New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement

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Abstract

There is a well-established principle of international law according to which whenever an insurrectional movement succeeds in creating a new state, *the new state should be held responsible for obligations arising from internationally wrongful acts committed by the insurrectional movement against third states during the armed struggle for independence. The principle is clearly stated in Article 10(2) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The issue has, surprisingly, not been the object of great attention by legal scholars. This article examines the different possible theoretical foundations in support of this principle. It is submitted that the new state should remain responsible for acts which took place before its independence because there is a 'structural' and 'organic' continuity of the legal personality of the organization of the rebels with that of the new state. There is, however, only limited state practice in support of this principle. The analysis of the concrete application of this principle for different types of succession of states leads the author to conclude that it should find application in all cases because of its fair and equitable consequences.*

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Introduction

In times of political turmoil, insurrectional movements fighting for independence have rights and obligations under international law.[1] This issue is independent of the question whether insurrectional movements have been recognized with an international legal personality under international law.[2] There exists a well-established principle of international law according to which a state should *not* be held responsible for internationally wrongful acts committed by an *unsuccessful* insurrectional movement against other states in its struggle for independence.[3] The question addressed in this paper arises whenever an insurrectional movement *succeeds* in *establishing a new state*, and not merely in becoming a *new government* of an already existing state.[4] This paper examines in detail the scope and content of the principle that a new state is responsible for internationally wrongful acts committed by an insurrectional movement during its armed struggle for independence.[5]

[1] See Atlam, 'Succession d'Etats et continuité en matière de responsabilité internationale' (doctoral dissertation on file at the Université de droit, d'économie et des sciences d'Aix-Marseille, France) (1986), at 313–335, 352–392.

[2] R. Ago, *Fourth Report on State Responsibility of the Special Rapporteur*, 24th session of the ILC, 1972, UN Doc A/CN.4/264 and Add 1, ILC Report, A/8710/Rev.1 (A/27/10), 1972, ch IV(B), paras 72–73 in [1972] II *Yearbook of ILC* 71, at 150.

[3] This rule was upheld by an Italian municipal court (the First Instance Court, Brescia) in the context of the unsuccessful secession of the Italian 'Social Republic', the fascist Nazi puppet Republic of Salò, during the Second World War: *Rainoldi v Ministero della Guerra*, Court of First Instance, Brescia, 20 Feb. 1946 [1947] I Foro Italiano 151, in: *Annual Digest and Reports of Public International Law Cases*, 1946, at 6. The rule is also set out at Sect. 4 of the Fourteenth Amendment to the United States Constitution enacted on 28 July 1868 after the failed attempt of the Southern Confederate forces to secede during the American Civil War of 1861–1865. This provision has been interpreted by the US–Great Britain Mixed Claims Commission in *John H. Hanna v United States*, case no. 2, discussed in J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), iii, at 2982. See also: *Salvador Prats v United States*, US–Mexico Mixed Commission, case no. 748, in *ibid.*, at 2886; *Alleghanian v United States*, Peru–US Claims Commission in *ibid.*, at 1615 ff. Another example arises from internationally wrongful acts committed by Filipino insurgents against British nationals in the context of the 1898 cession by Spain to the United States of sovereignty over the Philippines: *Several British Subjects (Great Britain) v United States*, Great Britain–US Claims Commission, Award of 19 Nov. 1925 at 20 AJIL (1926) 382–384; in 6 United Nations Reports of International Arbitral Awards (UNRIAA) 158. Finally, another case involved internationally wrongful acts committed by Cuban insurgents in 1870 against the property of US nationals: *Emma McGrady & Augustus Wilson v Spain* in 59 *Span Com* (1871), 25 Apr. 1874, also discussed in Moore, *supra*, at 2981–2982.

[4] The situation of change of *government* is dealt with at Art. 10(1) of the ILC Articles on State Responsibility (Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, 26 July 2001, UN Doc. A/CN.4/L.602/Rev.1.), which stipulates as follows: '[t]he conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law'.

[5] This paper will not address the other question whether or not a new State should be held responsible for obligations arising from internationally wrongful acts *committed by the predecessor State* in fighting the successful rebels. This issue is dealt with in Dumberry, *State Succession to Rights and Obligations arising from the Commission of Internationally Wrongful Acts in International Law* (doctoral dissertation, completed in February 2006, Graduate Institute for International Studies, Geneva), at 297.

The principle is clearly stated in Article 10(2) of the final 2001 Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter Articles on State Responsibility], adopted by the International Law Commission (ILC).[6] This principle has surprisingly not been the object of extensive attention by past and contemporary legal scholars.[7] This article will examine the different theoretical foundations that have been submitted in doctrine in order to explain why a new state should be responsible for acts committed by rebels before its independence. The (limited) state practice supporting the principle of devolution of responsibility will also be analysed. Finally, the article will examine the concrete application of this principle for different types of succession of states.

1 The Theoretical Foundation of the Principle Adopted by the ILC Articles on State Responsibility

According to Article 10(2) of the Articles on State Responsibility adopted by the ILC, the conduct of 'a movement, insurrectional or other' which establishes 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'.[8]

The 1961 Harvard Draft Convention on International Responsibility also adopted the principle in its Article 18(1).[9] Writers generally agree with the principle of the devolution of responsibility in the context of *governmental* changes. They, however, rarely address the other question of whether the same principle should apply in cases where actions of rebels result not in a change of government, but in the *creation of a new state*.[10] The limited numbers of writers who have indeed made this distinction and have tackled this specific question have reached the conclusion that there should be devolution of responsibility to the new state for acts

[6] ILC Draft Articles on State Responsibility, *supra* note 4.

[7] In fact, the only comprehensive work dealing partially with this question is that of Atlam, *supra* note 1, and Atlam, 'National Liberation Movements and International Responsibility', in M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility* (1987), at 35, 35–56.

[8] ILC Draft Articles, *supra* note 4. The previous 1996 version of the Articles (Text of the Draft Articles on State Responsibility Adopted by the Commission on First Reading, 1996, Report of the ILC on the Work of its Forty-Eighth Session, 6 May–26 July 1996, General Assembly Official Records, Fifty-First Session Supplement No 10, UN Doc A/51/10, ch III [1996] II *Yearbook ILC* (Part Two) at 58–65) made reference only to 'insurrectional movements'.

[9] Draft Convention on the International Responsibility of States for Injuries to Aliens, 15 Apr. 1961, by reporters Sohn and Baxter, Harvard School of Law, at 55 *AJIL* (1961) 576. See also the Harvard Draft of 1929, at Art. XIII (b), at 23 AJIL Spec. Supp. (1929) 131: '[i]n the event of a revolution or insurrection which brings about a change in the government of a State *or the establishment of a new State*, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government' (emphasis added).

[10] This is acknowledged in *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May–25 July 1975, Draft Articles on State Responsibility, UN Doc A/10010/Rev.1, in [1975] II *Yearbook ILC* 47, at 104, para. 18.

committed by rebels before the achievement of independence.[11] Although scholars seem unanimous in supporting this principle, several different theoretical foundations have been submitted to explain it.[12]

The approach, generally supported in doctrine, is that there is a *continuity* between the two subjects of international law, namely the insurrectional movement and the new state: they have the same legal identity. Consequently, the new state takes over the obligations arising from internationally wrongful acts which *it* committed while still an insurrectional movement not yet structured as an independent state. This is, for instance, the position adopted by the ILC:

> The structure of the organisation of the insurrectional movement then becomes those of the organisation of the new State. In such a case, the affirmation of the responsibility of the newly-formed State for any wrongful acts committed by the organs of the insurrectional movement which preceded it would be justified by virtue of the continuity which would exist between the personality of the insurrectional movement and that of the State to which it has given birth . . . [A]n existing subject of international law would merely change category: from a mere embryo State it would become a State proper, without any interruption in its international personality resulting from the change.[13]

[11] Stern, 'Responsabilité internationale et succession d'Etats', in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality/L'ordre juridique international, un système en quête d'équité et d'universalité. Liber amicorum Georges Abi-Saab* (2001), at 327, 344 (describing this rule as a customary norm of international law); Atlam, *supra* note 1, at 422 (speaking of '*une règle bien établi en droit international*'; see also his comments at 399, 410, 419, and 422); L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (2002), at 155–156; Q.D. Nguyen, P. Daillier, and A. Pellet, *Droit international public* (6th edn., 1999), at 755; G. Balladore Pallieri, *Diritto internazionale pubblico* (8th edn, 1962), at 173; Udina, 'La succession des Etats quant aux obligations internationales autres que les dettes publiques', 44 *Recueil des cours* (1933–II) 665, at 768–769; G. Arangio-Ruiz, *L'Etat dans le sens du droit des gens et la notion du droit international* (1975), at 45; Christenson, 'The Doctrine of Attribution in State Responsibility', in R.B. Lillich, *International Law of State Responsibility of Injuries to Aliens* (1983), at 321, 334; J.B. Moore, *Digest of International Law* (1906), i, at 44; Quigley, 'State Responsibility for Ethnic Cleansing', 32 *University of California at Davis L Rev* (1999) 341, at 357; Czaplinski, 'State Succession and State Responsibility', 28 *Canadian YIL* (1990) 339, at 353 (speaking of a 'consistent' practice in this field); Volkovitsch, 'Righting Wrongs: Toward a New Theory of State Succession to Responsibility for International Delicts', 92 *Columbia L Rev* (1992) 2162, at 2199. See also: Dumberry, *supra* note 5, at 268 ff.

[12] Atlam, *supra* note 1, at 23 ff., provides a comprehensive analysis of these different theories.

[13] *Fourth Report on State Responsibility of the Special Rapporteur*, *supra* note 2, at 131, paras 159 and 194. It should be noted that for a minority of authors the victory of the rebels results in the creation of an original new subject of international law (the new State), which *is conceptually distinct* from the other subject (the insurrectional movement), which is now extinct. There would therefore be a break in the chain of the continuity of legal personality between the movement and the new State. According to this approach the devolution of responsibility to the new State is simply based on the 'ordinary' existing rules of *State succession* between *two distinct subjects* of international law. This is, for instance, the position of Cansacchi, 'Identité et continuité des sujets de droit international', 130 *Recueil des cours* (1970–I) 1, at 42–43.

An important point is that this devolution of responsibility is solely based on the mechanisms of state responsibility and *not on any rules of state succession*.[14] This is generally agreed in doctrine,[15] as well as in the work of the ILC.[16]

At least four different theories have been elaborated in doctrine to explain the relationship of *continuity* between the insurrectional movement and the new state. These theories will be examined in the following subsections.

A *The Theory of the Continuity of Government*

According to this theory, continuity between the new state and the rebels arises from the fact that throughout the hostilities the rebels had been organized in a de facto government and had acted in such capacity.[17] From this *continuity of government* it would result that the new state should be held responsible for the acts committed by the de facto rebel government prior to independence.

The theory of the continuity of government is generally supported by international jurisprudence,[18] as well as in doctrine[19] in the *different context* of the establishment of a *new government* by the rebellion. However, this theory does not seem to be supported when the actions of the rebels result in the creation of a *new state*. This theory has also been rejected by the ILC.[20] In fact, the attribution to the new state of the acts of

[14] The issue of State succession to rights and obligations arising from the commission of internationally wrongful acts is the object of this author's doctoral dissertation: Dumberry, *supra* note 5.

[15] Atlam, *supra* note 1, at 435; Stern, *supra* note 11, at 344; Udina, *supra* note 11, at 768–769. *Contra* Czaplinski, *supra* note 11, at 353, who seems to view this issue as one dealing with the questions of State succession. Thus, for him, this rule is 'the exception to the general rule of non-responsibility of the successor State for the acts of its predecessor'.

[16] *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, *supra* note 10, at 101, para. 8. See also *Fourth Report on State Responsibility*, *supra* note 2, para. 159.

[17] Atlam, *supra* note 1, at 455–461.

[18] *Dix* case, US–Venezuela Commission, Award of 1903, at 9 UNRIAA 119, at 120. The case is about an American national (Mr Dix) who was involved in the cattle business in Venezuela at the time of important political turmoil between the Venezuelan government and some revolutionaries. The revolutionaries were in the end successful in their attempt to take power. The Tribunal decided that the revolutionaries (now forming the new government) should in principle be held responsible for the acts they had committed before their seizure of power and should compensate Mr Dix for his stolen cattle. This is the relevant passage of the Award of the Tribunal: '[t]he revolution of 1899 . . . proved successful and its acts, under a well-established rule of international law, are to be regarded as the acts of a de facto government. Its administrative and military officers were engaged in carrying out the policy of that government under the control of its executive. The same liability attaches for encroachments upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other de facto government.' It should be noted that the Tribunal nevertheless rejected the claim. Thus, it concluded that, in the circumstances of the case, the losses complained of were too remote to entitle Mr Dix to compensation and, in any event, the rebels had no deliberate intention to injure him.

[19] D.P. O'Connell, *International Law* (1970), at 968; C. de Visscher, *Les effectivités du droit international public* (1967), at 120; Reuter, 'La Responsabilité internationale, problèmes choisis', in P. Reuter, *Le développement de l'ordre juridique international, écrits de droit international* (1995), at 377, 465.

[20] *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, *supra* note 10, at 100, para. 2: 'for the purpose of attributing acts to the State, no distinction is made between the acts of organs of the insurrectional movement according to whether they preceded or followed the acquisition by the movement of effective power over a given region'.

insurgents is indeed *quite independent* from the other question of whether the rebels were exercising de facto power in part of the territory of the predecessor state, which subsequently became a new state.[21] A further weakness of the continuity theory is its limited application. Thus, it is limited only to those cases where the rebels have indeed established a regular 'government' during the hostilities, which is far from always the case.[22]

B *The Theory of the Legitimacy of the Struggle*

Another theory submitted in doctrine to explain why a new state should be responsible for acts committed by an insurrectional movement before its independence is based on the idea of the 'internal legitimacy' of the struggle of the rebels against the predecessor state.[23] According to this theory, since the rebels' struggle would truly represent the 'desire' of the people they are fighting for, the new state should be held accountable for internationally wrongful acts committed by them during that liberation struggle.

Here again, this theory is generally supported by international jurisprudence,[24] as well as in doctrine[25] in the *different context* of the establishment of a *new government* by the rebellion. This approach does not seem to be supported when the actions of the rebels result in the creation of a *new state*. The major criticism that can be raised against the application of this theory to new states is the fact that it is not, of course, true in all cases that the rebels can be said to be representing the interests and the will of the people.[26] This point was highlighted in the work of the ILC.[27] The situation is

[21] *Fourth Report on State Responsibility of the Special Rapporteur*, *supra* note 13, at 145, para. 198.

[22] Atlam, *supra* note 1, at 459.

[23] *Ibid.*, at 461.

[24] In the *Bolivar Railway Company* case, Great Britain–Venezuela Mixed Claims Commission, Award of 1903, at 9 UNRIAA 445, Umpire Plumley, at 453, expressed the principle as follows: '[t]he nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result'.

[25] See, for instance, E.M. Borchard, *The Diplomatic Protection of Citizens Abroad (or the Law of International Claims)* (1915), at 241; C. Rousseau, *Droit international public* (1977), v, at 85–86; J. Salmon, *La responsabilité internationale* (1968), at 60; Berlia, 'La guerre civile et la responsabilité internationale', 11 *RGDIP* (1937) 59, at 59; J.H. Ralston, *Law and Procedure of International Tribunals* (1926), at 343–344; Al-Ganzory, 'International Claims and Insurgence', 33 *Revue égyptienne de droit international* (1977) 71, at 93. See also the documents quoted in G.H. Hackworth, *Digest of International Law* (1943), v, at 681–682.

[26] Atlam, *supra* note 1, at 465. Referring to the case of rebels establishing a new government, G. Schwarzenberger, *International Law* (3rd edn., 1957), i, at 628, stated that this theory of the national will 'is no more than an empty fiction in the verbiage of political philosophy'.

[27] *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, *supra* note 10, at 100, para. 2: '[t]he idea has also been put forward that, where the action of the insurgents was successful, they would be regarded as having represented the true national will ever since their uprising against the constituted power. But the very concept of "national will" is to be treated with caution, quite apart from the fact that, in general, international law is not greatly concerned with whether a given government is or is not the representative of the "true" national will. Even leaving that aside, it is difficult to maintain that the outcome of fighting should, like a judgement of God, establish retrospectively that the victors, from the outset of the civil war, were more representative of the true national will than the defeated.' See also *Fourth Report on State Responsibility of the Special Rapporteur*, *supra* note 13, at 145, para. 198.

clearly different in the other context where the legitimacy of one insurrectional movement in representing a people struggling for independence has been recognized by the United Nations. In this case, the theory of the legitimacy of the struggle may explain why the new state should be held accountable for internationally wrongful acts committed by the recognized rebel movement during the liberation struggle.

C *The 'Resurrection' of State Theory*

In some cases, the 'new' state may actually be an 'ancient' state, which only ceased to exist as an independent entity for a certain period of time.[28] The new state would thus be 'resurrected' through the struggle of the liberation movement. According to this theory,[29] there would be a continuity of identity between the 'ancient' state, the insurrectional movement and the 'new' state. Consequently, the newly 'resuscitated' state would be responsible for obligations arising from internationally wrongful acts committed by the rebel movement prior to independence.

The very notion of state 'resurrection' has been widely contested in doctrine and treated by authors as nothing more than a legal fiction without any foundation in international law.[30] In practice, states claiming to be identical to ancient states have nevertheless been regarded as new states.[31] Moreover, this theory can only find application in *specific circumstances* and can by no means be resorted to as a general explanation as to why new states should *always* be responsible for obligations arising from internationally wrongful acts committed by rebels in their struggle for independence.

D *The Organic or Structural Continuity Theory*

Finally, it has been submitted that it is the 'structural' continuity between the organization of the insurrectional movement and the organization of the new state which better explains why the consequences of responsibility should be accepted by

[28] The general issue (unrelated to the specific question of insurrectional movements) is analysed in: Degan, 'Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)', 279 *Recueil des cours* (1999) 195, at 293ff.

[29] A summary of this thesis, as well as a list of writers supporting it, can be found in Atlam, *supra* note 1, at 437–455.

[30] K. Marek, *Identity and Continuity of States in Public International Law* (1968), at 6: '[i]t could, however, be asked whether . . . there might not be identity of a State without its continuity. Unless the possibility of legal miracle is admitted, the question must be answered emphatically in the negative: there is no legal resurrection in international law. Once a State has become extinct, it cannot resume a continued existence.' See also Cansacchi, *supra* note 13, at 47–48. *Contra* Degan, *supra* note 28, at 293 ff, who indicates that the relevant factor is the lapse of time during which there was an effective lost of State sovereignty. He is of the view that in situations where the lapse of time is short the issue should be best understood as one of continuity of state rather than one of succession.

[31] Several African and Asian states have claimed such status after their independence and refused to be qualified as 'new' states. This is, for instance, the position of Algeria, explained in M. Bedjaoui, *La révolution algérienne et le droit* (1961), at 18–39.

the latter for internationally wrongful acts committed by the former.[32] This is so for the reason that the rebels and the new state are essentially the *same* legal entity: 'from being only an embryo State, the insurrectional movement has become a State proper, without any break in the continuity between the two'.[33]

This approach is supported by many in doctrine as the appropriate way to explain the theory of continuity.[34] The 'organic' or 'structural' theory is indeed the most appropriate to explain the continuity between the insurgents and the new state and why the latter is responsible for the acts of the former prior to independence. The application of this theory is, however, not self-evident in cases where it is the efforts of not one, but many, rebels groups which led to the creation of a new state. It has been suggested in doctrine that in such cases, the new state should be held responsible for obligations arising from the internationally wrongful acts of *all* revolutionary groups, and not only for the movement which eventually becomes the new government of the new state.[35]

2 State Practice is Limited

However necessary and justified in contemporary international law the principle expressed in Article 10(2) of the Articles on State Responsibility may be, an analysis of state practice leads to the conclusion that the ground on which this principle rests is not as solid as is often indicated in doctrine. One therefore cannot fully agree with the statement made by the ILC Special Rapporteur James Crawford that 'the earlier jurisprudence and doctrine, at least, firmly support the two rules set out in article 15 [now Article 10]'.[36] The principle seems to be more a doctrinal construction than one based on actual state practice. As a matter of fact, the ILC Commentary to the Draft

[32] See Atlam, *supra* note 1, at 468–476, for an analysis of this theory.

[33] *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, *supra* note 10, at 101, para. 6. The same explanation is found in *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, Nov. 2001, Report of the ILC on the work of its Fifty-Third session, Official Records of the General Assembly, Fifty-Sixth session, Supplement No. 10 (A/56/10), ch IV.E.2), 59 ff, at 114, para. 6. See also *Fourth Report on State Responsibility of the Special Rapporteur*, *supra* note 13, at paras. 159, 194.

[34] Arangio-Ruiz, *supra* note 11, at 304; Zegveld, *supra* note 11, at 156; Atlam, *supra* note 1, at 476, 479.

[35] Atlam, *supra* note 1, at 475, for whom the *raison d'être* of the continuity of the international legal personality between the new state and the movements (other than the one forming the new government) is based on the common goal of their struggle. For Atlam (at 484–485), these questions simply do not arise in the case where the struggle is made by a National Liberation Movement. Thus, since (according to him) the international legal personality is vested in the people and not in the movement, it does not make any difference which of the competing groups actually succeeds in forming a new state. In all cases, the new state would be held responsible for the internationally wrongful acts committed by the people, through any of the groups which fought for independence. One example of such scenario is the independence of Angola (1975), which was the result of the fighting efforts of different groups: *União Nacional para a Independência Total de Angola* (UNITA), *Movimento Popular de Libertação de Angola* (MPLA) and *Frente Nacional de Libertação de Angola* (FNLA).

[36] *First Report on State Responsibility* (*addendum* no. 5), by Mr James Crawford, Special Rapporteur, 22 July 1998, UN Doc A/CN.4/490/Add. 5., at para. 267.

Articles adopted on first reading by the Commission (1996) only mentions one single case of state practice, which is only of limited relevance.[37] The First Report on State Responsibility by James Crawford refers to one judicial decision, which is, however, not relevant in the present context as it does not deal with the consequences of internationally wrongful acts committed by rebels.[38] The same comment can also be made with respect to doctrinal analysis.[39]

This author's analysis of case law leads to the discovery of only three examples of state practice dealing with the issue. These examples support (to some extent) the principle expressed in Article 10(2) of the ILC Articles.

A *French Municipal Court Decisions in the Context of the Independence of Algeria*

The former French colony of Algeria became an independent state in July 1962 after a civil war lasting eight years. Article 18 of the *Déclaration de principes relative à la coopération économique et financière* entered into by France and Algeria on 19 March 1962 indicated that Algeria (the new successor state) took over the obligations arising from internationally wrongful acts committed before the date of succession.[40] The

[37] This example is in the context of the (unsuccessful) struggle of the Confederate Army to secede from the United States during the American Civil War (1861–1865). This example will be fully examined below (*infra* note 58).

[38] The *First Report on State Responsibility*, *supra* note 36, at para. 277, refers to a case decided by the High Court of Namibia: *Minister of Defence, Namibia v. Mwandinghi*, 1992 (2) SA 355, at 359–360, 91 ILR 341 at 361. This case, as well as that of *Minister of Defence, Namibia v. Mwandinghi* before the Supreme Court of Namibia (25 Oct. 1991, 1992 (2) SA 355 (NmS), 91 ILR 358), involves damage arising out of the shooting of a Namibian national by militia operating under the South African Defence Forces in 1987 (i.e. before the independence of Namibia in 1990). This case therefore deals with the *different question* of the devolution of responsibility for acts committed, not by the rebels (SWAPO, the insurgent movement fighting for independence), but *by the predecessor State* (South Africa). These two decisions have been the object of comments in academic literature: Botha, 'To Pay or Not to Pay: Namibian Liability for South African Delicts?', 16 *South African YIL* (1990–1991) 156; Botha, 'Succession to Delictual Liability: Confirmation', 17 *South African YIL* (1991–1992) 177; Booysen, 'Succession to Delictual Liability: a Namibian Precedent', 24 *Comp & Int'l LJ S Africa* (1991) 204; Dumberry, *supra* note 5, at 228 ff.

[39] Thus, Atlam, *supra* note 1, at 422, who considers this principle as well established, does not quote a single case of State practice where the principle was referred to, let alone applied. The author acknowledges (see at 410 ff) the rarity of state practice in support of the principle. In fact, the one international judicial decision he mentioned in support of the principle (*Case Concerning Certain German Interests in Upper Silesia (Merits)* [1926] PCIJ Series A, No. 7) is not relevant as it deals only with the question of state succession *to treaties*. Atlam also makes reference (*supra* note 1, at 410, 448–450) to the fact that there is apparently evidence that insurrectional movements (such as the *Front de Libération Nationale* (FLN) of Algeria) have themselves taken the view that the new state, which they want to see emerge, should be responsible for their acts committed during their struggle for independence. In fact, the many references he makes to the work of Bedjaoui, *supra* note 31, do not deal with any kind of acceptance by Algeria of responsibility for internationally wrongful acts committed by the FLN during the civil war prior to independence.

[40] The text of the Agreement, which is part of the Evian Accords that ended the civil war, is found at [1962] JORF 3019: 'Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities'.

new state of Algeria did not fully implement its obligations under Article 18 of the *Déclaration*.[41] Faced with such refusal by the Algerian authorities, France decided to compensate *French nationals* who had suffered damage during the civil war.[42] In one case, France also decided to compensate a foreign national for acts committed by the OAS.[43] As a result of a request for interpretation made by French courts,[44] the French Ministry of Foreign Affairs issued an official interpretation of Article 18 of the *Déclaration*, stating that Algeria should *not* be responsible for the acts and measures taken by France that were *specifically directed against the rebellion of the FLN (Front de libération nationale)*.[45] This principle has been consistently applied by French municipal courts.[46]

French municipal courts have also consistently held that the new state of Algeria should (in principle) provide compensation to French nationals victims of internationally wrongful acts *committed by the insurgents of the FLN* in their war efforts to achieve independence. However, since Algeria was not a party to any of the proceedings before these French municipal courts, the court decisions did not formally hold Algeria responsible for the obligations arising from such acts committed by the FLN. These decisions simply held that France could not be responsible for such acts which only 'concerned'[47] Algeria.

This principle was applied, for instance, in the *Perriquet* case, where the *Conseil d'Etat* had to decide the legality of a decision taken in 1990 by the *Commission d'arrondissement des dommages de guerre de Paris* (French war damages commission), which rejected the plaintiff's request for compensation for an internationally wrongful act committed by the rebels. The *Conseil d'Etat* upheld this decision and reached the conclusion that Algeria should be responsible for obligations arising from internationally wrongful acts caused by the

[41] This is the conclusion reached by Charpentier, 'Pratique française du droit international' [1963] *AFDI* 1014, at 1015–1016, 1021–1023.

[42] Art. 13 of the *Loi de finances rectificative* of 31 July 1963, Decree no. 64–505 of 5 June 1964. See also the statement of the French State Secretary to Algerian Affairs in [1963] JORF Assemblée nationale no 3814, at 4919, quoted in Charpentier, *supra* note 41, at 1021.

[43] This case involves damage to property suffered in May 1961 by a Swiss national, Mr Gehrig, a trader who was also the Consulate Agent of Switzerland in Oran, Algeria. The internationally wrongful acts were not committed by the French colonial authorities, but by the OAS (*Organisation armée secrète*), a para-military organization of French nationals in Algeria opposed to its independence. This case is briefly mentioned in: *Rapport du Conseil fédéral*, 1965, at 28, quoted in Guggenheim, 'La pratique suisse 1965', 23 *Annuaire Suisse de Droit International* (1966) 65, at 87. It is also referred to in Rousseau, 'Chronique des faits internationaux' [1966] *RGDIP* 995, at 995–996; Rousseau, 'Chronique des faits internationaux' [1961] *RGDIP* 575, at 602–603.

[44] This request was made in the *Union régionale d'Algérie de la CFTC* case decided by the *Conseil d'Etat*, 5 Mar. 1965, in 44 ILR 43, [1967] JDI (No. 2) 387, in Rousseau, 'Jurisprudence française en matière de droit international public' [1965] *RGDIP* 845, at 846–847.

[45] 'Conclusions de M. le Commissaire du Gouvernement Fournier', delivered to the *Conseil d'Etat* in letters dated 13 Feb. 1963 and 30 July 1963, extracts of which can be found in a doctrinal note by Pinto at [1967] *JDI* 387.

[46] These cases are analysed in Dumberry, *supra* note 5, at 279 ff.

[47] '*Intéressent*' in French.

FLN.[48] A similar finding was made by the *Conseil d'Etat* in the *Hespel* case dealing with material damage to property suffered during the civil war.[49] In this case, the *Conseil d'Etat* annulled part of a 1977 award made by the same French war damage commission in favour of the plaintiff insofar as this portion of the award accepted France's responsibility for damage caused by the FLN. In several other cases, the *Conseil d'Etat* concluded that it had no jurisdiction to hear cases involving internationally wrongful acts caused by the FLN: these include the no. 5059 case,[50] the *Etablissements Henri Maschat* case,[51] and the *Consorts Hovelacque* case.[52]

The *Conseil d'Etat* decided similarly in the *Grillo* case.[53] In this case the *Conseil d'Etat* rejected a request by the plaintiff to annul a 1995 decision by the administrative court of Lyon, which in turn had rejected his request to annul a 1992 decision by the administrative tribunal of Nice. This tribunal had decided not to award the plaintiff any compensation for damage suffered by his company as a result of acts of the insurgents. The *Conseil d'Etat* concluded that both courts were right in rejecting the plaintiff's claim insofar as damage had been caused by *a foreign state*.[54] It therefore seems that the *Conseil d'Etat* interpreted the internationally wrongful acts committed in January 1962 by the FLN (i.e. *before* the independence of Algeria) as those of the *future* state of Algeria.

[48] *Perriquet*, Conseil d'Etat, case no. 119737, 15 Mar. 1995. This is the relevant quotation taken from the decision: '*[c]onsidérant qu'il résulte tant de la déclaration de principe du 19 mars 1962 publiée au Journal Officiel du 20 mars 1962 relative à la coopération économique et financière, que du protocole judiciaire conclu le 28 août 1962 entre le gouvernement de la République française et l'Exécutif provisoire algérien et publié par décret du 29 août 1962 que l'ensemble des droits et obligations contractés par la France au titre de l'Algérie ont été transférés à l'Etat algérien à la date de son indépendance; que si l'application de cette règle générale n'a pas pour effet de mettre à la charge de l'Etat algérien la réparation des dommages causés par les mesures prises spécialement et directement par les autorités françaises en vue de faire échec aux mouvements insurrectionnels, l'indemnisation des dommages imputables à des éléments insurrectionnels intéresse l'Etat algérien; Considérant que M. Perriquet a demandé réparation des dommages causés à l'exploitation agricole dont il était propriétaire en Algérie; que ces dommages ont été causés par des éléments insurrectionnels avant l'accession de l'Algérie à l'indépendance; que leur réparation ne peut, en vertu de ce qui a été dit ci-dessus, incomber à l'Etat français…*'.

[49] *Hespel*, Conseil d'Etat, 2/6 SSR, case no. 11092, 5 Dec. 1980, in Tables du Recueil Lebon.

[50] Conseil d'Etat, 2/4 SSR, case no. 5059, 25 May 1970. This case dealt with a submission to annul an award made by a war damage commission in Algeria (before independence), which had rejected a claim for damages since it was resulting from internationally wrongful acts committed by both the rebels and the French army. The *Conseil d'Etat* concluded that it had no jurisdiction with respect to the part of the plaintiff's submission dealing with the damage caused by the rebels.

[51] *Etablissements Henri Maschat*, Conseil d'Etat, case no. 04878, 10 May 1968. In this case the *Conseil d'Etat* had to decide on a request submitted by the plaintiff to annul an award made by a war damage commission in Algeria (before independence), which had refused to provide any compensation to the plaintiff.

[52] *Consorts Hovelacque*, Conseil d'Etat, 2/6 SSR, case no. 35028, 13 Jan. 1984. In this case, the *Conseil d'Etat* was asked to annul a decision by the Paris administrative court which had found France liable for damage caused by the rebels.

[53] *Grillo*, Conseil d'Etat, case no. 178498, 28 July 1999.

[54] The French original version of the judgment reads as follows: '*le préjudice subi par les requérants, qui trouve son origine direct dans le fait d'un Etat étranger, ne saurait engager la responsabilité de l'Etat français sur le fondement du principe de l'égalité devant les charges publiques*'.

B *The Socony Vaccum Oil Company Case before the US International Claims Commission*

Another example involving internationally wrongful acts committed by rebels is the *Socony Vaccum Oil Company* case before the United States International Claims Commission.[55] The case arose out of the taking of property of the claimant by the Nazi puppet 'independent' state of Croatia during the Second World War. The claimant requested payment of $US11,325 million from Yugoslavia on the ground that the latter should be held responsible for the internationally wrongful acts committed by the 'independent' state of Croatia.

The Claims Commission concluded that this so-called 'independent' state of Croatia was actually a 'puppet' state created by Italy and Germany, which at no time had complete control over its territory and population, and which disappeared upon the retreat of foreign troops. In other words, the Claims Commission viewed the 'independent' state of Croatia as an *unsuccessful attempt* by an insurrection group (backed by the Nazi regime) to secede from Yugoslavia, which as a state had never ceased to exist. In one *obiter dictum*, the Claims Commission nevertheless made reference to the (successful) secession of the United States from the British Crown in 1776 and indicated that in such case the new state was responsible for the acts of the rebels committed during the revolution:

> Such was the case of the State government under the old [United States] confederation on their separation from the British Crown. *Having made good their declaration of independence, everything they did from that date was as valid as if their independence has been at once acknowledged. Confiscations, therefore, of enemy property made by them were sustained as if made by an independent nation*. But if they had failed in securing their independence and the authority of the [British] King had been reestablished in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.[56]

The Claims Commission ultimately rejected the claim on the ground that the confiscation of property which took place under the authority of the 'puppet' state of Croatia was not covered by the 1948 bilateral Agreement entered into by the United

[55] *Socony Vaccum Oil Company*, decided by the US International Claims Commission [1949–1955] Settlements of Claims 77, [1954] ILR 55. On 19 July 1948, the USA and Yugoslavia entered into an agreement for the settlement of claims of US nationals against Yugoslavia for taking of property and other measures of confiscation, which occurred during and after the Second World War (i.e. from 1 Sept. 1939 to the date of the Agreement). Yugoslavia paid US$ 17 million to the USA, which established an internal commission (the International Claims Commission) to adjudicate the claims of US nationals.

[56] Emphasis added. The Claims Commission quoted in favour of such proposition the work of Moore, *supra* note 11, at 44, which states: '[t]he other kind of de facto government . . . is such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeeds, and become recognised, its acts from the commencement of its existence are upheld as those of an independent nation.'

States and Yugoslavia, and that it had never been the intention of the negotiators of the treaty to include such claims.[57]

C *A Legal Opinion of Great Britain in the Context of the American Civil War*

In the context of the (unsuccessful) struggle of the Confederate Army for secession of the southern states from the United States during the American Civil War (1861–1865), the Law Officers of the British Crown gave a legal opinion during the war (16 February 1863). The Opinion states that if the rebels were to succeed in their secession efforts, the new state should be held responsible for their acts committed before independence. The Opinion states:

> In the event of the war having ceased, and the authority of the Confederate State being de *jure* as well as de facto established, it will be competent to Her Majesty's Government to urge the payment of a compensation for the losses inflicted on Her Majesty's subjects by the Confederate Authorities during the War.[58]

This example is not the most solid precedent in support of the principle expressed in Article 10(2) of the Articles on State Responsibility. Thus, it is merely a legal opinion addressing what was, at the time it was issued, a theoretical question.

3 The Application of the Principle Adopted by the ILC in the Context of Different Types of Succession of States

The principle established in Article 10(2) of the Articles on State Responsibility seems to be perfectly applicable to cases of *secession*.[59] In such case, the new state (and not the continuator state) should be held responsible for obligations arising from internationally wrongful acts committed by the secessionist rebels against third states.[60] There are similarly no reasons to object to the application of Article 10(2) of the Articles on State Responsibility in the context of the *dissolution* of states[61] as well as for the *unification* of states.[62] In contrast, there is some controversy as

[57] The Claims Commission arrived at the exact same result in two other cases dealing with damage caused by the 'puppet' State of Croatia: the *Popp Claim* [1949–1955] Settlements of Claims 76, referred to in [1954] ILR 63, dealing with the taking of a motor car, as well as in the *Versic Claim* [1949–1955] Settlements of Claims 76, [1954] ILR 63, which was for personal injuries suffered in a camp.

[58] Legal Opinion of the Law Officers of the British Crown, 16 Feb. 1863, in L. McNair, *International Law Opinions* (1956), ii, at 257. This example is reported in *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, *supra* note 10, at 103, para. 12.

[59] There is secession when a new state emerges from the break-up of an already existing state, which nevertheless continues its existence after the loss of part of its territory.

[60] *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, *supra* note 33, at 114, para. 6.

[61] Cases of dissolution of states involve the extinction of the predecessor state, resulting in the creation of many new states on its original territory.

[62] Cases of unification of states involve (at least) two existing states which merge to form a new state, while the predecessor states become extinct.

to whether the principle of devolution of responsibility should find application in the contexts of newly independent states and cession and transfer of territory. This question will now be examined.

The wording used in Article 10(2) of the Articles on State Responsibility clearly indicates that it applies to newly independent states since it contains the expression 'or in a territory under its administration', which refers specifically to the situation of a dependent colony not yet recognized as an independent state.[63] This is also clear from the use of the words 'movement, insurrectional or other', which includes national liberation movements struggling in the particular context of colonialism. The ILC thus rejected the distinction between national liberation movements and other movements in the context of this provision.[64] It held that '[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'.[65]

The assimilation of national liberation movements with 'insurrectional movements' has been criticized in doctrine,[66] as well as by several members of the ILC.[67] It was also contested by some states on the ground that this assimilation would not take into account the legitimacy of the struggle for independence of national liberation movements.[68] It was suggested by some states that if the struggle of a national

[63] Like cases of secession, examples of newly independent states involve the creation of a new state while the predecessor state continues to exist. However, cases of newly independent states arise in the context of decolonisation where the territory of a colony is not considered part of the territory of the colonial state administrating it (*Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, adopted by GA Res 2625 (XXV), 24 Oct. 1970). In that sense, a newly independent state is a new state, which, however, cannot be said to have 'seceded' from the colonial power to the extent that its territory was never formally part of it. The most recent example of a newly independent state is East Timor which became independent in 2002.

[64] *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, *supra* note 10, at 105–106, paras 20–22: '[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'.

[65] *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, *supra* note 33, at 116, para. 11

[66] Atlam, *supra* note 1, at 258, 419–421. See also Atlam, *supra* note 7, at 55.

[67] *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, 5 May–25 July 1975, *Discussion in Plenary*: 1303rd to 1317th meetings (6–27 May 1975), and 1345th meeting (7 July 1975), ILC Report, A/10010/Rev.1 (A/30/10), 1975, ch II, paras 9–52 [1975] I *Yearbook ILC* 3–72, 213–220. See the comments by: Bedjaoui (Documents officels de l'Assemblée générale des Nations unies, *supra* note 31, at 48–49), Elias (*ibid.*, at 50, para. 30), Reuter (*ibid.*, at 45–46, 58), Ushakov (*ibid.*, at 47, para. 7; at 64, para. 20; at 70, para. 26), and Tabibi (*ibid.*, 59, para. 34).

[68] See the discussion held during the Sixth Committee of the General Assembly in 1975 on the ILC's Report: 'Documents officiels de l'Assemblée générale des Nations unies, 30e session, sixième Commission, Questions juridiques'. See in particular the comments made by the following countries: German Democratic Republic (1539th Meeting, 15 Oct. 1975, Doc.A/C. 6/SR. 1539, at 68, para. 3), Ghana (1549th Meeting, 27 Oct. 1975, Doc.A/C. 6/SR. 1549, 133, para. 42), Liberia (1539th Meeting, 17 Oct.

liberation movement results in the creation of a new state, that new entity *should not* be held accountable for the internationally wrongful acts committed by the movement against third states during the struggle for independence.[69]

The position of this author is that the principle established in Article 10(2) of the Articles on State Responsibility should apply to newly independent states in the same way that it applies in the case of secession: the colonial continuator state should not be responsible for internationally wrongful acts committed by successful rebels in their efforts to establish a new state in the context of decolonization. The legitimacy of the struggle for independence of national liberation movements *does not* result in any impunity for internationally wrongful acts committed during that struggle.

The question of whether Article 10(2) of the Articles on State Responsibility is applicable to *cession and transfer of territory* is also controversial.[70] The ILC Commentaries to the 2001 Articles on State Responsibility indicate 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] This interpretation apparently derives from the wording of Article 10(2), specifically referring to the creation of a 'new State'. Consequently, the work of the ILC suggests that Article 10(2) of the Articles on State Responsibility does not find application in cases of cession and transfer of territory where no new state is created as a result of the mechanism of succession of states.

It is submitted that the non-application of Article 10(2) of the Articles on State Responsibility in the context of cession and transfer of territory could lead to unfair results. Firstly, it would certainly be unfair for the continuator state to be held liable for internationally wrongful acts committed by rebels who manage to remove part of its territory and have it attached to another state. Secondly, internationally wrongful

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1975, Doc.A/C. 6/SR. 1542, 86, para. 22), Madagascar (1546th Meeting, 22 Oct. 1975, Doc.A/C. 6/SR. 1546, 109, para. 54), Oman (1546th Meeting, 22 Oct. 1975, Doc.A/C. 6/SR. 1546, 108, para. 42), Swaziland (1549th Meeting, 27 Oct. 1975, Doc.A/C. 6/SR. 1549, 131. para. 28), Syria (1548th Meeting, 24 Oct. 1975, Doc.A/C. 6/SR. 1548, 127, para. 54), Zambia (1550th Meeting, 28 Oct. 1975, Doc.A/C. 6/SR. 1550, 137, para. 3), Czechoslovakia (1546th Meeting, 22 Oct. 1975, Doc.A/C. 6/SR. 1546, 103, para. 3), USSR (1544th Meeting, 21 Oct. 1975, Doc.A/C. 6/SR. 1544, 93–94, para. 11), Tanzania (1542th Meeting, 17 Oct. 1975, Doc.A/C. 6/SR. 1542, 84, para. 12), Lesotho (1545th Meeting, 21 Oct. 1975, Doc.A/C. 6/SR. 1545, 99, para. 16) and Indonesia (1548th Meeting, 24 Oct. 1975, Doc.A/C. 6/SR. 1548, 123, para. 19). A different position is taken by Italy (1543th Meeting, 20 Oct. 1975, Doc.A/C. 6/SR. 1543, 89, para. 19).

[69] See the discussion held during the Sixth Committee of the General Assembly in 1975 on the ILC's Report, *supra* note 68. See, in particular, the comments made by the following countries: Lesotho (1545th Meeting, 21 Oct. 1975, Doc.A/C. 6/SR. 1545, 99, para. 16), Madagascar (1546th Meeting, 22 Oct. 1975, Doc.A/C. 6/SR. 1546, 109, para. 54); Liberia (1539th Meeting, 17 Oct. 1975, Doc.A/C. 6/SR. 1542, 86, para. 22), Syria (1548th Meeting, 24 Oct. 1975, Doc.A/C. 6/SR. 1548, 127, para. 54), Indonesia (1548th Meeting, 24 Oct. 1975, Doc.A/C. 6/SR. 1548, 123, para. 19) and Tanzania (1542th Meeting, 17 Oct. 1975, Doc.A/C. 6/SR. 1542, 84, para. 12).

[70] A case of cession or transfer of territory arises when the events affecting the territorial integrity of the predecessor state (which continues to exists) result in the enlargement of the territory of an existing state. A classic example of a cession of territory is that of Alsace-Lorraine from Germany to France in 1919.

[71] *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session (2001)*, *supra* note 33, at 115, para. 10.

acts committed before the date of succession should not simply go unpunished based on the (rather technical) reason that the actions of the rebels did not establish a *new state*, but led to the attachment of the territory to an *already existing state*. For the injured third state which has suffered damage as a result of the internationally wrongful act committed by the rebels, it matters little whether the actions of the rebels led to the creation of a new state or a cession of territory. The already existing state which now has a territory enlarged as a result of the successful actions of the rebels should compensate any injured third state for internationally wrongful acts committed by the rebels before the date of succession. This solution is based on fairness and should apply notwithstanding the fact that there is no 'organic continuity' between the rebels and the successor state.[72] Therefore, the principle established in Article 10(2) of the Articles on State Responsibility should apply in the context of cession and transfer of territory.

For similar reasons, Article 10(2) of the Articles on State Responsibility should also apply to cases of *total incorporation* of a state into another already existing state, even if it does not result in the creation of a new state.[73]

Conclusion

The work of the ILC and doctrine has long considered as a well-established principle of international law the fact that whenever an insurrectional movement succeeds in creating a *new state*, that new state should be held responsible for obligations arising from internationally wrongful acts committed by the insurrectional movement against third states during the armed struggle for independence. The new state should remain responsible for acts which took place before its independence because there is a 'structural' and 'organic' continuity of the legal personality of what was then a rebel movement and what has since successfully become a new independent state.

The somehow surprising result of the research outlined here is the limited state practice which can be found in support of this principle. Thus, state practice ultimately consists of one *obiter dictum* by an internal United States compensation commission and one sentence taken from a legal opinion discussing the likely consequences arising from uncertain future events. Even the several French municipal court decisions, which held that the new state of Algeria was (in principle) responsible for the internationally wrongful acts committed by the FLN before 1960, had limited concrete implications since Algeria was in fact not a party to any of these proceedings.

[72] There could be an 'organic continuity' between the rebels and the successor state if the rebels were not only successful at having the territory removed from the predecessor state and having it attached to the successor state, but also successful at gaining power and becoming the government of the already existing successor state.

[73] Cases of incorporation (or 'absorption') of states are defined as those where the territory of a state (the successor state) is enlarged as a result of the integration of the *entirety* of the territory of the predecessor state (which ceases to exist). The most recent example of incorporation of a state was when in 1990 the German Democratic Republic ceased to exist as an independent state and its territory, comprising 5 *Länder*, was integrated into the already existing Federal Republic of Germany.

Notwithstanding the fact that the principle expressed in Article 10(2) of the final 2001 ILC Articles on State Responsibility is based on limited precedent, it is this author's position that it should find application in the context of *all cases* of succession of states (including newly independent states and cession and transfer of territory). This principle is *fair and equitable* in the context where the predecessor state ceases to exist as a result of the events affecting its territorial integrity (such as cases of unification, dissolution and incorporation of states). Thus, the application of ILC Article 10(2) ensures that an internationally wrongful act does not remain unpunished and that the injured state victim of such act is not left without any debtor against whom it can file a claim for reparation. In the other context where the predecessor state *does not* cease to exist as a result of the events affecting its territorial integrity (such as in cases of secession, newly independent states and cession and transfer of territory), the opposite solution of *non-devolution* of responsibility would certainly result in unfair consequences. Thus, it would no doubt be unjust for the continuator state to be held liable for internationally wrongful acts committed by rebels, with whom it simply had no involvement. This is all the more so considering that the consequence of such wrongful acts by the rebels ultimately led to the dismembering of its territorial integrity and the loss of part of its territory. It is further submitted that the principle expressed in Article 10(2) of the final 2001 ILC Articles on State Responsibility is also *necessary* because it addresses the important concern of the international community for order and stability of international legal relations between states.[74]

[74] Mullerson, 'Law and Politics in Succession of States: International Law on Succession of States' in G. Burdeau and B. Stern (eds), *Dissolution, continuation et succession en Europe de l'Est* (1994), at 15, 44.