McGill Journal of Dispute Resolution

Revue de règlement des différends de McGill

Volume 7 (2020-2021), Number 7

Article

State Responsibility of New States Regarding Acts Committed by Rebels During a Successful Civil War: How Does the Rule Apply to Different Types of State Succession?

Patrick Dumberry

Contents

State Responsibility of New States Regarding Acts Committed by Rebels During a Successful Civil War: How Does the Rule Apply to Different Types of State Succession?

Patrick Dumberry*

This article examines one aspect of Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 ("ILC Articles"). The second paragraph of this provision deals with the issue of State responsibility and attribution arising from the conduct of an insurrectional movement in the context of a successful rebellion or civil war resulting in the establishment of a new State. Article 10(2) sets out one basic principle: The acts committed by the rebels during the successful insurgency are attributable to the new State after their victory.

The question examined in this article is whether the rule set out at Article 10(2) should find application for all six different types of State succession. This is a question which has, perhaps surprisingly, not been systematically addressed by scholars. The work of ILC Special Rapporteur Šturma suggests that the provision would not find application in the context of incorporation of a State, unification of States and in situations of transfer of territory from one State to another. The article examines whether this is indeed the case and also what would be the likely consequences of not applying the provision in these situations.

...

Cet article examine un volet de l'article 10 des Articles sur la responsabilité de l'état pour fait internationalement illicite adoptés par la Commission du droit international en 2001 (« les Articles de la CDI »). Le deuxième paragraphe de cet article traite de la responsabilité d'un état et l'attribution vis-à-vis le comportement d'un mouvement insurrectionnel dans le contexte d'une guerre civile menant à la création d'un nouvel état. L'article 10(2) énonce un principe de base : les actes commis par les rebelles lors de l'insurrection sont attribuables au nouvel État après leur victoire.

La question examinée dans cet article est celle de si la règle énoncée à l'article 10(2) doit s'appliquer aux six différents types de succession d'États. Il s'agit d'une question qui, de manière peut-être surprenante, n'a pas été systématiquement abordée par la communauté juridique. Les travaux du rapporteur spécial de la CDI, M. Šturma, suggèrent que cet article ne trouverait pas à s'appliquer dans le contexte de l'incorporation d'un État, de l'unification d'États et dans les situations de cession de territoire d'un État à un autre. Cet article examine si c'est effectivement le cas et les conséquences potentielles de la non-application de la disposition dans ces situations.

Introduction

This article examines one aspect of Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 ("ILC Articles").[1] The second paragraph of this provision deals with the issue of State responsibility and attribution arising from the conduct of an insurrectional movement in the context of a successful rebellion or civil war resulting in the establishment of a *new State*.[2] Article 10(2) sets out one basic principle: The acts committed *by the rebels* during the successful insurgency are attributable to the new State after their victory.[3]

I have examined in the past,[4] and in a recent book,[5] the scope and content of this principle as well as the different theoretical justifications which have been put forward by scholars. The new State should remain responsible for acts that took place before its independence because there is a "structural" and "organic" continuity with the rebel movement.

In previous writings, I have noted that, while the principle of attribution embodied in Article 10(2) was generally considered as well-established, it seems to be more of a doctrinal construction than one based on actual State practice.[6] The same conclusion has also been reached by other writers since then.[7] In a recent book I published with Professor Kohen, we examined the

---

* Patrick Dumberry, Ph.D. (Graduate Institute of International Studies, Geneva), Full Professor, Faculty of Law (Civil Law Section), University of Ottawa, Canada. The author can be contacted at Patrick.dumberry@uottawa.ca. This article contains some extracts of different sections of my recent book: P. Dumberry, Rebellions and Civil Wars: State Responsibility for the Conduct of Insurgents (Cambridge UP, 2021). This article reflects facts current as of January 2021.

1 See International Law Commission, *Draft Articles on Responsibility for Internationally Wrongful Acts*, Report on the Fifty-Third Session, 2001, Supp No 10, UN Doc A/56/10 (2001).

2 Article 10(1) deals with the different situation where the rebels are successful at creating a *new government*. On this question, see: Hazem M Atlam, "National Liberation Movements and International Responsibility" in Marina Spinedi and Bruno Simma, eds, *United Nations Codification of State Responsibility* (New York, Oceana, 1987) 55 [Atlam, "National Liberation Movements"]; Abdel-Azzeem Al-Ganzory, "International Claims and Insurgence" (1977) 33 REDI 71; Michael Akehurst, "State Responsibility for the Wrongful Acts of Rebels - An Aspect of the Southern Rhodesian Problem"(1968) 43 British YIL 49; Jean d'Aspremont, "Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents" (2009) 58 ICLQ 427; Gérard Cahin, "Attribution of Conduct to the State: Insurrectional Movements" in James Crawford et al, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 247.

3 The question is examined in Patrick Dumberry, *Rebellions and Civil Wars: State Responsibility for the Conduct of Insurgents* (Cambridge: Cambridge University Press, 2021), at 299 [Dumberry, *Rebellions and Civil Wars*].

4 See Patrick Dumberry, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement" (2006)17:3 European J Int'l L 605 [Dumberry, "New State Responsibility"].

5 See Dumberry, *Rebellions and Civil Wars*, *supra* note 3.

6 See Dumberry, "New State Responsibility", *supra* note 4.

7 See Tatyana Jane Eatwell, *State Responsibility for the Unlawful Conduct of Armed Groups* (Doctoral Thesis, University of Cambridge, 2020) (noting that "there is a distinct lack of case law or examples of state practice supporting the existence of the rule provided by Article 10(2)" and that "the scarcity of judicial precedent and state practice is evident in the ILC Commentary on Article 10", adding that "no authority is cited in direct support of Article

Resolution adopted by the Institute of International Law in 2015 on State succession to responsibility. Specifically, we noted that while the principle expressed in Article 10(2) is certainly necessary and justified in contemporary international law, it remains that an analysis of State practice shows that it does not rest on grounds as solid as often believed in doctrine.[8] ILC Special Rapporteur Šturma also noted the limited practice.[9] The same assessment was made by Judge Kreća in his separate opinion in the 2015 *Genocide* case. He noted that the explanation given in the ILC Commentaries to the effect that "more recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in Article 10"[10] is, according to him, a characterization which "is, in terms of law, wishful thinking rather than a respectable argument".[11] It seems that former ILC Special Rapporteur Crawford may have taken into account these remarks when he wrote, in his subsequent book, that while "the rule stated within Article 10(2) is again relatively uncontroversial", it remains that "state and judicial practice is relatively sparse".[12] In this context, the question arises as to whether or not Article 10(2) can be considered a customary rule.[13]

The question examined in this article is whether the rule set out at Article 10(2) should find application for all six different types of State succession. This is a question which has, perhaps surprisingly, not been systematically

---

10(2)"). See also Sten I Verhoeven, "International Responsibility of Armed Opposition Groups. Lessons from State Responsibility for Actions of Armed Opposition Groups" in Noemi Gal–Or, Cedric Ryngaert & Math Noortmann, eds, *Responsibilities of the Non–State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (Richmond, British Columbia: Brill Nijhoff, 2015) 285.

8 See Institute of International Law, "State Succession in Matters of State Responsibility, Final Report", Rapporteur Marcelo G Kohen in (2015) 76 YB Inst Intl L (Tallinn: IDI, 2015) at para 82 [*IIL, Final Report on State Succession*].

9 See International Law Commission, *Second Report on Succession of States in Respect of State Responsibility,* Pavel Sturma, Special Rapporteur, UNILCOR, 70th Sess, UN Doc A/CN.4/719 (2018) at para 116 [*ILC Second Report*].

10 See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UNILC, 53rd Sess (2001) at 51 para 14 [*ILC Commentaries*].

11 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Separate Opinion of Judge Kreća [2015] ICJ Rep 450 at paras 66.2, 67 [*Genocide*].

12 James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) at 176, referring to Dumberry, "New State Responsibility", *supra* note 4.

13 In the *Genocide* case, Serbia argued that the rule "does not reflect customary international law." See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, "Counter-Memorial of Serbia" (December 2009), ICJ Written Proceedings (vol 1) at paras 284 point (a);286. In its 2015 decision on the merits, the Court did not have to take a stance on this question. Yet, the wording used ("even if Article 10 (2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time (...)") suggests that it was not convinced at all about the customary status of Article 10(2). See *Genocide*, *supra* note 11 at para 104.

addressed by scholars.[14] ILC Special Rapporteur Šturma mentioned that the rule set out in Article 10(2) "is fully applicable to *certain* categories of succession, namely secession and creation of a newly independent State".[15] The emphasis on the word "certain" and the express mention of two types of succession shows that Šturma considers that the rule does *not* apply to other types of succession.[16] The ILC Commentaries on the 2001 Articles also indicate that Article 10(2) does not cover a "situation where an insurrectional movement within a territory succeeds in its agitation for *union with another State"*.[17] This comment suggests that the provision would not find application in the context of incorporation of a State, unification of States and in situations of transfer of territory from one State to another. There are also a few passages in the ILC 1975 Report which suggests that the provision only applies to cases of secession and Newly Independent States.[18]

In the following sections, I will examine whether or not Article 10(2) should apply to different types of State succession. Most importantly, I will focus on what would be the likely consequences of *not* applying the provision in these situations and discuss whether any alternative solution could be contemplated.

1. Secession

The events affecting the territorial integrity of the predecessor State may sometimes result in the creation of a *new State* (or even more than one). The predecessor State (often described as the "continuing" or "continuator"[19] State) will continue its existence after losing a part of its territory.

The principle established in Article 10(2) appears perfectly applicable to cases of secession. The new State should be held "responsible" for the consequences of obligations arising from internationally wrongful acts committed by the secessionist rebels against third States or foreign investors. This is indeed the position adopted by scholars.[20] The ILC 1975 Report

14 See generally Patrick Dumberry, *State Succession to International Responsibility* (Leiden; Boston: Martinus Nijhoff, 2007), at 246–49. See also Dumberry, *Rebellions and Civil Wars*, *supra* note 3 at 329.

15 *ILC Second Report*, *supra* note 9 at para 108 [emphasis in the original].

16 See also, *ibid* at para 76: "the rule seems to be relevant only to certain (and not all) situations of succession, namely separation of parts of a State (secession) and creation of newly independent States".

17 *ILC Commentaries*, *supra* note 10 at 51, para 10 [emphasis added].

18 See International Law Commission, "Report of the International Law Commission to the General Assembly on the work of its twenty-seventh Session" (UN Doc. A/10010/Rev.l) in *Yearbook of the International Law Commission 1975*, vol 2 (New York: UN, 1976) at 105, para 22 (indicating that this provision "concerns the case of the formation of a new State by means of secession or decolonization"). See also 100, para 1.

19 *Genocide*, *supra* note 11, Judgment 26 February 2007, ICJ Rep 2007, using that term at paras 71, 75, 80–81, 106, 130–31.

20 See *ILC Second Report*, *supra* note 9 at para 108; James Crawford, *The Creation of States*

leaves no doubt as to the application of Article 10(2) to situations arising from secession.[21] Accordingly, the continuing State should *not* be held accountable for the internationally wrongful acts committed by successful secessionist rebels.[22] Any other solution would be unjust. Thus, why should the continuing State be held liable for wrongs committed by another entity whose successful armed struggle ultimately led to the dismemberment of its territorial integrity and the loss of part of its territory? After all, the State that continues to exist is the first "victim" of a successful secession by the rebels.

While some of the examples of State practice I have found are clearly not the strongest precedents,[23] they generally support this basic principle.[24]

---

in International Law, 2nd ed (Oxford: Oxford University Press, 2006) at 656 (referring to "the well established rule that a seceding State will be held internationally responsible for acts performed by it in the process of its formation"). See also Haig Silvanie, "Responsibility of States for Acts of Insurgent Governments" (1939) 33:1 *AJIL* at 89 ("[i]n the case of a secession no question arises as to the liability of the old state for the acts and contracts of the successfully seceding government. The problem is one chiefly of state succession and not of succession of governments. A seceding government does not pretend to act in the name and on behalf of the old state; its acts and contracts are normally intended to bind the new state. In such a case the sole question is: How far is the new state bound by the acts and contracts of insurgents who created it?").

21 See *ILC Report*, *supra* note 18 at 100, para 1. See also, para 6 ("[Article 15(2)] should therefore be understood that the questions of attribution contemplated in the present article arise solely in the case where the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question, or in the case where the structures of the insurrectional movement have become those of a new State, constituted *by secession* or decolonization in part of the territory which was previously subject to the sovereignty or administration of the pre-existing State") [emphasis added].

22 See *ILC Commentaries*, *supra* note 10 at 51, para 6.

23 These examples are examined in Dumberry, *Rebellions and Civil Wars*, *supra* note 3 at 331. See Legal Opinion of the Law Officers of the British Crown, 16 February 1863 (in Lord McNair, *International Law Opinions* vol 2 (Cambridge: Cambridge University Press, 1956) at 257); *Williams v Bruffy*, 96 US 176 (1877) at 186. In my book, I also examined two other cases. See Dumberry, *Rebellions and Civil Wars*, *supra* note 3 citing *Socony Vacuum Oil Company*, US International Claims Commission in *Settlements of Claims* (1949–55) at 77; *ILR* (1954) at 55; *Irish Free State v Guaranty Safe Deposit Co*, 215 NYS 255 (1927).

24 See Dumberry, *Rebellions and Civil Wars*, *supra* note 3 (a number of cases arose in the context of the secession of Mexico from Spain in 1821 and were decided by the claims commissions established by the United States and Mexico between 1839 and 1849. The claims, involving contracts signed during the insurgency between US nationals and the rebels, support the principle whereby the acts of rebels (including signing contracts with foreigners) made during an insurgency are attributable to the new State once the rebellion has been successfully completed). See: Silvanie, *supra* note 20 at 89–90 (examining a number of cases supporting the principle which were decided by the US-Venezuela Claims Commission of 1885 in the context of the independence of Venezuela from Spain which took place in 1821. One example is the *Idler* case involving an American citizen who had furnished large quantities of arms and army stores to authorized agents of Simon Bolivar's revolutionaries in 1817, during Venezuela's war of independence against Spain).

2. Newly Independent States

There is another type of succession of States that is similar to cases of secession insofar as the events affecting the territorial integrity of the predecessor State result in the creation of a new State while the predecessor State continues to exist. This is the case of the creation of "Newly Independent States" in the context of decolonization. It is generally admitted that the territory of a colony should not be considered part of the territory of the colonial State administrating it.[25] In this regard, a Newly Independent State is a new State that cannot be said to have "seceded" from the colonial power to the extent that its territory was never formally part of it.[26]

The principle established in Article 10(2) is clearly applicable to Newly Independent States. In its 2001 Commentaries the ILC mentioned that "the expression 'or in a territory under its administration' is included in order to take account of the differing legal status of different dependent territories"[27] because "it is now incorrect to describe" dependent territories "as the "territory of a State."[28] Such wording was clearly meant to cover national liberation movements in the context of decolonisation.[29] The expression was indeed introduced in the 1975 draft "in order to take into account of the legal status of dependent territories".[30]

The fact that Article 10(2) covers Newly Independent States is also clear from its use of the words "movement, insurrectional *or other*."[31] The words "or other" were added by the Drafting Committee; they were not present in the earlier draft until the 2001 final version.[32] The Drafting Committee explained that it "felt that the concept of 'insurrectional movement' might be too restrictive, as there was a greater variety of movements whose action might result in the formation of a new State."[33] The word "other" was meant

25 See *Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, GAOR, 25th Sess, 188rd Mtg, UN Doc A/RES/2625(XXV) (1970).

26 See Zidane Meriboute, *La codification de la succession d'États aux traités: décolonisation, sécession, unification* (Geneva : Graduate Institute Publications, 1984) at 174.

27 *ILC Commentaries*, *supra* note 10 at 51, para 8.

28 *ILC Report*, *supra* note 18 at 99, para 29. See also 105–06, para 22.

29 See *ILC Second Report*, *supra* note 9 at para 131; Eatwell, *supra* note 7 at 215–16; Verhoeven, *supra* note 7 at 293.

30 *ILC Report*, *supra* note 18 at 105–06, para 22. See also 100, para 1.

31 Cahin, *supra* note 2 at 252.

32 For a detailed analysis of the origin of the words "or other", see *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, "Verbatim Record" (11 March 2014), ICJ Oral Proceedings (CR 2014/14, 21), Tams (Serbia) at para 70.

33 International Law Commission, "Summary Records of the Meetings of the Fiftieth Session 20 April-12 June 1998 27 July-14 August 1998" in *Yearbook of the International Law Commission 1998*, vol 1 (New York: UN, 1998) (UN Doc A/CN 4/SR 2519-A/CN 4/SR 2564) at 287; 290, para 88 [*ILC Summary Records*] (adding that "[i]t had thus been decided to use the phrase 'movement, insurrectional or other' to indicate that the intention was to cover ejusdem generis

to include National Liberation Movements struggling in the particular context of decolonisation. The ILC thus rejected the distinction between National Liberation Movements and other movements in the context of this provision.[34]

The ILC 1975 Report goes further and indicates that "it would be extremely dangerous to introduce" the concept of "legitimacy".[35] Crawford is clear on that point in his subsequent writing: "Article 10 treats all insurrections generally and makes no attempt to distinguish between a struggle for national liberation on the one hand and a simple rebellion on the other".[36] This is because, in the words of the ILC, it was "not the Commission's business to establish when an insurrectional movement was or was not legitimate, or when, how, or with respect to whom, it acquired international personality".[37] Crawford has subsequently made the same observation that "no distinction should be made" under Article 10 "between different categories of insurrectional movements on the basis of any international 'legitimacy' or any illegality in respect of their establishment of government".[38] This position has been praised by many,[39] endorsed by ILC Special Rapporteur Šturma,[40] but also criticised by others.[41]

In my view, the principle established in Article 10(2) should apply to Newly Independent States in the same way as for cases of secession. The colonial continuing State should *not* be "responsible" for internationally

movements").

34 See *ILC Report*, *supra* note 18 at 105, para 20.

35 *Ibid* at 105, para 20 ("[t]he Commission considered that no distinction should be made, for the purposes of this article, between different categories of insurrectional movements on the basis of any international 'legitimacy' or any illegality in respect of their establishment as the government, despite the possible importance of such distinctions in other contexts"). The same comments were made in *ILC Commentaries*, *supra* note 10 at 51, para 11 ("[f]rom the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin").

36 Crawford, *supra* note 12 at 172.

37 *Ibid* at 173, quoting from the work of the ILC in *ILC Yearbook* I (1975) at 60. See also *ILC Report*, *supra* note 18 at 91, para 7 ("[i]n formulating . . . the present article, the Commission . . . is not required to say anything about the various forms which insurrection may take according to whether there is a relatively limited internal struggle, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movement and so on, or about the questions which may arise in connexion with the problem of the international legitimacy of some of these forms").

38 *Ibid* at172.

39 One example is Cahin, *supra* note 2 at 252.

40 See *ILC Second Report*, *supra* note 9 at para 108 ("[i]t is important to stress that article 10 treats all insurrections generally and makes no attempt to distinguish between a struggle for national liberation on the one hand and a simple rebellion on the other").

41 See Hazem M Atlam, *Succession d'États et continuité en matière de responsabilité internationale* (Doctoral Thesis, Université de droit, d'économie et des sciences d'Aix-Marseille, 1986) at 258, 419–21; Atlam, *supra* note 2 at 55.

wrongful acts committed by successful rebels in their efforts to establish a new State in the context of decolonisation. The same position was recently adopted by the Institute.[42] Article 16(3) of the Resolution adopted by the Institute provides that the conduct of a National Liberation Movement, representing the people entitled to self-determination, which succeeds in establishing a Newly Independent State will be considered as an act of that State under international law.[43] The solution is supported by scholars,[44] and has recently been adopted by ILC Special Rapporteur Šturma.[45] This principle has been applied by French municipal court decisions in the context of the independence of Algeria in 1962.[46]

3. Dissolution of State

The extinction of the predecessor State may result in the creation of many new States on its original territory. This is the case of the dissolution of a State.

As mentioned above, ILC Special Rapporteur Šturma has made it clear that Article 10(2) was "fully applicable to *certain* categories of succession",[47] but did not mention anything about dissolution of State.[48] This omission suggests that he does not consider cases of dissolution to be covered by Article 10(2). The ILC Commentaries are silent on the matter. The ILC Commentaries indicate that Article 10(2) "focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be."[49] This remark does not seem to prevent the application of Article 10(2) in the specific context of dissolution.[50] One can indeed foresee a scenario where the break-up of a State (and its dissolution) is the result of the successful struggle of *several* insurrectional movements, each fighting at the same time for the creation of *their own* States. In this context, there

42 On this question, see Marcelo G Kohen & Patrick Dumberry, *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2019) at 128.

43 See Institute of International Law, "State Succession in Matters of State Responsibility", Rapporteur Marcelo G Kohen (2015) 76 YB Inst Intl L 509 at 701. Article 16(3) reads as follows: "[t]he conduct, prior to the date of succession of States, of a national liberation movement which succeeds in establishing a newly independent State shall be considered the act of the new State under international law" [IIL, "State Succession"].

44 See Dumberry, *State Succession*, *supra* note 14. 171–72, 247, referring to a long list of writers.

45 See *ILC Second Report*, *supra* note 9 at paras 108, 115 (see: Draft Article 8(3).

46 See Dumberry, *State Succession*, *supra* note 14 at 235.

47 *ILC Second Report*, *supra* note 9 at para 108 [emphasis in the original].

48 *ILC Second Report*, *supra* note 9, Draft Article 11, dealing with dissolution of State, does not refer to the conduct of rebels as a ground for succession to responsibility. Unlike Draft Articles 7(4) and 8(3) which specifically refers to such conduct in the different context of secession and Newly Independent States.

49 See *ILC Commentaries*, *supra* note 10 at 51, para 10.

50 For the same view, see Verhoeven, *supra* note 7 at 292.

may be a structural and organisational continuity between *each* rebel group and the respective new States they have created. Another possible scenario is the struggle of *only one* insurrectional movement which ultimately becomes successful at creating its own State, which in turn, leads to the subsequent disintegration of the rest of the State from which the new State is detached.[51] In sum, there seems to be no theoretical obstacle preventing the application of Article 10(2) to cases of dissolution.[52]

One reason why Article 10(2) should apply to cases of dissolution is to prevent any potential situation resulting in a "responsibility gap".[53] The point can be explained by reference to the *Genocide* case. Serbia argued that Article 10(2) "does not apply to situations in which the responsibility of the predecessor State can be established."[54] This is because, in such a case, the predecessor State remains responsible for the wrongs it has itself committed. As mentioned above, this is indeed the case when the predecessor State *continues to exist* after the date of succession. Serbia further explained the rationale behind Article 10(2) as follows:

> The ILC accepted the need for a transfer of attribution, from a movement to a subsequently-emerging State, because this was the only way of avoiding a problematic gap in the attribution of responsibility. Hence the ILC noted that, "[t]he predecessor State will not be responsible for those acts [i.e. acts committed by an insurrectional movement]". As a consequence, "[t]he only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment."[55]

Serbia argued that there was in the present case, "no 'responsibility gap' to be filled, and there is therefore no need to apply an exceptional rule such as Article 10, para. 2, that seeks to close such a gap."[56] Thus, "unlike in the scenario envisaged in Article 10, para. 2, at all relevant times, there existed a State for the purposes of State responsibility, and at all relevant times this State could be held responsible for internationally wrongful acts."[57] Serbia's

---

51 This is a scenario which could potentially occur in Iraq in the future. Thus, the military actions of Kurdish insurgents in Iraq may eventually be successful and lead to the secession of Iraqi Kurdistan. If this happens, it is far from certain that the rest of Iraq, which has been plagued with sectarian violence for years, will remain united. It may very well be that the Sunni and Shia populations will each create their own State and that Iraq, as a sovereign State, will simply disappear.

52 See also Eatwell, *supra* note 7 at 216, 218–19.

53 See *IIL*, *Final Report on State Succession*, *supra* note 8 at 534 "[o]ne of the most fundamental goals guiding the Resolution adopted by the Institute was to 'prevent situations of State succession from leading to an avoidance of the consequences of internationally wrongful acts, particularly in the form of the extinction or disappearance of the obligation to repair, by virtue of the mere fact of the State succession'").

54 *Genocide*, *supra* note 11, Serbia Counter-Memorial, December 2009 at para 351.

55 *Ibid* at para 354.

56 *Ibid* at para 359.

57 *Ibid*.

argument is that the SFRY is in fact that predecessor State.[58] In its Rejoinder, Serbia clarified its position, according to which it believed that: "in the case at hand where the SFRY still existed until its dissolution in April 1992 and where the relevant acts (such as the alleged acts of genocide Croatia claims have been committed by JNA units) are attributable to the predecessor State, such required responsibility gap does not exist".[59] It is true that there was no "responsibility gap" *before* the dissolution of State. At that time, the SFRY (as the predecessor State) was indeed responsible for its own acts. The question, however, is what happens *after* the date of dissolution of the SFRY (in April 1992)? At that date, the predecessor State (SFRY) no longer existed. Serbia argued that on 27 April 1992, the FRY took over any responsibility from the former SFRY with respect to the Genocide Convention.[60] Given that this was "essentially a case of succession", Serbia added that "Article 10, para. 2, does not attempt to deal with" such case.[61] Thus, since the FRY *succeeded* to the obligations of the former SFRY, there was no "responsibility gap" *after* the dissolution. In other words, Serbia's argument was that Article 10(2) did not apply in this case because there was simply no "responsibility gap" (either before or after the dissolution).

The situation is entirely different in the event where *none* of the successor States decide to take over the obligations arising from the commission of wrongful acts by the rebels. This is a case where there is indeed a "responsibility gap". In fact, there is such a gap if Article 10(2) does *not* apply to cases of dissolution. Thus, an internationally wrongful act committed by rebels during the insurgency would simply remain unpunished. The injured State or the foreign investor victim of such an act would be left without any debtor against whom it can file a claim for reparation. This is an outcome that can certainly be considered unfair for the victims of a wrongful act. In my view, this is the reason why Article 10(2) should apply: the acts committed by the rebels during the insurgency are attributable to the new State. In the context of dissolution, the only remaining question is *which one* of the many successor States should be responsible for the acts of the rebels?

The answer should be based on the existence of a relationship of *continuity* between the insurrectional movement that committed the wrong and *one* new State. This is indeed the main argument that was developed by Croatia in the *Genocide* case.[62] The Court did not address this argument.

---

58 See *ibid* at para 358 ("[t]here existed a predecessor State, the SFRY. There emerged several new successor States, including the FRY/Serbia").

59 *Ibid* at para 186.

60 See *i*bid at para 358 ("[a]s the Court clarified in its judgment of 18 November 2008, on 27 April 1992, the FRY *succeeded* to the rights and obligations of the former SFRY with respect to the Genocide Convention") [emphasis in the original].

61 *Ibid* at para 358.

62 See *Genocide, supra* note 11, Judgment of 3 February 2015 at para 102 (the Court described the

Yet, what is also noticeable is that the Court did not reject the possibility of applying Article 10(2) in the context of dissolution.

In my view, the solution adopted by the Institute's Resolution on State succession to responsibility could be used *by analogy*. Article 15 applies to cases of dissolution in general (i.e. not involving insurrectional movements per se).[63] Under that provision, the obligations arising from an internationally wrongful act committed by the predecessor State against another State (or a foreign investor) are transferred to one successor State when the author of the act was an *organ* of the predecessor State that later became an organ of that new State.[64] One example would be the wrongful act committed by the authorities of a province, a federated State or an autonomous region which later becomes an independent State. The same general approach has been adopted by the ILC Special Rapporteur Šturma.[65] In fact, "organ" continuity was invoked by Croatia in the *Genocide* case as a second "alternative" argument.[66]

4. Transfer of Territory

The events affecting the territorial integrity of the predecessor State may sometimes *not* result in the creation of a new State, but rather in the *enlargement* of the territory of an *existing* State.[67] This is the case of a "cession" or "transfer" of territory from one existing State to another. In the context of a rebellion by an insurrectional movement, the term "transfer"

---

argument as follows: "According to Croatia, that provision is part of customary international law. Croatia maintains that, although the FRY was not proclaimed as a State until 27 April 1992, that proclamation merely formalized a situation that was already established in fact. During the course of 1991, according to Croatia, the leadership of the republic of Serbia and other supporters of what Croatia describes as a 'Greater Serbia' movement took control of the JNA and other institutions of the SFRY, while also controlling their own territorial armed forces and various militias and paramilitary groups. This movement was eventually successful in creating a separate State, the FRY. Croatia contends that its claim in relation to events prior to 27 April 1992 is based upon acts by the JNA and those other armed forces and groups, as well as the Serb political authorities, which were attributable to that movement and thus, by operation of the principle stated in Article 10 (2), to the FRY"").

63 See IIL, "State Succession", *supra* note 43, Article 15 at 565.

64 See analysis in Kohen and Dumberry, *supra* note 42 at 126.

65 See *ILC Second Report*, *supra* note 9 at paras 147, 167, 185, 188 (See, Draft Article 11).

66 See *Genocide*, *supra* note 11, Judgment of 3 February 2015 at para 107 (describing the argument as follows: "one of the entities that emerged as a successor – the FRY- largely controlled the armed forces of the SFRY during the last year of the latter's formal existence, justify[ing] the succession of the FRY to the responsibility incurred by the SFRY for the acts of armed forces that subsequently became organs of the FRY". Croatia thus argued that there was a "structural and organic continuity between the Serbian military and political leadership and the FRY"). On this point, see, Kohen and Dumberry, *supra* note 42 at 127.

67 This type of territorial transformation is somewhat different compared to other mechanisms of State succession insofar as it results in neither the extinction of a State nor in the creation of a new State.

should be used.[68]

The question as to whether Article 10(2) of the ILC Articles can be applied to transfers of territory is controversial. As mentioned above, ILC Special Rapporteur Šturma made it clear that Article 10(2) was "fully applicable to *certain* categories of succession",[69] but he did not mention transfers of territory.[70] This omission suggests that he did not consider Article 10(2) to cover cases of transfers of territory. The ILC, in its Commentaries, indicates that this provision does not cover a "situation where an insurrectional movement within a territory succeeds in its agitation *for union* with another State."[71] Article 10(2) would therefore not cover transfers of territory. The ILC Commentaries further added: "[t]his is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the *continuity of the movement* concerned and the eventual *new* Government or *State*, as the case may be."[72] These two remarks suggest that the application of Article 10(2) requires the existence of two elements: (1) the fact that a new State is created, and (2) the idea of a "*continuity*" between the movement and that new State. The following paragraphs examine how these two conditions apply in the context of transfers of territory.

Given that *no new State* is created as a result of a transfer of territory, it would appear that Article 10(2) does not apply to this specific type of State succession.[73] Yet, it should be added that when the Drafting Committee adopted Article 10(2), it made a remark suggesting that the provision should *not only* apply to "new" State, but also to "the case where an entity of a State seceded and became part of another State."[74] While this expression is not entirely clear, it is probably a reference to the situation of a transfer of territory from one State to another. Interestingly enough, the Drafting Committee specifically stated that "the commentary would explain" that aspect. It did not. In fact, the ILC, in its Commentaries, indicates the opposite.[75]

Another problem related to the application of Article 10(2) is the

68 The term "cession" is used only to refer to cases where the territorial change is made pursuant to a treaty to which the predecessor State is a party. On the contrary, a "transfer" of territory applies to situations where there is no agreement between the predecessor State and the successor State. See Oliver Dörr, "Cession" in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2006) at paras 1, 8.

69 *ILC Second Report*, *supra* note 9 at para 108 [emphasis in the original].

70 See *ibid* (Draft Article 9, dealing specifically with transfers of territory, does not refer to the conduct of rebels as a ground for succession to responsibility).

71 *ILC Commentaries*, *supra* note 10 at 51, 115, para 10 [emphasis added].

72 *Ibid* [emphasis added].

73 See Eatwell, *supra* note 7 at 218–19. See also 216.

74 *ILC Summary Records*, *supra* note 33 at 287, 291, para 89 ("[t]he commentary would explain that, while paragraph 2 envisaged only the case of the formation of a new State, it would apply, mutatis mutandis, to the case where an entity of a State seceded and became part of another State").

75 See *ILC Commentaries*, *supra* note 10 at 51, para 10.

requirement of a "*continuity*" between the rebels and the governing entity.[76] In the context of a transfer of territory, it is not enough for the rebels to have won their struggle and successfully achieved their goal of removing part of the territory of the predecessor State and transferring it to that of the successor State. For the "continuity" requirement to be fulfilled under Article 10(2), the rebels would probably have to gain power and *become the new government* of the already existing successor State. This is indeed the only scenario where there can truly be some sort of organic and structural continuity between the rebels and the government in power in the enlarged successor State.[77] While such a scenario is possible,[78] it remains that it is unlikely to occur in practical terms.[79] Thus, rebels are seldom *that* "successful" in their efforts to transfer territories. In the event that there is an absence of continuity between the rebel movement and the government in place, it seems that Article 10(2) would not apply to such a specific case of transfer of territory.

Yet, in my view, the preliminary conclusion reached in the previous paragraph is only part of the analysis. One also needs to consider what would be the practical consequences resulting from the *non-application* of Article 10(2) in the context of transfers of territory. The answer is quite straightforward: the internationally wrongful acts committed by the rebels before the date of succession would simply go unpunished. That result seems unfair for the victims of the acts (third States, foreign investors) who will be unable to get any reparation for the damages suffered.[80] For the injured party who has suffered damage, it matters little whether the actions of the rebels led to the creation of a "new" State (secession) or to a transfer of territory.[81]

It begs the question as to what the alternative solution would be. Could the *predecessor* State be held responsible for the wrongs committed by the rebels before the date of succession? This solution seems unfair for the predecessor State (which continues to exist, albeit with a reduced territory). Indeed, why would it have to pay for the damages done by rebels who were

76 This important aspect is overlooked by Verhoeven, *supra* note 7 at. 293.

77 Another possibility that could be envisaged is for the rebels to take a substantial part in a coalition government with the government in power in the successor State. The question of national coalition governments is examined in Dumberry, *Rebellions and Civil Wars*, *supra* note 3 at 117.

78 See Kohen and Dumberry, *supra* note 42 at 87, 88, para 244 envisaging the application of Article 11(3) in the specific context of a struggle by an insurrectional movement.

79 See Eatwell, *supra* note 7 at 218, also noting that in the context of transfers of territory, "there will be a break in continuity between the organisational structure of the movement and the other state as the former are either absorbed into or dissolved by the organisational structure of latter".

80 The same position is adopted by Verhoeven, *supra* note 7 at 294.

81 Yet, in terms of the application of Article 10(2), the difference is important. Thus, as mentioned above, an injured party would get some reparation if a successful insurrection is considered as a secession, but that would not be the case if a transfer of territory is the ultimate outcome of the struggle.

successful at dismembering its own territory? Given that the predecessor State lost part of its territory as a result of the successful actions taken by the rebels, it seems particularly unjust for it to have to pay any reparation to the victim of such action.[82] This is because the predecessor State is, after all, the first obvious victim of the success of the rebels.

5. Incorporation of States

As mentioned above, the ILC in its Commentaries indicates that Article 10(2) does not cover a "situation where an insurrectional movement within a territory succeeds in its agitation *for union* with another State."[83] As mentioned above, two other remarks made in the ILC Commentaries suggest that what matters for the application of Article 10(2) is that two conditions be fulfilled: (1) a *new* State is created, and (2) there is a "*continuity*" between the movement and that new State.

One can theoretically envisage a situation where the rebels are fighting the governmental forces of a State with the aim of completely integrating the entire territory of that State within another already existing State.[84] Yet, and importantly, cases of "incorporation" do not involve the creation of any "new State", but rather the *enlargement* of the territory of an *existing* State.[85] The absence of the creation of a new State suggests that Article 10(2) does not apply to cases of incorporation. Another reason for not applying Article 10(2) is the possible lack of "continuity" between the rebel movement and the government in place in the enlarged successor State.[86] In any event, Article 10(2) only covers situations where the rebels establish a new State "*in part* of the territory of the pre-existing State". That condition simply cannot be fulfilled in the context of incorporation dealing with the *entire* territory of the pre-existing State.

6. Unification of States

The same comment mentioned in the previous section also applies to cases of unification of States.[87] Given that unification cases involve the creation of

82 The same position is adopted by Verhoeven, *supra* note 7 at 294.

83 See *ILC Commentaries*, *supra* note 10 at 51, para 10 [emphasis added].

84 One hypothetical case could be, for instance, a rebellion in Moldova against the central government aiming at the total absorption by Romania of the entire territory of Moldova.

85 The territory of a State (the successor State) is thus enlarged as a result of the integration of the *entirety* of the territory of the predecessor State.

86 Thus, in the example mentioned above, the rebels would need not only to have totally "incorporated" the territory of Moldova into Romania, but they would also need to have successfully taken power and formed the new government of Romania in Bucharest.

87 This situation involves (at least) *two* existing States which will merge to form a new State. Here, the extinction of the predecessor State results in the creation of *one* new State (the successor State).

a new State, it would seem, at first, that Article 10(2) could apply in such a situation.[88] Yet, Article 10(2) only covers situations where the rebels establish a new State "*in part* of the territory of the pre-existing State." That condition simply cannot be fulfilled in the context of an unification. Here, the rebels establish a new State in the *entire* territory of *two* (not one) pre-existing States. In any event, it is also difficult to consider how the "continuity" requirement could be fulfilled.[89]

Conclusion

The basic principle sets out in Article 10(2) of the ILC Articles is well-established. The acts committed by the rebels during a successful insurgency are attributable to the new State after their victory. Yet, scholars have not examined how this rule should concretely apply to different types of succession of States. The work of both ILC Special Rapporteur Crawford and Šturma clearly indicates that the principle should find application in the context of secession and Newly Independent States. This is indeed the case. This is indeed the case as shown by the work of the Institute in its 2015 Resolution. Some comments made by ILC Special Rapporteur Crawford and Šturma in their reports suggest that the principle should not apply in case of transfer of territory. The same is true for incorporation and unification of States. In any event, what is clear is that the principle underlying Article 10(2) should apply in cases of dissolution in order to prevent wrongful acts from simply going unpunished.

88 This is the position of Eatwell, *supra* note 7 at 215–16.

89 Thus, it would firstly require *two distinct groups* of rebels, each fighting in parallel against their own central government and each being ultimately successful at creating a new unified State. Moreover, it would secondly require for them to share power together in the government of that new State. Such a possibility cannot be completely excluded. See Verhoeven, *supra* note 7 at 292, for whom Article 10(2) applies to unification: "[i]f armed opposition groups in different States succeed in ousting the government and decide to unify these States a new State is created through the actions of the successful insurrectional movements". One potential hypothetical scenario could involve the terrorist group ISIS (Islamic State of Iraq and Syria), which in June 2014 proclaimed a "caliphate" and is currently fighting the central governments of both Iraq and Syria. It would appear that one of the aims of the group is to erase the border between the two States and effectively unite the two States together. Under that scenario, both predecessor States (Iraq and Syria) would disappear and a new State would potentially emerge. This is a scenario where there could potentially be a structural continuity between the rebels and the new government of the unified State. Yet, it seems rather unlikely that this "continuity" requirement could ever be fulfilled in the context of unification.