
Room for ‘State continuity’ in international law? A constitutionalist perspective

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I am grateful to the editors for their idea and initiative to mark Professor Crawford’s contribution to the discipline of international law in a book written by his former doctoral students. Crawford’s analysis of the notions of State continuity and State succession was of particular importance for Estonia, Latvia and Lithuania when, following the demise of the USSR, they were formulating their claims to State continuity in view of the unlawful occupation of their territories by the Soviet Union since 1940. A book honouring James Crawford should carry an analysis of the notion of State continuity, which is therefore the purpose of this chapter.

Overview of reasons for scepticism over a distinction between State continuity and State succession

Professor Crawford has argued that international law:

embodies a fundamental distinction between State continuity and State succession: that is to say, between cases where the ‘same’ State can be said to continue to exist despite sometimes drastic changes in its government, its territory or its people and cases where one State has replaced another with respect to a certain territory and people. The law of State succession is predicated on this distinction.¹

Crawford recognises that the notion of ‘State continuity’ has been criticised by many scholars as a misleading and overly political concept. Ian Brownlie pointed out that ‘the assumption of a neat distinction between categories of “continuity” and “state succession” only make a difficult

¹ See James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford: Clarendon Press, 2006), 667–8.

subject more confused'.² Matthew Craven offers an insightful analysis of the critique of the distinction between continuity and succession, which had been already voiced by Professor O'Connell and later continued by Professor Schachter and others, observing and analysing the processes in Central and Eastern Europe at the beginning of the 1990s. This critique focused on the difficulty of placing legal personality in the centre of the distinction between continuity and succession.³ Craven sums it up:

If personality connoted nothing more than an undifferentiated 'legal capacity' it could not usefully be employed as a means of determining what rights and obligations a State might have as a consequence of a change in sovereignty, nor as a way of usefully separating the doctrine of succession from other forms of argument about legal change.⁴

I have argued elsewhere that a general category of 'legal personality' is not really helpful when dealing with specific questions that arise in relation to statehood and changes that might affect it. It is, in fact, not a function of 'legal personality'.⁵ Legal personality demonstrates the recognition of a particular legal system and means that, in principle, the entity concerned has rights and obligations. It certainly does not point to differences that might distinguish one legal person from another in the sense of being useful for the purposes of separating cases of State succession and State continuity. This is the reason why Crawford proposed to distinguish between a 'general' concept of legal personality and a 'specific' concept of legal personality,⁶ whereby the latter characterises a particular subject of law. Be that as it may, inquiry into the question of whether the State is the 'same' State does not raise the question whether it is the same legal personality, because irrespective of whether it is 'new' or 'old', the State as such has legal personality. Therefore the search into the 'new' or 'old' personality should be approached differently. According to Crawford this

² See Ian Brownlie, *Principles of Public International Law*, 6th edn (Oxford University Press, 2003), 80. See also Martti Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' in Pierre M. Eisemann and Martti Koskenniemi (eds.), *La Succession d'états: la codification à l'épreuve des faits/State Succession: Codification Tested against the Facts* (The Hague: Martinus Nijhoff, 2000); Konrad Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (The Hague: Kluwer Law International, 2001).

³ See Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Clarendon Press, 2007), 216 *et seq.*

⁴ *Ibid.*

⁵ See Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Leiden: Martinus Nijhoff, 2005), 97–8.

⁶ Crawford, *The Creation of States in International Law*, 30.

essentially depends upon the view one takes of the role that international law plays concerning the creation of States. Legal personality is neither a solution to nor a problem for the questions of creation and change.

For Crawford, 'the determination of identity and continuity [is] dependent on the basic criteria for statehood. A State may be said to continue as such so long as an identified polity exists with respect to a significant part of a given territory and people.'⁷ Thus Crawford clearly moved the debate from a legal personality paradigm, as understood by O'Connell, to an examination of the elements of statehood within the legal system. This fundamental shift entails ramifications and consequences which have not been fully explored. For example, the International Court of Justice in its Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* did not engage in a broader analysis of the issues relevant to the question whether or not an independent State had been created in compliance with the relevant international law criteria of statehood.⁸ For the purposes of this chapter, the practical follow-up to Crawford's theory of statehood will not be examined.⁹ The aim of this chapter is to develop further a few aspects relating to his theory. I will adapt the thesis that the creation of States is not merely a matter of fact situated outside the realm of international law.¹⁰ Like Crawford I take an opposite view. Where decisions on statehood are taken within the international legal system, it should be possible to determine the changes affecting States and raising questions as to their continuity by reference to, at least, some rules of international law.

To put it differently, one could say that there has always been a certain tension between what could be called private law and public law approaches to changes affecting States. According to the first approach, it is important that there is a legal entity upholding, inheriting or succeeding to the existing obligations, even if it is a different or new subject, since it is legal certainty that matters. According to the latter, the very

⁷ *Ibid.*, 671.

⁸ See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010). Also Anne Peters, 'Statehood after 1989: "Effectivités" between Legality and Virtuality' in James Crawford and Sarah Nouwen (eds.), *Select Proceedings of the European Society of International Law III* (Oxford: Hart, 2010), 182–3.

⁹ Crawford relies on such authorities as Verzijl, Marek, etc., *The Creation of States in International Law*, 255.

¹⁰ E.g. a classical Anglo-Saxon approach to the creation of States is summed up by Brierly: 'Whether or not a new state has actually begun to exist is a pure question of fact.' See Andrew Clapham, *Brierly's Law of Nations*, 7th edn (Oxford University Press, 2012), 149.

existence of the 'same' subject, referring inter alia to the self-identification of the historical community, is of primary importance and the continuity or discontinuity of rights and obligations normally follow therefrom. As Crawford said: 'The rights are better referred to the entity than the entity to the rights.'¹¹ Certainly, where no change has taken place no difficulties as to legal certainty should arise since it is presumed that the same State will continue the same international obligations or, at least, as in the case of the Baltic States, this will be a presumption on the basis of which to develop new legal obligations.¹²

For the purposes of this chapter, the relevance of what could be broadly defined as a private *versus* public law divide in conceptualising State continuity in international law will be explored. I argue that James Crawford's view in *The Creation of States* appears to take a constitutionalist reading of the subject of the creation and disappearance of States. I would add that a constitutionalist reading sits more comfortably with the fact that rules such as the prohibition of the use of force and the right to self-determination may have an important impact on claims of statehood or State continuity, or State succession, as seen, for example, during the decolonisation process.¹³

The dissolution of States in Central and Eastern Europe in the early 1990s, while in many ways different from the decolonisation process, reaffirmed the importance of the question of identity of a 'new State', and not only in the case of the Baltic States.¹⁴ With the benefit of hindsight, in view of the manner in which new democracies in Central and Eastern Europe have been able to deal with the challenges that they faced following the political change, a proposition emerges that relevant traditions and a clear identity of a particular polity are extremely important for a more successful functioning of that polity as a State. While the claim to identity in the 1990s of the Baltic States unlawfully occupied by the Soviet Union in 1940 was first and foremost a reaction based on a strong sense that the three States and the peoples concerned suffered from one of the most serious violations of international law, there was also another level of thinking which had to do with the need to go back to the origins

¹¹ Crawford, *The Creation of States in International Law*, 670.

¹² Ziemele, *State Continuity and Nationality*, 77–82.

¹³ See Peters, 'Statehood after 1989', 175. More precisely Crawford's thinking would fit within the constitutionalist pluralist approach; see J. L. Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective' in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 273.

¹⁴ For a different view, see Craven, *The Decolonization of International Law*, 264–6.

or the original identity of these States. This explains the return to the pre-occupation with Constitutions and institutional settings within the States.¹⁵ The steps undertaken to reunite with the historical origins of these States have proved to be the strength of the modern Baltic States as compared, perhaps, with the State-building processes in the neighbouring countries. Apart from the example of the Baltic States, all the cases of continuity or succession claims in Central and Eastern Europe are valuable examples for studying whether identity issues are important or not in the context of such claims. There is clearly a basis for suggesting that in situations which, like the decolonisation processes or the Baltic cases, derive from unlawfulness or injustice in international law, questions of identity are highly pertinent. It cannot be said that they lose their relevance in other more classical situations of State succession. In fact, the reunification of Germany and the creation of new States in the territory of the former Yugoslavia underline the importance of identity, which was both a motivating factor and the basis of often serious disputes.

Why is there a difference in the appreciation of the importance of the identity question in scholarly writings on State succession and State continuity? What is the possible ideological or theoretical divide?

Private law reading of State continuity

The wisdom and practicability of distinguishing between State continuity and State succession was strongly criticised in the 1960s by O'Connell who 'complained that legal doctrine on succession had been derailed by the predominance of Hegelian conceptions of the State, which, from the time of Bluntschli onwards, had placed the issue of identity at the forefront'.¹⁶ In O'Connell's view the question should be whether existing obligations survive the change, and he considered that the nature and degree of change should be examined with a view to preserving obligations. To put it differently, he was persuaded that a minimal disturbance of existing legal situations is in the greater interest of humanity and that such an approach is consistent with the very nature of law.¹⁷ Craven has summed up the essence of O'Connell's conviction as follows: 'Legal continuity thus preceded sovereignty, and sovereignty could only thus

¹⁵ See Ziemele, *State Continuity and Nationality*, ch. 3; see also Yaël Ronen, *Transition from Illegal Regimes under International Law* (Cambridge University Press, 2011), 170–1.

¹⁶ See Craven, *The Decolonization of International Law*, 75.

¹⁷ On this and further explanations, see *ibid.*, 85 *et seq.*

mean a competence or right of decision in relation to the array of legal relations that were already in place.¹⁸

One can indeed agree with O'Connell that succession does not take place in a legal vacuum and that a proper legal system certainly contains guidance as to the nature of change and the consequences. For the purposes of international law as a system, O'Connell's views have a considerable importance. It has to be noted, however, that O'Connell only refers to legal relations that are in place, and not the rules or criteria that may determine the subject of these relations. It has to be observed further that the criticism that O'Connell addresses to the central role given to liberty and sovereignty of States in international law follows the traditional critique mounted earlier in the British international law scholarship of Hersch Lauterpacht and James Brierly. Lauterpacht also argued in his *Private Law Sources and Analogies of International Law* that States should be kept to the same standards of behaviour as individuals, but that the Hegelian conception as concerns the status of a State as it had evolved in international law was the main barrier to such a development. Lauterpacht pointed out that:

it will serve no useful purpose to deny that the modern science of international law follows closely the Hegelian conception of State and sovereignty. Accordingly, it will not be found surprising that its expounders did not view with sympathy any larger reception of private law. For private law suggests subordination to an objective rule.¹⁹

Lauterpacht's main argument was that even where States have not consented to some international rules, international law should nevertheless be applied by international judges since there are no gaps in the legal system.²⁰ In other words, there was at the time a very strong view, especially among the British and American schools of international law, that the concept of State sovereignty, as it had emerged following Emer de Vattel's *Droit de gens*, was highly problematic for the purposes of the proper development of an international legal system with autonomous rules binding States irrespective of their consent.²¹ Scholars were

¹⁸ *Ibid.*, 86.

¹⁹ See Anthony Carty, 'Hersch Lauterpacht: A Powerful Eastern European Figure in International Law', *Baltic Yearbook of International Law*, 7 (2007), 93, 101.

²⁰ See Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge University Press, 2010), 56.

²¹ For an excellent overview of the slow but progressive development of international law as a legal system and its basic concepts, see Emmanuelle Jouannet, *Le Droit international liberal-providence: une histoire du droit international* (Bruxelles: Bruylant, 2011).

dealing with this challenge in different ways, one of which was that of Hersch Lauterpacht, bringing back to the discourse State practice and private law analogies to show the effect of rules limiting States. O'Connell's view on change of sovereignty and international obligations falls clearly within this broader disagreement on the nature of international law as an autonomous legal system. Ever since, scholars have been bound to examine the notions of continuity and succession and to provide their views on the possibility and practicability of a definition in this respect; the differences of view have persisted depending on what theoretical or philosophical outlook one took on international law at large.

The question nevertheless remains whether the critique directed towards the role attributed to a State and the principles of State sovereignty and consent in international law, as introduced above, is fully justified.

Constitutionalist reading of State continuity

There are scholars who take a different view and State practice shows that one cannot completely ignore the issue of identity, which remains important for the political realities of the communities concerned.²² It has been stated that:

State sovereignty is valuable in international law and international relations for (at least) three interrelated reasons. First, it is part of a just answer to the question of personhood in international law (because it offers a technique for the people of any territory to participate in international relations in a way that is regulated and facilitated by international law). Secondly, state sovereignty is valuable in so far as there is value in national self-determination (the capacity of a nation to make decisions – good or bad – (within limits) for itself). Thirdly, the very substantial independence involved in state sovereignty is valuable.²³

It was pointed out earlier in this chapter that, while having legal certainty in relations between the subjects of a legal system is an important value in itself, in a system where States as the main subjects of law are made up of individuals forming a community or a polity with a distinct sense of identity, sovereignty acquired through self-determination is also an important value. This is not limited to the decolonisation process. While the approach to State continuity and State succession as per a private law

²² See Carty, 'Hersch Lauterpacht', 77 (with reference to Koskenniemi's analysis).

²³ See Timothy Endicott, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 255.

or even natural law reading would not address the nature of change in sovereignty as part of the analysis, the constitutionalist reading, I submit, is capable of and indeed requires such an analysis since 'sovereignty protects moral values and has normative value itself'.²⁴

Anne Peters builds on Crawford's theory and underlines that '[f]rom a constitutionalist perspective . . . states – as international legal subjects – are constituted by international law'.²⁵ This is indeed the value of the proposition that international law contains certain criteria and rules that, if applied, are capable of leading to the determination of the existence of a State. In this regard, Peters observes that the fundamental requirement of effectiveness governing the definition of statehood for a long time has 'suffered some modifications'.²⁶ 'One discernible aspect of the constitutionalization of statehood is that the principle of effectiveness has been complemented and to some extent even substituted by the principle of international legality and legitimacy in international recognition practice.'²⁷ The dismemberment of the Socialist Federal Republic of Yugoslavia is likely to be the most striking example of modern State practice where Serbia was not given the 'legal and moral advantage' that would stem from the acceptance of its claim to State continuity in view of the particularly grave humanitarian situation that it created.²⁸

It is certainly true that the post-1945 period has seen the growing role of rules of international law, such as the prohibition of the use of force and the prohibition of apartheid, which have prevented *de facto* effectiveness from acquiring expected legitimacy and legal consequences in international law. We have also seen the effect of these rules as concerns claims to State continuity or succession in the above-mentioned case of the Baltic States. These are processes and developments which give reason to argue in favour of the constitutionalisation of international law and thus a constitutional reading of the concept of State and related issues such as effects of changes in sovereignty. James Crawford argued in favour of

²⁴ See Cohen, 'Sovereignty in the Context of Globalization', 279.

²⁵ See Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford University Press, 2009), 179.

²⁶ *Ibid.*, 180. ²⁷ *Ibid.*, 181.

²⁸ Crawford, *The Creation of States in International Law*, 714. See also Ineta Ziemele, 'Is the Distinction between State Continuity and State Succession Reality or Fiction? The Russian Federation, the Federal Republic of Yugoslavia and Germany', *Baltic Yearbook of International Law*, 1 (2001), 208.

'a certain peremptory authority' of modern international law²⁹ in matters eminently political such as the creation of States a couple of decades before the fall of the Berlin wall.

However, apart from the debate on the effect of international rules on decisions relevant to the creation of States and their disappearance, I would argue that a constitutionalist reading of international law suggests at least a slightly different analysis of the distinction between State succession and State continuity since, as explained, the constitutionalisation perspective helps 'the right questions of fairness, justice, and effectiveness to be asked'.³⁰ Evidently, if the primary concern is the continuity of international obligations as per the private law paradigm, introduced earlier, some of the questions of justice are not always particularly helpful. Indeed most of the debate about the distinction between State succession and State continuity has focused on difficulties that continuity claims raise in terms of their extremely diverse character which, for example, gave ground to significant concern in Europe in the 1990s.³¹ Craven correctly notes that for reasons of presumed difference from the decolonisation era and based on the understanding that international law itself does not require any dramatic change, the presumption of treaty continuity emerged as an appropriate policy response to the uncertainties of that time. He admits, however, that it would have been too radical to fully embrace O'Connell's position since differentiation between various categories 'of succession' could not be easily dismissed.³² His summary of the main view of the events in Eastern and Central Europe in the 1990s is perfectly correct and goes as follows:

So for those who were busy advocating the necessity of legal continuity in the turbulent changes that had enveloped Europe, there was also a sense that O'Connell's prescription really demanded too much. Change was also required, but it came in the form not of a law of succession as such, but in an apparently prior deliberation as to status.³³

If it is accepted that international law constitutes States, it should also follow that it determines the character of changes affecting States, or at least

²⁹ E.g., Crawford's argument on the peremptory character of the prohibition of use of force and the effects of that in the Baltic cases, *The Creation of States in International Law*, 704.

³⁰ Peters, 'Conclusions' in 'Membership in the Global Constitutional Community', 344. For a particularly useful insight into the understanding of international law and processes within the constitutionalism discourse, see also Cohen, 'Sovereignty in the Context of Globalization', 278.

³¹ Craven, *The Decolonization of International Law*, 228–9.

³² *Ibid.*, 258. ³³ *Ibid.*

contains a number of elements for such purposes. If one agrees with this proposition in principle, one needs to determine its meaning and importance. I think it is relevant to make a point with regard to the decolonisation era and contemporary challenges posed by it to international law. It should be recalled that in the decolonisation period of the 1960s and 1970s, the manner in which succession issues were addressed represented an attempt to depart from international law's colonial past.³⁴ The vindication of the principle of 'clean slate' in the Vienna Conventions on State Succession,³⁵ even if recognising a number of limitations, was seen as a proper functioning of self-determination and the sovereign equality of States, as reflected in the UN Charter.³⁶ Admittedly, this approach was seen as rather troubling to those advocating a more autonomous character for international law.

It is therefore no surprise that the majority of commentators on the events in the 1990s were engaged in a search for arguments that would support the least possible disruption in legal relations. Matthew Craven notes in this regard that '[a]ll were agreed that the "new events" were profoundly different from the past, and the sense of contestation that had underpinned discussions during decolonisation was almost entirely absent'.³⁷ It may well be that there was less contestation, or that at least it was different in nature as compared to the decolonisation era. Nevertheless, and as noted above, the need for change was clearly present in the 1990s and was recognised even if it was approached with great caution. The reasons might be very different but among them there was thinking similar to that present during the decolonisation process among the powerful States for whom legal certainty clearly was more important. The need for change in the 1990s too was in line with the principle of sovereign equality, which in its internal perspective means that the domestic legal order is supreme and determines the compatibility of external decisions with this order. This takes place, however, within the context of a growing constitutional quality of the international legal order.³⁸ It is

³⁴ See Anthony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', *Third World Quarterly*, 27 (2006), 739.

³⁵ See Vienna Convention on Succession of States in Respect of Treaties (Vienna, adopted 23 August 1978, entered into force 6 November 1996), reproduced in *International Legal Materials*, 17 (1978), 1488; Vienna Convention on Succession of States in Respect of State Property Archives and Debts (Vienna, adopted 8 April 1983, not yet in force), *International Legal Materials*, 22 (1983), 306.

³⁶ See Craven, *The Decolonization of International Law*, 263. ³⁷ *Ibid.*, 264.

³⁸ See Cohen, 'Sovereignty in the Context of Globalization', 273–4.

therefore the case that the acceptance of the changes in statehood that do take place, and that may have consequences for the rights and obligations of the State concerned, does not automatically bring about a dramatic disruption in legal relations. The examination of, and decisions on, status belong to a constitutionalist perspective in international law, as does the process leading to a better identification of applicable rules to consequences of change. One does not conflict with the other. This brings me to some concluding remarks.

Conclusions

James Crawford offers three main reasons for the usefulness of the concept of continuity in international law. In short, they are as follows: first, continuity of a State presumes the continuity of its obligations certainly to a greater extent than in situations of State succession; secondly, there is usually a close relationship between the claim of continuity and the peoples' self-determination or self-awareness; and, thirdly, the issue of continuity or 'sameness' does not arise in general but only in relation to a specific legal question.³⁹

These reasons continue to be perfectly valid and are reinforced by the previous analysis. On a more general level, I agree with Jean L. Cohen that it is not a feasible Utopia to abandon sovereignty in favour of a cosmopolitan world view and that sovereignty has a special role in protecting domestic democratic processes with global implications.⁴⁰ Within the constitutionalist pluralist vision, decisions on status in situations raising questions as to State continuity or State succession are very important since they are linked to internal processes taking place within a particular community. This does not mean that rules should not be further developed and changed at an international level, imposing greater responsibility and accountability on States and other international actors.⁴¹ This is equally necessary in situations where such events arise that are likely to affect States and raise questions as to their identity and continuity. In other words, I would submit that if one takes a constitutionalist perspective on international law, including with respect to questions of State continuity and State succession, the confrontation between the views surveyed above is beside the point and in fact each view can have its valid

³⁹ Crawford, *The Creation of States in International Law*, 668.

⁴⁰ Cohen, 'Sovereignty in the Context of Globalization', 279.

⁴¹ *Ibid.*, 278.

place in the constitutionalist debate. The notion of State continuity has its legitimate place within the international legal order since it provides the means for accepting valid and lawful claims of the community concerned and responds to important self-determination and self-awareness processes.