



**RIGA
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Succession of States in Respect of State Responsibility: Towards Yet Another Vienna Convention?

MASTER'S THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

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ABSTRACT

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

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

SUMMARY

The following Thesis “*Succession of States in Respect of State Responsibility: Towards Yet Another Vienna Convention?*” has the major objective of identifying the strengths and weaknesses of the wording of the Draft Articles on Succession of States in Respect of State Responsibility that are currently being developed by the International Law Commission. The study aims to answer two research questions. First, is there a true necessity for a written set of rules, or could state succession in respect of state responsibility take place by virtue of application of the existing legal rules? Second, as already noted, what are the advantages and the possible criticism of the newly proposed Articles?

To provide an answer to these questions, the development of two concerned areas of law – state succession and state responsibility – is being examined. Thus, Chapters One and Two provide a historical overview. The analysis of the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts shows that the territoriality element is crucial for cases of succession. The Chapter also discusses the tension created by the co-existence of the principle of continuity and the clean slate principle and how it could possibly complicate further codification in the area. The Chapter is concluded by a discussion of the absence of general codified rules on state succession and provides reasons for it, such as the lack of consistent state practice, the inherently complex and sensitive nature of this field of law as well as the overall architecture of international legal system, where prevalence is given to the state consent.

Chapter Two focuses on the Draft Articles on Responsibility of States for Internationally Wrongful Acts and examines Articles 10 and 11 that can be employed in cases of state succession. It is followed by Chapter Three, which discusses four cases relevant to the present research: the *Gabčíkovo-Nagymaros* case, two *Genocide* cases as well as the case of *Bijelić v. Montenegro and Serbia*. *Gabčíkovo-Nagymaros* is a relatively straightforward case, as the Special Agreement on succession with regard to the project in issue was concluded between the disputing parties – Hungary and Slovakia – which served as a basis for the Court ruling. The first *Genocide* case refers to succession to responsibility only implicitly: the Court used the classical mechanism of attribution enshrined in the ARSIWA, yet in principle recognised that the role of the successor state in the wrongful act of its predecessor should be taken into account. The second *Genocide* case, in contrast, became the first judicial pronouncement, where the concept of succession to responsibility was expressly used as an argument by Croatia and was subsequently not rejected by the Court. This judgment, however, earned severe criticism due to the Court’s expansive interpretation of Article IX of the Genocide Convention as if including matters of state responsibility. The European Court of Human Rights judgment in *Bijelić v. Montenegro and Serbia* was chosen to diversify the catalogue of reviewed cases and see if this Court’s approach is different from that of the ICJ. The Court indeed viewed fundamental rights protected by international human rights regimes such as the ECHR as belonging directly to the individuals and therefore ultimately held Montenegro, and not Serbia, accountable for the violations of the Convention – although the latter is the sole successor state to the State Union of Serbia and Montenegro, against which the proceedings were initially brought.

Chapter Four provides an extensive analysis of all proposed draft Articles. The analysis shows that Articles aim to complement other existing legal rules, namely, the two Vienna Conventions on State Succession and the 2001 Articles on State Responsibility.

Chapter Five serves as a logical continuation of the previous one and outlines the advantages and disadvantages of the proposed Articles. As to the former, methodological strengths are emphasised: the provisions are based on the conducted study of state practice; Articles are categorised based on the type of succession taking place, which is logical and simplifies navigation in the document. Further, the creation of written legal rules is believed to fill the existing legal gaps as well as provide guidance for both states and courts in cases of state succession and disputes arising out of such cases. As to the weaknesses of the Draft Articles, the author submits that the study conducted by the ILC is insufficient as it fails to take into account certain regional succession cases in the Latin America and Asia. Also, there are serious conceptual problems: there seems to be no agreement among the members of the Commission whether the undertaken work is that of codification or further development of law. Further, there is no univocal answer provided by the Articles as to which of the principles – that of automatic succession or non-succession – should be the general rule. The wording of the Articles is heavy, contains multiple exceptions and insufficiently precise legal concepts, such as “particular circumstances”, “direct link”, and so forth. Therefore, this Chapter answers one of the posed research questions.

As to the second research question, the author argues that the need for these Articles is by no means pressing. It is possible to hold the successor state accountable, provided there is continuity between the predecessor and the successor states, by virtue of application of the existing legal rules governing attribution. In addition, the work very similar to one being done by the International Law Commission was already accomplished by the Institute of International Law), resulting in adoption of the draft Resolution on State Succession in respect of State Responsibility. Both the content and the structure of the said Resolution remind, and at times even mirror, the ILC-proposed Articles.

In conclusion, the author once again emphasises the deficiencies of the ILC approach to the present matter, claiming it should become more flexible: consultations with States and non-state actors are necessary to ensure positive acceptance of the final document. Otherwise, the current Commission’s preoccupation with the form over substance would lead to another poorly ratified Convention, which would not serve the initial purpose of its adoption.

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TABLE OF ABBREVIATIONS

ARSIWA Draft Articles 2001 Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ILC Commission	International Law Commission
USSR	Union of Soviet Socialist Republics

INTRODUCTION

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

This is how the work of the International Law Commission on codification of the rules on state responsibility has begun. As a result of this work, a set of secondary rules, Draft Articles on the Responsibility of States for Internationally Wrongful Acts were adopted in 2001.¹ The document provides a comprehensive set of rules governing the whole process of determination of state responsibility, including the establishment of the existence of a breach of an obligation, its attribution to a state and the legal consequences of an internationally wrongful act. With regard to attribution, Draft Articles cover a wide range of cases: from relatively simple ones, when the wrongful act was perpetrated by an official state organ, or more complicated ones, when the wrongdoer is an entity that is not formally a part of the machinery of the state but nevertheless is under its control. However, imagine a situation involving state succession, such as when organs of state A perform an internationally wrongful act, and afterwards state A dissolves into two separate states – B and C. If there is an agreement reached between all states as to who inherits international responsibility, or if there are applicable primary rules, these would apply. In case neither provide an answer, then secondary rules would step in.

It is especially important to emphasise the secondary nature of the law on state responsibility here. The law on state succession regulates areas which the states have themselves decided to regulate: several conventions were adopted in the preceding decades. There are no existing *primary* rules on state succession in respect of state responsibility, but the International Law Commission has recently undertaken the task of developing secondary rules on that matter. This would provide guidance in the absence of primary rules, yet would not hinder their creation, shall the states decide to do so. Thus, in 2017 the ILC has included the topic in the long-term programme of work with Pavel Šturma being appointed as a Special Rapporteur on the matter.² So far, the wording of eleven draft Articles was proposed, and it is believed that the whole set of Articles would be adopted in 2020-2021.³ In comparison with the ARSIWA, where the whole codification process took 52 years, this time the ILC has taken an impressive pace.

The purpose of this thesis is to trace the evolution of the rules on state succession in general and specifically in relation to state responsibility and offer a critical view on the developments in the field. There are two research questions that will be answered. First, is there a true necessity for a written set of rules, or could state succession in respect of state

¹ Draft Articles on the Responsibility of States for Internationally Wrongful Acts. 2001. *ILC Yearbook* 2001, vol. II, part 2, pp.26-30. Available at: <http://bit.ly/2W9TtI8> (last visited: 16 May 2019).

² Provisional summary record of the 3354th meeting of the ILC. Sixty-ninth session, 9 May 2017, A/CN.4/SR.3354, p.10. Available at: <https://bit.ly/2TtSvIF> (last visited: 3 February 2019).

³ Second report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, A/CN.4/719 (2018), p.52. Available at: <https://bit.ly/2TEVsTw> (last visited: 10 April 2019).

responsibility take place by virtue of application of the existing legal rules? Second, what are the advantages and the possible criticism of the newly proposed Articles?

In Chapter One, a historical overview and discussion on the current legal framework governing the area of state succession is offered. It aims to identify whether there is a certain rule common to both Vienna Conventions on state succession, which may possibly be used in cases of succession to state responsibility. Chapter Two focuses on the whole legal area of state responsibility, discussing the 2001 ILC Articles and the possibility of using them in cases of succession. Chapter Three provides an overview of selected judicial pronouncements by discussing four cases: the *Gabčíkovo-Nagymaros* case, two so-called *Yugoslav* cases as well as the case of *Bijelić v. Montenegro and Serbia*. The latter was adjudicated by the European Court of Human Rights, while the latter – by the International Court of Justice. The choice of cases is deliberate: comparison of different courts' approaches is believed to contribute to the research. Chapter Four turns to the recent work of the ILC as well as offers analysis of each proposed Article. Chapter Five serves as a continuation of the previous and provides the analysis of the work made by the ILC. The focus would be put on the necessity for adoption of the new Draft Articles, benefits they might bring to the international legal system as well as possible criticism.

The ILC-proposed Articles will be examined from four perspectives: historical (description of evolution of the field provided in Chapters One and Two), literal (analysis of wording provided in Chapter Four), systemic (review of case law) and teleological (discussion of the need for Draft Articles provided in Chapter Five). Finally, conclusions will be drawn, reflecting the analysis.

1. THE STARTING POINT: CONCEPTUALISING STATE SUCCESSION

1.1. Historical background

There was no attempt to codify the topic of succession of states up until late 1940's-early 1950's, when the title first appeared in the works of the newly established International Law Commission.⁴ One of possible reasons is that, before, the transfer of sovereignty usually took place through war, and the process of new independent states appearing on the international plane at early 20th century was yet again disrupted by a World War, leaving virtually no possibility to codify the rules on state succession. Despite that, the evolution of the international legal thinking began much earlier: in 1928, the use of war for settlement of disputes was renounced by the Kellogg–Briand Pact⁵, and that very principle was later incorporated in the Charter of the United Nations⁶. With the establishment of the ILC, the topic of state succession immediately appeared on the list of fourteen topics provisionally selected by the Commission for codification.⁷

⁴ Survey of International Law in Relation to the Work of Codification of the ILC, A/CN.4/1/Rev.1 (1949), p.28. Available at: <https://bit.ly/2HTxEXr> (last visited: 4 February 2019).

⁵ Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy (also known as the Kellogg-Briand Pact), 1928. Available at: <https://bit.ly/2Zb9cFI> (last visited: 10 April 2019).

⁶ Charter of The United Nations and Statute of the International Court of Justice, 1945. Available at: <https://bit.ly/1PS7npG> (last visited: 10 April 2019).

⁷ Report of the ILC on the work of its first Session, 12 April 1949, A/CN.4/13 and Corr. 1-3, *ILC Yearbook* 1949, vol. I, p.281, para.16(2). Available at: <https://bit.ly/2rouvUz> (last visited: 4 February 2019).

In early 1960's, the work on codification has started, and already then, it took numerous paths: succession of States in relation to membership in the United Nations was considered separately from other state succession matters. It was of a mostly political nature and depended upon objections (or lack thereof) on the part of governments, which is why the *legal* aspect of succession to membership was not discussed and there is little that this topic may offer to the present study.⁸ Interestingly, responsibility is recognised as a relevant in context of state succession already in the earliest works of the ILC. This matter was not forgotten but rather intentionally excluded from the scope of codification at the time, to avoid overlap with the work of the Sub-Committee on State Responsibility.⁹ Indeed, before turning to the question of whether a newly established government should be liable for the actions of the previous, a question about the succession to *legal obligations* – preceding responsibility – should have been answered. Consequently, this became the focus of the Commission and was further divided into two categories: succession in respect of treaties, and succession in respect or rights and duties resulting from other sources than treaties. This divide became fundamental, since research in both areas has resulted in adoption of separate legal documents.

1.2. Existing law on state succession

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

The subject-matter that first took attention of the Commission was state succession in relation to treaties. As another topic – law of treaties – was on the agenda for codification then, it was reasonable to undertake work in relation to treaty obligations.¹⁰ To do that, the Secretariat has prepared numerous studies on the state practice relating to bilateral and multilateral treaties of various subject-matters, ranging from protection of artistic and literary work¹¹ to air transport agreements.¹² In 1968, the work on codification began, which resulted in adoption of the Vienna Convention on Succession of States in respect of Treaties in 1978.¹³

Although the Convention does not deal with state responsibility, some of its provisions present an interest for this research. Article 2, which provides a definitional infrastructure, gives the following definition of the term succession of States: “replacement of one State by another in the responsibility for the international relations of territory.”¹⁴ The use of the word “responsibility” might be somewhat misleading here, as it usually refers to a *legal* type of liability. It might be mistakenly read as if the succeeding state automatically assumes responsibility for the wrongdoing made by the predecessor state. Accordingly, several

⁸ The Succession of States in relation to Membership in the United Nations. A/CN.4/149 and Add. 1., *ILC Yearbook* 1962, vol. II. Available at: <https://bit.ly/2DU41RP> (last visited: 4 February 2019).

⁹ Report by Manfred Lachs, Chairman of the Sub-Committee on the Succession of States and Governments. *ILC Yearbook* 1963, vol. II, p.261, para.11. Available at: <https://bit.ly/2Sh76o0> (last visited: 5 February 2019).

¹⁰ Report of the ILC on the work of its nineteenth session, A/6709/Rev.1 and Corr.1, *ILC Yearbook* 1967, vol. II, p.368, para.39. Available at: <https://bit.ly/2Ss9GGU> (last visited: 6 February 2019).

¹¹ See Succession of States to multilateral treaties (study prepared by the Secretariat), A/CN.4/200 & Corr.1 and Add.1 & 2, *ILC Yearbook* 1968, vol. II. Available at: <https://bit.ly/2SxQveU> (last visited 7 February 2019).

¹² See Succession of States in respect of bilateral treaties (study prepared by the Secretariat), A/CN.4/243 and Add.1, *ILC Yearbook* 1971, vol. II, part 2. Available at: <https://bit.ly/2RMit1S> (last visited 7 February 2019).

¹³ Vienna Convention on Succession of States in respect of Treaties. United Nations, 1978. Available at: <https://bit.ly/2Sgw3zz> (last visited: 7 February 2019).

¹⁴ *Ibid.*, Article 2, para.b.

governments – those of Cuba, Turkey, Sweden and the United Kingdom¹⁵ – have expressed concerns about this wording. The *travaux*, however, clarify this matter:

[t]he word "responsibility" should be read in conjunction with the words "for the international relations of territory" and does not intend to convey any notion of "State responsibility [...]"¹⁶

As further reading of the Convention shows, there is also another provision that “distances” it from state responsibility by limiting the scope:

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 [...]¹⁷

This is so because a similar provision can be found in the Vienna Convention on the Law of Treaties¹⁸, and the former in a way serves as a ‘sequel’ of the latter. The reason for such Article appearing in both documents is the unwillingness to include a topic that was subject of separate codification process. At the time, the wish to avoid overlap by limiting the scope of Conventions was an explainable move; however, today, when the codification of those matters is accomplished, this divide seems somewhat artificial. In other words, while the reasons for excluding state responsibility back then are still valid, it is no longer possible to achieve strict separation of these matters, since areas of international law became intertwined to a highest degree.

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

Another subject of codification in the field of succession, as already noted above, was matters other than treaties. Generally, such matters form a non-exhaustive list, including the legal regime of the predecessor state (together with legislation or pending court cases), state property, public debts, certain territorial rights, and so forth. However, the Vienna Convention on Succession of States in respect of State Property, Archives and Debts¹⁹ has limited the scope to just three areas, as follows from the title.

Interestingly, the Convention does not contain a clause similar to Article 39 of the 1978 Vienna Convention, which explicitly excludes state responsibility from the scope. There is no direct reference to state responsibility in the Convention at all; nor was this area of law discussed in the context of matters other than treaties in the preparatory documents. Furthermore, Article 5 of the Convention very precisely defines the scope, stating that the rules contained in it are only limited to the three areas – property, archives and debts:

Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention.²⁰

¹⁵ First report on succession of States in respect of treaties by Sir Francis Vallat, Special Rapporteur, A/CN.4/278 and Add.1-6, *ILC Yearbook* 1974, vol. II, part 1, pp.24-25. Available at: <https://bit.ly/2RUlgGp> (last visited: 10 February 2019).

¹⁶ Report of the ILC on the work of its twenty-fourth session, A/8710/Rev.1, *ILC Yearbook* 1972, vol. II, p.231, para.4. Available at: <https://bit.ly/2HZc4Rh> (last visited: 7 February 2019).

¹⁷ Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 39.

¹⁸ Vienna Convention on the Law of Treaties. United Nations, 1969, Article 73. Available at: <https://bit.ly/2mhLNme> (last visited: 7 February 2019).

¹⁹ Vienna Convention on Succession of States in respect of State Property, Archives and Debts. United Nations, 1983. Available at: <https://bit.ly/2Ss8wvS>. (last visited: 11 February 2019).

²⁰ *Ibid.*, Article 5.

As opposed to the Vienna Convention on the Succession of States in respect of Treaties, there apparently was no intention to *exclude* particularly state responsibility out of the scope, but rather to *narrow* the scope as foreseen by the drafters.

1.2.3. Rules of Vienna Conventions: whether same pattern can be applicable to state responsibility

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

To start, the Vienna Convention on Succession of States in respect of Treaties distinguishes various types of state succession, all leading to different outcomes. In case when a part of the predecessor state's territory is transferred and becomes part of another state, it "switches" from the legal regime of the predecessor state to that of the successor state, meaning that treaties of the former no longer apply to it, while of the latter – do.²¹ When a completely new independent state is proclaimed, it is not bound by any prior obligations²², which is usually referred to as the clean slate principle. In case of uniting of states – when two or more states merge into one – all treaties in force for separate parts of this newly formed state continue to be in force, but only for the respective territories.²³ Similarly, in case of dissolution of states, treaty in force for the predecessor state continues to be in force for the separated parts.²⁴ As seen, change in the territory is the defining element.

Rules of the Convention under present analysis are highly technical and detailed, since account should be taken not just of type of state succession, but also status of the treaty (in force, not in force, awaiting ratification, etc.), the type of the treaty (bilateral or multilateral) and its subject-matter. The difficulty is that even in presence of detailed and seemingly clear rules, there is a percentage of cases that will remain uncovered: e.g., when further application of the treaty might be incompatible with its objects and purposes, or simply unrealistic. Hence, the purpose of this exercise is not to paraphrase the rules of the Convention but rather to identify the main elements. It can be seen that high importance is attached to the territorial element. Thus, in case of both dissolution and uniting of a state, treaties in force continue to apply in the territories where they used to apply when concluded. Another important feature is the clean slate principle: a new state should not be bound by the burden of obligations it did not assume.

Turning back to the comparison, in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, it is particularly the part on state debts that presents interest: while passing of property and archives are essentially procedural matters, i.e. do not involve the transfer of legal obligations, state debts in fact represent a form of financial liability. As Article 34 puts it, such transfer represents an "extinction of the obligations of the predecessor State and the arising of the obligations of the successor State"²⁵. As the Convention prescribes, if there is an agreement between the predecessor state and the successor state regarding the passing of debt, it would prevail. In the absence of such

²¹ Vienna Convention on the Law of Treaties, *supra* note 18, Article 15.

²² *Ibid.*, Article 16.

²³ *Ibid.*, Article 31.

²⁴ *Ibid.*, Article 34.

²⁵ Vienna Convention on Succession of States in respect of State Property, Archives and Debts, *supra* note 19, Article 34.

an agreement, various scenarios are possible, depending largely on the type of state succession. In case when parts of the territory of a state are being transferred or separated, or in case of dissolution of a state, the share(s) of passed debt should be proportionate to the property, rights and interests acquired by the successor state(s).²⁶ In case of uniting of states, debt of the successor state is the sum of the debts of the predecessor states.²⁷ In case of a newly independent state, the general rule is that no state debt passes to it.²⁸

The rules contained in the 1983 Convention mirror those of the 1978 Convention. First, the same clean slate principle is applicable in case of newly independent states. Second, the portion of acquired territory in case of dissolution influences calculation of a debt that would pass to the successor state, which shows these rules are also attached to the territoriality element. A certain pattern can be deduced from these two sets of rules: in case there is a meaningful link between the predecessor state and the successor state, the latter assumes obligations, or a part of obligations, of the former. Also, the principle that a newly established state should be able to start its existence without any prior restraints or commitments should be borne in mind.

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

A reference has been made to a clean slate principle, which deserves some further explanation. This principle has gained relevance in the context of the decolonisation process in the 1960's: it was argued by the newly independent states that this principle reflects their right to self-determination and allows not to retain ties with the former colonial rulers.²⁹ It was largely supported by the ILC and the majority of states³⁰ and hence found its place in Article 16 of the 1978 Vienna Convention, establishing a general rule, according to which the newly independent states are not automatically bound by the legal obligations of the predecessor state.

The clean slate principle in its classical meaning, as noted above, was used as the main argument specifically during the decolonisation process, however, there were attempts to rely on it also in later cases of succession. One of the most complicated dissolution processes in the late 20th century – the breakup of the Soviet Union – serves as an example. Some former Soviet Republics adopted the “pick and choose” approach, deciding which obligations they would be willing to succeed to, and to which – not; thus, instead of automatically assuming all legal obligations of their predecessor, just as Azerbaijan did,³¹ they chose the path of succeeding to chosen treaties as new states.

The concurring principle – that of continuity – leads to the successor state inheriting the treaty obligations of the predecessor. This approach is also reflected in other Articles of the 1978 Convention, and was generally favoured during dissolution processes in Yugoslavia, Czechoslovakia and the Soviet Union.³² It is also directly applicable in the context of

²⁶ *Ibid.*, Articles 37, 40 and 41 respectively.

²⁷ *Ibid.*, Article 39.

²⁸ *Ibid.*, Article 38.

²⁹ Dumberry, Patrick. “The Controversial Issue of State Succession to International Responsibility Revisited in Light of Recent State Practice”. *German Yearbook of International Law*, vol. 49 (Berlin: Duncker & Humblot, 2006), p.39.

³⁰ Schachter, Oscar. “State Succession: The Once and Future Law”. *Virginia Journal of International Law*, vol.33 (1993), p.256.

³¹ Ziemele, Ineta. *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2005), p.137, note 190.

³² Schachter, *supra* note 30, p.257.

territorial/localised treaties and treaties of a personal nature, such as human rights treaties³³: in these two cases, the clean slate argument would not work due to the nature of obligations in question.

As seen, the 1978 Convention contains both principles, and the defining factor is the type of succession: in case of newly independent states, the clean slate formula is applicable, while in case of separating states, continuity prevails.³⁴ This is problematic. First, distinguishing between the two types is not always an easy task. The situation where the type of succession determines the applicable legal principle is, as Beato puts it, “a matter of form over substance”.³⁵ There is no objective test that would facilitate determination of the type of succession; the existing one provided in the definition uses as criterion the degree of dependence of the newly independent/succeeding state on the predecessor:

a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;³⁶

This test is highly subjective and debatable, so we find ourselves in a situation where the Vienna Convention contains two mutually exclusive principles yet does not provide an “unambiguous mechanism”³⁷, allowing to resolve the legal tension created by their competing coexistence. An illustration to this ambiguity is again the USSR: it formally ceased to exist as a result of Declaration of Alma Ata and the Minsk Agreement of 1991. In purely legal terms, this was a case of dissolution and further emergence of newly independent states³⁸, which, consequently, makes the application of the clean slate principle justified. However, the actual state practice showed that both Russia and the former Soviet Republics viewed Russia as a continuator of the Soviet Union: this characterises the situation as a series of secessions and leads to the principle of continuity.

How is this relevant to state responsibility? Despite the fact the continuity principle was favoured with regard to succession to treaty obligations, the views on succession to state responsibility might differ. The doctrine of non-succession is more often found in scholarly writings: it is, or used to be, a generally accepted rule that the state should not be held responsible for the actions it has not committed, i.e. for the conduct of another state.³⁹ Dumberry, however, dismisses this rule, stating that it is not just the responsibility for internationally wrongful act that passes to the successor state, but the international obligation of the predecessor, too.⁴⁰ According to him, the state becomes responsible not merely for the act committed by the predecessor state, but rather for its own failure to observe international obligation it has inherited. The clean slate principle is an example of the principle of non-succession: a newly established state does not inherit rights and obligations of the predecessor state. On the one hand, the reasoning appears logical, since it would be wrong, both legally

³³ Ziemele, *supra* note 31, p.136.

³⁴ Beato, Andrew M. “Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union.” *American University International Law Review*, vol.9, issue 2 (1994), p.529.

³⁵ *Ibid.*

³⁶ Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 2(f).

³⁷ Gordon, Andrea. “New States: Chained to Old Treaty Obligations or Clean Slate?” *North Carolina Journal of International Law*, vol.41, issue 3 (2016), p.546.

³⁸ Dumberry, Patrick and Daniel Turp. “State Succession with Respect to Multilateral Treaties in the Context of Secession: From the Principle of Tabula Rasa to the Emergence of a Presumption of Continuity of Treaties.” *Baltic Yearbook of International Law*, vol.13 (2013), p.47.

³⁹ Dumberry, *supra* note 29, p.416.

⁴⁰ *Ibid.*

and morally, to make a *completely* new state repair the wrong that was not done by it; on the other hand, realistically, it is doubtful that today a state can emerge “from nowhere”, with no link to any predecessor state whatsoever. With no *terra nullius* left, a new state would certainly have some sort of connection to its predecessor, either existing or dissolved, and would thus inherit certain rights and duties from it. Craven supports this, writing that

[i]n very few cases have newly emergent states discarded, in their entirety, all rights and duties that were formerly incumbent upon the previous sovereign. Even those states emerging from a process of decolonization tended to accept a certain number of treaties entered into on their behalf by former colonial powers.⁴¹

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

1.2.5. The “who” or “what” dilemma with regard to state succession

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

a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State.⁴²

Consequently, there is a group of scholars emphasising the state succession element, i.e. prioritising the question of *who* is the subject of state succession and therefore inherits treaty obligations; in contrast, there is another group of scholars that puts emphasis on “the what” – which obligations are to be succeeded to. The first revolves around the questions of statehood (when and how is a state created and when does it cease to exist) and legal identity of states; the second lies in the realm of the law of treaties.

Craven notes that when Sir Humphrey Waldock started his work on the topic succession to treaties, he has shifted the focus of the Commission: instead of approaching it from the general law perspective he proposed the treaty law perspective.⁴³ Craven states that “neither the principle of universal succession nor that of the clean slate was helpful”⁴⁴, so Wadlock proposed to move away from the old/new state distinction and instead focus on the consensual nature of treaty relations with other existing states.⁴⁵

The very same dilemma might appear relevant in context of state responsibility: while one group of scholars would focus on the question of who inherits responsibility (arising out of inherited obligations), the other would first ask what is the precise content of these obligations and responsibility, and only then move to the subject. These complex legal dilemmas reflect the contradictory nature of international law and partly explain the absence of general codified set of rules governing state succession, the subject of next chapter.

⁴¹ Craven, Matthew C.R. “The Problem of State Succession and the Identity of States under International Law”, *European Journal of International Law*, no.9, p.149.

⁴² Report of the ILC on the work of its twenty-sixth session, A/9610/Rev. 1, *ILC Yearbook 1974*, vol. II, part 1, p.167, para.49. Available at: <http://bit.ly/2Jhd4jN> (last visited: 13 May 2019).

⁴³ Craven, Matthew. *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2009), p.113.

⁴⁴ *Ibid.*

⁴⁵ First Report on Succession of States and Governments in respect of treaties by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/202. *ILC Yearbook 1968*, vol. II, p.90, para.14. Available at: <https://bit.ly/2V7EryE> (last visited: 17 February 2019).

1.3. Absence of general codified rules on state succession

The two Conventions discussed above are the only sets of codified legal rules on state succession. The question here is whether this should be seen as a problem: should the codification effort be stronger, covering also other areas of state succession, or is it not desirable?

There are at least three reasons why codification of the matters related to state succession is more complicated than in other areas of law. The first is a methodological one: when a topic for codification is chosen by the ILC, the actual drafting is preceded by the profound study of the topic, including both the examination of scholarly writings and the state practice. In case of state succession, despite the fact that the phenomenon is not new as such, there is no *continuous and consistent* practice⁴⁶, which complicates the process of identification and formulation of rules. In other words, the materials that codification process is to be based on are not coherent enough to serve as a solid basis. As member of the ILC Milan Bartoš pointed out,

[r]ealities must not be ignored, but the international order, international jus cogens, had undergone so many changes that the nineteenth and the early twentieth century could not always be accepted as the only guide.⁴⁷

The second difficulty lies in the nature of state succession. It has always been a highly politicised area, since it involves the transfer of sovereignty; in determining the existence of general practice, one has to distinguish between cases where the outcomes were dictated by politics from those where the outcomes are legally reasoned.⁴⁸ State succession is a complex, multi-dimensional subject because it involves the passing of rights, interests, obligations and responsibilities of various types and on various levels. The problem lays *both* in the transfer from the predecessor state(s) to the successor state(s) *and* in the effect that this transfer has on the relations with third parties and the international community as a whole.⁴⁹ In this sense, codification or development of codified law is the attempt is to create absolute rules that would applicable to essentially non-absolute, relative circumstances and situations.

This is what leads to the third reason, a structural one – the consensual nature of international law.⁵⁰ Legal relationships between two or more states are based on their consent to be bound by created obligations, and state succession poses a dilemma here: on the one hand, if a new state, which has a different legal personality from the predecessor state, becomes automatically bound by the obligations assumed by it, such state becomes bound without its consent; if, on the other hand, it is not bound by such obligations, then relations between the predecessor state and the third state essentially disappear because the predecessor state ceased to exist.

These three reasons, however, do not render codification of the topic of state succession completely useless. Codification here serves not just the purpose of formulating the rules, but of categorising various types of state succession, creating a kind of taxonomy, and bringing clarity to the whole area.⁵¹ While these rules have a potential of providing more

⁴⁶ Summary record of the 702nd meeting, A/CN.4/SR.702, *ILC Yearbook 1963*, vol. I, p.190, para.12. Available at: <https://bit.ly/2V0SgP8> (last visited: 15 February 2019).

⁴⁷ *Ibid.*, p.192, para.31.

⁴⁸ First Report, Waldock, *supra* note 45, p.90, para.16.

⁴⁹ *Ibid.*, p.194, para.59.

⁵⁰ Craven, “The Problem of State Succession ...”, *supra* note 41, p.150.

⁵¹ *Ibid.*, p.151.

questions than answers, they serve as a written evidence of matters on which the states generally agree, such as definitions or general concepts.⁵² Where certain provisions do not enjoy unanimous support, they become a starting point for a legal debate, which contributes to the development of international law.

It is also claimed that both Vienna Conventions did not become authoritative legal instruments (number of ratifications was relatively low, and application uncommon) mainly because of the timing that was chosen for codification. Sarvarian rightly points out that

[c]odification in the teeth of epoch-changing crises such as decolonization or desovietization – however much there may be demand for normativity – considerably hampers efforts to codify in a technocratic, depoliticized fashion. In particular, efforts to influence the very practice that is materializing at the time of codification inevitably shifts the focus away from the systemic generality that codification embodies.⁵³

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

2. EXISTING LAW ON STATE RESPONSIBILITY

The topic of state responsibility was put on agenda for codification simultaneously with state succession, in 1949.⁵⁴ During the drafting process, there were few instances where state succession was discussed in relation to international responsibility. One of the early drafts of the Articles on State Responsibility contained then Article 15 titled “Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State” that provided as follows:

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.
2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.⁵⁵

As Roberto Ago, at that time Special Rapporteur on state responsibility, explained in his commentary to the draft article, when the insurrectional movement, by way of using of the existing structures of a former (predecessor) state proclaims a state of its own, it is because of this link, because of the continuity between the two states that wrongful conduct can be

⁵² Sarvarian, Arman. “Codifying the Law of State Succession: A Futile Endeavour?” *The European Journal of International Law*, vol.27, no.3, p.803.

⁵³ *Ibid.*, p.809.

⁵⁴ Survey of International Law, *supra* note 4, p.56.

⁵⁵ Report of the ILC on the work of its thirty-second session, A/35/10, *ILC Yearbook 1980*, vol. II, part 2, p.31. Available at: <https://bit.ly/2ttHANI> (last visited: 21 February 2019).

attributed to the successor state.⁵⁶ This, however, only relates to a situation when the successor state “inherits” the structures and a part of the identity of the predecessor state. In case when the predecessor state ceases to exist and a new state is born with a separate legal personality, the concept of continuity does not apply, and responsibility for the acts performed by the predecessor state cannot be attributed to the new state.⁵⁷

An apparent counter-argument to the second situation would be as follows: while in theory the establishment of a “brand new” state is a possible option, in practice, there is little, if at all, opportunity that an insurrectional movement will establish a state not based on the previously existing state structures. It is much more likely that a new state formed by such a movement will be established by way of making adjustments and re-organising the existing (or the remaining) machinery of the predecessor state. A note should also be made on the importance of establishing a link between the predecessor state and the successor state for the purposes of transfer of responsibility from the former to the latter. Despite the fact that Article 15 was not retained in the final document in its initial wording, it is worth paying attention to the fact that this continuity element reminds of the provisions of the two Vienna Conventions discussed in the previous chapter.

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

It is controversial in what circumstances there can be succession to State responsibility. The draft articles do not address that issue, which is an aspect of the law of succession rather than of responsibility.⁵⁸

By this footnote, the question of state succession in respect of state responsibility was mildly put away from the scope of codification. This might be explained by the timing: the referenced report was drafted in 2000, the drafting process was moving towards an end; rising such a complex legal issue as state succession in conjunction with international responsibility might have prolonged the process for another couple of decades.

Ultimately, the ARSIWA were adopted in 2001; the document is divided into conceptual chapters, covering the notion of internationally wrongful act, attribution, the concept of breach of international obligation, consequences of breach, etc. We shall focus on attribution: there are two Articles that evidently allow to “tie” the topic of succession to responsibility. The first one is Article 10, “Conduct of an insurrectional or other movement”, which reads:

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.⁵⁹

Several changes have been made to its wording, comparing with the initial version discussed above. The Article provides two options: when an insurrectional movement establishes a new

⁵⁶ Fourth report on State responsibility by Mr. Roberto Ago, Special Rapporteur, A/CN.4/264 and Add. 1, *ILC Yearbook* 1972, vol. II, p.144, para.194. Available at: <https://bit.ly/2GVROFT> (last visited: 21 February 2019).

⁵⁷ *Ibid.*, para.195.

⁵⁸ Third report on State responsibility by Mr. James Crawford, Special Rapporteur, A/CN.4/507 and Add. 1–4 (2000), p.111, footnote 855. Available at: <https://bit.ly/2E1psza> (last visited: 21 February 2019).

⁵⁹ ARSIWA, *supra* note 1, Article 10.

government in the *whole* territory or *in part* of the territory of the pre-existing state, but in both cases the international responsibility becomes attributable to the new state. As official commentaries provide, the reasoning behind this Article is continuity. When insurrectional movement establishes a new state, it is the link between the movement and the new government that provides for responsibility of the latter.⁶⁰

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

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.⁶¹

According to it, an internationally wrongful act that is otherwise not attributable to a State but was nevertheless accepted by it as its own shall be attributed to such State. As Crawford puts it, if the state “endorses” wrongful conduct, it thus assumes responsibility for it.⁶² The wording “to the *extent* that the State acknowledges and adopts the conduct as its own”, however, puts a limitation: responsibility is attributed to the acknowledging state only in part, as much as the State agrees to assume. How the extent of responsibility is determined – in simple terms, “how much” responsibility should be attributed – is an open question. Ultimately, the standard proportionality test would be employed.

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

3. CASE STUDIES

3.1. *Gabčíkovo-Nagymaros case*

3.1.1. Factual background and findings of the Court

In 1997, not long after the dissolution of Czechoslovakia, the International Court of Justice has pronounced on the dispute between the Republic of Hungary and the Slovak Republic. The dispute concerned the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, which was signed between Hungary and Czechoslovakia in 1977. The subject-matter of the treaty was the construction and operation of the system of locks on the Danube river that bordered both countries, with locks located in Gabčíkovo (in Czechoslovak territory) and Nagymaros (in Hungarian territory) being two main ones. The project had multiple purposes, such as prevention of floods, production of hydroelectricity, improved navigation on the river, etc. The works started in 1978, however, in 1989, the Hungarian government has suspended them due to a large amount of criticism that the project has faced there. It was later decided to completely terminate the works in Nagymaros, which led to a disagreement between Hungary and then Czechoslovakia. During negotiations, one of the alternatives – the so-called “Variant C” – was proposed, which required diversion of the river by Czechoslovakia on its territory.

⁶⁰ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *ILC Yearbook 2001*, vol. II, part 2, p.50, para.6. Available at: <https://bit.ly/1MIyM9V> (last visited: 22 February 2019).

⁶¹ ARSIWA, *supra* note 1, Article 11.

⁶² Report of the ILC on the work of its fifty-third session, A/56/10, *ILC Yearbook 2001*, vol. II, part 2, p.52, para.3. Available at: <https://bit.ly/2SVrrj3> (last visited: 21 February 2019).

In 1991, the work based on the Variant C began. Negotiations have meanwhile continued, but, being unable to reach an agreement and find an alternative acceptable to both parties, Hungary has notified Czechoslovakia on the termination of the treaty with effect from 25 May 1992. Not long after, in 1993, dissolution of Czechoslovakia took place, with Slovakia becoming a separate independent state.⁶³

During the proceedings, Hungary contended, *inter alia*, that it was entitled to terminate the 1977 Treaty, that the Treaty was never in force between it and the newly formed Slovakia, and that the latter bears responsibility for unilateral application of the provisional solution. Slovakia, on the other hand, argued that it is a successor to the Treaty, which remained in force between it and Hungary, that the Hungarian notification of the Treaty termination had no legal effect, and application of the Variant C was lawful.⁶⁴

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

[...] Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility [...] as those two branches of international law obviously have a scope that is distinct.⁶⁵

With this, the Court draws a clear dividing line between the two areas of law, doing so based on the exclusion of matters relating to state responsibility in the 1969 Vienna Convention on the Law of Treaties.⁶⁶ Thus, the Court had to first examine the questions that are regulated by the primary rules: whether the treaty was in force between the parties, whether its suspension by Hungary was lawful and whether the application of the provisional plan by Slovakia was or was not a violation. Then, in case violations of primary rules by either party had been established, it would turn to the question of responsibility.

As to the first element, the Court found that initial suspension of works by Hungary was unlawful; Czechoslovakia was also found in violation of 1977 Treaty because of its implementation of Variant C.⁶⁷ Regarding the question on whether the Treaty remained in force upon notification of termination by Hungary, the Court concluded that this notification had no effect of terminating the Treaty.⁶⁸ Moving further to the issue of succession, the Court first had to determine whether Slovakia is successor to the 1977 Treaty. This question is crucial to the dispute. Hungary has contended that, because Czechoslovakia ceased to exist as a separate legal entity, the Treaty was terminated due to disappearance of its party; second, it claimed there is no rule of automatic succession to bilateral agreements and that it has never expressly recognised Slovakia as successor to it. It has also rejected that the Treaty was of a territorial nature.⁶⁹ Slovakia has submitted that the 1977 Treaty remains in force even in the absence of express consent on the part of Hungary because of the principle of continuity and due to the fact that the Treaty is of a territorial nature within the meaning of Article 12 of the 1978 Vienna Convention.⁷⁰

In determining the outcome, the Court has given priority to the character of the treaty. Indeed, it found that it is of a territorial character, providing that such treaties remain

⁶³ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 25 September 1997. ICJ Reports 1997, p.8.

⁶⁴ *Ibid.*, pp.14-24, paras.15-25.

⁶⁵ *Ibid.*, p.35, para.47.

⁶⁶ Vienna Convention on the Law of Treaties, *supra* note 18, Article 73.

⁶⁷ *Gabčíkovo-Nagymaros Project*, *supra* note 63, p.43-51, paras.59-78.

⁶⁸ *Ibid.*, p.66, para.115.

⁶⁹ *Ibid.*, pp.66-67, paras.116-119.

⁷⁰ *Ibid.*, pp.67-68, paras.120-122.

unaffected by state succession. Based on that provision, the Court has found that Slovakia is a successor to the Treaty in question.⁷¹ It noted that further relationship between parties are to be governed by various rules, including other treaties that Hungary and Slovakia are bound by, rules of general international law, rules on state responsibility, etc., but the priority shall be given to the 1977 Treaty regime, which, quoting the Court, applies “above all”.⁷² Thus, the prevalence of the primary rules was emphasised.

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

[...] the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project [...]⁷³

This wording allows to hold Slovakia accountable for the acts of Czechoslovakia and bear international responsibility for the wrong performed by it as the predecessor state. Based on this provision, Slovakia was found liable to pay damages both for its own wrongful conduct and that of Czechoslovakia by way of succession. Similarly, it was also entitled to receive damages that otherwise Czechoslovakia would receive as a compensation for the wrongful acts performed by Hungary.⁷⁴

3.1.2. Effect of existence of the prior agreement between parties

In its determination of responsibility of Slovakia for acts performed by Czechoslovakia, the Court relied solely on the Special agreement and did not go into further discussion on succession in respect of state responsibility. In the present case, the Court had a provision which had priority over other possible outcomes. In the absence of such a provision, the Court might have been faced with the need to engage in complex legal discussions on whether and why does Slovakia inherit international responsibility from Czechoslovakia. Despite the fact that in this judgment the Court does not expressly use the wording “succession to responsibility”, it nevertheless does make a distinction between responsibility that Slovakia bears for the wrongful act performed by Czechoslovakia and the responsibility for its own conduct.

Gabčíkovo-Nagymaros exemplifies a category of cases of state succession, where there is an agreement between states concerned and where the successor state is expressly recognised as such. This case was relatively straightforward: the dissolution of Czechoslovakia was peaceful, there was no dispute between the two successor states (neither of them claimed to be the sole successor), and the Special agreement concluded between Slovakia and Hungary further simplified the matter. Another category of succession cases, where there is no agreement between the separating states, presents a bigger difficulty to the adjudicator. Well-known cases falling into this category – the *two Genocide* cases – are subjects of the next chapters.

⁷¹ *Ibid.*, pp.68-70, paras.123-124.

⁷² *Ibid.*, p.73, para.132.

⁷³ *Ibid.*, p.8, para.2.

⁷⁴ *Ibid.*, p.78, para.151.

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

3.2.1. Factual background and findings of the Court

Before starting a legal discussion of the two *Genocide* cases, the background information about the disintegration of Yugoslavia has to be provided. The breakup of the Socialist Federal Republic of Yugoslavia was induced by severe economic and political crisis within the country coupled with the overall instability in the Central and Eastern Europe during late 1990's. Similarly to the dissolution of Czechoslovakia, the process was relatively fast, yet much more violent. Chronologically, Slovenia and Croatia were first to declare independence in June 1991, with Bosnia and Herzegovina and Macedonia following. Serbia and Montenegro remained federated, proclaiming in April 1992 a new state – the Federal Republic of Yugoslavia.⁷⁵

The proceedings in issue were initiated by Bosnia and Herzegovina in 1993, alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide by Serbia and Montenegro.⁷⁶ In particular, the applicant alleged that Yugoslavia by killing, detaining, torturing, kidnapping and exterminating the citizens of Bosnia and Herzegovina has violated its legal obligations under the Genocide Convention, Geneva Conventions of 1949, UN Charter as well as general and customary international law.⁷⁷ While this case is highly complicated, for the purposes of this thesis, a focus will be made on the issue of state succession. Here, one must note that the Court in its deliberations on the merits does not directly address state succession *in respect of state responsibility*, but it does not mean that it is left completely untouched.

In its preliminary objections, Yugoslavia has challenged jurisdiction of the Court, claiming that the Notification of Succession to the 1948 Genocide Convention filed by Bosnia and Herzegovina in 1992 has no legal effect.⁷⁸ While Bosnia and Herzegovina considered the Genocide Convention to fall under the category of human rights protecting instruments, and hence contended that automatic succession applies, Yugoslavia disputed that assumption.⁷⁹ The Court, however, decided not to go into determination of legal consequences of state succession, stating that

[...] the Court does not consider it necessary [...] to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties.⁸⁰

According to it, the way in which Bosnia and Herzegovina became a party to the Convention – through automatic succession upon its independence or when filing the Notification of Succession – is not crucial to determination of jurisdiction.⁸¹

⁷⁵ Bookman, Milica Z. "War and Peace: The Divergent Breakups of Yugoslavia and Czechoslovakia." *Journal of Peace Research*, vol. 31, no. 2 (1994), p. 175.

⁷⁶ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, 11 July 1996, ICJ Reports 1996, p.598, para.1. Available at: <http://bit.ly/2KrQOJY> (last visited: 12 April 2019).

⁷⁷ *Ibid.*, p.600, para.13.

⁷⁸ *Ibid.*, p.604, para B.1.

⁷⁹ *Ibid.*, p.611, para 21.

⁸⁰ *Ibid.*, p.612, para 23.

⁸¹ *Ibid.*

The final judgment dates 26 February 2007, and by that time the Federal Republic of Yugoslavia broke up into two separate states: Serbia and Montenegro.⁸² This is why the Court had to devote special attention to the identification of the respondent: the Chief Prosecutor of Montenegro argued that the process of succession of Serbia and Montenegro is regulated by Constitutional Charter, which states that the Republic of Serbia is the sole successor to Yugoslavia; based on that provision, it was submitted that Montenegro may not be the respondent in the case.⁸³ Serbia has expressly claimed continuity to the predecessor state and willingly accepted all its previous commitments. The Court agreed that the newly proclaimed Republic of Montenegro has a separate legal personality; hence, Serbia remains the only respondent in the case⁸⁴ and consequently may be held responsible for the acts of the former single state of Yugoslavia. However, a Court then made a note that

[...] it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.⁸⁵

Although implicitly, this refers to succession to responsibility. One also has to note that the alleged violations took place *before* dissolution of Yugoslavia into two separate states, which means that the Court hereby acknowledges possibility of bearing responsibility for actions taking place before the date of succession. Responsibility could be transferred based on the continuity between Yugoslavia and the newly formed Republic of Serbia, as the latter “inherited” the legal personality of the former.⁸⁶

3.2.2. Formula used by the Court

In practice, the Court followed a clear pattern of attribution of responsibility, moving from the primary to the secondary rules of international law. Thus, it has first identified the applicable primary rule – the 1948 Genocide Convention – and has established its violation, the events of the Srebrenica massacre, as it constituted genocide within the meaning of the Convention.⁸⁷ Then, the Court divided this act into three separate categories: the commission of genocide itself, actions related to but other than genocide, and the obligation to prevent and punish genocide. Consequently, the rules of attribution have to be applicable not in relation to all these issues cumulatively, but separately from each other. Let us focus on the first matter – the commission of genocide. Since attribution is not regulated by primary rules, secondary rules, those on state responsibility, come into play. The Court here follows a classical process of attribution: first, it has to determine whether the alleged violations were committed by state organs, whose actions then are automatically attributed to the state based on Article 4 ARSIWA. If this is not so, the Court would have to establish whether these actions were committed by organs that are not formally *state* organs, but nevertheless were under its direction or control.⁸⁸ Thus, the Court had to determine

⁸² *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Final Judgment, 26 February 2007, ICJ Reports 2007, pp.34-35, paras.67-69. Available at: <http://bit.ly/2w2VerV> (last visited: 15 April 2019).

⁸³ *Ibid.*, p.36, para.72.

⁸⁴ *Ibid.*, p.37, paras.76-78.

⁸⁵ *Ibid.*, p.37, para.78.

⁸⁶ Second report on succession of States in respect of State responsibility, *supra* note 3, p.25, para.90.

⁸⁷ *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 82, p.160, para.379.

⁸⁸ *Ibid.*, p.162, para.384.

[...] whether the acts of genocide committed in Srebrenica were perpetrated by “persons or entities” having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force.⁸⁹

With this statement, the Court in a way equalises the former Yugoslavia with Serbia, underlining that the two have the same legal personality. It then moves on to determine the status and the degree of dependence of the perpetrators of massacre on Yugoslavia, concluding that it has not been established that these organs have been acting under direction or control of the Respondent state.⁹⁰ Consequently, these acts cannot be attributed to it.

However, with regard to its third question, the Court has found a violation on the part of the respondent, as it failed to prevent and punish genocide.⁹¹ It then employs the link, or the established continuity, between the predecessor state and the successor state – Serbia, to hold the latter accountable. Consequently, the final ruling refers to Serbia, not Yugoslavia:

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

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

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

3.3.1. Factual background and findings of the Court

The second *Genocide* case was initiated by the claim submitted by Croatia against Yugoslavia in 1999, which in essence is very similar to the one brought by Bosnia and Herzegovina six years earlier: it was alleged that Yugoslavia has violated the Genocide Convention by committing genocide on the territory of Croatia from 1991 to 1995.⁹² In identification of the Respondent party, the Court followed an identical path as in the first case and concluded that Serbia was the sole respondent in the case.⁹³

The positions of parties regarding jurisdiction were, obviously, opposite. Despite the fact that Serbia was a recognised successor of the Federal Republic of Yugoslavia, which, in turn, was one of the successor states to the Socialist Federal Republic of Yugoslavia, it contended that distinction should be made between obligations of the FRY and the SFRY. Further, it submitted that the actions of the SFRY cannot be attributed to the FRY (and, consequently, to Serbia as the direct successor), since these alleged actions took place before the existence of Yugoslavia.⁹⁴ Croatia, in turn, considered that the FRY came into existence directly from the SFRY, and there is nothing that could hinder attribution of acts to Yugoslavia. In its argument, Croatia relied on the Draft Articles on State Responsibility, namely, on Article 10, which allows to attribute the actions of the insurrectional movement to

⁸⁹ *Ibid.*, p.163, para.386.

⁹⁰ *Ibid.*, p.175, para.413.

⁹¹ *Ibid.*, p.190, para.450.

⁹² *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, 18 November 2008, ICJ Reports 2008, p.417, para.21. Available at: <http://bit.ly/2JLOs24> (last visited: 15 April 2019).

⁹³ *Ibid.*, pp.421-423, paras.23-34.

⁹⁴ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, ICJ Reports 2015, p.43, paras.79-80. Available at: <http://bit.ly/2WdctW6> (last visited: 15 April 2019).

the new State emerging from that movement.⁹⁵ More specifically, Croatia submitted that the movement “Greater Serbia” acquired control over certain organs of the SFRY and latter crystallised into the FRY.⁹⁶ As to application of Article 10(2) of ARSIWA, the Court noted that

Article [10] is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State.⁹⁷

The Court continued by stating that the FRY was not bound by the Genocide Convention until it became party to it with the declaration of independence made on 27 April 1992 and notification of succession; consequently, since it was not bound by the international legal obligation before that date, there could be no potentially attributable breach (apart from obligations or prohibitions conferred by customary international law).⁹⁸

Further, Croatia has advanced another argument, the one expressly referring to succession to responsibility. According to it, internationally wrongful acts committed before 27 April 1992 (i.e. before the FRY came into existence) are attributable to the SFRY, which at the time was party to the Genocide Convention. When the SFRY ceased to exist, the FRY by its notice of succession has succeeded to treaty obligations of the former *together with* its international responsibility.⁹⁹ According to Croatia, there are two grounds for this argument: first, that application of general rules on state succession leads to possibility of succession to responsibility, especially taking into account the background for the FRY’s succession, involving armed conflict and its control over entities of the SFRY. Second, FRY in its declaration of 27 April itself indicated that it succeeded not just to treaty obligations, but also responsibility.¹⁰⁰

The Court did not dismiss this argument and stated that, in order for it to determine whether Serbia bears responsibility for violations of the Convention by succession, three points have to be reviewed:

- (1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention;
- (2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and
- (3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.¹⁰¹

In the last paragraph, the Court used the wording “succeeded to that responsibility”, thus accepting the whole idea of possibility of succession to responsibility. In order for the Court to determine whether it could adjudicate on these three matters, it had to determine whether they fall within the scope of Article IX of the Genocide Convention. As to the last paragraph of the scheme provided by the Court, it noted with reference to the Convention that

Article IX speaks generally of the responsibility of a State and contains no limitation regarding the manner in which that responsibility might be engaged.¹⁰²

⁹⁵ *Ibid.*, p.44, para.82.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, p.52, para.104.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, p.54, para.107.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, p.55, para.112.

¹⁰² *Ibid.*, p.56, para.114.

Here again, the Court has read the provision of the Genocide Convention as *not precluding* responsibility by succession. The Court then agreed with Croatia’s submission that the whole matter of whether Serbia succeeds to responsibility is governed not by the Convention, but by general international law.¹⁰³ In practice, the ICJ did not go beyond the first paragraph, as, according to it, Croatia failed to prove that *genocide* was committed. Since no violation was established, the questions of responsibility and, moreover, succession to it were not touched upon.¹⁰⁴ However, despite the fact that the Court did not use its own proposed plan to the fullest, this judgment is still of utmost importance to the whole field of state succession, since the Court for the first time expressly – not implicitly, as in the first Yugoslav case – acknowledged the possibility of incurring responsibility by succession. At the same time, the way in which Court has dealt with this matter has earned major criticism by several judges – discussed below.

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

Major criticism was advanced by the President of the ICJ Peter Tomka, concerning the Court’s reading of Article IX of the Genocide Convention as allowing responsibility by succession. Tomka identifies at least two problematic points. First, the wording contained in Article IX “including [disputes] relating to the responsibility”, according to him, was not meant to widen the scope of the provision so as to include the controversial matter of succession, since as such the legal term “responsibility” does not include succession.¹⁰⁵ He provides a short analysis of the *travaux* and concludes that the word “responsibility” was used just to exemplify, provide a subset of issues that fall under the big area “interpretation, application and fulfilment of the Convention”; therefore, the term “responsibility” does encompass the matters of succession that the Court has decided to include in its scope.

Second, he notes that the way in which Court has interpreted the provision allows it to adjudicate a dispute not just between Croatia and Serbia, the immediate parties, but also to review application and fulfilment of the Convention by *another* party – the SFRY. According to Tomka, formulation contained in Article IX – “disputes between the Contracting Parties” – definitely precludes that possibility.¹⁰⁶

Finally, he makes an important remark as to effects of Court’s findings on other successor states:

Serbia is only one of five equal successor States to the SFRY. A decision as to the international responsibility of the SFRY may well have implications for several, if not each, of those successor States, depending on what view is taken on the question of the allocation of any such responsibility as between them.¹⁰⁷

This leads to another dilemma: had actions of the SFRY been recognised as violations of international law, would the responsibility pass by way of succession solely to Serbia? In 2001, the five successor states to the SFRY – Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and Yugoslavia – have signed the Yugoslav Agreement on Succession Issues, which

¹⁰³ *Ibid.*, para.115.

¹⁰⁴ *Ibid.*, p.128, para.441.

¹⁰⁵ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Separate Opinion of President Peter Tomka, p.163, para.24. Available at: <http://bit.ly/2VeiUlf> (last visited: 22 April 2019).

¹⁰⁶ *Ibid.*, p.158, paras.9-10.

¹⁰⁷ *Ibid.*, p.166, para.32.

clearly indicates that all five states are equal successors.¹⁰⁸ Taking into account this agreement, the question arises as to whether only Serbia (as recognised sole successor of Yugoslavia) could have been held responsible for the acts of the SFRY by way of succession? Had it been the case, what would be the legal grounds for making just one successor state out of five liable for the wrongful acts of the predecessor? On the other hand, it would still be impossible to hold other four states accountable as a result of present proceedings, since they are not parties to the dispute and have not consented to the jurisdiction of the Court.

A similar line of criticism is advanced by Judge Leonid Skotnikov, who compares Serbia in the present case with Montenegro in the first *Yugoslav* case. In *Bosnia and Herzegovina v. Serbia*, Montenegro clearly rejected responsibility for the acts of the FRY, relying on the Constitutional Charter – this argument was used by the Court for determination of the respondent party, i.e. Serbia. Drawing parallels, Skotnikov notes that in the present case Serbia did not inherit legal personality of the SFRY, neither did it accept responsibility for disputed acts.¹⁰⁹ While in the first Yugoslav case, the Court did not even consider a notion of succession to responsibility, in the present one, it quite rapidly accepts it, although not going into detailed explanations. Despite the evident similarities between both cases, this time the Court sees no problem proposing the three-step solution. Skotnikov continues:

I cannot see how this construction could possibly be justified by the Court's obvious observation that the SFRY, whose responsibility or lack thereof the Court is prepared to determine, "no longer exists . . . no longer possesses any rights and is incapable of giving or withholding consent to the jurisdiction of the Court".¹¹⁰

Further, Judge Xue speaks of the Court not making a distinction between two types of invocation of responsibility: by attribution (according to Croatia's first argument that actions of insurrectional movement are directly attributable to Serbian state) or by succession (according to its second argument that Serbia succeeds to responsibility of the SFRY).¹¹¹ The Court, by stating that it is not the manner in which responsibility is conferred that matters, but the overall question of responsibility of Serbia, indeed blurs the line between two distinct notions: that of attribution, a well-established and commonly used concept, and that of succession to responsibility, a concept characterised by the lack of consistent practice and well-defined application standard.

These three major points of criticism of the Court's approach are not without grounds. As to the first point – the overstretch of the scope of Article IX of the Genocide Convention – indeed, the Court's interpretation of the word "responsibility" is very broad, even though the *travaux* showed no intent of the drafters to include this matter. The Court, in its reasoning of such interpretation, states that "Article IX... contains no limitation", but neither does it permit expansion of the scope. Objectively, the Court does not provide a *legal* argument, justifying such reading of the provision.

Further, a certain legal deadlock is created by the Court's readiness to accept a possibility of Serbia "succeeding" to responsibility of the SFRY, disregarding the existence of

¹⁰⁸ Agreement on Succession Issues, Vienna, 29 June 2001. Available at: <http://bit.ly/2IGYBgP> (last visited 23 April 2019).

¹⁰⁹ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Separate Opinion of Judge Leonid Skotnikov, p.196, para.5. Available at: <http://bit.ly/2PmUOFQ> (last visited: 22 April 2019).

¹¹⁰ *Ibid.*, p.197, para.5.

¹¹¹ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Separate Opinion of Judge Xue Hanqin, p.386, para.17. Available at: <http://bit.ly/2W1h5LJ> (last visited: 23 April 2019).

five other successor states. While this might be a speculation, *had* the Court found violations of the Convention on the part of the SFRY and considered that Serbia is responsible for these violations by way of succession, it would remain completely unclear what would be the consequences for other successor states, if at all; and if not, how would the Court justify making solely Serbia accountable.

Finally, the readiness with which the Court accepts the argument based on succession to responsibility also raises doubts. Paragraphs referring to this notion contain no references to principles of general international law, just to the *Lighthouses Arbitration* case, which in itself is not enough to justify application of the principle in the present case. Yet, ICJ endorses the idea, as Judge *ad hoc* Kreća puts it, “with amazing ease.”¹¹²

To sum up, while the judgment in *Croatia v. Serbia* for the first time expressly refers to the concept of state succession to international responsibility, and not just mentions, but also provides a three-step plan, there are still too many grey which trigger academic debate, but did not get as much attention of the Court as it should have.

3.4. *Bijelić v. Montenegro and Serbia*

3.4.1. Factual background and findings of the Court

The application to the European Court of Human Rights was filed by three applicants: Ms Nadezda Bijelić, Ms Svetlana Bijelić and Ms Ljiljana Bijelić, all being members of one family and Serbian nationals. All applicants as well as the first applicant’s husband resided in one flat in Podgorica. In 1989, the first applicant divorced with her husband. Shortly after, she was declared to be the only holder of the tenancy rights by the local authorities, while her husband was ordered to vacate the flat. He did not comply with this decision voluntarily, and, in 1994, the first applicant has filed a formal application to the court to enforce the decision. Up until 2007, countless attempts were made by the authorities (in presence of the police forces, fire fighters, paramedics, etc.) to force the ex-husband to leave the flat, yet all of them were in vain: he refused to vacate the premises and threatened to resort to physical force.¹¹³

Applications to the Court were filed in 2004 and 2005, at the time, when Serbia and Montenegro formed a single state called the State Union of Serbia and Montenegro, while already on 3 June 2006, Montenegro has declared its independence.¹¹⁴ In practice, the flat in issue was located in the territory of Montenegro, yet, after its declaration of independence, all applicants wished to continue proceedings against both Serbia and Montenegro: against the former based on the fact that Serbia is the sole successor to the predecessor state, and against the latter due to the fact that the actual enforcement proceedings took place in the territory of Montenegro.¹¹⁵

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

¹¹² *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Separate Opinion of Judge Milenko Kreća, p.487, para.60. Available at: <http://bit.ly/2KWWNIC> (last visited: 23 April 2019).

¹¹³ *Case of Bijelić v. Montenegro and Serbia*, Judgment, 28 April 2009, European Court of Human Rights, paras.10-33. Available at: <http://bit.ly/2UJWWbP> (last visited: 27 April 2019).

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, paras.61, 64.

although the sole successor of the State Union of Serbia and Montenegro [...] Serbia cannot be deemed responsible for any violations of the Convention which might have occurred in Montenegro prior to its declaration of independence.¹¹⁶

Montenegro shared this view, and so ultimately did the Court, when stating that the fundamental rights protected by international human rights regimes belong directly to the individuals “notwithstanding its subsequent dissolution or succession”.¹¹⁷ The Court further made a comparison between the present case and the dissolution of Czechoslovakia: while the Czech Republic and Slovakia were formally admitted to the Council of Europe in June 1993, the presumption was that both have succeeded to the Convention when declaring independence in January 1993, i.e. retroactively. Based on the principle of human rights belonging to individuals as well as conducted comparison, the Court concluded that the ECHR and Protocol 1 have *continuously* been in force for Montenegro both when it was a part of the predecessor state (that is, as of 3 March 2004, when these instruments entered into force in respect of the State Union of Serbia and Montenegro) up until its declaration of independence in June 2006, as well as afterwards.¹¹⁸ Based on this finding, it then went on to examine the alleged existence of a violation of the provisions of the ECHR and Protocol 1 and found a violation of Article 1 of Protocol No. 1 on the part of Montenegro.¹¹⁹

With regard to the “official” successor state – Serbia, the Court took note of the Serbian argument that the proceedings in issue were held solely before the Montenegrin authorities and found the applicants’ complaints in respect of Serbia incompatible *ratione personae*.¹²⁰

3.4.2. Court’s approach to the issue of state succession in the present case

The difference in Court’s approach in *Bijelić* case comparing to the first *Genocide* case is evident. To recall, in the latter, the Court relied on Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, according to which Serbia is the only successor state and hence actions and possible responsibility of Montenegro for alleged violations of international law were not considered by the Court. Here, the Court takes a completely different view: despite the fact that, based on *the very same* Constitutional Charter, Serbia is the sole successor, the Court nevertheless considers it should not be held responsible for the alleged wrongdoings and moves its attention towards the actions of the Montenegrin authorities.

Ultimately, an already noted, Montenegro was found in violation – however, is there really a transfer of responsibility taking place? In other words, is Montenegro held accountable only for the acts committed after its declaration of independence, or also before that date, thus transferring responsibility of the State Union of Serbia and Montenegro to the newly independent Montenegro? While in *Gabčíkovo-Nagymaros* judgment, the ICJ made a clear distinction between responsibility of the predecessor state and the successor state, although ultimately Slovakia assumed both, in the present case, the ECtHR gives no explicit acknowledgement of that transfer¹²¹: on the one hand, it found that the Convention and

¹¹⁶ *Ibid.*, para.62.

¹¹⁷ *Ibid.*, para.69.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, the Ruling part, para.3.

¹²⁰ *Ibid.*, para.70.

¹²¹ Brockman-Hawe, Benjamin E. (2010). Commentary on the European Court of Human Rights *Bijelić v. Montenegro and Serbia* Judgment of 11 June 2009. *International and Comparative Law Quarterly*, vol.59, issue 3 (August 2010), p.857.

Protocol 1 “have *continuously* been in force” for Montenegro; on the other hand, it does not make a distinction between the acts committed before 3 June 2006 and after that date, it merely states that

Montenegrin authorities have failed to fulfil their positive obligation, within the meaning of Article 1 of Protocol No. 1, to enforce the judgment of 31 May 1994. There has, accordingly, been a violation of the said provision.¹²²

The Court in the present decision in fact does not offer any substantial legal analysis of succession to responsibility, but nevertheless manages to keep a balance between satisfying the applicants’ claim and at the same time not creating a “tension between the successor and continuing States”¹²³, as Brockman-Hawe notes. Indeed, had the Court gone into discussion of which acts are to be attributed to the dissolved predecessor state, and which – to successor state, it would inevitably have to provide legal reasoning for the transfer of responsibility. The *Bijelić judgment* is not completely silent, but rather “quiet” on this matter.

Despite that, it still has a potential of influencing the system: the principle that the ECtHR has applied – looking at *de facto* degree of involvement of a state in certain acts rather than following the formal approach and transferring responsibility to the “official successor” – might influence the practice of other international courts, especially when the dispute involves interpretation of the international human rights instruments.

4. PRESENT WORK OF THE ILC AND THE PROPOSED DRAFT ARTICLES

In 2016, Pavel Šturma, now Special Rapporteur on state succession in respect of state responsibility, has presented a comprehensive report, providing an overview of relevant historical facts and legal views on the matter, as well as the reasons for inclusion of the topic in the agenda of the ILC: lack of customary international law in this field and existing legal gaps that have to be filled.¹²⁴ Each following sub-chapter is devoted to a separate draft Article proposed by the Special Rapporteur, with reference to the two Vienna Conventions and/or ARSIWA where relevant. The proposed provisions are divided in categories: draft Article 6 seeks to introduce a general rule, while further Articles provide solutions based on the type of succession taking place.

4.1. General rule (draft Article 6)

Proposed draft Article 6 reads as follows:

1. Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States.
2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the responsibility of the predecessor State and claim from it a reparation for the damage caused by such internationally wrongful act.
3. This rule is without prejudice to the possible attribution of the internationally wrongful act to the successor State on the basis of the breach of an international obligation by an act having a continuing character if it is bound by the obligation.

¹²² *Bijelić v. Montenegro and Serbia*, *supra* note 113, para.85.

¹²³ Brockman-Hawe, *supra* note 121, p.865.

¹²⁴ “Succession of States in respect of State responsibility”. *Annex A to Report of the ILC on its Sixty-eighth session*, A/71/10, p.410, para.39. Available at: <https://bit.ly/2NAZk2B> (last visited: 1 March 2019).

4. Notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles.¹²⁵

Paragraph one of this Article is a tribute to Article 1 ARSIWA, which states that “[e]very internationally wrongful act of a State entails the international responsibility of *that* State.”¹²⁶ This provision in fact is the illustration of the non-succession principle: the state should only be responsible for *its own* conduct. In case state succession had effect on attribution of the internationally wrongful act that took place before succession, these newly proposed rules would be in clear contradiction with the ARSIWA. Paragraph one thus affirms that draft Article 6 does not seek to alter the rules of the 2001 Draft Articles but to complement them.¹²⁷ However, the wording “before the date of succession of States” appears ambiguous. As such, this term is defined in both Vienna Conventions and is based on the replacement of the predecessor state in its international relations by the successor state.¹²⁸ Yet, even in presence of the definition, the vagueness remains: what exactly is meant by the “responsibility for international relations”, how could one decide whether the state has or has not assumed complete responsibility for them, and how is the date of the transfer of that responsibility determined, remains unresolved. Thus, Article 6(1) reiterates the notion that is not precise enough.

Draft Article 6, in principle, should clearly set a general rule, however, paragraph one, as noted by the ILC member Hong Thao Nguyen, does not state who bears responsibility in case when the internationally wrongful act takes place before succession.¹²⁹ To clarify, while it *does* state that the succession has no impact on attribution, which shows that the general rule is the one of non-succession, it does not *expressly* mention that it is the predecessor state that bears responsibility. As Sir Michael Wood comments,

the focus on attribution made draft article 6 rather obscure; what mattered was not so much the original attribution of conduct to the predecessor State, but whether the latter remained responsible after a succession of States.¹³⁰

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

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

¹²⁵ Second report on succession of States in respect of State responsibility, *supra* note 3, Annex I (Text of the new proposed draft articles), p.53.

¹²⁶ ARSIWA, *supra* note 1, Article 1.

¹²⁷ Second report on succession of States in respect of State responsibility, *supra* note 3, p.13, para.45.

¹²⁸ See Article 2(1)(d) in both Conventions.

¹²⁹ Provisional summary record of the 3431st meeting of the ILC, 9 August 2018, A/CN.4/SR.3431, p.17. Available at: <http://bit.ly/2GWhRDt> (last visited: 4 May 2019).

¹³⁰ *Ibid.*, p.16.

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

To sum up, draft Article 6 can be characterised by two important points. First, it seeks to create a rule that would not conflict with the existing ARSIWA rules, and reinforces the principle that the State should only be held liable only for its own violations. Second, it affirms that the interest of the injured state in reparation should prevail over the changing circumstances, where the former states cease to exist or new states appear. The claim for reparation may be addressed to either predecessor or successor state, so that the interests of the injured party are secured. However, it is important to recognise that this provision, as follows from the title, establishes just a *general* rule. More specific rules depending on the type of succession are the subject of subsequent Articles.

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

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

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of secession of a part or parts of the territory of a State to form one or more States, if the predecessor State continues to exist.
2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.
3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State or States.
4. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.¹³¹

Thus, as a general rule, obligations of State A, where State B appeared by way of secession from it, do not pass to the latter. This rule in essence mirrors the one contained in Article 35 of the 1978 Vienna Convention: if, upon separation, the predecessor state continues to exist, the treaty remains in force in respect of the remaining territory on the predecessor state.¹³²

Yet, paragraphs two and three establish exceptions: according to paragraph two, in case there is a link between the organ of state A, which later becomes the organ of state B and is located in its territory, then the acts of the former become responsibility of the latter. Here, the territorial element plays an important role: obligations, metaphorically speaking, are being

¹³¹ Second report on succession of States in respect of State responsibility, *supra* note 3, p.53.

¹³² Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 35.

transferred to the successor state together with the transfer of territory. Paragraph three refers to a more peculiar situation, where there is “a direct link” between the wrongful act or its consequences and the territory of the successor state; in that case, the responsibility is assumed by both the predecessor and the successor state. This provision becomes in a way a continuation of the one described in paragraph two: while in the previous case, a formal link was required (i.e. act should be performed by an official organ in the territory of the successor state), in this case, a *de facto* link has to be established. Interestingly, the scope of the paragraph three is quite broad: it refers not just to the wrongful *act*, but also the *consequences* of that act. While, on the one hand, this provision might allow to hold the wrongdoer accountable in cases when the act was performed elsewhere, but its effect was strongly felt on the territory in issue, on the other hand, it seems that this provision might be misinterpreted due to its wide scope.

Paragraph four in essence mirrors the rule contained in Article 10 ARSIWA: the act of the insurrectional movement that later crystallises into a new state shall be attributed to that new state; consequently, responsibility for it shall also be assumed by the new state. This is another proclamation of the fact that the new Articles aim at complementing ARSIWA rather than conflicting with it. On the other hand, the essence of this paragraph relates more to classical attribution of responsibility rather than to succession.¹³³

Despite the fact that draft Article 7 is quite detailed and covers variety of situations relating to secession, several problems with interpretation may potentially appear. First, the wording contained in paragraphs two and three “if particular circumstances so require” add ambiguity: it is unclear what kind of circumstances are implied. Consequently, in case of proceedings, the court would have to not only establish the required link, but also confirm the existence of these special circumstances. Since different courts will interpret the “particular circumstances” formula differently, this would lead to a lack of uniformity and undermine legal certainty. As Wood notes, “the meaning... would have to be spelled out in the draft article or explained very carefully in the commentary”.¹³⁴

Second, the meaning of the “direct link” required in paragraph two also needs further interpretation. While the wording “direct link” is more clear than simply “a link”, there might be situations where parties would take opposite positions as to whether a certain act or a consequence constitutes a *direct* link. In other words, while the intention of the drafters is intuitively clear – to require a sufficiently precise and straight connection between the act or its consequences and the territory – a legal concept must have a well-defined content and scope.

Third, the proportion of responsibility assumed by predecessor and the successor states in cases regulated by paragraph three is not specified. Neither is it indicated that this is to be determined by the responsible states themselves.¹³⁵ There is, however, a way to get rid of the unnecessary confusion brought by the two problematic areas outlined above: a detailed commentary to the new Articles might shed light on how to apply these provisions correctly; in the absence of those, these provisions would ultimately have to be interpreted by the courts.

¹³³ Provisional summary record of the 3431st meeting, *supra* note 129, p.16.

¹³⁴ *Ibid.*

¹³⁵ Provisional summary record of the 3432nd meeting of the ILC, 24 September 2018, A/CN.4/SR.3432, p.4. Available at: <http://bit.ly/2ZW9Yqd> (last visited: 4 May 2019).

4.3. Newly independent States (draft Article 8)

Draft Article 8 reads as follows:

1. Subject to the exceptions referred to in paragraph 2, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State.
2. If the newly independent States agrees, the obligations arising from an internationally wrongful act of the predecessor State may transfer to the successor State. The particular circumstances may be taken into consideration where there is a direct link between the act or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy.
3. The conduct of a national liberation or other movement which succeeds in establishing a newly independent State shall be considered an act of the new State under international law.¹³⁶

The first paragraph of draft Article 8 is a proclamation of the clean slate principle, according to which a new state is not bound by obligations (and, hence, responsibility) of the predecessor state. However, the structure of paragraph is of importance here: it starts with the phrase “subject to the exceptions referred to in paragraph 2” and thus immediately signals that this rule is *not* absolute and has exceptions.

Paragraph two establishes the rule that, upon consent of the newly independent state, a part of responsibility of the predecessor state may be transferred to it. However, the tone of this provision is quite soft because responsibility may be transferred only if the state agrees to it. There are situations where the newly independent state would disagree to assume responsibility for the wrongful act that it is linked to it simply out of reluctance. Also, the provision uses the optional, softer word “may” instead of the imperative “shall”, which again indicates that the application of this norm is much dependent on the willingness of the state in question.

Paragraph two also refers to the direct link between the predecessor state and the newly formed state. While it does not expressly provide that acts of the latter *shall* be attributed to the former, such possibility exists. The actions of a relatively autonomous territory that formed a new state may be attributed to it, and this rule is a tribute to the principle of continuity (if the “substantively autonomous” territory within the the predecessor state and the newly formed state share legal personality). It seems that, by having reference to both the clean slate principle in the first paragraph and the principle of continuity in the second, this Article aims at reconciling the two and finding a formula when these two principles would co-exist and be applicable in different circumstances.

Similarly to draft Article 7, the formulation “particular circumstances may be taken into consideration” suggests the predominantly courtroom application of the draft Articles.

Finally, draft Article 8 refers to a situation when a national liberation movement becomes the government of that new state: its actions shall be considered the acts of the newly formed state. This is yet another reference to Article 10 ARSIWA, similar to one contained in draft Article 7.

According to the 1978 Vienna Convention, a newly independent State is not bound by a treaty *merely* due to the fact that a treaty was in force for the predecessor state in the same

¹³⁶ Second report on succession of States in respect of State responsibility, *supra* note 3, p.53.

territory.¹³⁷ The Vienna regime grants considerable discretion to decide whether to become part to treaties concluded by the predecessor state or abstain from that. In that respect, draft Article 8 follows a similar logic and allows the new states to have a bigger say than in other cases of succession.

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

The form and also the content of draft Article 9 reminds draft Article 7 on secession:

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State when part of the territory of the predecessor State becomes part of the territory of the successor State.
2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.
3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State.¹³⁸

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

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

4.5. Uniting of States (draft Article 10)

A different outcome than in all previously discussed types of succession is provided in draft Article 10, which regulates the case of uniting of states:

1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State.
2. When a State is incorporated into another existing State and ceased to exist, the obligations from an internationally wrongful act of the predecessor State pass to the successor State.
3. Paragraphs 1 and 2 apply unless the States concerned, including an injured State, otherwise agree.¹³⁹

Thus, when several states merge into one, the international responsibility of all merging states then are transferred to the newly formed united state. There are two elements of this Article

¹³⁷ Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 16.

¹³⁸ Second report on succession of States in respect of State responsibility, *supra* note 3, p.54.

¹³⁹ *Ibid.*

that deserve special attention. First, the structure of this Article is different: the wording is less complex, there are no multiple exceptions, as in all preceding Articles, and the whole Article is worded in the positive. This creates an impression of the rules contained in it being somewhat less sophisticated. Second, paragraph three contains a provision, stipulating a possibility for all states concerned, including the injured one, to come to an agreement regulating the transfer of obligations arising from an internationally wrongful act. This is the only Article that expressly provides the parties with an opportunity to themselves determine how the transfer of responsibility will take place.

In essence, the rule contained in draft Article 10 echoes Article 31 of the 1978 Vienna Convention: in case of uniting of states, a treaty in force for the uniting parts continues to be in force in respect of the successor State.¹⁴⁰

4.6. Dissolution of State (draft Article 11)

The final type of succession regulated by the Articles is dissolution of states. Draft Article 11 reads:

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States.
2. Successor States should negotiate in good faith with the injured State and among themselves in order to settle the consequences of the internationally wrongful act of the predecessor State. They should take into consideration a territorial link, an equitable proportion and other relevant factors.¹⁴¹

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

Paragraph two introduces an important good faith principle, which all the parties – the successor state(s) and the injured state – have to employ when negotiating the terms of the transfer. This is the first provision that contains a requirement to have negotiations. This may be explained by the fact that the dissolution of states is one of the most complicated types of succession, often accompanied by the use of force or strong political tension, and therefore is highly sensitive.

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

Interestingly, out of all newly proposed draft Articles, this one appears to be the vaguest: the whole transfer of responsibility is left for the states to regulate, yet, it is precisely dissolution cases that were reviewed by the Courts in the last couple of decades. It would

¹⁴⁰ Vienna Convention on Succession of States in respect of Treaties, *supra* note 13, Article 31.

¹⁴¹ Second report on succession of States in respect of State responsibility, *supra* note 3, p.54.

seem natural to concentrate on this type of succession and provide a more comprehensive legal guidance, taking into account the complexity of cases discussed above; yet, the drafters of the Articles decided – whether on purpose or not – to leave the provision more flexible than all the rest.

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

5.1. Nature and form of the proposed Articles

Before turning to the identification of advantages and disadvantages of the ILC-proposed Articles, a note should be made on their nature and form. In its first report, Special Rapporteur Šturma asserts that the form of draft articles is the most suitable for the document that is to be developed, based on the positive example of similar documents, such the 2001 Articles on State Responsibility; other forms – e.g., principles or guidelines – are believed to be less suitable.¹⁴² The form of draft articles has its advantages: on the one hand, this is a set of non-binding, rather recommendatory provisions that seek to provide guidance for states and courts, and the form of “articles” endows these provisions with the necessary legal weight; on the other hand, the word “draft”, which will most probably be retained in the title of the final document (just as it was kept in the official title of the ARSIWA), indicates that this document falls into category of soft law, which, in turn, reduces states’ reluctance of assuming legal obligations. The form can also be explained by highly sensitive and complicated nature of the topic under consideration. Due to that utmost complexity, the drafters have to be careful when trying to develop a single approach for each category of cases. It would be naïve to assume that the outcome is determined merely by a type of succession taking place, be it dissolution or unification; instead, there is a whole range of other factors to be taken into account, such as the presence or absence of agreement among parties or the willingness of the parties to negotiate, events preceding state succession, whether the wrongful conduct is tied to the specific territory, whether the wrongful act concerns human rights violations, and so forth.

The drafters of the new Articles are faced with an important task of keeping the balance between two distinct legal principles. Šturma notes:

[...] the traditional thesis of non-succession has been questioned by modern practice... this does not mean that the opposite thesis, i.e. automatic succession in all cases, is true.¹⁴³

Thus, the drafters would need to preserve a balance between the two, since in different cases, either principle of automatic succession based on continuity, or clean slate principle, would take prevalence, depending on the circumstances.

Another difficulty is the lack of consistent state practice, which was already mentioned above. While state succession is not new as such, and it is possible to identify even very early cases, these isolated old examples would not serve as a stable ground for codification, since one must take into account the legal documents adopted in the 20th century and the features of the modern international legal system in general. A more recent state practice would be

¹⁴² First report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur, A/CN.4/708 (2017), p.8, para.28. Available at: <http://bit.ly/2PH1per> (last visited: 3 May 2019).

¹⁴³ *Ibid.*, p.23, para.83.

desirable, yet cases of state succession involving issues of state responsibility are not *that* frequent. Most of these cases took place in the late 1990's and have already been pronounced upon: consequently, the drafters would have to rely on these judicial pronouncements.

5.2. Advantages of the proposed Articles

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

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

Second, there is a clear logic in the structure of the articles: cases where the original state ceased to exist and cases where the predecessor State continues to exist along with the successor state(s) are separated. Such categorisation helps to “avoid unnecessary repetition of rules and exceptions for each and every case of succession”¹⁴⁴ and makes it easier for the reader to navigate in the document.

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

Finally, as follows from the analysis of Articles provided in the previous chapter, the attempt was made to provide solutions that would best suit the specific type of succession. Articles do not offer a uniform answer to all cases, they are flexible and allow tailor-made solutions. ILC's approach to the topic is quite realistic, taking into account specific features of different succession types instead of developing a set of rigid legal rules of absolute nature.

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

Another evident benefit is filling of existing legal gaps. Indeed, practice has shown that the available laws on state succession and state responsibility usually do not provide a univocal answer, remaining silent on certain matters. Creation of clear legal rules would eliminate these gaps and contribute to the progressive development of international law, one of the primary tasks of the ILC.

While some claim that cases of state succession do not occur that often nowadays, there is still such a possibility, and the existence of clearly-formulated legal rules would assist both the states (in case state succession *does* take place) as well as the courts (in case of proceedings related to state succession in respect of state responsibility). While the freedom of states to negotiate the terms of succession is retained, as Hussein Hassouna, member of the

¹⁴⁴ Second report on succession of States in respect of State responsibility, *supra* note 3, p.7, para.20.

ILC, notes that Draft Articles present “a useful model for States to follow and a default rule to be applied in cases of dispute”.¹⁴⁵

5.3. Criticism of the proposed Articles

5.3.1. Certain methodological and conceptual problems

While most members of the Commission welcomed the research made by the Special Rapporteur in his first report, it has been pointed out that the review of case law focused mostly on Europe, excluding cases originating from Asia and Latin America and not giving enough attention to the dissolution of the Soviet Union.¹⁴⁶ Therefore, insufficient examination of state practice might lead to Articles being formulated based on distorted conclusions.

Further, Articles give no clarity as to which of the principles – that of automatic succession or the non-succession – should be the general rule. While the Special Rapporteur in his second report confirmed that it is the former, the wording of draft Article 6, which is aimed at confirming this rule, is not straightforward. Instead of using the univocal wording like “as a general rule, successor state shall assume the obligations arising from the commission of an internationally wrongful act of the predecessor State” or similar, Article 6 places focus on the attribution and has exceptions. In contrast, draft Article 10 (uniting of states) and draft Article 11 (dissolution of states) speak of automatic transfer of obligations upon succession, which is opposite what draft Article 6 provides. While this seems to be the way of preserving balance between the two competing principles, in practice the used wording and lack of explanations only create confusion and raise doubts as to whether there is a conceptual clarity behind the produced Articles.

Going back to draft Article 11, the Special Rapporteur notes in his second report that “a transfer of obligations may take place according to or in the absence of an agreement”¹⁴⁷, yet, the wording of the Article refers to transfer of obligations “subject to an agreement, to one, several or all the successor States”, meaning that the case where there is no agreement among parties is left completely untouched. To illustrate this point, let us imagine a situation when the Court is confronted with a case concerning dissolution of states – for instance, one similar to the dissolution of the Socialist Federal Republic of Yugoslavia in its initial stages, where there was no agreement among parties. Draft Article 11 would provide no answer at all, since it only relies on the parties’ ability to reach an agreement themselves. From the perspective of the injured state, draft Article 11 stating that responsibility passes to “one, several or all the successor States” is also not particularly promising or relieving.

All these points create an impression that, while there is a compromise reached as to the overall benefit of creation of rules in question, there is no stable conceptual basis and clear purpose that these Articles would have to attain. On a positive side, the work of the Commission is not over yet, and there are two more reports to be produced by the Special Rapporteur, which leaves hope that some clarity as to the *rationale* behind these rules will be defined.

¹⁴⁵ Provisional summary record of the 3376th meeting of the ILC, 17 August 2017, A/CN.4/SR.3376, p.3. Available at: <http://bit.ly/2WpuBcj> (last visited: 4 May 2019).

¹⁴⁶ Provisional summary record of the 3375th meeting of the ILC, 7 August 2017, A/CN.4/SR.3375, p.5. Available at: <http://bit.ly/2LiV7mt> (last visited: 4 May 2019).

¹⁴⁷ Second report on succession of States in respect of State responsibility, *supra* note 3, p.51, para.189.

5.3.2. Vagueness and heavy structure of Draft Articles

Another disadvantage of the Draft Articles is their formulation as well as terms that are being used that often create confusion and require clarification. A careful analysis shows that nearly every Article contains terms or phrases that are ambiguous: the use of word “attribution” in draft Article 6, which shifts attention from succession to attribution; the wording “if particular circumstances so require” in draft Article 7, which raises questions as to how and who would determine the existence of such circumstances; the notion of “direct link” in draft Article 8 – this list can be continued. In general, the presence of terms that are not entirely clear are natural for legal documents: for comparison, Draft Articles on State Responsibility contain terms like “essential interest” and “imminent peril” in Article 25, which served as a catalyst for both the academic debate as well as were subject of judicial pronouncements; a perfectly clear set of Articles would be unattainable, yet the number of vague terms in the present version of Articles is beyond acceptable.

There are also signs of inattentive drafting: whereas paragraph three of draft Article 7 refers to “the conduct of a movement, insurrectional or other”, draft Article 8 speaks of “a national liberation or other movement”, when in essence both speak of the same; at least, there is no indication that the intention was to distinguish the two types of movements.

Finally, the overall style of the draft Articles appears to be heavy. Sentences are lengthy, some provisions are drafted in the negative, phrases such as “without prejudice to” and “subject to exceptions contained in paragraph...” are used excessively – all these characteristics taken together make it different even for a lawyer to get the meaning. The adoption of the final document is provisionally planned for 2020, which leaves some time for improvement: re-drafting and/or a careful elaboration of comments, which would shed light on the precise content of the proposed rules. Otherwise, the Articles as they are now blur the picture instead of clarifying it.

5.4. Is there a need for these rules?

We are now coming to the research question posed at the beginning of this thesis: is there a need for the rules on state succession in respect of state responsibility to be developed? There seemingly is a general agreement that such work is necessary: during the debate at the 71st session of the General Assembly in 2016, seven delegations out of ten were in favour of creation of rules under discussion, while only two were not, with one delegation keeping neutral.¹⁴⁸ This shows that, on the Commission level, the need for the new Draft Articles is recognised as existing. However, one should note a difference between codification, i.e. identification of established state practice and subsequently producing a legal document based on it, and progressive development of law, a different task by its nature.

The main reason for creation of these rules provided by the ILC was the existing legal gap where matter concerns simultaneously state succession and state responsibility. On the one hand, indeed, it was already identified that the Articles on State Responsibility do not refer to cases of state succession, and therefore such rules have to be created. As practice of the courts has shown, in the absence of express rules, determination of whether and how the transfer of obligations arising out of internationally wrongful act takes place is left to the courts, which leads to a fragmented approach. From the timing perspective, it looks like the international legal community is ready for such work – rules on state responsibility were

¹⁴⁸ First report on succession of States in respect of State responsibility, *supra* note 142, pp.2-3, paras.3-7.

adopted almost two decades ago, enough time has passed since the period marked by political crises, including the dissolution of the Soviet Union, the breakup of Yugoslavia, and the emergence of newly independent states in the Central and Eastern Europe. The memories of these events are still fresh, but the degree of intensity has lowered, which is why codification of rules on state succession in respect of state responsibility has a potential of rendering truly valuable results.

On the other hand, the existence of the legal gap is not proved merely by the absence of express rules. In fact, the ARSIWA are not completely silent on the matters of succession: the wrongful conduct of insurrectional movement or the wrongful conduct endorsed by the new state will be attributable to this new state in accordance with Articles 10 and 11, respectively. As to other cases, succession to obligations arising out of the internationally wrongful act of the predecessor state is still possible under the 2001 Articles: the required element for that would be continuity between the two states. This is precisely what the Court proposed in the first *Genocide* case, when it first had to check whether the wrongful conduct is attributable to the Federal Republic of Yugoslavia based precisely on the ARSIWA provisions, and then, by way of succession between the FRY and Serbia, the responsibility could have been transferred to Serbia as the sole successor to the predecessor state. This example proves that there *are* possibilities to hold the successor state accountable based on the existing legal rules; therefore, it is not so that the rules are non-existent – clarification is needed.

Furthermore, the ILC is not the first to consider the topic: in 2015, the *Institut de Droit International* (the Institute of International Law), a non-governmental institution stating as its purpose contributing to the development of international law, has undertaken a profound study and, as a result, adopted a draft Resolution on State Succession in respect of State Responsibility, consisting of 16 Articles in total.¹⁴⁹ The structure of the Resolution reminds a document that the ILC intends to adopt: it borrows the definitions from the 1978 and 1983 Vienna Conventions, employs the same distinction of state succession cases based on whether the predecessor state ceases or continues to exist, and so forth. With this knowledge, the decision to choose particularly the topic of state succession in respect of state responsibility is quite surprising: the need for these rules is existing, but it is not urgent; the topic is highly sensitive, and, most importantly, similar work has been already done by the Institute of International Law. Of course, this last fact should not preclude the Commission from picking the same subject, but using the classical rules of attribution provided by the ARSIWA together with the draft Resolution as auxiliary source might very well suit the purposes that ILC aims to achieve with its new codification endeavour. To clarify, the work undertaken by the ILC *as such* is a positive development; the problematic area is its *approach*. Let us recall the Statute of the ILC, which provides that

[...] “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States [...] “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.¹⁵⁰

¹⁴⁹ State Succession in Matters of State Responsibility, *Yearbook of Institute of International Law*, vol.76 (2015), Draft Resolution, p.186. Available at: <http://bit.ly/2Vo0PmX> (last visited: 14 May 2019).

¹⁵⁰ Statute of the International Law Commission, Article 15, United Nations, 1947. Available at: <http://bit.ly/2DPDqom> (last visited: 5 May 2019).

In its first report, Special Rapporteur Šturma notes that the present task is both codification and progressive development of international law¹⁵¹, but the current version of the Draft Articles in reality represents a confusing combination of the two. For example, while there is an agreement among ILC members that the principle of non-succession should be the general rule, draft Article 6 does not reflect that. In the proposed document, “the general” is immediately followed by “the exceptional”, which makes it difficult to see the *core* of the rule. The reason for that is the inability of the ILC – at least for the time being – to reconcile codification and progressive development of law in this particular matter.

Much depends on the Commission itself: just recently, comments from the governments were requested on the proposed wording of Articles. Since this topic is sensitive and controversial, states should have a say, and, in case the governments express discontent with the proposed rules, the Commission would have to act in a flexible way and adjust accordingly. For instance, Austria has already proposed an alternative solution: focusing on the topic of “state responsibility *problems* in cases of succession of states” instead of the “state succession in respect of state responsibility”, as the topic reads now.¹⁵² Even if this is the common sentiment, the ILC might still continue with the adoption of the Draft Articles, which would then not get a high rate of approval by the states; alternatively, it might shift the focus of their work together with the format by adopting principles of guidelines, going in line with the wishes of states. It would also be advisable to take into account the views of the non-state actors capable of influencing international law, such as non-governmental organisations, interest groups, etc. There is no indication that the ILC has done or is intending to do that.

To sum up, the production of the rules on state succession in respect of state responsibility indeed has a potential of increasing legal certainty and security of international relations. They may serve as auxiliary materials for the courts in case of a dispute and as guidelines for the states negotiating bilateral or multilateral agreements on succession. At the same time, the approach adopted by the ILC and hence the current form of the Draft Articles does not suit the purpose of their adoption. However, the work is still in progress, and only time will tell how the Commission would proceed.

CONCLUSION

The present study has showed at least three developments that have to be highlighted. First, history shows that the field of state succession as such is characterised by lack of consistent practice, legal contradiction and unresolved disputed among scholars with polarised views. This sets the background for work specifically on state succession in respect of state responsibility. Second, the consideration of selected jurisprudence reveals that the judicial practice is also not uniform either: different court view this matter from different perspectives, or simply avoid going into this area of law. Finally, the analysis of the internal discussion within the International Law Commission and the produced Articles shows that there are serious problems – both conceptual and methodological – with regard to this process. Most notably, there is no agreement among ILC members as to whether the process they have so readily engaged into prioritises codification or further development of law; to some, this distinction might seem insignificant, yet it is also reflected in the proposed text of Draft Articles.

¹⁵¹ First report on succession of States in respect of State responsibility, *supra* note 142, p.8, para.27.

¹⁵² Statement by Austria, 31 October 2017, p.4. Available at: <http://bit.ly/2DR8PXB> (last visited: 5 May 2019).

This research had two research questions. As to the first one – is there a true necessity for codification? – there is no definitive answer. The author argues that the *need* for these new rules is not pressing, therefore the ILC could have abstained from this exercise and instead focus on supplementing the well-developed mechanism of attribution of the internationally wrongful act with special rules relating to cases of state succession. This could take the form of recommendations, and the work of the Institute of International Law could serve as a point of departure. The ILC has chosen a different path – a decision that is not unreasonable either. However, it is argued that the approach it has taken requires re-consideration.

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

[...] there was an inevitable tension between the idea of seeking to codify and develop rules of succession to govern future cases of political transformation, at the same time as concentrating upon the particular experience of decolonization whose course was almost run.¹⁵³

The present Articles are both re-active and pro-active, seeking to codify the existing practice and simultaneously propose new rules. This incertitude, if retained, would lead to poor acceptance and low rate of ratifications, shall Articles transform into Convention. The conviction of the ILC as to the form of proposed rules is surprising: the form should not take priority over substance. It is possible that the states wish to retain this area of law untouched and are capable of reaching *ad hoc* bilateral and multilateral agreements when such need arises. This is why the first question that should have been asked by the ILC is whether the international legal system needs *yet another* Vienna Convention, the question that was not yet asked.

¹⁵³ Craven, *The Decolonization of International Law*, *supra* note 43, p.202.

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