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MAKING SENSE OF TRANSCENDENTAL NONSENSE:

A FUNCTIONAL REFRAMING OF THE LAW OF STATE SUCCESSION

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Making sense of transcendental nonsense: a functional reframing of the law of state succession

James Gerard Devaney*

Introduction

The law is replete with 'transcendental' legal concepts.[1] These are concepts which cannot be assessed against any verifiable reality.[2] Of course, not all legal concepts are transcendental. Some, like pacta sunt servanda, bear a direct relation to the social facts that they are meant to regulate. The modalities of the law of treaties provide tangible criteria such as signature or notification of accession to which we can point and say 'this state has expressed its consent to be bound.'[3] The expression of consent to be bound can be defined in terms of experience, in the sense of practical contact with facts or events, and various empirical decisions flow from this experience. Such consequences include the fact that the state cannot easily free itself from the obligation it has taken upon itself, save for in certain, limited circumstances. [4]

Other concepts – 'transcendental legal concepts' – cannot be assessed against verifiable reality. This is problematic since any legal proposition which contains such concepts 'can not be confirmed or refuted by positive evidence or ethical argument.'[5] In this paper I argue that two transcendental concepts plague the law of state succession. These are the concepts of continuity/identity ('C/I') and automatic succession. I show that these concepts cannot be assessed against any verifiable reality, and in fact disguise that determinations are made on other grounds. As such, the law of state succession fails to perform its most basic function: to guide action. [6]

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[1] Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 6 Columbia Law Review 809. By 'transcendental' I mean something supernatural, namely something 'of or relating to an order of existence beyond the visible observable universe', see Merriam-Webster Dictionary, < https://www.merriam-webster.com/dictionary/supernatural > accessed 6 October 2022.

[2] See the discussion below in Section 2 for further elaboration on transcendental concepts.

[3] Arts 11, 12, 15, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1946 UNTS vol. 1155, p. 331 ('VCLT').

[4] See generally Part V VCLT ibid.

[5] Cohen (n 1) 814.

[6] For a defence of this aspect of the nature of law see Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law: Essays on Law and Morality* (OUP 1979) 217; Andrei Marmor and Alexander Sarch, 'The Nature of Law', Stanford Encyclopedia of Philosophy (2019).

In order to address this a functional reframing of the law is necessary. This involves the replacement of C/I and automatic succession with concepts which can be assessed against verifiable realities, namely recognition and consent. It is only once such functional reframing has taken place that we can have a meaningful debate about the role of international law in regulating the ever-changing configuration of the international community of states. Such debate is sorely needed given the current state of the law and the International Law Commission's (ILC) continued attempts at codification and progressive development.

1. Marshland, miry bog, and other metaphors: the law of state succession

South Sudan joined the international community of states just over a decade ago in 2011,[7] and issues relating to state succession are set to occupy politicians and international lawyers in the years to come. A further referendum on Scottish independence is touted for 2023;[8] a number of other entities vociferously pursuing claims of statehood such as Kosovo[9] and Nagorno-Karabakh;[10] and Russia's unlawful invasion of Ukraine has already meant that questions of state succession have arisen in recent investment arbitration awards.[11]

State succession, in all its forms,[12] potentially affects all rights and obligations of the states involved, be they successor, continuing or third states. And yet the international law designed to govern such situations is well-known to be far from a model of clarity. [13] Since Hersch Lauterpacht first included it on its long-term programme of work in 1948,[14] the ILC has attempted to codify and progressively develop significant parts of the law of state succession. Decades of work by various Special Rapporteurs have produced a number of multilateral conventions intended to bring clarity to this area of international law including the Vienna Convention on the Law of the Succession of States in respect of Treaties of 1978 (VCSST),[15] and the Vienna Convention on the Succession of States in respect of State Property,

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[7] BBC News, 'South Sudan referendum: 99% vote for independence' 30 January 2011 <https://www.bbc.co.uk/news/world-africa-12317927> accessed 15 January 2021; UNGA Res 65/308 (2011) GAOR 65th Session 308; UN News, 'UN Welcomes South Sudan as 193rd Member State' 14 July 2011 <https://news.un.org/en/story/2011/07/381552> accessed 15 January 2021.

[8] Scottish Government, 'Next steps in independence referendum set out', 28 June 2022, <https://www.gov.scot/news/next-steps-in-independence-referendum-set-out/ > accessed 15 September 2022.

[9] BBC News, 'Kosovo MPs proclaim independence' 17 February 2008, see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403.*

[10] New York Times, 'A Quick End to a Dangerous War' 20 November 2020 <https://www.nytimes.com/2020/11/20/opinion/armenia-azerbaijan-peace-deal.html?searchResultPosition=8> accessed 15 September 2022.

[11] 'In the Matter of an Arbitration before a Tribunal Constituted in Accordance with the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments Dated November 27, 1998, and the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, PCA Case No. 2015-21, PJSC CB Privatbank and Finance Company Finilon and The Russian Federation, Interim Award, 27 March 2017.

[12] Defined as 'the replacement of one State by another in the responsibility for the international relations of territory', see e.g. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, art 1 (1) (a).

[13] This is despite significant studies and attempts at codification by the International Law Association, and the ILC, Institut de droit international, *State Succession in Matters of Property and Debts*, Vancouver Session (2001); ILC, Committee on Aspects of the Law of State Succession, Final Report, Rio de Janeiro Conference (2008), at 27, 54 <www.ila-hq.org/en/committees/index.cfm/cid/11 >.

[14] See Bedjaoui, 'Final Report on Succession of States', (1968) 2 Yearbook of the International Law Commission (YBILC) 95; Arman Sarvarian, 'Codifying the Law of State Succession: A Futile Endeavour?' (2016) 27(3) European Journal of International Law, 789.

[15] VCSST, ibid, see the information at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en >.

Archives and Debts of 1983 (VCSSSPD). These conventions have, however, largely failed to attract the support of states. The VCSST to date only has 23 state parties,[16] while the VCSSPD so far has not attracted sufficient state parties to come into effect.[17] Seemingly undeterred by these damp squibs, the ILC added the topic of state succession to responsibility to its programme of work in 2017. However, this project appears to be in serious danger of running aground without a swift change of course with states expressing serious disquiet about the initial reports of Special Rapporteur Pavel Šturma. The uncertainty surrounding the future of this project has been compounded by Šturma's failure to secure re-election to the ILC in 2021.[18]

As such, the law of state succession largely continues to be governed by customary international law. And the fruits of the ILC's labour on another subject, namely its Articles on the Responsibility of States for Internationally Wrongful Acts, show us that it is not always necessary for its work to be adopted in treaty form for a codification effort to come to encapsulate the law.[19] But even here divergent state practice means that some of the law of state succession's central propositions are controversial. Practice demonstrates that states prefer 'nuanced and case-specific solutions'[20] to faithful adherence to the general rules on state succession set out in the Vienna Conventions.

It is not my aim in the present piece to regurgitate what commentators (myself included[21]) have already made plain regarding states' preferences for tailor-made agreements. Rather, I will take as my starting point the proposition that, while states emerging from periods of succession generally have sought to ensure continuity of rights and obligations, this has been achieved not through adherence to the general rules but more often through the negotiation of special agreements.[22] Readers will note at this stage that I refer from time to time to 'periods' of state succession. This is a conscious choice which reflects my

[16] See the information at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en; In addition, the VCSST does not apply retrospectively, only a limited number of its provisions are widely accepted by states in practice, and states are always free to deviate from the VCSST's regime by agreement – an option they have often taken up; James G. Devaney and Christian J. Tams, 'Succession in respect of cession, unification and separation of States' in Andreas Kulick and Michael Waibel (eds) *Commentary on General International Law in International Investment Law* (OUP forthcoming).
[17] In accordance with Art 50 that number would be 15; see Vienna Convention on the Succession of States in respect of State Property, Archives and Debts (adopted 8 April 1983); see the information at < https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-12&chapter=3&clang=_en>
[18] See generally: <https://legal.un.org/ilc/sessions/72/index.shtml#a6> accessed 16 September 2022.
[19] Fernando Lusa Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 International and Comparative Law Quarterly 535, 538.
[20] Devaney and Tams (n 16).
[21] See James G. Devaney, 'The Law of State Succession: Regulating the Aftermath' in Jure Vidmar et al (eds) *Research Handbook on Secession* (Elgar forthcoming).
[22] Devaney and Tams (n 16); noting that states have most often reached agreement on the continuing application of certain treaties to succession states, including bilateral investment treaties. See, for example, state practice relating to the breakdown of the former Czechoslovakia in this regard, cited in this piece.

conviction that conceiving of succession of a singular event is not broad enough to encapsulate the process we observe in practice through which a state's rights and obligations are gradually clarified over a period of time.

Taken together, then, the lack of widely-accepted conventional rules and paltry number of customary international norms mean that the law of state succession is often seen as one of the most vexing and ineffective areas of international law. The unsettled and often unhelpful state of the law and scholarship has been well-documented both in international scholarship,[23] judicial decisions,[24] and by the International Law Commission itself.[25] In the following section I set out to consider why the law is so unsettled and unhelpful and what (if anything) might be done about it. In doing so, I first argue that the root of much of the uncertainty surrounding the law of state succession is two central propositions, namely that:

a) a state's claim to be a continuator state with the same rights and duties as before depends on it possessing the same *identity* as the predecessor state; and
b) when no such claim is made, in the most common forms of succession (separation and dissolution), the successor state *automatically succeeds* to the rights and obligations of the predecessor.[26]

I argue that much of the uncertainty regarding these propositions can be attributed to the problematic formulation of the concepts at the heart of the relevant legal rules, namely 'continuity/identity' ('C/I') and 'automatic succession'. These are transcendental concepts which bear no relation to the social facts (by this I mean simply non-normative facts) and as such any legal proposition of which they form part

[23] See Andreas Zimmermann, *Staatennachfolge in Völkerrechtliche Verträge* (Springer 2000); Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (OUP 2009) 208; Christian J. Tams, 'State Succession to Investment Treaties: Mapping the Issues', (2016) 31(2) ICSID Review 413; James G. Devaney, 'What Happens Next? The Law of State Succession' in Jure Vidmar et al (eds) *Research Handbook on State Secession* (Elgar forthcoming 2022); Andreas Zimmermann and James G. Devaney, 'Succession to treaties and the inherent limits of international law' in Christian J. Tams et al (eds) Research Handbook on the Law of Treaties (Elgar 2014); Andreas Zimmermann and James G. Devaney, 'State Succession in Treaties', and 'State Succession in Matters Other Than Treaties' (2020) MPEPIL <https://opil.ouplaw.com/home/mpil>.
[24] See e.g. BVerfGE vol 96, 68, 79.
[25] Yearbook of the ILC (1974) vol II, Part I, para 51.
[26] A proposition reflected in arts 34 and 35 Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3 ('VCSST'); see the information at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en. It should be noted that the VCSST states that this rule does not apply if states agree otherwise or if such automatic succession would be contrary to the object and purpose of the treaty in question. This is nevertheless a significant and ambitious provision intended to represent one of the central propositions of the law of state succession.

is similarly detached from reality. This is why the law diverges from practice and why the law cannot fulfil its basic function of guiding action.

Consequently, I advocate a functional reframing of the law of state succession to shift our focus from identity and automatic succession to recognition and consent. These are concepts which I believe have a better chance of being assessed in terms of 'verifiable realities'. In doing so I believe we can start to demystify the law of state succession and make it more effective at guiding action, while simultaneously bringing to the fore the normative implications of regulating state succession in this way.

2. A tale of two troublesome concepts: continuity/identity and automatic succession

In 1935 Felix S. Cohen published 'Transcendental Nonsense and the Functional Approach' - an important critique of the use of legal concepts.[27] A significant number of legal concepts, he argued in this article, bear no relation to the social facts that law ostensibly seeks to regulate. All too often lawyers and judges instead concern themselves with abstract legal issues in much the same way that Scholastic scholars have been characterised as debating how many angels could dance on the head of a pin.[28] Perhaps an example from Cohen is useful at this stage. In the case of *Tauza v. Susquehanna Coal Company* the New York Court of Appeals was faced with the question of whether or not a corporation chartered in Pennsylvania could be sued in New York. Cohen points out that this question could be answered by considering certain facts (the difficulties that people would experience bringing a claim in a different state) or certain values (the propriety of placing financial burdens on corporations in certain situations). However, what the Court of Appeals did was neither engage with practical, political or ethical considerations. The Court considered the question of 'where a corporation is' purely by reference to the law, seemingly without any consideration of the economic, social and ethical issues.

In deciding that a corporation can be sued because it can be considered to be 'in' New York appears to justify the Court's decision. However, in fact, this is no justification at all since 'where a corporation is' is not something that can be confirmed or refuted by positive evidence or by ethical argument. A better, more honest, answer would be to say that 'a corporation can be sued in New York because the Court allows it to be sued.' This cannot be confused with a justification in itself, but rather requires a justification in non-legal terms, making clear the policy, economic and ethical considerations that actually lie behind the decision.

Cohen's plea was for the demystification of the law and for a reframing of legal concepts in such a way as to acknowledge the role of legal actors in engaging with and affecting real world issues.[29] I believe Cohen's realist critique has something to teach us about the operation of certain concepts within international law. I draw on this work in the following sections as I examine two central concepts, C/I and automatic succession, which, in my opinion, explain much of the uncertainty in the law of state succession.

[27] Cohen (n 1).
[28] ibid 811.
[29] Jeremy Waldron, '"Transcendental Nonsense and System in the Law' (2000) 100(1) Columbia Law Review 16.

One further word on the framework. I take international law to be a means to a social end rather than an end in itself, an interpretative concept[30] and 'semi-autonomous field constituted by internal and external factors that shape law's meaning, practice, and consequences.'[31] The framework adopted in the following pages also allows me to take the normative force of international law seriously,[32] so that I can ensure that the role of international legal rules and principles is not dismissed in favour of extra-legal factors such as power or state preferences alone.[33] In the following pages I am careful to engage with legal rules and principles, while at the same time emphasising the consequences of such legal norms measured against a pragmatist ethics.[34]

I believe that Cohen's framework, with its focus on empiricism and philosophical pragmatism, is particularly suitable for consideration of state succession as it is particularly sensitive to external factors such as policy, economics and other extra-legal factors.[35] The framework places context and real world consequences front and centre.[36] As such, in contrast to the legal doctrinal method where the law is primarily examined from the point of view of the law itself,[37] we can also openly take into account the context in which the law operates and the implications and consequences of the operation of particular legal rules.[38] And in contrast to other normative theories such as interpretivism which are interested in

[30] Ronald Dworkin, 'Hard Cases', (1975) 88 Harvard Law Review 88 1057; Ronald Dworkin, *Law's Empire* (1986) 45; Dworkin, *Justice for Hedgehogs* (2011); Neil MacCormick, *Rhetoric and the Rule of Law* (2005) 39; N. Stavropoulos, 'Legal Interpretivism', *Stanford Encyclopedia of Philosophy*, 8 February 2021, available at plato.stanford.edu/entries/law-interpretivist/; D. Priel, 'Making Sense of Nonsense Jurisprudence', SSRN, 10 November 2020, available at ssrn.com/abstract=3696933. For a critique of this view see e.g. for example, David Plunckett and Timothy Sundell, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes', (2013) 19 Legal Theory 242.

[31] Karl N. Llewellyn, 'The Bramble Bush: On Our Law and its Study' 63 (1930); Gregor Shaffer, 'Legal Realism and International Law' in Jeffrey L. Dunoff and Mark A Pollack (eds) *International Legal Theory: Foundations and Frontiers* (CUP 2022) xx; Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound* (1931) 44 Harvard Law Review 1222.

[32] Shaffer (n 31) 2-3; in accordance with international legal realism, '[i]nternational law forms part of a recursive process in which actors and institutions interact at different levels of social organization, propagating, resisting, and adapting norms over time, shaping their meaning and practice and giving rise to the settlement and unsettlement of the norms.' This approach 'enhances understanding about how international law obtains meaning, operates, and changes as a going institution in response to social context. It thus provides a better grounding for law's application in pragmatic decision-making and social action.'

[33] Shaffer, at 13; '[f]or legal realists, legal norms matter. Because they are constituted by reason as well as power, they can provide effective tools for resolving common challenges (climate change being the largest confronting the world today), and, in the process, also protect the interests of less powerful actors. There is much tragedy in international relations, but for legal realists, law also offers hope.'

[34] Shaffer (n 31) 5; John Dewey, 'Logical Method and Law', (1924) 17 Cornell Law Review 24.

[35] Shaffer (n 31) 2-3; Victoria Nourse and Gregory Shaffer, 'Empiricism, Experimentalism, and Conditional Theory' (2014) 67 Southern Methodist University Law Review 101.

[36] Shaffer (n 31) 3.

[37] Llewellyn (n 31); Oliver Wendell Holmes, 'The Path of The Law' (1897) 10 Harvard Law Review 457; Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) Cohen (n 1) 831.

[38] Karl N. Llewellyn, 'A Realistic Jurisprudence - The Next Step', (1930) 30 Columbia Law Review 431; In Llewellyn's words: 'law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purposes, and for its effect, and to be judged in the light of both and of their relation to each other." Karl Llewellyn, 'Some Realism About Realism' (n 26) 150.

coherence within that particular framework or approach,[39] Cohen's approach places strong emphasis on the importance of empirics and pragmatic decision-making. [40] A number of detailed studies of state practice on state succession in general as well as more specific studies looking, for instance, at state succession to responsibility, have been carried out, such as those of the Institut du Droit International.[41] But these have had a particular focus and more empirical work on the law of state succession in all its different forms would be beneficial. In short, the value for me in drawing on this scholarship is in how it allows us to think about the central concepts in the law of state succession. Drawing on this literature, we can acknowledge the important force that these concepts exert by dint of their legal nature, while at the same time bearing in mind that these 'concepts are important not for their representation of immemorial "truth," but rather for their use in social action.'[42]

[39] See the references in (n 26).
[40] Shaffer (n 31) 7.
[41] Marcelo G. Kohen and Patrick Dumberry, *The Institute of International Law's Resolution on State Responsibility,* (CUP 2019).
[42] Cohen (n 1) 835.

(a) Transcendental concept 1: State continuity/identity (C/I)

The first scenario on which I would like us to focus relates to those situations in which an entity makes a claim to continue as the same state as the pre-existing state. In accordance with the law of state succession such claims necessarily involve a claim to identity.[43] I argue that identity is a transcendental concept since it cannot be meaningfully assessed against any verifiable yardstick. Rather, state identity is an abstract concept, a creation of the law itself, and attempts to define it will necessarily be circular.

Successful examples of such claims include the Russian Federation's claim to be the continuator state of the Soviet Union[44] while unsuccessful attempts include Serbia and Montenegro's claim to be the continuator state of the Yugoslavia after its collapse.[45] Such scenarios bring to the fore a fundamental distinction which lies at the heart of international law regulating the change of states, namely that between instances of state succession and instances where states continue with their rights and obligations unaffected. Were Scotland to become independent following next year's planned independence referendum, and England, Wales and Northern Ireland to claim that they should continue as the predecessor state (the United Kingdom of Great Britain and Northern Ireland) on which basis would we assess this claim? The independence of Scotland would mean that the predecessor state would lose 32% of its land mass. And yet I would imagine that instinctively we as international lawyers do not feel that this would somehow threaten the continuation of the Rest of the UK ('rUK') as a state with the same international rights and obligations as before.

Changes in territory such as those precipitated by a boundary delimitation between two states,[46] or declining or changing population, are almost unanimously accepted as having no effect on statehood: it continues.[47] But other situations are considered to be substantively different, like the cession of

[43] See generally on statehood James Crawford, *The Creation of States in International Law* (OUP 2nd edn. 2006) 3 et seq.
[44] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) 2011, para 105.
[45] See *Bosnian Genocide,* Provisional Measures, ICJ Rep 1993, 15; Zimmermann, *Völkerrechtliche Verträge* (n 23) 334 et seq.
[46] Vahagn Avedian, 'State Identity, Continuity and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide' (2012) 23 EJIL, 797, 800; K.G. Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Kluwer 2001) 14; Maxym Alexandrov, 'The Concept of State Identity in International Relations: A Theoretical Analysis', (2003) 10 Journal of International Development and Cooperation' 33; Peter J. Burke and Jan E. Stets, 'The Development of Identity Theory' in Peter J. Burke and Jan E. Stets, *Identity Theory* (OUP 2009);
[47] Devaney and Zimmermann (n 23) 513; although the outer bounds of such changes may be somewhat difficult to state in the abstract and there are certainty questions regarding, for instance, the (partial) submergence of the territory of a state due to climate change, see: Melissa Stewart, 'Cascading Consequences of Sinking States' (2023) 59 Stanford Journal of International Law.

territory from one state to another,[48] or the voluntary incorporation of one state into another.[49] These count as state succession and have a material effect on relevant rights and obligation of that and other states. But why is that? Against which yardstick do we measure whether a claim to continuity made by a state is acceptable or not?

The law of state succession tells us that a state can continue with the same rights and obligations as before as the continuator state, despite even significant changes to its territory, population, government or international relations, as long as it maintains the same *identity* as the predecessor state.[50] Now, this raises the obvious question: what exactly is the identity of a state and how do we go about establishing it? [51] The truth is that, while the distinction between C/I and succession is one 'upon which the entire edifice of the law of state succession rests',[52] the law of state succession provides no workable definition of identity which allows us to assess any claim to continuity made by a state.[53] Over the years scholars have attempted to provide workable approaches for the task of distinguishing between cases of continuity and succession with varying degrees of success, a selection of which are considered in the following section.

Selected approaches to the concept of continuity/identity

First, when assessing claims to continuity some have proposed the development of a so-called 'material' approach to state identity whereby identity is assessed against material or real-world factors.[54] For instance, Fielder proposed adding a 'material concept' to the formal criteria of statehood (of territory and population) which would 'extend beyond a narrow, legalistic approach, in that political, historical and intellectual elements would be encompassed'.[55] Similarly, Craven has advocated examining the

[48] ibid 520.
[49] ibid 521.
[50] James Crawford, *The Creation of States in International Law* (OUP 2nd edn 2006) 667; Andreas Zimmermann, 'Continuity of States' (2006) MPEPIL <https://opil.ouplaw.com/home/mpil>; Anne Østrup, 'Conceptions of State Identity and Continuity in Contemporary International Legal Scholarship', European Society of International Law Conference Paper Series, Conference Paper No. 11/2015; W.E. Hall, *A treatise on international law* (1880) (Frowde) 16-18; Lassa Oppenheim, *International law: A treatise*, (1905) (Longmans, Green, & Co), 115-118; Ineta Ziemele, 'Room for "State Continuity" in international law? A Constitutionalist perspective' in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (CUP 2015) 273.
[51] Østrup (n 47) 4; Patrick Dumberry, 'Is Turkey the "Continuing" State of the Ottoman Empire Under International Law?' (2012) LIX Netherlands International Law Review 235;
[52] Ineta Ziemele, 'Is the Distinction between State Continuity and State Succession Reality or Fiction? The Russian Federation, the Federal Republic of Yugoslavia and Germany' (2001) 1 BYIL 191, 214.
[53] Østrup (n 47) 4.
[54] See, e.g. G. Cansacchi di Amelia, 'Identité et continuité des sujets internationaux', (1970) Recueil des Cours, 130, 2; Bühler, 2001, at 10
[55] W. Fiedler, *Das Kontinuitätsproblem im Völkerrecht* (Alber 1978) 139 [English translation by Bühler].

identity of a state before and after succession to assess the extent to which we are justified in saying that rights and obligations still exist, despite a formal change in status of the state;

> 'The task […] 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.'[56]

But identifying the substantive properties of statehood such as 'self', 'singularity', and 'community' is in fact both a fiendishly difficult endeavour, and one of dubious utility. [57] The main issue is, as Østrup asks: '[h]ow are the material elements identified, by whom and how are they 'quantified' and made operational?'[58] What makes a state a state? Its traditions, perhaps, but which traditions can and should be relevant? Is the convention of the Queen or King opening each new session of parliament somehow relevant to the identity of the United Kingdom as a state? What about the importance of bacalhau to Portuguese cuisine, or the practice of Queima das Fitas at the end of each new academic year? It strikes me that there are few distinguishing features of states that we would wish to make relevant for international law. States share languages, governmental systems, legal traditions, ethnicities, common histories – how are these to be sorted out and attributed to certain individual states in a way that is relevant for assessing their claims to continuity on the basis of identity? It seems to me that at best this is a completely subjective exercise and at worse could lead to all sorts of problematic ethno-national nonsense.

A second approach is the so-called 'procedural' approach taken by a number of prominent scholars.[59] This approach seeks to combine the 'objective' factors from the legal concept of statehood such as territory and population and combine them with additional 'subjective' factors, most notably recognition by other states.[60] Perhaps the most prominent proponent of this approach to identity was James Crawford, who argued that the criteria for statehood should constitute the basis for the concept of state identity.[61] His argument was that a state continues if a number of conditions are met. First, a

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[56] Matthew Craven, 'The problem of state succession and the identity of states under international law' (1998) 9 European Journal of International Law, 146-7.
[57] Krystina Marek, *Identity and Continuity of States in Public International Law,* (Droz 1954) 159. Or as Marek remarked at 588: while the 'identity of territory and population can vouchsafe the historical identity and continuity of a nation…', this in fact 'discloses nothing about the identity of and continuity of a State.'
[58] Østrup (n 47) 24.
[59] Fiedler (n 58) 807-808; W. Czaplinsky, 'La continuité, l'identité et la succession d'Etats – evaluation de cas récents', (1993) 26(2) Revue belge de droit international, 374; R. Müllerson, 'The continuity and succession of states, by reference to the former USSR and Yugoslavia' (1993) 42(3) International and Comparative Law Quarterly. 475-476; Craven (n 59) 151; 1996 ILA Report, at 657; 2002 ILA Report, at 2; 'Final Report on the Economic Aspects of State Succession,' International Law Association. (2006) Report of the Committee on Aspects of the Law of State Succession, Conference held at Toronto, at 11; Crawford (n 47) 667-668.
[60] See Bühler (n 43) 17-18; Müllerson (n 62) 477.
[61] Crawford (n 47) 670.

state continues as long as '[..] an identified polity exists with respect to a significant part of a given territory and people' – or in other words as long as the 'noyau irréductible de l'État' remains.'[62] Second, a claim is made to the historical continuity that the state embodies. And third, this claim is recognised or acquiesced to by other states.[63] Despite its attempt to include additional criteria such as recognition, the procedural approach has also been criticised, in particular for the fact that it conceptualises state identity as an abstract legal status,[64] and utilises the criteria for statehood to assess state continuity. By shifting our focus from C/I to statehood we may discover more tangible criteria against which to assess claims to statehood such as territory and population, but while '[t]he basic criteria for statehood help us determine whether a given entity is a state according to international law […] do they help us determine whether the state is the same at two different points in time?'[65] Furthermore, even with the addition of the subjective element of recognition, the procedural approach does not explain variations in state practice – in other words the procedural approach cannot satisfactorily explain why some claims to continuity have been successful and others have not.[66]

In response some commentators have advocated moving away from conceptualising C/I as an abstract legal concept. For example, Martti Koskenniemi proposes taking a relativist approach to the issue of C/I which focuses on specific normative relations.[67] Ultimately, Koskenniemi proposes the abandonment of the distinction between continuity and succession:

> [..] much depends on what kinds of obligations (how important? owed to whom?) one deals with and whether the justice of changed circumstances or the justice of stable expectations should be deferred to. As a result, an entity might be held the 'same' in some respects (for instance, in respect of the continued validity of state contracts and foreign debts) and 'different' in other respects (for instance, in regard to political or military alliances or membership in international organizations). In this way, statehood appears not as an abstract, uniform status, but as a generalization from conclusions regarding particular normative relationships.[68]

Koskenniemi's contention is that the 'objective' factors of statehood are at play when states consider whether or not to recognise a situation created through succession, but that they do not take the form of abstract criteria that can be applied in practice by international lawyers.[69] In accordance with this

[62] Crawford (n 47) 671, referring to Brigitte Stern 'Succession d'Ètats', (1996) Recueil des Cours, 262, 80
[63] Crawford (n 47) 668 - 669, 671.
[64] Ineta Ziemele, *State Continuity and Nationality, the Baltic States and Russia, Past, Present and Future as Defined by International Law* (Martinus Nijhoff 2015) 136; Bühler (n 43) 11; Crawford (n 47) 670; Koskenniemi (2000) 122.
[65] Craven (n 59) 158-159.
[66] Østrup (n 47).
[67] Eisemann and Koskenniemi, (*State Succession: Codification Tested against the Facts* (Martinus Nijhoff 2000); Martti Koskenniemi 'The Future of Statehood' (1991) 32(2) Harvard International Law Journal 397; Martti Koskenniemi, 'The Wonderful Artificiality of States' American Society for International (1994).
[68] Koskenniemi (1997) 580.
[69] Koskenniemi *Codification Tested against the Facts* (n 71) 158.

approach the concepts of C/I and statehood too become relational, whereby we would not be able to make general statements about whether, for example, an entity has maintained the same identity, but rather only something about 'particular normative relationships' between different entities.[70] And while some have voiced concern regarding the creation of 'split personality of states',[71] the idea of treating a state new for some purposes and the same as the predecessor state for others is far from a new one.[72]

While I believe that there may be much to like about this approach, with its abandonment of C/I as an abstract legal concept, the relativist approach raises certain questions of its own. For example, Dörr has rejected attempts to split the question of identity or continuity by providing different answers to the question of 'does this legal right or obligation continue to apply?' depending on the particular situation at hand. Why? Because while in practice it may be that states are willing to entertain a level of pragmatism or flexibility when it comes to the continued application (or otherwise) of certain rights and obligations, in terms of international legal doctrine the state is indivisible as an 'abstract topos of international law.'[73] In other words, the idea that, even after succession, a state might live on, only in its relationship to particularly legal norms relevant between particular states, like some sort of ghoul haunting the international legal order, simply does not match up with the state practice we observe. Similarly, Mälksoo has raised the difficulty of coming up with criteria which could facilitate the 'splitting' of legal relations in the way that those such as Koskenniemi propose.[74] How can we justify treating a state as a continuator state for the purposes of state contracts and foreign debts and not for the purposes of any other international legal norms? Who would decide which categories of norms would result in the norms continuing unaffected and which would not? And how could such categorisation be challenged or change over time? I believe these and other similar questions are ones that would come to any lawyer's mind when considering the practical implications of the relativist approach. We will return to this issue below at section 3(a) when we consider my proposed functional reframing of this concept.

To recapitulate, the law of state succession tells us that claims to continuity should be based on showing that the entity in question has the same identity as the predecessor state. But as we have seen in this section, different attempts to fill the concept of 'identity' with substance have proved unsatisfactory. And in practice it seems that, as Zimmermann has stated, 'what often matters most is not objective facts, such as the size of territory or population, but rather to what extent the claim to continuation of identity

[70] Østrup (n 47) 22; Koskenniemi (1997) 580.
[71] Bühler (n) 315.
[72] See Verzijl, '[...] it is quite possible juridically to consider a retransformed State "old" for certain purposes and "new" for others', J.H.W. Verzijl, *International Law in Historical Perspective,* Part II, (A.W. Sijthoff 1969) 96.
[73] Oliver Dörr, *Die Inkorporation als Tatbestand der Staaensukzession* (Duncker & Humbolt 1995) 135 [English translation by Bühler].
[74] Lauri Mälksoo, 'State Identity, Deconstruction and Functional Splitting: The Case of Illegal Annexations' (2002) 7 Austrian Review of International and European Law, 108.

was generally accepted by the international community as a whole, including international organizations.'[75] As such, it seems an unavoidable conclusion that recognition plays an important role in practice regarding claims to continuity.[76] In section 3(a) I will return to the concept of C/I to argue that it is irrelevant to how claims to continuity are dealt with by states and other relevant international legal subjects in practice and reformulate the concept in a functional manner.[77] But first I would like us to consider the second scenario in which we find the roots of much of the current uncertainty in the law of state succession.

[75] Zimmermann, '... Avoiding Principled Answers to Questions of Principle' (n 32) 57.
[76] although international courts and tribunals have to date avoided addressing claims to continuity which have not already been generally accepted, see *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012; *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) 2011, para 105; Patrick Dumberry, 'Is Turkey the "Continuing" State of the Ottoman Empire Under International Law?' (2012) LIX Netherlands International Law Review 235.
[77] Andreas Zimmermann, 'The International Court of Justice and State Succession to Treaties: Avoiding Principled Answers to Questions of Principle' in CJ Tams and J Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 57.

(b) Transcendental concept 2: automatic succession as dubious inheritance

The concept of automatic succession arises in a different scenario from that explored in the preceding section, i.e., when no claim to continuity is made by a state. This may be either because the state does not wish to be seen as the continuator state subject to the same rights and obligations, or because the state does not believe it has any chance of success in being recognised as such by other states. In this scenario the question of C/I does not come into play. Rather, the general regime of state succession is designed to apply, depending on the particular form of state succession that has taken place.[78]

I argue that 'automatic succession' is a transcendental concept. Succession is one borrowed from domestic private law which does not accord with how states have approached such issues in practice.[79] In cases of separation and dissolution states do not consider themselves to automatically succeed to their legal inheritance, but most often take active steps towards expressing their consent to be bound by international obligations or to claiming rights. In 1926 Hersch Lauterpacht wrote in *Private Law Analogies in International Law* that:

> The main question in State succession is: Is the international legal order strong enough to regulate facts arising out of a change of sovereignty, or does this change take place in a legal *vacuum*? Does the new sovereign acquire rights because it pleases him to take them, or because international law confers upon him the title? Is he bound by the obligations of the former sovereign because he finds it convenient to be so, or because international law imposes upon him that duty?[80]

I do not believe that many today would argue that state succession happens in a legal vacuum. The international legal order today is undoubtedly more robust than it was in 1926, having developed to cover a significantly broader range of subjects and issues than was perhaps imaginable at the time Lauterpacht was writing. International law does certainly regulate to a greater or lesser extent issues of state succession, that much is clear. The second and third questions that Lauterpacht posed, however, are much more difficult to give a confident answer to, especially in relation to the two types of succession under consideration in this section - separation and dissolution. Does the new state acquire rights because it pleases it to take them, or because international law confers title upon them? Is that state bound by obligations of the predecessor state because international law imposes a duty to this effect or because it consents to be bound?

[78] For more on the different kinds of state succession see generally Devaney and Zimmermann (n 23).
[79] Hersch Lauterpacht, *Private Law Analogies in International Law* (1926) 125-126.
[80] ibid.

(i) What we know: customary propositions of the law of state succession

It is important at this stage for us to note that certain provisions of the VCSST can in fact be said to reflect customary international law and in that sense apply to all states from the moment they come into existence.[81] These provisions include Article 15 VCSST which contains the so-called 'moving treaty frontiers' rule. This rule means that in the cases of cession of territory from one state to another, such as the transfer of Hong Kong from the United Kingdom to China in 1997, the successor state's treaty obligations extend to include the ceded territory while the predecessor state's cease to apply.[82]
The same can be said for the special case of border treaties or other treaties which 'run with the land.'[83] It has long been accepted (including as a rule of customary international law[84]) that such treaties are unaffected by state succession. They continue in effect for the benefit of the stability of the international legal order, regardless of the consent of the successor state to be bound by such treaties. That said, these cases remain the relatively few examples of clear customary norms of the law of state succession. More often the customary status is much less clear and we are faced with the unenviable task of seeking to establish whether the general regime as represented by the Vienna Conventions has sufficient support in practice to have achieved customary status. And this is most often in the absence of clear authoritative guidance from international courts and tribunals.[85]

(ii) What we don't know: the role of the law in cases of separation and dissolution

A clear example in this regard is the second scenario which I believe is the source of a great deal of the uncertainty that we observe regarding the law of state succession. This relates to the VCSST's provisions on the most common forms of state succession, namely separation of certain territory from one state to form another and the complete dissolution of one state and the formation of one or more

[81] Devaney and Zimmermann (n 23) 521.
[82] This, it is interesting to point out, has a direct equivalent in the Vienna Convention on the Law of Treaties and was already thought to represent customary international law at the time of the adoption of the VCSST, see Art 29 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, which states that '[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' The connection between these two provisions is made clear by the fact that commentary to what would become Article 15 VCSST specifically refers to the pre-existing rule in the VCLT, 208.
[83] Devaney and Zimmermann (n 23) 532.
[84] Case Concerning the Temple of Preah Vihear (Cambodia v Thailand), Merits, Judgment, ICJ Rep 1962 (15 June), 6, 34; Frontier Dispute, Judgment, ICJ Rep 1986, 554, 567.
[85] Devaney and Tams (n 16); And even in those few cases where state succession issues have come before courts such as the International Court of Justice, these courts have tended to shy away from making pronouncements on the customary status of certain (even central) propositions of the law of state succession See, e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2008*, 412, paras 98–117.

new states.[86] These types of succession, separation and dissolution, are covered by Article 34 VCSST (along with Article 35 of the same convention) which attempts to establish a rule of 'automatic succession'. In effect the rule of automatic succession means that new states would be subject to the same rights and obligations as were applicable to them before succession.

> *Article 34*
> *Succession of States in cases of separation of parts of a State*
>
> 1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> (*a*) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
>
> (*b*) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

Since the conclusion of the VCSST, however, it is clear from even a cursory glance at practice in relation to these two different kinds of state succession that the rule of automatic succession reflected in Article 34 has not been uniformly followed by states in practice.[87] Instead, as I have already mentioned above, states have opted for 'nuanced and case-specific solutions,'[88] preferring to maintain as much control over their rights and obligations as possible.[89] This is evidenced by practice which is replete with negotiated agreements, devolution agreements,[90] unilateral declarations, and so on.[91] To elaborate, while states emerging from periods of succession such as the Czech Republic and Slovakia, or the states of the former Yugoslavia, generally sought to ensure treaty continuity, this was secured

[86] For definitions of separation and dissolution see e.g. Andreas Zimmermann and James G. Devaney, 'State Succession in Treaties', and 'State Succession in Matters Other Than Treaties' (2020) MPEPIL <https://opil.ouplaw.com/home/mpil>.
[87] For very cautious perspectives see e.g. Brigitte Stern, 'La succession d'Etats' (1996) 262 Recueil des cours 9, 315; and Patrick Dumberry 'An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?' (2015) 6 Journal of International Dispute Settlement 74.
[88] Devaney and Tams (n 16); for very cautious perspectives see e.g. Brigitte Stern, 'La succession d'Etats' (1996) 262 Recueil des cours 9, 315; and Patrick Dumberry 'An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?' (2015) 6 Journal of International Dispute Settlement 74.
[89] Akbar Rasulov, Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?, European Journal of International Law 14 (2003), 141; Tams (n 23).
[90] Zimmermann and Devaney (n 9).
[91] ILA (n 3) 27, Art 8(1) VCSST.

not through adherence to a general rule of automatic succession but more often through the negotiation of special agreements.[92]

In the case of bilateral treaties, too, there is a general trend towards the continuity of treaty relations after succession, but again one that is the result of renegotiation of obligations by states rather than due to the operation of any general rule.[93] The same can be said for the category of treaties in relation to which the most vociferous case for automatic succession has been made, namely multilateral treaties concerning fundamental rights such as human rights treaties.[94] In practice continuity of such treaty relations has been maintained,[95] although I would again point out that this has not been due to the operation of any sort of general rule to this effect, but through active steps taken by states (perhaps wishing to demonstrate their desire to prove that they are responsible additions to the international community).[96] And even the ICJ in the *Bosnian Genocide* cases did not find that Serbia and Montenegro had automatically succeeded to the Genocide Convention, but rather sought to construe practice to find an implication of consent to the applicability of such norms.[97] This approach has been adopted by other international courts and tribunals who have shown a similar scepticism of the applicability of general rules of state succession. What we observe in practice is a trend towards an approach which emphasises the search for the consent of the successor state as the basis for the continuation of legal rights and obligations. This often involves detailed examination of the practice of states in the search for tacit consent, including whether states have included certain treaties in databases of treaties applicable to them, or whether they have demonstrated behaviour that suggests that they have at one point or another considered themselves to be bound.

(iii) The practice of international courts and tribunals – the search for (tacit) consent

The practice of international investment arbitral tribunals illustrates the aforementioned trend towards taking seriously the practice of states in order to seek to establish (tacit) succession to rights and obligations. Leaving aside situations where tribunals have simply gone along with the wishes of the

[92] ILA, Rapport final sur la succession en matière de traités, Committee on Aspects of the Law State Succession, New Delhi Conference 2002, at 22, available at http://www.ila-hq.org/index.php/committees; Tams and Devaney (n 9).
[93] ILA ibid; 'la pratique de la négociation prévaut concernant la succession en matière de traités', but that 'la présomption de la continuité est la prémisse fondamentale en matière de succession d'Etats—afin de sauvegarder la stabilité des relations internationales'. Through such agreements the relevant parties can, for instance, bring certainty to the transition to statehood by clarifying important issues such as the treaty obligations the entity intends to accede to, how state property will be divided, and other issues regarding nationality of persons and any potential issues of state responsibility.
[94] Human Rights Committee, General Comment No 26, UN Doc A/53/40, 4.
[95] Zimmermann and Devaney, 'Succession to Treaties' (n 9) 533.
[96] The different views on this matter are reflected in MT Kamminga, State Succession in Respect of Human Rights Treaties, European Journal of International Law 7 (1996), 469; Rasulov (n 93) 141.
[97] ICJ Reports 2008, 412, paras 98–117.

parties with regard to the application of legal agreements,[98] practice relating to those situations where states have not successfully clarified their rights and obligations, or where they have simply not tried to do so, is instructive. For instance, in the context of international investment law practice, foreign investors have brought claims against states arguing for the continued application of agreements entered into by predecessor states.[99] From the information that we have available from such practice, it seems that arbitral tribunals have generally not endorsed automatic succession, only explicitly stating that states did not seem to 'proceed from a generally shared expectation of automaticity.'[100] Just as importantly, tribunals have exerted significant time and effort evaluating the behaviour of certain states and the general context in an attempt to discern whether there was any evidence for whether the states desired to keep the relevant rights and obligations in force. In doing so, tribunals have looked to treaty databases to see whether a particular treaty is listed,[101] references to a particular treaty as being in force in subsequent treaties, [102] unilateral statements,[103] statements of states as to whether or not they considered a particular treaty to be in force, [104] pledges to respect other treaties, for instance, among other contextual factors.[105]

So what are the takeaways from the preceding analysis? The principal takeaway is that in practice states appear to have rejected the idea that upon coming into existence they somehow 'inherit' certain rights and obligations as part of the law of state succession. Article 34 VCSST and the rule of automatic

[98] E.g. *Ronald S Lauder v the Czech Republic*, UNCITRAL, Final Award (3 September 2001) paras 2 and 10.

[99] *World Wide Minerals Ltd and Mr Paul A Carroll, QC v Kazakhstan, UNCITRAL*, Award (19 October 2015); *Gold Pool Limited Partnership v Kazakhstan, PCA Case No 2016–23,* Award (30 July 2020); *Oleg Deripaska v the Republic of Montenegro* (PCA Case No 2017-07) Final Award (15 October 2019).

[100] See Vladislav Djanic, 'Revealed: Reasons surface for tribunal's decision that Montenegro was not bound by the Russia-Yugoslavia BIT', *Investment Arbitration Reporter* (3 July 2020), at https://www-iareporter-com.ezproxy.lib.gla.ac.uk/articles/revealed-reasons-surface-for-tribunals-decision-that-montenegro-was-not-bound-by-the-russia-yugoslavia-bit (p. 3).

[101] Djanic ibid 6-7.

[102] Baro Huelmo, 'Is Kazakhstan a State Successor to the USSR? A Perspective from Investment Treaty Arbitration', ASA Bulletin 36(2) (2018), 295, 309; Luke Eric Peterson, 'After failure of claim under Kazakh statute, Canadian miner hopes that USSR-Canada investment treaty permits arbitration with Kazakhstan', *Investment Arbitration Reporter* (18 December 2013), 1.

[103] Peterson ibid, 'In a dramatic Holding, UNCITRAL tribunal finds that Kazakhstan is bound by terms of former USSR BIT with Canada', *Investment Arbitration Reporter* (28 January 2016), at https://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada; Djanic, 'Revealed' (n 100), 7-8; Djanic, 'Kazakhstan fends off claims by Canadian gold miner, as tribunal finds it is not a successor to USSR BIT', *Investment Arbitration Reporter* (4 August 2020), at https://www-iareporter-com.ezproxy.lib.gla.ac.uk/articles/kazakhstan-fends-off-claims-by-canadian-gold-miner-as-tribunal-finds-it-is-not-a-successor-to-ussr-bit), 1.

[104] Djanic, 'Revealed' (n 100), 7-8; Peterson, 'After failure' (n 102), 1; as well as Ministry of Justice (Kazakhstan), 'The Republic of Kazakhstan won a multimillion arbitration brought by Canadian company "Gold Pool"' (press release, 3 August 2020), at < https://www.gov.kz/memleket/entities/adilet/press/news/details/respublika-kazahstan-vyigrala-mnogomilionnyy-arbitrazhnyy-process-protiv-kanadskoy-kompanii-gold-pool-arbitrazhnyy-tribunal-podtverzhdaet-chto-kazahstan-ne-svyazan-sovetskim-soglasheniem?lang=en.>

[105] Djanic, 'Revealed' (n 100), 3.

succession does not find widespread and representative support in practice, and as a result it does not reflect customary international law. This is due to states' preference to maintain a degree of control over their legal rights and obligations. Instead, states favour negotiating specific ad hoc agreements through which they can express their desire to bind and consent to be bound, and regulate the applicability of relevant rights and obligations post-succession. In the following section I set out to argue that attempts to fill the concept of automatic succession with meaning, as with C/I, were always doomed to fail due to the concept's transcendental nature.

3. Making sense of transcendental nonsense

In the preceding sections we have examined the concepts of C/I and automatic succession and how they operate in practice in relation to the law of state succession. In this section I develop this analysis and show that these particular legal concepts are nothing more than 'poetical or mnemonic devices for formulating decisions reached on other grounds'.[106] And more importantly, these concepts in fact stand in the way of us analysing the social issues the law is meant to regulate, and the values against which we are wont to assess the law.

I contend that the legal concepts of C/I and automatic succession lead us as international lawyers to assess a change in the community of states in an abstract way that is rejected by states themselves, 'without any appreciation of the economic, social, and ethical issues which it involves.'[107] For example, by saying that 'a state maintains the same international rights and obligations as it had before despite changes to the constituent elements of statehood because it has the same *identity* as before' we pretend to give a justification for allowing such continuity. However, this is in reality no justification at all due to the fact that, as we have seen, we are not in possession of any workable criteria for assessing C/I. By seeking to establish the 'identity' of a state we are forced to resort to a proposition which, in Cohen's words, 'can not be confirmed or refuted by positive evidence or by ethical argument.'[108] On the other hand, if we say that 'Russia has the same international rights and obligations as the USSR because other states recognise it as such and accept the legal consequences' then we at least have a way of assessing the level of recognition. We can then focus our attention on whether we believe such recognition is desirable in normative terms, and which factors perhaps play a role in states offering or withholding such recognition.[109]

The search for the 'identity' of a state, or to imagine its 'inheritance' through automatic succession, leads us to recognise a 'pre-existent Something' as an abstract concept. And this obscures the fact that the decision as to whether a state's claim to continuity (and also its maintenance of rights and duties) is accepted or not is one which involves seismic political and ethical consequences.[110] What states actually do in fact, when they recognise or deny a state's claim to continuity, is act as gatekeepers to the privileged club of states and the enjoyment of all rights and privileges that go along with statehood. By spending significant amounts of time considering the identity of a certain entity, or the consequences of automatic succession based on reference to an abstract taxonomy of succession, what international

[106] Cohen (n 1) 812.
[107] ibid 812.
[108] ibid 814.
[109] Ibid; Rose Parfitt 'Theorizing Recognition and International Personality' in Anne Orford and Florian Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (OUP 2016) 583.
[110] ibid.

lawyers end up doing is 'ignoring practical questions of value or of positive fact and taking refuge in "legal problems" which can always be answered by manipulating legal concepts in certain approved ways.'[111]

Whether a state's claim to continuity should be accepted or not, or what the rights and obligations of a successor state not making such a continuity claim are, are questions with both practical and ethical effects. It is my argument that attendant concepts such as identity and succession must be formulated in a way that reflects this fact. The way they are formulated at present, however, 'bar[s] the way to intelligent investigation of social fact and social policy.'[112] The concepts of C/I and automatic succession which are central to this area of law in the end amount to:

> … magic "solving words" of traditional jurisprudence. Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormitive principle.[113]

In other words, the proposition that a state is a continuator state and has rights and duties by dint of being identical to the pre-existing state would only be useful if 'identity' was defined in such a way as to take into account the real-world implications of defining identity in this way.[114] But as we have seen above, all such attempts to date have proven unsuccessful. Any rule which uses these concepts, such as 'a state which has the same identity continues with the same international rights and duties' are not in fact 'descriptions of empirical social facts…not yet statements or moral ideals, but are rather theorems in an independent system,'.[115] This consequently means that any legal argument made which uses such rules can 'never be refuted by a moral principle nor yet by any empirical fact.'[116]

So what is the alternative to such transcendental nonsense concepts? Or in other words, how do we 'substitute a realistic, rational, scientific account of legal happenings for the classical theological jurisprudence of concepts'? Cohen's 'Transcendental Nonsense' was written at the height of American legal realism when scholars such as Holmes, Gray, Pound, Llywellyn and others were challenging the type of 'legal magic and word-jugglery' that they perceived traditional jurisprudence was representing. Many such scholars proposed what was termed the 'functional approach'. For Cohen the functional approach entailed 'eliminating supernatural meaningless questions and redefining concepts and

[111] ibid 820.
[112] ibid.
[113] ibid.
[114] Cohen (n 1) at 821; In Cohen's words, concepts such as C/I and succession 'are supernational entities which do not have a verifiable existence except to the eyes of faith.'
[115] Cohen (n 1) at 821.
[116] ibid.

problems of verifiable realities'. And this was an endeavour that was also being carried out in psychology, economics, anthropology and other sciences at the time he was writing.[117] In the following section I explore the possibility of a functional reframing of the concepts of C/I and automatic succession in the context of international law.

Sweeping away the useless menagerie of metaphysical monsters[118]

I have already stated that the function of law is to guide action.[119] What's more, I have showed that all too often the law of state succession fails to perform this function. In the following section I will explain how a functional reframing of C/I and automatic succession can begin to remedy this. We can formulate this in relatively simple terms. My proposed functional reframing would mean that when, say, the Rest of Spain (rSpain) claims to continue as the same state despite Catalonia having achieved independence through a democratic process, the question will not be whether rSpain is identical with the pre-existing state. Rather, Spain's claim to continuity will turn on something that can be verified in the real world, namely whether this claim is recognised by other states.

Further, upon coming into existence Scotland will not automatically inherit a broad range of rights and obligations. Rather, it will only be bound by norms that have achieved customary status and those other norms that it expressly consents to. Reframing the law around these two concepts which can be assessed against verifiable realities will bring significant clarity to the law. No longer will we have to grapple with the fiendishly difficult questions of 'what is the identity of a state?' or 'is this the type of succession that brings automatic succession?' Instead, states will know that if they secure a certain level of recognition then their claim to continuity will be successful. Or that they will become bound by human rights treaties not magically but only through the expression of consent to be bound. With the law reframed in this way states will know *a priori* when certain norms will become applicable, and the law will guide their actions accordingly. All of this requires further elaboration.[120]

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[117] ibid.

[118] Or in Russell's words: 'Our procedure here is precisely analogous to that which has swept way from the philosophy of mathematics the useless menagerie of metaphysical monsters with which it used to be infested.' Bertrand Russell, *Mysticism and Logic* (1918) 155.

[119] See FN 6.

[120] Cohen's striking argument is that there are only two significant questions in the field of law, namely 'how do courts actually decide cases of a given kind?' and 'how ought they to decide cases of a given kind'. Any legal problem that cannot be asked in either of these forms 'is not a meaningful question and any answer to it must be nonsense.' (Felix S. Cohen, 'What is a Question?' (1929) 39(3) The Monist 350). Now, it is clear that Cohen, with his focus on a particular context, namely the domestic legal system of the United States, did not have international law in mind when making such statements. International law is not all about courts, and its decentralised nature precludes any direct transplants from domestic law without careful consideration. Due to the rarity of issues of state succession coming before courts and tribunals, it is clear that these questions require some adaptation to make sense in the international legal context. So the question is, if not courts, who are the relevant actors for the purpose of state succession? I would venture that the relevant actors are almost

Scholars such as Cohen, Holmes, and Hohfeld sought to provide a basis for redefining all legal concepts in empirical terms, leaving behind the 'ghost world' of supernatural concepts and instead emerging with concepts as patterns of behaviour which have real world effects and which are consequently subject to moral criticism.[121] In doing so, we can bring to the fore policy and ethical issues and discuss their merits openly while dispensing with '…prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy.'[122] This approach will allow us to look at a particular international legal question relating to state succession and say 'this rule leads to the following results, namely that the state's claim to continuity will be accepted (or not), and this result is desirable or undesirable for the following reasons.'[123]

Bearing these insights in mind and drawing on the practice examined in the preceding chapters, I would propose the functional reframing of the two concepts hitherto the subject of our attention mentioned above. When an entity claims to continue with its rights and obligations unaffected despite significant changes to constituent elements of its statehood instead of seeking to establish whether that entity possesses the same identity as the predecessor state, we should instead ask: 'do other states recognise the entity's claim to continuity?' In cases of separation or complete dissolution of states where no claim to continuity is made, instead of asking 'what is the inheritance of the successor state in accordance with automatic succession?' we should instead ask, 'which rights and obligations are relevant to the successor state given their stated consent to be bound'? In short, then, my proposal is to shift our focus from the transcendental concepts of identity and automatic succession to recognition and consent – concepts which I believe have a better chance of being assessed in terms of verifiable realities.

Given its own contested nature, one might question the wisdom of advocating resort to recognition as a more reliable concept for assessing whether succession has occurred or whether a state continues as before with the same rights and obligations. Nevertheless, I believe that no matter whether one considers that recognition in the context of the formation of states is constitutive or declaratory or something else altogether, it can provide a more reliable yardstick than identity for assessing claims to continuity.
Why do I say this? Well, because this is in fact already how the success or failure of claims to continuity have been measured to date. It was the fact that there were no significant objections to the Russian Federation's claim to be the continuator of the Soviet Union that allowed it to enjoy the same rights and be subject to the same obligations simply with the swapping of nameplates in the UN Security Council,

exclusively other states, and to a lesser extent relevant international organisations. As such, we should reframe the questions as, 'what do states do when faced with instances of state succession?' and 'what should they do?'
[121] Cohen (n 1) 828.
[122] ibid.
[123] ibid.

General Assembly and so on. Recognition of this social fact, or the absence of any relevant objections to it, are real world factors which can be subject to empirical observation. We can count the number of vociferous objections to Serbia and Montenegro's claim to be the continuator of Yugoslavia. Or consider the absence of such objections to be acquiescence from other states of rUK's future claim to continuity in order to somehow cling on to the UK's veto in the Security Council. Plenary fora such as the United Nations General Assembly represent an attractive way of measuring recognition in this way.

Likewise, while the expression of consent is sometimes contested, it is nevertheless something that can be seen as a verifiable reality against which we can discern a state's rights and obligations. Again, instead of trying to discern a state's 'inheritance' as a result of automatic succession, in practice states prefer to negotiate their own tailor made solutions to succession, to positively express their accession to multilateral treaties. This includes major human rights treaties which some authors have claimed are best suited to automatic succession.[124] The practical reality of this functional reformulation would be that states would only be bound by treaty obligations to which they positively consent. No doubt this will strike some as a retrogressive step in terms of ensuring that rights are protected even after significant upheaval that state succession brings. But the truth is that this is nothing different from the current state of affairs in any case. Aside from limited exceptions such as border treaties it is not the norm that successor states are bound by international obligations without their consent.

My proposed functional reframing would at once recognise this reality, free us from the fool's errand of trying to fill transcendental concepts with substance, but also prompt us to take a fresh look at the way the law of state succession operates. I think it is fairly easy to anticipate certain objections to reframing the law of state succession in these scenarios to centre around the concepts of recognition and consent. Are these not traditional, even conservative concepts that favour existing states and existing power structures? This may well be the case. So why propose to reformulate the legal rules in question in this way? I would argue that there is value in reframing these concepts in a way that can be assessed against real world factors such as expressions of recognition or consent.

This may not only align international law more closely with the practice of states,[125] but also allow us to ask the questions that in my opinion are asked too rarely at the moment. These questions include: is this how we wish the law of state succession to operate? Do we want claims to continuity to be ultimately decided by other states? Or can we envisage another legal rule that could be used to make the distinction between C/I and work besides identity? What about automatic succession, are we happy that even today it seems that state consent is the principal concern for determining the applicability of

[124] See the discussion in Rasulov (n 87).
[125] Devaney and Zimmermann (n 23) 515; Zimmermann (n 16) 57.

international rules and principles (save for those limited number that have already achieved customary international law status)? Or can we imagine a more useful role for international law than the post-hoc taxonomical one that it currently serves? I believe it is only through dispensing with the transcendental concepts explored in this paper that we can ever truly begin to ask these questions, laying bare the social, political, and economic implications of the current international legal norms and doing likewise for the future law of state succession that we may one day see.

4. Conclusion

It seems to me that like death and taxes there are few more constant things in life than the ever-changing configuration of the international community of states. Whether it is one year or ten years before we are faced by the next set of challenges presented by the occurrence of state succession, it is surely inevitable that we will face such challenges once more. This paper has attempted to move the debate forward by pinpointing two particular legal concepts which I believe are the root of a great deal of uncertainty in the law of state succession as it currently stands. Having made the case that C/I and automatic succession are transcendental concepts, I have advocated dispensing with them and instead reformulating the relevant international legal norms in a way that accords with the social facts they are designed to regulate, and in a way that brings to the fore the normative implications of such important norms. It is only then that we can have an open an honest debate about the policy implications of the law of state succession and have it fulfil the basic function of guiding action. To the end I have advocated putting recognition and consent at the heart of these succession scenarios not because I believe these to be a panacea for the problems the law of state succession faces, but rather to have functional concepts the normative implications of which we can discuss honestly and plainly without entering into the realms of the mystical, the transcendental or meaningless monsters.