The Problem of State Succession and the Identity of States under International Law

Matthew C.R. Craven[*]

Abstract

Although in recent years the issue of state succession has once again assumed a prominence in international legal practice, there remains considerable doubt and confusion as to the content and application of relevant rules and principles. The problem, it is argued, is not so much the lack of state practice, but a failure to appreciate fully the conceptual problems that underlie the construction of doctrine. In an attempt to clarify matters, this article reflects upon two categories of problems that raise continuing difficulties: problems of substance and methodology, and problems of analytical structure. In each case it is argued that the heart of the problem lies in the approach taken as regards the creation, assumption or imposition of legal obligation in international law, and in the 'construction' of the legal subject. It is the latter point which is taken up in the final section, where an attempt is made to illustrate why international law needs to incorporate within its terms a substantive, rather than merely a formal, conception of the state, and to show how otherwise it is incapable of explaining legal continuity in times of radical change.

1 Introduction

If there is one common theme running through all recent literature on the law of state succession, it is that the subject is largely confused and resistant to simple exposition.[1] Rarely is mention made of the topic without reference to the complexity of issues involved, the almost total doctrinal schism that has polarized thinking, and the lack of any agreed theoretical structure.[2] This may seem surprising given the vast amount of literature on the subject,[3] the fact

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[*] Senior Lecturer in Law, Department of Law, School of Oriental and African Studies, Thornhaugh Street, London, WC1H 0XG, United Kingdom.

[1] Jennings remarks, for example, that the law of state succession 'is a subject which presents such a rich diversity of practice as to give some plausibility to a surprisingly varied range of theoretical analysis and doctrine'. Jennings, 'General Course on Principles of International Law', 121 *RdC* (1967), at 437.

[2] The ILC commented, for example, that '[a] close examination of State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties could find their appropriate solution'. *Yearbook ILC* (1974 – II, part i), at 168, para. 51. Castrén remarks similarly that: 'The elucidation of this question is rendered difficult by the absence of general international treaties and in view of the great instability in the practice observed by different States in different periods. It is, therefore, not surprising to find that differences of opinion, even with regard to certain fundamental aspects of the problem, prevail in the doctrine of the law of nations.' See Castrén, 'Obligations of States Arising from the Dismemberment of Another State', 13 *ZaöRV* (1951) 753.

[3] Some of the most prominent works are D. O'Connell, *State Succession in Municipal and International Law*, vols. I and II (1968); E. Feilchenfeld, *Public Debts and State Succession* (1931); A. Keith, *The Theory of State Succession with Special Reference to English and Colonial Law* (1907); O. Udokang, *Succession of New States to International Treaties* (1972); A. Cavaglieri, *La dottrina della successione di stato a stato e il suo valore giuridico* (1910); Hershey, 'The Succession of States', 5 *AJIL* (1911) 285; Jenks, 'State Succession in Respect of Law Making Treaties', 29 *BYbIL* (1952) 105.

that the matter has been considered extensively by the International Law Commission,[4] and that two international conventions on the law of state succession have been adopted.[5] Indeed, the overriding impression is that the more that is written on the subject, the less clear or coherent the whole becomes. There is a risk, therefore, that even this essay, written with the aim of clarification, will do little more than muddy the already murky waters. It is thought, however, that a little reflection upon the nature of the problems that arise may go some way towards ameliorating their effect.

The lack of common agreement on some of the central issues in the law of state succession has become particularly evident in the wake of the territorial/ political changes in Central and Eastern Europe,[6] particularly following the 'dissolution' of the USSR,[7] Yugoslavia,[8] and Czechoslovakia,[9] and the unification of Germany.[10] It remains unclear, for example, whether and to what extent the Federal Republic of Yugoslavia (Serbia-Montenegro)

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4 The problem of state succession was placed on the ILC's agenda at its first session in 1949, following the recommendation of Lauterpacht in his survey (UN Doc. A/CN.4/1/Rev.1, 10 Feb. 1949), 1 *Yearbook ILC* (1949) 53, UN Doc. A/CN.4/Ser.A/1949.

5 Vienna Convention on State Succession in Respect of Treaties, 17 *ILM* (1978) 1488; Vienna Convention on State Succession in Respect of Property, Archives and Debts, 1983, 22 *ILM* (1983) 306.

6 See generally, Shaw, 'State Succession Revisited', 6 *Finn.Y.I.L.* (1995) 34; Schachter, 'State Succession: The Once and Future Law', 33 *Va. J. Int'l L.* (1993) 253; Martins, 'An Alternative Approach to the International Law of State Succession', 44 *Syr.L.R.* (1993) 1019; Lloyd, 'Succession, Secession, and State Membership in the United Nations', 26 *N.Y.U.J.I.L.P.* (1994) 761; Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations', 28 *Cornell Int'l L.J.* (1995) 29; Williams, 'State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations', 43 *ICLQ* (1994) 776.

7 See, e.g., Koskenniemi and Lehto, 'La succession d'Etats dans l'ex-URSS, en ce qui concern particulièrement les relations avec la Finlande' 38 *AFDI* (1992) 179; Love, 'International Agreement Obligations after the Soviet Union's Break-up: Current United States Practice and its Consistency with International Law', 13 *Van.J.T.L.* (1993) 413; Müllerson, 'New Developments in the Former USSR and Yugoslavia', 33 *Va. J. Int'l L.* (1993) 299; Williams, 'The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?', 23 *Denv. J.I.L.P.* (1994) 1; Bunn and Rhinelander, 'The Arms Control Obligations of the Former Soviet Union', 33 *Va. J. Int'l L.* (1993) 323; Beato, 'Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union', 9 *Am.U.J.I.L.P.* (1994) 525.

8 See, e.g., Müllerson, *supra* note 7; Williams, *supra* note 7; Beato, *supra* note 7.

9 See, e.g., Malenovsky, 'Problèmes Juridiques Liés à la Partition de la Tchécoslovaquie', 39 *AFDI* (1993) 305; Williams, *supra* note 7.

10 See, e.g., Randelzhofer, 'German Unification: Constitutional and International Implications', 13 *Mich. J. Int'l L.* (1991) 122; Oeter, 'German Unification and State Succession', 5 *ZaöRV* (1991) 349, at 352-3; Tomuschat, 'A United Germany within the European Community', *CMLR* (1990) 415; Jacqué, 'L'Unification de l'Allemagne et la Communauté Européenne', 94 *RGDIP* (1990) 997.

remains bound by the treaties of the former Yugoslavia.[11] If it is not accepted as the 'continuation' of the former Socialist Federal Republic of Yugoslavia (as indeed is implied by its exclusion from participation in the UN[12]), can it still be considered to be a party to the Genocide Convention and thereby found the jurisdiction of the ICJ in the present case?[13] If it is a party to the Convention, as the Court seems to have assumed, there is a need for further consideration as to why that is the case (especially as it has not issued a notification of succession). The position is all the more confused since some element of continuity appears to be accepted in the practice of treaty depositaries, while actively opposed by certain states.[14]

The case of German unification was less overtly problematic as far as state succession was concerned, but nonetheless raised a number of fundamental questions. For example, a central assumption seems to have been that unification did not involve the creation of an entirely new state.[15] If otherwise, it might have been concluded that both the FRG and GDR had ceased to exist and that the new Germany would have to apply afresh for membership in international organizations (including the UN and EC). But if the process was essentially one of the absorption of the GDR by the FRG[16] (a matter which presumably cannot be determined solely by reference to the parties themselves), questions arise as to the status of the agreements of the former GDR. Was it the case that they were nullified by the process of union, or did they continue to apply on a territorial basis (as is laid down in Article 31 of the 1968 Vienna Convention on the Law of Treaties[17])?

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11 The 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties' of 1996 described the FRY as the 'predecessor state' whose treaty obligations remained unaffected by the secession of the various Yugoslav republics. UN Doc. ST/LEG/8, paras. 297-8 (1996). The US, Germany and Guinea all objected to these paragraphs (UN Docs. S/1996/251; S/1996/263; S/1996/260) and an errata was issued.

12 See SC Res. 777 (1992); GA Res. 47/1 (1992); Opinion of UN Legal Counsel, UN Doc. A/47/485 (1992). See generally, Wood, 'Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties', 1 *Yearbook UN Law* (1997).

13 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia)*, ICJ Reports (1996) 3, at para. 17. The ICJ considered the FRY to be a party to the Genocide Convention by reason of the fact that it had expressed its intention to remain bound by the treaty in a declaration of 27 April 1992. What the Court conveniently overlooked, however, was that the essence of the declaration was the FRY's claim to be the continuation of the former Yugoslavia.

14 See dissenting opinion of Judge Kreca, *supra* note 13, para. 93. Also, Wood, *supra*, note 12.

15 Some traditional schools of thought maintained that when two or more states unite, the personality of each becomes extinct. See, e.g., P. Fiore, *International Law Codified and its Legal Sanction* (5th ed., 1918), at 133.

16 Article 1(1) of the Unification Treaty of 31 August 1990, 30 *ILM* (1991) 457, makes clear that the unification takes the form of accession under Article 23 of the FRG Basic Law of 1949. Article 23 envisaged the application of the Basic Law to other German territory following an act of accession (this is to be contrasted with Article 146 which envisaged the unification of the two states to form a new state with a new constitution). On 23 August 1990 the *Volkskammer* decided by a two-thirds majority in favour of the accession of the GDR to the FRG based on Article 23 of the Basic Law.

17 Article 31(1) provides that '[w]hen two or more States unite and so form one successor State, any treaty

The answers to such questions, and numerous other similar ones, cannot be found in any simplistic process of doctrinal inquiry. Ultimately, in any case of state succession (which, for want of a better description, may be defined as a 'change in sovereignty over territory'[18]) two sets of problems of an interrelated nature arise. First, and most visibly, are problems of substance – defining the existence, content, and scope of particular prescriptions. An example of such a problem arose recently in the *Genocide Convention* case where the International Court of Justice was faced with the question whether or not there existed a rule of automatic succession to conventions of a humanitarian nature (and therefore to the Genocide Convention itself).[19] Although the ICJ left the matter open, Shahabuddeen, in his separate opinion, appeared to favour such a view, relying *inter alia*, upon a particular construction of the object and purpose of the Convention.[20] Another similar example might be drawn from the recent *Gabcicovo-Nagymaros* case in which a central point of dispute was whether the agreement to construct a series of dams along the Danube was essentially in the nature of a treaty establishing a 'territorial regime' and therefore subject to automatic succession.[21] The response of the Court to that question was in the affirmative – not only did it find Article 12 of the 1978 Vienna Convention to be declaratory of customary international law, it concluded that the agreement in question was indeed territorial in nature despite the fact that it had never been executed and had been substantially repudiated by both parties.[22] Whatever the position taken, it is clear that these problems essentially involved assessing whether or not there was sufficient evidence to support the establishment of the norm of automatic succession in question, and whether its application could be justified in the case at hand. They were, in other words, concerned primarily with the existence and scope of particular rules of general international law.

The second set of problems essentially concern classification or taxonomy: determining what schemata of principles is to be employed. Such questions are inevitably closely related to

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in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State ...'

18 Definitions include a 'transfer of territory from one national community to another', O'Connell, *supra* note 3, vol. I, at 3; the 'replacement of one State by another in the responsibility for international relations of territory', Vienna Convention, 1978, Article 2(1)(a); the 'transfer of territory of one State to another', Feilchenfeld, *supra* note 3; 'la substitution d'un sujet à l'autre dans un rapport juridique donné qui demeure identique', Udina, 'La Succession des États Qant aux Obligations International autre que les dettes Publiques', 44 *RdC* (1933), at 665.

19 See, e.g., Kamminga, 'State Succession in Respect of Human Rights Treaties', 7 *EJIL* (1996) 469; Müllerson, 'The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia', 42 *ICLQ* (1993) 473.

20 Shahabuddeen suggested that 'to effectuate its object and purpose, the Convention would fall to be construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention. The necessary consensual bond is completed when the successor State decides to avail itself of the undertaking by regarding itself as a party to the treaty.'

21 See *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997.

22 *Ibid*, para. 123.

the first set of problems, insofar as the development of a particular rule will always depend to some extent upon how practice is classified, and what practice is considered analogous in the circumstances. Questions of taxonomy are distinct, however, in that they operate on a different level of generality. Here the concern is not so much as to the content of individual norms, but the circumstances in which sets of interrelated norms should operate. In the context of Yugoslavia, for example, the issue of 'continuity' was a problem of classification or taxonomy insofar as it was of importance, not only for membership in international organizations,[23] but also as regards entitlement to assets and responsibility for debts, treaty obligations and delicts. Such problems are more in the nature of 'structural' problems, the relevance of which is explicitly dependent upon particular theoretical assumptions: that we speak at all of 'annexation', 'cession', 'dismemberment', 'secession', or the like, is not because such categories are set in stone, nor indeed because they are terms of art, but because we accept them as useful and necessary descriptive categories. That they are either useful or necessary, however, is a reflection of the particular theory of succession adopted. For example, if the central consideration is one of 'mutual consent', the classification would reflect a fundamental division between cases of 'cession' and 'union' on the one hand, and cases of conquest and secession on the other.[24] By contrast, if the central consideration is rather the issue of personality (as it is in most traditional works) the classification would distinguish categorically between instances of secession and of dismemberment. The point is that unless some agreement is reached as to the basis of the taxonomy employed, doctrine will always be at a loss to explain why a principle utilized in one circumstance should be applied in another. Before considering such issues in greater detail, it is as well to consider briefly the more immediate issues of substance and methodology.

2 Problems of Substance and Methodology

For many authors, the central issue of substance is simply whether or not one of two alternative theses should be applied: the 'universal succession' thesis or the 'clean slate' (*tabula rasa*) thesis.[25] The former approach is a derivative of the Roman law concept of inheritance in civil law, in which the *heres* (the appointed successors) acquire not merely a single *res*, but an aggregate of rights and liabilities called a *iuris universitas*.[26] Prichard explains that at the time of Justinian:

> The universal successor assumes the whole of the legal clothing of the person to whom he succeeds; steps, as it were, into his shoes. He takes over his rights and liabilities of every kind; his property (*res singulae*) and *iura in re aliena*, the debts and other obligations (such as rights of action for damages for breach of contract) owing to him, and the debts and obligations which

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23 See e.g., Blum, 'UN Membership of the "New" Yugoslavia: Continuity or Break?', 86 *AJIL* (1992) 830.

24 For this view see Keith, *supra* note 3, at 1.

25 See, e.g., Schaffer, 'Succession to Treaties: South African Practice in Light of Current Developments in International Law', 30 *ICLQ* (1981) 593.

26 This is what distinguished the heir (the universal successor) from the legatee. H. Jolowicz, *Historical Introduction to the Study of Roman Law* (1954), at 127.

he owes.[27]

It was in the work of Gentili,[28] Grotius[29] and Pufendorf[30] that such concepts found their way, in rudimentary form, into the body of international law, it being argued that the rights and duties of the predecessor passed *ipso jure* to a successor sovereign. Although such authors were generally concerned primarily with succession of the person of the sovereign (i.e. what is now referred to as succession of governments),[31] rather than succession of 'states', the universal succession thesis survived largely intact until the late nineteenth century.[32] By this stage it found its justification not so much in theistic dogma but in theories of 'popular continuity',[33] 'organic substitution'[34] and, improbably enough, 'autolimitation'.[35]

The 'clean slate' thesis, by contrast, appears to have emerged in the late nineteenth century as a result of the influence of voluntarist or imperative approaches to law (the *Willenstheorie*).[36] It proceeds from an understanding of law as deriving from the expression of sovereign will, and embodies thereby the view that legal relations are essentially personal. As a result, the process of transformation necessarily involves a legal hiatus when the sovereignty of

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27 A. Prichard, *Leage's Roman Private Law* (3rd ed., 1961), at 233. Jolowicz points out that liability for delict was sometimes deemed 'personal' such that it became extinguished altogether. See Jolowicz, *supra* note 26, at 128.

28 *De Jure Belli Libri Tres* (1612, Translated by Rolfe, 1964) III, at xxii.

29 *De Jure Belli ac Pacis*, II, ix, 10-12, xiv, 1, 10. See generally, O'Connell, *supra* note 3, vol. I, at 9-10; Feilchenfeld, *supra* note 3, see esp. ch. II.

30 *De Jure Naturae et Gentium Libri Octo* (1688, translated by Oldfather and Oldfather, 1934) VIII, at xii, ss. 1-9.

31 See O'Connell, *supra* note 3, vol. I, at 1-2 (who arguably overstates the point).

32 See generally, O'Connell, 'State Succession and the Theory of the State', *Grot. Soc. P.* (1972) 23.

33 E.g., Fiore, *supra* note 15, at 134. This theory maintains that the state has two forms of personality: the political and the social. In cases of state succession, only the political personality of the state (a fictitious concept) is affected, leaving the social personality (the legal condition of the people) intact. See, O'Connell, *supra* note 3, vol. I, at 11.

34 See, e.g., M. Huber, *Die Staatensuccession* (1898), at 18-19; J. Westlake, *International Law* (1904), at 61; *Idem*, 'The Nature and Extent of the Title by Conquest', 17 *LQR* (1901) 392. According to this theory the successor state (conceived as an organic juridical entity) merely absorbs the factual situation brought about by the predecessor's legal commitments. In doing so, it takes over all the rights and duties of its predecessor, save those which are essentially political. See generally, O'Connell, *supra* note 32, at 40-45.

35 See, e.g., G. Jellinek, *Allegemein Staatslehre* (1900), at 367-375. Despite employing the consensually-oriented '*Willenstheorie*', Jellinek found that states were bound, practically speaking, to accept tacitly the continuity of legal obligation. This, however, can clearly be regarded as a matter of 'novation', rather than 'succession'.

36 See, e.g., Cavaglieri, *supra* note 3; Cavaglieri, 'Règles Genérales du Droit de la Paix', 26 *RdC* (1929) 311, at 364-376.

one state comes to an end and another takes its place. In such a situation, there can be no 'transfer' of rights or obligations between the old and the new state. Rather, the incoming sovereign is free of all rights and obligations save those it assumes afresh.

In reality, neither of these two positions is wholly tenable, nor do they provide ready solutions to the range of problems that arise in the context of state succession. It is clear to begin with that neither rule makes much sense with respect to cases of cession of territory. In such cases the 'successor' (if that is how the cessee is to be addressed) will neither begin life with a clean slate, nor will it succeed to the full range of rights and duties of the 'predecessor'. It is, therefore, only when a new state comes into existence, or when an old state ceases to exist, that the debate is of significance. Even then, the two approaches tend to be insufficiently nuanced: to claim for instance, in the context of dismemberment, that a rule of universal succession applies does little to address problems such as the distribution of property or debts among successor states.

Even when considered within the restricted context of treaties, the universal succession thesis demands too much. It argues for the maintenance of legal continuity in circumstances in which some alteration of legal relations is both inevitable and necessary. It assumes that states may be burdened with obligations in a situation where specific consent is palpably absent, not because of any universal necessity but because of some inchoate systemic interest in legal continuity. The clean slate thesis, by contrast, is not properly a thesis of succession at all.[37] It denies the possibility of the passing of rights and duties in virtue of an overarching requirement of consent. But in denying the possibility of succession, it also appears to deny the possibility of law. Only by resort to some artificial notion of auto-limitation[38] can a strict application of a voluntarist approach be reconciled with the existence of external legal obligation (bearing in mind that a looser notion of collective consent is apparently excluded).

It is also very clear that, on an evidential level, state practice does little to substantiate either position. In very few cases have newly emergent states discarded, in their entirety, all rights and duties that were formerly incumbent upon the previous sovereign. Even those states emerging from a process of decolonization tended to accept a certain number of treaties entered into on their behalf by former colonial powers.[39] This is especially the case with respect to

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37 Bello argues that the 'clean slate theory' is a 'misnomer'. 'Reflections on Succession of States in the Light of the Vienna Convention on Succession of States in Respect of Treaties 1978', 23 *GYIL* (1978) 296, at 309-310.

38 Cf. Jellinek's concept of '*Selbstverpflichtungslehre*', *Idem*, *Die Rechtliche Natur der Staatenvertrige* (1880), at 1ff.

39 It is clear that very few states have, in practice, refused to apply any of the predecessor states' treaties (the one main exception being Israel). See International Law Association, *The Effect of Independence on Treaties* (1965), at 2-3; O'Connell, 'Independence and Succession to Treaties', 38 *BYbIL* (1962) 84; Keith, 'Succession to Bilateral Treaties by Seceding States', 61 *AJIL* (1967) 521. O'Connell argues that the evidence cited by the ILC to support its 'clean slate' thesis is extremely partial. He suggests that: i) it arbitrarily excluded from analysis cases of separation (such as the separation of Norway from Sweden) in which the clean slate analysis was not applied; ii) many examples given were from the nineteenth century (such as the independence of Latin American republics) when there was only a restricted category of treaties, many of which were merely treaties of political alliance; iii) in practice, through the use of devolution agreements, a good many treaties remained in force for the successor states. O'Connell, 'Reflections on the State Succession Convention', 39 *ZaöRV* (1979) 725, at 729-733.

treaties establishing a territorial regime.[40] On the other hand, it is equally rare to find examples where no alteration in the legal position of a state or territory has occurred following a change in sovereignty.[41] It is generally accepted, for example, that certain 'personal treaties', such as treaties of friendship or alliance (and perhaps commercial treaties), are not subject to automatic succession.[42] Similarly, it is widely conceded that there is limited succession to delicts (unliquidated debts).[43] The argument, therefore (if indeed there is one at all), is only as to which approach is more accurate in a very general sense – one which supports a notion of succession or one which emphasizes, instead, the necessity of consent?

The approach adopted for the debate above is likely to be informed primarily by the broad approach taken as to the nature of international law. One of the central difficulties underlying the notion of succession has been the perceived absence in international law of a set of systemic norms that governs all dimensions of the creation, disappearance or mutation of the legal order of the state.[44] This is represented, in a weak sense, by the perception that international law is not as yet sufficiently developed to guarantee the transmission of rights and obligations in case of changes in the condition of states.[45] In a stronger sense, however, it manifests itself in a recognition that the essentially consensual nature of international law, and the bilateral nature of international legal obligation, pose almost insuperable obstacles in the way of the development of a law of succession. From one perspective, to consider a successor state to be party to a treaty ratified by the predecessor state is to assume that those obligations could be imposed on what is, to all intents and purposes, a third party, without its consent. If the successor state is, in reality, a legally distinct person, the treaties of the predecessor state must

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40 The special nature of such 'territorial' treaties was first recognized by de Vattel, who distinguished between 'real' treaties and 'personal' treaties. The former he considered to be 'those contracts by which a right is once for all acquired, independently of any subsequent acts of either party'. E. de Vattel, *The Law of Nations*, vol. II (Trans. Chitty, 1863), c. xii, 204. These have become known as 'dispositive treaties' or 'international servitudes' and are thought to create rights in land and to survive changes in sovereignty. O'Connell, *supra* note 3, vol. II, at 12-23; A. McNair, *The Law of Treaties* (1961), at 256. Such treaties may be universal or particular, and include treaties of cession, boundary treaties, peace treaties, treaties of neutrality and treaties providing for rights of way over territory. The notion of dispositive treaties is given specific recognition in the Vienna Convention 1978, Articles 11 and 12. Cf also, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, para. 123.

41 This might be possible in the case that the least 'disruptive' form of succession occurs, namely, cession of territory. In cases in which succession involves the emergence of a wholly new state, it is unlikely that purely political treaties or delicts of the predecessor state will continue.

42 See, e.g., R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed. 1992), at 212.

43 See, e.g., *Robert E. Brown case*, A.D., vol. 2, no. 35.

44 This approach has traditionally been expressed in the form of the 'state as fact' argument. See, e.g., Cavaglieri, *supra* note 36, at 321, 340-1.

45 Such a view is implicit in the contention that international law, as a 'primitive' system of law, does not possess a clear set of secondary rules which include, *inter alia*, rules of change. See generally, H.L.A. Hart, *The Concept of Law* (1961), at 209.

be considered essentially *res inter alios acta*.[46] Nor is the issue merely one of the rights and duties of the successor state: if some element of succession is accepted, the successor will necessarily assume certain rights and duties *vis-à-vis* other states. Preservation of legal continuity in such circumstances can only be justified by one of two arguments (assuming the absence of an act of novation). Either continuity is ensured systemically in virtue of a positive rule of succession, to which all states (new and old) are assumed to have consented, or it is ensured through the continuing identity of the subject (as perhaps might be expressed in some notion of 'popular continuity') which in essence denies the fact of succession.

Considering the first possibility, there are essentially three problems that attend to the development of a customary law of state succession. The first is that state practice will rarely provide a substantive explanation for the fact of legal continuity. The assumption of rights and duties on the part of a successor state may variably be interpreted either as an explicit recognition of the operation of a norm of succession or as an assumption *de novo* of certain international rights and duties (through an act of novation). In both cases, evidence of consent may be provided, but in the absence of an express statement as to its import it cannot necessarily be construed as a recognition of succession in law.[47] Even in the context of treaties, where depositaries will usually register the fact of succession, accession or the like, there is frequently doubt as to whether succession was considered to occur automatically or by reason of the fact of notification.

Secondly, unlike many other areas of law, the law of state succession benefits little from codification.[48] In its conventional form, the law of state succession is ultimately self-regarding – the question whether a new state is bound by particular conventional norms of succession is contingent upon a recognition that it has, indeed, succeeded to those norms. This point was not lost on the ILC which, when drafting articles on state succession to treaties, admitted that the adoption and general ratification of a relevant treaty would itself do little to resolve legal difficulties:

> Since a succession of States in most cases brings into being a new State, a convention on the law of succession in respect of treaties would *ex hypothesi* not be binding on the successor State unless and until it took steps to become a party to that convention; and even then the convention would not be binding upon it in respect of any act or fact which took place before the date on which it became a party. Nor would other States be bound by the convention in relation to the new State until the latter had become a party.[49]

The particular aim of the ILC, therefore, was not so much to achieve results by conventional means, but rather to begin a process of codification and clarification in the hope that the norms

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46 Castrén, *supra* note 2, at 754.

47 O'Connell, accepting that practice was by no means coherent, remarked that an appreciation of the law of state succession was 'ultimately one of emphasis'. O'Connell, *supra* note 3, vol. I, at 33.

48 O'Connell remarks that 'State succession is a subject altogether unsuited to the processes of codification, let alone of progressive development.' O'Connell, 'Reflections', *supra*, note 39, at 726.

49 1974, II, pt. i, at 170, para. 62. This point is further bolstered by the principle of non-retroactivity embodied in Article 7.

may eventually take on the character and shape of norms of customary international law.[50] Such a transformation, however, is far from simple. Certainly, as the ICJ noted, a 'widespread and representative participation in the convention might suffice' but only 'provided it included that of States whose interests were specifically affected'.[51] The problem here is that, even assuming widespread ratification of the Vienna Conventions, in most cases those states specifically affected will, *ex hypothesis*, not have ratified the Convention nor will there necessarily be any evidence of 'extensive' and 'uniform' practice.

This leads to the third point, namely, that it is assumed that newly emergent states would be automatically bound by the terms of a general international law of succession. The traditional justification for this lies in the supposition that, in seeking entry into the international legal community, new states impliedly accept the terms of existing general international law.[52] Leaving aside the question-begging nature of such resort to 'tacit' consent (it clearly not being the same as consent to the creation of a legal norm), it may be argued that there is a world of difference between the acceptance of obligations where there is evidence of an existing general practice and, on the other hand, the acceptance of rules whose application is directed specifically and exclusively to new states as they emerge onto the international plane. The point is that new states do not enter into a legal community in which the rules of succession govern the relations between states on a day-to-day basis, but are rather subjected to the application of a particular, conditional set of rules that lays down the legal circumstances that are to accompany their 'birth'. This is not to say that the creation of rules of this type is an impossibility, but rather that their justification cannot be based upon the traditional processes of tacit consent, acquiescence or estoppel.

3 Problems of Analytical Structure

Whilst methodological issues are certainly of importance in the context of state succession, it is in the lack of structural clarity and the mutability of classification that most problems arise. As O'Connell remarked, '[i]t is significant that, in the history of State succession, controversy has developed not so much around the question whether such and such a principle exists as over application of such a principle'.[53] Although this is not a problem specific to the question of succession, particularly insofar as all customary international law is dependent upon operative taxonomy, it is nevertheless particularly evident in this area.

In traditional works, a distinction is usually made between forms of succession determined by reference to the nature of the change taking place and its effect on the personality of the predecessor state. It is common, for example, to find a differentiation between universal succession and partial succession.[54] In the former case, the predecessor state is said to cease to exist and there is thus greater pressure to ensure succession to international rights and duties. In the latter case, succession will be less maximal insofar as the predecessor state remains *prima facie* responsible for all international rights and duties. Thus the law of state succession has, for some time, been explicitly contingent upon the 'personality' of the state, and specifically its

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50 *Yearbook ILC* (1981 – II, part ii), at 9. See Bello, *supra* note 37, at 301-2.

51 *North Sea Continental Shelf Cases*, ICJ Reports (1969), at 3, para. 73.

52 See, e.g., Westlake, *International Law*, *supra* note 34, at 49; Hall, *International Law* (4th ed. 1895), at 44; L. Oppenheim, *International Law: A Treatise* (2nd. ed. 1910), at 18.

53 O'Connell, *supra* note 3, vol. I, at 29.

54 See, e.g., Fiore, *supra* note 15; Udokang, *supra* note 3; Jennings and Watts, *supra* note 42, at 209.

'identity' or 'continuity', which remained the point of differentiation between the operation of two distinct legal regimes. Identity, therefore, serves to differentiate between a case of cession (or secession)[55] and one of dismemberment,[56] between a case of absorption (or annexation) and one of union,[57] and between the birth of a new state and its resurrection.[58] In each case, the defining consideration is whether or not the state concerned retains its legal identity; in other words, whether it continues its personality as a state. Such differentiations are thought to be particularly important because international law presumes that all decisions relating to the continuation or otherwise of a state's rights and duties, assets and liabilities, will be dependent upon the universal characterization adopted. This, in turn, flows from the proposition that the possession of international rights and duties inheres in an entity with appropriate legal personality. Identity, therefore, provides the key to determining the proper set of norms that are to be applied in a given case.

In practice, however, it has become very clear that such distinctions raise more questions than they answer. In most cases, it is extremely difficult to distinguish properly between the two classes of case, as, for instance, between a case of multiple succession and one of dismemberment, or between a case of absorption and one of union. This was certainly the case in the past (as with the dissolution of the Dual Monarchy of Austria-Hungary in 1919, and the unification of the Kingdoms of Italy) and continues to be a live issue today (as with the argument over continuity of the USSR and Yugoslavia, and the absorption/union of Germany). The difficulty is that, factually speaking, the processes are similar: in the case of Yugoslavia, the process could equally well be viewed as one of multiple secession or as one of dismemberment. Both situations involve the non-consensual disengagement of a number of territorial units from the former parent state. Without a clear point of differentiation, problems will inevitably arise as to the proper characterization of particular cases and the determination of what analogies are appropriate in the circumstances.

4 O'Connell and the Elimination of Personality

Such problems of differentiation were clearly perceived by O'Connell, who sought to eliminate in large part any consideration of the issue of 'personality' from the law of state succession. His central thesis was that legal doctrine on succession had been derailed by the predominance of Hegelian conceptions of the state, which, from the time of Bluntschli onwards, understood the question of succession in terms of the identity (or personality) of the parties themselves. He argues that when Hall made personality the universal touchstone of succession, jurists came to think that treaties were generally annulled by change of sovereignty. Such an approach, he thought, stood in distinction from the earlier, and better, approach, namely to analyse the effect of change upon the treaty concerned, rather than the continuity or otherwise of the parties.[59] He comments that '[t]he law of State succession in the mid-twentieth century has reached a

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55 See *Yearbook ILC* (1974 – II), at 263-6.

56 E.g. Austria-Hungary in 1918, see K. Marek, *Identity and Continuity of States in Public International Law* (1954), at 205-210; Federation of Mali, see Cohen, 'Legal Problems Arising from the Dissolution of the Mali Federation', 36 *BYbIL* (1960) 375.

57 E.g. Yugoslavia 1918, see, Marek, *supra* note 56, at 237-262. UAR (1958), Cotran, 'Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States', 8 *ICLQ* (1959) 346.

58 Kunz, 'Identity of States under International Law', 49 *AJIL* (1955) 68.

59 O'Connell, *supra* note 39, at 734.

position of crisis, because evident moral and sociological pressures emphasise the need for continuity and the avoidance of disruption, while theory remains enmeshed in the nineteenth-century conception of sovereign will'.[60] The point was that, although 'a conceptual distinction must be made between succession of States and continuity of States', the problems of succession differ from those of continuity 'only to the extent that the legal régime governing the consequences of a change of sovereignty differs from that governing the consequences of a change of government'.[61] He took the view that since the boundary between change of sovereignty and change of government 'wears thin to the point of disappearance',[62] the question may be asked whether 'there is any utility in maintaining a rigid distinction between the legal consequences of the one and the other situation'.[63] He therefore advocated, and indeed foresaw, a return to (what he considered to be) the eighteenth-century position in which all changes to the condition of the state would fall somewhere along a continuum in terms of their effect on a state's international rights and obligations. The presumption, however, would be one of continuity of rights and obligations which 'only concrete analysis may rebut':

> If there is any rubric, therefore, to which one could resort as a touchstone for the solution of all problems of political change over territory it might be this: that the consequences of such change should be measured according to the degree of political, economic and social disruption which occurs.[64]

The point being made was that merely because a case may be classified as one of dismemberment rather than of secession, this should have little relevance for the law of succession. In each case, certain changes in the rights and duties of the states concerned may be necessitated, but only in virtue of the extent of change and its effect upon the instruments concerned and not by reason of whether or not the state is deemed to continue. O'Connell's approach in this regard is undoubtedly radical, and for that reason his tentative phraseology is entirely apposite. His suggestion is tantamount to a disposal of all questions of 'succession' understood as an 'inheritance' or 'assumption' of rights and obligations by reference, not to the normal bivalent division between succession and non-succession but to the integrity of the legal relations themselves. In the context of treaties, then, the matter of succession could be disposed

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60 O'Connell, *supra* note 3, vol. I, at 34.

61 *Ibid*, at 5. He argues that: 'With the abstraction of the concept of sovereignty, however, a conceptual chasm was opened between change of sovereignty and change of government; in the one instance a problem of substitution in the possession of rights and obligations was raised; in the other, continuity of these rights and obligations was presumed in virtue of continuity in the personality of the possessor.' *Ibid*, at 5-6.

62 O'Connell argues that: 'The concept of "personality" with its Hegelian overtones, seems to have misled the theorists. Modern jurisprudence has assisted us in recognizing that the word "personality" does not stand for something, is not descriptive of anything, and cannot be substituted for by a synonym; it is not, in fact, a reflection of some prototype sitting on a cloud somewhere, but merely a shorthand expression indicating the faculties of legal action.' See O'Connell, 'Independence and Problems of State Succession', in W. O'Brien, (ed.), *The New Nations in International Law and Diplomacy* (1965) 7, at 11.

63 D. O'Connell, *The Law of State Succession* (1956), at 6.

64 O'Connell, *supra* note 3, vol. I, at v-vi.

of within the general category of *rebus sic stantibus*, as a technique to cope with situations of 'fundamentally changed circumstances'.[65]

Whilst O'Connell was entirely right in his assessment of the abstracted artificiality of the notion of 'sovereignty' or 'the state' in international law and, as we shall see, was also right in thinking that 'personality' as currently understood is problematic as a determining criterion for succession, it is doubted whether his advocated return to the practice of the eighteenth century is either possible or desirable.[66] As an initial point, it is clear that O'Connell did not found his argument exclusively, or even mainly, upon state practice. He was very much aware that practice by its nature is open to a wide variety of constructions. For O'Connell, the point was that such practice should be rendered coherent by means of the force of 'reason' or 'juristic logic'. 'A rational approach', he thought, 'will thrust the emphasis on positive manifestation of the need for order and stability to be discovered in regular solutions devised by states in their day-to-day practice'.[67] Such an avowed resort to rationalism clearly exposes the precarious nature of his thesis: only if one treasures legal continuity at the expense of allowing new states to determine their own legal future may one follow O'Connell on this point. In its barest form, it is far from being a compelling or overwhelming argument.

Leaving aside the unstable grounding of his thesis, there are a number of other more practical reasons why O'Connell's approach is to be questioned. First, even if his argument were to be given due deference, there would still remain questions that could not be resolved. For example, the issue of personality which underlies the differentiation between secession and dismemberment (and between absorption and union) would remain ultimately crucial as regards membership in international organizations,[68] and possibly also as regards the continuance of political treaties[69] and the attribution of delictual responsibility.[70]

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65 This proposition was first developed by H. Wheaton, *Elements of International Law* (8th ed., 1866), at 275. O'Connell expresses it thus: 'The real question is the extent to which a treaty loses its effectiveness in the changed situation. If it be presumed that treaties in principle survive the change of government, a wider spectrum of treaties is likely to be excluded from lapse on frustration than if the contrary be presumed; and the presumption might very well vary according to whether the case is characterised as one of annexation, cession, federation, secession or independence. When the contracting State totally disappears as an administrative entity, it is likely that a wide range of treaties would cease to be performable in the changed circumstances, and the presumption might be against treaty survival. But when the change of sovereignty modifies the circumstances of performance only slightly, if at all, the presumption will be reversed.' O'Connell, *supra* note 3, vol. I, at 3.

66 Crawford points out that although O'Connell objected to the traditional classification, he nevertheless retained that structure in his own work, See Crawford, 'The Contribution of Professor D.P O'Connell to the Discipline of International Law', 51 *BYbIL* (1980) 2.

67 *Ibid*.

68 The case of Germany has been presented as one of absorption, which itself gives rise to few problems regarding UN membership. Oeter, *supra* note 10, at 368. Cf. Article 11 of the Unification Treaty.

69 Political treaties were traditionally thought to be 'personal' rather than 'dispositive'. They were, in other words, dependent upon the continued existence of the parties concerned. See, O'Connell, *supra* note 63, at 15.

70 Article 39 of the 1978 Convention provides that '[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to the effects of a succession of States in respect of a treaty from the international responsibility of a State...'.

O'Connell avoids the first issue by arguing that membership in international organizations is a distinct, and particular, issue. To his mind, membership in these organizations is not strictly a matter of general international law – it is subject to the internal rules of the particular organization and therefore conditional upon the acceptance of certain constitutional obligations. Even if this argument is accepted, distinguishing between forms of state practice in this way tends to be rather too easy. Leaving aside the willingness of a state to comply with the rules of the organization concerned, it cannot necessarily be assumed that decision-making within organizations is made by reference to a discrete set of concepts and principles that are not applicable outside that context.[71] It is widely acknowledged, for example, that the acquisition of UN membership itself may be a central means by which the general personality of a state is established.[72] Hence, it was not without some significance that Russia took over the mantle of the USSR as regards its seat in the UN and, in particular, its membership within the UN Security Council.

Secondly, so-called 'political treaties' which regulate the political and economic status of the state[73] have long been regarded as terminating in case of change of sovereignty. It is reasoned that alliances, treaties of friendship, treaties forming a political union, and treaties establishing a system of economic integration are indissolubly linked to the political structure of the state concerned and must therefore be seen to terminate on the extinction of that state. Reliance upon the notion of *rebus sic stantibus* in this context is problematic, particularly insofar as the ICJ has stressed that resort to that principle must be limited to circumstances which 'resulted in a radical transformation of the extent of the obligations still to be performed' and that the 'change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken'.[74] A case in which one sovereign has absorbed another (or entered into a union with another) will not necessarily 'increase the burden of the obligations' in the case of a treaty of friendship. Termination in such circumstances must in reality turn upon a change in the identity of the state concerned. It might well be argued that the notion of *rebus sic stantibus* needs to be expanded to account for such alterations in the form of states, but to do so without using 'identity' or 'continuity' as a reference point would place great pressure upon what is intended to be a limited principle.

Thirdly, in discarding the notion of personality as a determinant of rules of 'succession', O'Connell is forced to base his assertion of legal continuity on something other than state sovereignty. In practice, he subordinates entirely the question of consent, placing emphasis instead upon the sovereignty of the international legal order. He asserts in that vein that '[s]overeignty connotes nothing more than the supreme legal competence within a defined region' and that such a competence 'is relative only'.[75] As the extent and nature of sovereignty

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71 Cf. Article 4 of the 1978 Convention which provides that '[t]he present Convention applies to the effects of a succession of States in respect of (a) any treaty which is the constituent instrument of an international organization without prejudice to any other relevant rules of the organization...'.

72 In the case of Macedonia, for example, the UK saw its endorsement of FYROM's membership as being an act of recognition. Statement of Douglas Hogg, House of Commons, *Deb.*, vol. 223, WA, col. 241, 22 April 1993. See generally, Craven, 'What's in a Name: The Former Yugoslav Republic of Macedonia and Issues of Statehood', *Aust.Yearbook Int'l. L.* (1995).

73 See Jennings and Watts, *supra* note 42, at 212.

74 *Fisheries Jurisdiction Case*, ICJ Reports (1973) 3, at 21.

75 O'Connell, *supra* note 3, vol. I, at 26.

is apparently determined systemically by the international legal order, it may be concluded that 'the imposition upon the successor State by international law of duties with respect to such territory is not incompatible with the extension of its sovereign jurisdiction'.[76] While it is clear that approaching the question of succession from the point of view of 'consent' (or what O'Connell would refer to as 'will') raises more questions than it resolves, it is doubtful whether discarding it entirely as a matter of concern purely for reasons of theoretical convenience is necessarily appropriate. One might question, for example, why consent should continue to be a central consideration in treaty-making or in the creation of customary international law if it is so easily discarded in times of change. Whatever general rules of succession develop, the continued emphasis upon some form of consent as the basis of obligation in international law means that it is difficult to dispose of the argument that a new state should not be subject to customary, let alone conventional, obligations to which it has not voluntarily agreed. This is particularly the case with respect to states that have emerged from colonialism or some other condition of dependency. By contrast, in a case of continuity, there is always at least *prima facie* continuity of rights and duties, subject only to changes that are necessitated by the transfer of territory or by the principle of *rebus sic stantibus*.[77]

That the law of state succession does not appear capable of setting aside, or discarding, all questions of personality is particularly evident from an analysis of the ILC's work in that regard. The ILC, apparently taking its cue from O'Connell (not without some irony it might be noted[78]) and wishing to avoid the enunciation of a 'theory' of state succession,[79] sought to assimilate several of the traditional categories of practice (that were otherwise distinguishable by reference to the issue of personality). Thus, in the 1978 Convention, it avoided making a distinction between a case of absorption and one of union (Articles 31-33) and, similarly, between a case of separation and one of dismemberment (Articles 34-35). In so doing, it was

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76 *Ibid*.

77 In this context, it is necessary to address O'Connell's characterization of succession as a matter of succession to a factual situation. If this view were to be taken, it would have to be admitted that the question of personality has little consequence for the attribution of rights and duties; the difference between a case of secession and one of dismemberment would not be determined by the continuity or otherwise of the state, but by the extent of change. Certainly, O'Connell's approach on this question avoids the problems associated with relying upon legal fictions, such as the idea that rights and duties can be transferred to an entity that has yet to acquire personality, or the idea that successor states are in some respect 'parties' to treaties which they have neither signed nor ratified. But he cannot fully explain why the simple fact of transference of territory from the authority of one sovereign state to another should have any necessary legal consequences except by reference to existing principles of international law. Facts, in themselves, do not create law and it is only by invocation of a relevant prescription that certain legal consequences are attributed to material events. In essence, his approach represents an extension of the 'state as fact' theory and suffers from the attendant problems of explaining the necessary transformation of fact into law.

78 O'Connell was fiercely critical of the ILC's work; see O'Connell, 'Reflections', *supra* note 39.

79 See, e.g., First Report of Sir Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/202, *YBILC*, 1968, vol. II, 87, at 89, para. 10, where it was commented that if a theory of state succession were adopted 'it would almost certainly be found to be a strait-jacket into which the actual practice of States ... could not be forced without inadmissible distortions either of the practice or the theory'.

forced to ignore relevant state practice[80] and produced several rules that were barely justifiable. First, as the experience of German unification shows, the Article 31 rule – namely that treaties of the predecessor state should be maintained but only in relation to its former territory – appears to deny the realities of absorption, where the objective is arguably to create and maintain a single constitutional and administrative structure.[81] Secondly, the Article 34 rule, by which the treaties applicable to the entire territory of the predecessor state continue in force in respect of each and every successor state, appears hard to justify when no rule of succession applies in cases of cession of territory.[82] It is clear in this case that the point of distinction is primarily one of personality; in the case of secession a new entity comes into being, but not so in the case of cession. But if personality is the relevant distinguishing point here, one might ask why it is not relevant otherwise.

5 Reinvention of the Subject: Personality and the Identity of States

Even if the elimination of 'personality' or 'identity' from the law of state succession cannot be supported, there does remain, nevertheless, a need to re-evaluate such concepts in light of their apparent indeterminacy. Indeed, it is considered that at this point legal doctrine has been fundamentally misleading. The initial assumption of most writers has been that the matter of identity is primarily one analogous to that of statehood or personality. As Kunz remarked, '[t]he problem of identity of states is not the antithesis of the problem of state succession but of the problem of the extinction of States'.[83] The result is that it is common to find pronouncements to the effect that international law has no real understanding of when a state ceases to exist.[84] The point being made is not so much that the existence of the state is merely a presupposition of the law, an argument associated with early voluntarists,[85] but rather that the conditions for the extinction of the state are particular, and more complex.

When examined closely, however, this argument becomes difficult to comprehend. Assuming that international law does possess certain criteria that condition the 'existence' of the state, or at least its participation in the legal community, then logically those criteria should also apply as regards its 'legal demise'. Thus, the general criteria for statehood (which for purposes of argument are taken to be government, territory, population and independence[86])

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80 E.g., in relation to Article 31, it ignored the fact that on the admission of Texas to the USA in 1845, the 'moving treaty frontiers' rule was applied (Texas' treaties lapsing with its absorption). It also drew exclusively upon the cases of the UAR and Tanzania, which, it admitted were peculiar, *Commentary*, 1974, at 258, para. 24.

81 See Oeter, *supra* note 10, at 355.

82 *Commentary*, Article 14, at 208, para. 2. It is notable that the ICJ could have relied upon Article 34 to decisive effect in both the *Genocide Convention case* (*supra* note 13) and in the *Gabcikovo-Nagymaros Project case* (*supra* note 21), but deliberately chose to rely upon other arguments (in the latter case, Article 12 of the 1978 Convention).

83 J. Kunz, *The Changing Law of Nations* (1964), at 288. Kunz is right that the problem of identity is not the antithesis of the problem of succession. However, even in cases of continuity, issues of succession might arise.

84 Marek, *supra* note 56, at 7.

85 See, e.g., Cavaglieri, *supra* note 36, at 340.

86 See J. Crawford, *The Creation of States in International Law* (1979) . The Montevideo Convention defines (in Article 1) the qualifications for statehood as being the possession of '(a) a permanent population; (b) a

should presumably govern not merely the legal 'creation' of states, but also their 'extinction'. So, where the territory of a state becomes submerged by the sea, or where the population of a state evacuates en masse to other territories, or where it falls into a state of extended anarchy, it should be possible to conclude that the state has ceased to exist.[87]

What has to be understood, however, is that the traditional criteria for statehood are both abstract and exclusionary. They are abstract in the sense that they do not require the possession of a particular territorial locus, the maintenance of a particular composition of population or, indeed, a particular form of government. Thus, it is commonly accepted that the continuity of the state is not affected by changes in government (even revolutionary changes)[88] nor by the cession of territory.[89] The requirements of statehood are also exclusionary in the sense that they operate as threshold evaluations primarily intended to exclude from international discourse those entities that are not, for example, fully independent. That they are not operated so clearly in the context of putative extinction is primarily a result of the fact that states are not in the habit of withdrawing recognition from entities once established.[90] This, in turn, is primarily due to the fact that states are not willing to jeopardize legal relations with an entity where there is clearly no successor state. Thus, it is not surprising that states did not withdraw recognition from the state of Somalia during the period of disrule, nor from Albania despite the apparent total absence of government. The fact that there may be a presumption of continuity in such circumstances, however, does not detract from the point that the essential conditions for extinction are logically the same as those for the recognition of new states.

Perhaps this point may be best illustrated with respect to the dismemberment of Yugoslavia. In that case, the disengagement from the federation of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia, left in place the remaining republics of Serbia and Montenegro.[91] The approach of the Badinter Commission,[92] and also apparently the UN,[93] was to argue that the SFRY had ceased to exist as a state in virtue of the fact of dismemberment. But to accept that would be to say that Yugoslavia had ceased to exist as a state, despite the fact that it continued to possess, in the form of the FRY, all the material requirements for existence. The truth is that at no stage did the FRY lose, in its entirety, independence, territory, population or government: it continued to possess all these attributes, albeit in a reduced form. It is also interesting to note, in that regard, that no states actually withdrew recognition from Yugoslavia, or subsequently the FRY, at any stage.

What this suggests is that a distinction needs to be drawn between transformations that result in the extinction of the state, strictly understood, and those that result merely in a change

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defined territory; (c) government; and (d) capacity to enter into relations with other States'. 165 *LNTS* 19.

87 Independence is more difficult insofar as it is a relational concept. Loss of independence assumes a certain identity of the subject, which cannot easily be presumed in the case of corporate entities.

88 Protocol of London, 19 February 1831, G. Fr. Martens, *Nouveau recueil de traites et autres actes relatifs aux rapports de droit*, vol. 10, at 197.

89 See, e.g., Hall, *supra* note 52, at 22.

90 See H. Lauterpacht, *Recognition in International Law* (1947), at 349-52.

91 See generally, Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86 *AJIL* (1992) 569.

92 See Opinion No. 1, 31 *ILM* (1992) 1494, at 1495. See generally Craven, 'The European Community Arbitration Commission on Yugoslavia' 66 *BYbIL* (1995) 333, at 357-375.

93 See Blum, *supra* note 23.

in identity. In the case of Yugoslavia, what is at issue is not so much whether the FRY is a state, but whether it is the same as, or different from, the SFRY. The point of difference may be described as follows: whereas the concepts of statehood and personality proceed on the understanding that states have certain attributes or qualities in common and that they are thereby attributed with, or inherently enjoy, certain competencies under international law, the concept of identity, by contrast, is predicated upon a notion of difference. 'Identity' assumes that individual states, whilst being members of a particular class of social or legal entities, also possess certain distinguishing features that differentiate one from another. Identity, therefore, presumes personality but is concerned with what is personal or exceptional in the nature of the subject. This can never be provided by reference to the traditional requirements of statehood.

Once the issue of 'personality' (*qua* competence) is placed to one side it becomes clear that in many cases the issue is not simply one of determining the existence of the state, but rather the degree of identity and extent of continuity. What this means is that emphasis should not be so much upon the existence of 'external' rules of succession that allow for the 'transference' of rights and duties from one subject to another, but rather upon determining the extent to which legal continuity should follow from elements of material (social, cultural or political) identity. Whilst it is beyond the scope of this paper to analyse the consequences of this insight in depth, it may be noted that there are two general consequences of such an approach. First, if the distinguishing feature in many cases of succession is recognized as being one of 'identity', it avoids, or at least minimizes, the methodological problems raised by the apparent lack of 'consent' on the part of successor states as well as by the idea that agreements are essentially *res inter alios acta.* In such cases, the 'successor state' (for want of a better description) may be assimilated in some degree to the 'identity' of the predecessor and cannot thereby claim the entitlement to be entirely free from obligations undertaken by the latter. Rights and obligations that in some sense define the identity of the subject of succession, should presumptively remain untouched by events. This may result in supplementing the traditional category of 'dispositive' treaties which continue in all circumstances with a category of humanitarian treaties that attach to the 'person' of the subject. It may also justify invoking the principle of self-determination as a reason for denying the imposition of obligations that were previously assumed by non-democratic (or previously colonial) regimes.

Secondly, recognizing that identity is the central issue in the law of succession means that a far more gradated approach needs to be taken whilst dealing with questions of succession. No longer is it simply a case of determining the applicability of different rules according to a simple bifurcation between continuity and discontinuity, but rather of justifying changes to legal relations by reference to degrees of changes in the identity of the subject. There is a return, here, in spirit (but not necessarily in form) to the nineteenth-century German Historical School, whose conception of customary law as the will of the people provided the extant justification for the consensual orientation of international law.[94] There is also, ironically enough, a return to the relativity of O'Connell's conception of succession, in which he recognized that problems would not be resolved by any simplistic mechanism that either discarded entirely the need for continuity or denied the need for legal change. The point of difference, however, arises in the justificatory discourse – it is not simply a question of introducing a presumption of succession or of emphasizing the integrity of legal relations, but of examining the extent to which a community ought to be burdened with historic obligations having reference to the nature of the obligation in question, and the circumstances in which it was assumed.

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94 See A. Carty, *The Decay of International Law?* (1986), at 25-42.

6 Conclusion

It has been one of the objectives of this paper to develop thinking as to the substance, methodology and structure of the law of state succession in such a way as to point to the need for some reorientation. It has been pointed out that the validity or influence of any rule, principle or doctrinal approach in relation to state succession will rarely be determined by reference to state practice alone. Even without adopting a stringently consensual approach to legal obligation, established practice will only provide a very marginal or insubstantial argument in favour of either legal continuity or discontinuity. Not only is practice sharply divergent, but there are the added problems of discerning intent and of binding what are understood to be third parties.

The greater influence in any approach to state succession, it has been argued, is the theoretical structure adopted. The problem with traditional approaches, as was clearly perceived by O'Connell, was the fact that a great deal was left to depend upon what was essentially a matter of political technique or argument. He therefore advocated, without too much conviction, that the issue of personality should be entirely discarded from the law of state succession. It has been argued that such an approach is not entirely without its problems, there being a number of instances in which the issue of personality apparently remains essential. What is suggested, however, is that the problem largely lies in the traditional assimilation of the distinct notions of personality and identity. Once identity is separated as a conceptually distinct issue, concerned as it is with the substance rather than the form of the state, much of the unnecessary rigidity in traditional doctrine may be avoided entirely. The task for the future, therefore, is to map out some of the characteristics and determinants of state identity in a way that takes into account not merely the formal properties of statehood, but also the sense of 'self', 'singularity', and 'community', that justifies the attachment of international legal obligations to particular territories and social groups. Without such a concept of identity, international law will remain unable to appreciate properly, apart from in a very abstract or formal way, the sense of legitimacy that underlies its claim to be the medium by which individual and cosmopolitan values and interests are pursued on the international plane.