the issue of succession, the Court first had to determine whether Slovakia was the successor to the 1977 Treaty. This question was crucial to the dispute. Hungary contended that, because Czechoslovakia had ceased to exist as a legal entity, the Treaty was terminated due to the disappearance of that party. Hungary further claimed that there was no rule of automatic succession to bilateral agreements and that it had never expressly recognised Slovakia as a successor to the 1977 Treaty. It also rejected the notion that the Treaty was of a territorial nature.[71]

Slovakia submitted that the 1977 Treaty remained in force even in the absence of express consent on the part of Hungary due to the principle of continuity and as the treaty in question was of a territorial nature within the meaning of Article 12 of the 1978 Vienna Convention.[72]

In determining the outcome, the Court gave priority to the territorial character of the 1977 Treaty, providing that such treaties remain unaffected by state succession. Consequently, the Court found that Slovakia was a successor to the treaty.[73] The Court noted that further relationship between the parties was to be governed by various rules, including other treaties that Hungary and Slovakia are

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[66] *Ibid.,* pp.14-24, paras.15-25.
[67] *Ibid.,* p.35, para.47.
[68] Vienna Convention on the Law of Treaties, *supra* note 19, Article 73.
[69] *Gabčíkovo-Nagymaros Project, supra* note 65, p.43-51, paras.59-78.
[70] *Ibid.,* p.66, para.115.
[71] *Ibid.,* pp.66-67, paras.116-119.
[72] *Ibid.,* pp.67-68, paras.120-122.
[73] *Ibid.,* pp.68-70, paras.123-124.

bound by, the rules of general international law, the rules on state responsibility, etc., but stressed that priority should be given to the 1977 Treaty regime, which, quoting the Court, applies "above all".[74] Thus, the prevalence of the primary rules was emphasised.

Having determined that, the Court then moved to the legal consequences of the violations committed by the parties. In doing so, it recalled the Special Agreement concluded between Hungary and Slovakia on 7 April 1993, which reads in its Preamble:

> [...] the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project […][75]

This wording allows Slovakia to be held accountable for the acts of Czechoslovakia and bear international responsibility for wrongs committed by Czechoslovakia as the predecessor state. Based on this provision, Slovakia was found liable to pay damages both for its own wrongful conduct and that of Czechoslovakia by way of succession. Similarly, Slovakia was also entitled to receive damages that otherwise Czechoslovakia would have received as compensation for wrongful acts committed by Hungary.[76]

3.1.2. Effect of the existence of prior agreement between the parties

In its determination of responsibility of Slovakia for acts committed by Czechoslovakia, the Court relied solely on the Special Agreement and did not go into further discussion on succession in respect of state responsibility. It relied on a provision which took priority over other possible outcomes. In the absence of such a provision, the Court might have been faced with the need to engage in complex legal discussions on why, if at all, Slovakia inherited international responsibility from Czechoslovakia. Although in this judgment the Court does not use the wording "succession to responsibility", it nevertheless does make a distinction between responsibility that Slovakia bears for wrongful acts committed by Czechoslovakia and responsibility for its own conduct.

Gabčíkovo-Nagymaros exemplifies a category of cases of state succession, where there is an agreement between the states concerned and where the successor state is expressly recognised as such. It is relatively straightforward: the dissolution of Czechoslovakia was peaceful, neither of the successor states claimed to be the sole successor, and the Special Agreement concluded between Slovakia and Hungary further simplified the matter. Another category of succession cases, with no agreement between the separating states, presents a bigger difficulty for the adjudicator.

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[74] *Ibid.*, p.73, para.132.
[75] *Ibid*, p.8, para.2.
[76] *Ibid*, p.78, para.151.

3.2. The first *Genocide* case *(Bosnia and Herzegovina v. Serbia and Montenegro)*

3.2.1. Factual background and findings of the Court

Before starting a legal examination of the two *Genocide* cases, background information about the disintegration of Yugoslavia has to be provided. The breakup of the Socialist Federal Republic of Yugoslavia (SFRY) was induced by a severe economic and political crisis within the country coupled with overall instability in Central and Eastern Europe during the late 1990s. Similarly to the dissolution of Czechoslovakia, the process was relatively fast, yet much more violent. Chronologically, Slovenia and Croatia were the first to declare independence in June 1991, with Bosnia and Herzegovina plus Macedonia following. Serbia and Montenegro remained a federation, in April 1992 proclaiming a new state – the Federal Republic of Yugoslavia (FRY, or Yugoslavia).[77]

The proceedings in issue were initiated by Bosnia and Herzegovina in 1993, alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) by Serbia and Montenegro.[78] In particular, the applicant alleged that then Yugoslavia had – by killing, detaining, torturing, kidnapping and exterminating citizens of Bosnia and Herzegovina – violated its legal obligations under the Genocide Convention, Geneva Conventions of 1949, the United Nations Charter, as well as general and customary international law.[79] While the case is highly complicated, for this study the focus will be on the issue of state succession. One must note that, in its deliberations on the merits, the Court does not directly address state succession *in respect of state responsibility*, although the matter is not completely untouched.

In its preliminary objections, the FRY challenged the jurisdiction of the Court, claiming that the Notification of Succession to the 1948 Genocide Convention filed by Bosnia and Herzegovina in 1992 had no legal effect.[80] Bosnia and Herzegovina considered the Genocide Convention to fall under the category of human rights protection instruments and hence contended that automatic succession applies.[81] The Court, however, decided not to go into determination of the legal consequences of state succession, stating that:

> [...] the Court does not consider it necessary […] to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties.[82]

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[77] Bookman, Milica Z. "War and Peace: The Divergent Breakups of Yugoslavia and Czechoslovakia." *Journal of Peace Research*, vol. 31, no. 2 (1994), p. 175.
[78] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Preliminary Objections, Judgment, 11 July 1996, ICJ Reports 1996, p.598, para.1. Available at: http://bit.ly/2KrqOJY (last visited: 15 May 2020).
[79] *Ibid.,* p.600, para.13.
[80] *Ibid.,* p.604, para B.1.
[81] *Ibid.,* p.611, para 21.
[82] *Ibid.,* p.612, para 23.

According to the Court, the way in which Bosnia and Herzegovina became a party to the Genocide Convention – through automatic accession upon independence or when filing the Notification of Succession – is not crucial to the determination of jurisdiction.[83]

The final judgment is dated 26 February 2007, by which time the FRY had broken up into two separate states: Serbia and Montenegro.[84] This is why the Court had to devote special attention to identifying the respondent: the Chief Prosecutor of Montenegro argued that the process of succession of Serbia and Montenegro was regulated by the Constitutional Charter, which states that the Republic of Serbia is the sole successor to Yugoslavia; based on that provision, it was submitted that Montenegro could not be the respondent in the case.[85] Serbia expressly claimed continuity with the predecessor state and willingly accepted its previous commitments. The Court agreed that the newly proclaimed Republic of Montenegro had a separate legal personality; hence, the Republic of Serbia remained the only respondent in the case[86] and consequently could be held responsible for acts of the former single state of Yugoslavia. However, the Court then made a note that:

> [...] it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.[87]

This implicitly refers to succession to responsibility. One also has to note that the alleged violations took place *before* the dissolution of Yugoslavia into two separate states, which means that the Court hereby acknowledges the possibility of establishing responsibility for actions taking place before the date of succession. Responsibility could be transferred based on the continuity between Yugoslavia and the newly formed Republic of Serbia, as the latter inherited the legal personality of the former.[88]

3.2.2. The formula used by the Court

In practice, the Court followed a clear pattern of attribution of responsibility, moving from the primary to the secondary rules of international law. Thus, it first identified the applicable set of primary rules – the 1948 Genocide Convention – and established violation thereof as the events of the Srebrenica massacre were found to constitute genocide within the meaning of the Convention.[89]

Then, the Court divided this act into three separate categories: the commission of genocide itself, actions related to but other than genocide, and the

[83] *Ibid.*
[84] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Final Judgment, 26 February 2007, ICJ Reports 2007, pp.34-35, paras.67-69. Available at: http://bit.ly/2w2VerV (last visited: 15 May 2020).
[85] *Ibid.*, p.36, para.72.
[86] *Ibid.,* p.37, paras.76-78.
[87] *Ibid.,* p.37, para.78.
[88] Second report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, A/CN.4/719 (2018), p.p.25, para.90. Available at: https://bit.ly/2ZdMleM (last visited: 9 July 2020).
[89] *Bosnia and Herzegovina v. Serbia and Montenegro, supra* note 84, p.160, para.379.

obligation to prevent and punish genocide. Consequently, the rules of attribution have to apply, though not to all these issues cumulatively but separately from each other.

Let us focus on the first matter – the commission of genocide. Since attribution is not regulated by primary rules, secondary rules on state responsibility come into play. The Court here follows a classical attribution process: it has to determine whether the alleged violations were committed by state organs, whose actions would then be automatically attributed to the state based on Article 4 of the ARSIWA. If not, the Court would have to establish whether these actions were committed by organs that were not *formally* state organs but were still under its direction or control.[90] Thus, the Court had to determine:

> [...] whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (*as the Respondent was known at the time*) under its internal law, as then in force.[91] [emphasis added]

With this statement, the Court in a way equated the former Yugoslavia with Serbia, underlining that the two shared the same legal personality. The Court then moved on to determine the status and the degree of dependence of the perpetrators of the massacre on Yugoslavia, concluding that it had not been established that these organs were acting under the direction or control of the Respondent state.[92] Consequently, these acts could not be attributed to it.

However, regarding the third question, the Court found a violation on the part of the Respondent, as it had failed to prevent and punish genocide.[93] The Court then employed the link – i.e. the continuity established between the predecessor state and the successor state – to hold the successor state accountable. Consequently, the final ruling refers to Serbia, not Yugoslavia:

> [the Court] ... finds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995.

Although in this judgment the Court does not go into deliberations on state succession in respect of state responsibility, in the second Genocide case this matter is touched upon in express terms.

3.3. The second *Genocide* case *(Croatia v. Serbia)*

3.3.1. Factual background and findings of the Court

The second *Genocide* case was initiated by a claim submitted by Croatia against Yugoslavia in 1999. This was similar to the one brought by Bosnia and Herzegovina six years earlier: Croatia alleged that Yugoslavia had violated the Genocide

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[90] *Ibid.,* p.162, para.384.
[91] *Ibid.,* p.163, para.386.
[92] *Ibid.,* p.175, para.413.
[93] *Ibid.,* p.190, para.450.

Convention by committing genocide on the territory of Croatia from 1991 to 1995.[94] In identifying the Respondent, the Court followed an identical path and concluded that Serbia was the sole respondent in the present case.[95]

Despite Serbia being a recognised successor to the FRY, which, in turn, was one of the successor states to the SFRY, Serbia contended that a distinction should be made between the obligations of the two (FRY and SFRY, respectively). Further, it submitted that the wrongful acts of the SFRY could not be attributed to the FRY (and thus to Serbia as its direct successor), since the alleged actions took place before the existence of the FRY, and thus the obligations were not binding upon it at the time.[96]

Croatia, in turn, considered that the FRY came into existence *directly* from the SFRY, and there is nothing that could hinder attribution of the acts in question to it. In its argument, Croatia relied on the ARSIWA, namely, on Article 10, which allows attribution of the actions of an insurrectional movement to a new State emerging from that movement.[97] More specifically, Croatia submitted that the "Greater Serbia" movement acquired control over certain organs of the SFRY and latter crystallised into the FRY.[98] As to the application of Article 10(2) of ARSIWA, the Court noted that:

> Article [10] is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State.[99]

The Court continued by stating that the FRY was not bound by the Genocide Convention until it became a party to it with the declaration of independence on 27 April 1992 and notification of succession. Consequently, since it was not bound by international legal obligations before that date, there could be no potentially attributable breach (apart from obligations or prohibitions conferred by customary international law).[100]

Croatia then advanced another argument, expressly referring to succession to responsibility. According to this argument, internationally wrongful acts committed before 27 April 1992 (i.e. before the FRY came into existence) were attributable to the SFRY, which at the time was party to the Genocide Convention. When the SFRY ceased to exist, the FRY by its notice of succession succeeded to the treaty obligations of the former *together with* its international responsibility.[101] According to Croatia, there were two grounds for this argument: first, that application of general rules on state succession leads to the possibility of succession to responsibility, especially taking into account the background to the FRY's succession, involving

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[94] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, ICJ Reports 2008, p.417, para.21. Available at: http://bit.ly/2JLOs24 (last visited: 15 May 2020).
[95] *Ibid.,* pp.421-423, paras.23-34.
[96] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment, 3 February 2015, ICJ Reports 2015, p.43, paras.79-80. Available at: http://bit.ly/2WdctW6 (last visited: 15 May 2020).
[97] *Ibid.*, p.44, para.82.
[98] *Ibid.*
[99] *Ibid.,* p.52, para.104.
[100] *Ibid.*
[101] *Ibid.,* p.54, para.107.

armed conflict and control by the FRY over the entities of the SFRY. Second, the FRY in its declaration of 27 April 1992 itself indicated that it succeeded not just to treaty obligations, but also to treaty responsibility.[102]

The Court did not dismiss this argument, stating that, for it to determine whether Serbia bore responsibility for violations of the Genocide Convention by way of succession, three points had to be reviewed:

> (1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention;
>
> (2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and
>
> (3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.[103]

In the last paragraph, the Court used the wording "succeeded to that responsibility", thus, in essence, accepting that possibility. For the Court to determine whether it could adjudicate on these matters, it had to determine whether they fell within the scope of Article IX of the Genocide Convention. As to paragraph (3) of the Court's scheme, it noted with reference to the Convention that

> Article IX speaks generally of the responsibility of a State and contains no limitation regarding the manner in which that responsibility might be engaged.[104]

Here again, the Court read the provision of the Genocide Convention as *not precluding* responsibility by succession. The Court then agreed with Croatia's submission that the whole matter of whether Serbia succeeded to responsibility was governed not by the Convention, but by general international law.[105]

In practice, the ICJ did not go beyond the first paragraph, as it found that Croatia had failed to prove that genocide was committed. Since no violation was established, further questions were not examined.[106] However, although the Court did not employ its own proposed plan, this judgment is still of utmost importance, since the Court for the first time expressly – not implicitly, as in the first *Genocide* case – acknowledged the possibility of incurring responsibility by succession. At the same time, the Court's approach to this matter was not endorsed by several judges.

3.3.2. Criticism and analysis of the Court's findings regarding state succession to responsibility

The major criticism, advanced by the President of the ICJ Peter Tomka, concerns the Court's reading of Article IX of the Genocide Convention as allowing responsibility by succession. Tomka identified two problematic points. First, the wording contained in Article IX "including [disputes] relating to the responsibility", according to him, was not meant to widen the scope of the provision to include the controversial matter of

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[102] *Ibid.*
[103] *Ibid.,* p.55, para.112.
[104] *Ibid.,* p.56, para.114.
[105] *Ibid.,* para.115.
[106] *Ibid.,* p.128, para.441.

succession since responsibility as a legal term does not include succession.[107] He provided a short analysis of the *travaux* and concluded that the word "responsibility" was used merely to exemplify, to provide a subset of issues that fall under the wider area of "interpretation, application and fulfilment of the Convention"; therefore, it does encompass matters of succession.

Second, he noted that the Court's interpretation of the provision allowed it to adjudicate a dispute not just between Croatia and Serbia, the immediate parties, but also to review application and fulfilment of the Convention by *another* party – the SFRY. According to Tomka, the formulation contained in Article IX – "disputes between the Contracting Parties" – definitely precludes that possibility.[108]

Finally, he made an important remark as to the effects of the Court's findings on other successor states:

> Serbia is only one of five equal successor States to the SFRY. A decision as to the international responsibility of the SFRY may well have implications for several, if not each, of those successor States, depending on what view is taken on the question of the allocation of any such responsibility as between them.[109]

This leads to another dilemma: had the actions of the SFRY been recognised as violations of international law, would the responsibility pass by way of succession solely to Serbia? In 2001, the five successor states to the SFRY – Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and the FRY – signed the Yugoslav Agreement on Succession Issues, covering issues such as archives, pensions, financial liabilities, and so on, which indicates that all five states are, in their sovereign equality, successor states.[110] Taking into account this agreement, the question arose as to whether only Serbia (as the sole successor of the FRY) could have been held responsible for the acts of the SFRY by way of succession? Had it been the case, what would be the legal grounds for holding just one successor state out of five liable for the wrongful acts of the predecessor? On the other hand, it would still be impossible to hold the other four states accountable as a result of the proceedings in issue since they were not parties to the dispute and had not consented to the jurisdiction of the Court.

A similar line of criticism was advanced by Judge Leonid Skotnikov, who compared Serbia in the present case with Montenegro in *Bosnia and Herzegovina v. Serbia*. Then, Montenegro rejected responsibility for the acts of the FRY, relying on the Constitutional Charter – this argument was used by the Court in its determination of the Respondent. Drawing parallels, Skotnikov noted that in the present case

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[107] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Separate Opinion of President Peter Tomka, p.163, para.24. Available at: http://bit.ly/2VeiUIf (last visited: 15 May 2020).

[108] *Ibid.,* p.158, paras.9-10.

[109] *Ibid.,* p.166, para.32.

[110] Agreement on Succession Issues, Vienna, 29 June 2001. Available at: http://bit.ly/2IGYBgP (last visited 15 May 2020).

Serbia did not inherit the legal personality *of the SFRY*, nor did it accept responsibility for the disputed acts.[111]

While in the first *Genocide* case, the Court did not even consider succession to responsibility, in the present case, it quite rapidly accepted the idea without going into detailed explanations. Despite the evident similarities between the two cases, this time the Court saw no problem in proposing the three-step solution. Skotnikov continues:

> I cannot see how this construction could possibly be justified by the Court's obvious observation that the SFRY, whose responsibility or lack thereof the Court is prepared to determine, "no longer exists . . . no longer possesses any rights and is incapable of giving or withholding consent to the jurisdiction of the Court".[112]

Further, Judge Xue spoke of the Court not making a distinction between two types of invocation of responsibility: by attribution (according to Croatia's first argument) or by succession (according to its second argument).[113] The Court, by disregarding the way in which responsibility is conferred, and instead prioritising the overall question of the responsibility of Serbia, had indeed blurred the line between two distinct notions: that of attribution, well-established and commonly used, and that of succession to responsibility, characterised by lack of consistent practice and a well-defined application standard.

These points of criticism are not without grounds. As to the first point – the overstretch of the scope of Article IX of the Genocide Convention – indeed, the Court's interpretation of the word "responsibility" was too broad, even though the *travaux* showed no intent on the part of the drafters to include this matter. The Court, in its reasoning for such interpretation, stated that "Article IX... contains no limitation", but nor does it permit expansion of the scope. Objectively, the Court does not provide a *legal* argument that would justify such reading of the provision.

Moreover, a legal deadlock is created by the Court's readiness to accept the possibility of Serbia succeeding to the responsibility of the SFRY, disregarding the existence of five other successor states. While this is speculation, *had* the Court found violations of the Convention on the part of the SFRY and considered that Serbia was responsible for these violations by way of succession, the consequences for other successor states, if at all would remain unclear; and if not, how would the Court justify making solely Serbia accountable?

Finally, the readiness with which the Court accepted the argument based on succession to responsibility also raises doubts. Paragraphs referring to it contain no references to principles of general international law, just to the *Lighthouses Arbitration* case, which in itself is not enough to justify application of the principle in

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[111] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Separate Opinion of Judge Leonid Skotnikov, p.196, para.5. Available at: http://bit.ly/2PmUOFQ (last visited: 15 May 2020).

[112] *Ibid.,* p.197, para.5.

[113] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Separate Opinion of Judge Xue Hanqin, p.386, para.17. Available at: http://bit.ly/2W1h5LJ (last visited: 15 May 2020).

the present case. Yet, the ICJ endorses the idea, as Judge *ad hoc* Kreća puts it, "with amazing ease."[114]

To sum up, although the judgment in *Croatia v. Serbia* is truly significant, there are too many grey areas which trigger academic debate but regretfully did not receive as much attention from the Court as they should have.

3.4. The case of *Bijelić v. Montenegro and Serbia*

3.4.1. Factual background and findings of the Court

An application to the European Court of Human Rights (ECtHR) was filed by three applicants: Ms Nadezda Bijelić, Ms Svetlana Bijelić and Ms Ljiljana Bijelić, all members of one family and Serbian nationals. All applicants, as well as the first applicant's husband, resided in one flat in Podgorica. In 1989, the first applicant divorced her husband. Shortly afterwards, the local authorities recognised her as the only holder of tenancy rights, while her husband was ordered to vacate the flat. He did not comply with this decision voluntarily, and, in 1994, the first applicant filed a formal application to the national court to enforce the decision. Up until 2007, numerous attempts were made by the authorities (in the presence of the police forces, firefighters, paramedics, and the like) to force the ex-husband to leave the flat, yet all of them were in vain: he refused to vacate the premises and threatened to resort to physical force.[115]

Applications instituting the proceedings in question were filed in 2004 and 2005, at the time when Serbia and Montenegro formed a single state called the State Union of Serbia and Montenegro. However, on 3 June 2006, Montenegro declared independence.[116] Factually, the flat in issue was located in the territory of Montenegro, yet, after its declaration of independence, all applicants wished to continue proceedings against both Serbia and Montenegro: against the former based on the fact that Serbia is the sole successor to the predecessor state, and against the latter because the actual enforcement proceedings took place in Montenegro.[117]

As to the positions of the parties, Serbia submitted that the proceedings in issue specifically concern actions of the Montenegrin authorities, and thus Serbia (as now a separate state) cannot be expected to act in the territory of another independent state. Also, Serbia stated that:

> although the sole successor of the State Union of Serbia and Montenegro [...] Serbia cannot be deemed responsible for any violations of the Convention which might have occurred in Montenegro prior to its declaration of independence.[118]

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[114] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Separate Opinion of Judge Milenko Kreća, p.487, para.60. Available at: http://bit.ly/2KWWNlC (last visited: 15 May 2020).

[115] *Case of Bijelić v. Montenegro and Serbia*, Judgment, 28 April 2009, European Court of Human Rights, paras.10-33. Available at: http://bit.ly/2UJWWbP (last visited: 15 May 2020).

[116] *Ibid.*

[117] *Ibid.,* paras.61, 64.

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

Montenegro shared this view, and so ultimately did the Court, when stating that the fundamental rights protected by international human rights regimes belong (attach) directly to the individuals concerned "notwithstanding its subsequent dissolution or succession".[119] The Court further compared the present case and the dissolution of Czechoslovakia: while the Czech Republic and Slovakia were formally admitted to the Council of Europe in June 1993, the presumption was that both had succeeded to the Convention when declaring independence in January 1993, i.e. retroactively.

Based on the principle of human rights attaching to individuals as well as the comparison mentioned above, the Court concluded that the European Convention on Human Rights (ECHR) and Protocol 1 had *continuously* been in force for Montenegro *both* when it was a part of the predecessor state (that is, from 3 March 2004, when these instruments entered into force in respect of the State Union of Serbia and Montenegro) up until Montenegro declared independence in June 2006, and afterwards.[120] Based on this finding, the Court went on to examine the alleged existence of a violation of the provisions of the ECHR and Protocol 1 and found a violation of Article 1 of Protocol 1 by Montenegro.[121]

Concerning Serbia, the Court took note of its argument that the proceedings in issue were held solely before the Montenegrin authorities and found the applicants' complaints in respect of Serbia incompatible *ratione personae*.[122]

3.4.2. Court's approach to the issue of state succession in *Bijelić*

The difference in the Court's approach in *Bijelić* compared to the Genocide cases is evident. To recall, then the Court relied on Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, according to which Serbia was the only successor state and hence the actions and possible responsibility of Montenegro for alleged violations of international law were not considered by the Court. Here, the Court took a completely different view: although, based on *the very same* Constitutional Charter, Serbia was the sole successor, the Court nevertheless considered it should not be held responsible for the alleged wrongdoings and shifted its attention to the actions of the Montenegrin authorities.

Montenegro was found to be in violation – however, does this mean that transfer of responsibility took place? In other words, was Montenegro held accountable only for acts committed after it declared independence, or also for acts before that date, thus transferring the responsibility of the State Union of Serbia and Montenegro to the newly independent Montenegro? While in the *Gabčíkovo-Nagymaros* judgment, the ICJ clearly distinguished between responsibility of the predecessor state and the successor state (although, ultimately, Slovakia assumed both), in the present case the ECtHR gave no explicit acknowledgement of that

[119] *Ibid.,* para.69.
[120] *Ibid.*
[121] *Ibid.,* the Ruling part, para.3.
[122] *Ibid.,* para.70.

transfer:[123] on the one hand, it found that the Convention and Protocol 1 "have *continuously* been in force" for Montenegro; on the other hand, the Court did not distinguish between acts committed before 3 June 2006 and after that date, merely stating that:

> …Montenegrin authorities have failed to fulfil their positive obligation, within the meaning of Article 1 of Protocol No. 1, to enforce the judgment of 31 May 1994. There has, accordingly, been a violation of the said provision.[124]

The Court offers no substantive analysis of succession to responsibility, nevertheless managing to keep a balance between satisfying the applicants' claim and at the same time not creating a "tension between the successor and continuing States".[125] Indeed, had the Court gone into a discussion of which acts are to be attributed to a dissolved predecessor state and which – to a successor state, it would inevitably have had to provide legal reasoning for the transfer of responsibility. The *Bijelić* judgment is "carefully quiet" on this matter.

Despite that, the principle applied by the ECtHR – looking at the *de facto* degree of involvement of state organs in certain acts rather than following the formal approach and transferring responsibility to the official successor – might influence the practice of other courts, especially when the dispute involves application or interpretation of international human rights instruments.

4. Present work of the ILC and the proposed Draft Articles

In 2016, Pavel Šturma, now Special Rapporteur on state succession in respect of state responsibility, has presented a comprehensive report, providing an overview of relevant historical facts and legal views on the matter, as well as the reasons for including the topic in the agenda of the ILC: lack of customary international law in this field and existing legal gaps.[126]

The proposed provisions are divided into categories based on the type of succession taking place – each of them will be examined separately in the following subsections.

4.1. General rule (draft Article 6)

Proposed draft Article 6 reads as follows:

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[123] Brockman-Hawe, Benjamin E. (2010). Commentary on the European Court of Human Rights Bijelic v. Montenegro and Serbia Judgment of 11 June 2009. *International and Comparative Law Quarterly*, vol.59, issue 3 (August 2010), p.857.
[124] *Bijelić v. Montenegro and Serbia*, *supra* note 115, para.85.
[125] Brockman-Hawe, *supra* note 123, p.865.
[126] "Succession of States in respect of State responsibility". *Annex A to Report of the ILC on its Sixty-eighth session*, A/71/10, p.410, para.39. Available at: https://bit.ly/2NAZk2B (last visited: 15 May 2020).

> 1. Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States.
>
> 2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the responsibility of the predecessor State and claim from it a reparation for the damage caused by such internationally wrongful act.
>
> 3. This rule is without prejudice to the possible attribution of the internationally wrongful act to the successor State on the basis of the breach of an international obligation by an act having a continuing character if it is bound by the obligation.
>
> 4. Notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles.[127]

The first paragraph is a tribute to Article 1 ARSIWA, which states that "[e]very internationally wrongful act of a State entails the international responsibility of *that* State"[128] [emphasis added]. It refers to the non-succession principle: the state should only be responsible for *its own* conduct. Had state succession affected attribution of an internationally wrongful act that took place before succession, the newly proposed rules would be in clear contradiction with the ARSIWA. Paragraph one thus affirms that draft Article 6 does not seek to alter the rules of the 2001 Draft Articles but to complement them.[129]

However, the wording "before the date of succession of States" is ambiguous. As such, it is defined in both Vienna Conventions as the date of replacement of the predecessor state in its international relations by the successor state.[130] Yet, even in presence of the definition, the vagueness remains: what precisely is meant by "responsibility for international relations", how to determine whether the state has assumed it, and how is the date of transfer of that responsibility determined – all these remain unresolved. Thus, Article 6(1) reiterates the notion that is not precise enough in legal terms.

Draft Article 6, in principle, should unambiguously set a general rule. However, paragraph one, as noted by ILC member Hong Thao Nguyen, does not state who bears responsibility in cases when an internationally wrongful act takes place before succession.[131] To clarify, while it *does* state that succession has no impact on attribution, which shows that the general rule is non-succession, it does not *expressly* provide that it is the predecessor state that assumes responsibility. As Sir Michael Wood comments:

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[127] Second report, Šturma, *supra* note 88*,* Annex I, p.53.
[128] ARSIWA, *supra* note 1, Article 1.
[129] Second report, Šturma, *supra* note 88, p.13, para.45.
[130] See Article 2(1)(d) in both Conventions.
[131] Provisional summary record of the 3431st meeting of the ILC, 9 August 2018, A/CN.4/SR.3431, p.17. Available at: http://bit.ly/2GWhRDr (last visited: 14 May 2020).

> the focus on attribution made draft article 6 rather obscure; what mattered was not so much the original attribution of conduct to the predecessor State, but whether the latter remained responsible after a succession of States.[132]

As follows from paragraph two, the fact of succession should not affect the ability of the injured party to claim reparation from the predecessor state, provided that the latter continues to exist. Creation of a new state should not in principle change the nature of the relationship between the actual wrongdoer and the injured party. Put simply, in cases when the predecessor state continues to exist (provided it is the wrongdoer), responsibility stays with it.

Based on paragraph three, the same wrongful act can also be attributed to the successor state if the legal obligation is in force for it, and the wrongful act is continuous. This provision secures the injured party, ensuring that it does not find itself in a situation when the wrong cannot be repaired because there is no state from which reparation can be claimed. This provision, however, does not provide a solution in cases when the predecessor state has ceased to exist, yet the wrongful act is not of a continuous character.

It appears that the injured party can claim reparation from the predecessor state as well as from the successor state. Importantly, these two options are not mutually exclusive, as paragraph four provides. Let us imagine there is a predecessor state A that engages in wrongful conduct, as well as a successor state B that inherited the same legal obligations yet does not comply with them. Provided that state A continues to exist, draft Article 6 does not prohibit the injured party from claiming reparation from both states A and B, since they have distinctive legal personalities. As legal obligations are in force for both of them, wrongful conduct committed by states A and B may be attributed to them accordingly.

To sum up, draft Article 6 seeks to create a rule that would not conflict with the existing ARSIWA rules, reinforcing the principle that the state should be held liable only for its own violations. It also affirms that the interest of the injured state in reparation should prevail over changing circumstances (states ceasing to exist or appearing). A claim for reparation may be addressed to either predecessor or successor state so that the interests of the injured party are secured. However, it is important to recognise that this provision, as follows from the title, establishes just a *general* rule, not encompassing the specifics of different types of state succession.

4.2. Separation of parts of a State (secession) (draft Article 7)

The text of draft Article 7 is divided into four paragraphs according to the specific circumstances that may accompany the case of secession:

> 1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of secession of a part or parts of the territory of a State to form one or more States, if the predecessor State continues to exist.

[132] *Ibid.,* p.16.

> 2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.
>
> 3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State or States.
>
> 4. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.[133]

Thus, as a general rule, obligations of state A, where state B appeared by way of secession from it, do not pass to state B. This rule mirrors Article 35 of the 1978 Vienna Convention: if, upon separation, the predecessor state continues to exist, the treaty remains in force in respect of the remaining territory of the predecessor state.[134]

Further paragraphs establish exceptions: according to paragraph two, in cases where there is a link between an organ of state A, which later becomes the organ of state B and is located in its territory, then the acts of the organ of state A become the responsibility of the organ of state B. Here, the territorial element plays an important role: obligations, metaphorically speaking, are being transferred to the successor state together with the transfer of territory.

Paragraph three refers to a more peculiar situation, where there is a direct link between the wrongful act or its consequences and the territory of the successor state; in that case, the responsibility is assumed by both the predecessor and the successor states. This is in a way similar to the situation covered by the previous paragraph. The difference is that paragraph two requires a *formal* link (i.e. an official organ of the predecessor state will later become an official organ of the successor state). Paragraph three, in contrast, requires a *de facto* link.

Interestingly, the scope of paragraph three is quite broad: it refers not just to the wrongful act, but also the consequences of that act. On the one hand, this provision might allow the wrongdoer to be held accountable in cases when the act was committed elsewhere but there is a connection to the territory of the successor state. On the other hand, this provision might be misinterpreted due to its wide scope.

Paragraph four mirrors Article 10 ARSIWA: an act of an insurrectional movement that later crystallises into a new state shall be attributed to that new state; consequently, responsibility for it shall also be assumed by the new state. This is further proof that the new Draft Articles aim at complementing the ARSIWA rather

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[133] Second report, Šturma, *supra* note 88, p.53.

[134] Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 35.

than conflicting with it. On the other hand, this paragraph relates more to classic attribution of responsibility rather than to succession.[135]

Although draft Article 7 is quite detailed and covers a variety of situations relating to secession, several problems with its interpretation may appear. First, the wording contained in paragraphs two and three "if particular circumstances so require" add ambiguity: it is unclear what kind of circumstances are implied. Consequently, the courts would have to not only establish the required link but also confirm the existence of these special circumstances. As different courts will interpret the "particular circumstances" formula differently, this would result in lack of uniformity and undermine legal certainty. As Wood notes, "the meaning… would have to be spelt out in the draft article or explained very carefully in the commentary".[136]

Second, the notion of a direct link required in paragraph two also needs further interpretation. While linguistically the wording "direct link" is more precise than simply "a link", in practice it is hard to evaluate whether a certain connection is indeed *direct*. In other words, while the intention of the drafters is intuitively clear – to require a sufficiently precise or evident connection between the act or its consequences and the territory – a legal concept must have a well-defined content and scope.

Third, the proportion of responsibility assumed by the predecessor and the successor states in cases regulated by paragraph three is not specified. Nor is it indicated that this is to be determined by the responsible states themselves.[137]

There is, however, a way to dispose of the unnecessary confusion brought by the problematic areas outlined above: a detailed commentary might shed light on how to apply these provisions correctly; in the absence of a commentary, the provisions would ultimately be interpreted by the courts.

4.3. Newly independent States (draft Article 8)

Draft Article 8 reads as follows:

> 1. Subject to the exceptions referred to in paragraph 2, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State.
>
> 2. If the newly independent States agrees, the obligations arising from an internationally wrongful act of the predecessor State may transfer to the successor State. The particular circumstances may be taken into consideration where there is a direct link between the act or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy.

[135] Provisional summary record of the 3431st meeting, *supra* note 131, p.16.
[136] *Ibid.*
[137] Provisional summary record of the 3432nd meeting of the ILC, 24 September 2018, A/CN.4/SR.3432, p.4. Available at: http://bit.ly/2ZW9Yqd (last visited: 15 May 2020).

> 3. The conduct of a national liberation or other movement which succeeds in establishing a newly independent State shall be considered an act of the new State under international law.[138]

The first paragraph is a proclamation of the "clean slate" principle, based on which a new state is not bound by the legal obligations (and, hence, obligations arising out of their breach, i.e. responsibility) of the predecessor state. However, the structure of the paragraph is of importance: it begins with the wording "subject to the exceptions referred to in paragraph 2" and thus immediately signals that this rule is not absolute.

Paragraph two establishes that, upon consent of the newly independent state, a part of the responsibility of the predecessor state may be transferred to it. The tone of this provision is quite soft as responsibility may be transferred only if the state agrees to it. The optional word *may* is used instead of the imperative *shall*, which again indicates that application of this norm is much dependent on the willingness of the newly established state. However, it might simply disagree to assume responsibility for a wrongful act linked to it simply out of reluctance.

Paragraph two also refers to a direct link between acts of the predecessor state and the newly formed state. While it does not expressly provide that responsibility *shall* be attributed to the latter, that possibility is implied. This is a tribute to the principle of continuity (if the substantively autonomous territory within the predecessor state and the newly formed state share the same legal personality). It seems that, by having reference to both the "clean slate" principle in the first paragraph and the principle of continuity in the second, this article aims at reconciling the two and finding a formula where both principles would co-exist and be applicable in different circumstances.

Similarly to draft Article 7, the formulation "particular circumstances may be taken into consideration" requires further interpretation and suggests courtroom application of the article.

Finally, draft Article 8 refers to a situation when a national liberation movement becomes the government of a new state: its actions shall be considered the acts of that state. This is yet another reference to Article 10 of ARSIWA.

According to the 1978 Vienna Convention, a newly independent State is not bound by a treaty *merely* because a treaty was in force for the predecessor state in the same territory.[139] The Vienna regime grants the newly proclaimed state considerable discretion to decide whether to become party to treaties concluded by the predecessor state. In that respect, draft Article 8 follows a similar logic and allows new states to have a bigger say compared to other cases of succession.

4.4. Transfer of part of the territory of a State (draft Article 9)

The form and the content of draft Article 9 remind draft Article 7:

> 1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not

[138] Second report, Šturma, *supra* note 88*,* p.53.
[139] Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 16.

> pass to the successor State when part of the territory of the predecessor State becomes part of the territory of the successor State.
>
> 2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.
>
> 3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State.[140]

Just as in draft Article 7, the general rule is that responsibility is not passed with transfer of territory. This is logical because the responsibility for a wrongful act as such is not *as a general rule* linked to the territory. Thus, as the predecessor state continues to exist (albeit possessing a smaller portion of land), it is the one bearing responsibility.

However, the already familiar wording "if particular circumstances so require" provides an opportunity for transfer of responsibility to occur when an organ of the predecessor state becomes an organ of the successor state, or when there is a direct link between the act or its consequences and the territory of the successor state. Since draft Article 9 essentially duplicates draft Article 7, all problematic areas that were identified concerning the latter by analogy apply to the former.

4.5. Uniting of States (draft Article 10)

A different outcome comparing to all those previously discussed is provided in draft Article 10, which regulates the case of uniting of states:

> 1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State.
>
> 2. When a State is incorporated into another existing State and ceased to exist, the obligations from an internationally wrongful act of the predecessor State pass to the successor State.
>
> 3. Paragraphs 1 and 2 apply unless the States concerned, including an injured State, otherwise agree.[141]

When several states merge into one, the international responsibility of any of the merging states is transferred to the newly formed state. Two elements of this Article deserve special attention. First, the structure of this article is different: the wording is less complex, without multiple exceptions, as in all preceding ones, and the whole provision is worded in the positive. This creates an impression of it being somewhat less sophisticated. Second, paragraph three contains a provision stipulating a possibility for all states concerned, including the injured state, to come to an agreement regulating transfer of obligations arising from an internationally wrongful

[140] Second report, Šturma, *supra* note 88, p.54.
[141] Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 31.

act. This is the only provision that offers the parties an *opportunity* (but not an obligation) to themselves determine how the transfer of responsibility will take place.

Draft Article 10 also echoes Article 31 of the 1978 Vienna Convention: in the case of uniting of states, a treaty in force for the uniting parts continues to be in force in respect of the successor State.[142]

4.6. Dissolution of State (draft Article 11)

The final type of succession is the dissolution of state. Draft Article 11 reads:

> 1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States.
>
> 2. Successor States should negotiate in good faith with the injured State and among themselves in order to settle the consequences of the internationally wrongful act of the predecessor State. They should take into consideration a territorial link, an equitable proportion and other relevant factors.[143]

The general rule prescribes that passing of responsibility should take place under the agreement reached by these states. While this provision grants parties the autonomy to regulate the transfer of obligations arising from an internationally wrongful act on their own and consequently gives prevalence to their agreement, it does not regulate situations when such an agreement is absent. This is explicable: cases of dissolution, as the analysis of case law shows, vary to a great extent, and it would be simply unreasonable to force a "one-size-fits-all" approach.

Paragraph two introduces an important good faith principle, which all the parties – the successor state(s) and the injured state – have to employ when negotiating the terms of transfer. This is the first provision that contains a requirement (not an option, as in draft Article 10) to hold negotiations. This may be explained by the fact that the dissolution of states is one of the most complicated types of state succession, often accompanied by the use of force or strong political tension, and therefore is highly sensitive.

As the provision reads further, the parties should take into account, *inter alia*, the territorial link. This is a reference to the two Vienna Conventions, where the territorial link is a crucial element. Moreover, wrongful acts are often linked to the specific territory (as in the *Gabčíkovo-Nagymaros* case), which is why the reference to the territorial aspect is indeed logical.

Interestingly, out of all proposed draft Articles, this one appears to be the vaguest: transfer of responsibility is left for the states to regulate, yet, it is precisely the dissolution cases that were scrupulously examined by the courts in the preceding decades. It would seem natural to concentrate on this type of succession and provide more comprehensive legal guidance, considering the complexity of the cases discussed above; yet, the drafters decided – whether on purpose or not – to leave the provision flexible.

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[142] Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 31.
[143] Second report, Šturma, *supra* note 88, p.54.

5. PROPOSED DRAFT ARTICLES ON STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY: ADVANTAGES AND POSSIBLE CRITICISM

5.1. Nature and form of the proposed Articles

Before turning to the identification of advantages and disadvantages of the ILC-proposed Articles, a note should be made on their nature and form. In his first report, Special Rapporteur Šturma asserts that the document should have a form of Draft Articles based on the positive example of the 2001 Articles on State Responsibility; other forms – e.g., principles or guidelines – are believed to be less suitable.[144] This form has its advantages: this is a set of non-binding, recommendatory provisions that seek to guide states and courts, and the form of Draft Articles endows these provisions with the necessary legal weight. On the other hand, the word "draft", which will most likely be retained in the title of the final document (just as in the official title of the ARSIWA), indicates that it falls into the category of soft law, which reduces states' usual reluctance to assume binding legal obligations.

The form can also be explained by the highly sensitive and complicated nature of the topic under consideration. Due to that utmost complexity, the drafters have to carefully assess whether it is possible to develop a universal solution. It would be naïve to assume that the outcome is determined merely by the type of state succession taking place – numerous other factors have to be taken into account, such as the presence or absence of an agreement among parties, the willingness of the parties to negotiate, the events preceding state succession, the existence of a link between wrongful conduct and the territory, potential violations of human rights, and so forth. Special Rapporteur Šturma also notes:

> [...] the traditional thesis of non-succession has been questioned by modern practice... this does not mean that the opposite thesis, i.e. automatic succession in all cases, is true.[145]

Thus, the drafters would need to preserve a balance between two distinct legal principles, since in different cases, either principle of automatic succession based on continuity, or the "clean slate" principle, would prevail.

Another difficulty is the lack of consistent state practice, as already mentioned above. While state succession is not new as such, and it is possible to identify even early cases, these isolated old examples would not serve as solid ground for codification, since one must also take into account the international documents adopted in the 20th century and the features of the modern international legal system. More recent state practice would be desirable, yet cases of state succession involving issues of state responsibility are not *that* frequent. Most of them took place

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[144] First report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, A/CN.4/708 (2017), p.8, para.28. Available at: http://bit.ly/2PH1per (last visited: 13 May 2020).

[145] *Ibid.*, p.23, para.83.

in the late 1990s and have already been pronounced upon: consequently, the drafters would have to rely on these judicial pronouncements.

5.2. Advantages of the proposed Articles

5.2.1. Special Rapporteur's approach to the topic and methodology

One of the positive features is an attempt to develop a solid methodology. The new Draft Articles are not without legal foundation: a survey was made of both early and recent cases of state succession, serving as a basis for the drafting process. While it was underlined by Šturma that lack of *consistent* practice could potentially undermine the work, the catalogue of topic-related case law and literature was nevertheless reviewed. The fact that the proposed rules are based on legal research rather than merely political negotiations ensures reliability.

There is a clear logic in the structure of the document: cases where the original (i.e. predecessor) state ceased to exist and cases where it continues to exist are separated. Such categorisation helps to "avoid unnecessary repetition of rules and exceptions for each case of succession"[146] and makes it easier for the reader to navigate the document.

The new provisions are also drafted so as to complement existing rules: for instance, the part containing definitions is borrowed from the two Vienna Conventions on state succession, while other provisions contain implicit references to the ARSIWA. Such cross-referencing indicates that the document is to become not an isolated set of rules but a part of a *system* of legal rules.

As follows from the analysis provided above, an attempt was made to provide solutions that would best suit the specific type of succession. Proposed articles do not offer a uniform answer to all cases, they are flexible and allow tailor-made solutions. The ILC's approach is quite realistic, as it considers specific features of different succession types instead of developing rigid rules of an absolute nature.

Finally, a thorough study of the topic would – irrespective of the outcome – contribute to academic debate. As Dumberry noted in 2007, previously the topic received limited attention not just from international organisations and scientific bodies, but also from individual academics.[147] A more careful investigation might also bring novel legal issues into focus.

5.2.2. Gap-filling and creation of guidelines for states and courts

Another evident benefit is the filling of existing legal gaps. Indeed, practice has shown that the available laws on state succession and state responsibility do not provide unequivocal or immediate answers, remaining silent on certain matters. Legal regulation would eliminate these gaps and contribute to the progressive development of international law, one of the primary tasks of the ILC.

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[146] Second report, Šturma, *supra* note 88, p.7, para.20.
[147] Dumberry, Patrick. *State Succession to International Responsibility* (Leiden; Boston: Martinus Nijhoff Publishers, 2007), pp.11-12.

While some claim that cases of state succession do not occur that often nowadays, it is still possible given the existence of secessionist movements in Europe and beyond. In this context, the existence of clearly formulated rules would assist both states (in case state succession *does* take place) as well as the courts (when proceedings relate to state succession involving state responsibility). While the freedom of states to negotiate the terms of succession is retained, as ILC member Hussein Hassouna notes, the new Draft Articles present "a useful model for States to follow and a default rule to be applied in cases of dispute".[148]

5.3. Criticism of the proposed Articles

5.3.1. Certain methodological and conceptual problems

While the Commission welcomed the research done by the Special Rapporteur for his first report, it has been pointed out that the review of case law focused mostly on Europe, excluding cases originating from Asia and Latin America and not enough attention was given to the dissolution of the Soviet Union.[149] Therefore, insufficient examination of state practice might lead to distorted conclusions.

Further, the new Articles give no clarity as to which of the two principles – that of automatic succession or non-succession – should be the general rule. Although Šturma in his second report confirmed that it is non-succession,[150] the wording of draft Article 6, which is aimed at confirming this rule, is not straightforward. Instead of using the unequivocal wording,[151] Article 6 places focus on attribution and contains exceptions. In contrast, draft Article 10 (uniting of states) and draft Article 11 (dissolution of state) speak of automatic transfer upon succession, which is the opposite to what draft Article 6 provides. While this seems to be a way of preserving the balance between two competing principles and ensuring a context-specific approach, in practice the wording used creates confusion and raises doubts as to whether there is conceptual clarity.

Going back to draft Article 11, Šturma notes in his second report that "a transfer of obligations may take place according to or in the absence of an agreement",[152] yet, the wording of Article 11 speaks only of the transfer of obligations "subject to an agreement, to one, several or all the successor States", leaving the other option untouched. To illustrate, if the court is confronted with such a case, draft Article 11 would provide no answer since it largely relies on the parties' ability to reach an agreement between or among themselves.

[148] Provisional summary record of the 3376th meeting of the ILC, 17 August 2017, A/CN.4/SR.3376, p.3. Available at: http://bit.ly/2WpuBcj (last visited: 14 May 2020).
[149] Provisional summary record of the 3375th meeting of the ILC, 7 August 2017, A/CN.4/SR.3375, p.5. Available at: http://bit.ly/2LiV7mt (last visited: 14 May 2020).
[150] Second report, Šturma, *supra* note 88, p.6, para.16.
[151] For example, "as a general rule, successor state shall not automatically assume the obligations arising from the commission of an internationally wrongful act of the predecessor state" or similar.
[152] Second report, Šturma, *supra* note 88, p.51, para.189.

Finally, from the perspective of the injured state, the formulation "[responsibility passes] ... to one, several or all the successor States" is not particularly promising or relieving.

All these points create an impression that, while there is a compromise reached as to the overall benefit of the new Articles, there is neither a stable conceptual basis nor a sufficiently clear purpose. On the positive side, the work of the Commission is not over yet, leaving hope that the *rationale* behind these rules will be defined more clearly.

5.3.2. Vagueness and heavy structure

Another disadvantage of the new Draft Articles is their formulation and use of terms that require clarification. A careful analysis shows that the Articles contain terms or phrases that are ambiguous.

Thus, draft Article 6 has a heavy structure and contains terms that are not precise (e.g. the date of succession of states). The wording "if particular circumstances so require" in draft Articles 7 and 9 raises questions as to how and who would determine the existence of such circumstances. The list can be continued with the notion of "direct link" in draft Articles 7, 8 and 9 or "substantive autonomy" in draft Article 8.

In general, the presence of terms that require interpretation is natural for legal documents: for comparison, the ARSIWA contain terms like "essential interest" and "imminent peril" in Article 25, which both catalysed academic debate and were the subject of judicial pronouncements; disposing of all ambiguities is unrealistic, yet incorporating numerous vague terms in the present version of the text is quite problematic.

There are also signs of inattentive drafting: whereas paragraph three of draft Article 7 refers to "the conduct of a movement, insurrectional or other", draft Article 8 speaks of "a national liberation or other movement". In essence, both refer to the same phenomenon, as there is no indication that the intention was to distinguish between types of movements.

The overall style of the draft Articles is heavy. Sentences are lengthy, some provisions are drafted in the negative, phrases such as "without prejudice to" and "subject to exceptions contained in paragraph…" are used excessively – all these characteristics taken together make it difficult even for a lawyer to get to the core of the legal rule. Adoption of the final document is provisionally planned for 2021, which leaves time for improvement: re-drafting and/or a careful elaboration of comments, which would shed light on the precise content of the proposed rules. Otherwise, their current form blurs the picture rather than clarifying it.

Finally, the conviction of the ILC as to the form of Draft Articles is surprising: form should not take priority over substance. Šturma in his first report explains the choice, relying on the examples of the two Vienna Conventions.[153] However, their acceptance rate remains quite low. The 1978 Convention took 18 years to enter into

[153] First report on succession of States in respect of State responsibility, *supra* note 144, p.8, para.28.

force, while the 1983 Convention is still not yet in force as the required number of ratifications has not been reached.

Although some countries (Peru, Poland, Iran, Russia and Romania) have proposed alternatives, such as general conclusions, draft guidelines, and an analytical report,[154] it is not likely that the form would be changed.

5.4. Is there a need for these rules?

We now come to the question posed at the beginning: is there a need to develop rules on state succession in respect of state responsibility? During the debate at the 71st session of the General Assembly in 2016, seven delegations out of ten were in favour of creating the rules under discussion, two were against, and one stayed neutral.[155] This shows that, on the Commission level, there is agreement on the need for the new Draft Articles. However, one should note the difference between codification, i.e. identification of established state practice and subsequent production of a legal document based on it, and progressive development of law, a different task by nature.

The main reason for creation of these rules provided by the ILC is the existing legal gap where the matter concerns simultaneously state succession and state responsibility. Indeed, it was already identified that the ARSIWA do not refer to cases of state succession. As practice has shown, in the absence of express rules, determining whether and how the transfer of obligations arising out of internationally wrongful acts takes place is left to the courts, which leads to fragmentation. From the timing perspective, it looks like the international legal community is ready for such work – the ARSIWA were adopted two decades ago, enough time has passed since the political crises including succession, such as the dissolution of the Soviet Union, the breakup of Yugoslavia, and the subsequent emergence of newly independent states in the Central and Eastern Europe. Memories of these events are still fresh, but the degree of intensity has cooled, which is why codification might proceed.

On the other hand, the legal gap consists not merely of the absence of express rules. The ARSIWA are not *completely* silent on succession: wrongful conduct of an insurrectional movement or wrongful conduct endorsed by a new state will be attributable to the new state under Articles 10 and 11, respectively. As to other cases, succession to obligations arising out of internationally wrongful acts of a predecessor state is still possible under the 2001 Articles: the required element for that would be continuity between the two states. This is precisely what the ICJ proposed in the first *Genocide* case when it had to check whether wrongful conduct is attributable to the FRY based precisely on the ARSIWA provisions, and then, by way of succession between the FRY and Serbia, responsibility could have been attributed to Serbia as the sole successor. This example proves that there are possibilities to hold the successor state accountable under the existing legal rules.

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[154] Third report on succession of States in respect of State responsibility, *supra* note 3, p.5, para.11.

[155] First report on succession of States in respect of State responsibility, *supra* note 144, pp.2-3, paras.3-7.

Furthermore, the ILC is not the first to consider the topic: in 2015, the *Institut de Droit International* (the Institute of International Law), a non-governmental institution promoting the progress of international law, undertook a profound study and adopted a draft Resolution on State Succession in respect of State Responsibility, consisting of 16 Articles in total.[156] The document recalls the new Draft Articles: it borrows the definitions from the 1978 and 1983 Vienna Conventions, employs the same distinction of state succession cases based on whether the predecessor state ceases or continues to exist, and the structure is similar.

Against this background, the decision of the ILC to begin its own work on the same topic is somewhat unclear: the need for these rules exists, but is not urgent, and similar work has already been accomplished, albeit by a different organisation. This does not preclude the Commission from picking the same subject, but using the classic rules of attribution provided by the ARSIWA together with the draft Resolution as an auxiliary source might suit the purposes just as well as production of new Draft Articles. To clarify, the work undertaken by the ILC *as such* is a positive development; what is controversial is its *approach*. Let us recall the Statute of the ILC, which provides that

> [...] "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States [...] "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.[157]

In its first report, Special Rapporteur Šturma notes that for the topic in question the task is both codification and progressive development of international law,[158] but the current version of the Draft Articles represents a peculiar combination of the two. In the proposed Articles, the general rules are intertwined with numerous exceptions, which makes it difficult to see the *core* of the document.

Much depends on the Commission itself: following the usual practice, comments on the proposed document were requested from governments. Since this topic is sensitive and controversial, states should have a say, and, if governments express discontent, the Commission would have to act flexibly and adjust accordingly. For instance, Austria has proposed an alternative topic – "state responsibility *problems* in cases of succession of states".[159] Depending on the views of governments, the ILC might have to revise the focus and the format by adopting principles or guidelines instead of the Draft Articles. It would also be advisable to consider the views of non-state actors, such as non-governmental organisations and

[156] State Succession in Matters of State Responsibility, *Yearbook of Institute of International Law,* vol.76 (2015), Draft Resolution, p.186. Available at: http://bit.ly/2Vo0PmX (last visited: 14 May 2020).
[157] Statute of the International Law Commission, Article 15, United Nations, 1947. Available at: http://bit.ly/2DPDqom (last visited: 15 May 2020).
[158] First report on succession of States in respect of State responsibility, *supra* note 144, p.8, para.27.
[159] Statement by Austria, 31 October 2017, p.4. Available at: http://bit.ly/2DR8PXB (last visited: 5 May 2020).

interest groups. There is so far no visible indication that the ILC has done or is intending to do that.

To sum up, production of rules on state succession in respect of state responsibility indeed has the potential to increase legal certainty and security of international relations. They may serve as auxiliary materials for the courts and as guidelines for states negotiating bilateral or multilateral agreements on succession. At the same time, the approach adopted by the ILC and hence the current form of the Draft Articles does not suit their purpose.

CONCLUSION

The present study has placed three developments in the spotlight. First, history shows that the field of state succession is characterised by lack of consistent practice, by legal contradictions, and by unresolved disputes among scholars.

Second, consideration of selected jurisprudence reveals that judicial practice is not uniform either: different courts view the interplay between state succession and international responsibility from different perspectives, or simply avoid this topic altogether.

Finally, analysis of the Draft Articles highlights conceptual and methodological issues. Most notably, there is no agreement among the ILC members as to whether the process they have so readily engaged in prioritises codification or further development of law; to some, the distinction might seem insignificant, yet this tension is reflected in the proposed text.

This study had two research questions. The answer to the first – is there a true necessity for codification? – is not unequivocal. The author argues that the *need* for new rules is not pressing, therefore the ILC could have abstained from this exercise and instead have focused on supplementing the well-developed mechanism of attribution of internationally wrongful acts with rules specific to cases of state succession. This could have taken the form of recommendations, with the work of the Institute of International Law serving as a point of departure. The ILC has chosen a different path – a decision that cannot be called unreasonable either.

As to the second question – what are the advantages and possible criticism of the proposed Draft Articles? – Section Five provides a catalogue of benefits and problematic areas. While the new Articles could fill existing gaps, they are heavily worded and therefore do not fulfil their primary task, namely, clarification. The situation now faced by the ILC recalls the 1978 Vienna Convention, which Craven described as follows:

> [...] there was an inevitable tension between the idea of seeking to codify and develop rules of succession to govern future cases of political transformation, at the same time as concentrating upon the particular experience of decolonization whose course was almost run.[160]

[160] Craven, *The Decolonization of International Law*, *supra* note 45, p.202.

The new Articles are both reactive and proactive, seeking to codify existing practice and propose new rules at the same time. This incertitude, if retained, might lead to poor acceptance and a low rate of ratifications, should the Articles transform into a convention. This is why the initial question that should have been asked is whether the international legal system needs *yet another* Vienna Convention.