

Acceptance of a Claim for State Continuity: A Question of International Law and its Consequences

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This article provides an overview of the conflicting theoretical premises that characterize the debate and legal developments in international law in the fields of State succession and State continuity. It is argued that both identity and legal certainty principles have a role to play in the modern understanding of State succession and State continuity. The article explains that the developments in international law and debate, especially those taking place within the so-called constitutionalist perspective on international law, provide for more support to the view taken by the Baltic states, when putting forward their claim to State continuity. The article argues that while international law does not determine the constitutional identity of a State, international law should be concerned with constitutional processes within the State since it is international law that attributes international consequences to these internal constitutional processes. The article sums up the most important legal issues regarding the claim to State continuity of Latvia.

Keywords: state, state continuity, state succession, decolonization, self-identification, self-determination, identity, constitutionalist pluralist vision.

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Introduction

International law has become a very dynamic legal system, which also means that there are many questions and differences of opinion. One area, which rather consistently remains controversial, is the law of State succession and the distinction between State succession and State continuity. There has been very little or no in-depth discussion, however, of these controversies in the Latvian legal discourse. Therefore, I will first of all sum up the main points of the discussion on State

succession (*valsts pēctecība*) and State continuity (*valsts nepātrauktība/turpināšanās*) and also introduce some new propositions for this discussion.¹

The Latvian legal discourse is characterized by the assumption that Latvia along with the other two Baltic states continue their international legal personality and that no particular difficulty arises in this respect. It is true, however, that so far the available studies in the Latvian language regarding the issue of State continuity have primarily approached it within the constitutional law or (legal) history discourse. There is no study available in Latvia concerning the possible complexities of the Latvian claim to State continuity under international law. Furthermore, a fairly rich discussion about the so-called Baltic case in the international law literature is available in English, French and German, but it is not widely known in Latvia.

The second aim of this article is to introduce the main elements prevailing in the international law discourse regarding the Latvian State continuity claim. The article will also address and provide a response to some of the challenges posed to the Latvian or Baltic claim to State continuity. At the outset, it should be pointed out that one of the most comprehensive studies summing up the main criticism of the underlying concepts of international law which are of particular relevance to the Baltic claim is the book “Decolonization of International Law” by Matthew Craven.² For the purposes of this article I shall use this study as a starting point.

State succession and State continuity: how relevant is the distinction

Craven begins his book by a comprehensive presentation, using a historical narrative related to the consolidation of the law of State succession and the difficulties that have accompanied that process. Since territory and sovereignty play a crucial role in any discussion of a State, he rightly observes that it has been difficult to arrive at an objective set of rules to explain or define the character of changes that affect States and give rise to claims of succession or continuity. Territory and sovereignty are the concepts that traditionally generate different views. They are essential for the existence of any State, but at the same time those States set the rules of international law, including those concerning any changes affecting them. State succession is placed in the middle of this complex and sensitive setup, and therefore it is not surprising that it remains one of the most controversial areas of international law. Craven notes that: “The three conceptions of territory .. – as property, as competence, and as an attribute of a political community – provide radically different answers to the question as to how one might approach the nature and character of State succession”.³ He is correct at a certain level. However, upon a deeper reflection, can one really distinguish between these three conceptions of territory? It is important to fully cognize the centrality of the territory in the discussion of State succession and State continuity.

At this stage, it is important to note that Craven offers a comprehensive overview over how claims linked to territory which sovereignty passed from one hand to another, were dealt with over a long period of time. One of his important conclusions is that “one may sense in early 20th century doctrine the pervasive

¹ See: *Ziemele, I.* Room for ‘State Continuity’ in International Law? In: *Chinkin, Ch., Beatens, F. (eds.)*. Sovereignty, Statehood and State Responsibility. Essays in Honour of James Crawford. Cambridge: Cambridge University Press, 2015, pp. 273–284.

² See: *Craven, M.* The Decolonization of International Law: State Succession and the Law of Treaties. Oxford: Clarendon Press, 2007.

³ *Ibid.*, p. 63.

influence of a late-imperial doctrine”.⁴ It is very clearly evidenced in the Robert E. Brown’s case, where an arbitral tribunal disallowed the claims presented by the United States on behalf of Robert E. Brown in respect of losses incurred as a consequence of the acts of South Africa. According to the tribunal, such responsibility did not pass to Britain following its annexation of the territory.⁵

Until the Charter of the United Nations was adopted and the decolonization process took place, the international law discourse and practice were influenced by the divide between the European and non-European worlds. Decisions regarding succession or continuity were overshadowed by the imperial doctrine. In this context, even if, as Craven rightly points out, one conception of a territory refers to it as an attribute of a political community, for as long as the conception of the world order was based on the notion of civilized States and the others, the full appreciation of this conception was limited. Furthermore, scholarly works of, for example, D. P. O’Connell and the others have also had a major influence on the State succession discourse in that they have attempted to promote legal certainty in times of all kinds of change. This approach tends to stay away from the third conception of a territory.

Craven notes that O’Connell has criticised “the predominance of Hegelian conceptions of the State, which, from the time of Bluntschli onwards, had placed the issue of identity at the forefront.”⁶ In O’Connell’s view, there should be a presumption of continuity of legal obligations, which should not be jeopardised by a prior view on personality or status of the territory concerned. Craven suggests that O’Connell was most likely influenced by the Soviet renunciation of the Tsarist debt following the Bolshevik revolution.⁷ That may well be so, nevertheless, as practice shows, other States, including the judicial practices, did not accept this position. The Tsarist debt to France was eventually settled in 1997.⁸

With the decolonization process and the drafting of the two Vienna Conventions on State Succession, the clash between the continuity of legal obligations approach, on the one hand, and the identity approach, on the other hand, came to the forefront.⁹ Craven argues that there was a fundamental difference of positions between O’Connell and Bedjaoui.¹⁰ In fact, O’Connell’s view echoed the approach that was adopted in the Brown case with the effect of a continuous distinction between European and non-European States. At the same time, in Craven’s view, the Bedjaoui approach was not without problems. This is how he puts it: “It is Bedjaoui, rather than O’Connell, who takes the job of universalizing international law seriously. Bedjaoui is the one who insists that international law is definitely set against colonial ambition or imperial control. It is he who seeks to legitimize decolonization as a process in and of itself, and quite independently of its consequences. Bedjaoui’s denunciation of O’Connell ultimately comes in a startlingly traditional form – questions concerning the status, rights, or obligations

⁴ See: *Craven, M. The Decolonization of International Law ...*, p. 51.

⁵ See the discussion in: *Craven, M. The Decolonization of International Law ...*, p. 47 *et seq.*

⁶ *Ibid.*, p. 75.

⁷ See discussion in: *Craven, M. The Decolonization of International Law ...*, pp. 76–77.

⁸ See: *Ziemele, I. State Continuity and Nationality: The Baltic States and Russia*. Leiden: Martinus Nijhoff, 2005, p. 88.

⁹ Vienna Convention on State Succession in Respect of Treaties, 23 August 1978; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 18 April 1983.

¹⁰ See discussion in: *Craven, M. The Decolonization of International Law ...*, p. 80 *et seq.*

of the newly emancipated populations are simply questions of sovereignty, or consent ...".¹¹

Craven's reading of Bedjaoui is eloquent. In practical terms, however, there was a clear confrontation between the interests of the colonizers and the colonized. Difficult questions regarding property and nationality of the colonizers had to be addressed, on the one hand, while on the other hand the colonized wanted to finally benefit from their internationally recognized right to self-determination. To put it differently, if the British did not want to assume responsibility for actions in tort following their annexation of South Africa, it is difficult to see why South Africa should assume responsibility for rights and obligations that were intimately related to the fact of annexation and the legal regime installed as a result of this annexation. It is hard to accept the argument regarding individual rights, which became a prominent part of the decolonization process, but was not put in practice at the time when colonization was spreading. What were the arguments to insist that it should become a part of decolonization? Craven accepts that the argument regarding individual rights became deeply ideological, although he also qualified Bedjaoui's position as authoritarian.¹²

I may not agree with this characterization of Bedjaoui's position, but I do agree with Craven, when he says that there were "deeper points of contestation" between these rival positions, which were "associated with differing conceptions of statehood, sovereignty, and territory [...]"¹³ As indeed I already pointed out, the conception of a territory as an attribute of political community was of a key importance in the exercise of the right to self-determination by colonized peoples. My reading of the Vienna Conventions on State Succession is that this conception of territory and the principle of free consent are accepted, while they equally do not depart from the interests of ensuring legal certainty and continuity of international engagements. In fact, the Conventions do not offer radically new solutions to the issues arising in the context of State succession, even if the preambles note the transformation of the international community. That observation has not been sufficient to allow for new solutions.

One can agree that neither O'Connell's nor Bedjaoui's approaches were new in international law. It is also clear that it was impossible to reconcile these approaches and therefore it is rather admirable that the two Vienna Conventions achieved a certain compromise, which served its purpose in the 1990s with the transformations in Central and Eastern Europe.

To sum up, the law of State succession embeds several controversies. These have to do with the way the State-centered international legal order emerged, the different understanding of a State and of sovereignty, as well as different visions for the future of the international legal order. This area of law is exposed to a lot of political pressure. However, I have argued elsewhere that, since the creation of the United Nations and a greater density of international rules pertaining to the protection of States and the maintenance of international peace and security, there are more objective factors for the identification of new States and the definition of the

¹¹ Craven, M. *The Decolonization of International Law ...*, p. 87.

¹² *Ibid.*, pp. 89–90.

¹³ *Ibid.*, p. 90.

changes affecting them. It is in this context that I have argued the relevance of the distinction between State succession and State continuity.¹⁴

Conceptualizing State continuity

Professor James Crawford has argued that international law embodies a fundamental distinction between State continuity and State succession: that is to say, between the 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 predicted on this distinction.¹⁵

I had proposed a working definition of State continuity:

State continuity describes the continuity or identity of States as legal persons in international law, subject to relevant claims and recognition of those claims determined, in principle, in accordance with the applicable international law rules or procedures when statehood is at issue.¹⁶

Despite the criticism of centrality of a legal person throughout the development of the law of State succession and the missed opportunity to bring in the individual rights approach in international law, I maintain that States as legal persons and an important form of organization of society have not lost in their importance at the domestic and international levels. The criticism is exaggerated or misplaced.

It is important, therefore, to decipher the meaning of the ‘same’ State for the purposes of a useful distinction between State continuity and State succession because, if the idea of the ‘same’ State is just a tool for political ends, then O’Connell’s criticism of the doctrine and the distinction is perfectly justified.

It is true that the notion of a legal person in international law cannot contain characteristics capable of showing a difference between States as such legal persons. It is not a function of legal personality.¹⁷ According to Crawford, the notion of the ‘same’ State refers back to the criteria of statehood assessed within the system of law.¹⁸ I have tried to explain this difference of the opinions concerning the importance of the distinction between State succession and State continuity, as well as the possibility to have a meaningful definition of State continuity by reference to the so-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 the existing obligations, even if it is a different or new subject, since it is legal certainty that matters and the notion of a legal person as such does not reflect any particular characteristics of that legal person. In other words, such an approach completely excludes the issues that are, for example, relevant in the right to self-determination discourse. According to the public law approach, in my view, the very existence of the ‘same’ subject, referring to, *inter alia*, the self-identification of the historical community is of a primary importance, and the continuity or discontinuity of rights and obligations normally follow therefrom.

¹⁴ See: Ziemele, I. State Continuity and Nationality ...; Ziemele, I. Extinction of States. In: Wolfrum, R. (ed.). The Max Planck Encyclopedia of Public International Law, Vol. IX. Oxford University Press, 2012, p. 558; Ziemele, I. Room for ‘State Continuity’ ..., pp. 280–283.

¹⁵ See: Crawford, J. The Creation of States in International Law, 2nd ed. Oxford: Clarendon Press, 2006, pp. 667–668.

¹⁶ Ziemele, I. State Continuity and Nationality ..., p. 118.

¹⁷ Ibid., p. 98.

¹⁸ Crawford, J. The Creation of States ..., p. 671.

As Crawford said, “The rights are better referred to the entity than the entity to the rights”.¹⁹ 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.²⁰

I submit that throughout the periods of dissolution of States and emergence of new States, the questions of self-identification have been very important, even if international law has chosen to disregard it and consider them as a matter of a primarily internal character. I already referred to O’Connell’s criticism of the “predominance of Hegelian conceptions of the State, which, [...] had placed the issue of identity at the forefront”.²¹ My view of international law is contrary. It had primarily stayed away from the issues of identity of States. They were made more relevant through the decolonization process, followed by the changes in Central and Eastern Europe, which yet again emphasized the importance of self-determination. Craven also arrives at a similar conclusion with respect to the questions regarding change and continuity in the context of Central and Eastern European events, when he observes the following:

“So for those who were busy advocating the necessity of legal continuity in the turbulent changes that had enveloped Europe, there was also 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...”.²²

State practice shows the importance of self-identification and self-awareness of the community for the purposes of avoiding weak or failed States. Any change affecting States, apart from outright aggression, has to do exactly with the challenges that communities face concerning their identity and values. The stronger the identity, the more stable is the State. Therefore, if international law plays its role as a tool for maintenance of international peace and order, it has to reconcile the principle of legal certainty, which any legal system has to uphold, with the principle of self-determination and self-awareness, since the States represent real human societies. There is no question that such reconciliation requires further development of the international legal system, for example, concerning its approach to domestic matters. In fact, through different actions, such as the developments in international criminal law, we see that the process is already taking place.

These developments in international law demonstrate the growing constitutional quality of the international legal order. I have also suggested that one should look at the issue of the distinction between State succession and State continuity through the so-called constitutionalist pluralist vision, which allows one to take into account the processes within a particular community.²³ If that is so, the distinction indeed is of a fundamental importance, as Crawford suggested several decades ago.

¹⁹ Crawford, J. *The Creation of States ...*, p. 670.

²⁰ Ziemele, I. *State Continuity and Nationality ...*, pp. 77–82; Ziemele, I. *Room for ‘State Continuity’ ...*, pp. 275–276.

²¹ See: Craven, M. *The Decolonization of International Law ...*, p. 75.

²² *Ibid.*, p. 258.

²³ Ziemele, I. *Room for ‘State Continuity’ ...*, p. 279 *et seq.*

Continuity of the Republic of Latvia in international law

I have carried out a comprehensive study of all the relevant questions surrounding the claim to State continuity of Latvia and the other two Baltic states from the perspective of international law and in relation to the issue of the international legal status of the Russian Federation. It is published in the book titled "State Continuity and Nationality: The Baltic States and Russia".²⁴ I will offer here a summary of the most important points for the purpose of a more complete legal analysis in the Latvian debate today:

- 1) The internal process of self-identification is a starting point. The identity of a State is normally a decision at a constitutional level, which then takes a form of a constitutional pronouncement. In Latvia, there were several key constitutional pronouncements of this kind. Among those, one should mention the 4 May 1990 Independence Declaration, the 21 August 1991 Constitutional Law on the Republic of Latvia as a State and the restoration of the 1922 *Satversme* in full force. They all confirmed that the majority of the Latvian population considers that, following the restoration of the independence of the Republic of Latvia, the same State that was created in 1918 has been preserved.
- 2) It is important that this constitutional position is coherent and that it is transmitted to the level of international law, where it is considered as a claim of the State regarding its status as the same State which, while affected by the unlawful use of force on the part of the Soviet Union, had not changed in essence.
- 3) Since international law to a large part is a process of claims and recognition, Latvia's claim for a certain legal status was subjected to this process. It should be recalled, that the claim and recognition process is also considered as a weakness of international law, because there is allegedly too much space for political abuse. That may very well be the case, but it is also true that the more the claim is based on existing rules of international law, the more likely it is that there will be less space for political maneuvers. The Latvian claim to State continuity was based on the rule that already in 1940 the use of force and the threat of using force were outlawed in international law. Therefore, the Latvian claim was more cogent, even though Latvia had not fully existed for 50 years. It is a very long time for any legal system to uphold the validity of what in some ways is a virtual proposition.
- 4) One should not think that Latvia's claim to State continuity was recognized without any doubt and hesitation. There were different nuances in State practice. It is also clear that the Russian Federation has never admitted to having violated international law and does not consider Latvia and the other Baltic states as continuing their legal personalities.
- 5) In a situation, where a few States dispute the continuity of Latvia, it is very important that in relevant matters Latvia remains consistent with its claim to continuity. These relevant matters relate to evidence of the identity of the State. There are two sides to the identity, i.e., constitutional and international identity of the State. The constitutional identity is characterized by citizenry and

²⁴ Ziemele, I. State Continuity and Nationality ...

constitutional values,²⁵ while the international identity is characterized by at least some part of the same territory, as well as the identity of international legal obligations.

- 6) Practice shows the multifaceted importance of Latvia's position as to its State continuity. Based on that, Latvia could claim back its property abroad, including the gold reserves in foreign banks. It avoided responsibility for Soviet acts and actions, and maintained the claim for compensation for losses suffered during the Soviet occupation.²⁶

Conclusions

When Latvia formulated its continuity claim, it was a part of the process of constitutional self-identification and self-awareness. The doctrine of State continuity is one of the foundational Latvian constitutional law doctrines, and the Constitutional Court of Latvia has interpreted Article 2 of the Satversme in accordance with this doctrine.²⁷ Furthermore, Latvia submitted its claim to State continuity under international law at an advantageous time, because of the density of relevant international regulation and owing to a better understanding of the importance of internal processes within the societies, which was influenced by the further development of the right to self-determination and human rights law. All in all, the Baltic claims have benefitted from the evolution of enhanced understanding of the substance and role of various international law concepts. If this were not the case, the claims to State continuity after fifty years of the unlawful Soviet presence in the territories of the Baltic states might have been subjected to a rather uncertain outcome despite the constitutional law positions in Latvia and the other Baltic states.

The example of the Baltic state continuity shows the importance of both international law and constitutional law in determining the status of the entity seeking to validate its statehood. It is important that the two legal systems exist in harmonious inter-action as concerns the notion of the State.

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²⁵ See: Konstitucionālo tiesību komisijas viedoklis "Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu", 17 September 2012 [Opinion of the Constitutional Law Commission On the Constitutional Foundations of the State of Latvia and Inviolable Core of the Constitution]. Available: http://www.president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf [last viewed 31.05.2016].

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