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ORIGINAL ARTICLE

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A critical analysis of the work of the ILC on 'State Succession in Matters of State Responsibility': A missed opportunity

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Abstract

This article examines the recent work of the ILC on 'Succession of States in Respect of State Responsibility'. While the ILC decided in 2024 to stop working on the topic, the five reports submitted by Special Rapporteur Šturma and the Guidelines provisionally adopted will have a long-lasting impact on state succession scholarship and may influence states in their practice. This article provides a critical analysis of the Guidelines by comparing its content with the Resolution adopted by the Institute of International Law in 2015 on the same issue. It will show that while the solutions which were initially put forward by Special Rapporteur Šturma in his reports followed many of the same features as the Institute's Resolution, the final version of the Guidelines are significantly different in both content and tone. A major shift occurred when each provision was examined by the Drafting Committee. This is because some ILC members, and many states, rejected any presumption of succession to responsibility. Instead, they favoured the opposite general rule of nonsuccession. As a result, none of the provisions provisionally adopted by the ILC impose any obligations whatsoever on states. They only go so far as to encourage them to reach agreements on matters of succession to responsibility. Ultimately, the Guidelines leave wide open the possibility that a wrong remains unpunished in the context of a succession of states. As such, the Guidelines do little to protect the interests of injured states.

Keywords: guidelines; ILC; Institute of International Law; state responsibility; state succession

1. Introduction

For decades, the interaction between the fields of state succession and state responsibility sparked little interest in the literature. Thus, until a book published in 2007 by myself,[1] only five articles had focussed on the issue.[2] Since then a number of other articles have addressed this question.[3] The Arbitral Tribunal in the 1956 *Lighthouse Arbitration* case noted that 'the question of the transmission of responsibility in the event of a territorial change presents all the difficulties of a matter which has not yet sufficiently developed to permit solutions which are both certain and

*This article contains some extracts of different sections of my recent book: P. Dumberry, *State Succession to International Responsibility* (2024). This article reflects facts current as of September 2024.

[1]P. Dumberry, *State Succession to International Responsibility* (2007). See also, P. Dumberry, *State Succession to International Responsibility* (second edition, 2024).

[2]See, literature mentioned in Ibid. (2024), at 15ff.

[3]For a review of recent literature, see Ibid. (2024), at 43ff.

applicable equally in all possible cases'.[4] Judge Xue in her Declaration in the *Croatia Genocide Convention* case also noted that 'little can be found about State succession to responsibility in the field of general international law',[5] adding that 'rules of State responsibility in the event of succession remain to be developed'.[6]

Until very recently, no attempt at codifying this question was pursued by the work of the International Law Commission (ILC), neither in the area of state responsibility nor in that of state succession. In the context of the elaboration of the final ILC Articles on State responsibility, the last Special Rapporteur, Professor James Crawford, highlighted the difficulties and uncertainties surrounding the question: '[i]t is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory'.[7] Since then two important codification efforts have been conducted in recent years. The *Institut de Droit international* adopted in 2015 a Resolution on State succession and State Responsibility (the Institute's Resolution).[8]

This article examines the second recent effort of codification. It provides a critical analysis of the work of the ILC on 'Succession of States in Respect of State Responsibility'. In 2017, the ILC placed the topic on its programme of work and appointed Professor Pavel Šturma as Special Rapporteur. The ILC Special Rapporteur issued five Reports and a complete set of 'Draft Articles'.[9] In 2022, the ILC provisionally adopted, with commentaries, draft 'Guidelines' 1 to 15 *bis* which had been provisionally adopted by the Drafting Committee in previous sessions.[10] The mandate of Special Rapporteur Šturma ended in 2022. At its seventy-fourth session (2023), the ILC decided to establish a Working Group. While many options were on the table,[11] in the end the Working Group decided to recommend that the Commission 'continue its consideration of the topic, but not proceed with the appointment of a new Special Rapporteur' and that 'a decision on such a way forward would be taken only' at the next session 'so as to allow more time for reflection' on the basis of a working paper to be prepared by the Chair.[12] A final decision was taken at the seventy-fifth session (2024). The Working Group recommended drafting a report that 'would contain a summary of the difficulties that the Commission would face if it were to continue its work on the topic and explain the reasons for the discontinuance of such work'.[13] In other words, the ILC

[4]Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d'arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce, Award of 24/27 July 1956, in 12 UNRIAA 155; (1956) 23 ILR 91.

[5]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, [2015] ICJ Rep. 3, para. 22 (Declaration, Judge Xue).

[6]Ibid., at para. 23.

[7]ILC Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at Its Fifty-third Session (2001); Report of the ILC on the Work of Its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), 119, at para. 3 (2001) YILC, vol. II(2), at 30. It should be added that in his subsequent book, J. Crawford, *State Responsibility: The General Part* (2013), at 447ff, he analyzed the issue thoroughly.

[8]Institute of International Law, State Succession in Matters of State Responsibility, 14th Commission, Rapporteur M. G. Kohen, Resolution, 28 August 2015. On this resolution, see M. G. Kohen and P. Dumberry, *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries* (2019).

[9]ILC First Report on Succession of States in Respect of State Responsibility, Special Rapporteur Pavel Šturma, 69th session, A/CN.4/708 (31 May 2017) (ILC Special Rapporteur, First Report, 2017); ILC Second Report on Succession of States in Respect of State Responsibility, Special Rapporteur Pavel Šturma, 70th session, A/CN.4/719 (April 2018) (ILC Special Rapporteur, Second Report, 2018); ILC Third Report on Succession of States in Respect of State Responsibility, Special Rapporteur Pavel Šturma, 71st session, A/CN.4/731 (2 May 2019) (ILC Special Rapporteur, Third Report, 2019); ILC Fourth Report on Succession of States in Respect of State Responsibility, Special Rapporteur Pavel Šturma, 72nd session, A/CN.4/743 (7 March 2020) (ILC Special Rapporteur, Fourth Report, 2020); ILC Fifth Report on Succession of States in Respect of State Responsibility, Special Rapporteur Pavel Šturma, 73rd session, A/CN.4/751 (1 April 2022) (ILC Special Rapporteur, Fifth Report, 2022).

[10]Only one provision (Guideline 15 *ter*, dealing with restitution, compensation, and satisfaction) had not been approved.

[11]ILC Report, 74th session, A/78/10 (2023), Ch. IX, paras. 231ff, at para. 237.

[12]Ibid., paras. 240–3.

[13]ILC Report of the Working Group, A/CN.4/L.1003 (12 July 2024), para. 23.

decided to stop working on the issue and not to adopt any 'Guidelines'. At the time of writing (September 2024), the final 'Report' by Bimal Patel had not been published.

This article tells the story of how the work that Special Rapporteur Šturma had initially envisaged as Draft Articles[14] would eventually become merely 'guidelines' when the Drafting Committee got involved[15] . . . and finally be buried for good.

Given that the ILC ultimately decided not to adopt any articles or guidelines, it is entirely legitimate to ask the question why one should bother with this topic at all. I believe that there are many reasons why this question is worth analyzing in some detail. First, whatever the final outcome, the work of the ILC remains important for anyone interested in matters of State succession. The five reports published by Special Rapporteur Šturma will continue to have an important impact on scholarship. Second, the fact that the Guidelines were never formally adopted by the ILC does not mean that they (or the previous 'Draft Articles') may not have an impact and influence on how states find solutions to problems of state succession to responsibility. Third, the radical transformation in both content and tone of the different 'Draft Articles' initially put forward by Special Rapporteur Šturma when they were later provisionally adopted as 'Guidelines' by the Drafting Committee is a story worth telling. It provides a vivid illustration of how states currently consider matters of state succession. It shows that the majority of them are reluctant to be imposed any binding 'obligations'. What happened at the ILC in the last five years confirms what Zimmerman and Devaney had observed regarding the 1978 Vienna Convention on Succession to Treaties[16]: States 'prefer ad hoc political solutions rather than fixed and somewhat rigid rules' and this 'further increases the uncertain nature of the rules on . . . succession which, in turn, then lead to an even further increase in pragmatic political solutions'.[17] What happened at the ILC is just the latest illustration of the difficulties of codification in the field of state succession.[18]

This article will provide a critical analysis of the final version of the ILC Guidelines by comparing its content with the Resolution adopted by the Institute in 2015 under the rapporteurship of Marcelo Kohen. While the scope of the ILC Guidelines was to assess 'whether there are rules of international law governing both the transfer of obligations and the transfer of rights arising from international responsibility of States for internationally wrongful acts',[19] this article will only focus on the first question of succession to *obligations*. Thus, when an internationally wrongful act is committed *by* the predecessor state against a third state, which state (the predecessor state or the successor state) should be held responsible for the obligations arising from that act?[20]

In Section 2, I will start by examining the similarities between the works of the ILC and the Institute and explain how the Guidelines that were later provisionally adopted were significantly different from the work initially put forward by Special Rapporteur Šturma in both content and tone. The analysis of the different solutions adopted by the ILC Guidelines will start in Section 3 with an assessment of three categories of state succession where the predecessor state *continues* to

[14]See ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 28.

[15]ILC Provisional Summary Record of the 3583rd Meeting, 73rd session, A/CN.4/SR.3583 (17 May 2022).

[16]1978 Vienna Convention on Succession of States in Respect of Treaties, 1946 UNTS 3, in (1978) 17 ILM 1488.

[17]A. Zimmermann and J. G. Devaney, 'Succession to Treaties and the Inherent Limits of International Law', in C. J. Tams, A. Tzanakopoulos and A. Zimmermann (eds.), *Research Handbook on the Law of Treaties* (2014), 505 at 539.

[18]A. Sarvarian, 'Codifying the Law of State Succession: A Futile Endeavour?', (2016) 27(3) EJIL 789. See also D. P. O'Connell, 'Recent Problems of State Succession in Relation to New States', (1970–II) 130 *Recueil des Cours*, 726 ('State succession is a subject altogether unsuited to the processes of codification').

[19]The question of the title was discussed in: ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 19; ILC Report on the Work of its 70th Session, A/73/10 (2018), Ch. X, at para. 255; ILCReport on the Work of its 71st Session, A/74/10 (2019), Ch. VII, at paras. 93, 114.

[20]See Dumberry (2024), *supra* note 1. I will therefore not address the other question of succession to *rights*: When an internationally wrongful act is committed by a third state *against* the predecessor state, which state (the predecessor state or the successor state), should have the right to claim reparation for an injury resulting from that act?

exist (separation, newly independent states, and transfer of territory). In Section 4, I will address three other provisions dealing with the opposite situation where the predecessor state does *not* continue to exist (unification, incorporation, and dissolution).

2. Basic similarities and differences between the approaches followed by the ILC and the Institute

My analysis starts by addressing the similarities between the works of the ILC and that of the Institute.

First, they essentially have the same scope and deal with the issue of succession to both rights and obligations. It is important to highlight at the outset that the question examined here is not one of state succession to state responsibility *per se*. In other words, it is not whether the successor state should be '*responsible*' for internationally wrongful acts committed by the predecessor state before the date of succession. As a matter of principle, the successor state cannot be *liable for* internationally wrongful acts committed by *another State* (the predecessor state).[21] The basic principle under Article 1 of the ILC *Articles on State Responsibility* is that 'each State is responsible for its own wrongful conduct'.[22] The predecessor state therefore remains responsible for its own breaches.[23] The right question to be asked instead is whether there is any succession to the obligations *arising from* wrongful acts committed by the predecessor state. In other words, the issue is not the transfer of *responsibility* for internationally wrongful acts, but rather the succession to the *consequences* of international responsibility *arising from* the commission of such acts.[24]

Second, both the work of the ILC and that of the Institute are of the same nature. The preamble of the Institute's Resolution indicates that it is an effort at 'codification and progressive development of the rules relating to succession of States in matters of international responsibility of States'. ILC Special Rapporteur Šturma also emphasized that the document 'should be both codification and progressive development of international law'.[25] Both resolutions only cover situations of succession that are considered *legal* under international law.

Third, the work of the ILC and that of the Institute also shared, at least initially, the same ultimate goal. The aim of the Institute's Resolution was to

> prevent situations of State succession from leading to an avoidance of the consequences of internationally wrongful acts, particularly in the form of the extinction or disappearance of the obligation to repair, by virtue of the mere fact of the State succession.[26]

To that effect, the Resolution discarded the application of a general and all-encompassing rule of 'non-succession' which had been supported by many scholars in the past.[27] Under this 'traditional' approach, the obligation to repair is simply *never* transferred to the successor state. At the same time, as noted by Rapporteur Kohen in his Final Report,

[21]See Crawford, *supra* note 7, 439.

[22]ILC First Report on State Responsibility (addendum no. 4), Special Rapporteur James Crawford, A/CN.4/490/Add.4 (26 May 1998), at para. 110.

[23]This is undeniable insofar as it continues to exist after the date of succession. When it does not continue to exist, another question needs to be asked: is there is a successor state that should bear the burden of the obligations arising from the wrongful act?

[24]See ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 75; see ILC Special Rapporteur, Fourth Report, 2020, *supra* note 9, para. 33. On this point, see Institute of International Law, Final Report on State Succession in Matters of State Responsibility, Rapporteur Marcelo G. Kohen (28 June 2015), para. 31, in (2015) 76 *Annuaire de l'Institut de Droit international*, 511ff.

[25]See ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 27, see also para. 16.

[26]See IIL, Kohen, Final Report, *supra* note 24, para. 53.

[27]On this question, see Dumberry (2024), *supra* note 1, 43 ff.

> the purpose of ensuring that obligations stemming from the commission of internationally wrongful acts must be carried out even in cases of State succession must not lead to the adoption of an opposite, general rule of succession to these obligations in all cases.[28]

In other words, the Institute did not support the opposite rule of *automatic* succession whereby the successor state *always* takes over the consequences of wrongful acts committed by the predecessor state.

The same approach was adopted by Special Rapporteur Šturma, indicating that 'he does not suggest replacing one highly general theory of non-succession by another similar theory in favour of succession', adding that 'instead, a more flexible and realistic approach is needed'.[29] As further examined below, this issue would eventually become highly contentious during the work of the ILC.

Fourth, on a related point, both the Institute and the ILC emphasized that different solutions regarding the question of succession to responsibility should be adopted depending on the situations prevailing in each case. Thus, for the Special Rapporteur, 'at best, it is possible to conclude that it was succession in certain cases' and that 'the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needs to be proved on a case-by-case basis'.[30] The starting point for both institutions was that the solution adopted for one specific type of succession may very well not be appropriate for other instances of succession.[31] For instance, the fact that the predecessor state continues to exist after the date of succession in some instances has important consequences with respect to the determination of whether there is any succession to obligations. Both the ILC and the Institute have therefore examined six types of succession separately.[32] Similarly, the Institute's Resolution also considered several different factors and circumstances (including the 'organ' and 'direct link' elements, further discussed below) to determine whether there should be succession to obligations. While the ILC Special Rapporteur initially took the same general approach in his reports[33] and in the Draft Articles he put forward, the Drafting Committee subsequently took a drastically different direction. As further discussed below, this is in fact one feature where the content of the Guidelines is significantly different from that of the Institute's Resolution.

In the end, the final work of the ILC (which ended up never being adopted) is very different from that of the Institute. Yet, the first set of rules and principles put forward by Special Rapporteur Šturma in his reports and Draft Articles were very much in line with most of the content to the Institute's Resolution.[34] But a clear and undeniable shift occurred when each article was subsequently examined by the ILC Drafting Committee. Each Article was systematically diluted of its 'binding' content and the tone became much softer. In the following sections, I will explain how this shift happened and what are the consequences resulting from adopting this new language.

Another interesting question is why this radical change in both content and tone occurred. At the outset, it seems that several ILC members were reluctant to study the question of succession to responsibility. Thus, the 2018 Report to the ILC indicates that the 'scarcity of State practice' and

[28]See IIL, Kohen, Final Report, *supra* note 24, at 534.

[29]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 16. See also, ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 83; ILC Special Rapporteur, Third Report, 2019, *supra* note 9, para. 35.

[30]See ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 83. See also ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 16, 167.

[31]See, for instance, ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 84.

[32]The structure adopted by the Institute is however different insofar as it contains a provision for each six categories of state succession, each dealing with both questions of succession to rights and that of succession to obligations. The Guidelines examined the question of succession to rights and obligations separately.

[33]See, for instance, ILC Special Rapporteur, Fourth Report, 2020, *supra* note 9, para. 57.

[34]See Kohen and Dumberry, *supra* note 8, for a critical assessment of some features of the Draft Articles.

the fact that it was 'diverse, context-specific and often politically sensitive' were mentioned as 'difficulties' which 'confirmed the initial misgivings expressed by some members as to the suitability of the topic for codification or progressive development'.[35] Several States have also mentioned the same concern in their comments at the UNGA Sixth Committee about the suitability of the topic for codification.[36] In addition, the Report also explained that 'several members expressed caution at the heavy reliance of the report on academic writings and on the work of the Institute of International Law'.[37] Many states expressed the same concerns about the undue reliance on such materials;[38] some of them being very specific on that point.[39] As a result, many states considered that the work could only be treated as progressive development of the law, not an exercise of codification.[40]

Another important point is that the general approach which was adopted by Special Rapporteur Šturma (in line with the Institute's Resolution) was not shared by several ILC members. They openly supported the 'traditional' rule of non-succession and ultimately rejected any approach that they considered favorable to succession to obligations.[41] In their statements, Russia[42] and Austria[43] were probably the most virulent critics of the approach adopted by the Special Rapporteur and considered that he had, in fact, endorsed the rule of automatic succession to obligations. It is true that many states did support the middle-ground approach favoured by the Special Rapporteur by rejecting both the rule of non-succession and that of automatic succession.[44] Yet, many other states clearly endorsed the 'traditional' rule of non-succession.[45] Only a few states took the opposite view.[46]

These theoretical disagreements would have some very practical consequences on the work of the ILC. They ultimately led to the provisional adoption of 'Guidelines' instead of 'Draft Articles'.

[35]See ILC Report, 70th Session, 2018, *supra* note 19, para. 234.

[36]See *inter alia*: United Kingdom (rep. 71st sess. 2019), Turkey (rep. 69th sess. 2017); Italy (rep. 71st sess. 2019, rep. 72nd sess. 2021); Romania (rep. 72nd sess. 2021); Netherlands (rep. 71st sess. 2019); China (rep. 69th sess. 2017); Israel (rep. 70th sess. 2018); Austria (rep. 69th sess. 2017).

[37]See ILC Report, 70th Session, 2018, *supra* note 19, para. 234.

[38]See United Kingdom (rep. 74th sess. 2019), Iran (rep. 71st sess. 2019), China (rep. 71st sess. 2019); Israel (rep. 70th sess. 2018).

[39]Russia (rep. 73rd sess. 31 October 2018) (indicating that 'instead of relying on the achievements of the Commission relating to the succession of States, the report of the Institute of the International Law and a resolution adopted on its basis as well as the works of Mr. Patrick Dumberry were used as the main basis for this research.'); Netherlands (rep. 71th sess. 2019) (indicating that the 'vast majority of the rapport, and the ensuing conclusions, is based on academic literature' which is a 'subsidiary means for the determination of international law' and 'should therefore not be put at a more important level than sources that reflect customary international law . . .' and 'urg[ing]' the Special Rapporteur 'to conduct a more thorough investigation into existing State practice and opinio juris, instead of the reliance on doctrine').

[40]See United Kingdom (rep. 71st sess. 2019); Romania (rep. 71st sess. 2019).

[41]ILC Report on the Work of its 69th Session, A/72/10 (2017), Ch. IX, at para. 231: 'A number of members underlined that the "traditional" rule of non-succession that the Special Rapporteur had outlined remained the prevailing position at the present time, with the possibility of automatic succession being limited to succession to State debts, and the potential for a limited range of clearly established possible exceptions to non-succession being available. Other members expressed doubt that the traditional rule of nonsuccession had changed, although the report of the Special Rapporteur suggested he saw it otherwise, and suggested that any shift from the traditional rule must be supported by clear and unambiguous evidence of State practice and decisions of courts and tribunals.'

[42]Russia (rep. 73rd sess. 31 October 2018).

[43]Austria (rep. 69th sess. 2017; rep. 72th sess. 2021; rep. 71st sess. 2019).

[44]Italy (rep. 71st sess. 2019; rep. 72nd sess. 2021); Cameroon (rep. 72nd sess. 2021); Portugal (rep. 71st sess. 2019); United Kingdom (rep. 72nd sess. 2021); Netherlands (rep. 71st sess. 2019); Slovenia (rep. 69th sess. 2017).

[45]See: Japan (rep. 69th sess. 2017); Vietnam (rep. 71st sess. 2019, rep. 72nd sess. 2021); Romania (rep. 72nd sess. 2021): Russia (rep. 69th sess. 2017).

[46]One example is the Czech Republic (69th sess. 2017).

This is because 'several members questioned whether the development of draft articles was the most appropriate outcome'.[47] They preferred a document that 'would be designed to serve as general guidance for States (as opposed to developing a set of binding rules)'.[48]

I will first examine in Section 3 the work of the ILC regarding three categories of state succession where the predecessor state *continues* to exist: separation, newly independent states, and transfer of territory. In Section 4, I will address three other provisions dealing with the opposite situation where the predecessor state does *not* continue to exist: unification, incorporation, and dissolution of state.

3. Cases where the predecessor state continues to exist

In order to have a better understanding of the nature of the changes of language which occurred during the work of the ILC, it is helpful to look briefly at how the Institute's Resolution dealt with the question. The Resolution includes a general clause providing the framework of analysis regarding matters involving succession to obligations in the specific situation where the predecessor state continues to exist after the date of succession. Article 4 of the Institute's Resolution highlights three points:

The first paragraph expresses the basic principle mentioned in Article 1 of the ILC's *Articles on State Responsibility* that only the state, which has actually committed an internationally wrongful act, should engage its responsibility for it;

The second paragraph explains that, in general, the predecessor state (now called the 'continuing' state after the date of succession) should *remain* responsible for *its own* internationally wrongful acts, including those committed *before* the date of succession;

The third paragraph indicates that there are specific circumstances where the injured state can request reparation to the successor state, or both the predecessor state and the successor state.

This provision is important because it provides a road map for the solutions followed in Chapter III of the Institute's Resolution dealing with three categories of state succession involving situations where the predecessor state continues to exist. Thus, while Article 4(2) provides the *general rule*, Article 4(3) indicates that there are several exceptional circumstances where a *different solution* should apply and when the obligations arising from an internationally wrongful act should, in fact, pass to the successor state (even though the predecessor state continues to exist). Articles 11 (transfer of territory), 12 (separation) and 16 (newly independent states) of the Institute's Resolution follow the same structure. The ILC Guidelines do not contain a general provision like Article 4.[49]

3.1 General rule: The continuing state remains responsible for its own obligations

In the context of separation, the basic principle under Article 12(1) of the Institute's Resolution is that the obligations arising from an internationally wrongful act committed by the predecessor state *do not pass* to the successor state. The solution of non-succession is adopted for the simple reason that the predecessor state (now called the 'continuing' state) continues to exist following the separation of a part of its territory. It should therefore remain the holder of obligations arising from wrongful acts which took place before the date of succession. The Institute's Resolution also

[47]ILC Report on the Work of the 73rd Session, A/77/10 (12 August 2022), para. 86.

[48]Ibid.

[49]It should be added that an earlier draft attached to the ILC Special Rapporteur's Second Report did include a clause (Art. 6) which was essentially to the same effect. The clause was later amended and the relevant paragraphs 2 and 4 were removed. Only the first paragraph remained and later became Art. 4 ('no effect upon attribution') of the Draft Articles attached to the ILC Special Rapporteur's Fifth Report. Its content was to the same effect as Art. 4(1) of the Institute's resolution. The clause was not kept in the Guidelines provisionally adopted by the Drafting Committee.

adopted the same general principle of non-succession for newly independent states (Article 16(1)) and transfer of territory (Article 11(1)). This solution is line with state practice.[50]

The same principle of non-succession was initially followed by the ILC Special Rapporteur in earlier draft Articles attached to his 2018 Second Report regarding separation (Article 7(1)),[51] newly independent states (Article 8(1))[52] and transfer of territory (Article 9(1)).[53] All three provisions clearly indicated that, as a matter of principle, the obligations 'do not pass' to the successor state. The three provisions were later regrouped, and a new proposal for a single clause was submitted by the Special Rapporteur.[54] At its seventy-second session, in 2021, the ILC provisionally adopted, *inter alia*, Draft Article 9, which had been provisionally adopted by the Drafting Committee at the seventy-first session in 2019.[55] In 2022, the provision would become Guideline 9. It followed a different approach. It indicates that 'an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession'.

In my view, the wording used in Guideline 9(1) is not the most efficient. In his Second Report, the ILC Special Rapporteur had clearly adopted (as recognized by the Chair of the Drafting Committee[56]) a 'general rule of non-succession' in the context of separation[57] *precisely because* the predecessor state remains responsible for its own wrongful acts.[58] It may have been preferable for Guideline 9(1) to simply affirm the uncontested proposition that, as a matter of principle,[59] the obligation to repair 'does not pass' to the successor state and that the predecessor state *remains* responsible for *its own* wrongful acts. In fact, the point is already covered by Guideline 6.[60] Such language would have been more effective than merely stating the (rather obvious) fact that the injured state 'continues to be entitled to invoke the responsibility of the predecessor State' after the date of succession.[61] While this language may not be optimal, it is, in any event, far better than some other propositions that were discussed at the Commission.[62]

[50]See Dumberry (2024), *supra* note 1, at 197ff.

[51]See ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 17; ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 46, 77, 80.

[52]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 124, 130.

[53]See ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 17; ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 139.

[54]See ILC Special Rapporteur, Third Report, 2019, *supra* note 9, para. 65; ILC Statement, Chair of the Drafting Committee, Claudio Grossman Guiloff, 31 July 2019, at 6.

[55]ILC Text of Draft Articles 7, 8 and 9 Provisionally Adopted by the Drafting Committee at the Seventy-First Session, A/CN.4/L.939/Add.1 (24 July 2019). The language is similar to Art. 4(2) of the Institute's Resolution.

[56]See ILC Statement, Grossman Guiloff, *supra* note 54, at 6.

[57]The same rule also applied to newly independent states (see ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 124) and transfer of territory (Ibid., para. 139).

[58]This is clear from this passage, ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 46: 'It seems to be generally acceptable that the main (or default) rule governing the issue of succession to obligations arising from an internationally wrongful act of the predecessor State committed before the date of succession in the context of separation of parts of a State is the principle of non-succession. Since the predecessor State continues to exist, "the continuing State should remain responsible for its own internationally wrongful acts committed before the date of succession"'.

[59]With a number of possible exceptions, further discussed below.

[60]The provision indicates that state succession 'has no effect upon the attribution to [the "continuing State"] of an internationally wrongful act committed by that State before the date of succession'.

[61]See also, observations by the Czech Rep. (rep. 71st sess. 2019).

[62]Thus, the Drafting Committee 'considered that a proposal indicating that the injured State "may request" reparation was not appropriate since this expression was not sufficiently normative'. See ILC Statement, Grossman Guiloff, *supra* note 54, 7–8 indicating that 'referring to an entitlement to "invoke the responsibility of the predecessor State" was more appropriate than referring to an entitlement to "reparation", since the responsibility of the predecessor State was comprehensive before the succession of States'.

3.2 Exceptional situations where obligations could pass to the successor state

This section will discuss another feature of Guideline 9(1) which is much more problematic. As mentioned above, both the Institute's Resolution and the earlier ILC Draft Articles contain possible exceptions to the general rule whereby the continuing state remains responsible for its own obligations. As further discussed in the next paragraphs, ILC Draft Articles 7(2)(3), 8(2) and 9(2)(3) referred to two exceptional circumstances where the obligations could pass to the successor State. In contrast, Guideline 9(1) no longer includes any reference to these two exceptions.

3.2.1 The 'organ' and 'direct link' exceptions

Article 12(3) of the Institute's Resolution provides for one possible exception to the general principle of non-succession (mentioned in Article 12(1)) in the context of separation.[63] It concerns the situation when the author of a wrongful act committed before independence was an 'organ of the territorial unit of the predecessor State', such as an autonomous government, 'that has later become an organ of the successor State'.[64] There is some state practice adopting this solution.[65] One example would be an unlawful or uncompensated acts of expropriation committed by a province, a canton, or any kind of a state-unit with significant autonomy, against a foreign investor before independence. After that entity becomes an independent state, the obligations arising from the wrongful act may pass to the successor state 'if particular circumstances so require'. One example would be a new state benefiting from assets expropriated without having compensated the owner of the property. The solution adopted in Article 12(3) of the Institute's Resolution was initially followed by the ILC Special Rapporteur in earlier Draft Articles 7(2) (separation),[66] 9(2) (transfer)[67] and, to some extent, in Draft Article 8 (newly independent states).[68]

The earlier work of the ILC contained a second exception to the general principle of non-succession: the 'direct link' exception.[69] In the context of separation,[70] ILC Draft Article 7(3) indicated that:

[63]The same exception is also mentioned in the Institute's Resolution regarding transfer of territory (Art. 11(3)). The 'organ' exception is, however, not mentioned in the context of newly independent states (Art. 16). On this point, see Kohen and Dumberry, *supra* note 8, at 131.

[64]It should be added that Art. 12(6) of the Institute's Resolution deals with the more specific situation of acts committed by an insurrectional or other movements in their struggle for independence in the context of separation. Similarly, Art. 16(3) is concerned with acts committed by national liberation movements in the context of decolonisation. In both cases, these acts are attributed to the new State. For a recent analysis of this question, see P. Dumberry, *Rebellions and Civil Wars: State Responsibility for the Conduct of Insurgents* (2021), at 229 ff. Arts. 7(4) and 8(3) of the ILC Draft Articles attached to the Special Rapporteur's Second Report also provided for the same rule for both cases of separation and newly independent states.

[65]See Dumberry (2024), *supra* note 1, at 300 ff.

[66]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 94ff. See also, ILC Report, 70th Session, 2018, *supra* note 19, para. 264.

[67]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 139, 144-145.

[68]For a critical analysis of this provision, see Kohen and Dumberry, *supra* note 8, 131-132.

[69]It should be added that the Institute's Resolution does not contain this exception in the context of succession to *obligations* regarding separation. Art. 12(2) only concerns the existence of a 'direct link' between the consequences of an internationally wrongful act committed *against* the predecessor state before the date of succession and the territory or the population of the successor state(s). It does not address the reverse situation of a wrongful act committed *by* the predecessor state. For an analysis, see Kohen and Dumberry, *supra* note 8, 98-101. The 'direct link' exception is also not found in the provisions of the Institute's Resolution dealing with transfer of territory (see Ibid., 85-86) and newly independent states (Ibid., 131).

[70]A similar exception was also mentioned in the context of transfer of territory (Draft Art. 9(3)). See also, Draft Art. 8(2) in the context of newly independent states using different language.

> 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.[71]

There is some state practice adopting this solution.[72] One example of such a 'direct link' would be the expropriation of assets taken place in the territory of a state-unit, which later becomes an independent state. In his Report, the Special Rapporteur indicated that, in the context of separation, the successor state was 'not *automatically* responsible' for such obligations 'solely based on the fact that such acts took place on what is now its territory', adding that 'the linkage of the acts to the territory is only *one relevant element* that needs to be taken into account'.[73]

3.2.2 Modifications downgrading the role and importance of these exceptions

One of the most intriguing features of Guideline 9 is that it no longer contains any explicit reference to the 'organ' and 'direct link' exceptions.[74] This is a surprising outcome considering the importance given to them by the ILC Special Rapporteur. He stated in his Second Report that 'despite non-succession being a general principle in this context' (i.e., separation) 'it might not be of an absolute character'.[75] He spoke of the 'need to draft an article … in which the general principle of non-succession is complemented by a number of exceptions'.[76] He referred to the 'direct link' and 'organ' exceptions as 'situations that would justify a different approach' than the principle of non-succession.[77] In contrast, Guideline 9(2), which was adopted in 2019 by the Drafting Committee, simply indicates that 'in particular circumstances, the injured State and the successor State should endeavour to reach an agreement for addressing the injury'.[78] In the following paragraphs, I will make three observations about the new language contained in Guideline 9.

First, in his 2019 Statement, the Chair of the Drafting Committee explained that the 'purpose' of Guideline 9(2) was to 'address exceptional situations where there is a direct link between the act or its consequences and the territory of the successor State or States' and that 'in such circumstances, the predecessor State may not be in a position to address the injury alone and may need the cooperation with the successor State to do so'.[79] The same observation is contained in the commentary to Guideline 9.[80] The Chair also added that 'the term "in particular circumstances" covers diverse situations where a successor State may be addressing the injury, which will be described in the commentary'.[81] In the commentary to Guideline 9,[82] reference is made to both the

[71]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 98ff.

[72]See Dumberry (2024), *supra* note 1, at 330 ff.

[73]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 103 (emphasis in the original).

[74]It should be added that Guideline 8(1) deals specifically with a unique and different situation: the conduct of an insurrectional or other movements which succeeds in creating a new state (in the context of separation and newly independent states) is considered as an act of the new state.

[75]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 92.

[76]Ibid., para. 122.

[77]Ibid., para. 92. See also his conclusion in paras. 97, 103.

[78]See ILC Statement, Grossman Guiloff, *supra* note 54, 8. As a result of the decision in 2022 to adopt guidelines rather than draft articles, the expression 'shall endeavour' was changed to 'should endeavour'. It should be added that Guideline 9(3) states that 'Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.' This provision simply reiterates the subsidiary nature of the articles (Guideline 1(2)). See ILC Text of the Draft Guidelines and Commentaries, provisionally adopted, 72th session, in ILC Report on the Work of its 72th Session, A/76/10 (2021), Ch. VII, at para. 165, Art. 9, sub-para. 6.

[79]See ILC Statement, Grossman Guiloff, *supra* note 54, 8.

[80]See ILC Commentaries, 2021, *supra* note 78, para. 165, Art. 9, sub-para. 4.

[81]See ILC Statement, Grossman Guiloff, *supra* note 54, 8.

[82]See ILC Commentaries, 2021, *supra* note 78, para. 165, Art. 9, sub-para. 5.

'organ' and 'direct link' exceptions,[83] but also to situations involving restitution of property,[84] or unjust enrichment.[85] These clarifications in the commentary are very useful. Yet, it shows that both the Special Rapporteur and the Drafting Committee always had in mind the 'organ' and 'direct link' exceptions as 'particular circumstances' which could require a different solution than that of non-succession. In my view, a better approach would have been to explicitly mention these two exceptions (and possibly others) directly in the text of Guideline 9(2), just as it was previously done in Draft Articles 7 and 9.

Second, Guideline 9 is fundamentally different from Draft Articles 7 and 9 put forward by the ILC Special Rapporteur. Draft Article 7(3) indicated that in cases where there is a 'direct link' between the consequences of a wrongful act and the territory of one successor State, the obligation to repair would be ('if particular circumstances so require') 'assumed' by *both* the predecessor state and the successor state.[86] Similarly, in the context of the 'organ' exception under earlier Draft Articles 7(2) and 9(2), the obligation to repair is ('if particular circumstances so require') 'transferred' to the successor state. Guideline 9(2) is completely different. The successor state no longer has to 'assume' (or be 'transferred') *any obligation*. This is a significant and deliberate change, not a minor drafting anomaly. The Chair of the Drafting Committee explained that the purpose of paragraph 2 was 'not to create obligations entailing the automatic transfer of obligations to the successor state, but instead is to signal the possibility for the successor state to reach an agreement with the injured state for addressing the injury'.[87] The same observation is contained in the commentary to Guideline 9.[88] This is a good example of a provision that was initially meant to impose some obligations on the successor state, but was later completely diluted of its 'binding' content. The successor state no longer has any obligation ('if particular circumstances so require') to actually repair the damage done. Now, the injured state has merely the possibility to reach an agreement with the successor state on the matter.[89] While the parties concerned may very well reach such an agreement, they are certainly under no obligation to do so. If they do not, this could lead to a situation where a wrongful act remains un-remedied.[90]

Third, the modification completely changes the very nature of the two exceptions. Under Draft Articles 7 and 9, the 'organ' and the 'direct link' exceptions were relevant to determine whether or not there could be any transfer of the obligation to repair to the successor state.[91] This is no longer the case. Now, the two exceptions are only useful in the context of an eventual agreement to be reached between the states concerned.[92] This is because, when there is a direct link between a wrongful act (and its consequences) and the territory of the successor state, the 'predecessor State

[83]Ibid.

[84]Ibid.

[85]Ibid.

[86]See also Art. 9(3) in the context of transfer of territory.

[87]See ILC Statement, Grossman Guiloff, *supra* note 54, 8.

[88]See ILC Commentaries, 2021, *supra* note 78, para. 165, Art. 9, sub-para. 4.

[89]Interestingly, for Austria the formulation used is still too 'strong': (rep. 72nd sess. 2021): 'We are seriously concerned about draft article 9 paragraph 2 .... Quite apart from the fact that the purported rule seems to be based on the erroneous assumption of a transfer of responsibility between the predecessor and the successor state, the rule is vague and imprecise and fails to indicate elements that may help ascertain such particular circumstances.'

[90]In fact, the continuing state is likely to reject any claim by the injured state precisely on the ground that there is a 'direct link' between the consequences of the wrongful act and the territory of the successor state. It will argue that it is for the successor state to provide reparation to the injured state. If the injured state and the successor state do not reach an agreement on the matter, the wrongful act will remain un-remediated.

[91]Interestingly, Austria does not consider that these examples have anything to do with any transfer of obligations per se. See, rep. 72nd sess. 2021: 'The examples of such particular circumstances given in para. 5 of the commentary, such as when an expropriated factory is situated in the territory of a successor state or when a successor state would be unjustly enriched, demonstrate that the resulting "exceptional situation" is not at all a transfer of responsibility from the predecessor to the successor state. Rather, it may be a justified consequence of the rule calling for the avoidance of unjust enrichment.' See also: rep. 70th sess. 2018.

[92]See ILC Commentaries, 2021, *supra* note 78, para. 165, Art. 9, sub-para. 4.

may not be in a position to address the injury alone and cooperation with the successor State may be necessary'.[93] In other words, in these circumstances the injured state may want to address its claim to the successor state rather than the continuing state. The role and importance of the two exceptions has thus been significantly downgraded. They are now only useful to the injured state in assessing whether the 'successor State may be relevant for addressing the injury'.[94]

In sum, the overall impression is that Guideline 9(2) is much less efficient than earlier Draft Articles 7 and 9 in protecting the interests of injured states. The Chair of the Drafting Committee nevertheless explained that 'the purpose of paragraph 2 is also to signal that the consequences of the internationally wrongful act do not disappear simply because of the succession of States'.[95] That signal was indeed clear under the earlier Draft Articles. They explicitly referred to the possibility of obligations being assumed or transferred to the successor state when there is a 'direct link' or when the act was committed by an 'organ' of a territorial unit. The wording used in Guideline 9(2) no longer 'signals' any possible accountability. As a result of the modification, the real 'purpose' of Guideline 9(2) is merely to express 'the possibility of an agreement between the successor State and the injured State' regarding the consequences of wrongful acts committed before independence.[96] The provision does not impose any binding obligations on anyone.[97] In contrast, the two exceptions under the Institute's Resolution are referred to as 'situations calling for the transfer of ... obligations to the successor State'.[98] The difference between the nature and aim of the two documents could hardly be clearer.

4. Cases where the predecessor state cease to exist

In this section, I will address three other provisions dealing with the situation where the predecessor state does *not* continue to exist: unification, incorporation, and dissolution of state.

4.1 Unification of states

Unification involves the merger of two (or more) states to form a new state. Under Article 13 of the Institute's Resolution, since the predecessor states cease to exist as a consequence of the unification, it follows that the obligations arising from an internationally wrongful act committed by one of them 'pass to the successor State'. This solution is in line with state practice.[99] The ILC Special Rapporteur adopted the same solution in Draft Article 10(1).[100] In fact, in his Second Report, he speaks of the application of a 'presumption' of the transfer of obligations in the context of unification.[101] This is because in this situation 'the wrongdoing State does not exist any longer, but the consequences of its international wrongful acts continue'.[102] For him, 'the application of the general rule of non-succession' here 'would mean that no State incurs obligations arising from

[93]Ibid., para. 165, Art. 9, sub-para. 4.

[94]Ibid., para. 165, Art. 9, sub-para. 5.

[95]See ILC Statement, Grossman Guiloff, *supra* note 54, 8.

[96]See ILC Commentaries, 2021, *supra* note 78, para. 165, Art. 9, sub-para. 1.

[97]In fact, as the Czech Republic noted in a statement to the Sixth Committee, it seems to suggest that both states have 'an equal obligation' to try to reach an agreement, which seems unfair from the perspective of the injured state, the victim of a wrong, see Czech Republic (rep. 71st sess. 2019).

[98]See Kohen and Dumberry, *supra* note 8, 98.

[99]See Dumberry (2024), *supra* note 1, at 115 ff.

[100]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 149ff. See Draft Art. 10(1).

[101]Ibid., para. 164: 'it seems appropriate to accept the presumption that obligations arising from an internationally wrongful act of the predecessor State pass to the successor State, unless the States concerned (which include an injured State) otherwise agreed'.

[102]Ibid., para. 147.

internationally wrongful acts', adding that 'such a solution would be hardly compatible with the objectives of international law, which include equitable and reasonable settlement of disputes'.[103]

The clear and affirmative language contained in that provision (i.e., obligations 'pass to the successor State') is no longer present in Guideline 10, which the ILC provisionally adopted at its seventy-third session, in 2022, after it had been provisionally adopted by the Drafting Committee in 2021.[104] The new provision indicates instead that in the context of 'uniting of States',[105] 'the injured State and the successor State should agree on how to address the injury'.[106] How and why did the content of this provision changed so radically?

The clause was modified because of criticisms by some ILC members which considered the earlier draft as an endorsement of a general presumption of succession[107] or a rule of 'automatic succession'.[108] They were also critical of the position adopted by the Institute on the matter.[109] Their views are clearly reflected in the commentary to Guideline 10 explaining that 'the provision is not to be interpreted as a rule of automatic succession, as rights and obligations do not automatically transfer from a predecessor State to a successor State'.[110] In contrast, other members were concerned that the new clause would amount to adopting the 'clean' slate approach and 'would risk leaving the injured State without remedy'.[111] Their views are also reflected in the commentary.[112] The Chair explained that the final wording adopted by the Drafting Committee in 2021 was the 'result of a compromise between the various divergent positions' ('a middle ground between these formulations') insofar as it 'does not articulate a "clean slate" rule or an automatic succession rule'.[113] The Special Rapporteur made the same comment in his last report.[114] Guideline 10 calls for a number of observations.

First, in my view, the wording 'should' (or even 'shall') 'agree on how to address the injury' is clearly not strong enough. In fact, the Chair indicated that some members of the Drafting Committee favored 'formulating the obligation to address the injury in stronger terms, and thereby avoiding the impression that the "clean slate" rule applied to the circumstance contemplated in the draft article'.[115] She referred to several drafting examples (such as 'shall reach

[103]Ibid.

[104]ILC Text of Draft Articles 10, 10 *bis* and 11, provisionally adopted, Drafting Committee, 72nd session, A/CN.4/L.954 (19 July 2021).

[105]See ILC Statement, Chair of the Drafting Committee, Patrícia Galvão Teles (28 July 2021), at 6 explaining why the term was chosen instead of 'merger' or 'unification'.

[106]The word 'should' eventually replaced 'shall' when the Drafting Committee decided in 2022 to adopt Guidelines instead of Articles.

[107]See ILC Report, 70th Session, 2018, *supra* note 19, para. 236: 'Several members cautioned against replacing a general theory of non-succession to State responsibility with a similarly general presumption of succession. It was noted that some of the draft articles proposed by the Special Rapporteur in fact espoused such a presumption of succession, especially in relation to cases where the predecessor State no longer existed. In the view of several members, such proposals were based on policy grounds rather than State practice, and were more in the nature of progressive development, or *de lege ferenda*, rather than codification of existing international law.' See also ibid., at para. 249.

[108]See ILC Statement, Galvão Teles, *supra* note 105, at 3. See also ibid., at 5: 'several members who were concerned that such formulation, and in particular the reference to obligations "passing" to a successor State, effectively amounted to a rule of automatic succession. In their view, succession in respect of responsibility in cases of merger could only take place subject to the consent of the successor State, and they proposed that the provision expressly say so.'

[109]Ibid., at 4: 'The view was expressed that the Institute of International Law's decision to provide for the responsibility of the successor State in cases of merger was not based on sufficient State practice, but rather on a policy decision to avoid leaving the internationally wrongful act unrepaired.'

[110]ILC Text of the Draft Guidelines and Commentaries, provisionally adopted, 72th session, in ILC Report on the Work of its 73rd Session, A/77/10 (2022), Ch. VII, at para. 89, Art. 10, sub-para. 3.

[111]See ILC Statement, Galvão Teles, *supra* note 105, at 3 ff. See also ibid., at 5.

[112]See ILC Commentaries, 2022, *supra* note 110, para. 89, Art. 10, sub-para. 3 ('the provision should not be viewed as an expression of the "clean slate" principle either, as that would risk leaving the injured State without a remedy').

[113]See ILC Statement, Galvão Teles, *supra* note 105, at 5.

[114]See ILC Special Rapporteur, Fifth Report, 2022, *supra* note 9, para. 6.

[115]See ILC Statement, Galvão Teles, *supra* note 105, at 4.

an agreement') that were discussed and stipulated that the injured state and the successor state have an obligation of result.[116] In his Fifth Report, the ILC Special Rapporteur indicated that 'even if the wording may appear rather weak, one should recall the concept of *pactum de negotiando* in international law', i.e., that the obligation 'to negotiate with a view to concluding an agreement – must be fulfilled in good faith, in accordance with the fundamental principle *pacta sunt servanda*'.[117] While this is true, it remains that the wording is indeed very 'weak'. The formulation used leaves wide open the possibility that the parties will never reach an agreement. There are basically no negative consequences under the Guidelines if they do not. As pointed out by the United States in its statement to the Sixth Committee, the language 'appears to be binding, but it is unclear what that legal obligation entails in practice'; it is more an 'exhortation to cooperate' than anything else.[118]

Second, in the event that the states concerned do not 'agree on how to address the injury', the injured state would be left with no debtor against whom it could file a claim for reparation. This outcome would result in a wrong remaining un-remedied. This is precisely the outcome that the ILC Special Rapporteur described as a solution 'hardly compatible with the objectives of international law, which include equitable and reasonable settlement of disputes'.[119] In fact, keeping the language of Draft Article 10(1) (obligations 'pass to the successor State') would have prevented such a possible outcome.

Third, a strongly worded provision, like Draft Article 10(1), would have still allowed the parties concerned to reach whatever agreement they wish to enter into. One of the basic principles at the heart of the work of the ILC is the subsidiary nature of the solutions put forward in the Guidelines. This is indeed what earlier Draft Article 10(3) provided for ('unless the States concerned, including an injured State, otherwise agreed').

Fourth, the Chair explained that the provision 'is intended to encourage States to seek a solution to questions of international responsibility in situations of a merger between States'.[120] The states concerned clearly do not need any 'encouragement' to resolve these matters. They are of course always free to reach an agreement. In that sense, the provision is rather useless.

4.2 Incorporation of state

Cases of 'incorporation' involve one state becoming part of another *already existing* state. Only the incorporated state ceases to exist; the enlarged (successor) state continues its prior legal personality. Under Article 14 of the Institute's Resolution, the obligations arising from an internationally wrongful act committed by the predecessor state 'pass to the successor State'. There are examples of modern state practice adopting this solution.[121] The ILC Special Rapporteur adopted the same approach in Draft Article 10(2).[122] As mentioned above, he considered this principle a 'presumption' finding application 'unless the States concerned, including an injured State, otherwise agreed'.[123] In my view, this solution was coherent with the general aim of the Draft Articles. Given the fact that the predecessor state ceases to exist because of its incorporation into another existing state, any other solution than succession would result in an internationally wrongful act committed before the date of succession remaining un-remediated.

[116]Ibid.

[117]See ILC Special Rapporteur, Fifth Report, 2022, *supra* note 9, para 18.

[118]United States (rep. 72nd UNGA Sixth Committee, sess. 2021).

[119]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 147.

[120]See ILC Statement, Galvão Teles, *supra* note 105, 5. See also ILC Commentaries, 2022, *supra* note 110, para. 89, Art. 10, sub-para. 4.

[121]See Dumberry (2024), *supra* note 1, at 100 ff.

[122]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 147, 157 ff.

[123]Ibid., para. 164.

The affirmative language contained in Draft Article 10(2) (obligations 'pass to the successor State') is no longer present in Guideline 10 *bis,* which the ILC provisionally adopted at its seventy-third session, in 2022, after it had been provisionally adopted by the Drafting Committee in 2021.[124] It indicates that 'the injured State and the incorporating State should agree on how to address the injury'.[125] As mentioned above, this language was the result of a compromise between opposite views of members of the Committee.[126] The commentary makes it clear that the 'obligations arising from the internationally wrongful act do not pass automatically to the incorporating State'.[127] It also adds that it is 'incumbent' on the parties concerned 'to pursue an agreement' and that 'the obligation to negotiate in good faith is also relevant here'.[128] In other words, by putting the injured state and the successor state on an equal footing and by merely letting them decide 'how to address the injury', Guideline 10 *bis* leaves the door open to the possibility that a wrong remains unpunished. For the same reasons as those mentioned in the previous section, I believe that this solution is clearly not the most effective to protect the interests of the injured state.

Finally, it should be added that Guideline 10 *bis* (2) provides that when a wrongful act has been committed before the incorporation 'by a State prior to incorporating another State' (i.e., the 'incorporating State') its responsibility 'is not affected' by the incorporation. In other words, the 'incorporating State' continues to be responsible for its own wrongful acts committed before the date of succession.[129] That rule is not controversial. In fact, it was probably not necessary to include this second paragraph given that Guideline 6 already provides for exactly the same rule.[130]

4.3 Dissolution of state

4.3.1 Transfer of obligations to the successor state(s) depending on relevant factors

Article 15(1) of the Institute's Resolution establishes the solution of succession: the obligations arising from the commission of a wrongful act by the predecessor state 'pass' to 'one, several or all the successor States' depending on the circumstances mentioned in Article 15(2)(3). This provision is in accordance with one of the most fundamental principles guiding the Resolution: avoiding, as much as possible, that a wrong remains unpunished as a result of the dissolution of a state. There are examples of modern state practice adopting this solution.[131] The same general approach was adopted by the ILC Special Rapporteur in Draft Article 11(1).[132] It should be mentioned that the provision also added that such a transfer of obligations was 'subject to an agreement' between the states concerned. The use of this language seems to suggest that there must be an agreement for any such transfer of obligations to occur.[133] Article 15(1) of the Institute's Resolution does not contain that caveat.[134]

[124]ILC Text of Draft Articles 10, 10 *bis* and 11, provisionally adopted, Drafting Committee, 72nd session, A/CN.4/L.954 (19 July 2021).

[125]It should be noted that while earlier Draft Art. 10(2) used the terms 'successor State' to describe the state which has enlarged its territory, Guideline 10(1) *bis* refers to the term 'incorporating State'. Also, when it was decided in 2022 to adopt Guidelines rather than draft articles, the Drafting Committee replaced the word 'shall' by 'should'.

[126]See ILC Statement, Galvão Teles, *supra* note 105, at 7.

[127]See ILC Commentaries, 2022, *supra* note 110, para. 89, Art. 10 *bis*, sub-para. 3.

[128]Ibid., para. 89, Art. 10 *bis*, sub-para. 3.

[129]Ibid., para. 89, Art. 10 *bis*, sub-para. 4.

[130]This question was discussed by the Committee, see ILC Statement, Galvão Teles, *supra* note 105, 8.

[131]See Dumberry (2024), *supra* note 1, at 134 ff.

[132]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, paras. 147, 167, 185.

[133]On this point, see: ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 187, indicating that he 'takes a slightly more cautious approach' than the one adopted in the Institute's Resolution: 'While accepting the presumption of the transfer of obligations from the predecessor State to the successor State or States, [the Articles] underlines the role of agreements.' Yet, elsewhere (Ibid., para. 189) he indicated that he 'wishes to make it clear that a transfer of obligations may take place according to or in the absence of an agreement.'

[134]See IIL, Kohen, Final Report, *supra* note 24, para. 49, stating that in the specific context of dissolution the 'successor State(s) will assume the rights and obligations stemming from an internationally wrongful act suffered or committed by the

Article 15(3) of the Institute's Resolution indicates that 'in order to determine which of the successor States becomes bearer of the obligations' to repair, there are two 'relevant factors'.[135] Importantly, succession is not automatic under Article 15(3); these are just 'relevant factors' to be considered for the distribution of obligations among the successor states. The first relevant factor is the existence of a 'direct link' between the consequences of an internationally wrongful act committed by the predecessor state and the territory or the population of one of the successor states.[136] ILC Draft Article 11(2) also referred to the importance of this 'direct link'.[137] The second 'relevant factor' mentioned in Article 15(3) of the Institute's Resolution is when the author of the internationally wrongful act was an organ of the predecessor state that later became an organ of the successor state. While ILC Draft Article 11(2) did not refer specifically to this 'organ' factor,[138] it remains that it is certainly one of those 'other relevant factors' (mentioned in Draft Article 11(2)) that would have to be considered.[139]

4.3.2 Modification leading to abandoning this principle

The ILC provisionally adopted Guideline 11 at its seventy-third session, in 2022, after it had been provisionally adopted by the Drafting Committee at the same session.[140] The provision is substantially different compared to both Article 15 of the Institute's Resolution and the Draft Article put forward by the ILC Special Rapporteur. Guideline 11 no longer contains the clear and affirmative language found in Draft Article 11(2) (obligations 'pass, subject to an agreement' to one or several successor state(s)). It merely indicates that 'the injured State and the relevant successor State or States should agree on how to address the injury'.[141] In the next paragraphs, I will make a few observations regarding this modification.

First, the Special Rapporteur explained that the solution under Guideline 11 was 'a middle-ground approach' adopted 'to overcome the dichotomy between the clean slate rule and automatic succession'.[142] The same observation is also found in the commentary.[143] Thus, some members remarked that the earlier draft provision 'espoused a general presumption of succession to responsibility that was inconsistent with the general rule of non-succession in respect to State

predecessor State, no matter whether an agreement between them so provides'. See, Kohen and Dumberry, *supra* note 8, 120, explaining that the absence of reference to agreements in Art.15(1) is simply due to the fact that the Resolution had already established that the parties to the state succession relationship cannot solely decide on their own about which of them will bear the obligation to repair: Arts. 3, 6 and 8. The victim must be allowed to take position on the matter. The injured state will therefore need to approve any outcome of allocation of obligations decided by other states.

[135]Under Art. 7 ('Plurality of successor States') whenever it is not possible to identify a single successor, all successor states will assume the obligations emerging from the responsibility relationship, in an equitable manner. Art. 7(2) establishes what criteria must be taken into consideration in order to determine an equitable apportionment of obligations among the successor states.

[136]Art. 15(2) deals with the 'direct link' factor concerning the situation of an internationally wrongful act committed *against* the predecessor state (succession to *rights*). Yet, the use of the words 'in addition to that mentioned in paragraph 2' in Art. 15(3) indicates that this factor is also relevant in the context of succession to *obligations*.

[137]The provision indicates that the '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'. The provision further adds that in this context, 'they should take into consideration a territorial link, an equitable proportion and other relevant factors'. This provision does not refer to 'population', but only to the 'territorial' link.

[138]The ILC Special Rapporteur does however mention this factor in his Second Report in the context of dissolution: see ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 188.

[139]The criteria are mentioned in ILC Special Rapporteur, Fifth Report, 2022, *supra* note 9, paras. 50–52.

[140]ILC Text of Draft Guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis*, provisionally adopted, Drafting Committee, 73rd session, A/CN.4/L.970 (12 July 2022).

[141]It should be added that when it was decided in 2022 to adopt Guidelines rather than Draft Articles, the Drafting Committee replaced the word 'shall' by 'should'.

[142]See ILC Special Rapporteur, Fifth Report, 2022, *supra* note 9, para. 6. See also ILC Statement, Galvão Teles, *supra* note 105, at 9.

[143]See ILC Commentaries, 2022, *supra* note 110, para. 89, Art. 11 *bis*, sub-para. 3.

responsibility' and that 'there was not sufficient State practice in support of such a presumption of succession, which found support only in some academic writings and in the work of the Institute of International Law'.[144] For these members, 'in the absence of consent, it was simply not possible to deduce any assumption of obligations by the successor State'.[145] It is interesting to note in this respect the completely opposite positions adopted by the Netherlands[146] and Austria on this issue.[147] As such, the approach adopted by the ILC is radically different from that followed by the Institute in Article 15.

Second, the commentary to Guideline 11 indicates that the provision 'recognizes the existence of an *obligation* among the concerned States to seek to agree on how to address the injury'.[148] In fact, this is merely an 'obligation' to negotiate. There is obviously no 'obligation' to actually reach any agreement. This is clear from the fact that elsewhere the commentary mentions that the phrase 'is to be understood in the same manner as in draft guidelines 10 and 10 *bis*, including the obligation to negotiate in good faith'.[149] As mentioned above, there is clearly no obligation imposed on the states concerned to reach any agreement under Guidelines 10 and 10 *bis*. My comments above about the consequences of adopting such weak language equally applies to Guideline 11. I would simply add that the ILC Special Rapporteur explained in his Second Report that 'modern State practice' in the context of dissolution 'allows for a rejection of a strict and automatic application of the principle of non-succession'[150] which 'would be in complete contradiction with the very idea of justice'.[151] However, the weak language ultimately used in Guideline 11 does not prevent in any way the states concerned from not reaching an agreement on the allocation of obligations. If they do not, there would simply be no transfer of obligations to the successor state(s). This would result in a wrongful act remaining unpunished. Such an outcome would undoubtedly be 'in complete contradiction with the very idea of justice'.[152]

Third, another important point is that the expression 'the injured State and the relevant successor State or States should agree on how to address the injury', used in Guideline 11, only concerns the relationship between the successor state(s) and the injured state.[153] The provision 'does not cover an agreement between the successor States themselves'.[154] What if the successor

[144]See ILC Report, 70th Session, 2018, *supra* note 19, para. 249 (examining comments made regarding both unification and dissolution).

[145]Ibid. (examining comments made regarding both unification and dissolution) and adding that for some members 'the policy rationale underlying such a reversal of the general rule of non-succession may in fact lead to inequitable or unjust results'.

[146]The Netherlands (rep. 72nd sess. 2021): 'My Government would reiterate its position, as previously expressed, that the point of departure should be the principle that no legal vacuum in terms of State responsibility should emerge. This applies both to situations of dissolution or unification, where the original State has disappeared, and to situations of secession, where the predecessor State remains. Whether rights or obligations be transferred in specific situations should be assessed on a case-by-case basis and be addressed in a succession agreement. If such agreement cannot be reached, the legal vacuum should be avoided by transferring rights and obligations to the successor State or States.'

[147]Austria (rep. 70th sess. 2018): 'Draft Article 10 (2) on incorporation and Draft Article 11 on dissolution are obviously prompted by the claim for justice according to which no unlawful act should remain without responsibility. However, state practice does not warrant the solution contained in these provisions. The practice as characterized by the report of the Special Rapporteur is not very convincing, since most of the cases concern succession into treaties or debts, or explicit acknowledgements of the responsibility by the successor state.'

[148]See ILC Commentaries, 2022, *supra* note 110, para. 110, Art. 11 *bis*, sub-para. 4 (emphasis added).

[149]Ibid., para. 89, Art.11 *bis*, sub-para. 6.

[150]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 167.

[151]Ibid.

[152]Ibid.

[153]See ILC Commentaries, 2022, *supra* note 110, para. 110, Art. 11 *bis*, sub-para. 4.

[154]See ILC Statement, Galvão Teles, *supra* note 105, at 10: 'Regarding the scope ratione personae of the provision, it was noted that the dissolution of a State might give rise to different kinds of legal relations: the inter se relations between the successor States, and the relations between the successor State or States and the injured State and the successor State or States. Draft article 11 only covers the latter kind of legal relations.'

states among themselves decide that none of them should be responsible for the wrongful acts committed by the predecessor state? The situation does not seem to be covered by Guideline 11. No solution is provided. In contrast, under the Institute's Resolution, the injured state would necessarily have to consent to any such annihilation of its right to reparation.[155]

Fourth, it should be recalled that Article 15(3) of the Institute's Resolution refers to two factors ('organ' and 'direct link') that are relevant to determine which of the successor states becomes bearer of the obligations to repair. These factors therefore play a major role. They are used to determine to which one of the successor states should the obligation to repair be transferred. Guideline 11 also refers to some factors. Thus, the second line of Guideline 11 indicates that the injured state and the 'relevant successor State or States' 'should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances'.[156] This is a non-exhaustive list[157] of factors that the injured state and the successor state(s) 'may take into account in determining how best to address the injury' suffered by the former.[158] These factors play a much more modest role. They are relevant to help the injured state to assess with whom it should enter negotiations to address the injury suffered. In other words, they 'serve as a guide for the determination of which successor State or States are to be considered "relevant" for purposes of draft guideline 11'.[159] Only the 'relevant' successor state(s) (i.e., the one that has 'a closer connection with the injury than others'[160]) should be concerned with such negotiations.[161] At the end of the day, the importance of these factors has been significantly downgraded under Guideline 11 when compared to the previous draft article.

In sum, Guideline 11 is a much weaker clause than Article 15 of the Institute's Resolution. This is obviously the result of some members' strong opposition to the very idea of succession to obligations. I nevertheless believe that a more appropriate solution would have been to follow these two logical steps: (i) firmly affirm the principle of succession, i.e., that the obligation to repair 'pass' to the successor state(s), and then (ii) provide guidance as to which factors should be taken into account to determine which of the different successor states should be the bearer of this obligation after the date of succession. In contrast, Guideline 11 provides limited guidance to states on what to do beyond encouraging them to 'agree on how to address the injury'. If they do not, a wrong will remain unpunished.

5. Conclusion

While the Draft Articles initially put forward by the Special Rapporteur followed most of the solutions adopted by the Institute's Resolution, a major shift occurred when each provision was examined by the Drafting Committee. The source of this radical change can be traced back to the point of departure adopted by the Special Rapporteur when he started his work. He decided to

[155]As noted by IIL, Kohen, Final Report, *supra* note 24, para. 26, devolution agreement 'cannot by itself relieve the State author of the internationally wrongful act of its obligation to repair'.

[156]See ILC Commentaries, 2022, *supra* note 110, para. 89, Article 11 *bis*, sub-para. 8, adding that 'Relevant circumstances include those that establish a link between the successor State or States and the internationally wrongful act or the injury, such as the continuity of organs (i.e., a personal link), or unjust enrichment'.

[157]Ibid., para. 89, Art. 11 *bis*, sub-para. 8.

[158]Ibid., para. 89, Art. 11 *bis*, sub-para. 7.

[159]Ibid., para. 89, Art. 11 *bis*, sub-para. 7.

[160]See ILC Statement, Galvão Teles, *supra* note 105, 10. See also: ILC Commentaries, 2022, *supra* note 110, para. 89, Art.11 *bis*, sub-para. 4; ILC Special Rapporteur, Fifth Report, 2022, *supra* note 9, para. 43 (noting that 'the injured State may not know, at least a priori, which of the successor States is relevant' and 'may therefore request reparation from one, several or all successor States').

[161]In fact, the expression 'relevant' successor state(s) was adopted to reflect the idea that 'the obligation to agree how to address the injury might not be relevant to all successor States to an equal extent'. See ILC Statement, Galvão Teles, *supra* note 105, 10. Others successor states 'that do not have an interest in addressing the injury' should 'not necessarily be involved in negotiations on the question': see ILC Commentaries, 2022, *supra* note 110, para. 89, Art. 11 *bis*, sub-para. 5.

exclude 'both the (automatic) extinction of responsibility and the automatic transfer of responsibility in cases of succession of States'.[162] Most importantly, in the context of dissolution and unification, he noted that the consequences of wrongful acts 'continue' (they 'do not disappear'[163]) after the date of succession and that 'the application of the general rule of non-succession to such cases would mean that no State incurs obligations arising from internationally wrongful acts'.[164] As mentioned above, he described this 'solution' as 'hardly compatible with the objectives of international law, which include equitable and reasonable settlement of disputes'.[165] For that reason, he proposed that 'the general rule of non-succession should be replaced rather by a presumption of succession in respect of obligations arising from State responsibility'.[166] This idea of a 'presumption' was reflected in the wording used in several draft articles, whereby the obligation to repair 'pass' to the successor state(s).[167] In contrast, the Guidelines provisionally adopted by the Drafting Committee in 2021 on dissolution and unification no longer contain any trace of this 'presumption', which was rejected by the majority of ILC members favouring instead a general rule of non-succession.

The theoretical shift adopted by the Drafting Committee had, in turn, a direct impact on the form that the ILC's work would ultimately take. While the Special Rapporteur had all along favoured draft articles with commentaries,[168] he explained in 2022 that 'the new language' of some of the provisions which had been provisionally adopted by the Drafting Committee had 'convinced him to propose a change of form'.[169] Thus, he considered that 'draft guidelines' now 'seemed to better reflect the language of the bulk of the provisions and the views of most States and of most members of the Commission'.[170] In reality, the content of the provisions had been completely diluted of any 'binding' obligations and the language so much soften that what was left could no longer be considered 'Articles'. It had become a list of general guiding principles that could possibly be useful for states when negotiating matters of succession to responsibility.[171] The difference between the two forms of outcomes could not have been better summarized by Chair Park of the Drafting Committee: 'draft guidelines were intended to provide guidance to States while draft articles were cast as directions to States, often suitable for incorporation in a treaty'.[172]

The content of each provision also radically changed. The Guidelines only go so far as to encourage the concerned parties to reach agreements on matters of succession to responsibility. But that possibility always exists anyway, with or without the Guidelines. Most importantly, the very 'soft' language used in the Guidelines does not impose any obligations on states to actually address the injury suffered. As such, the Guidelines do little to protect the interests of injured states. In my view, that should have been the goal of the whole exercise. This is indeed what was initially intended: 'the specific rules and exceptions to be drafted in that regard had to be worded in such a way as to prevent unjust and inequitable results'.[173] Yet, the Guidelines leave wide open

[162]See ILC Special Rapporteur, Third Report, 2019, *supra* note 9, para. 35.

[163]See ILC Special Rapporteur, Second Report, 2018, *supra* note 9, para. 148.

[164]Ibid., para. 147.

[165]Ibid.

[166]Ibid., para. 148. He added: 'Of course, this is not an unqualified or absolute succession, because the presumption of such transfer of obligations may be confirmed, rebutted, or modified by agreements, including agreements on distribution (sharing) of such obligations, where appropriate.'

[167]See, Draft Arts. 10 (unification and incorporation) and 11 (dissolution).

[168]See ILC Special Rapporteur, First Report, 2017, *supra* note 9, para. 28.

[169]See ILC Provisional Summary Record, *supra* note 15.

[170]Ibid.

[171]This change, in turn, also had a direct impact on how the Drafting Committee subsequently revised the language of some of the draft articles which had previously been adapted by the Commission. Thus, the word 'shall' (for instance, states 'shall endeavor' to reach an agreement, or they 'shall agree on how to address' an injury) was replaced by 'should' in order to 'reframing the provisions as guidance to States'.

[172]ILC Statement, Chair of the Drafting Committee, Ki Gab Park (14 July 2022), at 2.

[173]See ILC Report, 70th Session, 2018, *supra* note 19, para. 259.

the possibility that a wrong remains unpunished. Such an outcome could hardly be considered just or equitable. From that perspective, the Guidelines seem like a missed opportunity.

At the end of the day, while the content of the final text of the Guidelines is in many respects disappointing, clearly the Special Rapporteur should not be blamed for this outcome. He has written five very well-researched reports, which are of the greatest importance to scholarship on state succession. He should be praised for the balanced and generally satisfying approach adopted in the Draft Articles attached to his Reports.[174] States' strong reluctance to any departure from the 'traditional' rule of non-succession to state responsibility was simply insurmountable.

Finally, the outcome of the work (i.e., no articles, no guidelines) after more than five years of work is somewhat discouraging for anyone interested in state succession issues. Yet, in hindsight what happened is not entirely surprising. Already back in 2018, the Report to the ILC mentioned 'the initial misgivings expressed by some members as to the suitability of the topic for codification or progressive development'.[175] It seems that these doubts never disappeared. In fact, many states had the same concerns. A good example is the UK's position noting that the examples of state practice mentioned in the Special Rapporteur's reports 'must be viewed in its historical, political and cultural context', adding that 'rather than revealing any discernible trends of universal application, the practice summarized in the report tends to demonstrate the contrary'.[176] Ultimately, given that many states consider the question of state succession to responsibility to involve 'policy – and, indeed, political – decisions which go to the heart of the identity of the States involved',[177] any global codification effort was doomed to fail.

[174]The ILC Secretariat also published a comprehensive and very useful survey of agreements dealing with succession to responsibility: ILC Succession of States in Respect of State Responsibility, Information on Treaties which May Be of Relevance to the Future Work of the Commission on the Topic', Memorandum by the Secretariat, A/CN.4/730* (20 March 2019).

[175]See ILC Report, 70th sess., 2018, *supra* note 19, para 234. See letters sent to the UNGA Sixth Committee by, *inter alia*, UK (rep. 69th sess., 31 October, 1 November 2017), the Netherlands (rep. 74th sess., 5 November 2019); Sierra Leone (rep. 74th sess., 5 November 2019).

[176]UK (rep. 69th sess., 31 October, 1 November 2017).

[177]Ibid.

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