

Chapter VII

Succession of States in respect of State responsibility

A. Introduction

70. At its sixty-ninth session (2017), the Commission decided to include the topic “Succession of States in respect of State responsibility” in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.¹¹⁴⁰ The General Assembly, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work.

71. The Special Rapporteur submitted four reports from 2017 to 2021.¹¹⁴¹ The Commission also had before it, at the seventy-first session (2019), a memorandum prepared by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.¹¹⁴² Following the debate on each report, the Commission decided to refer the proposals for draft articles made by the Special Rapporteur to the Drafting Committee. The Commission heard interim reports from the successive Chairs of the Drafting Committee on succession of States in respect of State responsibility, containing the draft articles provisionally adopted by the Drafting Committee, at the seventieth to seventy-second sessions (2018, 2019 and 2021).

B. Consideration of the topic at the present session

72. At the present session, the Commission had before it the fifth report of the Special Rapporteur ([A/CN.4/751](#)).

73. In his fifth report, composed of four parts, the Special Rapporteur provided an updated overview of the work on the topic undertaken thus far, which included a summary of the debate in the Sixth Committee held at the seventy-sixth session of the General Assembly, together with an explanation of the methodology of the report (Part One). The Special Rapporteur then examined the question of a plurality of injured successor States and a plurality of responsible successor States (Part Two) and also proposed a new scheme for the consolidation and restructuring of the draft articles referred to the Drafting Committee at previous sessions on the basis of proposals contained in his reports (Part Three). Lastly, the Special Rapporteur addressed the future programme of work on the topic (Part Four). No new draft articles were proposed.

74. The Commission considered the fifth report at its 3579th to 3583rd meetings, from 11 to 17 May 2022.

75. At its 3583rd meeting, on 17 May 2022, the Commission decided, on the recommendation of the Special Rapporteur, to instruct the Drafting Committee to proceed with the preparation of draft guidelines on the basis of the provisions previously referred to the Drafting Committee (including those provisions provisionally adopted by the Commission at previous sessions), taking into account the debate held in the plenary on the Special Rapporteur’s fifth report.

76. At its 3593rd meeting, on 14 July 2022, the Commission considered the report of the Drafting Committee on the topic ([A/CN.4/L.970](#)),¹¹⁴³ and provisionally adopted draft

¹¹⁴⁰ At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*).

¹¹⁴¹ [A/CN.4/708](#), [A/CN.4/719](#), [A/CN.4/731](#) and [A/CN.4/743](#) and [Corr.1](#), respectively.

¹¹⁴² [A/CN.4/730](#).

¹¹⁴³ The report and the corresponding statement of the Chair of the Drafting Committee, containing an annex reflecting a consolidated text of all the titles and texts of the draft guidelines on succession of States in respect of State responsibility worked out by the Drafting Committee thus far, are available in the online analytical guide to the work of the International Law Commission.

guidelines 6, 10, 10 *bis* and 11, which had been provisionally adopted by the Drafting Committee in 2018 and 2021, respectively, as well as draft guidelines 7 *bis*, 12, 13, 13 *bis*, 14, 15 and 15 *bis*, which were provisionally adopted by the Drafting Committee at the present session (see section D.1 below). As a result of the change of form of the outcome, the Commission also took note of draft articles 1, 2, 5, 7, 8 and 9, as revised by the Drafting Committee to be draft guidelines.¹¹⁴⁴ It also took note that the Special Rapporteur had

¹¹⁴⁴ For the ease of reference, the previously adopted draft articles revised to the form of draft guidelines are reproduced below. The numbering reflects the omission of draft articles 3 and 4, proposed by the Special Rapporteur in his first report (2017) and pending in the Drafting Committee until 2022:

Guideline 1

Scope

1. The present draft guidelines concern the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.
2. The present draft guidelines apply in the absence of any different solution agreed upon by the States concerned.

Guideline 2

Use of terms

For the purposes of the present draft guidelines:

- (a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
- (b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
- (c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;
- (d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

Guideline 5

Cases of succession of States covered by the present draft guidelines

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

Guideline 7

Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Guideline 8

Attribution of conduct of an insurrectional or other movement

1. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration is considered an act of the new State under international law.
2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Guideline 9

Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

provided revised commentaries on an informal basis for draft guidelines 1, 2, 5, 7, 8 and 9 to assist the Commission in its future work on this topic.

77. At its 3605th to 3611th meetings, from 29 July to 4 August 2022, the Commission adopted the commentaries to draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis* (see sect. D.2 below).

78. At its 3611th meeting, on 4 August 2022, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Pavel Šturma, whose mastery of the subject, guidance, and cooperation greatly facilitated the work of the Commission.

Brief summary of the debate on selected issues raised in the fifth report of the Special Rapporteur

(a) Plurality of States

79. The Special Rapporteur explained that in his fifth report he had focused primarily on the problems associated with a plurality of injured successor States or with a plurality of responsible successor States. In doing so, the Special Rapporteur had also taken into account the concept of “shared responsibility”, referred to in the Guiding Principles on Shared Responsibility in International Law, developed through a project undertaken at the University of Amsterdam.¹¹⁴⁵ However, in his view, in light of their scope of application, the Guiding Principles were of limited use to the topic at hand.

80. As regards the plurality of injured successor States, the Special Rapporteur was of the view that not all categories of succession of States were equally relevant. Typical examples that occurred in practice were the dissolution of a State and the separation of a part or parts of a State. The Special Rapporteur concluded that State practice supported the priority of specific agreements. In the absence of such an agreement and where there were no special connections between one or more successor States and the injury, the solution was to be found in application of equitable apportionment. At the same time, he noted that the responsible State could not refuse a claim by one successor State because of a plurality of injured States, since that would contravene article 46 of the articles on responsibility of States for internationally wrongful acts.¹¹⁴⁶

81. Concerning the plurality of responsible successor States, the Special Rapporteur observed that in all cases where a predecessor State continued to exist, an injured State would be entitled to invoke its responsibility. In cases of uniting States (merger) and incorporation, the issue of plurality did not *per se* arise. In situations of the dissolution of a State, agreement between the injured State and the relevant successor State or States was key. At the same time, as a matter of invocation, the injured State was able to rely on the rule codified in article 47 of the articles on responsibility of States for internationally wrongful acts. The Special

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

2. In particular circumstances, the injured State and the successor State should endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

¹¹⁴⁵ A. Nollkaemper *et al.*, “Guiding Principles on Shared Responsibility in International Law”, *European Journal of International Law*, vol. 31 (2020), pp. 15–72.

¹¹⁴⁶ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

Rapporteur noted further that, in practice, owing to the application of relevant agreements or national legislation, only one successor typically bore responsibility in cases of the plurality of responsible successor States.

82. The Special Rapporteur further recalled that he had already addressed particular aspects of plurality of States in cases of continuing or composite acts in his earlier proposals, including those made in the Drafting Committee, for draft articles 7 and 7 *bis*. Accordingly, he had not proposed a draft article on plurality of States or on shared responsibility in the context of succession, since the examples of relevant State practice involved situations of either the responsibility of a predecessor State that continued to exist or the responsibility of a successor State for its own acts or the acts of a predecessor State to which it had a special link. A further option was to include a clause indicating that the text being developed by the Commission was without prejudice to the application of articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts.

83. During the ensuing debate in the plenary, several members agreed that there was no need to introduce a provision on plurality of States. It was emphasized that particular aspects of the existence of a plurality of States in cases of continuing or composite acts could be resolved on the basis of the general rules of State responsibility. According to another view, it was advisable to include such a provision, along the lines of article 7, “Plurality of successor States”, of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility,¹¹⁴⁷ or to include a reference thereto. Some members were also of the view that it was unnecessary to include a “without prejudice” clause in relation to articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts.

84. Several members agreed that there was no need to examine separately the concept of “shared responsibility”, since, in their view, the concept was not directly relevant to the present topic. On the other hand, it was suggested that examination of the concept could provide clarity to the Commission’s work, and that it could also be referred to in the commentary.

(b) Final form

85. As regards the work of the Drafting Committee on the draft provisions referred to it at previous sessions, the Special Rapporteur confirmed his intention to withdraw draft articles 3 and 4, proposed in his first report, submitted in 2017. His fifth report contained several proposals, of a technical and stylistic nature, for modification of draft provisions being considered by the Drafting Committee. He also expressed the hope that the topic could be completed on first reading at the current session.

86. Several members questioned whether the development of draft articles was the most appropriate outcome, particularly in light of concerns expressed by some States in the Sixth Committee, throughout the course of the Commission’s work on the topic, as to the relative paucity of State practice available to justify the adoption of draft articles. It was suggested that the Commission consider changing the format of its work on the topic to, *inter alia*, draft guidelines or draft conclusions, which would be designed to serve as general guidance for States (as opposed to developing a set of binding rules). Some members expressed doubts as to whether the adoption of the entire set of draft articles on first reading, at the present session, was feasible. While several members expressed support for continuing the work of the Drafting Committee, a proposal was made to discontinue the Committee’s work on an instrument, and, instead, to convene a Working Group, chaired by the Special Rapporteur, with the aim of producing a report on the topic that would be annexed to the Commission’s report, as had been done with previous topics, including that on the “obligation to extradite or prosecute (*aut dedere aut judicare*)”.¹¹⁴⁸

¹¹⁴⁷ *Yearbook of Institute of International Law, Tallinn Session*, vol. 76 (2015), p. 711, at p. 715.

¹¹⁴⁸ *Yearbook of the International Law Commission, 2014*, vol. II (Part Two), para. 65. Informal consultations on the final form of the work on the present topic were held on 19 May 2022.

C. Text of the draft articles on succession of States in respect of State responsibility provisionally adopted by the Commission at its seventy-first and seventy-second sessions

87. The text of draft articles 1, 2, 5, 7, 8 and 9 provisionally adopted by the Commission at its seventy-first and seventy-second sessions is reproduced below.

Article 1¹¹⁴⁹

Scope

1. The present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.
2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

Article 2¹¹⁵⁰

Use of terms

For the purposes of the present draft articles:

- (a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
- (b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
- (c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;
- (d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

...

Article 5¹¹⁵¹

Cases of succession of States covered by the present draft articles

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

Article 7¹¹⁵²

Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

¹¹⁴⁹ For the commentary to this draft article, see [A/74/10](#), para. 118. The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

¹¹⁵⁰ For the commentary to this draft article, see *ibid.* The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

¹¹⁵¹ For the commentary to this draft article, see *ibid.* The commentary should be read in light of the change of draft articles to draft guidelines, where appropriate.

¹¹⁵² For the commentary to this draft article, see [A/76/10](#), para. 165. The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

Article 8¹¹⁵³**Attribution of conduct of an insurrectional or other movement**

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

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Article 9¹¹⁵⁴**Cases of succession of States when the predecessor State continues to exist****Succession of States in respect of State responsibility**

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

2. In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

D. Text of the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission at its seventy-third session

1. Text of the draft guidelines

88. The text of draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis* provisionally adopted by the Commission at its seventy-third session is reproduced below.

Guideline 6**No effect upon attribution**

A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

Guideline 7 *bis***Composite acts**

1. When a predecessor State continues to exist, the breach of an international obligation by that State through a series of actions or omissions defined in aggregate

¹¹⁵³ For the commentary to this draft article, see *ibid.* The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

¹¹⁵⁴ For the commentary to this draft article, see *ibid.* The commentary should be read in light of the change of draft articles to draft guidelines, where appropriate.

as wrongful occurs when an action or omission of the predecessor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.

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

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

Guideline 10
Uniting of States

When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State should agree on how to address the injury.

Guideline 10 bis
Incorporation of a State into another State

1. When an internationally wrongful act has been committed by a State prior to its incorporation into another State, the injured State and the incorporating State should agree on how to address the injury.

2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Guideline 11
Dissolution of a State

When a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the injured State and the relevant successor State or States should agree on how to address the injury arising from the internationally wrongful act. They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

Guideline 12
Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to be entitled to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good.

2. In addition to paragraph 1, a successor State may, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State.

Guideline 13
Uniting of States

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

Guideline 13 bis
Incorporation of a State into another State

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

Guideline 14
Dissolution of a State

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

Guideline 15
Diplomatic protection

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

Guideline 15 bis
Cessation and non-repetition

1. A predecessor State that is responsible for an internationally wrongful act that occurred before the date of succession of States, and that continues to exist after the date of succession, remains under an obligation:
 - (a) to cease that act, if it is continuing;
 - (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.
2. A State that is responsible for an internationally wrongful act in accordance with draft guideline 7 or with draft guideline 7 bis, paragraph 1 or paragraph 2, is under an obligation:
 - (a) to cease that act, if it is continuing;
 - (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its seventy-third session

89. The text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its seventy-third session is reproduced below.

Guideline 6
No effect upon attribution

A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

Commentary

(1) The purpose of draft guideline 6 is to clarify that an internationally wrongful act occurring before the date of succession remains attributable to the State that committed it.

This provision expresses the basic principle which is codified in article 1 of the articles on responsibility of States for internationally wrongful acts.¹¹⁵⁵

(2) The Commission considered whether such a draft guideline was needed in the context of this topic. There was a view that the draft guideline was unrelated to the present topic and unnecessarily reiterated a rule that was obvious or self-evident. However, the Commission considered that such a provision was important, because it constituted the logical premise of a number of subsequent draft guidelines concerning aspects of State responsibility, which were relevant in the context of State succession. Such provisions, for example, concern the responsibility for breaches of international law having a continuing character (draft guideline 7), composite acts (draft guideline 7 *bis*) and the question of the attribution of conduct of an insurrectional or other movement (draft guideline 8).

(3) While the term “attribution” in this draft guideline comes from the concept of attribution of conduct addressed in article 2, subparagraph (a), and in chapter II of the articles on responsibility of States for internationally wrongful acts,¹¹⁵⁶ it does not refer to the term “attribution of conduct” as such. Instead, the Commission opted for the formulation “attribution ... of an internationally wrongful act” to emphasize that, in the context of succession of States, an internationally wrongful act as a whole remains attributable to the State that committed that act before the date of succession.

Guideline 7 *bis*

Composite acts

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

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

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

Commentary

(1) Following the structure of articles 14 and 15 of the articles on responsibility of States for internationally wrongful acts,¹¹⁵⁷ draft guidelines 7 and 7 *bis* appear consecutively in the present draft guidelines. In light of the complexity of the subject matter and the need to maintain consistency with its previous work, the Commission emphasized the importance in the present draft guideline of tracking the text of article 15 of the articles on responsibility of States for internationally wrongful acts as closely as possible.¹¹⁵⁸

(2) The draft guideline has three paragraphs. The wording of each paragraph follows that of article 15 of the articles on responsibility of States for internationally wrongful acts, focusing on the question of when the breach by a composite act occurs in various succession contexts. The first two paragraphs relate, respectively, to composite acts performed entirely by a predecessor State and by a successor State. The third relates to a composite act begun

¹¹⁵⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, p. 26 (“Every internationally wrongful act of a State entails the international responsibility of that State.”). See also General Assembly resolution 56/83 of 12 December 2001, annex.

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

¹¹⁵⁸ See article 15 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, p. 27.

by a predecessor State and completed by its successor State after the date of succession. All three paragraphs focus on composite acts that begin before the date of succession of States and end after such date.

(3) Paragraph 1 relates to composite acts that straddle the date of succession and are performed entirely by a predecessor State that continues to exist after the date of succession. The paragraph makes clear that a predecessor State is responsible for an internationally wrongful composite act comprising actions or omissions attributable to the predecessor State that were performed both before and after the date of succession. In other words, the incidence of a State succession has no impact on the responsibility of a predecessor State for a composite act whose components are entirely attributable to it. Furthermore, the paragraph does not address a composite act of the predecessor State that occurs entirely before or entirely after the date of succession.

(4) The Commission also considered whether a specific reference to attribution was necessary in the text, to make clear that the actions or omissions constituting the composite act must all be attributable to the predecessor State. To address this point, the word “its” was included before “other actions and omissions” and should be understood to refer to the element of attribution.

(5) Paragraph 2 mirrors paragraph 1 with respect to a successor State. The paragraph makes clear that a successor State is responsible for an internationally wrongful composite act comprising actions or omissions attributable to the successor State that were performed both before and after the date of succession. It is recalled that a State that incorporates all or part of the territory of another State is the successor State with respect to that territory, even though the State existed before the date of succession. A composite act performed by a successor State entirely after the date of succession is also within the scope of this paragraph.

(6) Paragraph 3 concerns the scenario where the composite act is started by the predecessor State before the date of succession of States and is completed by the successor State afterwards. One potential example is that of a creeping expropriation begun by the predecessor State and completed by the successor State. However, the obligation of the successor State to compensate for such an expropriation could be explained on other bases. For example, it could be considered that the continued application by the successor State of the relevant measures adopted by the predecessor State is an act attributable directly to the successor State. In several cases concerning the successors to the former Yugoslavia, for example *Zaklan v. Croatia*, the European Court of Human Rights determined, in a context relating to succession, that the successor State was responsible based on its own actions after the date of succession.¹¹⁵⁹

(7) In the *Gabčíkovo-Nagymaros* case, the International Court of Justice considered that a successor State could be responsible for the conduct of the predecessor State when, by its conduct, the successor assumed the actions of the predecessor as its own.¹¹⁶⁰ Other examples concern the possibility that a predecessor State might begin a series of actions that amounts to genocide or a crime against humanity¹¹⁶¹ only when continued by its successor State after the date of succession. Reference could also be made to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* case brought by Croatia against Serbia before the International Court of Justice, even though the Court ultimately did not need to resolve whether succession to responsibility had occurred because it did not find that the allegations of genocide were substantiated.¹¹⁶²

(8) The inconsistency of the available State practice did not allow a firm conclusion to be drawn as to the content of the law. The Commission therefore decided to draft paragraph 3

¹¹⁵⁹ *Zaklan v. Croatia*, No. 57239/13, European Court of Human Rights, 16 December 2021, paras. 85–86.

¹¹⁶⁰ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 81, paras. 151–152.

¹¹⁶¹ See paras. (3) and (5) of commentary to article 15, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at pp. 62–63.

¹¹⁶² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, at pp. 58 and 129, paras. 117 and 442.

in the form of a without prejudice clause. Paragraph 3 leaves open the question of whether the responsibility of a successor State for such a composite act exists under international law.

Guideline 10
Uniting of States

When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State should agree on how to address the injury.

Commentary

(1) Draft guideline 10 addresses the situation where two or more States merge to form one successor State. By forming a new State, the predecessor States cease to exist.

(2) In some of its earlier work, the Commission understood the term “uniting of States” to cover both merger and incorporation.¹¹⁶³ However, following the most recent approach in article 21 of the articles on nationality of natural persons in relation to the succession of States, of 1999,¹¹⁶⁴ the Commission decided to draw an explicit distinction by having separate draft guidelines to cover the two situations. Draft guideline 10 addresses merger, while draft guideline 11 addresses incorporation.

(3) 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. At the same time, 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.

(4) The Commission sought to balance such positions by recommending that the injured State and the successor State endeavour to reach an agreement on how to address the injury, an outcome inspired by draft guideline 9, paragraph 2. It is intended to encourage States to seek a solution to questions of international responsibility in situations of a merger between States. The wording is sufficiently flexible to give States the freedom to choose the modalities of the agreement.

(5) The provision should be understood as meaning that the States concerned should negotiate in good faith with a view to concluding an agreement. As the Permanent Court of International Justice stated in 1931 in the case concerning *Railway Traffic between Lithuania and Poland*, the obligation to negotiate is “not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements”.¹¹⁶⁵ The International Court of Justice summarized and confirmed the relevant case law in its 2011 judgment in *Application of the Interim Accord of 13 September 1995*.¹¹⁶⁶ In the same vein, in 1972 the Arbitral Tribunal for the Agreement on German External Debts in the case of *Greece v. the Federal Republic of Germany* explained very aptly the nature of the obligation to negotiate.¹¹⁶⁷

Guideline 10 bis
Incorporation of a State into another State

1. When an internationally wrongful act has been committed by a State prior to its incorporation into another State, the injured State and the incorporating State should agree on how to address the injury.

¹¹⁶³ See art. 31 of the Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

¹¹⁶⁴ *Yearbook ... 1999*, vol. II (Part Two), para. 48, at pp. 41–42.

¹¹⁶⁵ *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116.

¹¹⁶⁶ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, *I.C.J. Reports 2011*, p. 644, at p. 685, para. 132.

¹¹⁶⁷ *Greece v. the Federal Republic of Germany*, Arbitral Award of 26 January 1972, paras. 62–65: “However, a *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken.”

2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Commentary

(1) A situation of incorporation involves one or more States being incorporated into another State that continues to exist.

(2) Paragraph 1 reflects the scope of the provision. It deals with the situation where the internationally wrongful act was committed by a State that no longer exists, owing to its incorporation into another State. Therefore, the incorporating State continues to exist while the State that committed the internationally wrongful act ceases to exist.

(3) Under the formulation “should agree on how to address the injury”, it is incumbent on “the injured State and the incorporating State” to pursue an agreement. However, the obligations arising from the internationally wrongful act do not pass automatically to the incorporating State. Additionally, the obligation to negotiate in good faith is also relevant here (see para. (5) of the commentary to draft guideline 10 above), as well as the consideration of claims made by private individuals.

(4) Paragraph 2 applies to situations where the incorporating State commits the wrongful act. It clarifies that the incorporation does not affect the responsibility of the State that committed the wrongful act.

Guideline 11 Dissolution of a State

When a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the injured State and the relevant successor State or States should agree on how to address the injury arising from the internationally wrongful act. They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

Commentary

(1) Draft guideline 11 addresses the situation where a predecessor State that has committed an internationally wrongful act has ceased to exist as a result of a dissolution.

(2) The phrase “a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States” is inspired by articles 18, 31 and 41 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.¹¹⁶⁸

(3) The Commission sought to draw a balance between the “clean slate” doctrine and the “automatic succession” position.

(4) The draft guideline recognizes the existence of an obligation among the concerned States to seek to agree on how to address the injury. The draft guideline only applies to the relations between the injured State and the successor State or States. However, the need for agreement on how to address the injury may not be relevant to all successor States to an equal extent. Some successor States might have a closer connection with the wrongful act or the injury than others.

(5) The use of the word “relevant” in relation to “successor State or States” reflects the possibility that there may be successor States that do not have an interest in addressing the injury and therefore should not necessarily be involved in negotiations on the question.

¹¹⁶⁸ Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983, not yet in force), United Nations, *Juridical Yearbook 1983* (United Nations publication, Sales No. E.90.V.1), p. 139.

(6) The phrase “should agree on how to address the injury” is to be understood in the same manner as in draft guidelines 10 and 10 *bis*, including the obligation to negotiate in good faith.

(7) The second sentence, “[t]hey should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances” provides factors that relevant States may take into account in determining how best to address the injury arising from the internationally wrongful act committed by the predecessor State. In doing so, the factors listed therein also serve as a guide for the determination of which successor State or States are to be considered “relevant” for purposes of draft guideline 11.

(8) The express reference to “any territorial link, any benefit derived, any equitable apportionment” is not intended as providing an exhaustive list of factors. This is confirmed by the concluding phrase “and all other relevant circumstances” which is based on article 31, paragraph 2, of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. 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.

(9) The pronoun “they” refers to “the injured State and the relevant successor State or States”.

Guideline 12

Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to be entitled to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good.

2. In addition to paragraph 1, a successor State may, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State.

Commentary

(1) Draft guideline 12 concerns cases of succession when the predecessor State which has been injured prior to the date of succession continues to exist. These comprise cases where a part of a State secedes to form a new State, including cases of newly independent States, and cases where a part of the territory of a State is ceded to another, pre-existing State. In this respect, it is analogous to draft guideline 9, which covers the comparable scenarios of succession with respect to the responsibility for internationally wrongful acts performed by a predecessor State prior to the date of succession.

(2) The provision has three paragraphs. The first concerns the situation of an injured predecessor State that continues to exist after the date of the succession. The second concerns the situation of a successor State to such a predecessor State. The third is a without prejudice clause with respect to apportionments or other agreements between the predecessor and successor States.

(3) The phrase “continues to be entitled to invoke”, in paragraph 1, mirrors draft guideline 9 and confirms that the position of the predecessor State is not affected by the succession of States. The Commission considered whether to refer specifically to requesting reparation from the responsible State, but decided that a reference to the “entitle[ment] to invoke” responsibility was preferable because it is broader, encompassing not only reparation but also other obligations arising from the commission of an internationally wrongful act. Such reference also avoids the question of apportionment between the predecessor State and any relevant successor States, which is dealt with in paragraph 3.

(4) The phrase at the end of paragraph 1, “if the injury to it has not been made good” results from the Commission’s consideration of how the injury in question relates to the

continued entitlement of the predecessor State to invoke responsibility. The Commission chose this phrase rather than a reference to either the predecessor State being an “injured State” or the continued existence of the injury after the date of succession. Paragraph 1 relates only to the position of an injured predecessor State and is not concerned with the possibility of the invocation of responsibility by a State other than an injured State in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts.¹¹⁶⁹ The phrase “the injury to it” captures the idea of the injured predecessor State. Drawing on the articles on responsibility of States for internationally wrongful acts, the phrase “has not been made good” reflects the idea that the predecessor State is not entitled to invoke responsibility in relation to an injury for which full reparation has already been made.

(5) Paragraph 2 concerns the position of a successor State of the injured predecessor State. The paragraph seeks to address the circumstances where a successor State is able to invoke the responsibility of a third State for an internationally wrongful act that it committed, against the predecessor State before the date of succession. The paragraph begins with the phrase “In addition to paragraph 1” in order to clarify its relationship with the previous paragraph. The entitlement of both the predecessor State and the successor State to invoke the responsibility of the wrongdoing State does not entail an obligation of the wrongdoing State to make more than full reparation.

(6) The phrase “in particular circumstances”, which tracks the formulation of draft guideline 9, paragraph 2, refers to the connection between the injury to the predecessor State before the date of succession and either the territory or the nationals that became those of the successor State as a consequence of the succession. The paragraph is thus intended, *inter alia*, to satisfy the interests of newly independent States. It would be odd if a newly independent State would not be entitled to invoke the responsibility of a wrongdoing State for injury affecting its territory or population before it became independent.¹¹⁷⁰

(7) The Commission decided to use the phrase “entitled to invoke” to track the formulation of paragraph 1, and the word “may” to reflect the conditionality of the entitlement on the existence of the particular circumstances.

(8) Paragraph 3 is a without prejudice clause. It seeks to accommodate the scenario implied in paragraphs 1 and 2 in which both the predecessor and successor States are entitled to invoke responsibility. It is analogous to paragraph 3 of draft guideline 9 and gives priority to agreements between the States concerned. Such agreements could involve, *inter alia*, the apportionment of compensation already paid to the predecessor State before the date of succession or a decision that the successor State should pursue the entire claim.

Guideline 13 **Uniting of States**

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

¹¹⁶⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, pp. 29–30.

¹¹⁷⁰ This was, for example, the case with the secession of Pakistan from India in 1947. The British Dominion of India had been party to the 1946 Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, the purpose of which was the equitable distribution of the total assets available as reparation from Germany among several injured States. See Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, done at Paris on 14 January 1946 (United Nations, *Treaty Series*, vol. 555, No. 8105, p. 69). The Governments of India and Pakistan agreed in January 1948 on how to divide the share of reparations allocated to India under the 1946 Agreement. This bilateral agreement led to the conclusion of an additional Protocol to the 1946 Agreement. See Protocol attached to the Paris Agreement of 14 January 1946 on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, signed at Brussels on 15 March 1948 (*ibid.*, p. 104).

Commentary

(1) Contrary to draft guideline 10, draft guideline 13 deals with the situation where a predecessor State is an injured State by an internationally wrongful act of another State.

(2) As explained in the commentaries to draft guidelines 10 and 10 *bis*, the Commission decided to treat uniting of States separately from the incorporation of a State. The Commission decided to take the same approach with respect to draft guideline 13, treating uniting of States separately from the incorporation of a State for issues relating to the reparation of injury for internationally wrongful acts committed against a predecessor State. Accordingly, draft guideline 13 covers the unification scenario, while draft guideline 13 *bis* covers the incorporation of a State into another State.

(3) The Commission considered whether to make explicit that the provision referred to an internationally wrongful act that occurred before the date of succession of States. This was found to be unnecessary because, in a situation of unification, the predecessor States cease to exist on the date of succession. Therefore, an injury to a predecessor State could only refer to an injury caused by an internationally wrongful act that occurred before the date of succession.

(4) The Commission used the phrase “may invoke” in draft guideline 13 rather than the formulation in draft guideline 12, paragraph 2, “may, in particular circumstances, be entitled to invoke”, since, in the context of a uniting of States, where there is only one successor State, the challenge of determining which State might be entitled to invoke responsibility does not arise. Furthermore, in draft guideline 12, the notion of “entitled to invoke” is linked to the notion of continuation in paragraph 1 and to the idea of “particular circumstances” in paragraph 2, neither of which are relevant to draft guideline 13.

Guideline 13 *bis*

Incorporation of a State into another State

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

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

Commentary

(1) Draft guideline 13 *bis* concerns the scenario in which an injured predecessor State becomes part of another State. In line with the terminology used in the present draft guidelines, as set out in the definitions in draft guideline 2, the incorporated State is the predecessor State and the incorporating State is the successor State with respect to the territory incorporated. However, it was considered clearer to use phrasing such as “injured State” and “incorporated State” in the present context.

(2) In paragraph 1, where the ability of the incorporating State to invoke the responsibility of the wrongdoing State only begins on the date of succession, the wording “may invoke” is used. As in draft guideline 13, this reflects the fact that there is no confusion as to which of the States might invoke responsibility after the date of succession because the predecessor State has ceased to exist.

(3) In paragraph 2, the word “continues” is used to indicate that the entitlement of the incorporating State to invoke responsibility begins when it is injured, prior to the date of succession. This reflects the notion that the pre-existing entitlement is not affected by the occurrence of succession.

(4) The term “wrongdoing State”, used at the end of both paragraphs, as well as in draft guideline 14, is drawn from the commentary to the articles on responsibility of States for

internationally wrongful acts.¹¹⁷¹ The Commission considered that the phrase was a concise way of indicating the State that was responsible for the internationally wrongful act.

Guideline 14
Dissolution of a State

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

Commentary

(1) Draft guideline 14 concerns the dissolution of a State in circumstances where the predecessor State was injured prior to the date of succession, but does not continue to exist after that date. Like its analogue draft guideline 11, the provision defines the dissolution of a State in the terms used in article 18, paragraph 1, of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts: that is, “[w]hen a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States”. The same definition was also used in the Commission’s work on nationality in relation to the succession of States¹¹⁷² and the work of the Institute of International Law.¹¹⁷³ The only change from the 1983 Vienna Convention formulation is the addition of the phrase “that has been injured by an internationally wrongful act”. This does not change the definition of a dissolution, but rather serves to indicate the scenario in which the draft guideline applies.

(2) The draft guideline comprises two paragraphs. Paragraph 1 concerns whether one or more of the successor States is entitled to invoke the responsibility of the wrongdoing State for an act against the predecessor State, while paragraph 2 emphasizes the importance of pursuing an agreement between the wrongdoing State and the relevant successor State or States in the context of a dissolution.

(3) In paragraph 1, the use of the phrase “may, in particular circumstances, be entitled to invoke”, is inspired by that in draft guideline 12, paragraph 2. The Commission chose such formulation, instead of “may invoke”, so as to reflect the idea that, while not all successor States will necessarily be entitled to invoke responsibility, one or more will. The phrase “in particular circumstances” reflects the fact that the identification of the successor State or States that are entitled to invoke responsibility in respect of the injury to the predecessor may depend on a number of factors and that it will not necessarily be all successor States who are so entitled.

(4) The phrase “particular circumstances” refers to a territorial or personal link between an internationally wrongful act or its consequences and one or more of the successor States. The most obvious link seems to be in situations where the injurious consequences of an internationally wrongful act affect only the territory of one successor State. For example, in the *Gabčíkovo-Nagymaros* case, the object of the bilateral treaty between Czechoslovakia and Hungary was situated on the territory of Slovakia, which was solely entitled to invoke the responsibility of Hungary for the breach of the treaty, even if the breach occurred before

¹¹⁷¹ See, for example, para. (5) of the commentary to article 1, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 33.

¹¹⁷² Art. 22: General Assembly resolution 55/153 of 12 December 2000, annex. The articles and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

¹¹⁷³ See art. 15, para. 1, of the Institute of International Law resolution on State succession in matters of international responsibility: Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), “State succession in matters of international responsibility”, Fourteenth Commission, Rapporteur: Marcelo Kohen, p. 509, resolution, p. 711. Available from <https://idi-ii.org/app/uploads/2017/06/05-Kohen-succession.pdf>.

the date of succession.¹¹⁷⁴ Another possible link is the personal one, where the injury was suffered by persons who became nationals of one successor State. This seems to be the case in some decisions of the United Nations Compensation Commission.¹¹⁷⁵

(5) Paragraph 2 is inspired by draft guideline 11. The use of the word “relevant” is for the same reason as indicated in paragraph (5) of the commentary to draft guideline 11. As explained in paragraph (4) of the present commentary, it may be that only one or more of the successor States might be affected by the consequences of the internationally wrongful act (e.g., in *Gabčíkovo-Nagymaros*, it was Slovakia and not the Czech Republic that was affected). The last sentence is virtually identical to the last sentence of draft guideline 11; it provides criteria for the determination of which successor States are relevant and have a more justified claim in relation to the injury. The same criteria also point to the meaning of the phrase “particular circumstances” in paragraph 1. The emphasis on agreement is consistent with the overall orientation of the draft guidelines, reflected in draft guideline 1, paragraph 2: that agreements between the States concerned have priority.

Guideline 15 **Diplomatic protection**

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

Commentary

(1) The present draft guidelines, as set out in draft guideline 1, paragraph 1, concern the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts. Therefore, they do not address the application of the rules of diplomatic protection, as diplomatic protection is just one type of invocation of the responsibility of a State.

(2) The relationship between the rules of responsibility of States for internationally wrongful acts and rules of diplomatic protection was reflected, *inter alia*, in article 44, subparagraph (a), of the articles on responsibility of States for internationally wrongful acts.¹¹⁷⁶

(3) However, the omission of specific rules on diplomatic protection in the present draft guidelines does not mean that the rule relating to the nationality of claims¹¹⁷⁷ and other rules of diplomatic protection cannot apply in situations of the succession of States. On the contrary, the occurrence of a succession of States usually involves a change of nationality of persons who reside in the territory or parts of the territory of a predecessor State that becomes the territory of a successor State.

¹¹⁷⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at pp. 71–72 and 81, paras. 123 and 151.

¹¹⁷⁵ United Nations Compensation Commission, Decision concerning the first instalment of claims for serious personal injury or death (category “B” claims) taken by the Governing Council of the United Nations Compensation Commission at its 43rd meeting, held on 26 May 1994 in Geneva (Decision 20) and Decision concerning the first instalment of claims for departure from Iraq or Kuwait (category “A” claims) taken by the Governing Council of the United Nations Compensation Commission at its 46th meeting, held on 20 October 1994 in Geneva (Decision 22): see documents [S/AC.26/Dec.20 \(1994\)](#), para. 3, footnote 2 (“The claims were initially submitted by the Czech and Slovak Federal Republic. The award of compensation is to be paid to the Government of the Slovak Republic.”) and [S/AC.26/Dec.22 \(1994\)](#), para. 2, footnote 2 (“These claims were submitted before the Czech and Slovak Federal Republic ceased to exist. Awards of compensation are to be paid to the Governments of the Czech Republic and the Slovak Republic, respectively.”). Decisions of the Governing Council are available at <https://uncc.ch/decisions-governing-council>.

¹¹⁷⁶ Article 44: “The responsibility of a State may not be invoked if: (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims”.

¹¹⁷⁷ As expressed in the Permanent Court of International Justice, *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12.

(4) The previous work of the Commission addressed this issue in the articles on diplomatic protection, adopted in 2006.¹¹⁷⁸ In particular, this issue was reflected in the text of, and the commentary to, article 5. While the Commission considered that it was necessary to retain the continuous nationality rule, it agreed that there were exceptions to this rule.¹¹⁷⁹ Paragraph 2 of article 5 accordingly provides that a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not its national at the date of injury, provided that certain conditions are met. Those conditions, according to paragraph 2 of article 5 and the commentary thereto are: “first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.”¹¹⁸⁰

(5) Such conditions are usually met in the case of succession of States, when the change of nationality is involuntary. The second condition in article 5 of the articles on diplomatic protection limits exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, by which the person has acquired a new nationality as a necessary consequence of factors such as the succession of States.¹¹⁸¹ In situations of succession of States, the acquisition of the new nationality should be considered consistent with international law even if the person had a right of option to choose between two or more nationalities granted by the predecessor and successor States.¹¹⁸²

Guideline 15 bis
Cessation and non-repetition

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

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

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

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

Commentary

(1) Draft guideline 15 *bis* mirrors the formulation of article 30 of the articles on responsibility of States for internationally wrongful acts and applies the rule embodied in that article to the context of State succession.¹¹⁸³ Accordingly, it deals with two separate issues raised by the breach of an international obligation: (a) the cessation of the wrongful act, and (b) the offer of assurances and guarantees of non-repetition by the responsible State.

(2) On the one hand, cessation is thus linked to the more general rule expressed in article 29 of the articles on responsibility of States for internationally wrongful acts.¹¹⁸⁴ Article 29

¹¹⁷⁸ See General Assembly resolution 62/67, annex, of 6 December 2007. The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50.

¹¹⁷⁹ *Yearbook ... 2006*, vol. II (Part Two), para. 50, at pp. 31–33.

¹¹⁸⁰ Para. (7) of the commentary to article 5, *ibid.*, p. 32.

¹¹⁸¹ Para. (10) of the commentary to article 5, *ibid.*

¹¹⁸² See also articles 23 and 26 of the articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), pp. 43–47.

¹¹⁸³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 88.

¹¹⁸⁴ *Ibid.*

states the general principle that the legal consequences of an internationally wrongful act, in particular reparation, do not affect the continued duty of the State to perform the obligation breached. The Commission discussed this issue but decided not to include another draft guideline that would reproduce this principle. The continued duty to perform is a matter of primary rules (rather than secondary rules) and depends on whether the underlying obligation is still in force. On the other hand, assurances and guarantees of non-repetition serve a preventive function.

(3) The general condition that the underlying primary obligations remain in force fully applies. This is a necessary assumption of both the obligation of cessation and the obligation of assurances, in particular in situations of the succession of States. Regarding the obligation of cessation, as the tribunal in *Rainbow Warrior* arbitration stressed, there are “two essential conditions intimately linked” for the requirement of cessation of wrongful conduct to arise, “namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued”.¹¹⁸⁵

(4) Subparagraphs (a) and (b) of each paragraph are identical to their counterparts in article 30 of the articles on responsibility of States for internationally wrongful acts. The subparagraphs provide, respectively, for the obligation of a State to cease an internationally wrongful act, if the act has a continuing character, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, in the situations described in the *chapeaux* of paragraphs 1 and 2. The Commission also considered that the term “act” should be understood to refer to both actions and omissions.

(5) Paragraph 1 concerns a predecessor State which continues to exist after the date of succession of States. The word “remains” indicates that the succession of States has no impact on such a State’s responsibility to cease any wrongful act of a continuing character, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

(6) Paragraph 2 applies to acts by successor States having a continuing character and to composite acts. Acts having a continuing character for which a predecessor State that continues to exist is responsible are covered in paragraph 1. Thus, paragraph 2 addresses acts having a continuing character to the extent that a successor State is responsible. As addressed in draft guideline 7, a successor State is responsible for the consequences of its own acts after the date of the succession of States, and for the acts of its predecessor State, if and to the extent that the successor State accepts such acts as its own. The successor State is obligated to cease any wrongful act for which it is responsible under draft guideline 7 and offer appropriate assurances and guarantees of non-repetition, if circumstances require. With respect to composite acts, addressed in draft guideline 7 *bis*, paragraphs 1 and 2, predecessor States which continue to exist and successor States, respectively, are obligated to cease acts defined in aggregate as wrongful, provided that the acts are continuing in nature. In addition, these States have to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

¹¹⁸⁵ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision, 30 April 1990, *Reports of International Arbitral Awards* (UNRIAA), vol. XX (1990), pp. 215–264, at p. 270, para. 114.