

14<sup>ème</sup> Commission

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

Rapporteur: Marcelo Kohen

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\*Membres/Membership: Mme Bastid-Burdeau, MM. Degan, Fadlallah, Feliciano, Ferrari-Bravo, Hafner, Mme Infante Caffi, MM. Kamto, Ko, Mme Lamm, MM. Lee, Mahiou, Mikulka, Remiro Brotóns, Ress, Salmon, Mme Stern, M. Sucharitkul



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**A. Introduction**

1. The Commission was created during the Bruges Session in 2003 and the Rapporteur was appointed following his election as Associate Member in 2007. The Commission met at the Naples Session in 2009 and discussed the general issues that should be covered by its work. The Rapporteur distributed a first version of his Preliminary Statement which was discussed by the Commission at the Rhodes Session in 2011. As a result of the discussion, a new version of the Preliminary Statement, including a questionnaire which took into consideration a variety of concerns raised by the Rapporteur as well as other members of the Commission, was issued on 31 August 2011. Seven members of the Commission responded to that questionnaire. The questionnaire and the answers are attached to the present report as Annex 2. The Rapporteur submitted his Provisional Report including a draft Resolution on 9 August 2013. The Commission met at the Tokyo Session. Two members of the Commission who were not present at that Session sent their comments in writing. As a result of the Commission's discussion, the draft Resolution was adopted with some, although no substantial, changes and submitted to the plenary session. At the Tokyo Session, the second plenary session held a general discussion of the matter, and the fourth plenary session proceeded to an article-by-article discussion of the draft Resolution. Taking into account those discussions, the Rapporteur elaborated a first version of this final report and a new draft Resolution that were circulated to the members of the Commission on 7 March 2015. Five members of the Commission made comments and proposals. The present final report and the new draft Resolution include modifications taking into account those comments and proposals.

2. Although the Commission is conscious of the sensitive political aspects involved in some aspects of the problem of State succession to international responsibility, it considered that an attempt to codify the subject-matter is in order, and that the task of the Commission would not only be to take into consideration the practice followed by States and international bodies, but also to propose the solutions that logically seem to be most appropriate, particularly where practice is scarce or does not provide solutions generally followed in a particular situation.

3. During the discussion on the adoption of the topic in the Bruges Session in 2003, some doubts were raised – including by some members of the Institute who later became members of the Commission – over the possibility for the Institute to adopt a text on the matter. The provisional report intended to show that there is room for the codification and

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progressive development of the law in the form of a set of articles. The task is all the more in order given that until the present day the relationship between State responsibility and State succession is one that has consciously been put aside in the codification work undertaken by the ILC, no doubt due to its complexity, as will explained below. The discussions at the Tokyo session confirmed that this is the prevailing view of the Institute.

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

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

5. State succession has become a neglected topic of international law after the most important wave of decolonisation reached its peak towards the end of the 1970s. The subject of State succession again attracted the interest of scholars after the fall of the Berlin Wall with the emergence of new States, mainly as a result of the collapse of the so-called socialist federal States, such as the Soviet Union, Yugoslavia and Czechoslovakia, or the unification of other States, such as Germany and Yemen. The end of the overly lengthy processes of decolonisation in Namibia in 1991 and in Timor Leste in 2002 likewise contributed to renewed interest in the topic. The separation of Eritrea from Ethiopia (1993) led to the emergence of important disputes and to a bloody armed conflict. Unilateral declarations of independence were issued with respect to Kosovo in February 2008, and with respect to Southern Ossetia and Abkhazia some months later. In January 2011, in a referendum held in South Sudan on the basis of the Peace Agreement of 2005 between the Sudanese government and the Sudan People's Liberation Movement/Army, the overwhelming majority of participants decided in favour of the creation of a new State,<sup>1</sup> which came into being on 9 July

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<sup>1</sup> The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan's People's Liberation Movement/Sudan People's Liberation Army is available on the website of the United Nations Mission in Sudan at <http://unmis.unmissions.org>. The results of the referendum of 9 January 2011 are discussed in the Report of the Secretary-General on the Sudan, 12 April 2011, UN doc. D/2011/239.

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2011, and was the last member to be admitted to the United Nations.<sup>2</sup> Palestine, whose statehood has been challenged although the unanimous view is that it has the right to be a State, requested its admission as a Member State to the United Nations Organisation on 20 September 2011. The Security Council failed to take any decision with regard to this application, and on 29 November 2012, Palestine was granted non-member observer State status by the General Assembly.<sup>3</sup> The exercise of the right to self-determination by the people of Western Sahara, which includes the possibility of independent statehood, is still on the international agenda. In the context of the Ukrainian crisis, Crimea and the City of Sebastopol were incorporated into Russia, and self-proclaimed independent entities appeared in the Eastern part of the country in 2014. With all these cases coming to the forefront, in addition to a number of different secessionist attempts around the world, it may be asked whether international law is well equipped to address the different aspects of State succession that thereby arise in general, and the question which is the subject-matter of this Commission in particular. This Report does not deal with any of the particular situations referred to above. It does not take a stance regarding their legal characterisation. This is not the task of the Commission. Its task is to set out general rules relating to situations of State succession in the field of international responsibility. Whether situations such as those mentioned in this paragraph fall within the realm of the subject-matter of this report is a question that is beyond its scope. It is a matter concerning general international law, and in particular its fundamental principles.

6. In the same vein, the report and the draft Resolution do not contain rules as to the manner in which to determine whether a specific situation falls within one category of State succession or another. This is a matter of interpretation or application of the relevant rules of State succession, and it was also considered to be a question going beyond the scope of the task assigned to the Commission.

7. The present report and the draft Resolution deal with the consequences of an internationally wrongful act committed prior to the date of the succession of States, either by the predecessor State against a third State or another subject of international law, or by a third State or another subject of international law against the predecessor State. Internationally wrongful acts committed after the date of the succession of States are covered by the ILC Articles on international responsibility of States.

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<sup>2</sup> United Nations General Assembly Resolution 65/308 of 14 July 2011.

<sup>3</sup> United Nations General Assembly Resolution 67/19 of 29 November 2012.

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8. The two areas of international law relevant to answering this question have been on the agenda of the International Law Commission (ILC) for many years, even decades. In the field of State responsibility for internationally wrongful acts, the ILC produced a set of articles that are largely regarded and employed in practice and case law as reflecting general international law.<sup>4</sup> The subject of succession of States has been analysed by the ILC and partially codified in two treaties: the Vienna Convention of 1978, dealing with State succession in respect of treaties,<sup>5</sup> and the Vienna Convention of 1978 concerning State property, archives and debts.<sup>6</sup> In 1993, soon after the end of the Cold War, the ILC undertook a study on the issue of State succession in matters of nationality of natural and legal persons, adopting a set of articles in this respect.<sup>7</sup> It has been discussed at length whether these instruments, and particularly the two Vienna Conventions, reflect general international law and/or propose adequate solutions for the questions at issue.<sup>8</sup>

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

10. The question of the impact of matters of State responsibility on situations of State succession has remained neglected; no attempt at codifying this question was pursued in the work of the ILC in either the area of State responsibility or the area of State succession. At the beginning of the work of the ILC on the latter issue, it had been proposed to include

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<sup>4</sup> International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001, *Yearbook of the International Law Commission*, 2001, vol II (Part Two); annexed to United Nations General Assembly Resolution 56/83 of 12 December 2001, UN Doc. A/56/49(Vol. I)/Corr.4.

<sup>5</sup> Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, entered into force on 6 November 1996, 1946 UNTS 3.

<sup>6</sup> Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1978, not yet in force, *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts*, vol. II (United Nations publication, Sales No. E.94.V.6).

<sup>7</sup> International Law Commission, Nationality of Natural Persons in relation to the Succession of States, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10*, UN doc. A/54/10; annexed to United Nations General Assembly Resolution 55/153 of 12 December 2000.

<sup>8</sup> See Final Report on Aspects of the Law of State Succession (Co-rapporteurs Władysław Czapliński and Marcelo Kohen), International Law Association, *Report of the Seventy-Third Conference*, Rio de Janeiro, 2008, pp. 250-363.

<sup>9</sup> *Annuaire de l'Institut de Droit international*, 1952, vol. 44-II, p. 471.

<sup>10</sup> *Id.*, 2000-2001, vol. 69, p. 712.



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the question of succession with respect to responsibility for torts,<sup>11</sup> but it was decided not to deal with this matter.<sup>12</sup> Furthermore, the 1978 Vienna Convention contained a clause that explicitly removed the question from the ambit of the treaty.<sup>13</sup> Similarly, the 1983 Vienna Convention contained a general article setting out the scope of its provisions, thereby also excluding matters of State responsibility.<sup>14</sup>

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

12. For decades, the interaction between State succession and State responsibility has aroused little interest in the literature, with some important exceptions.<sup>15</sup> In the context of the elaboration of the final ILC

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<sup>11</sup> Proposal by the Chairman of the ILC Sub-committee on Succession of States and Governments, Manfred Lachs. ILC Yearbook 1963, vol. II, p. 260.

<sup>12</sup> Ibid., p. 299.

<sup>13</sup> Article 39 of the 1978 Vienna Convention provides: 'The provisions of the present Convention shall not prejudice any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State or from the outbreak of hostilities between States'.

<sup>14</sup> Article 5 of the 1983 Vienna Convention: 'Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention'.

<sup>15</sup> Cecil Hurst, 'State Succession in Matters of Torts', 5 *BYBIL* 1924, 163-178; Jean-Philippe Monier, 'La succession d'Etats en matière de responsabilité internationale', 8 *AFDI* 1962, 65-90; Władysław Czapliński, 'State Succession and State Responsibility', 28 *Canadian Yearbook of International Law* 1990, 339-359; Volkovitsch, Michael, 'Righting Wrongs: Toward a New Theory of State Succession to Responsibility of International Delicts', 92 *Columbia Law Review* 1992, 2162-2214; Brigitte Stern, 'Responsabilité internationale et succession d'Etats' in: Laurence Boisson de Chazournes & Vera Gowlland (eds), *The International Legal system in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab* (Leiden: M. Nijhoff, 2001), 327-355; Vaclav Mikulka, 'State Succession and

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articles on State responsibility, the last Special Rapporteur, Professor James Crawford, highlighted the difficulties and uncertainties surrounding the question of the interaction between State succession and international responsibility: “[i]t is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory”.<sup>16</sup> The Badinter Commission, established in the framework of the Peace Conference for the former Yugoslavia, contributed to this perception by simply stating that “[t]he rules applicable to State succession and State responsibility fell within distinct areas of international law.”<sup>17</sup> It did so in the framework of a question relating to the incidence of damages of war in the distribution of debts, goods and archives among the successor States. Clearly, the question was not whether there was succession to war debts, but rather whether acts carried out by the successor States themselves would influence the distribution of debts and assets ‘inherited’ from the former Yugoslavia. This is enough to demonstrate some of the uncertainty evident in both doctrine and practice surrounding the problem. A remarkable book by Professor Patrick Dumberry, the result of his PhD studies at the Graduate Institute in Geneva, fills this important analytical gap and sheds some very welcome light on this apparently controversial subject.<sup>18</sup>

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

13. The Commission discussed some preliminary questions in relation to the scope and content of its work. A first question arose as to whether the Commission should confine itself to the analysis of responsibility for internationally wrongful acts or, on the contrary, whether the work of the Commission should also cover issues relating to so-called “*responsabilité objective*” or “liability”. The Commission overwhelmingly supported the idea of keeping the analysis of matters of State responsibility for internationally wrongful acts only, at least at an initial stage. Among the

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Responsibility’, in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010) 291-296 and V. Mikulka, ‘Succession of States in Respect of Rights of an Injured State’, in: *ibid.*, 965-967.

<sup>16</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at Its Fifty-Third Session (2001), *Report of the International Law Commission on the Work of Its Fifty-third Session. Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 119, para. 3.

International Conference on the Former Yugoslavia, Arbitration Commission, Opinion No 13, 16 July 1993, reported at 96 ILR 727, p. 727.

<sup>18</sup> Patrick Dumberry, *State Succession to International Responsibility* (Leiden: M. Nijhoff, 2007), 517 p.

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reasons advanced, one may be highlighted according to which the rules relating to responsibility for internationally wrongful acts are of “secondary” character (in the sense employed by Roberto Ago when he acted as ILC Rapporteur on matters of State responsibility<sup>19</sup>), and hence applicable no matter the content of the obligation breached, whereas the rules relating to liability for injurious consequences arising out of acts not prohibited by international law are “primary” rules. Some members also mentioned the fact that the rules relating to liability are controversial with regard to their content and in some cases their very existence in positive international law is a matter surrounded by uncertainty.

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

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

16. With one exception, the general position of the Commission was that the work would be focused on the succession to the rights and obligations

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<sup>19</sup> *Yearbook of the International Law Commission*, 1970, vol. II (Part Two), p. 306, para. 66(c).

<sup>20</sup> Resolution on *Responsibility and Liability under International Law for Environmental Damage*, Session of Strasbourg, 4 September 1997. *Annuaire de l'Institut de Droit international*, vol. 67, Part II, pp. 486-513.

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arising from internationally wrongful acts committed or suffered by the predecessor State, instead of the succession to the status or quality of being an injured or a responsible State. This is also the prevalent view in doctrine. During the discussion of the preliminary report in the Tokyo session, participants who addressed the question endorsed this option.<sup>21</sup> Given the importance of this question for the content of the draft Resolution, it is addressed in more detail below.

17. The typology of cases of State succession that the Report should cover was also discussed. The majority of the members expressed the view that the categories employed by the 1978 and 1983 Vienna Conventions should be employed, at least as a starting point, without prejudice to their test against the facts and to their non-exhaustive character. Two members of the Commission cast doubts about continuing to refer to the category of “newly independent States”. A member of the Institute equally raised the issue during the Tokyo session discussions.<sup>22</sup> The main reason invoked was that this notion, reserved to former colonies and other dependent territories, would no longer be relevant. One member of the Commission expressed her hesitation with regard to this category being an autonomous one. The fact that the ILC Articles on nationality of natural persons in relation to the succession of States did not refer to this category was also mentioned.

18. In contrast to the outcome of the work of the Institute on State succession in matters of property and debts,<sup>23</sup> the Rapporteur considers it indispensable, in order to have a complete picture of the different cases of State succession with regards to matters of responsibility, to include newly independent States as a specific category. The ground for his choice is threefold. *First*, as some cases mentioned at the beginning of this report show, there can still be cases of emergence of new States that could fall within the realm of the category of newly independent States, as defined in the 1978 and 1983 Conventions. *Second*, as a recent judicial decision in the United Kingdom demonstrates, problems relating to the commission of internationally wrongful acts during colonial times and the question of responsibility of the predecessor or the successor States may emerge even long after the acts have occurred.<sup>24</sup> Hence, cases of State succession giving rise to the emergence of a newly independent State that occurred in the past may have still kept open situations concerning international responsibility. *Third*, as for treaties, archives, debts and

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<sup>21</sup> *Annuaire de l'Institut de Droit international*, 2013, vol. 75, p. 215.

<sup>22</sup> *Id.*, 2013, vol. 75, p. 217.

<sup>23</sup> *d.*, 2000-2001, vol. 69, p. 121.

<sup>24</sup> See, below, para. 100.

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property, the subject matter of the consequences of internationally wrongful acts committed before the date of State succession also appeals for a specific treatment of succession with regards to States having been dependent territories before coming into existence. Given the particular territorial status prior to independence, the cases of newly independent States cannot be assimilated to those of the separation of a State, whether by agreement or not.

19. During the oral discussions, a member of the Commission suggested adding the category of “failed States” to those already generally accepted. In the Rapporteur’s view, this is a category that describes a factual situation in which the State apparatus is unable to perform its usual function, rather than a legal category. Furthermore, questions arising from international responsibility in this situation are not governed by matters of State succession, but rather by the notions of continuity or identity.<sup>25</sup>

20. During the Tokyo session, it was suggested not to make any distinction between identity and continuity of States.<sup>26</sup> Although for some these terms can be considered synonymous, another possibility is to distinguish a situation of continuation of legal personality in which there is no temporal gap (continuity) from situations in which a State has ceased to exist for a given period but recovers its existence with the same personality later on. This was, for example, the situation of the Baltic States.<sup>27</sup> In this latter case, there is no situation of succession. The Commission considers it suitable to keep the notions of continuity and identity.

21. Another member suggested that the role of unjust enrichment in the determination of the relevant rules of State succession should be examined. The Commission agrees, and consequently proposes to take into account the need to avoid unjust enrichment in cases in which equitable considerations must be employed in order to determine an

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<sup>25</sup> See Article 2, paragraph 3 of the draft Resolution.

<sup>26</sup> *Annuaire de l'Institut de Droit international*, 2013, vol. 75, p. 232.

<sup>27</sup> Cf. Supreme Council of the Republic of Lithuania, Act on the Re-establishment of the State of Lithuania, Vilnius, 11 March 1990 (*Republic of Lithuania: A Compilation of Documents*, Vilnius: Lithuanian Supreme Council, 1990, p. 10); Declaration of the Supreme Soviet of the Latvian SSR on the Renewal of the Independence of the Republic of Latvia, Riga, 4 May 1990 (document submitted to the Rapporteur by the Mission of Latvia before the international organisations in Geneva); Resolution of the Supreme Soviet of the Estonian SSR on the State Status of Estonia, Tallinn, 20 August 1991 (2 *Finnish Yearbook of International Law* (1991), p. 523).

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equitable apportionment of rights or obligations in cases of a plurality of successor States.<sup>28</sup>

22. During the discussions, some members of the Commission also raised other questions relating to the scope of its work. It was proposed to examine whether in cases of a radical change of government, such as the transition from a dictatorship to a new democratic government, the democratic State should be considered responsible for the internationally wrongful acts committed during the dictatorship. In the view of the Rapporteur, this question falls outside the scope of the Commission's work, since this is not a case of State succession but one of regime change in the framework of the continuity of the legal personality of the State.<sup>29</sup>

23. Another member of the Commission raised the issue of the wrongful acts committed as a result of State succession *per se* or in cases of a disregard for the rules governing State succession itself. Again, in the Rapporteur's view, these are questions emerging *after* the date of the State succession, and as such are not regulated by the rules of State succession themselves.

24. Furthermore, the Commission considers that, as stated in both Vienna Conventions on State succession, the relevant rules apply to cases of State succession that occurred in accordance with international law.<sup>30</sup> Illegal entities claiming to be a State, as was the case of Southern Rhodesia, for example, are not cases of State succession, since the entity concerned cannot claim to be a State. It is enough to repeat in the Resolution an article similar to Article 6 of the 1978 Vienna Convention and Article 3 of the 1983 Vienna Convention, i.e., that the rules apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.<sup>31</sup> During the Institute's 2013 Tokyo Session, some voices appeared against this reference to the legality of State succession. It was advanced that succession is a matter of "life" and hence, "other" situations that ought to fall within the scope of the Resolution would not be excluded.<sup>32</sup> On the contrary, other Institute members were in favour of keeping it, some of them proposing to introduce some lexical

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<sup>28</sup> See Article 7, paragraph 2 of the draft Resolution.

<sup>29</sup> See Article 2, paragraph 3 of the draft Resolution.

<sup>30</sup> Article 6, Vienna Convention on Succession of States in Respect of Treaties; Article 3, Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. The same provision is included in Article 2, paragraph 2 of the draft Resolution.

<sup>31</sup> See Article 2, paragraph 2 of the draft Resolution.

<sup>32</sup> *Annuaire de l'Institut de Droit international*, 2013, vol. 75, pp. 105, 226-227 and 230-231.

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adjustments.<sup>33</sup> The Rapporteur considers this to be a very important article, in the sense that it impedes illegal situations from claiming the benefit of rights emerging from the rules of State succession. A *confrère* considered that in an illegal situation, such as one of conquest, there is no State succession precisely because of its illegal character.<sup>34</sup> The Rapporteur agrees. This is precisely the sense of Article 2 paragraph 2 of the draft Resolution. He considers that, although the wording of the draft article may seem not entirely satisfactory, this is the text that has consistently been adopted by the Vienna Conferences and the International Law Commission in all instruments dealing with matters of State succession. Consequently, there is some advantage in keeping it. However, some members were of the view that the deletion of the word “only” would allow consensus to be reached.<sup>35</sup> In the Rapporteur’s view, it is precisely this word that allows the idea of accordance with international law as a condition for the application of the rules to come into play. He proposes to maintain the text as it is.

25. During the general discussion at the Tokyo session, it was asked whether the Resolution would contain a reference to *erga omnes* obligations, and to envisage specific solutions when violations of these obligations are at stake.<sup>36</sup> In the opinion of the Rapporteur, the consequence of the distinction between *erga omnes* obligations and other kinds of obligations is a matter for the law of responsibility. No distinct consequences arise in the field of State succession. The successor State(s) inherit(s), or not, the rights or obligations stemming from the commission of an internationally wrongful act, no matter the nature of the obligation breached. In this regard, the particular situation of human and peoples’ rights was also mentioned.<sup>37</sup> The provisional report and the draft Resolution submitted with it contained references and provisions in respect of succession to the rights and obligations of peoples entitled to self-determination. It took into account both the situation in which peoples were victims of a wrongful act, and that in which they committed an internationally wrongful act before the date of State succession. However, the draft Resolution did not include any reference to circumstances in which the obligation breached before that date related to human rights. The Commission considers that it is worth envisaging the possibility of including in the Resolution situations in which the victim is an individual or even another subject, and not another State.

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<sup>33</sup> *Id.*, 2013, vol. 75, pp. 109 and 231-232.

<sup>34</sup> *Id.*, 2013, vol. 75, p. 231.

<sup>35</sup> *Id.*, 2013, vol. 75, pp. 230-231.

<sup>36</sup> *Id.*, 2013, vol. 75, pp. 215-219.

<sup>37</sup> *Id.*, 2013, vol. 75, pp. 216-220.

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26. The new draft Resolution consequently takes into account the fact that the subject victim of a breach can be an individual or a human group and not only a State. In case of a breach of human rights obligations committed by the predecessor State before the date of State succession, the victim individuals or groups enjoy all the benefits that the prior draft Resolution only recognized to the injured *State*. Since the main policy of the draft Resolution has been that no internationally wrongful act must remain unpunished as a result of the emergence of a case of State succession, the individuals or groups victims of human rights obligations will always find a State that will be obliged to repair that breach. Equally, any devolution agreement or unilateral act of the predecessor or successor State cannot by itself relieve the State author of the internationally wrongful act of its obligation to repair. Like the injured State in the prior draft Resolution, the victim individuals or human groups have the opportunity to fix their position vis-à-vis the devolution agreement or the unilateral acts. Equally, the victims may fix their position in the case of an agreement between or among successor States deciding which of them will bear the obligation to repair.

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

27. The main difficulty in doctrine and practice to appraise the matter under examination has been the identification of the subject matter which a situation of State succession could impact. The first approach consisted in affirming that responsibility is an *intuitu personae* phenomenon, i.e. intrinsically linked to the personality of the State, and consequently there cannot be succession in this field. This is the classical view that prevailed for many years.<sup>38</sup> Indeed, it was a position that was not adopted specifically in relation to the field of international responsibility. It was first advanced to deny the very existence of the phenomenon of State

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<sup>38</sup> For a list of authors maintaining this position, as well as the different arguments in support thereof, see: Patrick Dumberry, *op. cit.* at pp. 35-52 and Brigitte Stern, *op. cit.* at pp. 327-330. Recently, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, the Applicant, at the oral stage of the proceedings, advanced the issue of the succession by the Respondent to the alleged responsibility of the SFRY, without making any distinction between succession to responsibility and succession to the obligations stemming from an internationally wrongful act committed by the predecessor State (see the Judgment of 3 February 2015, para. 106 and *CR 2014/21*, 21 March 2014, pp. 20-22, paras. 39-43).



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succession.<sup>39</sup> The position of those accepting State succession in other fields, but rejecting it for international responsibility, is influenced by a criminal law perspective. As is known, criminal law is based on the personal and non-transferable nature of responsibility and punishment. State responsibility in international law, however, does not take the form of criminal responsibility, and the analogy is consequently misleading.<sup>40</sup>

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

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

“the question arises whether it is reasonable to describe as an unwritten rule of international law a rule which would entail that, when a change of sovereignty takes place, the new State or the State

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<sup>39</sup> Notably those adhering to voluntarist positivism. See the analysis by Santiago Torres Bernárdez, ‘Succession d’Etats’, in: M. Bedjaoui (ed.), *Droit international. Bilan et perspectives* (Paris: Pedone/Unesco), 1991, vol. 1, pp. 405-423 at 409.

<sup>40</sup> See G. Abi-Saab, ‘The Uses of Article 19’, *European Journal of International Law*, 1999, vol. 10, pp. 339-351 at 344-346, and ‘Que reste-t-il du « crime international »’, in: *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, (Brussels, Bruylant, 2007), pp. 69-91; and A. Pellet, ‘Le crime international de l’Etat: un phoenix juridique’, in: Kalliopi Koufá (ed.), *The New International Criminal Law: 2001 International Law Session*, Thessalonique, Sakkoulas, 2003, pp. 281-351.

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which has increased its territory would not be able to espouse any claim of any of its new nationals in regard to injury suffered before the change of nationality. It may also be questioned whether indeed it is any part of the Court's task to contribute towards the crystallization of unwritten rules of law which would lead to such inequitable results."<sup>41</sup>

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

31. However, the relevant question is not whether there is succession of States with respect to *responsibility per se*, but instead whether there is succession to the *rights and obligations arising from internationally wrongful acts* committed or suffered by the predecessor State. In other words, the main issue is whether or not the successor (or one of a number of successors) or the continuator State (if it still exists) has – after the date of succession – an obligation to repair or a right to reparation in relation to unlawful acts committed before the date of succession involving the predecessor State. A parallel can be drawn here with the rule incorporated in Article 11 of the 1978 Vienna Convention: rather than succession with regard to treaties establishing boundaries, this article consecrates a rule of *succession to the boundaries established by treaties*. In other words, even if there is no succession to the boundary treaty concerned (which is just one possibility, with the inverse also being possible), the boundary remains in place after the new situation of State succession is established.<sup>42</sup>

32. Even considering that the question of succession does not relate to the quality of the injured or responsible State, but rather to the rights and obligations arising from the commission of an internationally wrongful act prior to the date of State succession (which, according to the terminology employed by Roberto Ago would form part of the *secondary rules*<sup>43</sup>), there is still room for some scepticism about the need to search for a separate analysis of the question. Thus, it may be the case that following an internationally wrongful act, the scope and content of any responsibility was already determined by the injured State and the

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<sup>41</sup> *Panevezys-Saldutiskis Railway Case*, PCIJ, Series A/B No. 76, p. 35.

<sup>42</sup> See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, pp. 38 and 40, para. 75.

<sup>43</sup> See supra, footnote 19.

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wrongdoer by way of agreement before the date of succession. In such a case, the rules governing succession in respect of treaties would apply.

33. It may also be the case that after the commission of the wrongful act, the adequate form of reparation is the payment of compensation or indemnification. In this latter case, the rules relating to succession to debts would be applicable. Indeed, in a leading case between the United States of America and the United Kingdom, the claim of the former State for reparation was based on the succession by the United Kingdom to the debts of Transvaal, including responsibility for the commission of an internationally wrongful act against an American citizen.<sup>44</sup> These two hypothetical situations – the matter settled by treaty or the obligation to pay compensation and succession to treaties or to debts – may indeed cover certain situations and, depending on the approach adopted, may well offer the solution to the matters at stake.

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

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

**E. The notion of State succession and the cases envisaged**

36. There is general acceptance of the definition of State succession adopted by the different instruments dealing with the issue, including the Resolution adopted by our Institute in 2001. Consequently, the draft Resolution follows exactly the definition adopted in previous instruments,

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<sup>44</sup> *Anglo-American Pecuniary Claims Arbitration Award (Brown Case)* 23 November 1923, reported at 5 *BYBIL* 1924, pp. 210-221. The award was in line with the British position, which insisted on the non-transferable character of responsibility for torts.

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as well as those of predecessor and successor States, the date of State succession and that of newly independent States.<sup>45</sup> In a comment to the last version distributed to the Commission in March 2015, one member raised the issue of leaving out the definitions contained in the report altogether. In the Rapporteur's view, the definitions followed in the draft Resolution not only benefit from their pedigree, but also from the fact that they accurately reflect the situations under consideration.

37. The reference to succession as "the replacement of one State by another in the responsibility for the international relations of territory" generally involves a change of sovereignty, but this is not always the case. Thus, this reference also includes cases of succession in which there is no change in sovereignty. This has particularly been the case in the situation of the end of the different forms of protectorate. The protected State was the sovereign of the territory although some important State functions, including "the responsibility for the international relations of the territory", were delegated to the protector State. States administering territories under international regimes, such as Mandates, Trusteeship and Non-Self-Governing Territories, are another example. There have also been theoretical discussions about whether "succession" to sovereignty is possible. According to one view, sovereignty is always original. Hence, no succession is possible and what is called "succession" is in reality characterized by the extinction of rights and obligations of one subject of international law (the predecessor), and the creation of corresponding rights and obligations of another subject of international law (the successor). Another view is that there is no contradiction between the notions of sovereignty and international personality on the one hand, and the possibility of transfer of rights and obligations on the other. The current accepted definition of State succession which is followed here avoids this kind of abstract discussion.

38. The two Vienna Conventions on State succession distinguished four basic types of succession: (a) cession, that is, the transfer of part of the territory of one State to another State;<sup>46</sup> (b) separation of a part of the State's territory,<sup>47</sup> i.e. cases of secession/devolution or dismemberment/disintegration of the State; (c) A uniting of two or more

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<sup>45</sup> See Article 1 of the draft Resolution: Use of Terms.

<sup>46</sup> Article 15 of the Vienna Convention on Succession of States in Respect of Treaties; Article 14, paragraph 1 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983).

<sup>47</sup> Article 34, paragraph 1, Vienna Convention on Succession of States in Respect of Treaties; Article 30, paragraph 1 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

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existing States;<sup>48</sup> and d) succession in the context of decolonization ("newly independent States").

39. The classification adopted by the Vienna Conferences does not fully or accurately depict the different hypotheses of State succession.<sup>49</sup> Moreover, the 1978 Vienna Convention does not even distinguish between separation and unification, providing for the same rules in both cases.<sup>50</sup> It also departs from what the International Law Commission had proposed in 1972, distinguishing between secession and dissolution.<sup>51</sup>

40. It is possible to distinguish cases of separation of part of the territory and population of a State in order to create a new State on the basis of the existence of consent of the dismembered (and predecessor) State and cases in which this consent is lacking. The former case is sometimes called "devolution", whereas the former is a case of secession strictly so called. Cases of dissolution of States leading to the creation of new ones can also be distinguished depending upon whether this dissolution occurs consensually among the different components of the State or, on the contrary, without such an agreement. The latter case, as the Yugoslavian example shows, may raise the question of the qualification of the whole situation as one of secession or of dissolution. In the former case, one of the components would keep the legal personality of the dissolved State whereas the other or others would be successors. There is no need at all to discuss this issue here. The draft Resolution includes proposals of a general character referring to cases of separation or dissolution, without any need to identify whether a particular case would fall within one or the other category.

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

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<sup>48</sup> Article 31, paragraph 1 of the Vienna Convention on Succession of States in Respect of Treaties; Article 16 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

<sup>49</sup> R.Y. Jennings, A. Watts, *Oppenheim's International Law*, vol. I, (1992, Harlow), at. 210; G. Dahm, J. Delbrück, R. Wolfrum, *Völkerrecht*, 1989, N° 1, vol. I, p. 158 and ff; U. Fastenrath, *Das Recht der Staatensukzession, Berichte*, DtGVR, 1995, vol. 35, p. 14.

<sup>50</sup> See Art.. 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

<sup>51</sup> Draft Articles 27 and 28, *Yearbook of the International Law Commission*, 1972, vol. II, at. 292-298.

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42. Cession of a part of territory from one State to another State is a case which normally does not entail major practical or theoretical difficulties. In this case, both States continue to exist. Generally, each of them would have to assume the rights or obligations stemming from internationally wrongful acts committed before the date of the cession. However, a question may arise about the succession to the rights or obligations stemming from an internationally wrongful act committed from, in, or with regard to, the territory or the population concerned. The same applies to a situation in which the separation of part of the territory and population of a State in order to be incorporated into another State occurs without the consent of the former.

43. As stated above, the category of “newly independent States” finds its justification in the dependent nature of the territory and the population concerned. This situation explains why this particular case must be distinguished from those of separation of parts of the State, either with or without the consent of the latter State, in order to create a new one. By virtue of this distinction, the solutions for each of these cases are necessarily different.

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

44. Rules relating to State succession do not possess a peremptory character. They may be substituted by other rules if so agreed by the interested parties. Thus, the draft Resolution submitted with this report indicates from the outset the subsidiary character of the rules proposed to govern the different cases of State succession.<sup>52</sup> However, in the exercise of the sovereign autonomy of their will, the interested parties cannot adopt solutions that would be in contradiction with *ius cogens*. Like any other agreement, those regulating situations related to the consequences of internationally wrongful acts in cases of State succession must not conflict with a peremptory norm of general international law. Grave violations of fundamental norms of human rights or permanent sovereignty over natural resources, for example, may be at stake in these situations. Consequently, it is important to explicitly include this caveat in the Resolution, following the examples of the 1978 and 1983 Vienna Conventions but improving their content.<sup>53</sup>

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<sup>52</sup> See Article 3 of the draft Resolution.

<sup>53</sup> Article 13 of the Vienna Convention on Succession of States in Respect of Treaties; Article 15, paragraph 4 and Article 38, paragraph 2 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

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45. One specificity of agreements related to State succession is the fact that these agreements may in some cases be concluded by non-State actors in the process that leads to the creation of new States. Like inter-State treaties, these agreements concluded with non-State actors must also be subjected to the rules relating to the validity of treaties or the consent of the parties to be bound by these agreements. The situations in mind involve agreements concluded by the predecessor or another State with a national liberation movement representing a people exercising the right of self-determination, or with other entities that later become the organs of the new State, including existing autonomous entities within the predecessor State that later become new States.<sup>54</sup> Since these kinds of agreements are not governed by the Vienna Convention on the Law of Treaties or by customary law applicable to inter-State relations, it is important to explicitly indicate in the Resolution that the Institute will adopt that the so-called devolution agreements concluded with non-State actors must also respect the rules relating to the validity of treaties and consent of the parties.<sup>55</sup> Commenting on the draft Resolution distributed to the Commission in March 2015, one member suggested referring not only to these rules, but to the Vienna Convention on the Law of Treaties as a whole. Although there is some value in following this approach, the Rapporteur believes that the main concerns are with the applicability of rules relating to validity and consent. Moreover, a general reference to the Vienna Convention of 1969 raises the issues of the applicability of some of its rules outside inter-State relations, and more generally the customary character of all rules contained in that Convention. Consequently, the Rapporteur is of the view of keeping the draft Resolution as it is.

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

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<sup>54</sup> An example is the Agreement Relating to the Separation of Singapore from Malaysia as a Separate and Sovereign State of 7 August 1965 between the Governments of Malaysia and Singapore, 563 UNTS 89.

<sup>55</sup> See Article 6, paragraph 1 of the draft Resolution.

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

48. In particular, it is necessary to indicate that the obligations of a predecessor State in respect of an internationally wrongful act committed by it before the date of a State succession do not become the obligations of the successor State towards the injured State by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State. This proposition is in consonance with the rule established in Article 8, paragraph 1 of the 1978 Vienna Convention with regard to treaties.<sup>56</sup> Likewise, the predecessor State cannot impose its unilateral decisions. If the predecessor State continues to exist after the date of State succession, the victim must have the possibility to express its view on the question of the holder of the obligation in its favour. During the Tokyo session, it was suggested that the draft Resolution include a reference to the obligation to conduct negotiations in good faith in order to achieve an agreement in this particular situation.<sup>57</sup> The new draft Resolution follows this proposal.<sup>58</sup> If no agreement is reached, the solutions advanced for the particular categories of State succession are applicable.

49. In cases in which the predecessor State ceases to exist, the situation is different. Successor State(s) will assume the rights and obligations stemming from an internationally wrongful act suffered or committed by the predecessor State, no matter whether an agreement between them so provides. It has been discussed whether the Treaty on the establishment of German Unity contains a provision of this sort with regard to torts involving the German Democratic Republic.<sup>59</sup> In any event, what is clear

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<sup>56</sup> See Article 6, paragraph 2 of the draft Resolution.

<sup>57</sup> *Annuaire de l'Institut de Droit international*, 2013, vol. 75, pp. 218-219.

<sup>58</sup> Article 6, paragraph 4 of the draft Resolution.

<sup>59</sup> Article 24, paragraph 1 of the Treaty on the Establishment of German Unity of 31 August 1990, I.L.M., 1991, vol. 30, p. 457. In favour of considering this provision as the acceptance by the FRG of the obligations arising from internationally wrongful acts committed by the GDR: Oeter, Stefan, "German Unification and State Succession", *ZaöRV*, 1991, vol. 51, p. 381; Volkovitsch, Michael, *op. cit.*, p. 2177; Brigitte Stern,



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is that the predecessor and the successor State cannot decide on their own that the obligations emerging from an internationally wrongful act committed by the former State will cease with its disappearance, and will not pass to the successor State without the consent of the third injured State.

50. In the case of the emergence of a plurality of successor States as a result of the disappearance of the predecessor State, agreements concluded between the successor States must be distinguished depending on whether rights or obligations are at stake. Agreements able to decide upon the identity of the beneficiary successor State(s) or the apportionment of the rights of the successor must include all successor States. For instance, the Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia was concluded by all the successor States. Article 1 of Annex F of this Agreement establishes that rights that belonged to the SFRY will be shared by the successor States.<sup>60</sup>

51. In the case of succession to the obligations arising from an internationally wrongful act committed by the predecessor State, any agreement with regard to the successor State that holds the obligation or to the apportionment of the obligation among the successor States must require the consent of the victim. The same requirement to hold negotiations in order to achieve a solution mentioned above is applicable here.<sup>61</sup> If no agreement is reached under these conditions, the solutions advanced in the particular cases are applicable. This proposition is reflected in Article 3 of the draft Resolution.

52. Agreements concluded after the date of State succession between the third State, either as the author of the internationally wrongful act or as the injured State, and the successor States, providing for the modalities of the succession to these rights or obligations, will prevail over the guiding principles established in the Resolution for the specific categories, insofar as these agreements or the consent that lead to them are valid. The same applies to agreements concluded by the successor States with individuals or groups victims of an internationally wrongful act committed before the date of State succession.

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op. cit., p. 352, Patrick Dumberry, op. cit., p. 86. Contra: Ulrich Fastenrath, "Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge", *ÖZöRV*, 1992, vol. 44, p. 39

<sup>60</sup> Agreement on Succession Issues of 29 June 2001, *ILM* 2002, vol. 41, p. 34. For a discussion on the scope of this provision, see Patrick Dumberry, op. cit., pp. 322-323.

<sup>61</sup> See supra, paragraph 48.

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

53. As mentioned above, a fundamental goal that guides this report is 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. This purpose excludes *per se* the doctrinal and old case law perception of a general rule of non-succession, although the main reasons for discarding this general “clean slate” position are based on other, more fundamental, considerations explained above.<sup>62</sup>

54. 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, however, to the adoption of an opposite, general rule of succession to these obligations in all cases. Different categories of succession may be subject to specific solutions. The fact that the predecessor State continues to exist after the date of succession has more important consequences with respect to the determination of whether there is any succession to rights and obligations arising from international responsibility than in the cases of treaties or other issues. All members of the Commission who answered the questionnaire agreed with the idea that the continued existence of the predecessor State after the date of State succession is a relevant circumstance. During the discussions at plenary meetings in the Tokyo session, this issue did not raise controversy.

55. A crucial element to be taken into consideration for the determination of solutions relating to the succession to rights and obligations arising from internationally wrongful acts committed before the date of succession is the category of State succession that is at stake. The present section analyses the cases in which the predecessor State continues to exist and advances the general rule and its possible exceptions. The following section will examine the different categories of State succession, and indicates the solutions proposed for each of them.

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

56. The general, though not absolute, rule proposed is that in cases in which the predecessor State continues to exist, it is this State that continues the enjoyment of rights and the assumption of obligations

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<sup>62</sup> See above, paragraphs 27-35.

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arising from the internationally wrongful acts in which it was involved before the date of State succession. It appears normal that the same subject that has been the victim or the author of an internationally wrongful act holds the rights or obligations arising from this act, no matter whether its territory and population have diminished. This is the general proposition made in the draft Resolution in all cases in which the predecessor State continues to exist, i.e. the cases of transfer or separation of part of the territory of a State to another State (Article 11), separation of parts of a State in order to form one or more States (Article 12) and newly independent States (Article 16).

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

57. This general non-succession rule in cases in which the predecessor State continues to exist after the date of State succession may contain some exceptions. The question of where the wrongful act took place is not, in the Rapporteur's view, necessarily decisive.<sup>63</sup> Acts committed within or in relation to a given territory can be the result of centrally controlled organs, and not necessarily those of the territorial unit in which those acts were performed. Moreover, internationally wrongful acts can be committed inside or outside the territory of the author or the injured State, and the place where the acts were committed is irrelevant, unless the spatial element forms part of the elements of the primary obligation that has been violated.

58. What is essential in the field of international responsibility is the personal or subjective element – i.e. the attribution of an illegal conduct to a State or other subject of international law – and not the spatial element. An exception would be the violation of obligations related to territorial regimes, which, by definition, includes rights and obligations attached to a given territory.<sup>64</sup> This is probably the clearest example in which the primary obligation contains a spatial element.

59. The case concerning the *Gabcikovo-Nagymaros Project* is a relevant case here, even though it concerned a case of dissolution of a State. The agreement concerning the project was concluded with Hungary by the then Socialist Republic of Czechoslovakia in 1977. On the Czechoslovakian side, the project was located on Slovakian territory. After the dissolution of the Czech and Slovakian Federal Republic in

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<sup>63</sup> For the doctrinal discussion about this point, see Patrick Dumberry, *op. cit.*, pp. 285-287.

<sup>64</sup> See Article 12 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

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1992, Slovakia solely took over the rights and obligations stemming from the conduct of the predecessor State.<sup>65</sup>

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

61. The reasons for stressing the direct link between the consequences of the wrongful act and the territory and population are twofold. First, it must be recalled that succession in this field only concerns the rights and obligations arising from an internationally wrongful act and not the quality of author or injured State. In other words, what is at stake is the consequence of the act and not the characterisation of the successor as author or injured State. Wrongful acts whose core element is territory, such as in the case of violations of obligations stemming from territorial regimes or in relation to acts that must essentially be accomplished within a given territory, for its benefit or as a burden to it (for example, works benefitting a specific area, rights of passage on a given territory, fishing rights in a given waterway), deserve an exceptional treatment.

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

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

63. Another possible exception to the non-succession rule when the predecessor State continues to exist is the case of one of its composing entities (for example, federated entities, autonomous communities) later becoming independent. If the wrongful act was committed by the

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<sup>65</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

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composing entity before the date of succession, it is possible that the same entity later becoming independent (or part of another State) assumes the rights and obligations arising from that act.

64. Cases in which the entity enjoyed a great amount of autonomy within the predecessor State, and its central organs did not play a role in the decision or execution of the internationally wrongful act, would be candidates for the application of this exception to the non-succession rule. In the *Lighthouse Arbitration* case between France and Greece, the 1956 award decided with regard to claim No 4 that Greece (the successor State) should be responsible for the acts committed by the *de facto* autonomous government of Crete (part of the Ottoman Empire) before the date of the succession.<sup>66</sup>

65. However, it is difficult to assert this proposition in all circumstances. The State is responsible for the acts of all its components, no matter what place or function they possess or perform within the State. There must be cases in which the central organs delegate the accomplishment of these acts to the local authorities, or the benefits of these acts do not rest at the local level. For these reasons, the draft Resolution only considers that, if the author of the internationally wrongful act was the organ of an administrative unit of the predecessor State that later becomes the organ of the new State, the possibility *might* exist that the latter succeeds to the obligations stemming from that act. One circumstance could be the existence of some benefit derived from the internationally wrongful act. However, different circumstances which it is not possible to determine beforehand may lead to the opposite solution.<sup>67</sup> The draft Resolution only takes notice of these two possible avenues, but does not impose either one.

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

66. The acceptance by a successor State of the obligations stemming from a wrongful act committed by the predecessor State (or even endorsing its responsibility) may constitute another exception to the non-succession rule in case of subsistence of the predecessor State after the date of State succession. This situation must be distinguished from that envisaged by the ILC in Article 11 of its Articles on State Responsibility (“Conduct acknowledged and adopted by a State as its own”), which

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<sup>66</sup> *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, 24/27 July 1956, RIAA, vol. XII, pp. 191-200.

<sup>67</sup> See Article 11, paragraph 3, Article 12, paragraph 3, and Article 15, paragraph 3 of the draft Resolution.

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essentially relates to the conduct of private individuals which is subsequently endorsed by a State. The interest of the acceptance by the successor State is related to the possibility of excluding the otherwise applicable rule by which it is the predecessor State that must comply with the obligations arising from its conduct.

67. Article 140(3) of the Namibian Constitution, stating that anything done in accordance with the South African Laws by South African organs prior to the date of independence of Namibia shall be deemed to have been done by the Government of Namibia,<sup>68</sup> has been perceived as an example.<sup>69</sup> Putting aside the fact that South Africa could only be considered the predecessor State until such time as the United Nations declared the Mandate terminated, the position of the Namibian governmental bodies (i.e. Ministry of Defence) was that this provision did not derogate from the general international law rule of non-succession, although the judicial organs of Namibia perceived the matter otherwise.<sup>70</sup> Irrespective of its merits, what this case shows is the possibility of derogation from the general international law rule.

68. Acceptance by the successor State under the circumstances depicted above does not automatically produce the effect desired by the successor State. The situation resembles that of State succession to treaties. In cases of State succession to treaties, the will of the successor State to succeed to a given treaty is not *per se* a condition for that succession to occur. If one follows the logic of the 1978 Vienna Convention, only newly independent States would have the possibility to unilaterally decide whether they succeed to multilateral treaties or not.<sup>71</sup> This possibility does not even exist in the cases of treaties creating international organizations. In general, the rule is that a successor State must apply for membership. Following this reasoning, a unilateral undertaking by the successor State to the effect that it will succeed to the obligations stemming from a tort committed before the date of the succession will not be enough for succession to apply with respect to that tort. As indicated above in the case of an agreement between the predecessor and the successor States in this same vein, the acceptance of this undertaking by

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<sup>68</sup> Constitution of Namibia of 9 February 1990 (UN Doc. S/20967/Add.2).

<sup>69</sup> See Patrick Dumberry, *op. cit.*, pp. 192-194 and the authors cited.

<sup>70</sup> See *Mwandinghi* case, High Court of Namibia, 14 December 1990 (ILR vol. 91, p. 343) and Supreme Court of Namibia, 25 October 1991 (ILR vol. 91, p. 358).

<sup>71</sup> Article 16, Vienna Convention on Succession of States in Respect of Treaties. As is well known, the practice followed by the Secretary-General of the United Nations as well as other depositaries has not been consistent with the 1978 Vienna Convention and declarations of succession have been requested from other categories of successor States than newly independent States.

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the other party to the responsibility relationship – the injured State or another victim subject – is required.<sup>72</sup> Consequently, the draft Resolution includes a similar provision for the unilateral acceptance of obligations by the successor State.

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

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

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

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

71. Article 11 of the draft Resolution refers to the situation of transfer of territory under the sovereignty of one State to another State, but also the case in which a State that only bears the responsibility for the international relations of a territory, without being its sovereign, transfers the territory, or part of it, to another State. Evidently, the latter case presupposes that the State operating the transfer possesses the legal capacity to transfer the territory concerned. The wording employed here is similar to that of Article 15 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

72. As mentioned before, in this case the predecessor State continues to exist after the transfer or cession, and the successor State already existed at the time of the succession. No creation of a new State is involved. For the reasons set out in the preceding section, this is a clear case in which the non-succession rule applies. The exception to this general rule consisting in the existence of a direct link between the consequences of the internationally wrongful act and the territory and the population

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<sup>72</sup> Supra, paragraphs. 47-48.

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concerned also applies. The possible exception motivated by the author of the internationally wrongful act being the organ of the territorial unit that is the object of the transfer can also be mentioned.

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

74. The arbitral tribunal distinguished acts of which the Ottoman government was the direct author from those accomplished by Crete's autonomous government. In the first cases, the tribunal applied the general rule of non-succession, whereas in the latter case, as mentioned above, Greece, as a successor State, had to assume the obligations arising from the illegal conduct followed by the autonomous government of Crete at the time the island formed part of the Ottoman Empire.<sup>73</sup>

75. The solutions envisaged here can also be applied to situations of separation of part of a territory and population of a State in order to constitute an independent State or to join another existing State.

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

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

77. For the reasons explained above, Article 12 of the draft Resolution applies the general rule of non-succession, with the exception of the cases of existence of a direct link between the consequences of the wrongful act and the population or the territory concerned, and possible cases in which the author of the wrongful act is an organ of the administrative unit of the predecessor State that later became the organ of the successor State.

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<sup>73</sup> Cf. the Decision of the arbitral tribunal with regard to claims 4, 11 and 12 a, in: *Affaire relative à la concession des phares de l'Empire ottoman (Grèce, France)*, 24/27 July 1956, RIAA, vol. XII, pp. 188-200.



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78. In the *Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* case, after the separation of Montenegro on 3 June 2006, Serbia continued the personality of Serbia and Montenegro, which in turn was the same State previously called the Federal Republic of Yugoslavia, and Montenegro became a successor State to it, by virtue of Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro. Bosnia and Herzegovina was of the view that both Serbia, as the continuator, and Montenegro, as the successor of Serbia and Montenegro, 'jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case'.<sup>74</sup> Montenegro considered that this was not the case, and Serbia left the matter up to the Court to decide. The latter established that Montenegro was not a party to the case by virtue of the fact that the continuator of the Respondent was Serbia. Consequently, the findings that the Court made in the operative part of its judgment were addressed only to Serbia. The Court recalled that Montenegro, like any other State party to the Genocide Convention, has undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.<sup>75</sup>

79. The Court did not address the possibility of joint and several responsibility of Serbia and of Montenegro, let alone any kind of obligation incumbent on Montenegro for the internationally wrongful act committed by its predecessor State. What is beyond doubt in the Court's reasoning is that the continuator State has to assume the obligations of internationally wrongful acts committed before the date of State succession as a result of the separation of part of its population and territory in order to constitute a new State.

80. It may be, under special circumstances, that reasons akin to those invoked to depart from the general non-succession rule may also lead to the sharing of the consequences of an internationally wrongful act by both the predecessor and the successor State(s). This situation would for instance occur if the wrongful acts were committed by both the central organs of the predecessor State and the local organs that later became the organs of the successor State, or if the consequences of the wrongful act benefitted both the predecessor and the successor State, or if the consequences were directly linked to both territories and populations. The

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

<sup>75</sup> *Ibid.*, pp. 74-76, paras. 71-77. The Court, nevertheless, indicated that "it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro" (*Ibid.*, p. 76, para. 78).

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Resolution proposed is drafted in such a way that this exceptional solution will only apply if these or other special circumstances are present.

81. There exists another situation related to State responsibility in cases of separation of parts of a State to form one or more States that deserves consideration. It has already been addressed by Article 10 of the Articles on State Responsibility elaborated by the International Law Commission. It refers to the situation in which a secessionist movement succeeds in its endeavour to create a new State. According to Article 10, paragraph 2 of these Articles, in such a situation the conduct of a victorious insurrectional movement undertaken against the central government is attributable to the new State once the movement comes into power.<sup>76</sup> This situation was invoked by Croatia with regard to Serbia in the *Genocide Convention case* between these two States.<sup>77</sup> However, there was no need for the Court to examine the question, since it considered that its jurisdiction as set forth in Article IX of the Genocide Convention was limited to the time when Serbia became a party to that Convention, irrespective of the question whether prior acts could be attributed to Serbia or not.<sup>78</sup>

82. Indeed, the case envisaged in Article 10, paragraph 2 of the ILC Articles on State Responsibility is a particular situation in which there is no succession to rights or obligations of the predecessor State. Nevertheless, the question falls within the realm of the matter under consideration here, since the problem would be one of determining whether the predecessor or the successor State bears responsibility for such conduct. The commentary by the ILC to Article 10 explains its choice in the following terms:

“the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume

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<sup>76</sup> Article 10, paragraph 2, Articles on State Responsibility.

<sup>77</sup> ICJ Judgment of 3 February 2015, paras. 82 and 102.

<sup>78</sup> *Ibid.*, paras. 104-105.

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responsibility for conduct committed with a view to its own establishment.”<sup>79</sup>

83. The ILC position is based on a logical inference rather than on established practice. Indeed, the relevant case law only referred to situations of an insurrectional movement becoming the government of the State or cases of State succession in which the person concerned had acquired the nationality of the same State having caused the injury, not cases of secession or decolonisation.<sup>80</sup> In its 3 February 2015 Judgement on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* case, the ICJ did not have to take a stance on the customary character of Article 10, paragraph 2 of the ILC Articles.<sup>81</sup> The draft Resolution follows the ILC pattern and includes in paragraph 6 of Article 12 the same provision as that of Article 10, paragraph 2 of the ILC Articles on State Responsibility.

84. The ILC did not specifically address the responsibility of the predecessor State for its own acts accomplished in the situation envisaged in Article 10, paragraph 2 of its Articles on State Responsibility. The inference is that its obligations to repair continue after the date of State succession. The matter is governed by the rules of State responsibility as codified by the ILC Articles in this field.

**(c) Merger of States**

85. The category of merger of States refers to the case when two or more States unite and so form one successor State and, as a consequence of the unification, the predecessor States cease to exist. This particular category does not pose particular problems. Quite logically, the rights and obligations stemming from the commission of an internationally wrongful act in relation to which a predecessor State has been the author or the injured State pass to the successor State. Article 13 of the draft Resolution reflects this solution.

86. The Agreement concluded between the United Kingdom and the United Arab Republic (UAR) of 28 February 1959 furnishes an example.<sup>82</sup> The UAR was the result of the merger of Egypt and Syria in

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<sup>79</sup> Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10*, UN doc. A/56/10, ch. IV.E.2, 2001, p. 114 para. (6).

<sup>80</sup> See the examples cited in the ILC commentary to Article 10, *ibid.*, pp. 116-118, paras. (12)-(14). See also Crawford, James, *The Creation of States in International Law*, 2nd ed., Oxford, Clarendon Press, 2006, pp. 658-664.

<sup>81</sup> ICJ Judgment of 3 February 2015, para. 104.

<sup>82</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Republic Concerning

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1958. The treaty concerned referred to the Suez Canal Crisis of 1956, hence facts occurring before the date of unification and with regard to one of the predecessor States. By this agreement, the UK and the UAR waived their claims for war damages and for compensation of Egypt's seizure of the Suez Canal respectively. Even though neither side admitted "liability in respect of any of these claims", it is evident from the conclusion of the agreement itself that both envisaged the possibility of the succession of the UAR to the rights and obligations arising from allegedly internationally wrongful acts either committed or suffered by one of its predecessor States.

**(d) Incorporation of a State into another existing State**

87. The incorporation of a State into another existing State is a case in which only the former – predecessor – State ceases to exist. The existing State is its successor, but its personality remains unchanged. Again, this case offers no difficulty in affirming that the rights and obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State pass to the successor State. Article 14 of the draft Resolution reflects this solution.

88. The Treaty on the Establishment of German Unity between the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) of 31 August 1990 offers an example.<sup>83</sup> By this treaty, the five Ländern composing the GDR were incorporated into the FRG and the GDR ceased to exist on 3 October 1990. As mentioned above,<sup>84</sup> Article 24, paragraph 1 is considered to be a recognition of the succession of the FRG to the claims and liabilities of the GDR.

**(e) Dissolution of a State**

89. The category of dissolution applies when a State ceases to exist and from the territory of this, the predecessor State, two or more successor States are formed. Article 15 of the draft Resolution establishes the succession rule, i.e. that the rights and obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State pass to the successor States.

90. The fact of the existence of a plurality of successor States requires the determination of which of them becomes holder of the rights or of the

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Financial and Commercial Relations and British Property in Egypt, UNTS, vol. 343, N° 4925, p. 159.

<sup>83</sup> ZaöRV, 1991, vol. 51, p. 494; ILM, 1991, vol. 30, p. 463.

<sup>84</sup> Supra, para. 49.

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obligations arising from the internationally wrongful act committed before the date of the succession. A distinction may be made between rights and obligations, i.e. depending whether the predecessor State was the author or the injured State.

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

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

93. The *Gabčíkovo/Nagymaros Project* case offers an example of a situation of dissolution in which questions related to the consequences of the commission of internationally wrongful acts (both by and against the predecessor State) before the date of State succession are at issue. The parties explicitly stipulated in their special agreement that 'the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project'.<sup>85</sup> This ascertainment can be considered as declarative of the existing legal situation.

94. The Court, taking into account the above, decided that 'Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary'.<sup>86</sup>

95. The question of a successor State assuming responsibility for wrongful acts committed by the predecessor State was discussed in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. At the oral stage Croatia invoked as an alternative reasoning, that if the acts allegedly occurring prior to 27 April 1992 (date of the State succession of the Federal Republic of Yugoslavia (FRY), then Serbia and Montenegro, then Serbia) were attributable to the Socialist Federal Republic of Yugoslavia (SFRY), then Serbia succeeded to the responsibility incurred by the latter. The

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<sup>85</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 11, para. 2.

<sup>86</sup> *Ibid.*, p. 81, para. 151.

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argument was that “the entities that emerged as a successor – the FRY – largely controlled the armed forces of the SFRY during the last year of the latter’s formal existence, justify[ing] the succession of the FRY to the responsibility incurred by the SFRY for the acts of armed forces that subsequently became organs of the FRY”.<sup>87</sup> Among other reasons not related to the matter under examination, Serbia contended that “there is no principle of succession to responsibility in general international law”.<sup>88</sup> Examining its jurisdiction on the basis of Article IX of the Genocide Convention, the Court noted “that Article IX speaks generally of the responsibility of a State and contains no limitation regarding the manner in which that responsibility might be engaged”. Consequently, it considered that it had jurisdiction to deal with facts occurring before the date of State succession, but at the merits stage the question whether there was succession to responsibility “would require a decision only if the Court finds that the acts relied upon by Croatia were contrary to the Convention and were attributable to the SFRY at the time of their commission”.<sup>89</sup> Since the Court did not find those acts to be contrary to the Convention, the question of succession to the obligations stemming from the alleged breaches occurring before 27 April 1992 did not arise.

96. One member of the Commission expressed doubts about the factors mentioned in paragraphs (2) and (3) of Article 15 being relevant in all circumstances for determining which of the successor States becomes the bearer of the rights or obligations. The same member proposed to take into account factors such as whether the successor State disassociated itself from the wrongful act or, on the contrary, derived some benefit from the wrongful act. In the Rapporteur’s view, the question whether there is some benefit deriving from the wrongful act is covered by the notion of the existence of a direct link between the consequences of the internationally wrongful act and the territory or the population of the successor State, included in paragraph (2). The successor State necessarily takes a position with regard to the wrongful act after the date of the State succession. As such, it cannot *per se* determine the solution. The duty to negotiate referred to in paragraph (1) of the same article is applicable.

**(f) Newly Independent States**

97. This report has already elaborated on the reasons to include this category of State succession as a separate one.<sup>90</sup> This inclusion also commands, as a logical necessity, the conclusion according to which

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<sup>87</sup> Judgment of 3 February 2015, para. 107.

<sup>88</sup> *Ibid.*, para. 108.

<sup>89</sup> *Ibid.*, para. 114.

<sup>90</sup> See *supra*, paras. 17-18.

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there is no succession to the obligations arising from an internationally wrongful act committed by the predecessor State. This is reflected in Article 16, paragraph 1 of the draft Resolution.

98. Some domestic case law may be mentioned as an example of the application of this non-succession rule. Belgian courts confirmed Belgium's responsibility for internationally wrongful acts committed before the independence of the Congo by the predecessor State.<sup>91</sup>

99. Despite the existence of some contradictory interpretations of the Declaration of Principles Related to the Financial and Economic Cooperation between Algeria and France (an agreement forming part of the Evian Accords), France assumed its obligations from wrongful acts committed before the date of State succession with regard to acts aimed at preventing Algerian independence.<sup>92</sup> Equally, it provided reparation to foreigners with regard to acts committed against them before the date of Algerian independence.<sup>93</sup>

100. In a recent case decided in the United Kingdom, the High Court rejected the position taken by the Foreign Office according to which the British Government is not responsible for acts of torture committed by the Colonial Government in Kenya during the Mau-Mau rebellion in the 1950s, and therefore Kenya should be liable for those acts which occurred before its independence on 12 December 1963. The High Court considered that it was for the independent Kenyan Government to decide whether it assumed the liabilities of the British Colonial Administration or not, and in the circumstances it did not. A first judgment then opened the way for an examination of the responsibility of the British Government for the alleged acts at the merits stage.<sup>94</sup>

101. The situation may be different with regard to the rights stemming from an internationally wrongful act committed by a third State against

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<sup>91</sup> *Crépet c. Etat belge et Société des forces hydro-électriques de la colonie* (Civil Tribunal of Brussels, 30 January 1962, *Journal des tribunaux*, 1962, p. 242); *Pittacos c. Etat belge* (Brussels Court of Appel (2nd Chamber), 1 December 1964, *Journal des tribunaux*, 1965, p. 9; and Cour de cassation, 26 May 1966, *Pasicrisie belge*, 1966 Part I, p. 1221, also in ILR, vol. 48, p. 22).

<sup>92</sup> Ministry of Foreign Affairs to Conseil d'Etat, 13 February and 30 July 1963, extracts in: Conseil d'Etat, 5 mars 1965, *Union régionale d'Algérie de la C.F.T.C\_D.S.* 1965, p. 434 (Commentaire Roger Pinto), *JDI (Clunet)*, 1967-2, pp. 389-390. See the analysis in Patrick Dumberry, *op. cit.*, pp. 177-181.

<sup>93</sup> For example, cases concerning Swiss citizens victims of corporal or material damages in Algeria before the date of independence (P, Guggenheim, *La pratique suisse* 1965, *Annuaire suisse de droit international*, 1966, vol. XXIII, p. 87).

<sup>94</sup> See the judgments of the High Court of Justice (Justice McCombe) in *Mutua et al. v. The Foreign and Commonwealth Office* of 21 July 2011, [2011] EWHC 1913 (QB) and of 5 October 2012, [2012] EWHC 2678 (QB).

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the predecessor State in relation to the territory that later becomes a newly independent State. As a matter of fact, what is at stake are rights derived from the control by the predecessor State of the dependent territory. If that act or its consequences has a direct connection with the territory or the population of the newly independent State, then the rights stemming from it pass to the successor State. This solution is in line with what the 1983 Vienna Convention established with regard to property and archives.<sup>95</sup>

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

103. The conduct, prior to the date of State succession, of a national liberation movement which succeeds in establishing a newly independent State shall be considered an act of this new State under international law. This is in line with the traditional position taken with regard to belligerents who succeed in becoming the government of an existing State or in creating a new one. As seen before, this situation is contemplated in the ILC Articles on State Responsibility, and is reflected here.<sup>96</sup> As a result, the consequences of an internationally wrongful act committed by the national liberation movement pass to the newly independent State.<sup>97</sup>

104. On the other hand, torts committed against the people concerned before their constitution as a newly independent State generate rights that can be exercised by this State once it is constituted.<sup>98</sup>

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<sup>95</sup> See Article 15 and 28 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

<sup>96</sup> Article 10, paragraph 2 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>97</sup> See Article 16, paragraph 3 of the draft Resolution.

<sup>98</sup> See Article 16, paragraph 4 of the draft Resolution.



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105. The *Certain Phosphate Lands in Nauru* case before the ICJ offers an example in this regard. In its application against Australia, Nauru invoked alleged internationally wrongful acts committed by Australia as the Administering Power at the time Nauru was a UN Trust Territory. In its Memorial, Nauru submitted that “[t]he emergence of a new State from the status of a trust territory in accordance with the principle of self-determination embodied in the trusteeship arrangements is not the emergence *ab initio* of an entirely new legal entity, but the emergence from a state of dependence of a people whose rights and status are already distinctly recognized, and to which the predecessor State is in principle accountable”.<sup>99</sup>

106. Australia challenged the jurisdiction of the Court, but not on the ground that Nauru was not in a position to advance claims for the conduct of the Administering Power before Nauru’s existence as independent State. On the contrary, Australia invoked the fact that the Nauruan authorities had allegedly waived all claims relating to the rehabilitation of the phosphate lands even before independence.<sup>100</sup> The Court considered that it had jurisdiction and that the application was admissible, although the case did not go to the merits stage since the parties reached an agreement by which Australia made an *ex gratia* payment and the parties would require the Court to discontinue the proceedings.<sup>101</sup>

107. State practice also includes treaties concluded after the Second World War by which defeated States agreed to pay compensation for acts that occurred during that war whose victims were peoples that only constituted independent States later on. The Federal Republic of Germany concluded a reparation agreement with the State of Israel on 10 September 1952.<sup>102</sup> Japan concluded such treaties with Indonesia (on 20 January 1958), with Malaysia (on 21 September 1967) and with Singapore (on 21 September 1967).<sup>103</sup>

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<sup>99</sup> *Certain Phosphate Lands in Nauru*, Memorial of Nauru, vol. I, p. 169, para. 467.

<sup>100</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 247, para. 12.

<sup>101</sup> Agreement between Australia and Nauru of 10 August 1993, I.L.M., vol. 32, pp. 1471-1479. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Order of 13 September 1993, I.C.J. Reports 1993, p. 322.

<sup>102</sup> Agreement between the State of Israel and the Federal Republic of Germany on Compensation of 10 September 1952, UNTS, vol. 162, N° 2137, p. 205.

<sup>103</sup> Treaty of Peace between Japan and the Republic of Indonesia, UNTS, vol. 324, N°4688, p. 227; Treaty of Peace between Japan and Malaysia, UNTS, vol. 683, N° 9719, p. 67; Treaty of Peace between Japan and Singapore, UNTS, vol. 683, N° 9720, p. 81.

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

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

109. Measures taken by the Security Council by virtue of the powers conferred upon it by Chapter VII of the United Nations Charter are generally – although not always – adopted in situations in which internationally wrongful acts have been committed. In general – although not always – States against which these measures are taken are responsible for the illegal conduct or for the threats to international peace or security in question. The question may also arise of the fate of these measures in cases in which the States concerned are involved in situations of State succession. Although this issue is not strictly a matter of State responsibility, it is also briefly addressed below; notwithstanding this, the draft Resolution does not include an article in this regard.<sup>104</sup>

**(a) Internationally Wrongful Acts of a Continued or Composite Nature**

110. The ILC Articles on State Responsibility for Internationally Wrongful Acts distinguish between acts having been completed at the relevant time, acts having a continuing character, and acts possessing a composite character.<sup>105</sup> An instantaneous act takes place at the moment when it occurs. In the context of the present *problématique*, it can occur either before or after the date of State succession. The same is true with regard to a wrongful act, no matter its nature, that has occurred and ceased as such. The report's analysis only took into consideration internationally wrongful acts occurring before the date of State succession. However, acts having a continuing or composite character, since they occur over a given period of time and constitute a wrongful act during such a period, may occur in a process covering a lapse of time both before and after the date of State succession. These situations require the determination of which of the

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<sup>104</sup> Cf. *Annuaire de l'Institut de Droit international*, 2013, vol. 75, pp. 227 and 240-241.

<sup>105</sup> Articles 14 and 15 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

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predecessor or successor States has to bear the consequences of the breach of an international obligation having a continuing or composite character.

111. In its commentary to Article 11, the ILC envisages three possibilities in which a State acknowledges and adopts the conduct in question as its own, including that of succession. “[I]f the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.”<sup>106</sup> The draft Resolution follows this ILC-elaborated solution.

112. The question remains, however, whether there is joint responsibility shared by the predecessor State (if it continues to exist) and the successor State, whether each State is responsible for the relevant period of time in which it actually committed the wrongful act, or if there is succession/responsibility for the entire continuing act by the successor State. The ILC left this question open. The formula proposed in the draft Resolution contemplates the responsibility of the successor State for its own conduct since the date of the State succession and for the whole period during which the act continues and remains not in conformity with the international obligation concerned.<sup>107</sup> Indeed, in this situation we are not facing a problem related to State succession. It is simply the attribution of an internationally wrongful act to its author and its consequent responsibility for such conduct. The Rapporteur considers that with regard to the situation prior to the date of State succession, the specific rules for each category apply.

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

114. When a successor State completes a series of actions or omissions initiated by the predecessor State, in the sense that the composite wrongful act is performed, it bears international responsibility. Consistently with the ILC’s definition of composite acts, the breach

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<sup>106</sup> ILC commentary to Article 11, *ibid.*, p. 119, para. (3).

<sup>107</sup> Article 9, paragraph 1 of the draft Resolution.

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extends over the entire period starting with the first of the actions or omissions of the series (accomplished by the predecessor State), and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation. This provision is without prejudice to the responsibility incurred by the predecessor State if it continues to exist.<sup>108</sup>

**(b) State succession in cases of diplomatic protection**

115. The question of the possibility of State succession to claims arising from breaches to international obligations relating to the treatment to be granted to foreigners was addressed by the ILC in its Articles on Diplomatic Protection. The question arose with regard to the continuous nationality rule, which was the prevailing view in the matter up until the discussion before the ILC. According to the ILC, a State is only entitled to exercise diplomatic protection in respect of a person who has its nationality continuously from the date of the injury to the date of the presentation of the claim by the State.<sup>109</sup> The ILC took this as a general rule, but rightly included some important exceptions. Article 5, paragraph 2 of the Articles on Diplomatic Protection envisages such an exception in the situation of a change of nationality as a result of State succession in the following way:

“A State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State.”<sup>110</sup>

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

“A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim.”<sup>111</sup>

117. In the view of this Rapporteur, this is a positive development that overcomes the extremely rigid approach followed by the Permanent

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<sup>108</sup> Article 9, paragraph 2 of the draft Resolution.

<sup>109</sup> Or even, in the extreme position, until the end of the procedure open for the diplomatic protection exercised by the State. See on this: E. Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international* (Paris: PUF, 1990).

<sup>110</sup> GA Res. 62/67, 8 January 2008 (Diplomatic Protection), Annex.

<sup>111</sup> *Ibid.*

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Court of International Justice in the *Panevezys-Saldutiskis* case,<sup>112</sup> which did not take into consideration the succession to the nationality of a Russian corporation, dismissing the Estonian diplomatic protection claim for an alleged internationally wrongful act committed against the person of the then Estonian corporation at a time when it held the predecessor State's nationality.

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

- "a) Une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu peut être rejetée par l'Etat auquel elle est présentée si elle ne possède pas le caractère national de l'Etat requérant à la date de sa présentation comme à la date du dommage. Devant la juridiction saisie d'une telle réclamation, le défaut de caractère national est une cause d'irrecevabilité.
- b) Une réclamation internationale présentée par un Etat nouveau en raison d'un dommage subi par un de ses nationaux avant l'accession à l'indépendance de cet Etat, ne peut être rejetée ou déclarée irrecevable en application de l'alinéa précédent pour la seule raison que ce national était auparavant ressortissant de l'ancien Etat."<sup>113</sup>

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

120. The draft Resolution follows exactly the same approach as the ILC. A successor State may exercise diplomatic protection in respect of a person or a corporation who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of a predecessor State or lost his or her previous nationality and acquired, for

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<sup>112</sup> *Panevezys-Saldutiskis Railway Case*, PCIJ, Series A/B No. 76, pp. 16-17.

<sup>113</sup> « Le caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu » (Session de Varsovie – 1965), *Annuaire de l'Institut de Droit international*, vol. 51-II, pp. 260-261.

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a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.<sup>114</sup>

121. The draft Resolution also envisages the possibility that the claim in exercise of diplomatic protection has been initiated by the predecessor State and the question remains open at the time of State succession. In this case, the claim may be continued by the successor State under the same conditions set out above.<sup>115</sup>

122. Diplomatic protection in the context of State succession must also be examined the other way round, i.e. in case of a claim in exercise of diplomatic protection initiated by a third State against the predecessor State before the date of State succession. Coherently with the solutions envisaged earlier, it is proposed that if the predecessor State has ceased to exist, the claim may be continued against the successor State. In case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. In cases in which it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 7, paragraph 2 of the draft Resolution, containing provisions for an equitable apportionment, apply *mutatis mutandis* in this case.<sup>116</sup>

123. During the Tokyo session, it was suggested to make explicit mention of the situation of dual nationals having the nationality of both the predecessor and the successor State, that of nationals of other states, or that of stateless persons.<sup>117</sup> The draft Resolution makes clear that the cases envisaged are those in which the individual concerned lost their prior nationality (either of the predecessor State or of another one) as a result of a succession of States. Hence, there is no case of dual nationality. For the sake of clarity, a new paragraph is added to Article 10, indicating that in cases in which the predecessor State continues to exist and the individual or corporation possesses both the nationality of the predecessor and the successor State, the question is governed by general rules of diplomatic protection concerning dual or multiple nationality.<sup>118</sup>

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<sup>114</sup> Article 10, paragraph 1 of the draft Resolution.

<sup>115</sup> Article 10, paragraph 2 of the draft Resolution.

<sup>116</sup> Article 10, paragraph 3 of the draft Resolution.

<sup>117</sup> *Annuaire de l'Institut de Droit international*, 2013, vol. 75, p. 224.

<sup>118</sup> Article 10, paragraph 4 of the draft Resolution

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

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

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

126. In the draft Resolution submitted in the Tokyo session, a rule was proposed according to which there is no succession to the rights and obligations arising from measures adopted by the Security Council under Chapter VII. If such measures were adopted against a predecessor State that ceased to exist, it belongs to the Security Council to decide in a new resolution whether the sanctions will be applied to any successor State. If the predecessor State continues to exist, this is the only State to which the measures continue to be imposed.

127. An example is found in the Constitutional Charter of the State Union of Serbia and Montenegro. Article 60 of the Constitutional Charter envisaged the possibility of the breakdown of the State. In the case of separation by Montenegro, it was explicitly envisaged that UN SC Resolution 1244 (1999), relating to Kosovo, would concern and apply in its entirety to Serbia.<sup>119</sup> Serbia was considered to be the continuator of the State of Serbia and Montenegro. For its part, Montenegro is a successor State. Consequently, Serbia kept its place as UN member, whereas Montenegro had to apply for membership.

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

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<sup>119</sup> Text available at: [http://www.worldstatesmen.org/SerbMont\\_Const\\_2003.pdf](http://www.worldstatesmen.org/SerbMont_Const_2003.pdf)

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129. As mentioned above, the article proposed in the Provisional Report shall not be included in the Resolution.<sup>120</sup> Consequently, the new draft Resolution does not contain any provision in this regard.

**J. The Draft Resolution**

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

131. The preamble follows the general considerations already mentioned in other instruments relating to State succession, such as the 1978 and 1983 Vienna Conventions, the ILC Articles on succession of States in matters of nationality and the Institute's Resolution "State Succession in Matters of Property and Debts". In particular, references are made to the fundamental principles and rules of international law that must be taken into consideration in its interpretation and application. Considerations relating to the need to formulate guidelines in the situations of State succession in the field of international responsibility are also mentioned, particularly taking into account that no attempt at codifying this area of international law has been carried out in the past.

132. The first part contains general provisions, in particular the use of terms and the fact that the cases covered by the Resolution are those of State succession occurring in conformity with international law. The definitions of terms employed follow the previous instruments relating to State succession and State responsibility. The scope of the Resolution is explained in a wider manner than in previous drafts. Former Articles 2 and 3 were merged into a single article, explaining the situations that fall or do not fall within the scope of the Resolution.

133. The second part contains common rules applicable irrespective of the categories of State succession. It begins by indicating the subsidiary character of the guidelines contained in the Resolution and the conditions that must be respected by the agreements concluded with the aim of governing the matters covered by the text. Two new Articles were added to the last draft Resolution, making explicit the situations in which responsibility for the internationally wrongful acts committed by or against the predecessor State before the date of State succession can be invoked. This part also addresses the questions emerging from the existence of a plurality of successor States, and the way to determine an equitable apportionment of the rights and obligations concerned, if necessary. It contains guidelines relating to cases of internationally wrongful acts having a continuing or composite character, to the exercise

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<sup>120</sup> Supra, paragraph 109.



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of diplomatic protection and with regard to measures taken by the Security Council.

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

135. Taking into account suggestions made during the debates of the Tokyo session and reactions of the members of the Commission to a new draft distributed in March 2015, the proposed text contains some formal changes with regard to the draft Resolution submitted in 2013.

136. The draft Resolution is submitted in English and French (Annex 1). Both are authoritative texts. A prior draft submitted to the Commission On 7 March 2015 is included as Annex 2, in order to facilitate the comments expressed by its members with regard to it (Annex 3). The questionnaire and the answers of the members of the Commission, as well as the first draft Resolution, appeared in the *Annuaire de l'Institut de Droit international*, Session de Tokyo 2013, vol. 75, pp. 161-208.

**ANNEX 1**  
**Draft Resolution**

(French Text below)

*The Institute of International Law,*

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

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

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

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

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

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*Bearing in mind* that cases of State succession should not constitute a reason not to implement the consequences stemming from an internationally wrongful act,

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

*Considering* that law and equity require the identification of the States or other subjects of international law to which fall, after the date of State succession, the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State,

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

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

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

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

**CHAPTER I:  
GENERAL PROVISIONS**

*Article 1  
Use of terms*

For the purposes of this Resolution:

- (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.

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- (e) “Newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.
- (f) “Devolution agreement” means an agreement, concluded by the predecessor State and the successor State or a national liberation, insurrectional or other movement, or an entity or organ that later becomes the organ of the successor State, providing that rights and/or obligations of the predecessor State shall devolve upon the successor State.
- (g) “Internationally wrongful act” means conduct consisting of an action or omission which: (i) is attributable to the State or another subject under international law; and (ii) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

*Article 2*

***Scope of the present Resolution***

1. The present Resolution applies to the effects of a succession of States in respect of responsibility for an internationally wrongful act committed prior to the date of succession of States by the predecessor State against a third State or another subject of international law or by a third State or another subject of international law against the predecessor State.
2. The present Resolution applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.
3. The present articles do not apply to situations resulting from political changes within a State, including changes in the regime or name of the State.

**CHAPTER II:  
COMMON RULES**

*Article 3*

***Subsidiary character of the guiding principles***

The guiding principles mentioned below apply in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or another subject victim of the internationally wrongful act.

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*Article 4*

***Invocation of responsibility for an internationally wrongful act committed***

***by the predecessor State before the date of succession of States***

1. The internationally wrongful act committed before the date of succession of States by a predecessor State is attributable to this State.
2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the international responsibility of the predecessor State and request from it a reparation for the damage caused by such internationally wrongful act.
3. Notwithstanding the provisions of paragraphs (1) and (2), the injured State or subject may request reparation for the injury caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following articles.

*Article 5*

***Invocation of responsibility for an internationally wrongful act committed***

***against the predecessor State before the date of succession of States***

1. The predecessor State which after the date of succession of States continues to exist, may even after this date, invoke the international responsibility of another State or subject for its internationally wrongful act committed before the date of that succession and may request reparation for the injury caused by this act.
2. If the injury caused by an internationally wrongful act committed before the date of succession of States against a predecessor State affected the territory or persons which, after this date, are under the jurisdiction of a successor State, the successor State may request a reparation for the injury caused by such act, as provided in the following articles, unless the reparation was already made good in full before the date of succession of States.

*Article 6*

***Devolution agreements and unilateral acts***

1. Devolution agreements concluded before the date of State succession between the predecessor State and an entity or a national liberation movement representing a people entitled to self-determination are subjected, like agreements concluded by the interested States after the date of State succession, to the rules relating to the validity of treaties or the consent of the parties to be bound by these agreements, as set out in the Vienna Convention on the Law of Treaties. The same rule applies to

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devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.

2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against a third State or another subject before the date of a succession of States do not become the obligations of the successor State towards the injured State or subject by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

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

4. Where the injured State or subject does not accept the solution envisaged by the devolution agreement or unilateral act, good faith negotiations must be pursued by the interested States or subjects. If these negotiations do not succeed within a reasonable period of time, the solution envisaged by the relevant article of the present Resolution is applicable.

*Article 7*

***Plurality of successor States***

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

2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of the State succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

3. Negotiations in good faith must be pursued by the successor States. If these negotiations do not succeed within a reasonable period of time, the

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solution envisaged in the relevant article of the present Resolution is applicable.

*Article 8*

***Interested States or subjects***

For the purposes of Articles 6 and 7, “interested States or subjects” are:

- (a) in the case of an internationally wrongful act committed by the predecessor State, the injured State or subject and all the successor States;
- (b) in the case of an internationally wrongful act committed against the predecessor State, all the successor States.

*Article 9*

***Internationally wrongful acts having a continuing or composite character***

***performed or completed after the date of State succession***

1. When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, it bears international responsibility for the entire period during which the act continues and remains not in conformity with the international obligation.
2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in the aggregate as a breach of an international obligation, it bears international responsibility. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.
3. The provisions of the present Article are without prejudice to any responsibility incurred by the predecessor State if it continues to exist.

*Article 10*

***Diplomatic protection***

1. A successor State may exercise diplomatic protection in respect of a person or a corporation who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.
2. A claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of the State succession

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by the successor State under the same conditions set out in paragraph 1 of this Article.

3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In the case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. In cases in which it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 7 apply *mutatis mutandis*.

4. Where the predecessor State continues to exist and the individual or corporation possesses both the nationality of the predecessor and the successor State, or the nationality of a third State, the question is governed by the rules of diplomatic protection concerning dual or multiple nationality.

**CHAPITRE III:  
DISPOSITIONS CONCERNANT DES CATEGORIES SPECIFIQUES  
DE SUCCESSION D'ETATS**

*Article 11*

***Transfer of part of the territory of a State***

1. With the exception of the situations referred to in the following paragraphs, the rights and obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State do not pass to the successor State when part of the territory of the predecessor State, or any territory for the international relations of which this State is responsible, becomes part of the territory of the successor State.

2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if there exists a direct link between the consequences of this act and the territory transferred and/or its population.

3. If particular circumstances so require, the obligations arising from the commission of an internationally wrongful act pass to the successor State if the author of this act was an organ of the territorial unit of the predecessor State that becomes the successor State.

*Article 12*

***Separation of parts of a State***

1. With the exception of the situations referred to in paragraphs (2) to (4) of the present Article, the rights and obligations stemming from the

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commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State do not pass to the successor State or States when a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist.

2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State or States if there exists a direct link between the consequences of this act and the territory or the population of the successor State or States.

3. If particular circumstances so require, or if the author of the internationally wrongful act was an organ of a territorial unit of the predecessor State that later became the organ of the successor State, the obligations arising from the commission of that act pass to the successor State.

4. If particular circumstances indicated in paragraphs 2 and 3 of this Article so require, the obligations arising from an internationally wrongful act committed before the date of State succession are assumed by the predecessor and the successor State or States.

5. In order to determine an equitable apportionment of the rights or obligations of the predecessor and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of State succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

6. The internationally wrongful act of a movement, insurrectional or other, which succeeds in establishing a new State on part of the territory of the predecessor State or in a territory under the administration of this latter State shall be considered an act of the new State under international law. Consequently, the predecessor State bears no responsibility for the acts committed by the insurrectional or other movement.

*Article 13*

***Merger of States***

When two or more States unite and so form a new successor State, and no predecessor State continues to exist, the rights or obligations stemming from the commission of an internationally wrongful act of which a predecessor State has been the author or the injured State pass to the successor State.



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*Article 14*

***Incorporation of a State into another existing State***

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

*Article 15*

***Dissolution of a State***

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the rights or obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the victim State pass, bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs (2) and (3) of the present Article, to one, several or all the successor States.

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

3. In order to determine which of the successor States becomes bearer of the obligations described in paragraph (1), a relevant factor will be, in addition to that mentioned in paragraph (2), the fact that the author of the internationally wrongful act was an organ of the predecessor State that later became the organ of the successor State.

*Article 16*

***Newly independent States***

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

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

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

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

\* \* \*

*L'Institut de droit international,*

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

*Considérant* que d'autres situations impliquant la succession d'Etat pourraient émerger à l'avenir,

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

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

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

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

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

*Considérant* que, le droit et l'équité imposent que soient déterminés, après la date de succession d'Etats, à quels Etats ou d'autres sujets de droit international incomberont les droits et les obligations qui découlent des faits internationalement illicites commis ou subis par l'Etat prédécesseur,

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

*Conscients* des principes de droit international incorporés dans la Charte des Nations Unies, tels que les principes concernant l'égalité des droits des peuples et leur droit à disposer d'eux-mêmes, l'égalité

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souveraine et l'indépendance de tous les Etats, la non-ingérence dans les affaires intérieures des Etats, l'interdiction de la menace ou de l'emploi de la force et le respect universel et effectif des droits de l'homme et des libertés fondamentales pour tous,

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

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

**CHAPITRE I :**  
**DISPOSITIONS GENERALES**

*Article 1*  
***Expressions employées***

Aux fins de la présente résolution :

- a) L'expression « succession d'Etats » s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire.
- b) L'expression « Etat prédécesseur » s'entend de l'Etat auquel un autre Etat s'est substitué à l'occasion d'une succession d'Etats.
- c) L'expression « Etat successeur » s'entend de l'Etat qui s'est substitué à un autre Etat à l'occasion d'une succession d'Etats.
- d) L'expression « date de la succession d'Etats » s'entend de la date à laquelle l'Etat successeur s'est substitué à l'Etat prédécesseur dans la responsabilité des relations internationales du territoire auquel se rapporte la succession d'Etats.
- e) L'expression « Etat nouvellement indépendant » s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales.
- f) L'expression « accord de dévolution » s'entend d'un accord conclu entre l'Etat prédécesseur et l'Etat successeur ou un mouvement de libération nationale, insurrectionnel ou autre, ou une entité ou un organe qui devient ultérieurement l'organe de l'Etat successeur, stipulant que les droits et/ou obligations de l'Etat prédécesseur sont dévolus à l'Etat successeur.
- g) L'expression « fait internationalement illicite » s'entend d'un comportement consistant en une action ou une omission :  
(i) attribuable à l'Etat ou à un autre sujet en vertu du droit international; et (ii) constituant une violation d'une obligation

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internationale de l'Etat ou de l'autre sujet. La qualification du fait comme internationalement illicite relève du droit international. Une telle qualification n'est pas affectée par la qualification du même fait comme licite par le droit interne.

*Article 2*

***Portée de la présente Résolution***

1. La présente Résolution s'applique aux effets d'une succession d'Etats relatifs à la responsabilité pour un fait internationalement illicite commis avant la date de la succession d'Etats par l'Etat prédécesseur contre un Etat tiers ou un autre sujet de droit international ou par un Etat tiers ou un autre sujet de droit international contre l'Etat prédécesseur.
2. La présente Résolution s'applique uniquement aux effets d'une succession d'Etats se produisant conformément au droit international, et plus particulièrement aux principes du droit international incorporés dans la Charte des Nations Unies.
3. Les présents articles ne s'appliquent pas aux situations résultant de changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat.

**CHAPITRE II :  
REGLES COMMUNES**

*Article 3*

***Caractère subsidiaire des principes directeurs***

Les principes directeurs mentionnés ci-après sont d'application en l'absence de toute autre solution convenue entre les parties concernées par la situation de succession d'Etats, y compris l'Etat ou le sujet victime du fait internationalement illicite.

*Article 4*

***Invocation de la responsabilité pour un fait internationalement illicite commis par l'Etat prédécesseur avant la date de la succession d'Etats***

1. Le fait internationalement illicite commis avant la date d'une succession d'Etats par un Etat prédécesseur est attribuable à cet Etat.
2. Si l'Etat prédécesseur continue d'exister, l'Etat ou le sujet lésé peut, même après la date de la succession, invoquer la responsabilité internationale de l'Etat prédécesseur et lui demander réparation pour le dommage causé par ce fait internationalement illicite.
3. Nonobstant les dispositions des paragraphes (1) et (2), l'Etat ou sujet lésé peut demander réparation également ou uniquement à l'Etat ou Etats successeurs, comme il est établi dans les articles suivants, pour le dommage causé par le fait internationalement illicite commis par l'Etat prédécesseur.

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*Article 5*

***Invocation de la responsabilité pour un fait internationalement illicite  
commis contre l'Etat prédécesseur avant la date de la succession  
d'Etats***

1. L'Etat prédécesseur qui continue d'exister après la date de la succession d'Etats peut, même après cette date, invoquer la responsabilité internationale d'un autre Etat ou sujet pour les faits internationalement illicites que ce dernier aura commis avant la date de cette succession et peut demander réparation pour le dommage causé par ce fait.
2. Si le dommage causé par un fait internationalement illicite commis avant la date de la succession d'Etats contre l'Etat prédécesseur affecte le territoire ou des personnes qui, après cette date, sont sous la juridiction d'un Etat successeur, l'Etat successeur peut demander une réparation pour le dommage causé par ce fait, comme établi aux articles suivants, à moins que la réparation n'ait été intégralement obtenue avant la date de la succession d'Etats.

*Article 6*

***Accords de dévolution et actes unilatéraux***

1. Les accords de dévolution conclus avant la date de succession d'Etats entre l'Etat prédécesseur et une entité ou mouvement de libération nationale qui représente un peuple ayant le droit de disposer de lui-même sont soumis, comme les accords conclus par les Etats intéressés après la date de succession d'Etats, aux règles relatives à la validité des traités ou du consentement des parties à être liés par ces accords, telles qu'énoncées par la Convention de Vienne sur le droit des traités. La même règle s'applique aux accords de dévolution conclus entre l'Etat prédécesseur et une de ses entités autonomes qui deviendrait plus tard un Etat successeur.
2. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un Etat ou d'un autre sujet tiers avant la date d'une succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat prédécesseur et l'Etat successeur ont conclu un accord stipulant que lesdites obligations sont dévolues à l'Etat successeur.
3. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un Etat ou d'un autre sujet tiers avant la date d'une succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat successeur ait accepté que lesdites obligations lui soient dévolues.

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4. Lorsque l'Etat ou le sujet lésé n'accepte pas la solution envisagée par l'accord de dévolution ou par l'acte unilatéral, des négociations doivent être poursuivies de bonne foi par les Etats ou sujets intéressés. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent de la présente résolution est applicable.

*Article 7*

***Pluralité d'Etats successeurs***

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

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

3. Des négociations doivent être poursuivies de bonne foi par les Etats successeurs. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent de la présente résolution est applicable.

*Article 8*

***Etats ou sujets intéressés***

Aux fins des articles 6 et 7, les « Etats ou sujets intéressés » sont :

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

*Article 9*

***Faits internationalement illicites à caractère continu ou composite s'étant produits ou achevés après la date de succession d'Etats***

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

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

3. Les dispositions du présent article sont sans préjudice de toute responsabilité qui incombe à l'Etat prédécesseur si ce dernier continue d'exister.

*Article 10*

***Protection diplomatique***

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

2. Une réclamation présentée par l'Etat prédécesseur dans l'exercice de la protection diplomatique peut être poursuivie après la date de la succession d'Etats par l'Etat successeur dans les mêmes conditions énoncées au paragraphe premier du présent article.

3. Une réclamation présentée par un Etat dans l'exercice de la protection diplomatique contre l'Etat prédécesseur peut être poursuivie contre l'Etat successeur si l'Etat prédécesseur a cessé d'exister. Dans le cas d'une pluralité d'Etats successeurs, la réclamation sera adressée à l'Etat successeur ayant le lien le plus direct avec le fait qui donne lieu à l'exercice de la protection diplomatique. Dans les cas où il n'est pas possible d'identifier un Etat successeur unique ayant cette lien direct, la réclamation pourra être poursuivie contre tous les Etats successeurs. Les dispositions énoncées à l'article 7 s'appliquent *mutatis mutandis*.

4. Dans les cas où l'Etat prédécesseur continue d'exister et la personne ou la société possède la nationalité de l'Etat prédécesseur et celle de l'Etat successeur, ou celle d'un Etat tiers, la question est régie par les règles relatives à la protection diplomatique concernant la double ou multiple nationalité.

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**CHAPITRE III:  
DISPOSITIONS CONCERNANT DES CATEGORIES SPECIFIQUES  
DE SUCCESSION D'ETATS**

*Article 11*

***Transfert d'une partie du territoire d'un Etat***

1. A l'exception des situations visées aux paragraphes suivants, les droits et les obligations qui découlent de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat successeur, lorsqu'une partie du territoire de l'Etat prédécesseur, ou tout territoire pour lequel celui-ci a la responsabilité des relations internationales, devient partie du territoire de l'Etat successeur.
2. Les droits qui découlent de la commission d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat successeur s'il existe un lien direct entre les conséquences de ce fait et le territoire transféré et/ou la population.
3. Si des circonstances particulières l'exigent, les obligations qui découlent de la commission d'un fait internationalement illicite passent à l'Etat successeur, si l'auteur de ce fait était un organe de l'unité territoriale qui devient l'Etat successeur.

*Article 12*

***Séparation de parties d'un Etat***

1. A l'exception des situations visées aux paragraphes (2) à (4), les droits et les obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat ou aux Etats successeurs lorsqu'une partie ou plusieurs parties du territoire d'un Etat s'en séparent pour former un ou plusieurs Etats et que l'Etat prédécesseur continue d'exister.
2. Les droits qui découlent d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat ou aux Etats successeurs s'il existe un lien direct entre les conséquences de ce fait et le territoire ou la population de l'Etat ou des Etats successeurs.
3. Si des circonstances particulières l'exigent ou si l'auteur du fait internationalement illicite était un organe de l'unité territoriale de l'Etat prédécesseur qui plus tard est devenu organe de l'Etat successeur, les obligations qui découlent du fait internationalement illicite commis par l'Etat prédécesseur passent à l'Etat successeur.
4. Si les circonstances particulières indiquées aux paragraphes 2 et 3 du présent article l'exigent, les obligations qui découlent d'un fait



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internationalement illicite commis avant la date de la succession d'Etats sont assumées par l'Etat prédécesseur et l'Etat ou les Etats successeurs.

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

6. Le fait internationalement illicite d'un mouvement, insurrectionnel ou autre, qui parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous l'administration de ce dernier est considéré comme un fait de ce nouvel Etat d'après le droit international. En conséquence, l'Etat prédécesseur n'a pas de responsabilité pour des faits commis par le mouvement insurrectionnel ou autre.

*Article 13*

***Fusion d'Etats***

Lorsque deux ou plusieurs Etats s'unissent pour former un nouvel Etat sans laisser subsister d'Etat prédécesseur, les droits ou obligations qui découlent de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou la victime passent à l'Etat successeur.

*Article 14*

***Incorporation d'un Etat dans un autre Etat préexistant***

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

*Article 15*

***Dissolution d'un Etat***

1. Lorsqu'un Etat est dissout et cesse d'exister et que les parties de son territoire forment deux ou plusieurs Etats successeurs, les droits ou les obligations découlant de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou la victime passent, compte tenu du devoir de négocier et selon les circonstances mentionnées aux paragraphes (2) et (3) du présent article, à l'un, plusieurs ou à tous les Etats successeurs.

2. Afin de déterminer lequel des Etats successeurs devient le titulaire des droits énoncés au paragraphe précédent, sera un facteur pertinent l'existence d'un lien direct entre les conséquences du fait

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internationalement illicite commis contre l'Etat prédécesseur et le territoire ou la population de l'Etat ou des Etats successeurs.

3. Afin de déterminer lequel des Etats successeurs devient le titulaire des obligations énoncées au paragraphe premier, sera un facteur pertinent, outre celui énoncé au paragraphe (2), le fait que l'auteur du fait internationalement illicite ait été un organe de l'Etat prédécesseur qui est devenu ensuite un organe de l'Etat successeur.

*Article 16*

***Etats nouvellement indépendants***

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

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

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

4. Les droits qui découlent d'un fait internationalement illicite commis par l'Etat prédécesseur ou un autre Etat contre un peuple bénéficiant du droit de disposer de lui-même avant la date de succession d'Etats peuvent être exercés après cette date par l'Etat nouvellement indépendant créé par ce peuple.

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**ANNEX 2**  
**PRIOR DRAFT RESOLUTION AS DISTRIBUTED**  
**TO THE COMMISSION on 7 March 2015**

*The Institute of International Law,*

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

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

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

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

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

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

*Bearing in mind* that cases of State succession should not constitute a reason not to implement the consequences stemming from an internationally wrongful act,

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

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

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

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

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respect for, and observance of, human rights and fundamental freedoms for all,

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

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

**CHAPTER I:  
GENERAL PROVISIONS**

*Article 1  
Use of terms*

For the purposes of this Resolution:

- (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.
- (e) "Newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.
- (f) "Devolution agreement" means an agreement, concluded by the predecessor State and the successor State or a national liberation, insurrectional or other movement, or an entity or organ that later becomes the organ of the successor State, providing that rights and/or obligations of the predecessor State shall devolve upon the successor State.
- (g) "Internationally wrongful act" means conduct consisting of an action or omission which: (i) is attributable to the State or another subject under international law; and (ii) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

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*Article 2*

***Cases of succession of States in relation to internationally wrongful acts covered by the present Resolution***

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

*Article 3*

***Continuity of States***

The present articles do not apply to situations resulting from political changes within a State, including changes in the regime or name of the State. They are without prejudice to the rights and obligations stemming from an internationally wrongful act of the State whose legal personality continues or is identical to that of the predecessor State after a situation involving State succession.

**CHAPTER 2:  
COMMON RULES**

*Article 4*

***Subsidiary character of the guiding principles***

In the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the victim of the internationally wrongful act, the present guiding principles apply.

*Article 5*

***Devolution agreements and unilateral acts***

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

2. The obligations of a predecessor State arising from an internationally wrongful act committed by it before the date of a succession of States do not become the obligations of the successor State towards the injured State or subject by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

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

4. Where the injured State or subject does not accept the solution envisaged by the devolution agreement or unilateral act, good faith negotiations must be pursued by the interested States or subjects. If these negotiations do not succeed within a reasonable period of time, the solution envisaged by the relevant article of the present Resolution is applicable.

*Article 6*

***Plurality of successor States***

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

2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of the State succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

3. Negotiations in good faith must be pursued by the successor States. If these negotiations do not succeed within a reasonable period of time, the solution envisaged in the relevant article of the present Resolution is applicable.

*Article 7*

***Interested States or subjects***

For the purposes of Articles 5 and 6, “interested States or subjects” are:

- a) in the case of an internationally wrongful act committed by the predecessor State, the injured State or subject and all the successor States;
- b) in the case of an internationally wrongful act committed against the predecessor State, all the successor States.

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*Article 8*

***Internationally wrongful acts having a continuing or composite character***

***performed or completed after the date of State succession***

1. When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, it bears international responsibility for the entire period during which the act continues and remains not in conformity with the international obligation.
2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in the aggregate as a breach of an international obligation, it bears international responsibility. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.
3. The provisions of the present Article are without prejudice to any responsibility incurred by the predecessor State if it continues to exist.

*Article 9*

***Diplomatic protection***

1. A successor State may exercise diplomatic protection in respect of a person or a corporation who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.
2. A claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of the State succession by the successor State under the same conditions set out in paragraph 1.
3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In the case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. In cases in which it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 4 apply *mutatis mutandis*.

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4. Where the predecessor State continues to exist and the individual or corporation possesses both the nationality of the predecessor and the successor State, or the nationality of a third State, the question is governed by the general rules of diplomatic protection concerning dual or multiple nationality.

**CHAPTER III:  
PROVISIONS CONCERNING SPECIFIC CATEGORIES OF SUCCESSION OF  
STATES**

*Article 10*

***Transfer of part of the territory of a State***

1. With the exception of the situations referred to in paragraphs (2) and (3), the rights and obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State do not pass to the successor State when part of the territory of a State, or any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State
2. If there exists an intrinsic link between the consequences of the internationally wrongful act committed against the predecessor State and the territory transferred and/or its population, the rights arising from that act pass to the successor State.
3. If particular circumstances so require, if the author of the internationally wrongful act was an organ of the territorial unit of the predecessor State that is transferred to the successor State, the consequences of the internationally wrongful act committed by the predecessor State pass to the successor State.

*Article 11*

***Separation of parts of a State***

1. With the exception of the situations referred to in paragraphs (2) to (4), the rights and obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State do not pass to the successor State or States when a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist,
2. If there exists an intrinsic link between the consequences of the internationally wrongful act committed against the predecessor State and the territory or the population of the successor State or States, the rights arising from that act pass to the successor State or States.
3. If particular circumstances so require, or if the author of the internationally wrongful act was an organ of a territorial unit of the



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predecessor State that later became the organ of the successor State, the consequences of the internationally wrongful act committed by the predecessor State pass to the successor State.

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

5. In order to determine an equitable apportionment of the rights or obligations of the predecessor and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of the State succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

6. The internationally wrongful act of a movement, insurrectional or other, which succeeds in establishing a new State on part of the territory of the predecessor State or in a territory under its administration shall be considered an act of the new State under international law. Under these circumstances, the predecessor State bears no responsibility for the acts committed by the insurrectional or other movement.

*Article 12*

***Merger of States***

When two or more States unite and so form a new successor State, and no predecessor State continues to exist, the rights or obligations stemming from the commission of an internationally wrongful act of which a predecessor State has been the author or the injured State pass to the successor State.

*Article 13*

***Incorporation of a State into another existing State***

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

*Article 14*

***Dissolution of a State***

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

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bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs (2) and (3), to one, several or all the successor States.

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

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

*Article 15*

***Newly independent States***

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

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

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

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

\* \* \*

*L'Institut de droit international,*

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

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*Considérant* que d'autres situations impliquant des successions d'Etat pourraient émerger à l'avenir,

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

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

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

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

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

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

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

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

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

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

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

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**CHAPITRE I :**  
**DISPOSITIONS GENERALES**

*Article 1*

***Expressions employées***

- a) L'expression « succession d'Etats » s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire.
- b) L'expression « Etat prédécesseur » s'entend de l'Etat auquel un autre Etat s'est substitué à l'occasion d'une succession d'Etats.
- c) L'expression « Etat successeur » s'entend de l'Etat qui s'est substitué à un autre Etat à l'occasion d'une succession d'Etats.
- d) L'expression « date de la succession d'Etats » s'entend de la date à laquelle l'Etat successeur s'est substitué à l'Etat prédécesseur dans la responsabilité des relations internationales du territoire auquel se rapporte la succession d'Etats.
- e) L'expression « Etat nouvellement indépendant » s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales.
- f) L'expression « accords de dévolution » s'entend d'un accord conclu entre l'Etat prédécesseur et l'Etat successeur ou un mouvement de libération nationale, insurrectionnel ou autre, ou un entité ou organe qui devient ultérieurement l'organe de l'Etat successeur, stipulant que les droits et/ou obligations de l'Etat prédécesseur sont dévolus à l'Etat successeur.
- g) L'expression « fait internationalement illicite » s'entend d'un comportement consistant en une action ou une omission : (i) attribuable à l'Etat ou à un autre sujet en vertu du droit international; et (ii) constituant une violation d'une obligation internationale de l'Etat ou de l'autre sujet. La qualification du fait comme internationalement illicite relève du droit international. Une telle qualification n'est pas affectée par la qualification du même fait comme licite par le droit interne.

*Article 2*

***Cas de succession d'Etats en relation avec des faits  
internationalement illicites visés par la présente Résolution***

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

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*Article 3*

***Continuité de l'Etat***

Les présents articles ne s'appliquent pas aux situations résultant de changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat. Ils sont sans préjudice des droits et obligations qui découlent d'un fait internationalement illicite d'un Etat dont la personnalité juridique continue ou est identique avec celle de l'Etat prédécesseur après une situation qui comporte la succession d'Etats.

**CHAPITRE II :  
REGLES COMMUNES**

*Article 4*

***Caractère subsidiaire des principes directeurs***

En l'absence de solution différente convenue entre les parties concernées par la situation de succession d'Etats, y compris l'Etat lésé par le fait internationalement illicite, les présents principes directeurs s'appliquent.

*Article 5*

***Accords de dévolution et actes unilatéraux***

1. Les accords de dévolution conclus avant la date de succession d'Etats entre l'Etat prédécesseur et une entité ou mouvement de libération nationale qui représente un peuple qui a le droit de disposer de lui-même sont soumis, comme les accords conclus par les Etats intéressés après la date de succession d'Etats, aux règles relatives à la validité des traités ou du consentement des parties à être liés par ces accords, tels qu'énoncés par la Convention de Vienne sur le droit des traités. La même règle s'applique aux accords de dévolution conclus entre l'Etat prédécesseur et une de ses entités autonomes qui plus tard deviendrait un Etat successeur.
2. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis avant la date d'une succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou sujet lésé du seul fait que l'Etat prédécesseur et l'Etat successeur ont conclu un accord stipulant que lesdites obligations sont dévolues à l'Etat successeur.
3. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis avant la date d'une succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou sujet lésé du seul fait que l'Etat successeur ait accepté que lesdites obligations lui soient dévolues.
4. Lorsque l'Etat ou sujet lésé n'accepte pas la solution envisagée par l'accord de dévolution ou par l'acte unilatéral, des négociations en bonne

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foi doivent être poursuivies par les Etats ou sujets intéressés. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent de la présente résolution est applicable.

*Article 6*

***Pluralité d'Etats successeurs***

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

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

3. Des négociations en bonne foi doivent être poursuivies par les Etats Successeurs. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent de la présente résolution est applicable.

*Article 7*

***Etats ou sujets intéressés***

Aux fins des articles 5 et 6, les « Etats ou sujets intéressés » sont :

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

*Article 8*

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

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

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

3. Les dispositions du présent article sont sans préjudice de toute responsabilité qui incombe à l'Etat prédécesseur si ce dernier continue d'exister.

*Article 9*

***Protection diplomatique***

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

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

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

4. Dans les cas où l'Etat prédécesseur continue d'exister et la personne ou la société possèdent la nationalité de l'Etat prédécesseur aussi bien que celle de l'Etat successeur, ou d'un Etat tiers, la question est régie par les règles générales relatives à la protection diplomatique concernant la double ou multiple nationalité.

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**CHAPITRE III:  
DISPOSITIONS CONCERNANT DES CATEGORIES SPECIFIQUES  
DE SUCCESSION D'ETATS**

*Article 10*

***Transfert de partie du territoire d'un Etat***

1. A l'exception des situations visées par les paragraphes (2) et (3), les droits et les obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat successeur, lorsqu'une partie du territoire de l'Etat, ou tout territoire, pour lequel un Etat a la responsabilité des relations internationales, ne faisant pas partie du territoire de cet Etat, devient partie du territoire d'un autre Etat.
2. S'il existe un lien intrinsèque entre les conséquences du fait internationalement illicite commis contre l'Etat prédécesseur et le territoire transféré et/ou sa population, les droits qui découlent de ce fait passent à l'Etat successeur.
3. Si des circonstances particulières l'exigent, si l'auteur du fait internationalement illicite était un organe de l'unité territoriale de l'Etat prédécesseur qui est transféré à l'Etat successeur, les conséquences du fait internationalement illicite commis par l'Etat prédécesseur passent à l'Etat successeur.

*Article 11*

***Séparation de parties d'un Etat***

1. A l'exception des situations visées par les paragraphes 2 à 4, les droits et les obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat ou aux Etats successeurs lorsqu'une partie ou plusieurs parties du territoire d'un Etat s'en séparent pour former un ou plusieurs Etats et que l'Etat prédécesseur continue d'exister.
2. S'il existe un lien intrinsèque entre les conséquences du fait internationalement illicite commis contre l'Etat prédécesseur et le territoire ou la population de l'Etat successeur, les droits et obligations qui découlent de ce fait passent à l'Etat ou aux Etats successeurs.
3. Si des circonstances particulières l'exigent ou si l'auteur du fait internationalement illicite était un organe de l'unité territoriale de l'Etat prédécesseur qui plus tard est devenu organe de l'Etat successeur, les conséquences du fait internationalement illicite commis par l'Etat prédécesseur passent alors à l'Etat successeur.



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

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

6. Le fait internationalement illicite d'un mouvement, insurrectionnel ou autre, qui parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous son administration est considéré comme un fait de ce nouvel Etat d'après le droit international. Dans ces circonstances, l'Etat prédécesseur n'a pas de responsabilité pour des faits commis par le mouvement insurrectionnel ou autre.

*Article 12*

***Fusion d'Etats***

Lorsque deux ou plusieurs Etats s'unissent pour former un nouvel Etat sans laisser subsister d'Etat prédécesseur, les droits ou obligations qui découlent de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou la victime passent à l'Etat successeur.

*Article 13*

***Incorporation d'un Etat dans un autre Etat préexistant***

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

*Article 14*

***Dissolution d'un Etat***

1. Lorsqu'un Etat se dissout et cesse d'exister et que les parties de son territoire forment deux ou plusieurs Etats successeurs, les droits ou les obligations découlant de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou la victime passent, compte tenu du devoir de négocier et selon les circonstances mentionnées aux paragraphes 2 et 3, à l'un, plusieurs ou à tous les Etats successeurs.

2. Afin de déterminer lequel des Etats successeurs devient le titulaire des droits énoncés au paragraphe précédent, l'existence d'un lien intrinsèque

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entre les conséquences du fait internationalement illicite commis contre l'Etat prédécesseur et le territoire ou la population de l'Etat ou des Etats successeurs sera un facteur pertinent.

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

*Article 15*

***Etats nouvellement indépendants***

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

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

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

4. Les droits qui découlent d'un fait internationalement illicite commis par l'Etat prédécesseur ou un autre Etat contre un peuple bénéficiant du droit de disposer de lui-même avant la date de succession d'Etats peuvent être exercés après cette date par l'Etat nouvellement indépendant créé par ce peuple.

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**ANNEX 3**  
**COMMENTARIES BY MEMBERS OF THE COMMISSION**  
**TO THE DRAFT DISTRIBUTED ON 7 MARCH 2015**

*Comments by Mr Hafner*

**1. Some general remarks:**

1. I congratulate the Rapporteur on the work concerning State Succession in Matters of State Responsibility. And I am very grateful for reflecting some of my concerns in the new draft.

2. Again, I will refrain from commenting upon the report and confine my remarks to the 3<sup>rd</sup> draft of the Resolution of 7 March 2015 only. Generally, I reiterate my comment that a clear distinction between the succession to the rights of the injured States and the succession to the obligations arising from the unlawful act would have been preferred.

**2. Comments on the individual provisions:**

3. As to *Article 5*, I maintain my comments to the former draft article 4.

4. *Article 10 para 3*: Despite the new formulation (for which I'm grateful) the text is still not very clear: Taking into account the French text, the term "that" relates to the organ. I'm wondering whether an organ of the predecessor State can "be transferred" to a new State that has a new legal personality.

5. As to *Article 14 (Dissolution of a State)* I must confess that I have to maintain my remarks to the former draft article 13. I'm wondering how the case of the dissolution of the Austro-Hungarian Monarchy would have been solved: If the Monarchy would have been obliged to assume responsibility for WW I, to which successor state responsibility would have passed? There was no author of the internationally wrongful act that was an organ of an administrative unit of the predecessor State and later became the organ of the successor. Was there an intrinsic link between the territory of present Austria or the population of present Austria and the outbreak of WW I? In my view the decisive fact is whether the successor State disassociated itself from the wrongful act or, in the other way, derived some profit from the wrongful act. The examples presented in the report can be referred back to treaty provisions so that a general rule cannot be deduced therefrom.

*Commentaires de M. Kamto*

Toutes mes félicitations pour ton travail remarquable sur ce sujet pas aisé. Voici quelques remarques, de forme pour la plupart, sur la version française du projet de résolution. Bien entendu, il ne s'agit que de

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modestes suggestions sans prétention aucune, qu'il t'est loisible de retenir ou d'écarter. Ces suggestions sont en italiques.

**Préambule :**

§2 Dire : « .... impliquant *la* succession d'Etats... »

§4 Dire : « .... n'a pas *couvert* des questions ... »

§10 Dire : « *Attendu* que les principes de.... »

§11 Dire : « Conscients des principes de droit international .... tels que [les principes de] (supprimer ce qui est entre crochets) l'égalité des droits des peuples et ..... des droits de l'homme et des libertés fondamentales *de la personne humaine.* »

§12 Dire : « Rappelant [que] (supprimer le mot entre crochets) le respect de l'intégrité territoriale et de l'indépendance politique de tout Etat est *contenu dans* la Charte des Nations Unies, »

**Article 1 :**

Suggestion : Cet article devrait à mon avis débiter par un chapeau qui pourrait être formulé comme suit :

« *Aux fins de la présente résolution :* » (suivent la définition des différentes expressions)

La raison en est que par précaution, une définition est convenue en droit international toujours aux fins de l'instrument juridique dans lequel il est convenue afin d'éviter tout conflit avec une autre définition de la même expression dans un cadre juridique différent qui pourrait ne pas être exactement la même. Ainsi, la définition de l'expression « fait internationalement illicite » est manifestement tirée de l'article 2 des Articles de la CDI sur la responsabilité, mais elle ne lui est pas totalement fidèle puisque le (ii) parle de « constituant une violation d'une obligation internationale de l'Etat *ou de l'autre* sujet » alors que l'article 2 des Articles de la CDI s'arrête après « de l'Etat ».

b) L'expression « Etat prédécesseur » s'entend de l'Etat auquel un autre Etat s'est substitué *dans le cadre* d'une succession d'Etats.

f) L'expression « *accord de dévolution* »..... (Supprimer « s » à accord).

**Article 3 :**

Dernière ligne : Dire peut-être : « ....*après une situation de succession d'Etats* » au lieu de « ....comportant une succession d'Etats »

**Article 5 :**

1) « ... qui représente un peuple qui a le droit de disposer de lui-même... »

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Cette formulation donne l'impression qu'il y aurait des peuples qui n'ont pas le droit de disposer d'eux-mêmes. Peut-être pourrait-on dire :

« ... qui représente un peuple *dans l'exercice de son droit* de disposer de lui-même... »

4) « ...sujets intéressés... » (supprimer le « e » muet)

**Article 6 :**

3) 1<sup>ère</sup> ligne : « ... Etat successeur » (pas de majuscule à « s »)

**Article 8 :**

2) 2<sup>ème</sup> ligne : « ... définies dans *leur* ensemble... »

**Article 9 :**

2) Dire : « ... au premier paragraphe *du présent article* »

3) 4<sup>ème</sup> ligne : Dire : « ... ayant *un lien* direct ... » au lieu de « connexité directe »

La même suggestion vaut pour l'Article 15 (2) 3<sup>ème</sup> ligne.

**Article 10 :**

1) 1<sup>ère</sup> ligne : Dire : « ... paragraphe (2) et (3) *du présent article* [ou *ci-dessous*] » ;

3<sup>ème</sup> ligne : Y a-t-il une raison à la formule « ...à l'égard duquel l'Etat prédécesseur a été l'auteur... », au lieu de : « ... *dont* l'Etat prédécesseur a été l'auteur... » ?

3) 1<sup>ère</sup> ligne : Dire : « Si des circonstances particulières l'exigent, *ou* si l'auteur du fait internationalement illicite... »

2<sup>ème</sup> ligne : Dire : « ... *de l'entité* territoriale... », au lieu d' « unité territoriale »

**Article 14 :**

1) 3<sup>ème</sup> ligne : Dire : « ... paragraphe (2) et (3) *du présent article*... »

**Article 15 :**

3) Sauf explication, j'ai une réserve sur le fond de ce paragraphe, parce que dans sa formulation actuelle il pourrait entraver le droit d'un peuple à disposer de lui-même.

4) 1<sup>ère</sup> ligne : Dire : « ... un peuple *exerçant* le droit de disposer de lui-même ... », au lieu de « bénéficiant du droit de disposer de lui-même » ; le principe en droit international étant, comme nous le savons, le droit de tout peuple à disposer de lui-même.

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***Comments by Messrs Mahiou and Salmon***

N'ayant pas eu la possibilité d'assister à la session de Tokyo, j'ai relu dans l'Annuaire ton rapport préliminaire et les commentaires des membres de la Commission, puis j'ai pris connaissance du projet de résolution présenté à la session ainsi que des délibérations en séance plénière.

Je dois te dire combien j'ai apprécié la maîtrise que tu as de l'ensemble de la matière, la synthèse originale et complète à laquelle tu es parvenue, ainsi que l'autorité et l'a-propos avec lesquels tu as présenté et défendu les textes et répondu aux questions ou objections soulevées.

J'ai aussi lu avec intérêt ton rapport final. En ce qui le concerne, je ne sais pas s'il est déjà distribué à tous les membres, mais il me semble qu'il ne devrait pas reprendre l'ensemble des développements déjà exposés dans le rapport préliminaire. Il devrait se borner aux mises au point faisant suite aux discussions de Tokyo et nécessaires pour expliquer la structure et les options du projet de résolution que tu as envoyé aux membres de la commission. C'est là la procédure habituelle, ne fut-ce que pour en faciliter la lecture par les membres et pour des raisons d'économie lors de l'édition finale. Il va de soi que c'est dans ce rapport qu'il faut expliquer le pourquoi des positions prises face aux questions soulevées en plénière, ce qui peut rendre nécessaire de reprendre certains arguments déjà développés dans le rapport préliminaire.

Dans l'ensemble, je n'ai pas vraiment de remarques sur le rapport que nous n'avons pas eu l'occasion de discuter en commission depuis Tokyo. Pour le projet de résolution, en revanche, j'ai diverses suggestions que tu trouveras à la suite. Profitant que je sois en Provence, Ahmed Mahiou et moi nous sommes rencontrés à Avignon et avons mis au point le texte de ces suggestions que tu peux dès lors considérer comme nous étant communes.

Suggestions concernant le texte du projet de résolution

**Préambule**

Devrait être réduit à l'essentiel soit :

« *L'Institut de droit international,*

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

*Convaincus* de la nécessité de codifier et développer progressivement les règles relatives à la succession d'Etats en matière de

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responsabilité internationale de l'Etat, afin de garantir une plus grande sécurité juridique dans les relations internationales,

*Considérant* que le droit et l'équité imposent que soient déterminés sans lacune, après la date de succession d'Etats, à quel(s) Etat(s) incomberont les droits et des obligations qui découlent des faits internationalement illicites commis ou subis par l'Etat prédécesseur,

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

**Article 1**

La suggestion de Roy Lee de supprimer les définitions n'est pas sans bons arguments et il est vrai que les approfondissements de la question dus aux efforts personnels du rapporteur montrent que la définition de la CDI est insuffisante.

Dans le *Dictionnaire de droit international public* (2001) on avait retenu la définition suivante pour le mot "succession d'Etat" :

« Conséquences des mutations territoriales de l'État dans l'ordre juridique interne et dans l'ordre juridique international lorsque ces mutations ont pour effet de substituer un ou plusieurs État(s) (États successeurs) à un autre (État prédécesseur) dans la responsabilité des relations internationales d'un territoire et ceci que l'État prédécesseur subsiste ou disparaisse. »

Par rapport à la définition retenue au projet de résolution, cette définition aurait l'avantage de mieux couvrir plusieurs modalités du phénomène. S'agissant des territoires non autonomes, certes ils ne constituaient pas des Etats avant la succession, mais il y a néanmoins substitution d'un Etat successeur (Etat nouveau) à la puissance administrante (Etat prédécesseur).

Le texte susdit pourrait remplacer les trois premières définitions. Les autres définitions ne semblent pas soulever de difficultés.

**Article 2**

Accord avec le rapporteur pour maintenir le texte tel qu'il est.

La continuité des textes des conventions précédentes semble une justification suffisante.

**Article 3**

L'insertion, au début de l'article, de la phrase suivante

« Les présents articles ne s'appliquent pas aux situations résultant de changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat » dans un article qui a pour titre « Continuité de l'Etat »,

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suscite des interrogations.

Le but de cette phrase est de préciser que les changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat, n'affectent pas la personnalité et donc la continuité de l'Etat. Dans ces conditions, on ne peut pas dire que les situations en question échappent aux articles de la résolution, dont plusieurs d'entre eux, à commencer par l'article 3, traitent de la continuité de l'Etat.

Ce que le rapporteur veut dire n'est-il pas que « De simples changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat, n'emportent pas la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire » ou, dit plus simplement, « De simples changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat ne sont pas des faits générateurs d'une succession d'Etat ». En conséquence, comme ce sont des situations de continuité bon teint, elles *sont régies* par les articles de la résolution qui traitent de la continuité de l'Etat

Si telle est bien l'idée elle devrait trouver sa place dans l'article 1 définissant la notion de succession d'Etat ou dans un article intermédiaire entre les articles 1 et 2.

Quant à la seconde phrase de l'article 3 : “Les présents articles sont sans préjudice des droits et obligations qui découlent d'un fait internationalement illicite d'un Etat dont la personnalité juridique continue ou est identique avec celle de l'Etat prédécesseur après une situation qui comporte la succession d'Etats » ne se lirait-elle pas plus aisément sous la forme simplifiée suivante :

“Le fait générateur d'une succession d'Etat n'affecte pas les droits et obligations qui découlent d'un fait internationalement illicite d'un Etat dont la personnalité juridique continue celle de l'Etat prédécesseur ou est identique à celle de l'Etat prédécesseur.”

#### **Article 4**

En l'absence de solution différente convenue entre les parties concernées par la situation de succession d'Etats, y compris l'Etat lésé par le fait internationalement illicite, les principes directeurs mentionnés ci-après sont d'application.

Attention ! Il y a une différence entre le texte français et le texte anglais. Ce dernier utilise le mot “victim”. Ce n'est pas la même chose que “l'Etat lésé” ? ou “l'Etat victime” ? Au demeurant, plusieurs articles de la résolution traitent de situations où la victime est une personne ou une entité. Il serait sans doute souhaitable d'envisager une formule identique dans tous les cas. Soit “la victime”, soit la proposition que je fais ci-



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dessous à propos de l'article 5 : "l'Etat ou la personne ou l'entité victime du fait illicite".

**Article 5**

L'article 40 du rapport explique très clairement que, dans l'hypothèse visée au paragraphe 2, l'Etat victime est un *Etat tiers* par rapport à un traité conclu entre l'Etat prédécesseur et l'Etat successeur; auquel cas le principe *res inter alios acta* peut s'appliquer. Ne serait-il pas plus clair, par conséquent, de viser "l'Etat tiers" dans ce paragraphe. Et le texte aurait pour objet de protéger l'avis de cet Etat tiers.

Le paragraphe 2 se lirait comme suit :

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

Un paragraphe supplémentaire expliquerait que l'expression Etat tiers couvre aussi bien cet Etat que des sujets non étatiques victimes de l'acte illicite.

Le paragraphe 3 semble aussi envisager que l'Etat lésé est un Etat tiers par rapport à l'Etat prédécesseur et à l'Etat successeur et se lirait plus aisément comme suit :

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

Mais ce paragraphe demande une explication. S'agit-il de protéger l'Etat successeur de ne pas respecter son engagement comme le suggère notre confrère Lee dans ses observations ? Si c'est le cas, sur quelle justification reposerait cette rupture de l'engagement unilatéral ? Ou s'agit-il de protéger l'Etat tiers lésé qui estime avoir son mot à dire sur le changement de créancier de l'obligation ?

Une clarification s'impose.

4. Lorsque l'Etat lésé n'accepte pas la solution envisagée par l'accord de dévolution ou par l'acte unilatéral, des négociations doivent être poursuivies de bonne foi par les Etats ou sujets intéressés. Si ces négociations n'aboutissent pas dans un délai

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raisonnable, la solution envisagée par l'article pertinent de la présente résolution est applicable. » (simple modification de style)

Nouveau paragraphe 5 (pour donner une signification élargie à l'expression « Etat lésé »)

J'ignore si l'expression « injured State or subject » est correcte en anglais. En tout cas la traduction littérale en français « l'Etat ou sujet lésé » ne l'est pas. Il faut écrire ou bien « l'Etat ou le sujet lésé » ou bien « l'Etat lésé ou le sujet lésé ».

Dans l'article 39 des Articles sur la responsabilité de l'Etat pour fait internationalement illicite l'expression utilisée est "de l'Etat lésé ou de toute personne ou entité au titre de laquelle réparation est demandée"

S'en inspirant quelque peu on pourrait envisager un paragraphe 5 comme suit :

5. Dans les paragraphes 2 à 4 ci-dessus, l'expression "Etat lésé" couvre à la fois un Etat ou une personne ou entité victime du fait illicite.

Quid toutefois si la personne ou entité victime du fait illicite n'a pas la nationalité de l'Etat lésé ?

#### **Article 6**

*Paragraphe 1 :*

Votre idée ne serait-elle pas mieux exprimée comme suit :

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

*Paragraphe 3 :* lire "de bonne foi" et "successeurs"

#### **Article 8**

*Paragraphe 1 :* Remplacer les mots "il lui incombe la responsabilité internationale" par "la responsabilité internationale lui en incombe"

*Paragraphe 2 :* Remplacer les mots "il lui en incombe la responsabilité internationale" par "la responsabilité internationale lui en incombe"

#### **Article 9**

*Paragraphes 2 et 3* remplacer les mots "en l'exercice de la protection diplomatique présentée" par "présentée dans le cadre (ou dans l'exercice) de la protection diplomatique"

Les phrases révisées s'écriraient donc comme suit ;

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« 2. Une réclamation présentée par l'Etat prédécesseur dans l'exercice de la protection diplomatique peut être poursuivie après la date de la succession d'Etats par l'Etat successeur dans les mêmes conditions que celles qui sont énoncées au paragraphe premier.

3. Une réclamation présentée par un Etat dans l'exercice de la protection diplomatique contre l'Etat prédécesseur peut être poursuivie contre l'Etat successeur si l'Etat prédécesseur a cessé d'exister....

Dans la phrase suivante remplacer « continuée » par « poursuivie »

4. Dans les cas où l'Etat prédécesseur continue d'exister et lorsque la personne ou la société possèdent à la fois la nationalité de l'Etat prédécesseur et celle de l'Etat successeur, ou celle d'un Etat tiers, la question est régie par les règles relatives (supprimer « générales ») à la protection diplomatique concernant la double ou multiple nationalité.

**Article 10**

*Paragraphe 1 :*

1. A l'exception des situations visées dans les paragraphes suivants, ne passent pas à l'Etat successeur les droits et les obligations qui découlent de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou l'Etat lésé

a) dans une partie de son territoire, ou

b) dans tout territoire, ne faisant pas partie de son territoire, mais pour lequel il a la responsabilité des relations internationales,

lorsque ces territoires sont transmis à l'Etat successeur,

*Paragraphe 2 : Rédiger comme suit :*

« 2. Les droits qui découlent de la commission de ce fait illicite passent à l'Etat successeur s'il existe un lien intrinsèque entre les conséquences de ce fait et le territoire transféré, ou la population de ce territoire. »

*Paragraphe 3 : Rédiger comme suit :*

« 3. Les droits ou obligations qui découlent de la commission de ce fait illicite passent à l'Etat successeur, si l'auteur de ce fait était un organe de l'unité territoriale qui est transférée à l'Etat successeur, pourvu que des circonstances particulières l'exigent. »

(Je suppose que le mot "transféré" est au féminin, et non au masculin, et que selon l'intention du rapporteur c'est l'unité territoriale qui est transférée et non l'organe).

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Ici comme, à l'article suivant, la nature et l'objet des "circonstances particulières" demeurent un grand mystère .....

**Article 11**

Au *paragraphe 4*, il est question des "circonstances particulières indiquées aux paragraphes 2 et 3" (en réalité seul le paragraphe 3 les mentionne). En tout état de cause, le paragraphe 3 *n'indique* aucune circonstances particulières. Il se borne à en envisager l'existence. Avec leur mystère.

Au *paragraphe 5* : "produit national brut"

*Paragraphe 6* :

Plutôt que "mouvement insurrectionnel ou autre" il vaudrait mieux écrire "mouvement d'opposition ou insurrectionnel". Ces deux substantifs réunis semblent couvrir toutes les hypothèses. Ce paragraphe se lirait alors ainsi :

« 6. Le fait internationalement illicite d'un mouvement d'opposition ou insurrectionnel, lequel parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous l'administration de ce dernier, est considéré comme un fait de ce nouvel Etat d'après le droit international. En conséquence, l'Etat prédécesseur n'encourt aucune responsabilité pour des faits commis par le mouvement d'opposition ou insurrectionnel. »

**Article 14**

Fusionner comme suit les paragraphes 2 et 3

« 2. Afin de déterminer lequel des Etats successeurs devient le titulaire des droits énoncés au paragraphe précédent, les facteurs suivants seront pertinents :

- a) l'existence d'un lien intrinsèque entre les conséquences du fait internationalement illicite commis contre l'Etat prédécesseur et le territoire ou la population de l'Etat ou des Etats successeurs ;
- b) le fait que l'auteur du fait internationalement illicite a été un organe d'une unité administrative de l'Etat prédécesseur, qui est devenu ensuite un organe de l'Etat successeur. »

**Comments by Mr Mikulka**

It is a great honor and pleasure to be a member of your Commission. I wish to congratulate you and all *confrères et consœurs*, members of the Commission, on your excellent work on the topic. I am fully aware of the fact that the work entered its final stage and hope that my suggestions will not be disruptive.

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It seems to me, that the project could benefit from inclusion of two additional articles clarifying, among other things, the interaction between situations covered by the ILC Articles on Responsibility of States and situations covered by our Resolution.

The place for possible inclusion of these articles would be between current Article 7 and Article 8. Their possible inclusion would not require any change in other articles. Their content is in harmony with past discussions as they are reflected in the Report:

**Invocation of responsibility for an international wrongful act committed before the date of succession of States.**

**Article A**

1. The internationally wrongful act committed before the date of succession of States by a predecessor State is attributable to this State.
2. If the predecessor State continues to exist, the injured State may even after the date of succession invoke international responsibility of this State and request from it a reparation for the damage caused by such internationally wrongful act.
3. Notwithstanding provisions of para 1 and 2, and as provided in the following articles, the injured State may request reparation for the injury caused by an internationally wrongful act of the predecessor State also or solely from the successor State.

**Article B**

1. The predecessor State which after the date of succession of State continues to exist, may even after this date invoke international responsibility of another State for its internationally wrongful act committed before the date of succession of State and may request reparation for the injury caused by this act.
2. If the injury caused by an internationally wrongful act of a State committed before the date of succession of States against a predecessor State affected the territory or persons which, after this date are under the jurisdiction of a successor State, the successor State may request a reparation for the injury caused by such act, unless the reparation was already made good in full before the date of succession of States.

N.B. - Rules in Article A para 1 and 2 and Article B para 1 would apply mutandis. also to cases in which the international wrongful act was committed by or against a successor State that existed before the date of succession of States (cases of transfer of parts of the territory or incorporation of a State), however it is not necessary to include such article in this resolution - these situations are implicitly covered by ILC articles on Responsibility of States.

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I have few more comments on the draft Resolution that I would like to share with you and other *confrères et consœurs*:

**Article 2**

It strikes me, in connection with Articles 2 (and 3), that they are primarily exclusion clauses. There is no provision in the draft Resolution which would provide, in positive terms, what is the scope of the present Resolution/Articles. Such a provision could be very simple (something along the lines of Articles 1 of two Vienna Conventions on Succession of States), e.g.:

“The present Resolution applies to the effects of a succession of States in respect of responsibility for an internationally wrongful act committed prior to the date of succession of States by the predecessor State against a third State or by a third State against the predecessor State.”

The proposed provision could become paragraph 1 of Article 2. Current text of Article 2 would then become paragraph 2 of Article 2.

**Article 3**

In two sentences this article aims to deal with two very different issues. First sentence addresses situations where there was no succession of States, i.e. situations which are out of the scope of the Resolution. Second sentence addresses situations of State continuity in the context of succession of States. These two problems, should rather be dealt with separately.

First sentence - possible solutions include: (a) the sentence would become an independent provision - the title of this article could eventually read “Situations not covered by the present Resolution; or (b) first sentence of Article 3 would become last paragraph of Article 2, in which case the title of Article 2 would read “Scope of the present Resolution”; or (c) first sentence of Article 3 would be deleted and the problem would be explained in the report. I would prefer solution (a).

Second sentence - It seems to me that the second sentence does not correctly describe the effect of Articles on the position of a predecessor State, which after the date of succession of States continues to exist, concerning an internationally wrongful act committed prior to the date of such succession. It can't be said that these articles “are without prejudice to the rights and obligations ... of [the predecessor State]”. (Similar problem occurs also with Article 8 paragraph 3). Several articles indeed directly affect the rights and obligations of the predecessor State which continues to exist after the date of succession of States. See e.g. Art. 10(2)(3), Art.11(2-5); Art 15 2)(4). Accordingly, second sentence

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of Article 3 should be deleted. Inclusion of draft Articles A and B that I proposed earlier (see the attachment) would, among other things, address this problem).

**“Article 2: Scope of the present Resolution**

1. The present Resolution applies to the effects of a succession of States in respect of responsibility for an internationally wrongful act committed prior to the date of succession of States by the predecessor State against a third State or by a third State against the predecessor State.
2. The present Resolution applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.”

*Comment:*

The expression “third State” implies that the Resolution does not deal with consequences of an internationally wrongful act committed by the predecessor State against the successor State or vice versa (situation when both of them continue to exist after the date of succession). The expression “predecessor State” indicates that Resolution does not deal with consequences of an internationally wrongful act committed by the successor State against a third State or vice versa (situation when the successor State is not a new State born from the succession event in question). These situations are covered by the ILC Articles on International Responsibility of States.

**Article 3: Situations not covered by the present Resolution**

The present articles do not apply to situations resulting from political changes within a State, including changes in the regime or name of the State.

*Comment:*

In its two sentences Article 3 aims to deal with two very different issues. First sentence addresses situations where there was no succession of States, i.e. situations which are out of the scope of the Resolution. Second sentence addresses situations of State continuity/identity in the context of succession of States. These two problems, should rather be dealt with separately.

First sentence - possible solutions include: a) the sentence would become an independent provision - the title of this article could eventually read “Situations not covered by the present Resolution; or b) first sentence of Article 3 would become last paragraph of Article 2, in which case the title of Article 2 would read “Scope of the present Resolution”; or c) first

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sentence would be deleted and the problem would be explained in the report. My preference would be for solution a).

Second sentence - It seems that the second sentence does not correctly reflect the impact that the provisions of several articles would have on the position of a State, which after the date of succession of States preserves its international legal personality, in relation to an internationally wrongful act committed prior to the date of such succession. It can't be said that these articles "are without prejudice to the rights and obligations ... of [the predecessor State]". (Similar problem occurs also with Article 8 paragraph 3). Several articles indeed directly affect the rights and obligations of the predecessor State which continues to exist after the date of succession of States. See e.g. Art. 10(2)(3), Art. 11(2-5); Art 15(2)(4). Accordingly, the second sentence of Article 3 should be deleted (Inclusion of draft Articles A and B that I proposed earlier would, among other things, address this problem).

***Comments by Mr Lee***

I thank the Special Rapporteur for his excellent report and draft Resolution. The report has clarified many substantive issued of this complicated subject. The proposed guiding principles are very useful for states involved in this subject matter. The following are my comments on the draft resolution.

1. The Preamble does not seem to reflect the latest developments in the Commission. The Preamble explains well the gaps left behind from previous studies of state succession and state responsibility. The purposes and usefulness of the guiding principles should also be stated clearly to facilitate a better understanding of the endeavor.

2. I understand that the terms in Article 1, "succession of state", "predecessor State" and "successor state" are consistent with previous international legal instruments. The pedigree of these terms are however not very helpful as they limit to "replacement" of States, whereas your report covers different situations ranging from newly independent state, separation, transfer, incorporation, merger to dissolution and the like. The term "replacement" is, therefore, ill fitted for the purpose, irrespective of their authoritative origin. Appropriateness should be the real test. So, the definitions should be adjusted to cover the range of situations dealt with in your articles.

3. The situations referred to articles 10, 11 and 12 are not really "succession." The guiding principles in these articles may be denied on that ground, even though the principles are well founded. We should fix the definition so that they can be applied consistently.



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4. You may wish to consider leaving out the definitions all together. I realize this may be contrary to tradition. It is extremely difficult to define terms which will be able to cover complicated or divergent situations. This is the situation we now face. The definitions themselves should not become a source of confusion.

5. The phrase, “rights and obligations stemming from an internationally wrongful act”, is a key term and is used throughout the text. But in one or two places a disjunction “or” is used (see, for instance, article 6). The phrase, “any rights or obligations stemming from an internationally wrongful act,” might be helpful.

6. Situations referred to in Article 3 are not succession of states and is for this reason that the resolution does not apply. You explained this in your report but the draft articles did not bring out the issue clearly.

7. The second sentence of Article 3 raises a different point. I agree with the principle but for different reasoning. I suggest that you omit the words “after a situation involving state of succession”.

8. You raised an important point that devolution agreements (DAs) should be governed by the Vienna Convention on the Law of Treaties (VCLT). The fact that sometimes these agreements are not “inter-state” should not be an issue. VCLT is well established and most authoritative and should therefore be used to govern the legal relationship. Moreover, there is no legal instrument other than VCLT more suited for this purpose.

9. In article 5.1, you seem to limit VCLT’s application to validity and consent. I think that is too limiting. I see no harm but all the advantages in applying the whole of VCLT.

10. I do not understand the purpose of article 5.2 and 3. The current wording seems to favor successor states and provide them with a ground to challenge devolution agreements. The usual assumption may be that DAs are concluded under pressure and difficult circumstances and in most cases, favor the predecessor states. Article 5.2 and 3 open window opportunities for re-negotiation to adjust the situation. If this is the intention, a policy issue is involved. What do we prefer: status quo, change or chaos? I think “stability” is more important and the DA should be respected as a general rule. Since VCLT is applicable by reference and if there is any cause to challenge the DA, judicially it is better for the parties to proceed according to VCLT. It would be up to the parties to find ways to change by employing provisions of VCLT.

11. In this connection, you may wish to consider adding a paragraph at the end of article 5 regarding settlement of dispute and recommending that

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the application or interpretation of the DA would be subject to arbitration, unless otherwise specified in DA. This could serve two purposes: to provide a judicious way to deal with post-DA situation and to suggest the mode of arbitration which is generally favored.

12.I agree with your reasoning for the inclusion of “subject” in these articles. I have no doctrinal problem but welcome facilitating the application of international law in practical ways as you have done. By “subject” I presume you meant persons and companies as you did in article 9. It seems to me that the latter or like affected persons, companies or other entities, may be more explicit and suit the purpose better.

## II. DELIBERATIONS DE L'INSTITUT

**Première séance plénière** Lundi 24 août 2015 (matin)

La séance est ouverte à 9 h 15 sous la présidence de M. *Müllerson*.

### PROJET DE RÉSOLUTION

*L'Institut de droit international,*

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

*Considérant* que d'autres situations impliquant la succession d'Etat pourraient émerger à l'avenir,

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

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

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

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

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

*Considérant* que, le droit et l'équité imposent que soient déterminés, après la date de succession d'Etats, à quels Etats ou d'autres sujets de droit international incomberont les droits et les obligations qui découlent des faits internationalement illicites commis ou subis par l'Etat prédécesseur,

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

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

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

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

**CHAPITRE I :**  
**DISPOSITIONS GENERALES**

*Article 1:*

***Expressions employées***

Aux fins de la présente résolution :

- a) L'expression « succession d'Etats » s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire.
- b) L'expression « Etat prédécesseur » s'entend de l'Etat auquel un autre Etat s'est substitué à l'occasion d'une succession d'Etats.
- c) L'expression « Etat successeur » s'entend de l'Etat qui s'est substitué à un autre Etat à l'occasion d'une succession d'Etats.
- d) L'expression « date de la succession d'Etats » s'entend de la date à laquelle l'Etat successeur s'est substitué à l'Etat prédécesseur dans la responsabilité des relations internationales du territoire auquel se rapporte la succession d'Etats.
- e) L'expression « Etat nouvellement indépendant » s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales.
- f) L'expression « accord de dévolution » s'entend d'un accord conclu entre l'Etat prédécesseur et l'Etat successeur ou un mouvement de libération nationale, insurrectionnel ou autre, ou une entité ou un organe qui devient ultérieurement l'organe de l'Etat successeur, stipulant que les droits et/ou obligations de l'Etat prédécesseur sont dévolus à l'Etat successeur.

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

*Article 2*

***Portée de la présente résolution***

1. La présente résolution s'applique aux effets d'une succession d'Etats relatifs à la responsabilité pour un fait internationalement illicite commis avant la date de la succession d'Etats par l'Etat prédécesseur contre un Etat tiers ou un autre sujet de droit international ou par un Etat tiers ou un autre sujet de droit international contre l'Etat prédécesseur.
2. La présente résolution s'applique uniquement aux effets d'une succession d'Etats se produisant conformément au droit international, et plus particulièrement aux principes du droit international incorporés dans la Charte des Nations Unies.
3. Les présents articles ne s'appliquent pas aux situations résultant de changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat.

**CHAPITRE II :**

**REGLES COMMUNES**

*Article 3*

***Caractère subsidiaire des principes directeurs***

Les principes directeurs mentionnés ci-après sont d'application en l'absence de toute autre solution convenue entre les parties concernées par la situation de succession d'Etats, y compris l'Etat ou le sujet victime du fait internationalement illicite.

*Article 4*

***Invocation de la responsabilité pour un fait internationalement illicite commis par l'Etat prédécesseur avant la date de la succession d'Etats***

1. Le fait internationalement illicite commis avant la date d'une succession d'Etats par un Etat prédécesseur est attribuable à cet Etat.
2. Si l'Etat prédécesseur continue d'exister, l'Etat ou le sujet lésé peut, même après la date de la succession, invoquer la responsabilité internationale de l'Etat prédécesseur et lui demander réparation pour le dommage causé par ce fait internationalement illicite.

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3. Nonobstant les dispositions des paragraphes (1) et (2), l'Etat ou sujet lésé peut demander réparation également ou uniquement à l'Etat ou Etats successeurs, comme il est établi dans les articles suivants, pour le dommage causé par le fait internationalement illicite commis par l'Etat prédécesseur.

*Article 5*

***Invocation de la responsabilité pour un fait internationalement illicite commis contre l'Etat prédécesseur avant la date de la succession d'Etats***

1. L'Etat prédécesseur qui continue d'exister après la date de la succession d'Etats peut, même après cette date, invoquer la responsabilité internationale d'un autre Etat ou sujet pour les faits internationalement illicites que ce dernier aura commis avant la date de cette succession et peut demander réparation pour le dommage causé par ce fait.

2. Si le dommage causé par un fait internationalement illicite commis avant la date de la succession d'Etats contre l'Etat prédécesseur affecte le territoire ou des personnes qui, après cette date, sont sous la juridiction d'un Etat successeur, l'Etat successeur peut demander une réparation pour le dommage causé par ce fait, comme établi aux articles suivants, à moins que la réparation n'ait été intégralement obtenue avant la date de la succession d'Etats.

*Article 6*

***Accords de dévolution et actes unilatéraux***

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

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

3. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un Etat ou d'un autre sujet tiers avant la date d'une succession d'Etats ne deviennent pas

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les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat successeur ait accepté que lesdites obligations lui soient dévolues.

4. Lorsque l'Etat ou le sujet lésé n'accepte pas la solution envisagée par l'accord de dévolution ou par l'acte unilatéral, des négociations doivent être poursuivies de bonne foi par les Etats ou sujets intéressés. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent de la présente résolution est applicable.

*Article 7*

***Pluralité d'Etats successeurs***

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

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

3. Des négociations doivent être poursuivies de bonne foi par les Etats successeurs. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent de la présente résolution est applicable.

*Article 8*

***Etats ou sujets intéressés***

Aux fins des articles 6 et 7, les « Etats ou sujets intéressés » sont :

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

*Article 9*

***Faits internationalement illicites à caractère continu ou composite s'étant produits ou achevés après la date de succession d'Etats***

1. Quand un Etat successeur poursuit la violation d'une obligation internationale par un fait à caractère continu de l'Etat prédécesseur, la

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responsabilité internationale lui incombe pour toute la période durant laquelle le fait se poursuit et reste non conforme à l'obligation internationale.

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

3. Les dispositions du présent article sont sans préjudice de toute responsabilité qui incombe à l'Etat prédécesseur si ce dernier continue d'exister.

*Article 10*

***Protection diplomatique***

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

2. Une réclamation présentée par l'Etat prédécesseur dans l'exercice de la protection diplomatique peut être poursuivie après la date de la succession d'Etats par l'Etat successeur dans les mêmes conditions énoncées au paragraphe premier du présent article.

3. Une réclamation présentée par un Etat dans l'exercice de la protection diplomatique contre l'Etat prédécesseur peut être poursuivie contre l'Etat successeur si l'Etat prédécesseur a cessé d'exister. Dans le cas d'une pluralité d'Etats successeurs, la réclamation sera adressée à l'Etat successeur ayant le lien la plus direct avec le fait qui donne lieu à l'exercice de la protection diplomatique. Dans les cas où il n'est pas possible d'identifier un Etat successeur unique ayant cette lien direct, la réclamation pourra être poursuivie contre tous les Etats successeurs. Les dispositions énoncées à l'article 7 s'appliquent *mutatis mutandis*.

4. Dans les cas où l'Etat prédécesseur continue d'exister et la personne ou la société possède la nationalité de l'Etat prédécesseur et celle de l'Etat successeur, ou celle d'un Etat tiers, la question est régie par les règles relatives à la protection diplomatique concernant la double ou multiple nationalité.



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**CHAPITRE III:  
DISPOSITIONS CONCERNANT  
DES CATEGORIES SPECIFIQUES DE SUCCESSION D'ETATS**

*Article 11*

***Transfert d'une partie du territoire d'un Etat***

1. A l'exception des situations visées aux paragraphes suivants, les droits et les obligations qui découlent de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat successeur, lorsqu'une partie du territoire de l'Etat prédécesseur, ou tout territoire pour lequel celui-ci a la responsabilité des relations internationales, devient partie du territoire de l'Etat successeur.
2. Les droits qui découlent de la commission d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat successeur s'il existe un lien direct entre les conséquences de ce fait et le territoire transféré et/ou la population.
3. Si des circonstances particulières l'exigent, les obligations qui découlent de la commission d'un fait internationalement illicite passent à l'Etat successeur, si l'auteur de ce fait était un organe de l'unité territoriale qui devient l'Etat successeur.

*Article 12*

***Séparation de parties d'un Etat***

1. A l'exception des situations visées aux paragraphes (2) à (4), les droits et les obligations qui découlent de la commission d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé ne passent pas à l'Etat ou aux Etats successeurs lorsqu'une partie ou plusieurs parties du territoire d'un Etat s'en séparent pour former un ou plusieurs Etats et que l'Etat prédécesseur continue d'exister.
2. Les droits qui découlent d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat ou aux Etats successeurs s'il existe un lien direct entre les conséquences de ce fait et le territoire ou la population de l'Etat ou des Etats successeurs.
3. Si des circonstances particulières l'exigent ou si l'auteur du fait internationalement illicite était un organe de l'unité territoriale de l'Etat prédécesseur qui plus tard est devenu organe de l'Etat successeur, les obligations qui découlent du fait internationalement illicite commis par l'Etat prédécesseur passent à l'Etat successeur.
4. Si les circonstances particulières indiquées aux paragraphes 2 et 3 du présent article l'exigent, les obligations qui découlent d'un fait

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internationalement illicite commis avant la date de la succession d'Etats sont assumées par l'Etat prédécesseur et l'Etat ou les Etats successeurs.

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

6. Le fait internationalement illicite d'un mouvement, insurrectionnel ou autre, qui parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous l'administration de ce dernier est considéré comme un fait de ce nouvel Etat d'après le droit international. En conséquence, l'Etat prédécesseur n'a pas de responsabilité pour des faits commis par le mouvement insurrectionnel ou autre.

*Article 13*

***Fusion d'Etats***

Lorsque deux ou plusieurs Etats s'unissent pour former un nouvel Etat sans laisser subsister d'Etat prédécesseur, les droits ou obligations qui découlent de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou la victime passent à l'Etat successeur.

*Article 14*

***Incorporation d'un Etat dans un autre Etat préexistant***

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

*Article 15*

***Dissolution d'un Etat***

1. Lorsqu'un Etat est dissout et cesse d'exister et que les parties de son territoire forment deux ou plusieurs Etats successeurs, les droits ou les obligations découlant de la commission d'un fait internationalement illicite dont l'Etat prédécesseur a été l'auteur ou la victime passent, compte tenu du devoir de négocier et selon les circonstances mentionnées aux paragraphes (2) et (3) du présent article, à l'un, plusieurs ou à tous les Etats successeurs.

2. Afin de déterminer lequel des Etats successeurs devient le titulaire des droits énoncés au paragraphe précédent, sera un facteur pertinent l'existence d'un lien direct entre les conséquences du fait

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internationalement illicite commis contre l'Etat prédécesseur et le territoire ou la population de l'Etat ou des Etats successeurs.

3. Afin de déterminer lequel des Etats successeurs devient le titulaire des obligations énoncées au paragraphe premier, sera un facteur pertinent, outre celui énoncé au paragraphe (2), le fait que l'auteur du fait internationalement illicite ait été un organe de l'Etat prédécesseur qui est devenu ensuite un organe de l'Etat successeur.

*Article 16*

***Etats nouvellement indépendants***

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

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

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

4. Les droits qui découlent d'un fait internationalement illicite commis par l'Etat prédécesseur ou un autre Etat contre un peuple bénéficiant du droit de disposer de lui-même avant la date de succession d'Etats peuvent être exercés après cette date par l'Etat nouvellement indépendant créé par ce peuple.

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**DRAFT RESOLUTION**

*The Institute of International Law,*

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

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

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

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

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

*Bearing in mind* that cases of State succession should not constitute a reason not to implement the consequences stemming from an internationally wrongful act,

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

*Considering* that law and equity require the identification of the States or other subjects of international law to which fall, after the date of State succession, the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State,

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

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

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

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

**CHAPTER I:  
GENERAL PROVISIONS**

*Article 1*  
***Use of terms***

For the purposes of this Resolution:

- (a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory.

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- (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.
- (e) "Newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.
- (f) "Devolution agreement" means an agreement, concluded by the predecessor State and the successor State or a national liberation, insurrectional or other movement, or an entity or organ that later becomes the organ of the successor State, providing that rights and/or obligations of the predecessor State shall devolve upon the successor State.
- (g) "Internationally wrongful act" means conduct consisting of an action or omission which: (i) is attributable to the State or another subject under international law; and (ii) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

*Article 2*

***Scope of the present Resolution***

1. The present Resolution applies to the effects of a succession of States in respect of responsibility for an internationally wrongful act committed prior to the date of succession of States by the predecessor State against a third State or another subject of international law or by a third State or another subject of international law against the predecessor State.
2. The present Resolution applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.
3. The present articles do not apply to situations resulting from political changes within a State, including changes in the regime or name of the State.

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**CHAPTER II:  
COMMON RULES**

*Article 3*

***Subsidiary character of the guiding principles***

The guiding principles mentioned below apply in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or another subject victim of the internationally wrongful act.

*Article 4*

***Invocation of responsibility for an internationally wrongful act committed***

***by the predecessor State before the date of succession of States***

1. The internationally wrongful act committed before the date of succession of States by a predecessor State is attributable to this State.
2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the international responsibility of the predecessor State and request from it a reparation for the damage caused by such internationally wrongful act.
3. Notwithstanding the provisions of paragraphs (1) and (2), the injured State or subject may request reparation for the injury caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following articles.

*Article 5*

***Invocation of responsibility for an internationally wrongful act committed***

***against the predecessor State before the date of succession of States***

1. The predecessor State which after the date of succession of States continues to exist, may even after this date, invoke the international responsibility of another State or subject for its internationally wrongful act committed before the date of that succession and may request reparation for the injury caused by this act.
2. If the injury caused by an internationally wrongful act committed before the date of succession of States against a predecessor State affected the territory or persons which, after this date, are under the jurisdiction of a successor State, the successor State may request a reparation for the injury caused by such act, as provided in the following articles, unless the reparation was already made good in full before the date of succession of States.

*Article 6*

***Devolution agreements and unilateral acts***

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1. Devolution agreements concluded before the date of State succession between the predecessor State and an entity or a national liberation movement representing a people entitled to self-determination are subjected, like agreements concluded by the interested States after the date of State succession, to the rules relating to the validity of treaties or the consent of the parties to be bound by these agreements, as set out in the Vienna Convention on the Law of Treaties. The same rule applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.
2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against a third State or another subject before the date of a succession of States do not become the obligations of the successor State towards the injured State or subject by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.
3. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against a third State or another subject before the date of a succession of States do not become the obligations of the successor State towards the injured State or subject by reason only of the fact that the successor State has accepted that such obligations shall devolve upon it.
4. Where the injured State or subject does not accept the solution envisaged by the devolution agreement or unilateral act, good faith negotiations must be pursued by the interested States or subjects. If these negotiations do not succeed within a reasonable period of time, the solution envisaged by the relevant article of the present Resolution is applicable.

*Article 7*

***Plurality of successor States***

1. In cases of succession to the rights or obligations stemming from the commission of an internationally wrongful act in which it is not possible to determine a single successor State on the basis of the following articles, all the successor States will enjoy the rights or assume the obligations in an equitable manner, unless otherwise agreed by the interested States or subjects.
2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic

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product of the States concerned at the date of the State succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

3. Negotiations in good faith must be pursued by the successor States. If these negotiations do not succeed within a reasonable period of time, the solution envisaged in the relevant article of the present Resolution is applicable.

*Article 8*

***Interested States or subjects***

For the purposes of Articles 6 and 7, “interested States or subjects” are:

- (a) in the case of an internationally wrongful act committed by the predecessor State, the I injured State or subject and all the successor States;
- (b) in the case of an internationally wrongful act committed against the predecessor State, all the successor States.

*Article 9*

***Internationally wrongful acts having a continuing or composite character***

***performed or completed after the date of State succession***

1. When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, it bears international responsibility for the entire period during which the act continues and remains not in conformity with the international obligation.
2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in the aggregate as a breach of an international obligation, it bears international responsibility. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.
3. The provisions of the present Article are without prejudice to any responsibility incurred by the predecessor State if it continues to exist.

*Article 10*

***Diplomatic protection***

1. A successor State may exercise diplomatic protection in respect of a person or a corporation who is its national at the date of the official presentation of the claim but was not a national at the date of injury,



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provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.

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

3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In the case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. In cases in which it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 7 apply *mutatis mutandis*.

4. Where the predecessor State continues to exist and the individual or corporation possesses both the nationality of the predecessor and the successor State, or the nationality of a third State, the question is governed by the rules of diplomatic protection concerning dual or multiple nationality.

**CHAPTER III:  
PROVISIONS CONCERNING SPECIFIC CATEGORIES  
OF SUCCESSION OF STATES**

*Article 11*

***Transfer of part of the territory of a State***

1. With the exception of the situations referred to in the following paragraphs, the rights and obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State do not pass to the successor State when part of the territory of the predecessor State, or any territory for the international relations of which this State is responsible, becomes part of the territory of the successor State.

2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if there exists a direct link between the consequences of this act and the territory transferred and/or its population.

3. If particular circumstances so require, the obligations arising from the commission of an internationally wrongful act pass to the successor State

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if the author of this act was an organ of the territorial unit of the predecessor State that becomes the successor State.

*Article 12*

***Separation of parts of a State***

1. With the exception of the situations referred to in paragraphs (2) to (4) of the present Article, the rights and obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the injured State do not pass to the successor State or States when a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist.
2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State or States if there exists a direct link between the consequences of this act and the territory or the population of the successor State or States.
3. If particular circumstances so require, or if the author of the internationally wrongful act was an organ of a territorial unit of the predecessor State that later became the organ of the successor State, the obligations arising from the commission of that act pass to the successor State.
4. If particular circumstances indicated in paragraphs 2 and 3 of this Article so require, the obligations arising from an internationally wrongful act committed before the date of State succession are assumed by the predecessor and the successor State or States.
5. In order to determine an equitable apportionment of the rights or obligations of the predecessor and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of State succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.
6. The internationally wrongful act of a movement, insurrectional or other, which succeeds in establishing a new State on part of the territory of the predecessor State or in a territory under the administration of this latter State shall be considered an act of the new State under international law. Consequently, the predecessor State bears no responsibility for the acts committed by the insurrectional or other movement.

*Article 13*

***Merger of States***

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When two or more States unite and so form a new successor State, and no predecessor State continues to exist, the rights or obligations stemming from the commission of an internationally wrongful act of which a predecessor State has been the author or the injured State pass to the successor State.

*Article 14*

***Incorporation of a State into another existing State***

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

*Article 15*

***Dissolution of a State***

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the rights or obligations stemming from the commission of an internationally wrongful act in relation to which the predecessor State has been the author or the victim State pass, bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs (2) and (3) of the present Article, to one, several or all the successor States.

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

3. In order to determine which of the successor States becomes bearer of the obligations described in paragraph (1), a relevant factor will be, in addition to that mentioned in paragraph (2), the fact that the author of the internationally wrongful act was an organ of the predecessor State that later became the organ of the successor State.

*Article 16*

***Newly independent States***

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

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

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

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

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The *President* invited Mr Kohen to present his report.

Le *Rapporteur* exprime son grand plaisir de présenter à nouveau un rapport et un projet de résolution consacrés à la succession d'Etats en matière de responsabilité internationale. Il remercie les membres de la 14<sup>ème</sup> Commission de leurs riches contributions à ce projet de résolution.

Le *Rapporteur* rappelle brièvement les étapes du projet de résolution. La 14<sup>ème</sup> Commission a été créée à Bruges en 2003, son *Rapporteur* a été nommé à la suite de la session de Santiago de 2007. La Commission s'est réunie à Naples en 2009, à Rhodes en 2011 et à Tokyo en 2013. Le rapport et le projet de résolution ont été élaborés en tenant compte des commentaires des membres de la 14<sup>ème</sup> Commission sur un projet de rapport qui leur avait été adressé en mars 2015.

Le *Rapporteur* rappelle que les travaux de la Commission du droit international ne traitent pas de la question de la succession d'Etats en matière de responsabilité internationale. Les travaux conduits au sein de l'*Institut* visent ainsi à combler une lacune et à contribuer à un nécessaire éclaircissement du droit international public dans ce domaine. Il indique que l'idée générale du projet est d'éviter l'impunité et d'assurer qu'un fait internationalement illicite ne reste pas sans conséquence. Le *Rapporteur* précise avoir élargi le champ de son projet à la suite des délibérations de la session de Tokyo, afin de tenir compte de la situation des victimes non étatiques (individus, minorités, peuples, etc.).

Le *Rapporteur* précise que son projet est structuré autour de règles communes d'une part, de règles applicables à des catégories spécifiques de succession d'Etats, d'autre part. Il ajoute qu'il convient d'opérer une distinction selon que l'Etat prédécesseur continue ou cesse d'exister. Si l'Etat prédécesseur subsiste, il ne saurait en principe y avoir de succession en matière de responsabilité internationale. Dans de telles circonstances, des exceptions sont néanmoins possibles s'il existe un lien

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direct entre le fait internationalement illicite et l'Etat successeur, son territoire, ou sa population. Si l'Etat prédécesseur cesse d'exister, plusieurs critères pourront être utilisés afin d'identifier l'Etat responsable tels que l'existence d'un lien direct avec l'organe auteur du fait internationalement illicite, le territoire ou la population d'un Etat successeur.

Le Rapporteur attire l'attention des membres sur un arrêt rendu par la Cour internationale de Justice depuis la session de Tokyo. Dans l'affaire de l'*application de la Convention pour la prévention et la répression du crime de génocide (Croatie c Serbie)*, la Cour n'ayant pas conclu à la perpétration d'un génocide n'a pas eu à se prononcer sur la question d'une succession d'Etats en matière de responsabilité mais n'a pris aucune position qui permettrait de douter d'une telle possibilité.

Enfin, le Rapporteur mentionne les changements intervenus depuis la présentation de son rapport en 2013. Sur proposition de M. Mikulka, le nouveau projet de résolution inclut des dispositions de caractère général à l'article 2, paragraphe 1, et aux articles 4 et 5. Sur proposition de M. Pellet, a été supprimée du projet de résolution la disposition relative à la non-succession aux droits ou obligations découlant des mesures prises par le Conseil de sécurité en vertu du Chapitre VII de la Charte des Nations Unies. Enfin, à l'issue de la session de Tokyo, le Rapporteur a considéré pertinent d'inclure dans la disposition relative à la protection diplomatique un paragraphe traitant des situations de double nationalité (article 10, paragraphe 4).

The *President* opened the floor for discussion of the report and draft Resolution.

Mr *Alvarez*, having understood that the intention was to fill gaps in previous efforts at codification, suggested that in such case the draft Resolution make provisions equivalent to Articles 30 and 41 of the ILC Articles on State Responsibility, so as to address not only reparations but also other duties such as cessation and non-repetition.

The *Rapporteur* clarified that although the issue of reparations was one of the main problem areas, he believed that the draft Resolution did address all the consequences of internationally wrongful acts, and he would welcome suggestions if the existing text was not considered sufficient.

Mr *Frowein* questioned the rationale of restricting the scope of the Resolution to successions occurring in conformity with international law, as provided in Article 2, paragraph 2. He cited the example of the German Democratic Republic, which was created in violation of

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international law but remained in existence for 40 years. Mr Frowein recommended deleting this paragraph.

The *Rapporteur* recalled that the scope of the Resolution was extensively discussed at the Tokyo session and members expressed very different views. Article 2, paragraph 2 followed the approach taken in the Vienna Conventions of 1978 and 1983 and the Articles on State Responsibility, and he did not see the proposal as sensitive. The intention was to prevent illegal situations from claiming the benefit of rights emerging from State succession, in cases such as for instance Southern Rhodesia. It was the task of the *Institut* to foster legality. The question whether a given situation was in conformity with international law was outside the scope of the present work.

Mrs *Arsanjani*, expressing agreement with the comments and proposal made by Mr Frowein, did not believe that by deleting reference to conformity with international law the *Institut* would involve taking any judgment whether a succession was lawful or unlawful. The discussion was concerned with the consequences of succession and was not bound by the precedent of the Vienna Conventions.

Mr *Benvenisti* agreed with the views expressed by Mrs *Arsanjani* and Mr Frowein. There might be situations where a legal entity was trying to protect individuals whose rights had been violated by another country, in which cases the illegality of the creation of the entity should not affect those rights.

Mr *Tomka* voiced his appreciation for the hard work and useful report of the *Rapporteur*, and raised three issues. Firstly, he suggested that the title refer to "State succession to rights and obligations arising out of State responsibility". Secondly, calling attention to the fact that the draft Resolution was intended to set forth not hard rules but "guiding principles" as indicated in the preamble, Mr *Tomka* favoured retaining Article 2, paragraph 2, in the interests of strengthening legality. Finally, he emphasized that the recent *dicta* of the International Court of Justice in the case *Croatia v. Serbia* should not be perceived as an authoritative statement on state succession in matters of State responsibility. While the Court considered the law of State succession in upholding its jurisdiction *ratione temporis*, it found that no breach of the Genocide Convention had been established so it did not have to address the issue of succession to responsibility.

Mr *Tomuschat* commended the excellent work of the *Rapporteur*. He supported in particular the proposition that there should be State succession in matters of State responsibility and suggested this be mentioned in the preamble. He agreed with the proposal by Mr Frowein

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that the Resolution not be restricted to situations compliant with international law. Account had to be taken of the principle of effectiveness. In some situations, such as Kosovo, doubts over legality may persist for several years and third States needed rules that could be relied upon.

Mr *Koroma* noted that the text of Article 2, paragraph 2 was consistent with the requirement in international law that the principles of the UN Charter be observed. The principle of effectiveness, while relevant, was not the only concern. Mr *Koroma* favoured maintaining this paragraph.

The *Rapporteur* noted that most of the general remarks concerned the question whether the scope of the draft Resolution should be limited as set forth in Article 2, paragraph 2, and emphasized that in his view such a limitation was necessary in order to promote respect for international law. Regarding the comment made by Mr *Benvenisti*, the *Rapporteur* confirmed that the draft took into account that the victims of violations may be individuals. Turning to the comments of Mr *Tomka*, the *Rapporteur* noted that the draft Resolution was not exclusively based on State practice and the logic was to avoid that any internationally wrongful act be without consequences. He confirmed his understanding that the Court in its February 2015 Judgment had left open the possibility of State succession to obligations arising from internationally wrongful acts. In response to the remarks of Mr *Tomuschat*, the *Rapporteur* noted that the principle of effectiveness was taken into account in the preamble, with the text “*Bearing in mind* that cases of State succession should not constitute a reason not to implement the consequences stemming from an internationally wrongful act.”

The *President* underscored that international law had to be observed even in situations the creation of which was illegal. Turning to the article-by-article discussion of the draft Resolution, the *President* invited comments on draft Article 1, beginning with the *Rapporteur*.

Le *Rapporteur* explique que l'article 1 du projet de résolution définit les termes employés et repose très largement sur les définitions retenues par la Commission du droit international ou dans la pratique conventionnelle des Etats en matière de responsabilité internationale et de succession d'Etats.

Mr *Basedow* drew attention to the increasing occurrence of issues concerning States in the absence of any territorial organization, and questioned whether the definition of State succession should be limited with reference to territory.

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The *Rapporteur* clarified that the draft Resolution adopted the definition of State succession found in the relevant instruments, all of which refer to responsibility for the international relations of a given territory.

Mr *Lee* doubted whether an approach based on existing definitions could successfully fill gaps in previous efforts at codification, and called for careful consideration of the potential ambiguities in the definitions. By way of example he contrasted the definition of State succession as “replacement of one State by another” with situations going beyond replacement, such as merger, transfer, and dissolution.

The *Rapporteur* clarified that the draft defined State succession as “replacement of one State by another in responsibility for international relations,” which would cover situations going beyond replacement. This was the definition adopted by the ILC, which intended to cover all possibilities of State succession.

M. *Mahiou* considère qu’il pourrait être pertinent de s’interroger sur l’inclusion de dispositions relatives au règlement des différends. Selon lui, les références à l’obligation de négocier de bonne foi incluses à l’article 6, paragraphe 4, et à l’article 7, paragraphe 3, ne permettent pas de régler les éventuelles difficultés nées d’un différend persistant relatif à la succession d’Etats en matière de responsabilité.

Le *Rapporteur* indique que les dispositions visées par M. *Mahiou* ont été insérées à l’issue des discussions lors de la session de Tokyo. Il s’agit de considérer que l’autonomie de la volonté prime mais qu’en l’absence d’accord entre les parties impliquées, des négociations de bonne foi devraient être conduites. Si celles-ci ne permettent pas d’atteindre un accord, les dispositions de la résolution s’appliqueront. Le *Rapporteur* se montre défavorable à l’idée d’inclure une disposition relative au règlement des différends dans la mesure où la raison d’être de l’*Institut* est de formuler des propositions normatives, et non de se muer en commission de codification.

Sir *Kenneth Keith* drew attention to the limitations inherent in considering definitions in advance of the substantive text. It was his understanding that the Commission would need to review the definitions once the substance had been considered. For example, Article 4, paragraph 2, applied “if the predecessor State continues to exist” whereas it appeared from Article 1, paragraph (b), that by definition the “predecessor State” ceased to exist since it was “replaced by another State on the occurrence of a succession”.

Mr *Rao* joined his colleagues in congratulating the *Rapporteur* for his lucid report. He concurred with the remarks of Mr *Mahiou*. Noting that it



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was not within the ambit of the Resolution to propose a method of dispute settlement, Mr Rao asked to whom the guidance in Article 7, paragraph 2, was intended to be addressed.

Mme *Infante Caffi* estime que la référence à la conduite de bonne foi des négociations faite à l'article 7 n'est pas totalement convaincante. Elle affirme que si le principe est que les dispositions de la résolution sont applicables aux situations dans lesquelles les négociations ont échoué, il suffit de le mentionner sans nécessité de qualifier l'esprit dans lequel les négociations ont pu être menées par les parties ou l'une d'entre elles.

The *Rapporteur*, in response to the comment by Sir Kenneth Keith, clarified that Article 1(b) referred to the replacement of the predecessor State in the State succession relationship, and did not necessarily mean that the predecessor State ceased to exist. With regard to the observations of Mrs Infante Caffi and Mr Rao on Article 7 and by Mr Mahiou on Article 6, the *Rapporteur* clarified that Chapter 3 of the draft Resolution was intended to provide common rules which would apply in the absence of agreement. Article 7, paragraph 3 referred to a duty to negotiate in good faith. There was no need to specify the reasons for which negotiations might not succeed or define when negotiations had failed.

Mr *Reisman* proposed that the phrase "the international relations" in Article 1, paragraph (a), be amended to read "their international relations".

Mr *Basedow* proposed deleting the words "of territory" from Article 1, paragraph (a).

Mr *Tomka* was of the opinion that Article 1 ought to be uncontroversial, given that paragraphs (a) through (e) were taken literally from the Vienna Conventions and paragraph (g) from the ILC Articles on State Responsibility. The only new part was paragraph (f).

Le *Rapporteur* se dit attaché à l'autorité des définitions de l'article 1 du projet de résolution dans la mesure où celles-ci sont utilisées dans tous les textes relatifs à la succession d'Etats.

Mrs *Arsanjani* proposed voting on the substantive parts of the text before voting on the use of terms.

Mr *Lee* supported the proposal of Mrs Arsanjani, for the reasons outlined by Sir Kenneth Keith, and recommended that the definitions be left open so as not to restrict the substantive text at too early a stage.

The *Rapporteur* did not object to returning to Article 1 at a later stage, although he did not anticipate any need to do so.

Mr *Abi-Saab* recalled that by tradition a draft Resolution would be discussed article by article, following which the Commission would make

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amendments where necessary to adapt the earlier articles to what had been agreed later.

The *President* invited the members to proceed to the vote on Article 1 of the draft Resolution.

Le Président annonce les résultats du vote à main levée sur l'article 1 : 53 voix pour, 2 voix contre et 7 abstentions. He invited the Rapporteur to present Article 2 of the draft Resolution.

Le *Rapporteur* souligne que l'article 2 relatif à la portée de la résolution a subi des modifications depuis la session de Tokyo. Il présente la disposition paragraphe par paragraphe. Le paragraphe 1 a été inséré sur proposition de M. Mikulka afin de mieux définir la portée de la résolution. Le paragraphe 2 est le plus controversé dans sa référence à la conformité de la succession d'Etats au droit international. Le paragraphe 3 porte sur les situations de continuité de l'Etat : changement de nom, changement politique interne ou changement de régime notamment. La disposition étant composite, le Rapporteur estime pleinement pertinent de la discuter paragraphe par paragraphe.

Mme *Bastid-Burdeau* s'interroge sur la formulation retenue dans le paragraphe 1 de l'article 2. La résolution porte sur les obligations découlant de la responsabilité et non sur la responsabilité elle-même, or, dans sa formulation actuelle le paragraphe 1 semble porter sur une éventuelle transmission de la responsabilité d'un Etat prédécesseur à un Etat successeur. Mme Bastid-Burdeau propose également de supprimer le terme « uniquement » du texte du paragraphe 2 de l'article 2.

Mr *Gaja* recalled the idea discussed in Tokyo that the Resolution should address not only relations between States but also relations between a State and an injured party other than a State. It was not simple to make such an extension and might not be possible in a short formula if this also covered individuals. With regard to individuals, it would be preferable to include a "without prejudice" clause.

M. *Ranjeva* regrette que le paragraphe 1 de l'article 2 limite le champ d'application de la résolution aux situations de responsabilité pour fait internationalement illicite qui ne couvriraient pas l'ensemble des questions de responsabilité susceptibles de se poser dans un contexte de successions d'Etats. Il propose en outre de modifier le texte en substituant le terme « survenu » à celui de « commis ».

Le *Secrétaire général* salue la richesse des discussions des membres mais considère que cela ne relève pas du vote.

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The *President* recalled that Article 1 had been adopted subject to later revision for specific reasons. He did not foresee a need for the draft to be returned to the Commission.

Mrs *Xue* questioned whether the text was ready for voting if questions remained as to its content and requested clarification in this regard.

M. *Salmon* suggère de maintenir la discussion paragraphe par paragraphe et souhaiterait connaître la position du Rapporteur sur l'observation formulée par Mme Bastid-Burdeau.

M. *Abi-Saab* souhaiterait clarifier les termes du projet de résolution. Celui-ci doit porter sur la transmission des obligations nées d'une responsabilité pour fait internationalement illicite. Il relève l'intérêt de l'intervention de M. Ranjeva sur laquelle il souhaite que le Rapporteur apporte des clarifications.

M. *Tomuschat* appuie la proposition formulée par Mme Bastid-Burdeau consistant à supprimer le terme « uniquement » dans le libellé du paragraphe 2 de l'article 2.

Le *Président* indique que cela concerne le paragraphe 2 de l'article 2 et non son paragraphe 1, objet de la discussion.

Mme *Bastid-Burdeau* rappelle qu'il est admis qu'à la suite des travaux en commission, les membres participant à la séance plénière puissent proposer des modifications de rédaction. En ce sens, elle souscrit pleinement à l'observation de Mme *Xue*.

Le *Rapporteur* réserve sa réponse aux observations portant sur le paragraphe 2 de l'article 2. Concernant le paragraphe 1, en réponse à l'observation de Mme Bastid-Burdeau, le Rapporteur relève que l'expression « effets de la succession » est évidemment fondamentale et permet d'assurer la cohérence du projet avec l'idée générale de la 14<sup>ème</sup> Commission qui vise à traiter de la succession aux droits et aux obligations découlant de la responsabilité et non de la transmission de la responsabilité elle-même. Il est favorable au maintien de la formulation du paragraphe 1 de l'article 1 dont il considère qu'elle ne génère pas d'ambiguïté.

The Rapporteur noted that applicability of the draft Resolution to actors other than States could be achieved by use of the word "subjects".

Il rappelle qu'il a été convenu à Tokyo de traiter exclusivement des conséquences du fait internationalement illicite en excluant du champ du projet les situations de responsabilité objective (liability). Ce rappel fait, le Rapporteur affirme n'avoir aucune réticence à suivre la proposition de M. Ranjeva de remplacer « fait internationalement illicite commis » par « fait internationalement illicite survenu ».

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Mme *Bastid-Burdeau* s'interroge sur la terminologie retenue au paragraphe 2 de l'article 2. Elle propose de privilégier le terme « conséquences » à celui d'« effets », comme cela est le cas dans les travaux de la Commission du droit international.

Le *Rapporteur* n'élève aucune objection à cette proposition terminologique.

Mrs *Arsanjani* observed that Article 2, paragraph 1 referred without qualification to the effect of a State succession in terms of responsibility without qualification, and that the Rapporteur might wish to introduce the phrase from the preamble, so as to refer not to responsibility in general but to rights and obligations arising out of State succession.

M. *Ranjeva* remercie le Rapporteur des explications apportées sur la décision prise lors de la session de Tokyo.

Mr *Tomka* observed that the draft was rightly limited to issues arising out of internationally wrongful acts. There was a proposal to restrict the effect to consequences. If the Resolution was inspired by the two Vienna Conventions for definitions, the term "effects" in Article 2, paragraph 1, ought to be amended to as to refer to "rights and obligations" rather than "responsibility" arising out of an internationally wrongful act. This would address the question raised by Mrs Bastid-Burdeau and would be in harmony with the other texts.

Mr *Oxman* suggested that the scope of the Resolution could be extended to subjects of international law other than States by providing in Article 2 that "The present Resolution applies *mutatis mutandis* to other subjects of international law." The proposed amendment was not intended to result in any change of substance.

The *Rapporteur* accepted the proposal of Mr Tomka. He considered that the amendment suggested by Mr Oxman risked causing more problems than it would solve.

Mr *Gaja* enquired what solution was envisaged in cases where individuals were regarded as injured and their State of nationality concluded a devolution agreement. He reiterated his earlier proposal regarding the inclusion of a "without prejudice" clause concerning individuals.

Mr *Koroma* requested clarification of the meaning of the word "effects" in the first sentence of Article 2, paragraph 1.

The *Rapporteur* proposed that the question raised by Mr Gaja be considered in connection with Article 6, which was concerned with the position of individuals. In response to the question from Mr Koroma, he clarified that the word "effects" signified the consequences of an

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internationally wrongful act, in the sense of the rights and obligations arising therefrom.

Mrs *Xue* observed that the main question on Article 2, paragraph 1, concerned the phrase “by a third State or another subject of international law”. This part determined the scope of the Resolution as a whole and was perhaps the more appropriate place to address the question of State obligations towards individuals.

The *Rapporteur* emphasized that the term “another subject” of international law was open and included any non-state actor recognized by international law, including but not limited to individuals. A predecessor State might be the author or the victim of an internationally wrongful act.

Mrs *Xue* recalled that for an individual act to give rise to international responsibility, two conditions had to be fulfilled, namely, attribution of the act to a State under international law, and breach of an obligation by that State. This being the case that one could not speak of international individual responsibility.

Mr *Meron* shared the view expressed by Mrs *Xue*.

Mr *Tomka* noted that the draft Resolution was not limited to responsibility of States under international law but also addressed responsibility of other actors such as international organizations. Very rarely would the responsibility of individuals arise. The question was whether to limit the Resolution to State responsibility or to speak of international responsibility generally, and his understanding was that the intention established in Tokyo was for the broader scope.

The *Rapporteur* confirmed that the idea discussed in Tokyo was to define the scope of the draft Resolution broadly. The term “another subject” of international law referred not only to individuals. The two types of situation foreseen were, firstly where an individual was the victim of an internationally wrongful act such as breach of a human rights obligation, and secondly where the predecessor State was the victim of an internationally wrongful act and the author was a non-State actor such as a national liberation movement. He was willing to accept the amendment proposed by Mr *Tomka* and believed that this could allow a consensus. As amended, the relevant part of Article 2, paragraph 1, would read: “The present Resolution applies to the effects of a succession of States in respect of rights and obligations arising out of an internationally wrongful act”.

The *President* invited further comments on Article 2, paragraph 2.

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The *Rapporteur* stated that he was in favour of maintaining Article 2, paragraph 2.

Le *Secrétaire général* insiste sur la nécessité d'avoir un texte pour pouvoir procéder au vote.

Le *Rapporteur* indique pouvoir donner lecture du texte dans la mesure où les modifications proposées sont mineures.

M. *Salmon* souligne la nécessité d'avoir le texte en langues française et anglaise avant de procéder au vote.

Le *Rapporteur* ne croit pas utile de porter à nouveau le texte en commission et serait favorable à une discussion article par article en session plénière, suivi d'un vote sur les orientations générales avant que soit présenté un texte dans les deux langues.

Le *Secrétaire général* estime possible que l'assemblée exprime son accord sur les principes qui font l'objet de la discussion mais ne peut envisager de faire procéder à un vote sans texte.

Mr *Tomka* considered that it was settled practice for minor amendments to be made orally.

Le *Rapporteur* propose d'amender le texte de l'article 2, paragraphe 1, dans les termes suivants : « La présente résolution s'applique aux effets d'une succession d'Etats relatifs aux droits et obligations découlant de la responsabilité pour un fait internationalement illicite survenu avant la date de la succession d'Etats par l'Etat prédécesseur contre un Etat tiers ou un autre sujet de droit international ou par un Etat tiers ou un autre sujet de droit international contre l'Etat prédécesseur ».

The *Rapporteur* read the relevant part as amended in English as follows: "The present Resolution applies to the effects of a succession of States with regard to the consequences of an internationally wrongful act".

Mr *Tomka* suggested that the amendment of the English text read: "The present Resolution applies to the effects of a succession of States in respect of rights and obligations arising out of an internationally wrongful act".

The *President* invited comments upon article 2, paragraph 2, beginning with the *Rapporteur*.

Le *Rapporteur* relève que l'article 2, paragraphe 2 est l'objet de controverses. Les membres de l'Institut semblent fortement divisés, certains souhaitant supprimer la disposition tandis que d'autres défendent son maintien. Face à des positions inconciliables il semble nécessaire de procéder à un vote.

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Mme *Bastid-Burdeau* suggère de supprimer le terme « uniquement », « only » dans la version anglaise, afin de ne pas exclure du champ d'application de la résolution, les situations dans lesquelles la légalité du processus de succession est discutable. Cette position permettrait de maintenir la disposition tout en ne se limitant pas aux situations dans laquelle la succession d'Etats est conforme au droit international.

Mr *Frowein* emphasized that while a succession as such could be in violation of international law, this did not mean that it was not a succession of States.

Mr *Reisman* considered that suppressing the word “only” would not remove the objection that had been raised in relation to Article 2, paragraph 2. In his view, nothing would be lost by omitting this paragraph. However, it was problematic to assume that there would be a critical moment at which the lawfulness or otherwise of a succession would be authoritatively established.

Mr *Rao* expressed willingness to take direction from the Rapporteur. The aim was to ensure that the necessary consequences flowed from a serious violation of international law. To that end, deleting the paragraph was not a satisfactory solution.

Mr *Meron* supported the proposal to delete the paragraph. There was otherwise a risk, in every case of succession, that the question whether the condition of lawfulness had been satisfied or not would be discussed endlessly.

Mr *Tomka*, in response to the proposal to delete the word “only”, considered that the text should follow the position adopted in the Vienna Conventions. The issue was under discussion in certain pending investment arbitrations following recent territorial changes. In one such case, it was being argued on the basis of recent jurisprudence of the International Court of Justice that the succession in question was in conformity with international law.

M. *Gannagé* rappelle que dans la tradition de l'Institut les amendements sont déposés par écrit afin de juger au mieux de l'opportunité de les adopter.

Mr *Abi-Saab* was of the view that adverse inferences would be drawn if the Resolution did not include the requirement of lawfulness that was included in the Vienna Conventions. It was doubtful whether there could be any practical effect to obligations contrary to the United Nations Charter.

Mme *Bastid-Burdeau* rappelle que la résolution de l'Institut relative à la « succession d'Etats en matière de biens et de dettes » adoptée lors de

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la session de Vancouver (2001) n'inclut pas de référence à la régularité de la succession d'Etats au regard du droit international.

Mrs *Arsanjani* observed that whereas the International Law Commission was concerned only with States, the *Institut* was at liberty to take a more general approach and ought to seek to inspire international law, rather than limiting itself to the position taken in the Vienna Conventions more than 30 years previously.

The *Rapporteur* reiterated that in his view, the rules ought only to be applicable if the succession was in accordance with international law. He agreed that adverse inferences would be drawn from an omission and the *Institut* would hence convey a strong message either way, by deciding to include a condition of lawfulness or by deciding not to do so.

M. *Salmon* reconnaît avoir hésité sur la position à adopter sur cette disposition mais estime qu'il convient de conserver le texte qui correspond à une vision défendant le droit international. Il affirme que dans la pratique, les sujets souhaitant l'application de la résolution défendront la conformité de la succession au droit international. Ce serait en dernier ressort au juge de se prononcer.

Mme *Bastid-Burdeau* propose une solution de compromis en s'inspirant de la résolution de l'Institut sur la « succession d'Etats en matière de biens et de dettes » adoptée lors de la session de Vancouver (2001). Le préambule de cette résolution énonce : « *affirmant* que toute situation conduisant à une succession d'Etats devrait se dérouler en pleine conformité avec le droit international public, et surtout avec le droit humanitaire et avec les droits de l'homme ». Mme Bastid-Burdeau estime que la référence à la conformité de la succession au droit international en des termes semblables dans le préambule pourrait favoriser la recherche d'un consensus entre les membres de l'Institut.

The *President* commended the suggestion.

Mr *Koroma* was willing to accept the proposed amendment as a minimum, instead of deleting the paragraph. Contemporary international law demanded that State succession be consistent with international law.

The *Rapporteur* expressed a preference for the “maximum” formulation as drafted.

Mr *Abi-Saab* cautioned that mandatory provisions of international law were not limited to human rights and international humanitarian law, so referring only to these latter would be unduly restrictive. At a minimum, reference ought to be made to the principles of the Charter of the United Nations, this being the constitutional instrument of international law.



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Mr *Rao* recalled that in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the International Court of Justice clearly stated that South Africa was responsible for all the consequences of its management of a territory notwithstanding the illegality of the situation. He did not see why the same could not be said in the Resolution.

M. *Salmon* propose de voter tout d'abord sur le retrait du terme « uniquement », « only » dans la version anglaise, ensuite sur la suppression de l'article 2, paragraphe 2, sur le maintien de cette disposition enfin.

Mr *Meron* expressed difficulty with deleting the word "only".

The *President* invited the members to proceed to the vote on the proposal to delete Article 2, paragraph 2. Il annonce les résultats du vote à main levée : 22 voix pour, 33 voix contre et 8 abstentions.

Dame *Rosalyn Higgins* requested that the vote be taken once more, since the result did not accord with her impression of the number of hands raised and it was possible that a mistake could have been made in the counting.

The *President* recalled that in any event, the plenary would vote on the draft text at a further stage. He added that there was no sense in voting on the proposed deletion of the word "only".

Dame *Rosalyn Higgins* did not insist upon a recount.

La séance est levée à 12 h 10.

**Quatrième séance plénière** Mardi 25 août 2015 (après-midi)

La séance est ouverte à 14 h 10 sous la présidence de M. *Müllerson*.

Le *Secrétaire général* annonce que la séance sera consacrée à la poursuite de la discussion du projet de résolution sur la succession d'Etats en matière de responsabilité internationale.

Le *Président* donne la parole au Rapporteur pour présenter le paragraphe 3 de l'article 2.

Le *Rapporteur* indique que cette disposition portant sur les situations de continuité de l'Etat n'a pas entraîné de vifs débats lors de la session de Tokyo.

The *President* reminded the plenary that the debate was to focus on questions of substance, issues of terminology being reserved for the Drafting Committee.

M. *Salmon* concède qu'un changement de régime n'affecte pas l'Etat lui-même mais relève qu'il n'est pas rare dans la pratique de reconnaître

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que l'Etat affecté par le changement interne est continuateur de l'Etat prédécesseur, il ne devrait donc pas être possible de dire que les articles de la résolution ne s'appliquent pas à ces situations.

Le *Rapporteur* rappelle que la résolution indique clairement s'appliquer aux situations de succession d'Etat. Il est pertinent de mentionner tout aussi clairement que les articles ne sauraient s'appliquer aux situations résultant de changements internes.

M. *Salmon* propose de modifier la version française du texte en indiquant que les articles de la résolution ne « régissent pas les situations » et non qu'ils « ne s'appliquent pas aux situations » découlant de changements internes.

Mr *Gaja* noted that in a situation resulting from “political changes within a State” it would by definition be incorrect to speak of succession. He found this paragraph unnecessary and proposed its deletion.

Le *Rapporteur* rappelle qu'a été souligné, lors de la présentation du premier rapport à Tokyo, le caractère fondamental de la distinction entre succession d'Etats et continuité de l'Etat. Il serait ainsi souhaitable de maintenir la disposition.

Le *Président* invite le Rapporteur à présenter l'article 3 du projet de résolution.

Le *Rapporteur* explique que l'article 3 consacré au caractère subsidiaire des principes directeurs met en lumière sa volonté, soutenue par la 14<sup>ème</sup> Commission, de réaffirmer le principe de l'autonomie de la volonté des sujets impliqués dans une succession d'Etats pour déterminer les conséquences de cette succession sur les droits et obligations découlant d'un fait internationalement illicite.

Le *Président* constate l'absence de débat sur l'article 3 et invite le Rapporteur à présenter l'article 4.

Le *Rapporteur* précise que les articles 4 et 5 ont été proposés par M. Mikulka dans le but d'expliquer le contenu général des dispositions de la résolution. L'article 4 porte sur la situation dans laquelle un Etat prédécesseur a commis un fait internationalement illicite.

Mr *Gaja* proposed that Article 4, paragraph 1, be deleted for two reasons. Firstly, the proposition was self-evident and therefore superfluous. Secondly, in the field of State responsibility, the term “attribution” was used to refer to conduct, not to responsibility.

Mr *Rao* supported the proposition to delete Article 4, paragraph 1.

Le *Rapporteur* reconnaît que la proposition de M. Gaja mérite réflexion mais soutient qu'il n'est sans doute pas inutile de porter à la

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connaissance des destinataires extérieurs de la résolution à l'*Institut* des principes dont l'existence apparaîtrait évidente à ses membres.

M. *Basedow*, constatant que l'article 4 traite de situations dans lesquelles plus d'un Etat peut devoir assumer les conséquences d'un fait internationalement illicite, s'interroge sur la possibilité d'insérer dans la résolution une disposition relative à la responsabilité solidaire.

Le *Rapporteur* souligne que cette question est traitée dans le chapitre III de la résolution.

Le *Président* invite le Rapporteur à présenter l'article 5 du projet de résolution.

Le *Rapporteur* indique que l'article 5 est le pendant de l'article 4. Il vise la situation dans laquelle le fait internationalement illicite est commis contre l'Etat prédécesseur.

M. *Sicilianos* relève que les articles 4 et 5 constituent un ensemble et que l'on ne peut envisager de supprimer l'une des deux dispositions.

Mr *Frowein* was in favour of Article 5, paragraph 2, which represented an important development of international law. In paragraph 1, he proposed deleting the words "even after this date", because the qualifying term "after the date of succession" is present above in the same paragraph.

Le *Rapporteur* reconnaît que c'est une possibilité.

Mr *Gaja* pointed out that Article 5 had no equivalent to Article 4, paragraph 1, hence the inclusion of the term "even after this date" in Article 5. In order to maintain a parallel between Articles 4 and 5, he recommended deleting Article 4, paragraph 1.

Le *Rapporteur* estime possible, afin d'assurer l'équilibre entre les articles 4 et 5, de supprimer le paragraphe 1 de l'article 4.

Mr *Koroma* invited the Rapporteur to clarify how Article 5, paragraph 1, would apply in the case of Sudan and South Sudan. The draft Resolution set forth rules that were intended to be of general application. He would therefore find it helpful to consider how the rules would apply to a given situation. Based on the first two lines of Article 5, paragraph 1, it appeared that South Sudan might be able to bring a claim against Sudan.

The *Rapporteur* emphasised that he would refrain from presenting his views on specific situations. South Sudan was an instance of separation of part of a State, where the predecessor State continued to exist. The general rule was that if the predecessor State continued to exist, it could invoke the international responsibility of another State in respect of pre-

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succession acts causing injury to the former. Hence, Article 5 would relate to internationally wrongful acts committed against Sudan prior to the existence of South Sudan as a sovereign State. As such, the relationship between Sudan and South Sudan fell outside the scope of Article 5.

M. *Mahiou* suggère que la situation évoquée par M. Koroma pourrait être couverte par l'article 12 portant sur la séparation de parties d'un Etat.

Le *Rapporteur* soutient cette suggestion.

M. *Salmon* regretterait que le paragraphe 1 de l'article 4 soit supprimé et souhaite, afin d'assurer l'équilibre des articles 4 et 5, que soit inséré un paragraphe équivalent à l'article 5.

Le *Président* invite le rapporteur à présenter l'article 6.

Le *Rapporteur* indique que l'article 6 porte sur les accords de dévolution et les actes unilatéraux. L'esprit général de la disposition est d'assurer que les intérêts des victimes soient préservés et que ne leurs soient pas opposés des accords ou des actes unilatéraux par lesquels l'Etat prédécesseur et le ou les Etats successeurs ont organisé la succession en matière de conséquences du fait internationalement illicite. Le paragraphe 1 porte sur la validité de ces accords et vise à assurer leur soumission aux règles coutumières de validité des traités codifiées dans la Convention de Vienne de 1969. Le paragraphe 2 a trait aux accords conclus entre Etat prédécesseur et Etat successeur. Le paragraphe 3 porte sur les actes unilatéraux adoptés par l'Etat successeur. Le paragraphe 4 pose une obligation de négociation de bonne foi lorsque le sujet lésé n'accepte pas la solution envisagée par l'accord de dévolution ou l'acte unilatéral.

Mr *Gaja* noted that the reference to "the rules relating to the validity of treaties [...] as set out in the Vienna Convention on the Law of Treaties" was incorrect because the Vienna Convention was not applicable to the agreements in question. He proposed that the text referred to "the customary rules of international law" reflected in the Vienna Convention.

Further, Mr *Gaja* reiterated his earlier proposal to include a without prejudice clause in respect of injury caused to individuals. Difficulties could arise where a State had committed internationally wrongful acts against its own citizens or nationals of a third State. The question was whether decisive effect would be given to the consent of the individuals concerned, or whether the consent of the State of nationality was sufficient.

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M. *Frowein* exprime son accord avec les paragraphes 1, 3 et 4 de l'article 6, mais s'interroge sur la nécessité de maintenir le paragraphe 2 qui n'est que l'expression du principe de non opposabilité d'un accord ou d'un acte à un tiers.

The *Rapporteur* turned first to the question raised by Mr Gaja. The question whether a State could decide on the rights of its own citizens was beyond the scope of the discussion. The important principle was that the victim of an internationally wrongful act could not be imposed upon, either unilaterally or by the agreement of third parties.

Mr *Gaja* maintained that a "without prejudice" clause would be preferable if the draft Resolution could not appropriately address the relations between injured States and injured individuals.

M. *Torres Bernárdez* estime que ces difficultés trouvent leur origine dans la décision prise à Tokyo d'intégrer dans le projet de résolution des références aux sujets autres que les Etats.

Mrs *Arsanjani* expressed confusion as to what was intended by reference to "other subjects". The term did not appear to be consistently used throughout the Resolution. In relation to the national of a third State, where the successor and predecessor States had an agreement, the question arose whether the consent necessary for such agreement to have effect was the consent of the individual or of their State of nationality.

Sir *Kenneth Keith* observed some inconsistency between the definitions of "devolution agreement" in Article 6, paragraphs 1 and 2, and in Article 1, paragraph (f). He reiterated his earlier suggestion that the definitions in Article 1 be revisited once the discussion of the substantive terms was complete. Sufficiently precise definitions of the terms would avoid unnecessary repetition and promote consistency in their use, which would also address the first point raised by Mrs *Arsanjani*.

The *Rapporteur* concurred with the suggestion made by Sir *Kenneth Keith*. In relation to the substantive definitions, he noted that Article 1, paragraph (f), set forth the general definition, which would include devolution agreements between States. Article 6 was concerned with devolution agreements of which only one party was a State. Its purpose was to provide for analogous application of the rules reflected in the Vienna Convention to relationships between States and non-State actors.

In relation to the point made by Mr Gaja concerning the Vienna Convention on the Law of Treaties, he considered that the draft made an adequate distinction between the Vienna Convention as such on the one

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hand, and on the other, the “rules relating to the validity of treaties” set out therein.

Le Rapporteur reconnaît que le texte du paragraphe 2 de l'article 6 peut sembler évident aux membres de l'Institut mais que les sujets auxquels la résolution s'adressera peuvent ne pas avoir le même niveau de connaissance des principes du droit international.

In response to the question raised by Mrs Arsanjani, the Rapporteur recalled that in Tokyo, the Commission was tasked with making provision for a situation where the victim was an individual subject. Whether the consent of the individual or the State of nationality was relevant would be governed by the law of human rights, if applicable, or of diplomatic protection.

M. *Mahiou* croit possible d'éviter les ambiguïtés soulevées par les membres de l'Institut en harmonisant les références aux entités qui ne sont pas des Etats. Dans le paragraphe 1 sont visés « une entité ou un mouvement de libération nationale qui représente un peuple », alors que les paragraphes 2 et 3 visent « un autre sujet tiers ». Il suggère de reprendre l'expression utilisée au paragraphe 1 dans les paragraphes 2 et 3.

Le *Rapporteur* souligne que les paragraphes 1 d'une part, et 2 et 3 d'autre part, ont des objets bien différents. Le paragraphe 1 porte sur la nécessité d'assurer l'applicabilité des règles coutumières codifiées par la Convention de Vienne sur le droit des traités, tandis que les deux paragraphes suivants portent sur l'inopposabilité aux tiers des accords ou actes unilatéraux organisant les conséquences du fait internationalement illicite dans le contexte d'une succession d'Etats.

Mr *Lee* called attention to an apparent gap in Article 6, paragraphs 2 and 3. The effect of the text seemed to favour the new State in that it left a window of opportunity for a devolution agreement to be renegotiated. Mr *Lee* questioned the policy behind this approach and cautioned against allowing legally established situations to be destabilised.

Le *Président* invite le Rapporteur à présenter l'article 7.

Le *Rapporteur* indique que l'article 7 se réfère aux problèmes rencontrés lorsqu'existe une pluralité d'Etats successeurs.

M. *Basedow* regrette que cette disposition ne porte que sur l'hypothèse de la pluralité d'Etats successeurs et ne vise pas plus particulièrement les questions concernant l'existence d'une pluralité d'Etats débiteurs.

Mr *Hafner* expressed satisfaction with the work of the Commission and offered an interpretation in relation to the term “otherwise agreed by

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the interested State or subjects". This provision applied not only to written agreements but also to agreements that could be inferred from the conduct of a State. The provision was of particular relevance in post-conflict situations where the conclusion of a treaty was unlikely.

Le *Rapporteur* souligne que la référence faite à la pluralité d'Etats successeurs à l'article 7 s'inscrit dans une disposition générale. Les articles 12 et 15 de la résolution traitent de cette question dans le détail. Le Rapporteur reconnaît le grand intérêt épistémologique de la question de la responsabilité solidaire en droit international.

M. *Sicilianos* suggère, afin de dissiper certaines ambiguïtés, de remplacer à l'article 6, paragraphe 4, et à l'article 7, paragraphe 3, l'expression « solution envisagée par l'article pertinent de la présente résolution » par celle de « solution envisagée par l'article pertinent du chapitre III de la présente résolution ».

Le *Rapporteur* trouve la suggestion très pertinente.

Le *Président* invite le Rapporteur à présenter l'article 8.

Le *Rapporteur* relève que l'article 8 pose problème dans la mesure où des modifications opérées avant et après la session de Tokyo ont supprimé de l'article 7 les termes auxquels renvoie l'article 8. Il convient donc de supprimer l'article 8 et de reporter son contenu soit à l'article 1 portant sur les définitions, soit à l'article 6 qu'il complète.

Mr *Hafner* suggested adding the text of Article 8 as a separate paragraph of Article 6, since it only applied thereto.

The *Rapporteur* agreed with the suggestion.

The *President* opened the floor for discussion of Article 9.

Le *Rapporteur* indique que l'article 9 porte sur les faits internationalement illicites à caractère continu ou composite. Il est directement inspiré des commentaires de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite.

Mr *Reisman* requested clarification of the policy behind Article 9, paragraph 1. Where a successor State moved for a period of time to terminate a continuing wrongful act, he queried whether such a State would be responsible even if acting in good faith.

The *Rapporteur* referred to the Report at paragraph 110 onwards. The underlying principle was that a successor State would be directly responsible for the continuation of an internationally wrongful act commenced before the succession. Continuation of an internationally wrongful act was one of three ways in which the International Law

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Commission envisaged that a successor State might acknowledge and adopt conduct as its own. This was a matter of attribution rather than of succession. The specific case of a successor State that ceased to exist was addressed by Chapter III of the draft Resolution.

M. *Pellet* exprime son désaccord quand aux termes employés pour définir le fait internationalement illicite de caractère continu et le fait internationalement illicite de caractère composite.

Le *Rapporteur* rappelle que les termes utilisés sont distincts afin de rendre compte des différences entre les deux notions.

M. *Pellet* reconnaît la différence entre les deux notions mais suggère que dans la version anglaise du paragraphe 2 « completes a serie of actions » soit remplacé par « performs a serie of actions ». La version française devrait également être corrigée.

Mme *Bastid-Burdeau* suggère de remplacer dans la version française de l'article 9, paragraphe 2, le verbe « complète » par « parachève » pour rendre compte de la notion de fait internationalement illicite de caractère composite.

Mr *Koroma* perceived a contrast between paragraph 1, which referred to “an act of the predecessor State” and paragraph 2, which referred to “actions or omissions”, and sought an explanation for this difference.

Mr *Cançado Trindade* expressed support for the drafting of Article 9, paragraph 1, with one amendment which is related to the first point which has just been made by Mr Koroma. Preliminarily, he acknowledged that the formulation of Article 9, paragraph 1, was in conformity with the practice of supervisory organs of UN human rights treaty-bodies as well as with the case law of international human rights tribunals – for example, in cases of enforced disappearances of persons, and of continuing lack of access to justice. Such cases involved wrongful acts of a continuing character, amounting to *continuing violations* of international obligations concerning the safeguard of the rights of the human person. The situation should be addressed accordingly, as a *continuing situation* rather than a simple act. Therefore, he suggested to amend Article 9, paragraph 1, so that it would read: “When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, it bears international responsibility for the entire period during which *this situation lasts* and remains not in conformity with the international obligation”.

The *President* welcomed the suggestions of improvements in the form of specific drafting amendments, preferably in written form.



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Le *Secrétaire* général rappelle que cela est la pratique.

M. *Salmon* souligne que les formules retenues sont celles utilisées dans le cadre de la Commission du droit international et qu'il serait préférable de s'y conformer.

Le *Secrétaire général* souscrit à la remarque de M. *Salmon*.

Le *Rapporteur* reconnaît avoir utilisé les travaux en langues française et anglaise de la Commission du droit international et considère souhaitable de maintenir des formules semblables à celles de la CDI.

Turning to the point raised by Mr Koroma, the Rapporteur added that consistency of terminology was the reason for which Article 9, paragraph 1 employed the word "act". The reference to "actions and omissions" was for the purpose of describing internationally wrongful acts having a composite character.

Le *Président* invite le Rapporteur à présenter l'article 10.

Le *Rapporteur* explique que l'article 10 porte sur la protection diplomatique. Le paragraphe 1 traite de la situation dans laquelle l'Etat successeur présente pour la première fois une réclamation en protection diplomatique si un sujet de droit ayant antérieurement la nationalité de l'Etat prédécesseur est désormais un national de l'Etat successeur. Le paragraphe 2 traite de la situation dans laquelle l'Etat successeur maintient une action en protection diplomatique qui avait été initiée par l'Etat prédécesseur. Le paragraphe 3 régit la situation dans laquelle une action en protection diplomatique était dirigée contre l'Etat prédécesseur avant la date de la succession. Le paragraphe 4, inséré à la suite de la session de Tokyo, traite de l'action en protection diplomatique en faveur de sujets à nationalités multiples.

Mr *Reisman* observed that paragraph 4 envisaged multiple nationality not only of individuals but also of corporations. While the former was a feature of contemporary life, the latter was strikingly unusual.

The *Rapporteur* agreed that the prospect was unlikely, but did not see any reason to think that such a case might not arise.

Mr *Reisman* anticipated that leaving open the possibility might tempt certain lawyers to be inventive.

Le *Président* invite M. Rao, premier Vice-Président, à assurer la présidence durant la suite de la discussion sur le projet de résolution.

La séance reprend à 16 h 15 sous la présidence de M. Rao, premier Vice-Président.

The *President* opened the debate on Chapter III.

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Le *Rapporteur* souligne que l'article 11 est le premier du troisième chapitre de la résolution. Ce chapitre a pour objet de présenter les règles concernant des catégories spécifiques de succession d'Etats. L'article 11 traite de la situation de transfert d'une partie du territoire d'un Etat à un Etat successeur. La règle générale posée au paragraphe 1 est qu'il n'y a pas de succession. Le paragraphe 2 énonce qu'il peut y avoir succession s'il existe un lien direct entre les conséquences du fait internationalement illicite et le territoire transféré et/ou sa population. Le paragraphe 3 énonce qu'il peut y avoir succession si l'auteur du fait internationalement illicite était un organe de l'unité territoriale qui devient l'Etat successeur. Le Rapporteur précise que ce sont de possibles exceptions mais qu'il n'est pas indispensable qu'elles s'appliquent.

Mr *Frowein* found that the reference to "act in relation to which the predecessor State has been the author or the injured State" was rather confusing.

The *Rapporteur* clarified that the alternatives were where the predecessor State was either the author or the injured State.

The *President* noted that this was not an issue of substance and might be left to the Drafting Committee.

Mr *Kazazi* suggested that the text read "act in relation to which the predecessor State has been either the author or the injured State".

The *Rapporteur* agreed with the suggestion.

The *President* invited the Rapporteur to introduce Article 12.

Le *Rapporteur* explique que l'article 12 traite de la séparation de parties d'un Etat pour constituer un ou plusieurs Etats et que l'Etat prédécesseur subsiste. La règle générale est la non succession mais le Rapporteur relève que des exceptions sont possibles. Il peut y avoir succession s'il existe, aux termes du paragraphe 2, un lien direct entre les conséquences du fait internationalement illicite et le territoire ou la population de l'Etat ou des Etats successeurs ou si, aux termes du paragraphe 3, l'auteur de ce fait était un organe de l'unité territoriale de l'Etat prédécesseur et il est devenu un organe de l'Etat successeur. Les paragraphes 4 et 5 ont été ajoutés à Tokyo et visent la situation dans laquelle l'Etat prédécesseur et l'Etat successeurs doivent assumer ensemble les conséquences du fait internationalement illicite en recherchant une répartition équitable. Enfin, le Rapporteur présente le paragraphe 6 qui reprend les principes sur les mouvements insurrectionnels parvenant à créer un nouvel Etat énoncés par la Commission du droit international à l'article 10, paragraphe 2 des articles

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de codification du droit de la responsabilité de l'Etat pour fait internationalement illicite.

The *President* suggested that the word “either” be included in the third line of paragraph 1 consistently with the amendment made to Article 11, paragraph 1.

M. *Salmon* suggère de substituer la formule « soit l'auteur, soit l'Etat lésé » à « l'auteur ou l'Etat lésé » au paragraphe 1 de l'article 12.

Mr *Frowein* perceived a difference between Article 11, paragraph 3, applying “if the circumstances so require”, and Article 12, paragraph 3, which included a second alternative in the case of “an organ of a territorial unit of the predecessor State that later became the organ of the successor State”. It was not clear why the consequences following from this second alternative were expressed as an obligatory rule.

The *Rapporteur* distinguished cases of transfer of territory from one State to the other, where responsibility would follow accordingly, from cases of separation, where the range of possible outcomes was broader and there was a need for a more elaborated provision. Whether such a distinction was necessary was a question not of terminology but of scope.

Mr *Hafner* proffered an interpretation of the term “direct link” in Article 12, paragraph 2: where a successor State disassociated itself with the predecessor State, or took an attitude towards the latter that was otherwise negative, this was not a “direct link”. The term “direct link” signified a positive connection.

Mr *Gaja* observed that one could not assume that the transfer in question took place by agreement.

The *Rapporteur* explained that in general, a transfer of territory from one State to another took place by agreement.

The *President* shared the view that a distinction should be made between a situation where territory was transferred as a whole, on the one hand, and, on the other, that in which a territory was divided, but was unsure whether he properly understood the difference between Article 11, paragraph 3, and Article 12, paragraph 3.

Sir *Kenneth Keith* proposed that the text of this paragraph be amended to read “an organ of the successor State” which would align it better with the French.

M. *Torres Bernárdez* souligne que si dans les deux cas subsiste un Etat prédécesseur, dans l'un apparaît un nouvel Etat, tandis que dans l'autre il y a un transfert d'une partie de territoire à un Etat existant.

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Le *Rapporteur* considère pertinent d'insérer les modifications terminologiques suggérées par Sir Keith. Il s'interroge sur la nécessité de donner au paragraphe 3 de l'article 12 une rédaction semblable à celle du paragraphe 3 de l'article 11 et propose d'examiner cette question avec les membres de la 14<sup>ème</sup> Commission.

Mr *Basedow* noted that the issue joint and several liability, which he had mentioned previously, recurred in relation to Article 12, paragraphs 4 and 5, and that he had made a drafting suggestion in writing which he hoped would be of assistance.

Mr *Reisman* suggested that a comma follow the phrase "administration of this latter State" in paragraph 6.

The *President* invited comments upon Article 13.

Le *Rapporteur* estime que l'article 13 ne devrait pas soulever beaucoup de difficultés. Lorsque deux Etats disparaissent pour former un nouvel Etat, il y a succession des droits et obligations découlant d'un fait internationalement illicite.

Sir *Kenneth Keith* pointed out the recurrence of the phrase "has been the author or the injured State" which was to be amended as previously discussed in relation to Articles 11 and 12.

The *President* invited remarks on Article 14.

Le *Rapporteur* considère que l'article 14 ne devrait pas poser plus de difficultés. Lorsqu'un Etat disparaît en étant incorporé dans un Etat préexistant, les droits et obligations découlant d'un fait internationalement illicite passent à l'Etat successeur.

The *President* recalled that the phrase "has been the author or the injured State" was to be amended as previously discussed.

Mr *Koroma* requested that the Drafting Committee give further consideration to the phrase "has been either the author or the injured State".

The *President* invited comments on Article 15.

Le *Rapporteur* explique que cette disposition a trait à la dissolution d'un Etat. La règle générale est que les droits ou obligations découlant du fait internationalement illicite passent de l'Etat prédécesseurs à l'Etat ou aux Etats successeurs. Les paragraphes 2 et 3 portent sur l'identification de plusieurs Etats successeurs.

Mr *Frowein* contrasted the phrasing of Article 15, paragraph 3, with the second alternative in Article 12, paragraph 3. The former referred only to "a relative factor" rather than an obligatory rule and the reason for this difference was not clear.

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Mr *Reisman* found the reference to “a relevant factor” in Article 15, paragraph 2, to be infelicitous. It was not clear why reference was not made here to the much richer criteria to be taken into account according to Article 7.

The *Rapporteur*, responding to the comment made by Mr Frowein, preferred to refer to the Commission the question as to whether different consequences should follow as a rule in cases of separation or dissolution.

Mr *Hafner* ventured a response to the point raised by Mr Reisman. Article 7 addressed situations where responsibility was being apportioned between several States, whereas Article 15 identified whether one State or the other was responsible, and there was nothing to be distributed or divided. These distinct processes warranted differential treatment.

Mr *Reisman* remained unconvinced by the term “a relevant factor”. In the interests of certainty, the rule ought to specify what the other relevant factors were, and Article 7 seemed to provide a helpful list.

Mr *Basedow* put forward the further suggestion that Article 15, paragraph 2, dealt only with a determination of rights, whereas Article 7, paragraph 3, and Article 12, paragraph 3, were concerned with the assignment of rights and obligations. In the case of obligations, more flexibility was necessary.

Mr *Torres Bernárdez* expressed agreement with the suggestion of Mr Basedow.

Mrs *Arsanjani* agreed with Mr Reisman that there was an apparently unwarranted division between Article 7 and Article 15. This did not appear to result from one being concerned with rights and the other with obligations. Article 7 provided criteria for the division both of rights and of obligations. Article 15 referred to rights in paragraph 2 and obligations in paragraph 3. She suggested that the phrase “a relevant factor will be” be augmented to read, “in addition the criteria referred to in Article 7, a further relevant factor will be”.

The *Rapporteur* supported the explanation mentioned by Mr Hafner. The question in a situation of dissolution was whether one State or the other was the bearer of the relevant rights and obligations. This could be contrasted with the question of how rights and responsibilities were allocated between several successor States.

Mr *Reisman* proposed that Article 15, paragraph 3, be amended so as either to specify all relevant factors, or alternatively to refer to “the” relevant factor. This would provide the necessary guidance to those applying the rule.

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The *President* invited the *Rapporteur* and the Commission to take the point into consideration. He opened the floor for comments on Article 16.

Le *Rapporteur* présente l'article 16 traitant des Etats nouvellement indépendants. La règle générale exprimée au paragraphe 1 est l'absence de succession aux obligations découlant d'un fait internationalement illicite commis par l'Etat prédécesseur. Le paragraphe 2 régit la possible succession aux droits découlant d'un fait internationalement illicite. Le paragraphe 3 correspond à l'article 10, paragraphe 2 des articles sur la codification du droit de la responsabilité de l'Etat pour fait internationalement illicite concernant les mouvements insurrectionnels. Enfin, le paragraphe 4 traite de l'hypothèse d'un peuple parvenant à constituer un Etat nouvellement indépendant, ayant été victime d'un fait internationalement illicite antérieurement à l'indépendance.

M. *Basedow* s'interroge sur la différence entre un Etat nouvellement indépendant et la situation de séparation d'une partie du territoire d'un Etat visé à l'article 12 de la résolution.

Le *Rapporteur* rappelle que cette distinction, reposant sur le statut juridique du territoire antérieurement à la succession, est exprimée de manière constante par la Commission du droit international et reprise dans les deux Conventions de Vienne de 1978 et 1983.

Mr *Kazazi* found that there was a difference in terminology introduced in Article 16, which referred to the "passing" of rights and obligations and to the "exercise" of rights. He recommended that the Drafting Committee seek to achieve consistency of terminology.

Mr *Lee* invited a careful review of the terms of Article 16, paragraph 3. There appeared to be a logical gap between the first and second sentences. There needed to be a clear link between the consequences of an internationally wrongful act and the question of attribution.

The *Rapporteur* appreciated the need for a coherent link between attribution on the one hand and consequences on the other.

M. *Salmon* exprime la nécessité de discuter également les termes du préambule de la résolution.

The *President* invited observations on the preamble.

Le *Rapporteur* explique que le préambule a été modifié depuis la session de Tokyo. Son objet principal est d'indiquer la volonté de l'*Institut* de combler une lacune laissée par les travaux de codification de la Commission du droit international. Le *Rapporteur* rappelle que son projet est guidé par l'idée qu'un fait internationalement illicite ne doit pas rester sans conséquences. Le préambule reprend les idées incorporées

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dans les conventions de Vienne de 1978 et 1983 en matière de succession d'Etats, dans les travaux de codification de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite et dans le préambule de la résolution de l'*Institut* adopté à Vancouver (2001) sur la succession d'Etats en matière de biens et de dettes.

M. *Salmon* reconnaît qu'il y a beaucoup à dire mais regrette que le préambule soit si long et propose de supprimer les trois premiers considérants.

Mr *Koroma* supported the proposal by Mr Salmon.

Mrs *Infante Caffi* requested clarification as to the intended meaning of the reference to "law and equity" in the eighth preambular paragraph.

M. *Gannagé* se montre favorable au maintien de la référence à l'équité dans la résolution.

Mr *Bogdan* recalled that the notion of equity as something extraneous to the law was rooted in the common law system and had no direct civil law equivalent. The modern development of international law now included equity. In this sense, a reference to "law and equity" was somewhat tautologous.

The *President* considered that the question whether law "included" equity was a separate and substantive proposition.

The *Rapporteur* envisaged that the Commission could potentially improve the eighth preambular paragraph.

The *President* declared the article-by-article discussion closed, and thanked the Members for the many valuable points made. The Commission would have the opportunity to review all the suggestions made, including such further proposed amendments as Members wished to submit in writing. The plenary would then proceed to discuss and vote upon the amended draft.

La séance est levée à 17 h 40.

**Sixième séance plénière**

Vendredi 28 août 2015 (matin)

La séance est ouverte à 9 h 10 sous la présidence de M. *Müllerson*.

The *President* informed the Members that the Secretary-General had a short announcement to make.

Le *Secrétaire général* tient à signaler officiellement la présence de deux nouveaux membres associés : Mme Pinto et M. Nolte.

Il annonce qu'à présent, le reste de la session portera essentiellement sur les travaux de la 14<sup>ème</sup> Commission, espérant qu'ils pourront aboutir. Il

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rappelle que si certains membres entendent faire des amendements, ils doivent le faire par écrit, aucun amendement verbal n'étant acceptable.

The *President* announced that he would first give the floor to Mr Wolfrum in order for him to present a brief update on the work of the 12<sup>th</sup> Commission.

Mr *Wolfrum*, speaking as Rapporteur of the 12<sup>th</sup> Commission, recalled that after the very rich debate of the Tallinn Session, the Commission had agreed to meet by the end of March 2016, in order to produce a new text by July 2016. He informed the plenary that the Commission would have an intersessional meeting in December 2016, and the Rapporteur expected that a draft Resolution would be ready for the next session of the *Institut*.

The *President* thanked Mr Wolfrum for his short intervention, and gave the floor to Mr Kohen, Rapporteur of the 14<sup>th</sup> Commission. He recalled that the text of the revised draft Resolution was available in two languages.

Le *Rapporteur* rappelle que, suite à la dernière séance plénière, la Commission s'est réunie et a discuté des propositions qui avaient été faites. Deux propositions ont en outre été transmises par écrit : celle de M. Basedow et celle de M. Mikulka, qui n'étaient pas présents mais sont membres de la Commission, et ont évidemment suivi les débats et l'avancée du projet par voie électronique. La plus importante a trait à l'inclusion dans la résolution de la notion de responsabilité solidaire. Toutefois, la Commission ne peut admettre cette responsabilité de manière absolue : elle est permise par la résolution, mais pas en toutes circonstances.

Le Rapporteur est en outre très reconnaissant du travail du comité de rédaction, sur les versions française et anglaise du projet de résolution.

**PROJET DE RESOLUTION REVISE 1**

*L'Institut de droit international,*

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

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



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

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

*Considérant* que, le droit et l'équité imposent que soient déterminés, après la date de succession d'Etats, à quels Etats ou d'autres sujets de droit international incomberont les droits et les obligations qui découlent des faits internationalement illicites commis ou subis par l'Etat prédécesseur,

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

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

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

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

CHAPITRE I :

DISPOSITIONS GENERALES

*Article 1*

***Expressions employées***

Aux fins de la présente résolution :

- a) L'expression « succession d'Etats » s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire.
- b) L'expression « Etat prédécesseur » s'entend de l'Etat auquel un autre Etat s'est substitué à l'occasion d'une succession d'Etats.
- c) L'expression « Etat successeur » s'entend de l'Etat qui s'est substitué à un autre Etat à l'occasion d'une succession d'Etats.
- d) L'expression « date de la succession d'Etats » s'entend de la date à laquelle l'Etat successeur s'est substitué à l'Etat prédécesseur dans la

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responsabilité des relations internationales du territoire auquel se rapporte la succession d'Etats.

- e) L'expression « Etat nouvellement indépendant » s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales.
- f) L'expression « accord de dévolution » s'entend d'un accord conclu entre l'Etat prédécesseur et l'Etat successeur ou un mouvement de libération nationale, insurrectionnel ou autre, ou une entité ou un organe qui devient ultérieurement l'organe de l'Etat successeur, stipulant que les droits et/ou obligations de l'Etat prédécesseur sont dévolus à l'Etat successeur.
- g) L'expression « fait internationalement illicite » s'entend d'un comportement consistant en une action ou une omission : (i) attribuable à l'Etat ou à un autre sujet en vertu du droit international; et (ii) constituant une violation d'une obligation internationale de l'Etat ou de l'autre sujet. La qualification du fait comme internationalement illicite relève du droit international.
- h) L'expression « responsabilité internationale » s'entend des conséquences juridiques d'un fait internationalement illicite.

*Article 2*

***Portée de la présente résolution***

1. La présente résolution s'applique aux effets d'une succession d'Etats relatifs aux droits et obligations qui découlent d'un fait internationalement illicite commis par l'Etat prédécesseur contre un autre Etat ou un autre sujet de droit international avant la date de la succession d'Etats ou commis par un Etat ou un autre sujet de droit international contre l'Etat prédécesseur avant cette date.
2. La présente résolution s'applique uniquement aux effets d'une succession d'Etats se produisant conformément au droit international, et plus particulièrement aux principes du droit international incorporés dans la Charte des Nations Unies.
3. Les présents articles ne régissent pas les situations résultant de changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat.

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**CHAPITRE II :  
REGLES COMMUNES**

*Article 3*

***Caractère subsidiaire des principes directeurs***

Les principes directeurs mentionnés ci-après sont d'application en l'absence de toute autre solution convenue entre les parties concernées par la situation de succession d'Etats, y compris l'Etat ou le sujet lésé par le fait internationalement illicite.

*Article 4*

***Invocation de la responsabilité pour un fait internationalement illicite commis par l'Etat prédécesseur avant la date de la succession d'Etats***

1. Le fait internationalement illicite commis avant la date d'une succession d'Etats par un Etat prédécesseur est attribuable à cet Etat.
2. Si l'Etat prédécesseur continue d'exister, l'Etat ou le sujet lésé peut, même après la date de la succession, invoquer la responsabilité internationale de l'Etat prédécesseur pour le fait internationalement illicite qu'il a commis avant la date de la succession et lui demander réparation pour le préjudice causé par ce fait internationalement illicite.
3. Conformément aux articles suivants, l'Etat ou le sujet lésé peut demander réparation également ou uniquement à l'Etat ou Etats successeurs pour le préjudice causé par le fait internationalement illicite commis par l'Etat prédécesseur.

*Article 5*

***Invocation de la responsabilité pour un fait internationalement illicite commis contre l'Etat prédécesseur avant la date de la succession d'Etats***

1. L'Etat prédécesseur qui continue d'exister après la date de la succession d'Etats peut invoquer la responsabilité internationale pour le fait internationalement illicite commis à son égard avant cette date par autre Etat ou sujet de droit international et peut demander réparation pour le préjudice causé par ce fait.
2. Si le préjudice causé par un fait internationalement illicite commis avant la date de la succession d'Etats contre l'Etat prédécesseur affecte le territoire ou des personnes qui, après cette date, sont sous la juridiction d'un Etat successeur, l'Etat successeur peut demander une réparation pour le préjudice causé par ce fait, conformément aux articles suivants, à moins que la réparation n'ait été intégralement obtenue avant la date de la succession d'Etats.

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*Article 6*

***Accords de dévolution et actes unilatéraux***

1. Les accords de dévolution conclus avant la date de succession d'Etats entre l'Etat prédécesseur et une entité ou mouvement de libération nationale qui représente un peuple ayant le droit de disposer de lui-même, de même que les accords conclus par les Etats intéressés après la date de succession d'Etats, sont soumis aux règles relatives au consentement des parties et à la validité des traités, telles qu'énoncées par la Convention de Vienne sur le droit des traités. Le même principe s'applique aux accords de dévolution conclus entre l'Etat prédécesseur et une de ses entités autonomes qui deviendrait plus tard un Etat successeur.
2. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un autre Etat ou d'un autre sujet de droit international avant la date de la succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat prédécesseur et l'Etat successeur ont conclu un accord stipulant que lesdites obligations sont dévolues à l'Etat successeur.
3. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un autre Etat ou d'un autre sujet de droit international avant la date de la succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat successeur ait accepté que lesdites obligations lui soient dévolues.
4. Lorsque l'Etat lésé ou le sujet de droit international lésé n'accepte pas la solution envisagée par l'accord de dévolution ou par l'acte unilatéral, des négociations doivent être poursuivies de bonne foi par les Etats ou sujets intéressés. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent du chapitre III de la présente résolution est applicable.

*Article 7*

***Pluralité d'Etats successeurs***

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

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

3. Des négociations doivent être poursuivies de bonne foi par les Etats successeurs en vue d'aboutir à une solution dans un délai raisonnable.

*Article 8*

***Etats ou sujets de droit international intéressés***

Aux fins des articles 6 et 7, les « Etats ou sujets de droit international intéressés » sont :

- a) dans le cas d'un fait internationalement illicite commis par l'Etat prédécesseur, l'Etat lésé ou le sujet de droit international lésé et tous les Etats successeurs ;
- b) dans le cas d'un fait internationalement illicite subi par l'Etat prédécesseur, tous les Etats successeurs.

*Article 9*

***Faits internationalement illicites à caractère continu ou composite s'étant produits ou achevés après la date de la succession d'Etats***

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

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

3. Les dispositions du présent article sont sans préjudice de toute responsabilité qui incombe à l'Etat prédécesseur s'il continue d'exister.

*Article 10*

***Protection diplomatique***

1. Un Etat successeur est en droit d'exercer la protection diplomatique à l'égard d'une personne ou d'une société qui a sa nationalité à la date de la

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

2. Une réclamation présentée par l'État prédécesseur dans l'exercice de la protection diplomatique peut être poursuivie après la date de la succession d'États par l'État successeur dans les mêmes conditions énoncées au paragraphe premier du présent article.

3. Une réclamation présentée par un État dans l'exercice de la protection diplomatique contre l'État prédécesseur peut être poursuivie contre l'État successeur si l'État prédécesseur a cessé d'exister. Dans le cas d'une pluralité d'États successeurs, la réclamation sera adressée à l'État successeur ayant le lien la plus direct avec le fait qui donne lieu à l'exercice de la protection diplomatique. S'il n'est pas possible d'identifier un État successeur unique ayant ce lien direct, la réclamation pourra être poursuivie contre tous les États successeurs. Les dispositions énoncées à l'article 7 s'appliquent *mutatis mutandis*.

4. Lorsque l'État prédécesseur continue d'exister et la personne ou la société possède la nationalité de l'État prédécesseur et celle de l'État successeur, ou celle d'un État tiers, la question est régie par les règles relatives à la protection diplomatique concernant la double ou multiple nationalité.

**CHAPITRE III:**  
**DISPOSITIONS CONCERNANT DES CATEGORIES**  
**SPECIFIQUES DE SUCCESSION D'ÉTATS**

*Article 11*

***Transfert d'une partie du territoire d'un Etat***

1. A l'exception des situations visées aux paragraphes suivants, les droits et les obligations qui découlent d'un fait internationalement illicite à l'égard auquel l'État prédécesseur a été soit l'auteur soit l'État lésé, ne passent pas à l'État successeur, lorsqu'une partie du territoire de l'État prédécesseur, ou tout territoire pour lequel celui-ci a la responsabilité des relations internationales, devient partie du territoire de l'État successeur.

2. Les droits qui découlent d'un fait internationalement illicite commis contre l'État prédécesseur passent à l'État successeur s'il existe un lien direct entre les conséquences de ce fait et le territoire transféré et/ou la population.

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3. Si des circonstances particulières l'exigent, les obligations qui découlent d'un fait internationalement illicite passent à l'Etat successeur, pourvu que l'auteur de ce fait ait été un organe de l'unité territoriale qui plus tard est devenu un organe de l'Etat successeur.

*Article 12*

***Séparation de parties d'un Etat***

1. A l'exception des situations visées aux paragraphes 2 à 4, les droits et les obligations qui découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé ne passent pas à l'Etat ou aux Etats successeurs lorsqu'une partie ou plusieurs parties du territoire d'un Etat s'en séparent pour former un ou plusieurs Etats et que l'Etat prédécesseur continue d'exister.

2. Les droits qui découlent d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat ou aux Etats successeurs s'il existe un lien direct entre les conséquences de ce fait et le territoire ou la population de l'Etat ou des Etats successeurs.

3. Si des circonstances particulières l'exigent, les obligations qui découlent du fait internationalement illicite commis par l'Etat prédécesseur passent à l'Etat successeur pourvu que l'auteur du fait internationalement illicite ait été un organe de l'unité territoriale de l'Etat prédécesseur qui plus tard est devenu organe de l'Etat successeur.

4. Si les circonstances particulières indiquées aux paragraphes 2 et 3 du présent article l'exigent, les obligations qui découlent d'un fait internationalement illicite commis avant la date de la succession d'Etats sont assumées par l'Etat prédécesseur et l'Etat ou les Etats successeurs.

5. Pour établir une répartition équitable des droits ou obligations des Etats prédécesseur et successeur, pourront être pris en considération des critères tels que l'existence de liens spéciaux avec l'acte qui engage la responsabilité internationale, l'étendue du territoire et la taille de la population, les participations respectives dans le produit national brut des Etats concernés à la date de la succession de l'Etat, la nécessité d'éviter l'enrichissement sans cause et toute autre circonstance pertinente. Les dispositions de l'article 7 s'appliquent *mutatis mutandis*.

6. Le fait internationalement illicite d'un mouvement, insurrectionnel ou autre, qui parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous l'administration de ce dernier est considéré comme un fait de ce nouvel Etat d'après le droit international. En conséquence, l'Etat prédécesseur n'encourt pas de responsabilité pour des faits commis par le mouvement insurrectionnel ou autre.

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*Article 13*  
***Fusion d'Etats***

Lorsque deux ou plusieurs Etats s'unissent pour former un nouvel Etat sans laisser subsister d'Etat prédécesseur, les droits ou obligations qui découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé passent à l'Etat successeur.

*Article 14*  
***Incorporation d'un Etat dans un autre Etat préexistant***

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

*Article 15*  
***Dissolution d'un Etat***

1. Lorsqu'un Etat est dissout et cesse d'exister et que les parties de son territoire forment deux ou plusieurs Etats successeurs, les droits ou les obligations découlant d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé passent, compte tenu du devoir de négocier et selon les circonstances mentionnées aux paragraphes 2 et 3 du présent article, à l'un, plusieurs ou à tous les Etats successeurs.

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

3. Afin de déterminer lequel des Etats successeurs devient le titulaire des obligations énoncées au paragraphe premier, un facteur pertinent sera notamment, outre celui énoncé au paragraphe 2, le fait que l'auteur du fait internationalement illicite ait été un organe de l'Etat prédécesseur qui est devenu ensuite un organe de l'Etat successeur.

*Article 16*  
***Etats nouvellement indépendants***

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

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



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3. Le comportement, avant la date de succession d'Etats, d'un mouvement de libération nationale qui parvient à créer un Etat nouvellement indépendant, sera considéré comme le fait de ce nouvel Etat d'après le droit international.

4. Les droits qui découlent d'un fait internationalement illicite commis par l'Etat prédécesseur ou un autre Etat contre un peuple bénéficiant du droit de disposer de lui-même avant la date de succession d'Etats passe après cette date à l'Etat nouvellement indépendant créé par ce peuple.

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**DRAFT RESOLUTION REVISED 1**

*The Institute of International Law,*

*Noting* that the work of codification and progressive development carried out in the field of succession of States has not covered matters relating to State responsibility, and that work in the field of State responsibility has put aside matters relating to succession of States,

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

*Bearing in mind* that cases of succession of States should not constitute a reason for not implementing the consequences arising from an internationally wrongful act,

*Taking into account* that different categories of succession of States and their particular circumstances may lead to different solutions,

*Considering* that law and equity require the identification of the States or other subjects of international law to which, after the date of succession of States, pertain the rights and obligations arising from internationally wrongful acts committed by the predecessor State or injuring it,

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

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

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

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

**CHAPTER I:  
GENERAL PROVISIONS**

*Article 1  
Use of terms*

For the purposes of this Resolution:

- (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.
- (e) "Newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.
- (f) "Devolution agreement" means an agreement, concluded by the predecessor State and the successor State or a national liberation, insurrectional or other movement, or an entity or organ that later becomes the organ of the successor State, providing that rights and/or obligations of the predecessor State shall devolve upon the successor State.
- (g) "Internationally wrongful act" means conduct consisting of an action or omission which: (i) is attributable to the State or another subject under international law; and (ii) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act as internationally wrongful is governed by international law.
- (h) "international responsibility" refers to the legal consequences of an internationally wrongful act.

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*Article 2*

***Scope of the present Resolution***

1. The present Resolution applies to the effects of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act that the predecessor State committed against another State or another subject of international law prior to the date of succession or that a State or another subject of international law committed against the predecessor State prior to the date of succession.
2. The present Resolution applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.
3. The present Articles do not govern the situations resulting from political changes within a State, including changes in the regime or name of the State.

**CHAPTER II:  
COMMON RULES**

*Article 3*

***Subsidiary character of the guiding principle***

The guiding principles mentioned below apply in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or other subject of international law injured by the internationally wrongful act.

*Article 4*

***Invocation of responsibility for an internationally wrongful act committed by the predecessor State before the date of succession of States***

1. An internationally wrongful act committed before the date of succession of States by a predecessor State is attributable to this State.
2. If the predecessor State continues to exist, the injured State or subject of international law may, even after the date of succession, invoke the international responsibility of the predecessor State for an internationally wrongful act committed by that State before the date of succession of States and request from it a reparation for the injury caused by such internationally wrongful act.
3. In conformity with the following Articles, the injured State or subject of international law may also or solely request reparation from a successor State for the injury caused by an internationally wrongful act of the predecessor State.

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*Article 5*

***Invocation of responsibility for an internationally wrongful act committed***

***against the predecessor State before the date of succession of States***

1. The predecessor State which after the date of succession of States continues to exist may invoke the international responsibility of another State or subject of international law for an internationally wrongful act committed against it before that date by that State or subject and may request reparation for the injury caused by this act.
2. If the injury caused by an internationally wrongful act committed before the date of succession of States against a predecessor State affected the territory or persons which, after this date, are under the jurisdiction of a successor State, the successor State may request a reparation for the injury caused by such act, as provided in the following Articles, unless the reparation was already obtained in full before the date of succession of States.

*Article 6*

***Devolution agreements and unilateral acts***

1. Devolution agreements concluded before the date of succession of States between the predecessor State and an entity or a national liberation movement representing a people entitled to self-determination, as well as agreements concluded by the States concerned after the date of succession of States, are subjected to the rules relating to the consent of the parties and to the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties. The same principle applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.
2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement, providing that such obligations shall devolve upon the successor State.
3. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it.

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4. Where the injured State or subject of international law does not accept the solution envisaged by the devolution agreement or unilateral act, good faith negotiations must be pursued by the States or subjects concerned. If these negotiations do not succeed within a reasonable period of time, the solution envisaged by the relevant Article of Chapter III of the present Resolution is applicable.

*Article 7*

***Plurality of successor States***

1. In case of succession in which it is not possible to determine a single successor State on the basis of the following Articles, all the successor States will enjoy the rights or assume the obligations arising from the commission of an internationally wrongful act in an equitable manner, unless otherwise agreed by the States or subjects of international law concerned.

2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

3. Negotiations in good faith must be pursued by the successor States, with the goal of reaching a solution within a reasonable delay.

*Article 8*

***States or subjects of international law concerned***

For the purposes of Articles 6 and 7, "States or subjects of international law concerned" are:

- a) in the case of an internationally wrongful act committed by the predecessor State, the injured State or subject of international law and all the successor States;
- b) in the case of an internationally wrongful act committed against the predecessor State, all the successor States.

*Article 9*

***Internationally wrongful acts having a continuing or composite character***

***performed or completed after the date of succession of States***

1. When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, it bears international responsibility for the entire

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period during which the act continues and remains not in conformity with the international obligation.

2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in the aggregate as a breach of an international obligation, it bears international responsibility. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

3. The provisions of the present Article are without prejudice to any responsibility incurred by the predecessor State if it continues to exist.

*Article 10*

***Diplomatic protection***

1. A successor State may exercise diplomatic protection in respect of a person or a corporation that is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.

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

3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In the case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. When it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 7 apply *mutatis mutandis*.

4. Where the predecessor State continues to exist and the individual or corporation possesses the nationality of both the predecessor and the successor States, or the nationality of a third State, the question is governed by the rules of diplomatic protection concerning dual or multiple nationality.

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**CHAPTER III:  
PROVISIONS CONCERNING SPECIFIC CATEGORIES  
OF SUCCESSION OF STATES**

*Article 11*

***Transfer of part of the territory of a State***

1. With the exception of the situations referred to in the following paragraphs, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor State when part of the territory of the predecessor State, or any territory for the international relations of which this State is responsible, becomes part of the territory of the successor State.
2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if there exists a direct link between the consequences of this act and the territory transferred and/or its population.
3. If particular circumstances so require, the obligations arising from an internationally wrongful act pass to the successor State when the author of this act was an organ of the territorial unit of the predecessor State that later became an organ of the successor State.

*Article 12*

***Separation of parts of a State***

1. With the exception of the situations referred to in paragraphs 2 to 4 of the present Article, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor State or States when a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist.
2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State or States if there exists a direct link between the consequences of this act and the territory or the population of the successor State or States.
3. If particular circumstances so require, the obligations arising from the commission of that act pass to the successor State when the author of the internationally wrongful act was an organ of a territorial unit of the predecessor State that later became an organ of the successor State.
4. If particular circumstances indicated in paragraphs 2 and 3 of this Article so require, the obligations arising from an internationally wrongful act committed before the date of succession of States are assumed by the predecessor and the successor State or States.

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5. In order to determine an equitable apportionment of the rights or obligations of the predecessor and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession of States, the need to avoid unjust enrichment and any other circumstance relevant to the case. The provisions of Article 7 apply *mutatis mutandis*.

6. The internationally wrongful act of a movement, insurrectional or other, which succeeds in establishing a new State on part of the territory of the predecessor State or in a territory under the administration of this latter State shall be considered an act of the new State under international law. Consequently, the predecessor State incurs no responsibility for the acts committed by the insurrectional or other movement.

*Article 13*

***Merger of States***

When two or more States unite and form a new successor State, and no predecessor State continues to exist, the rights or obligations arising from an internationally wrongful act of which a predecessor State has been either the author or the injured State pass to the successor State.

*Article 14*

***Incorporation of a State into another existing State***

When a State is incorporated into another existing State and ceases to exist, the rights or obligations arising from an internationally wrongful act of which the predecessor State has been the author or the injured State pass to the successor State.

*Article 15*

***Dissolution of a State***

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the rights or obligations arising from an internationally wrongful act in relation to which the predecessor State has been the author or the injured State pass, bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs 2 and 3 of the present Article, to one, several or all the successor States.



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

3. In order to determine which of the successor States becomes bearer of the obligations described in paragraph 1, a relevant factor will in particular be, in addition to that mentioned in paragraph 2, the fact that the author of the internationally wrongful act was an organ of the predecessor State that later became the organ of the successor State.

*Article 16*

*Newly independent States*

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

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

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

4. The rights arising from an internationally wrongful act committed by the predecessor State or any other State against a people entitled to self-determination before the date of the State succession shall pass to the newly independent State created by that people after that date.

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Le *Rapporteur* procède à la lecture de l'article 1, relatif aux expressions employées.

The *President* called the Members to a vote by show of hands on Article 1, and announced the following results: 30 votes in favour, 0 votes against, 0 abstentions.

Le *Rapporteur* indique que, vu les débats animés au sujet de l'article 2 en séance plénière, il serait préférable de procéder à un vote paragraphe par paragraphe. Il procède à leur lecture.

The *President* called for a vote by show of hands after the reading of each paragraph, and announced the following results:

Article 2, paragraph 1: 30 votes in favour, 0 votes against, 1 abstention.

Article 2, paragraph 2: 24 votes in favour, 4 votes against, 4 abstentions.

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Article 2, paragraph 3: 34 votes in favour, 0 votes against, 0 abstentions.

Mr *Tomuschat* remarked that individuals were not included as subjects of international law in this draft Resolution, which indeed contained no definition of what was a subject of international law for its purposes. Nevertheless, he thought that their exclusion was of common understanding.

Mr *Reisman* stated that he did not share this common understanding.

Le *Rapporteur* procède à la lecture de l'article 3.

The *President* called for a vote by show of hands on Article 3, and announced the following results: 37 votes in favour, 2 votes against, 0 abstentions.

The *President* announced that the Members would vote by show of hands on Article 4 as a whole and, after the *Rapporteur's* reading, announced the following results: 34 votes in favour, 0 votes against, 3 abstentions.

Le *Rapporteur* rappelle le texte de l'article 5.

The *President* called for a vote by show of hands on Article 5, and announced the following results: 36 votes in favour, 0 votes against, 1 abstention.

The *President* wondered whether Article 6 should be voted on as a whole, or paragraph by paragraph.

Le *Secrétaire général* suggère qu'il soit procédé au vote paragraphe par paragraphe.

Le *Rapporteur* procède à la lecture des paragraphes 1 et 2.

The *President*, after each reading, called for a vote by show of hands and announced the following results:

Article 6, paragraph 1: 35 votes in favour, 0 votes against, 1 abstention.

Article 6, paragraph 2: 34 votes in favour, 1 vote against, 1 abstention.

Mr *Abi-Saab* asked whether the text presented had gone through the Drafting Committee, since he noted some improvements.

The *President* confirmed that the Drafting Committee had revised the draft Resolution. He called for a vote by show of hands on Article 6, paragraphs 3 and 4, each one read out by the *Rapporteur*, and announced the following results:

Article 6, paragraph 3: 31 votes in favour, 1 vote against, 3 abstentions.

Article 6, paragraph 4: 36 votes in favour, 0 votes against, 1 abstention.

Le *Rapporteur* suggère que l'article 7 soit voté paragraphe par paragraphe.

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The *President* called for a vote by show of hands after each paragraph had been read out by the *Rapporteur*, and announced the following results:

Article 7, paragraph 1: 34 votes in favour, 0 votes against, 2 abstentions.

Article 7, paragraph 2: 35 votes in favour, 0 votes against, 1 abstention.

Article 7, paragraph 3: 36 votes in favour, 0 votes against, 0 abstentions.

Le *Rapporteur* rappelle le texte de l'article 8.

The *President* called for a vote by show of hands on Article 8, and announced the following results: 35 votes in favour, 0 votes against, 3 abstentions.

Le *Rapporteur* procède à la lecture de l'article 9.

Mr *Tomka* drew the attention of the Drafting Committee to this Article. He believed that there was no responsibility for a period of time, but for an action, which occurred during this period. He understood the idea expressed in Article 9, paragraph 1, but thought that its formulation should be corrected.

Le *Rapporteur* procède à la lecture de l'article 10, paragraphe par paragraphe.

The *President* called for a vote by show of hands after the reading of each paragraph, and announced the following results:

Article 10, paragraph 1: 38 votes in favour, 0 votes against, 1 abstention.

Article 10, paragraph 2: 37 votes in favour, 0 votes against, 1 abstention.

Article 10, paragraph 3: 37 votes in favour, 0 votes against, 1 abstention.

Article 10, paragraph 4: 34 votes in favour, 0 votes against, 3 abstentions.

Le *Rapporteur* rappelle que l'article 11 est le premier du chapitre concernant les catégories spécifiques de successions d'Etat. Il procède à sa lecture, paragraphe par paragraphe.

The *President*, after each reading, called for a vote by show of hands and announced the following results:

Article 11, paragraph 1: 37 votes in favour, 0 votes against, 1 abstention.

Article 11, paragraph 2: 36 votes in favour, 0 votes against, 1 abstention.

Article 11, paragraph 3: 32 votes in favour, 0 votes against, 5 abstentions.

Le *Rapporteur* procède à la lecture de l'article 12, paragraphe par paragraphe.

The *President* called for a vote by show of hands after each reading and announced the following results:

Article 12, paragraph 1: 36 votes in favour, 1 vote against, 1 abstention.

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Article 12, paragraph 2: 38 votes in favour, 0 votes against, 1 abstention.

Article 12, paragraph 3: 36 votes in favour, 0 votes against, 3 abstentions.

Article 12, paragraph 4: 34 votes in favour, 0 votes against, 3 abstentions.

Article 12, paragraph 5: 38 votes in favour, 0 votes against, 2 abstentions.

Article 12, paragraph 6: 40 votes in favour, 0 votes against, 0 abstentions.

Dame *Rosalyn Higgins* wished to raise a small drafting matter. She believed the comma after the words “insurrectional movement” should be removed. Otherwise, the meaning of the sentence would be slightly different.

The *President* guaranteed that the Drafting Committee would take care of it.

Le *Rapporteur* procède à la lecture de l'article 13.

The *President* called for a vote on Article 13, and announced the following results: 39 votes in favour, 0 votes against, 0 abstentions.

The *President*, after Article 14 had been read out by the *Rapporteur*, called for a vote by show of hands on this Article and announced the following results: 39 votes in favour, 0 votes against, 0 abstentions.

Le *Rapporteur* procède à la lecture de l'article 15, paragraphe par paragraphe.

The *President*, after the reading of Article 15, paragraphs 1 and 2, called for a vote by show of hands and announced the following results:

Article 15, paragraph 1: 41 votes in favour, 0 votes against, 0 abstentions.

Article 15, paragraph 2: 38 votes in favour, 0 votes against, 3 abstentions.

Mme *Bastid-Burdeau* soulève une remarque de rédaction ; elle considère que l'adverbe « notamment » qui figure au paragraphe 3 devrait figurer également au paragraphe 2.

Le *Président* remercie Mme *Bastid-Burdeau* pour son intervention et, après lecture du troisième paragraphe de l'article 15 par le *Rapporteur*, appelle au vote et annonce les résultats suivants :

Article 15, paragraphe 3 : 40 voix pour, 0 voix contre, 0 abstentions.

Sir *Kenneth Keith* raised a drafting point relating to paragraph 3, suggesting that “the organ” become “an organ”, as previously in the sentence. He believed that it was just a trifling matter in the English version.

Le *Rapporteur* procède à la lecture de l'article 16, paragraphe par paragraphe.

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The *President*, after each reading, called for a vote by show of hands and announced the following results:

Article 16, paragraph 1: 38 votes in favour, 0 votes against, 3 abstentions.

Article 16, paragraph 2: 41 votes in favour, 0 votes against, 0 abstentions.

Article 16, paragraph 3: 41 votes in favour, 0 votes against, 0 abstentions.

Article 16, paragraph 4: 40 votes in favour, 1 vote against, 0 abstentions.

Mme *Bastid-Burdeau* souhaite faire une suggestion de rédaction. A la formule « un fait internationalement illicite commis par l'Etat prédécesseur ou un autre Etat », elle propose que soit ajouté « ou tout autre sujet du droit international ». Elle considère en effet qu'un fait illicite aurait pu être commis par une organisation internationale, notamment dans le cas d'une administration internationale de territoire, et que ce cas de figure devrait être embrassé par la résolution.

Le *Rapporteur* n'y voit aucun inconvénient, car il considère que cette vision large est dans la lignée du reste du projet. S'il est possible de considérer cela comme un simple point rédactionnel, alors l'article pourrait être revu. Il laisse toutefois cette question à l'appréciation du Président et du Secrétaire général.

The *President* indicated that the Drafting Committee would take care of this matter, and called for a vote on the preamble, paragraph by paragraph, after the reading of each by the *Rapporteur*. He announced the following results:

Preambular paragraph 1: 35 votes in favour, 0 votes against, 3 abstentions.

Preambular paragraph 2: 38 votes in favour, 0 votes against, 2 abstentions.

Preambular paragraph 3: 36 votes in favour, 0 votes against, 6 abstentions.

Preambular paragraph 4: 42 votes in favour, 0 votes against, 0 abstentions.

Preambular paragraph 5: 36 votes in favour, 0 votes against, 6 abstentions.

Preambular paragraph 6: 36 votes in favour, 0 votes against, 6 abstentions.

Preambular paragraph 7: 39 votes in favour, 0 votes against, 6 abstentions.

Preambular paragraph 8: 40 votes in favour, 0 votes against, 3 abstentions.

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Preambular paragraph 9: 43 votes in favour, 0 votes against, 0 abstentions.

Mr *Reisman* asked whether the President could explain the procedure of the *Institut*. He agreed with this draft Resolution as a whole, but abstained on several provisions. He mostly raised a reservation on Article 2, paragraph 2, explaining that he could not vote for the restriction “in conformity with international law”.

Mr *Tomuschat* expressed the opinion that, in preambular paragraph 3, the principle of continuity, which appeared as essential, should have been affirmed more clearly.

M. *Tomka* se réfère à la proposition de Mme Bastid-Burdeau, car il considère également que l'article 16 concerne tout autant les autres sujets du droit international que les Etats. Il craint cependant qu'il ne s'agisse pas là d'une question purement rédactionnelle. Les autres sujets du droit international dépassent selon lui la portée de la présente résolution telle que définie à l'article 2. Il n'est en effet question que de relations impliquant au moins un Etat, entre l'Etat prédécesseur qui a commis le fait illicite et un Etat ou un autre sujet du droit international. Or, si l'on prend en compte, dans l'article 16, paragraphe 4, les autres sujets du droit international comme susceptibles de commettre un fait illicite, cela pourrait conduire à inclure des relations ne rentrant pas dans le champ de la résolution.

Mr *Rao* reiterated his appreciation and admiration of the Commission for this draft Resolution, and commended the work of its excellent leader Mr Kohen. He recalled that Article 2, paragraph 2, had been through extensive discussions; however, he still wished to state that the restriction “in conformity with international law” emphasized rights that a State could not acquire from an illicit situation. He wished to make a reservation if, on the other hand, obligations were concerned. He believed that the *ex injuria jus non oritur* principle could not apply when obligations of the responsible State were at stake.

The *President* mentioned that he had voted against Article 2, paragraph 2. He declared that the plenary had to decide whether it would vote in favour of the whole text of the Resolution, before underscoring that he had some reservations on certain parts of the text.

Mr *Kazazi* aligned himself with the President's intervention, along with those of Messrs Rao and Reisman, and declared that he found himself in the same situation. In particular, he called upon the Rapporteur to explain why Article 2, paragraph 2, was drafted in the way it appeared in the draft Resolution. He expressed particular concern over the limitative effect of that provision, in that it restricted the application of

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the Resolution to State succession occurring in conformity with international law. He suggested that the text, as it stood, appeared to reward State successions that were not in conformity with international law.

The *President* voiced his general agreement with Mr Kazazi and gave the floor to Mrs Bastid-Burdeau.

Mme *Bastid-Burdeau* souhaite renchérir sur l'intervention de M. Tomka concernant le paragraphe 4 de l'article 16. Elle estime que l'objet de cette disposition est de préserver les droits de l'Etat nouveau après la succession, et ce, dans l'hypothèse où un fait internationalement illicite aurait été commis à son détriment dans la période précédant l'indépendance. Elle considère qu'il ne faut pas limiter la préservation de ces droits à un fait illicite commis soit par l'Etat prédécesseur, soit par un autre Etat, alors que ce fait pourrait être commis par un autre sujet de droit international. Elle fait remarquer que si le texte vise à limiter cette préservation des droits à l'Etat prédécesseur, il faudrait supprimer la mention « un autre Etat ». Elle signale à l'assemblée qu'elle laissera au Rapporteur le soin de trancher cette controverse.

M. *Kirsch* invoque l'article 39 du Règlement de l'*Institut* pour rappeler à ses collègues qu'il a été procédé à un vote sur l'ensemble d'une résolution sur la base d'un texte définitif. Il souligne que l'article 43 prévoit également le travail du comité de rédaction sur la base de ce texte définitif. Il relève que la proposition de Mme Bastid-Burdeau a été introduite après l'adoption du texte original présenté par le Rapporteur. Il estime que cette proposition ne peut être laissée à la discrétion du comité de rédaction. Il souligne que la plénière doit se prononcer sur la possibilité d'adopter un amendement éventuel. Il précise que son intervention ne vise que la procédure, sans concerner le fond de la proposition de Mme Bastid-Burdeau.

M. *Mahiou* se penche sur le dernier alinéa du préambule et propose que les termes « présents principes directeurs » soient substitués aux termes « principes directeurs suivants ». Proposant un amendement rédactionnel similaire au paragraphe 1 de l'article 7, il estime que les termes « sur la base des présents articles » devraient être substitués aux termes « sur la base des articles suivants ». A son sens, le maintien de la disposition en l'état porterait à confusion, en ce que l'expression « articles suivants » pourrait porter à croire qu'on se réfère aux articles 8 et suivants.

Mr *Wolfrum* supported the observations volunteered by Messrs Reisman, Rao and others, and, like the President, had voted against the adoption of Article 2, paragraph 2. He contended that this

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provision limited the scope of the Resolution and raised doubts as to the situation that would arise in respect of other secessions, namely those that did not occur in conformity with international law. He opined that the limb of the provision characterizing State successions as “occurring in conformity with international law” created a gap that could generate doubt in the international community. He resolved, much in the same vein as Mr Rao, that the only solution would be to attach a reservation to the Resolution addressing this very point.

*M Pellet* souligne qu’il n’a pas pu être présent lors de la discussion portant sur cette disposition. Il estime qu’elle est aberrante et que son emplacement au début du texte s’avère troublant. En définitive, il s’associe vivement aux positions défendues par MM. Reisman, Wolfrum et Rao à ce chapitre.

Mr *Lee* signalled his agreement with the previous speakers. He stated that the *Institut* had made particularly rich contributions in this field, especially by laying down overarching principles and guidelines for States that were called upon to deal with these issues. In general, he approved the approach espoused by the Rapporteur and the Commission. Turning to Article 6, paragraphs 2 and 3, he voiced some concerns that the Resolution appeared to favour one side over the other, which in his view would result in the destabilization of the ensuing legal situation. He stressed that these rationales had prompted him to vote against Article 6, paragraphs 2 and 3.

Mr *Tomka* queried whether the plenary would once again engage in substantive discussions on the Resolution. He interpreted international law as governing State successions that were in conformity with it, in which case the rights and obligations passed to the new State. Conversely, he opined that this would not be the case for successions that contravened international law. He noted the presence in the room of a number of realists who sometimes thought that facts created law, and insisted that an approach of legality should prevail over using power as a prism through which situations of succession should be contemplated.

The *President* declined to reopen the substantive discussion, judging that such course of action would result in circuitous debates. He highlighted two possible avenues. First, he recalled that Mrs Bastid-Burdeau had introduced a proposal regarding Article 16. He left the proposed amendment for the consideration of the Rapporteur. Second, the President lent his support to the proposal made by Mr Wolfrum, which had been backed by Mr Reisman and others. He specified that his own proposal would be for those who held similar views to draft and attach a



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reservation to Article 2, paragraph 2, in order to make their views known. To this end, he signalled that Mr Rao was already drafting a text.

Mrs *Arsanjani* confessed that she had not paid attention to this aspect of the Resolution but conceded that Mrs Bastid-Burdeau had made a valid point, recognizing that there was a problem with Article 16, paragraph 4. Moreover, she stressed that there were circumstances in which the administrating authority of a territory was not a State, e.g. an international organization or another type of coalition. She lamented the lack of clarity of this provision given that the relationship between the predecessor State and the territory or peoples that became subject to self-determination was unknown. She resolved that this shortcoming could be rectified by an explanatory footnote. She agreed with Mrs Bastid-Burdeau that the relevant limb of the provision should read “committed by the predecessor State or any other subject of international law”.

Mr *Reisman* wished to make a point of personal privilege in response to Mr Tomka without engaging with the broader implications. He explained that his resistance to Article 2, paragraph 2, did not arise from considerations of power nor the notion that international law had no purchase. Rather, he cautioned that the excellent Resolution under study might be impeded by the inclusion of this provision. He explained that many State successions and separations would occur in difficult circumstances, against the backdrop of very controversial issues, in which one side felt that the action was unlawful. In such scenarios, he argued that Article 2, paragraph 2, would prevent the Resolution’s criteria from being applied and contributing to a peaceful and lawful separation of two entities.

The *President* supported Mr Reisman’s remarks and observed that similar rationales had prompted him to vote against that provision. He invited the Rapporteur to pronounce on the Article 16 controversy.

Le *Rapporteur* avoue être à la fois sensible aux commentaires de Mme Bastid-Burdeau, soutenus par Mme Arsanjani, ainsi qu’aux observations de M. Kirsch, qui siège au sein du comité de rédaction. Il reconnaît qu’il existe un problème sur le plan règlementaire : même s’il est d’accord avec l’idée avancée par Mme Bastid-Burdeau, il estime que cette proposition n’est pas de nature rédactionnelle, et qu’elle est de toute façon intervenue après le vote. Il considère qu’on ne saurait la renvoyer au comité de rédaction. Il relève qu’une troisième proposition a été mise en avant, à savoir faire une explication du texte. Le Rapporteur considère qu’il serait inopportun de revenir en arrière. Il suggère qu’une explication soit incluse dans la version finale du rapport, sinon il estime qu’il faudrait formuler une proposition d’amendement et l’assujettir au vote de la

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plénière. A cet égard, il fait observer qu'aucun membre ne semble s'opposer à cette proposition sur le fond.

Se penchant sur le second paragraphe de l'article 2, le Rapporteur rappelle que cette question a été longuement débattue aux sessions de Tokyo et de Tallinn et qu'elle a suscité des points de vue divergents. S'adressant surtout à M. Pellet, il précise que la formulation de cette disposition s'inspire des deux conventions de Vienne sur la succession d'Etats et des articles de la Commission du droit international sur la nationalité en relation avec la succession d'Etats.

Le Rapporteur estime que cet article a sa raison d'être et qu'il ne va pas au détriment des victimes d'un fait internationalement illicite. Il relève que certains pensent que même si l'on se retrouve confronté à une situation de succession illicite, les principes directeurs de la résolution devraient être appliqués. Or, le Rapporteur soutient que le droit international proscrit cette éventualité et s'inscrit en faux contre cette approche qui, selon lui, demeure contraire à la garantie du respect de la légalité internationale.

The *President* thanked the Rapporteur and invited Mrs Bastid-Burdeau to produce a text for review in the plenary, which could be put to a vote. He added that if no agreement was reached on such text, no changes could be made to Article 16, paragraph 4, since the voting had already been concluded. With respect to Article 2, paragraph 2, he recalled the rationale behind the proposal spearheaded by Mr Wolfrum. He insisted that this approach was not intended to undermine international law, given that most separations were illegal from the point of view of some States or organizations. He proposed to proceed in the absence of any amendments to Article 16.

The *Rapporteur* underscored that the proposed drafting amendment to Article 16, paragraph 4, was very simple. He clarified that this would entail substituting the words "any other subject of international law" for the terms "any other State". He added that the corresponding change to the French version entailed changing the terms "un autre Etat" to "tout autre sujet de droit international".

Le *Secrétaire général* indique la nécessité d'une version écrite de ce texte.

Mr *Tomka* expressed appreciation for the efforts deployed by, and good intentions of, Mrs Bastid-Burdeau, along with the work of the Rapporteur. He cautioned that the proposed formulation would, to some extent, expand the scope and, on the other hand, limit it. He queried what was meant by the expression "any other subject of international law" (e.g.

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a State). He added that the proposed reformulation of paragraph 4 would not be in line with Article 2, paragraph 1.

He observed that the reformulated Article 16, paragraph 4, would contemplate an act committed by another subject of international law that was not a State against peoples entitled to self-determination, which would change the original relationship involving a State. He stressed that the proposed change to Article 16, paragraph 4, would require the harmonization of Article 2, paragraph 1, for the purposes of maintaining internal harmony in the Resolution.

Mr Tomka noted that the title of the Resolution read “State Succession in Matters of State Responsibility” but that the text of the Resolution went beyond that area, namely into the field of international responsibility. He provided further explanations on the distinction between both areas.

M. *Mahiou* souligne que le problème d’harmonisation soulevé par M. Tomka ne concerne pas uniquement le paragraphe premier de l’article 2 mais se pose également en ce qui concerne les paragraphes 2 et 3 de l’article 6. Il s’interroge sur le point de savoir s’il s’agit d’un problème d’harmonisation ou plutôt de fond, en quel cas une clarification s’imposerait. En revanche, s’il s’agit d’un problème d’harmonisation, M. Mahiou fait observer qu’une simple formulation pourrait régler ce problème.

Le *Rapporteur* reconnaît qu’il existe un problème concret mais relève que les préoccupations de M. Mahiou se rapportant à l’article 6 ne sont pas les mêmes que celles qui avaient été exprimées par Mme Bastid-Burdeau. En particulier, le *Rapporteur* fait remarquer que contrairement au paragraphe 4 de l’article 16, les paragraphes 2 et 3 de l’article 6 font référence à une relation dans laquelle figure l’Etat prédécesseur, ce qui relève de la succession de l’Etat.

Le *Rapporteur* se demande s’il est sage de revenir en arrière pour réviser l’article 2, quoiqu’il comprenne les soucis manifestés par M. Tomka. Le *Rapporteur* estime qu’à ce stade avancé, la meilleure solution consisterait à inclure, comme dans l’hypothèse invoquée par Mmes Bastid-Burdeau et Arsanjani, une explication qui engloberait les problèmes liés à l’administration internationale d’un territoire, par exemple.

Dame *Rosalyn Higgins* underscored that the second line of Article 6, paragraph 1, contained the expression “national liberation movement representing a people entitled to self-determination”, which should rather have used the plural form and read “representing peoples entitled to self-determination”. She cautioned that the *Institut* should not encourage the suggestion that there were a section of peoples in one place, a minority people in another, or regional peoples anywhere else who were entitled to

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self-determination. She recalled that this problem had cropped up elsewhere in the Resolution.

M. *Orrego Vicuña* s'excuse d'intervenir si tard mais estime que l'article 10 demeure incomplet. Quoiqu'il n'ait pas de réserve majeure à l'égard de cette disposition, il soutient que tout ce qui y est compris est en vérité sans préjudice au droit de la personne ou de la société en question à réclamer directement la protection accordée par des traités desquels elle est la bénéficiaire. Il ajoute que si la personne ou la société a le droit de continuer à se réclamer de la protection diplomatique, elle pourrait poursuivre ou introduire une réclamation qui n'entretient aucun rapport direct avec l'Etat prédécesseur. Il propose d'ajouter une clarification à ce sujet, sauf avis contraire de la plénière.

The *President* thanked Mr Orrego Vicuña and equated the content of his intervention with editing concerns.

Mr *Gaja* put forward a suggestion concerning Article 16, paragraph 4. Acknowledging Mr Tomka's intervention, he stressed that paragraph 4 extended the scope of the Resolution to cover a situation in which a wrongful act committed against the peoples enjoying the right to self-determination was not committed by the predecessor State, but now stated that it was committed by "any another State". He called into question this last limb of the provision. He argued that for the purposes of the Resolution, the *Institut* was required to deal only with the predecessor State. By way of solution, he suggested that the words "or any other State" be deleted, which would conform with the object of the Resolution and Article 2, paragraph 2. He opined that this matter could be left to the Drafting Committee or be decided in the plenary.

Mme *Bastid-Burdeau* souhaite contredire l'intervention de M. Gaja. Elle soutient que le fait illicite envisagé à l'article 11, paragraphe 2, peut être commis par un Etat tiers ou une organisation internationale. Ainsi, elle fait observer que la résolution ne se limite pas aux relations entre l'Etat prédécesseur et le successeur, et traite des conséquences découlant des faits internationalement illicites commis dans ce cadre. Se penchant sur l'article 16, paragraphe 4, elle estime que cette disposition vise à étendre cette situation aux droits d'un peuple qui n'est pas encore indépendant.

The *President* queried whether Mrs Bastid-Burdeau could propose an actual text for the plenary's consideration. He then invited the Rapporteur to read the text submitted by Mrs Bastid-Burdeau.

Le *Rapporteur* procède à la lecture de la proposition d'amendement de Mme Bastid-Burdeau: « Les droits qui découlent d'un fait internationalement illicite commis avant la date de la succession d'Etat par l'Etat prédécesseur ou tout autre sujet de droit international passent

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après cette date à l'Etat nouvellement indépendant créé par ce peuple. » Le Rapporteur fait observer que la relation qui intervient dans le cadre de la résolution n'est pas bipartite mais tripartite dans certains cas, car elle implique non seulement l'Etat prédécesseur et l'Etat successeur, mais aussi l'Etat ou l'autre sujet de droit international qui a été soit l'auteur soit la victime du fait internationalement illicite. En somme, il n'estime pas que la proposition d'amendement introduite par Mme Bastid-Burdeau élargisse le champ d'application de la résolution.

Mme *Bastid-Burdeau* souligne qu'une autre solution serait d'harmoniser l'article 16, paragraphe 4, et l'article 11, paragraphe 2, en supprimant toute mention de l'auteur du fait internationalement illicite.

Le *Rapporteur* affirme s'opposer à l'idée de revenir en arrière pour rediscuter de la résolution sur une base article par article. Il propose que si le Président et le Secrétaire général donnent leur assentiment, la plénière pourrait procéder au vote sur la proposition de Mme Bastid-Burdeau.

M. *Ranjeva* insiste sur le fait qu'il serait plus simple de faire voter la plénière sur la proposition de Mme Bastid-Burdeau, incorporer ou exclure cet amendement dans le texte définitif, lire le texte définitif à l'assemblée et le soumettre au vote.

The *President* recalled that the plenary had already adopted Article 16, paragraph 4, by way of vote. He observed that the situation that now confronted the plenary could not be resolved by adopting any of the proposed amendments.

Le *Rapporteur* propose que la plénière passe au vote sur l'amendement de Mme Bastid-Burdeau, à moins qu'il n'y ait objection dans la salle. Il précise que si l'amendement est adopté, il sera incorporé à la résolution. S'il ne l'est pas, le Rapporteur propose de passer au vote sur l'ensemble de la résolution.

Mr *Tomka* signalled that whilst he understood the intention behind the proposal to amend Article 16, paragraph 4, he cautioned that if it were adopted it would go beyond the scope, as defined in the Resolution.

M. *Sicilianos* estime que l'amendement de Mme Bastid-Burdeau ne change pas la portée de la résolution, en ce que la relation qui existe implique toujours un Etat.

Mr *Gaja* opined that contrary to what was noted by Mrs Bastid-Burdeau, Article 11, paragraph 2, did not extend the scope of that provision because it concerned a wrongful act committed against the predecessor State, which then conferred rights upon it resulting from the wrongful act. He pointed out that this provision regulated those rights. He

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opined that the proposed amendment could have made a contribution to the development of international law, but would have exceeded the object of the Resolution.

M. *Abi-Saab* rappelle qu'il est important d'avoir une vue cohérente et affirme que cette question peut être résolue à l'article 8, disposition qui comporte la définition des sujets de droit international pertinents.

M. *Mahiou* s'étonne que la conversation tourne en rond et se révèle tout aussi surpris que Mme Bastid-Burdeau n'ait pas repris la formule de la ligne 3 de l'article 2 qui introduit les termes « par l'Etat prédécesseur contre un autre Etat ou un autre sujet de droit international ». Il propose qu'on reprenne cette formulation à l'article 16, paragraphe 4, pour apaiser les préoccupations de M. Tomka. Par ailleurs, M. Mahiou rappelle qu'on retrouve cette formulation aux paragraphes 2 et 3 de l'article 6.

Mr *Tomka* underscored that if the proposed amendment to Article 16, paragraph 4, were to be adopted, Article 2, paragraph 1, would read "The present Resolution applies to the effects of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act that a subject of international law committed prior to the date of succession against another subject of international law." He explained that Article 16, paragraph 4, could envisage a situation where a non-State subject of international law committed an internationally wrongful act against peoples entitled to self-determination. He opined that many Members would not welcome this revision, as it would cover all possible scenarios.

The *President* invited the Rapporteur to react to the interventions.

Le *Rapporteur* propose que la plénière passe à un vote pour décider si la proposition d'amendement peut être prise en considération.

The *President* proposed that the Rapporteur read once more the relevant provision whilst including the amendment proposed by Mrs Bastid-Burdeau. The President then indicated that the plenary had to proceed.

Mr *Tomuschat* intervened on a point of order, stressing that the plenary should have been provided with a final written text before taking action.

The *Rapporteur* raised a point of order and suggested that the question of whether or not the plenary should vote on amendments be put immediately to the Assembly. He added that if the Plenary accepted that amendments could be discussed after a vote, the sitting would have to be suspended so that those wanting to submit amendments could prepare them in written form, which would then be submitted to a vote.

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Dame *Rosalyn Higgins* voiced her strong agreement with the Rapporteur but cautioned that his proposal was too broad. She insisted that the question to be put to the plenary concerned one specific amendment covering ground that concerned some Members, as opposed to amendments in the plural form.

The *President* agreed and recalled that the Drafting Committee would take care of minor editorial amendments. He was informed by the Secretary-General that, should the proposed amendment be adopted, this would lead to other amendments in respect of other provisions. Given that all provisions and the preamble had already been adopted by vote, the President indicated that the plenary had to decide whether it should reopen the possibility of amending the text of Article 16, paragraph 4.

The President inquired who was in favour of opening the door for amendments to Article 16, paragraph 4, and consequential amendments. He called the Members to a vote by show of hands and announced the following results: 19 votes in favour, 23 votes against, 6 abstentions.

The President confirmed that the wording of Article 16, paragraph 4, would stand in its present formulation, pursuant to the earlier vote. The President suggested addressing the reservation raised by some Members but first proposed to vote on the Resolution of the 14<sup>th</sup> Commission as a whole.

The President called the Members to a vote by show of hands and announced that the Resolution as a whole had been adopted unanimously.

The President congratulated the Rapporteur and the Commission, along with the Members, for their hard work and dedication. He celebrated the fact that this was the first Resolution adopted at the Tallinn Session.

Mr *Rao* thanked the Rapporteur and rejoiced in joining his colleagues in the adoption of the Resolution as a whole. That said, he pointed out that some Members considered it necessary to make and put on record an explanatory statement relating to Article 2, paragraph 2, of the Resolution. Those members were: Mr *Abi-Saab*, Mrs *Arsanjani*, Mrs *Bastid-Burdeau*, Mrs *Infante Caffi* and Messrs *Kazazi*, *Lee*, *Müllerson*, *Nolte*, *Rao*, *Reisman*, *Treves* and *Wolfrum*. Mr *Rao* proceeded to deliver the statement, which read as follows:

*“We would like to express our reservation on Article 2(2). The draft Article in its present form limits the application of the principles adopted **only** to situations of State Succession achieved in accordance with international law and the principles embodied in the Charter of the United Nations.*

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*We believe that the question of lawfulness of State Succession may be applicable or relevant only in respect of rights to be enjoyed or succeeded to by State(s) claiming succession. However, in respect of obligations arising out of succession, the State or States claiming succession and exercising effective control over the territory, people and its resources is or are deemed to be accountable for them. Any other view is likely to deny the victims or injured State of seeking remedies necessary for consequences arising from the internationally wrongful act."*

The *President* announced that the *Institut* had successfully completed its work on this Resolution. He informed the plenary that the afternoon session would be devoted to the Resolution prepared by the 9<sup>th</sup> Commission. He encouraged his colleagues to be punctual and efficient.

Mr *Gaja* reminded the newly elected Members that there would be a roll-call vote on the Resolution just adopted, and requested that the President inform the plenary of the date and time of that procedure in order to ensure the participation of a substantial number of Members. He suggested that the vote take place at the end of the afternoon session or the next morning.

Le *Secrétaire général* précise que l'assemblée plénière procédera au vote par appel nominal sur la résolution adoptée une fois que le comité de rédaction y aura apporté les changements nécessaires.

La séance est levée à 11 h 55.

**Septième séance plénière**                      Vendredi 28 août 2015 (après-midi)

La séance est ouverte à 17 h 10 sous la présidence de M. *Müllerson*.

**RESOLUTION**

*L'Institut de droit international,*

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

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



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

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

*Considérant* que le droit et l'équité imposent que soient déterminés, après la date de succession d'Etats, à quels Etats ou d'autres sujets de droit international incomberont les droits et les obligations qui découlent des faits internationalement illicites commis ou subis par l'Etat prédécesseur,

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

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

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

*Adopte* la résolution suivante :

**CHAPITRE I :**  
**DISPOSITIONS GENERALES**

*Article 1*

***Expressions employées***

Aux fins de la présente résolution :

- a) L'expression « succession d'Etats » s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire.
- b) L'expression « Etat prédécesseur » s'entend de l'Etat auquel un autre Etat s'est substitué à l'occasion d'une succession d'Etats.
- c) L'expression « Etat successeur » s'entend de l'Etat qui s'est substitué à un autre Etat à l'occasion d'une succession d'Etats.
- d) L'expression « date de la succession d'Etats » s'entend de la date à laquelle l'Etat successeur s'est substitué à l'Etat prédécesseur dans la

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responsabilité des relations internationales du territoire auquel se rapporte la succession d'Etats.

- e) L'expression « Etat nouvellement indépendant » s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales.
- f) L'expression « accord de dévolution » s'entend d'un accord conclu entre l'Etat prédécesseur et l'Etat successeur ou un mouvement de libération nationale, insurrectionnel ou autre, ou une entité ou un organe qui devient ultérieurement l'organe de l'Etat successeur, stipulant que les droits et/ou obligations de l'Etat prédécesseur sont dévolus à l'Etat successeur.
- g) L'expression « fait internationalement illicite » s'entend d'un comportement consistant en une action ou une omission : (i) attribuable à l'Etat ou à un autre sujet en vertu du droit international; et (ii) constituant une violation d'une obligation internationale de l'Etat ou de l'autre sujet. La qualification du fait comme internationalement illicite relève du droit international.
- h) L'expression « responsabilité internationale » s'entend des conséquences juridiques d'un fait internationalement illicite.

*Article 2*

***Portée de la présente résolution***

1. La présente résolution s'applique aux effets d'une succession d'Etats relatifs aux droits et obligations qui découlent d'un fait internationalement illicite commis par l'Etat prédécesseur contre un autre Etat ou un autre sujet de droit international avant la date de la succession d'Etats, ou commis par un Etat ou un autre sujet de droit international contre l'Etat prédécesseur avant cette date.
2. La présente résolution s'applique uniquement aux effets d'une succession d'Etats se produisant conformément au droit international, et plus particulièrement aux principes du droit international incorporés dans la Charte des Nations Unies.
3. Les présents articles ne régissent pas les situations résultant de changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat.

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**CHAPITRE II :  
REGLES COMMUNES**

*Article 3*

***Caractère subsidiaire des principes directeurs***

Les principes directeurs mentionnés ci-après sont d'application en l'absence de toute autre solution convenue entre les parties concernées par la situation de succession d'Etats, y compris l'Etat ou le sujet lésé par le fait internationalement illicite.

*Article 4*

***Invocation de la responsabilité pour un fait internationalement illicite commis par l'Etat prédécesseur avant la date de la succession d'Etats***

1. La responsabilité internationale découlant d'un fait internationalement illicite commis avant la date d'une succession d'Etats par un Etat prédécesseur incombe à cet Etat.
2. Si l'Etat prédécesseur continue d'exister, l'Etat ou le sujet lésé peut, même après la date de la succession, invoquer la responsabilité internationale de l'Etat prédécesseur pour le fait internationalement illicite qu'il a commis avant la date de la succession et lui demander réparation pour le préjudice causé par ce fait internationalement illicite.
3. Conformément aux articles suivants, l'Etat ou le sujet lésé peut demander réparation également ou uniquement à l'Etat ou Etats successeurs pour le préjudice causé par le fait internationalement illicite commis par l'Etat prédécesseur.

*Article 5*

***Invocation de la responsabilité pour un fait internationalement illicite commis contre l'Etat prédécesseur avant la date de la succession d'Etats***

1. L'Etat prédécesseur qui continue d'exister après la date de la succession d'Etats peut invoquer la responsabilité internationale pour le fait internationalement illicite commis à son égard avant cette date par un autre Etat ou sujet de droit international et peut demander réparation pour le préjudice causé par ce fait.
2. Si le préjudice causé par un fait internationalement illicite commis avant la date de la succession d'Etats contre l'Etat prédécesseur affecte le territoire ou des personnes qui, après cette date, sont sous la juridiction d'un Etat successeur, l'Etat successeur peut demander une réparation pour le préjudice causé par ce fait, conformément aux articles suivants, à moins que la réparation n'ait été intégralement obtenue avant la date de la succession d'Etats.

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*Article 6*

***Accords de dévolution et actes unilatéraux***

1. Les accords de dévolution conclus avant la date de succession d'Etats entre l'Etat prédécesseur et une entité ou mouvement de libération nationale qui représente un peuple ayant le droit de disposer de lui-même, de même que les accords conclus par les Etats intéressés après la date de succession d'Etats, sont soumis aux règles relatives au consentement des parties et à la validité des traités, telles qu'énoncées par la Convention de Vienne sur le droit des traités. Le même principe s'applique aux accords de dévolution conclus entre l'Etat prédécesseur et une de ses entités autonomes qui deviendrait plus tard un Etat successeur.
2. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un autre Etat ou d'un autre sujet de droit international avant la date de la succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat prédécesseur et l'Etat successeur ont conclu un accord stipulant que lesdites obligations sont dévolues à l'Etat successeur.
3. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un autre Etat ou d'un autre sujet de droit international avant la date de la succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat successeur ait accepté que lesdites obligations lui soient dévolues.
4. Lorsque l'Etat lésé ou le sujet de droit international lésé n'accepte pas la solution envisagée par l'accord de dévolution ou par l'acte unilatéral, des négociations doivent être poursuivies de bonne foi par les Etats ou sujets intéressés. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent du chapitre III de la présente résolution est applicable.

*Article 7*

***Pluralité d'Etats successeurs***

1. Dans les cas de succession où il n'est pas possible d'identifier un Etat successeur unique, tous les Etats successeurs seront bénéficiaires de droits ou assumeront les obligations découlant de la commission d'un fait internationalement illicite d'une manière équitable, à moins qu'il n'en soit convenu autrement par les Etats ou sujets intéressés.
2. Pour établir une répartition équitable des droits ou obligations entre les Etats successeurs, pourront être pris en considération des critères tels que l'existence de liens spéciaux avec l'acte qui engage la responsabilité

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internationale, l'étendue du territoire et la taille de la population, les participations respectives dans le produit national brut des Etats concernés à la date de la succession, la nécessité d'éviter toute situation d'enrichissement sans cause et toute autre circonstance pertinente.

3. Des négociations doivent être poursuivies de bonne foi par les Etats successeurs en vue d'aboutir à une solution dans un délai raisonnable.

*Article 8*

***Etats ou sujets de droit international intéressés***

Aux fins des articles 6 et 7, les « Etats ou sujets de droit international intéressés » sont :

- a) dans le cas d'un fait internationalement illicite commis par l'Etat prédécesseur, l'Etat lésé ou le sujet de droit international lésé et tous les Etats successeurs ;
- b) dans le cas d'un fait internationalement illicite subi par l'Etat prédécesseur, tous les Etats successeurs.

*Article 9*

***Faits internationalement illicites à caractère continu ou composite s'étant produits ou achevés après la date de la succession d'Etats***

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

2. Quand l'Etat successeur complète une série d'actions ou omissions initiées par l'Etat prédécesseur définies dans leur ensemble comme illicites, la responsabilité internationale de l'Etat successeur pour la violation s'étend sur toute la période débutant avec la première des actions ou omissions de la série et dure aussi longtemps que ces actions ou omissions se répètent et restent non conformes à ladite obligation internationale.

3. Les dispositions du présent article sont sans préjudice de toute responsabilité qui incombe à l'Etat prédécesseur s'il continue d'exister.

*Article 10*

***Protection diplomatique***

1. Un Etat successeur est en droit d'exercer la protection diplomatique à l'égard d'une personne ou d'une société qui a sa nationalité à la date de la présentation officielle de la réclamation mais qui n'avait pas cette nationalité à la date du préjudice, à condition que la personne ou société ait eu la nationalité de l'Etat prédécesseur ou qu'elle ait perdu sa

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première nationalité et acquis, pour une raison sans rapport avec la présentation de la réclamation, la nationalité de l'État successeur d'une manière non contraire au droit international.

2. Une réclamation présentée par l'Etat prédécesseur dans l'exercice de la protection diplomatique peut être poursuivie après la date de la succession d'Etats par l'Etat successeur dans les mêmes conditions énoncées au paragraphe premier du présent article.

3. Une réclamation présentée par un Etat dans l'exercice de la protection diplomatique contre l'Etat prédécesseur peut être poursuivie contre l'Etat successeur si l'Etat prédécesseur a cessé d'exister. Dans le cas d'une pluralité d'Etats successeurs, la réclamation sera adressée à l'Etat successeur ayant le lien le plus direct avec le fait qui donne lieu à l'exercice de la protection diplomatique. S'il n'est pas possible d'identifier un Etat successeur unique ayant ce lien direct, la réclamation pourra être poursuivie contre tous les Etats successeurs. Les dispositions énoncées à l'article 7 s'appliquent *mutatis mutandis*.

4. Lorsque l'Etat prédécesseur continue d'exister et la personne ou la société possède la nationalité de l'Etat prédécesseur et celle de l'Etat successeur, ou celle d'un Etat tiers, la question est régie par les règles relatives à la protection diplomatique concernant la double ou multiple nationalité.

**CHAPITRE III:  
DISPOSITIONS CONCERNANT DES CATEGORIES  
SPECIFIQUES DE SUCCESSION D'ETATS**

*Article 11*

***Transfert d'une partie du territoire d'un Etat***

1. A l'exception des situations visées aux paragraphes suivants, les droits et les obligations qui découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé, ne passent pas à l'Etat successeur, lorsqu'une partie du territoire de l'Etat prédécesseur, ou tout territoire pour lequel celui-ci a la responsabilité des relations internationales, devient partie du territoire de l'Etat successeur.

2. Les droits qui découlent d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat successeur s'il existe un lien direct entre les conséquences de ce fait et le territoire transféré et/ou la population.

3. Si des circonstances particulières l'exigent, les obligations qui découlent d'un fait internationalement illicite passent à l'Etat successeur, pourvu que l'auteur de ce fait ait été un organe de l'unité territoriale qui plus tard est devenu un organe de l'Etat successeur.

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*Article 12*

***Séparation de parties d'un Etat***

1. A l'exception des situations visées aux paragraphes 2 à 4, les droits et les obligations qui découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé ne passent pas à l'Etat ou aux Etats successeurs lorsqu'une partie ou plusieurs parties du territoire d'un Etat s'en séparent pour former un ou plusieurs Etats et que l'Etat prédécesseur continue d'exister.
2. Les droits qui découlent d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat ou aux Etats successeurs s'il existe un lien direct entre les conséquences de ce fait et le territoire ou la population de l'Etat ou des Etats successeurs.
3. Si des circonstances particulières l'exigent, les obligations qui découlent du fait internationalement illicite commis par l'Etat prédécesseur passent à l'Etat successeur pourvu que l'auteur de ce fait ait été un organe de l'unité territoriale de l'Etat prédécesseur qui plus tard est devenu organe de l'Etat successeur.
4. Si les circonstances particulières indiquées aux paragraphes 2 et 3 du présent article l'exigent, les obligations qui découlent d'un fait internationalement illicite commis avant la date de la succession d'Etats sont assumées par l'Etat prédécesseur et l'Etat ou les Etats successeurs.
5. Pour établir une répartition équitable des droits ou obligations des Etats prédécesseur et successeur, pourront être pris en considération des critères tels que l'existence de liens spéciaux avec l'acte qui engage la responsabilité internationale, l'étendue du territoire et la taille de la population, les participations respectives dans le produit national brut des Etats concernés à la date de la succession de l'Etat, la nécessité d'éviter l'enrichissement sans cause et toute autre circonstance pertinente. Les dispositions de l'article 7 s'appliquent *mutatis mutandis*.
6. Le fait internationalement illicite d'un mouvement, insurrectionnel ou autre, qui parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous l'administration de ce dernier est considéré comme un fait de ce nouvel Etat d'après le droit international. En conséquence, l'Etat prédécesseur n'encourt pas de responsabilité pour des faits commis par le mouvement insurrectionnel ou autre.

*Article 13*

***Fusion d'Etats***

Lorsque deux ou plusieurs Etats s'unissent pour former un nouvel Etat sans laisser subsister d'Etat prédécesseur, les droits ou obligations qui

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découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé passent à l'Etat successeur.

*Article 14*

***Incorporation d'un Etat dans un autre Etat préexistant***

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

*Article 15*

***Dissolution d'un Etat***

1. Lorsqu'un Etat est dissout et cesse d'exister et que les parties de son territoire forment deux ou plusieurs Etats successeurs, les droits ou les obligations découlant d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé passent, compte tenu du devoir de négocier et selon les circonstances mentionnées aux paragraphes 2 et 3 du présent article, à l'un, plusieurs ou à tous les Etats successeurs.

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

3. Afin de déterminer lequel des Etats successeurs devient le titulaire des obligations énoncées au paragraphe premier, il sera notamment tenu compte, outre le facteur énoncé au paragraphe 2, du fait que l'auteur du fait internationalement illicite ait été un organe de l'Etat prédécesseur qui est devenu ensuite un organe de l'Etat successeur.

*Article 16*

***Etats nouvellement indépendants***

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

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

3. Le comportement, avant la date de succession d'Etats, d'un mouvement de libération nationale qui parvient à créer un Etat nouvellement indépendant, sera considéré comme le fait de ce nouvel Etat d'après le droit international.



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4. Les droits qui découlent d'un fait internationalement illicite commis avant la date de succession d'Etats par l'Etat prédécesseur ou un autre Etat contre un peuple bénéficiant du droit de disposer de lui-même passent après cette date à l'Etat nouvellement indépendant créé par ce peuple.

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**RESOLUTION**

*The Institute of International Law,*

*Noting* that the work of codification and progressive development carried out in the field of succession of States has not covered matters relating to international responsibility of States, and that work in the latter field has set aside matters relating to succession of States,

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

*Bearing in mind* that cases of succession of States should not constitute a reason for not implementing the consequences arising from an internationally wrongful act,

*Taking into account* that different categories of succession of States and their particular circumstances may lead to different solutions,

*Considering* that law and equity require the identification of the States or other subjects of international law to which, after the date of succession of States, pertain the rights and obligations arising from internationally wrongful acts committed by the predecessor State or injuring it,

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

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

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

*Adopts* the following Resolution:

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**CHAPTER I:  
GENERAL PROVISIONS**

*Article 1  
Use of terms*

For the purposes of this Resolution:

- (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.
- (e) "Newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.
- (f) "Devolution agreement" means an agreement, concluded by the predecessor State and the successor State or a national liberation, insurrectional or other movement, or an entity or organ that later becomes the organ of the successor State, providing that rights and/or obligations of the predecessor State shall devolve upon the successor State.
- (g) "Internationally wrongful act" means conduct consisting of an action or omission which: (i) is attributable to the State or another subject under international law; and (ii) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act as internationally wrongful is governed by international law.
- (h) "international responsibility" refers to the legal consequences of an internationally wrongful act.

*Article 2  
Scope of the present Resolution*

1. The present Resolution applies to the effects of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act that the predecessor State committed against another State or another subject of international law prior to the date of succession, or

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that a State or another subject of international law committed against the predecessor State prior to the date of succession.

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

3. The present Articles do not govern the situations resulting from political changes within a State, including changes in the regime or name of the State.

**CHAPTER II:  
COMMON RULES**

*Article 3*

***Subsidiary character of the guiding principles***

The guiding principles mentioned below apply in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or other subject of international law injured by the internationally wrongful act.

*Article 4*

***Invocation of responsibility for an internationally wrongful act committed by the predecessor State before the date of succession of States***

1. International responsibility arising from an internationally wrongful act committed before the date of succession of States by a predecessor State falls on this State.

2. If the predecessor State continues to exist, the injured State or subject of international law may, even after the date of succession, invoke the international responsibility of the predecessor State for an internationally wrongful act committed by that State before the date of succession of States and request from it reparation for the injury caused by that internationally wrongful act.

3. In conformity with the following Articles, the injured State or subject of international law may also or solely request reparation from a successor State for the injury caused by an internationally wrongful act of the predecessor State.

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*Article 5*

***Invocation of responsibility for an internationally wrongful act  
Committed against the predecessor State before the date of succession  
of States***

1. The predecessor State which after the date of succession of States continues to exist may invoke the international responsibility of another State or subject of international law for an internationally wrongful act committed against it before that date by that State or subject and may request reparation for the injury caused by this act.
2. If the injury caused by an internationally wrongful act committed before the date of succession of States against a predecessor State affected the territory or persons which, after this date, are under the jurisdiction of a successor State, the successor State may request reparation for the injury caused by such act, as provided in the following Articles, unless reparation was already obtained in full before the date of succession of States.

*Article 6*

***Devolution agreements and unilateral acts***

1. Devolution agreements concluded before the date of succession of States between the predecessor State and an entity or national liberation movement representing a people entitled to self-determination, as well as agreements concluded by the States concerned after the date of succession of States, are subject to the rules relating to the consent of the parties and to the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties. The same principle applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.
2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement, providing that such obligations shall devolve upon the successor State.
3. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it.

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4. Where the injured State or subject of international law does not accept the solution envisaged by the devolution agreement or unilateral act, good faith negotiations must be pursued by the States or subjects concerned. If these negotiations do not succeed within a reasonable period of time, the solution envisaged by the relevant Article of Chapter III of the present Resolution is applicable.

*Article 7*

***Plurality of successor States***

1. In case of succession in which it is not possible to determine a single successor State, all the successor States will enjoy the rights or assume the obligations arising from the commission of an internationally wrongful act in an equitable manner, unless otherwise agreed by the States or subjects of international law concerned.

2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

3. Negotiations in good faith must be pursued by the successor States, with the goal of reaching a solution within a reasonable time.

*Article 8*

***States or subjects of international law concerned***

For the purposes of Articles 6 and 7, “States or subjects of international law concerned” are:

- a) in the case of an internationally wrongful act committed by the predecessor State, the injured State or subject of international law and all the successor States;
- b) in the case of an internationally wrongful act committed against the predecessor State, all the successor States.

*Article 9*

***Internationally wrongful acts having a continuing or composite character performed or completed after the date of succession of States***

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

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2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in the aggregate as a breach of an international obligation, the international responsibility of the successor State for the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

3. The provisions of the present Article are without prejudice to any responsibility incurred by the predecessor State if it continues to exist.

*Article 10*

***Diplomatic protection***

1. A successor State may exercise diplomatic protection in respect of a person or a corporation that is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.

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

3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In the case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. When it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 7 apply *mutatis mutandis*.

4. Where the predecessor State continues to exist and the individual or corporation possesses the nationality of both the predecessor and the successor States, or the nationality of a third State, the question is governed by the rules of diplomatic protection concerning dual or multiple nationality.

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**CHAPTER III:  
PROVISIONS CONCERNING SPECIFIC CATEGORIES  
OF SUCCESSION OF STATES**

*Article 11*

***Transfer of part of the territory of a State***

1. With the exception of the situations referred to in the following paragraphs, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor State when part of the territory of the predecessor State, or any territory for the international relations of which this State is responsible, becomes part of the territory of the successor State.
2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if there exists a direct link between the consequences of this act and the territory transferred and/or its population.
3. If particular circumstances so require, the obligations arising from an internationally wrongful act pass to the successor State when the author of this act was an organ of the territorial unit of the predecessor State that has later become an organ of the successor State.

*Article 12*

***Separation of parts of a State***

1. With the exception of the situations referred to in paragraphs 2 to 4 of the present Article, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor State or States when a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist.
2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State or States if there exists a direct link between the consequences of this act and the territory or the population of the successor State or States.
3. If particular circumstances so require, the obligations arising from the commission of an internationally wrongful act by the predecessor State pass to the successor State when the author of that act was an organ of a territorial unit of the predecessor State that has later become an organ of the successor State.
4. If particular circumstances indicated in paragraphs 2 and 3 of this Article so require, the obligations arising from an internationally

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wrongful act committed before the date of succession of States are assumed by the predecessor and the successor State or States.

5. In order to determine an equitable apportionment of the rights or obligations of the predecessor and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession of States, the need to avoid unjust enrichment and any other circumstance relevant to the case. The provisions of Article 7 apply *mutatis mutandis*.

6. The internationally wrongful act of an insurrectional or other movement which succeeds in establishing a new State on part of the territory of the predecessor State or in a territory under the administration of this latter State shall be considered an act of the new State under international law. Consequently, the predecessor State incurs no responsibility for the acts committed by the insurrectional or other movement.

*Article 13*

***Merger of States***

When two or more States unite and form a new successor State, and no predecessor State continues to exist, the rights or obligations arising from an internationally wrongful act of which a predecessor State has been either the author or the injured State pass to the successor State.

*Article 14*

***Incorporation of a State into another existing State***

When a State is incorporated into another existing State and ceases to exist, the rights or obligations arising from an internationally wrongful act of which the predecessor State has been the author or the injured State pass to the successor State.

*Article 15*

***Dissolution of a State***

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the rights or obligations arising from an internationally wrongful act in relation to which the predecessor State has been the author or the injured State pass, bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs 2 and 3 of the present Article, to one, several or all the successor States.

2. In order to determine which of the successor States becomes bearer of the rights described in the preceding paragraph, a relevant factor will in



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particular be the existence of a direct link between the consequences of the internationally wrongful act committed against the predecessor State and the territory or the population of the successor State or States.

3. In order to determine which of the successor States becomes bearer of the obligations described in paragraph 1, a relevant factor will in particular be, in addition to that mentioned in paragraph 2, the fact that the author of the internationally wrongful act was an organ of the predecessor State that later became an organ of the successor State.

*Article 16*

***Newly independent States***

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

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

3. The conduct, prior to the date of succession of States, of a national liberation movement which succeeds in establishing a newly independent State shall be considered the act of the new State under international law.

4. The rights arising from an internationally wrongful act committed before the date of the succession of States by the predecessor State or any other State against a people entitled to self-determination shall pass after that date to the newly independent State created by that people.

\*\*\*

Le *Secrétaire général* procède au vote de l'ensemble de la résolution par appel nominal.

Le résultat du vote est le suivant :

Pour : M. Abi-Saab, Mmes Arsanjani, Bastid-Burdeau, MM. Bernhardt, Bucher, Caflisch, Dinstein, El-Kosheri, Lady Fox, M. Gaja, Mme Gaudemet-Tallon, MM. Giardina, Dame Rosalyn Higgins, Mme Infante Caffi, MM. Jayme, Kazazi, Sir Kenneth Keith, MM. Kirsch, Kohen, Mme Lamm, MM. Lee, Mahiou, Müllerson, Nieto-Navia, Pocar, Ranjeva, Rao, Reisman, Ronzitti, Rozakis, Rudolf, Tomuschat, Torres Bernárdez, Treves, Verhoeven, Wolfrum, Bogdan, Mme Boisson de Chazournes, M. Caron, Mme Damrosch, MM. D'Argent, Greenwood, Iwasawa, Murase, Nolte, Oxman, Mme Pinto, MM. Sicilianos, Symeonides, Tomka.

Contre : aucun

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Se sont abstenus : aucun

La résolution est adoptée par 50 voix pour, 0 voix contre et 0 abstention,

The *President* thanked everyone for their contribution to the adoption of the Resolution.

La séance est levée à 17 h 20.

### III. RESOLUTION

#### QUATORZIEME COMMISSION

*La succession d'Etats en matière de responsabilité internationale*

Rapporteur : Marcelo Kohen

#### RESOLUTION

*L'Institut de droit international,*

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

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

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

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

*Considérant* que, le droit et l'équité imposent que soient déterminés, après la date de succession d'Etats, à quels Etats ou d'autres sujets de droit international incomberont les droits et les obligations qui découlent des faits internationalement illicites commis ou subis par l'Etat prédécesseur,

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

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

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

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*Adopte* la résolution suivante :

**CHAPITRE I :**  
**DISPOSITIONS GENERALES**

*Article 1*

***Expressions employées***

Aux fins de la présente résolution :

- a) L'expression « succession d'Etats » s'entend de la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire.
- b) L'expression « Etat prédécesseur » s'entend de l'Etat auquel un autre Etat s'est substitué à l'occasion d'une succession d'Etats.
- c) L'expression « Etat successeur » s'entend de l'Etat qui s'est substitué à un autre Etat à l'occasion d'une succession d'Etats.
- d) L'expression « date de la succession d'Etats » s'entend de la date à laquelle l'Etat successeur s'est substitué à l'Etat prédécesseur dans la responsabilité des relations internationales du territoire auquel se rapporte la succession d'Etats.
- e) L'expression « Etat nouvellement indépendant » s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales.
- f) L'expression « accord de dévolution » s'entend d'un accord conclu entre l'Etat prédécesseur et l'Etat successeur ou un mouvement de libération nationale, insurrectionnel ou autre, ou une entité ou un organe qui devient ultérieurement l'organe de l'Etat successeur, stipulant que les droits et/ou obligations de l'Etat prédécesseur sont dévolus à l'Etat successeur.
- g) L'expression « fait internationalement illicite » s'entend d'un comportement consistant en une action ou une omission : (i) attribuable à l'Etat ou à un autre sujet en vertu du droit international; et (ii) constituant une violation d'une obligation internationale de l'Etat ou de l'autre sujet. La qualification du fait comme internationalement illicite relève du droit international.
- h) L'expression « responsabilité internationale » s'entend des conséquences juridiques d'un fait internationalement illicite.

*Article 2*

***Portée de la présente résolution***

1. La présente résolution s'applique aux effets d'une succession d'Etats relatifs aux droits et obligations qui découlent d'un fait

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internationalement illicite commis par l'Etat prédécesseur contre un autre Etat ou un autre sujet de droit international avant la date de la succession d'Etats, ou commis par un Etat ou un autre sujet de droit international contre l'Etat prédécesseur avant cette date.

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

3. Les présents articles ne régissent pas les situations résultant de changements politiques internes à l'Etat, y compris les changements de régime ou de nom de l'Etat.

**CHAPITRE II :  
REGLES COMMUNES**

*Article 3*

***Caractère subsidiaire des principes directeurs***

Les principes directeurs mentionnés ci-après sont d'application en l'absence de toute autre solution convenue entre les parties concernées par la situation de succession d'Etats, y compris l'Etat ou le sujet lésé par le fait internationalement illicite.

*Article 4*

***Invocation de la responsabilité pour un fait internationalement illicite commis par l'Etat prédécesseur avant la date de la succession d'Etats***

1. La responsabilité internationale découlant d'un fait internationalement illicite commis avant la date d'une succession d'Etats par un Etat prédécesseur incombe à cet Etat.

2. Si l'Etat prédécesseur continue d'exister, l'Etat ou le sujet lésé peut, même après la date de la succession, invoquer la responsabilité internationale de l'Etat prédécesseur pour le fait internationalement illicite qu'il a commis avant la date de la succession et lui demander réparation pour le préjudice causé par ce fait internationalement illicite.

3. Conformément aux articles suivants, l'Etat ou le sujet lésé peut demander réparation également ou uniquement à l'Etat ou Etats successeurs pour le préjudice causé par le fait internationalement illicite commis par l'Etat prédécesseur.

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*Article 5*

***Invocation de la responsabilité pour un fait internationalement illicite  
commis contre l'Etat prédécesseur avant la date de la succession  
d'Etats***

1. L'Etat prédécesseur qui continue d'exister après la date de la succession d'Etats peut invoquer la responsabilité internationale pour le fait internationalement illicite commis à son égard avant cette date par un autre Etat ou sujet de droit international et peut demander réparation pour le préjudice causé par ce fait.
2. Si le préjudice causé par un fait internationalement illicite commis avant la date de la succession d'Etats contre l'Etat prédécesseur affecte le territoire ou des personnes qui, après cette date, sont sous la juridiction d'un Etat successeur, l'Etat successeur peut demander une réparation pour le préjudice causé par ce fait, conformément aux articles suivants, à moins que la réparation n'ait été intégralement obtenue avant la date de la succession d'Etats.

*Article 6*

***Accords de dévolution et actes unilatéraux***

1. Les accords de dévolution conclus avant la date de succession d'Etats entre l'Etat prédécesseur et une entité ou mouvement de libération nationale qui représente un peuple ayant le droit de disposer de lui-même, de même que les accords conclus par les Etats intéressés après la date de succession d'Etats, sont soumis aux règles relatives au consentement des parties et à la validité des traités, telles qu'énoncées par la Convention de Vienne sur le droit des traités. Le même principe s'applique aux accords de dévolution conclus entre l'Etat prédécesseur et une de ses entités autonomes qui deviendrait plus tard un Etat successeur.
2. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un autre Etat ou d'un autre sujet de droit international avant la date de la succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat prédécesseur et l'Etat successeur ont conclu un accord stipulant que lesdites obligations sont dévolues à l'Etat successeur.
3. Les obligations d'un Etat prédécesseur découlant d'un fait internationalement illicite qu'il a commis à l'égard d'un autre Etat ou d'un autre sujet de droit international avant la date de la succession d'Etats ne deviennent pas les obligations de l'Etat successeur vis-à-vis de l'Etat ou du sujet lésé du seul fait que l'Etat successeur ait accepté que lesdites obligations lui soient dévolues.

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4. Lorsque l'Etat lésé ou le sujet de droit international lésé n'accepte pas la solution envisagée par l'accord de dévolution ou par l'acte unilatéral, des négociations doivent être poursuivies de bonne foi par les Etats ou sujets intéressés. Si ces négociations n'aboutissent pas dans un délai raisonnable, la solution envisagée par l'article pertinent du chapitre III de la présente résolution est applicable.

*Article 7*

***Pluralité d'Etats successeurs***

1. Dans les cas de succession où il n'est pas possible d'identifier un Etat successeur unique, tous les Etats successeurs seront bénéficiaires de droits ou assumeront les obligations découlant de la commission d'un fait internationalement illicite d'une manière équitable, à moins qu'il n'en soit convenu autrement par les Etats ou sujets intéressés.

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

3. Des négociations doivent être poursuivies de bonne foi par les Etats successeurs en vue d'aboutir à une solution dans un délai raisonnable.

*Article 8*

***Etats ou sujets de droit international intéressés***

Aux fins des articles 6 et 7, les « Etats ou sujets de droit international intéressés » sont :

- a) dans le cas d'un fait internationalement illicite commis par l'Etat prédécesseur, l'Etat lésé ou le sujet de droit international lésé et tous les Etats successeurs ;
- b) dans le cas d'un fait internationalement illicite subi par l'Etat prédécesseur, tous les Etats successeurs.

*Article 9*

***Faits internationalement illicites à caractère continu ou composite s'étant produits ou achevés après la date de la succession d'Etats***

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

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2. Quand l'Etat successeur complète une série d'actions ou omissions initiées par l'Etat prédécesseur définies dans leur ensemble comme illicites, la responsabilité internationale de l'Etat successeur pour la violation s'étend sur toute la période débutant avec la première des actions ou omissions de la série et dure aussi longtemps que ces actions ou omissions se répètent et restent non conformes à ladite obligation internationale.

3. Les dispositions du présent article sont sans préjudice de toute responsabilité qui incombe à l'Etat prédécesseur s'il continue d'exister.

*Article 10*

***Protection diplomatique***

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

2. Une réclamation présentée par l'Etat prédécesseur dans l'exercice de la protection diplomatique peut être poursuivie après la date de la succession d'Etats par l'Etat successeur dans les mêmes conditions énoncées au paragraphe premier du présent article.

3. Une réclamation présentée par un Etat dans l'exercice de la protection diplomatique contre l'Etat prédécesseur peut être poursuivie contre l'Etat successeur si l'Etat prédécesseur a cessé d'exister. Dans le cas d'une pluralité d'Etats successeurs, la réclamation sera adressée à l'Etat successeur ayant le lien le plus direct avec le fait qui donne lieu à l'exercice de la protection diplomatique. S'il n'est pas possible d'identifier un Etat successeur unique ayant ce lien direct, la réclamation pourra être poursuivie contre tous les Etats successeurs. Les dispositions énoncées à l'article 7 s'appliquent *mutatis mutandis*.

4. Lorsque l'Etat prédécesseur continue d'exister et la personne ou la société possède la nationalité de l'Etat prédécesseur et celle de l'Etat successeur, ou celle d'un Etat tiers, la question est régie par les règles relatives à la protection diplomatique concernant la double ou multiple nationalité.



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**CHAPITRE III**  
**DISPOSITIONS CONCERNANT DES CATEGORIES SPECIFIQUES**  
**DE SUCCESSION D'ETATS**

*Article 11*

***Transfert d'une partie du territoire d'un Etat***

1. A l'exception des situations visées aux paragraphes suivants, les droits et les obligations qui découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé, ne passent pas à l'Etat successeur, lorsqu'une partie du territoire de l'Etat prédécesseur, ou tout territoire pour lequel celui-ci a la responsabilité des relations internationales, devient partie du territoire de l'Etat successeur.
2. Les droits qui découlent d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat successeur s'il existe un lien direct entre les conséquences de ce fait et le territoire transféré et/ou la population.
3. Si des circonstances particulières l'exigent, les obligations qui découlent d'un fait internationalement illicite passent à l'Etat successeur, pourvu que l'auteur de ce fait ait été un organe de l'unité territoriale qui plus tard est devenu un organe de l'Etat successeur.

*Article 12*

***Séparation de parties d'un Etat***

1. A l'exception des situations visées aux paragraphes 2 à 4, les droits et les obligations qui découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé ne passent pas à l'Etat ou aux Etats successeurs lorsqu'une partie ou plusieurs parties du territoire d'un Etat s'en séparent pour former un ou plusieurs Etats et que l'Etat prédécesseur continue d'exister.
2. Les droits qui découlent d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat ou aux Etats successeurs s'il existe un lien direct entre les conséquences de ce fait et le territoire ou la population de l'Etat ou des Etats successeurs.
3. Si des circonstances particulières l'exigent, les obligations qui découlent du fait internationalement illicite commis par l'Etat prédécesseur passent à l'Etat successeur pourvu que l'auteur de ce fait ait été un organe de l'unité territoriale de l'Etat prédécesseur qui plus tard est devenu organe de l'Etat successeur.
4. Si les circonstances particulières indiquées aux paragraphes 2 et 3 du présent article l'exigent, les obligations qui découlent d'un fait internationalement illicite commis avant la date de la succession d'Etats sont assumées par l'Etat prédécesseur et l'Etat ou les Etats successeurs.

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5. Pour établir une répartition équitable des droits ou obligations des Etats prédécesseur et successeur, pourront être pris en considération des critères tels que l'existence de liens spéciaux avec l'acte qui engage la responsabilité internationale, l'étendue du territoire et la taille de la population, les participations respectives dans le produit national brut des Etats concernés à la date de la succession de l'Etat, la nécessité d'éviter l'enrichissement sans cause et toute autre circonstance pertinente. Les dispositions de l'article 7 s'appliquent *mutatis mutandis*.

6. Le fait internationalement illicite d'un mouvement, insurrectionnel ou autre, qui parvient à créer un nouvel Etat sur une partie du territoire d'un Etat préexistant ou sur un territoire sous l'administration de ce dernier est considéré comme un fait de ce nouvel Etat d'après le droit international. En conséquence, l'Etat prédécesseur n'encourt pas de responsabilité pour des faits commis par le mouvement insurrectionnel ou autre.

*Article 13*

***Fusion d'Etats***

Lorsque deux ou plusieurs Etats s'unissent pour former un nouvel Etat sans laisser subsister d'Etat prédécesseur, les droits ou obligations qui découlent d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été soit l'auteur soit l'Etat lésé passent à l'Etat successeur.

*Article 14*

***Incorporation d'un Etat dans un autre Etat préexistant***

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

*Article 15*

***Dissolution d'un Etat***

1. Lorsqu'un Etat est dissout et cesse d'exister et que les parties de son territoire forment deux ou plusieurs Etats successeurs, les droits ou les obligations découlant d'un fait internationalement illicite à l'égard duquel l'Etat prédécesseur a été l'auteur ou l'Etat lésé passent, compte tenu du devoir de négocier et selon les circonstances mentionnées aux paragraphes 2 et 3 du présent article, à l'un, plusieurs ou à tous les Etats successeurs.

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

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3. Afin de déterminer lequel des Etats successeurs devient le titulaire des obligations énoncées au paragraphe premier, il sera notamment tenu compte, outre le facteur énoncé au paragraphe 2, du fait que l'auteur du fait internationalement illicite ait été un organe de l'Etat prédécesseur qui est devenu ensuite un organe de l'Etat successeur.

*Article 16*

***Etats nouvellement indépendants***

1. Quand l'Etat successeur est un Etat nouvellement indépendant, les obligations découlant d'un fait internationalement illicite commis par l'Etat prédécesseur ne passent pas à l'Etat successeur.
2. Quand l'Etat successeur est un Etat nouvellement indépendant, les droits découlant d'un fait internationalement illicite commis contre l'Etat prédécesseur passent à l'Etat successeur si ce fait a un lien direct avec le territoire ou la population de l'Etat nouvellement indépendant.
3. Le comportement, avant la date de succession d'Etats, d'un mouvement de libération nationale qui parvient à créer un Etat nouvellement indépendant, sera considéré comme le fait de ce nouvel Etat d'après le droit international.
4. Les droits qui découlent d'un fait internationalement illicite commis avant la date de succession d'Etats par l'Etat prédécesseur ou un autre Etat contre un peuple bénéficiant du droit de disposer de lui-même passent après cette date à l'Etat nouvellement indépendant créé par ce peuple.

*FOURTEENTH COMMISSION*

*State Succession in Matters of State Responsibility*

Rapporteur: Marcelo Kohen

**RESOLUTION**

*The Institute of International Law,*

*Noting* that the work of codification and progressive development carried out in the field of succession of States has not covered matters relating to international responsibility of States, and that work in the latter field has set aside matters relating to succession of States,

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

*Bearing in mind* that cases of succession of States should not constitute a reason for not implementing the consequences arising from an internationally wrongful act,

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*Taking into account* that different categories of succession of States and their particular circumstances may lead to different solutions,

*Considering* that law and equity require the identification of the States or other subjects of international law to which, after the date of succession of States, pertain the rights and obligations arising from internationally wrongful acts committed by the predecessor State or injuring it,

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

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

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

*Adopts* the following Resolution:

**CHAPTER I:  
GENERAL PROVISIONS**

*Article 1  
Use of terms*

For the purposes of this Resolution:

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

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- (f) “Devolution agreement” means an agreement, concluded by the predecessor State and the successor State or a national liberation, insurrectional or other movement, or an entity or organ that later becomes the organ of the successor State, providing that rights and/or obligations of the predecessor State shall devolve upon the successor State.
- (g) “Internationally wrongful act” means conduct consisting of an action or omission which: (i) is attributable to the State or another subject under international law; and (ii) constitutes a breach of an international obligation of the State or the other subject. The characterization of an act as internationally wrongful is governed by international law.
- (h) “international responsibility” refers to the legal consequences of an internationally wrongful act.

*Article 2*

***Scope of the present Resolution***

1. The present Resolution applies to the effects of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act that the predecessor State committed against another State or another subject of international law prior to the date of succession, or that a State or another subject of international law committed against the predecessor State prior to the date of succession.
2. The present Resolution applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.
3. The present Articles do not govern the situations resulting from political changes within a State, including changes in the regime or name of the State.

**CHAPTER II:  
COMMON RULES**

*Article 3*

***Subsidiary character of the guiding principles***

The guiding principles mentioned below apply in the absence of any different solution agreed upon by the parties concerned by a situation of succession of States, including the State or other subject of international law injured by the internationally wrongful act.

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*Article 4*

***Invocation of responsibility for an internationally wrongful act  
committed by the predecessor State before  
the date of succession of States***

1. International responsibility arising from an internationally wrongful act committed before the date of succession of States by a predecessor State falls on this State.
2. If the predecessor State continues to exist, the injured State or subject of international law may, even after the date of succession, invoke the international responsibility of the predecessor State for an internationally wrongful act committed by that State before the date of succession of States and request from it reparation for the injury caused by that internationally wrongful act.
3. In conformity with the following Articles, the injured State or subject of international law may also or solely request reparation from a successor State for the injury caused by an internationally wrongful act of the predecessor State.

*Article 5*

***Invocation of responsibility for an internationally wrongful act  
committed  
against the predecessor State before the date of succession of States***

1. The predecessor State which after the date of succession of States continues to exist may invoke the international responsibility of another State or subject of international law for an internationally wrongful act committed against it before that date by that State or subject and may request reparation for the injury caused by this act.
2. If the injury caused by an internationally wrongful act committed before the date of succession of States against a predecessor State affected the territory or persons which, after this date, are under the jurisdiction of a successor State, the successor State may request reparation for the injury caused by such act, as provided in the following Articles, unless reparation was already obtained in full before the date of succession of States.

*Article 6*

***Devolution agreements and unilateral acts***

1. Devolution agreements concluded before the date of succession of States between the predecessor State and an entity or national liberation movement representing a people entitled to self-determination, as well as agreements concluded by the States concerned after the date of succession of States, are subject to the rules relating to the consent of the

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parties and to the validity of treaties, as reflected in the Vienna Convention on the Law of Treaties. The same principle applies to devolution agreements concluded between the predecessor State and an autonomous entity thereof that later becomes a successor State.

2. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement, providing that such obligations shall devolve upon the successor State.

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

4. Where the injured State or subject of international law does not accept the solution envisaged by the devolution agreement or unilateral act, good faith negotiations must be pursued by the States or subjects concerned. If these negotiations do not succeed within a reasonable period of time, the solution envisaged by the relevant Article of Chapter III of the present Resolution is applicable.

*Article 7*

***Plurality of successor States***

1. In case of succession in which it is not possible to determine a single successor State, all the successor States will enjoy the rights or assume the obligations arising from the commission of an internationally wrongful act in an equitable manner, unless otherwise agreed by the States or subjects of international law concerned.

2. In order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession, the need to avoid unjust enrichment and any other circumstance relevant to the case.

3. Negotiations in good faith must be pursued by the successor States, with the goal of reaching a solution within a reasonable time.

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*Article 8*

***States or subjects of international law concerned***

For the purposes of Articles 6 and 7, “States or subjects of international law concerned” are:

- (a) in the case of an internationally wrongful act committed by the predecessor State, the injured State or subject of international law and all the successor States;
- (b) in the case of an internationally wrongful act committed against the predecessor State, all the successor States.

*Article 9*

***Internationally wrongful acts having a continuing or composite character performed or completed after the date of succession of States***

1. When a successor State continues the breach of an international obligation constituted by an act of the predecessor State having a continuing character, the international responsibility of the successor State for the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.
2. When a successor State completes a series of actions or omissions initiated by the predecessor State defined in the aggregate as a breach of an international obligation, the international responsibility of the successor State for the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.
3. The provisions of the present Article are without prejudice to any responsibility incurred by the predecessor State if it continues to exist.

*Article 10*

***Diplomatic protection***

1. A successor State may exercise diplomatic protection in respect of a person or a corporation that is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of the predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the successor State in a manner not inconsistent with international law.
2. A claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession of States by the successor State under the same conditions set out in paragraph 1 of this Article.

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3. A claim in exercise of diplomatic protection initiated by a State against the predecessor State may be continued against the successor State if the predecessor State has ceased to exist. In the case of a plurality of successor States, the claim shall be addressed to the successor State having the most direct connection with the act giving rise to the exercise of diplomatic protection. When it is not possible to determine a single successor State having such a direct connection, the claim may be continued against all the successor States. The provisions of Article 7 apply *mutatis mutandis*.

4. Where the predecessor State continues to exist and the individual or corporation possesses the nationality of both the predecessor and the successor States, or the nationality of a third State, the question is governed by the rules of diplomatic protection concerning dual or multiple nationality.

**CHAPTER III:  
PROVISIONS CONCERNING SPECIFIC CATEGORIES  
OF SUCCESSION OF STATES**

*Article 11*

***Transfer of part of the territory of a State***

1. With the exception of the situations referred to in the following paragraphs, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor State when part of the territory of the predecessor State, or any territory for the international relations of which this State is responsible, becomes part of the territory of the successor State.

2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if there exists a direct link between the consequences of this act and the territory transferred and/or its population.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act pass to the successor State when the author of this act was an organ of the territorial unit of the predecessor State that has later become an organ of the successor State.

*Article 12*

***Separation of parts of a State***

1. With the exception of the situations referred to in paragraphs 2 to 4 of the present Article, the rights and obligations arising from an internationally wrongful act in relation to which the predecessor State has been either the author or the injured State do not pass to the successor

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State or States when a part or parts of the territory of a State separate to form one or more States and the predecessor State continues to exist.

2. The rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State or States if there exists a direct link between the consequences of this act and the territory or the population of the successor State or States.

3. If particular circumstances so require, the obligations arising from the commission of an internationally wrongful act by the predecessor State pass to the successor State when the author of that act was an organ of a territorial unit of the predecessor State that has later become an organ of the successor State.

4. If particular circumstances indicated in paragraphs 2 and 3 of this Article so require, the obligations arising from an internationally wrongful act committed before the date of succession of States are assumed by the predecessor and the successor State or States.

5. In order to determine an equitable apportionment of the rights or obligations of the predecessor and the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession of States, the need to avoid unjust enrichment and any other circumstance relevant to the case. The provisions of Article 7 apply *mutatis mutandis*.

6. The internationally wrongful act of an insurrectional or other movement which succeeds in establishing a new State on part of the territory of the predecessor State or in a territory under the administration of this latter State shall be considered an act of the new State under international law. Consequently, the predecessor State incurs no responsibility for the acts committed by the insurrectional or other movement.

*Article 13*

***Merger of States***

When two or more States unite and form a new successor State, and no predecessor State continues to exist, the rights or obligations arising from an internationally wrongful act of which a predecessor State has been either the author or the injured State pass to the successor State.

*Article 14*

***Incorporation of a State into another existing State***

When a State is incorporated into another existing State and ceases to exist, the rights or obligations arising from an internationally wrongful

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act of which the predecessor State has been the author or the injured State pass to the successor State.

*Article 15*

***Dissolution of a State***

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the rights or obligations arising from an internationally wrongful act in relation to which the predecessor State has been the author or the injured State pass, bearing in mind the duty to negotiate and according to the circumstances referred to in paragraphs 2 and 3 of the present Article, to one, several or all the successor States.
2. In order to determine which of the successor States becomes bearer of the rights described in the preceding paragraph, a relevant factor will in particular be the existence of a direct link between the consequences of the internationally wrongful act committed against the predecessor State and the territory or the population of the successor State or States.
3. In order to determine which of the successor States becomes bearer of the obligations described in paragraph 1, a relevant factor will in particular be, in addition to that mentioned in paragraph 2, the fact that the author of the internationally wrongful act was an organ of the predecessor State that later became an organ of the successor State.

*Article 16*

***Newly independent States***

1. When the successor State is a newly independent State, the obligations arising from an internationally wrongful act committed by the predecessor State shall not pass to the successor State.
2. When the successor State is a newly independent State, the rights arising from an internationally wrongful act committed against the predecessor State pass to the successor State if that act has a direct link with the territory or the population of the newly independent State.
3. The conduct, prior to the date of succession of States, of a national liberation movement which succeeds in establishing a newly independent State shall be considered the act of the new State under international law.
4. The rights arising from an internationally wrongful act committed before the date of the succession of States by the predecessor State or any other State against a people entitled to self-determination shall pass after that date to the newly independent State created by that people.

