Chapter II: State Succession

"Considerations of justice and of economic stability in the modern world probably require that in any system of general codification of international law the question of State succession should not be left out of account. The law of State succession prevents the events accompanying changes of sovereignty from becoming mere manifestations of power."[281]

A) The Need for a Definition

Even if there seems to be more than abundant writing on state succession,[282] the literature has not ceased to underline that the subject is of utmost obscurity and vagueness and replete with controversy.[283] Multiple

281 *UN Secretariat Survey of International Law* (n 2) 28/29, para. 46.

282 Cf. only Francisca Markx-Veldhuijzen, 'Selected Bibliography' in Pierre M Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested Against the Facts* (Martinus Nijhoff 2000) 927.

283 E.g. James G Devaney, 'What Happens Next? The Law of State Succession' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Edward Elgar (forthcoming)) available online at https://gcils.org/wp-content/uploads/2020/11/GCILS-WP-2020-Paper-6-Devaney.pdf "State succession is a notoriously opaque area of international law"; Sarvarian (n 134), 789 "The succession of states is one of the most complex, challenging and politicized fields of international law"; Verdross and Simma (n 23) 608, para. 973 "most controversial part of interational law" [own translation from German]; Crawford *Brownlie's Principles of Public International Law* (n 3) 410 "State succession is an area of uncertainty and controversy."; Brigitte Stern, 'La Succession d'États' (1996), 262 RdC 15 27-28 "l'un des problèmes les plus complexes du droit international [...] apparemment anarchique"; Stefan Oeter, 'German Unification and State Succession' (1991), 51 ZaöRV 349 352 "chaotic"; Stefan Oeter, 'State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States' (1995), 38 GYIL 73 73 "never was much more than a set of more or less elaborate principles of adaptation to changed circumstances, abstract principles otherwise known under notions such as *clausula rebus sic stantibus* and duty to renegotiate *bona fides*" [italics in original]; Shaw, 'State Succession Revisited' (n 259), 35, 97 "an area of especial confusion and inconsistency [...] rules of state succession are marked either by their absence or their inconsistency"; Vassillis Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Edward Elgar 2017) 189–190; Andreas

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challenges are associated with identifying and applying rules on state succession. A main reason for the more than cautious attitude towards the assertion of any hard and fast rules lies in the subject's close relationship and interdependence with other fields of international law, in particular with the notions of sovereignty and statehood.[284] State succession represents a cross-cutting theme *par excellence*, a factual situation of disturbance that questions almost every other legal fact under international law. Instances *later* described as state succession were often politically loaded, associated with major societal upheavals and the disruption of whole peoples, territories, lands, and culture.[285]

Questions about the prerequisites and consequences of the emergence or demise of a state or the transferal of authority over a certain territory necessitate answers about the basis and scope of sovereignty, generally understood as the "supreme authority within a territory",[286] but probably still one of the most elusive concepts[287] of international law. Every discussion on state succession will hence give rise to all the political, sociological, and legal discussions around these far-reaching and often highly disputed

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Zimmermann and James G Devaney, 'Succession to Treaties and the Inherent Limits of International Law' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2016) 505 505/506 and the pertaining footnotes; Hafner and Kornfeind (n 27), 2.

284 Shaw, 'State Succession Revisited' (n 259), 36; Martti Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' in: *Eisemann/Koskenniemi State Succession* (n 282) 65 96–102.Generally on the relationship between state sovereignty and succession Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevenson & Sons Limited 1958) 319; for succession to treaties Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 511. Cp. Georg Jellinek, *Allgemeine Staatslehre* (3rd ed. Verlag O. Häring 1914) 270–275 who negates that the coming into existence of a state is a matter of law "Das Volkerrecht knüpft daher an das Faktum der staatlichen Existenz an, vermag dieses Faktum aber nicht zu schaffen" ("International law presupposes the fact of a state's existince, but it cannot establish it." [own translation from German]).

285 However, such rupture does not always have to take a violent form; cf. only the examples of the peaceful separation of Czechoslovakia and German unification; in detail *infra*, Chapter IV B) II) and V).

286 Samantha Besson, 'Sovereignty (2011)' in: *MPEPIL* (n 2) para. 1; *cf. also* James Crawford, 'State (2011)' in: *MPEPIL* (n 2) para. 40 "plenary competence that States prima facie possess"; Marcelo G Kohen and Mamadou Hébié, 'Territory, Acquisition (2021)' in: *MPEPIL* (n 2) para. 5 "Territorial sovereignty refers to the plenitude of a State's competences over a territory."

287 See Besson, 'Sovereignty (2011)' (n 286) paras. 1-4.

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issues.[288] Even the basic division between continuity and succession is dependent on the theories and corresponding controversies about defining a state.[289] With this in mind, one might be tempted to completely negate the significance of state succession as a distinct category of international law. At the very least, considerable doubt can be cast on whether labelling a situation as a case of state succession implies any distinct rules and consequences apart from those of more general international law.[290] State succession was often used as a "box" into which several unidentifiable or diplomatically intractable cases were assigned.[291]

As mentioned, the ILC's codification work on succession issues has not met with much support.[292] Currently, further work is under way concerning state succession in respect of state responsibility.[293] While its relevance and appeal to the international community remains to be seen, for the existing conventions, states or international organizations have supported only some of the provisions and many are not considered as having crystal-

288 Cf. Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 507; Lalive (n 8) 148/149 "Like the concept of sovereignty, that of 'acquired rights' is not a subject to be studied easily in a scientific, unbiased, and dispassionate manner".

289 Cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 98–99; Marek (n 61) 1–2.

290 Cf. Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 515; Sarvarian (n 134), 812; generally Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284).

291 The ILC in several cases separated issues of state succession from other topics in order not to burden the work on these topics with the mostly intricate and politically sensitive problems of state succession. E.g., Art. 73 ("The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States […]") was inserted into the Vienna Convention on the Law of Treaties (23 May 1969) UNTS 1155 331 because the ILC found it more appropriate to leave the analysis of succession into treaties to a separate working group, cf. ILC, 'Second Report on the Law of Treaties (Special Rapporteur Waldock)' (1963), 1963(II) YbILC 36 38, para. 3.

292 *Supra*, Chapter I B).

293 ILC, 'Fifth Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 43) para. 89. Its outcome will supposedly be crafted in the form of draft articles of an international convention, ILC, 'First Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 43) para. 28. But see also the critical voices referred to in ILC, 'Third Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 43) para. 11.

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lized into customary law.[294] While this "failure" might, at least, partly be blamed on the conventions' contents, *inter-alia* their strong focus on the interests of so called "newly independent states",[295] their lack of appeal may also be owed to the perceived inappropriateness of tackling the issue of succession by (general) conventional means instead of *ad-hoc* agreements.[296] In fact, the law of state succession was largely developed on a case-by-case basis. Solutions to the pressing needs of newly formed states or splintered societies, often after violent conflicts, were mostly the outcome of a bargain and met by concluding agreements tailored to a conflict's particularities. Therefore, it is also doctrinally challenging to derive general rules from

294 Herdegen (n 255) § 29 para. 2; Anthony Aust, *Modern Treaty Law and Practice* (3rd ed. CUP 2013) 321; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 474 "less the result of codification of existing norms than of the creative development of international law". For the VCSST Gerhard Hafner and Gregor Novak, 'State Succession in Respect of Treaties' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 396 399; cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 70 "there is no agreement about the authoritative status of the 1978 Convention"; in more detail Andreas Zimmermann, *Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation* (Springer 2000) 860–861.

295 Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 508–509; Andreas Zimmermann and James G Devaney, 'State Succession in Matters Other than Treaties (2019)' in: *MPEPIL* (n 2) para. 4; Verdross and Simma (n 23) 609, § 974, 621, § 997; Aust *Modern Treaty Law and Practice* (n 294) 321; Arnauld *Völkerrecht* (n 255) § 2 para. 108; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 473; cf. Detlev F Vagts, 'State Succession: The Codifiers' View' (1992-1993), 33(2) Va J Int'l L 275 283, 288; Oeter, 'German Unification and State Succession' (n 283), 353, 379; cf. Daniel P O'Connell, 'Reflections on the State Succession Convention' (1979), 39 ZaöRV 725 725; Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 354, para. 106; Patrick Dumberry, 'State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention' (2015), 28(1) LJIL 13 13–30; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 158; Hasani (n 2), 115, 116.

296 Cf. Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 151; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 539; famously, and comprehensively criticizing the VCSST O'Connell, 'Reflections on the State Succession Convention' (n 295), 726 "state succession is a subject altogether unsuited to the process of codification".

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ad-hoc solutions driven by the need to compromise.[297] Additionally, one of the particularities of the international law on succession is that it partly intends to govern relations of states that do not yet exist, which leads to evident problems related to any binding force for new states. This dilemma is openly acknowledged by Art. 7 para. 1 VCSST, which stipulates that "the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed". A parallel provision is found in Art. 4 para. 1 VCSSPAD.

The often casual and sometimes indiscriminate use of terminology when referring to succession has exacerbated the existing doctrinal confusion, which was also not conducive to rules evolving. With this in mind, it seems all the more important to clearly define the term of state succession in order to establish a common basis for and the outer limits of the following analysis. How succession scenarios are defined has an impact on the factual situations collected as evidence and on the conclusions drawn from them. Whether a state is defined as a successor or a continuator or whether a case is handled as a secession or dissolution will have a determinative influence on the outcome of the research. Therefore, this chapter is dedicated to setting the general framework of state succession as a field of international law.

B) Basic Requirements of State Succession

I) State Succession as a Set of Factual Events, not a Legal Effect

The very notion of succession can be misleading as it implies something it is, at the same time, supposed to prove, i.e. the taking-over of rights and responsibilities.[298] In the 19th century, a succession analogy with private law concepts was still widespread, equating the state with an individual

297 Cf. Shaw, 'State Succession Revisited' (n 259), 35, 40; Jan Klabbers and Martti Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' in Jan Klabbers and others (eds), *State Practice Regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe* (Kluwer Law International 1999) 118 142. On the intricacies of deducting general rules from treaties *infra*, Chapter V B) II) 3) b).

298 Also Shaw, 'State Succession Revisited' (n 259), 35–36, 41.

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heir succeeding into all rights and duties of the deceased.[299] But, with the end of the personal identification of the state through a monarch or emperor and the reception of the idea of a *contrat sociale*,[300] this perception changed – the taking over of another state's duties had to be reconciled with society's interest; the continuity of international legal duties became an option instead of a given.[301] Due to this change in perception, a distinction developed between state succession as a certain set of events ("state A becomes independent of state B") and the legal ramifications flowing from it ("state A has to accept as binding obligations undertaken by state B"). Succession therefore refers to a *factual* situation of territorial change and does not necessarily mean that a successor state commits to its predecessor's rights and responsibilities.[302] This commitment, conversely, is the

299 See Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 147–148.

300 Jean-Jacques Rousseau, *Du Contrat Social: Ou, Principes du Droit Politique* (l'Imprimérie de la Société typographique 1791).

301 Craven *Decolonization of International Law* (n 17) 29-34. On the difference between succession by private individuals and by abstract entities Delbrück and Wolfrum (n 266) 158, para. I.1.

302 Also ILC, Commentary on Art. 2 of the Draft Articles on Succession of States in Respect of Treaties, in ILC, 'Report on the Work of its Twenty-Sixth Session' (1974), 1974(II(1)) YbILC 157 175, para. 3; taken up in ILC, Commentary on Art. 2 lit. a Draft Articles on Succession of States in Respect of State Responsibility, in ILC, 'Report on the Work of its Seventy-First Session (2019)' (2019) UN Doc. A/74/10 309, para. 2; O'Connell *The Law of State Succession* (n 2) 3; Jennings and Watts (n 27) § 61; cp. also ILC, 'First Report on Succession of States and Governments in Respect of Treaties (Special Rapporteur Waldock)' (1968), 1968(II) YbILC 87 91, paras. 3-4; ILC, 'Second Report on Succession in Respect of Treaties (Special Rapporteur Waldock)' (1969), 1969(II) YbILC 45 51, para. 3; apparently differently Christian J Tams, 'Ways Out of the Marshland. Investment Lawyers and the Law of State Succession' in Rainer Hofmann, Stephan W Schill and Christian J Tams (eds), *Investment Arbitration as a Motor of General International Law* (Edward Elgar forthcoming (available at SSRN: https://ssrn.com/abstract=3086281)) 6 "State succession means both the process(es) through which changes in sovereignty and competence take place and the legal consequences occurring therefrom."; Ulrich Fastenrath, 'Das Recht der Staatensukzession' (24. Tagung der Deutschen Gesellschaft für Völkerrecht, Leipzig, April 1995) 9; Reinisch and Hafner (n 2) 91; Hernández, 'Territorial Change, Effects of (2010)' (n 166) para. 2 "in the case of State succession, a general regime of succession is said to apply, whereby any new State must maintain a certain continuity with the legal situation on the ground and with the previously existing situation".

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legal consequence to which the rules on state succession are supposed to find an answer.[303] In the words of *Crawford:*

> ”It is important to note that the phrase 'state succession' is employed to *describe* an area, a source of problems: it does not connote any overriding principle, or even a presumption, that a transmission or succession of legal rights and duties occurs in a given case.”[304]

Therefore, even if many of the VCSST and VCSSPAD provisions do not reflect customary international law, their common definition that “’succession of States’ means the replacement of one State by another in the responsibility for the international relations of territory”[305] has found wide agreement[306] and/or coincides largely with most other definitions of state succession.[307] It will therefore serve as the starting point for the current analysis.

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303 Delbrück and Wolfrum (n 266) 158, footnote 4.

304 Crawford *Brownlie's Principles of Public International Law* (n 3) 409 [italics in original].

305 Art. 2 para. 1, lit. b VCSST (n 20); Art. 2 para. 1 lit. a VCSSPAD (n 22); cf. also Art. 2 lit. a ILC, ‘Draft Articles on Nationality of Natural Persons in Relation to the Succession of States’ (1999), 1999(II(2)) YbILC and Art. 2 lit. a Draft Articles on Succession of States in Respect of State Responsibility in ILC, ‘Report on the Work of its Seventy-First Session (2019)’ (n 302) 306, para. 117.

306 E.g. Badinter Commission, ‘Opinion No. 1’ (1992), 31(6) ILM 1494 1495, para. 1(e); ILA, ‘Resolution No 3/2008: Conclusions of the Committee on Aspects of the Law on State Succession’ (2008) para. 1 <https://www.ila-hq.org/en_GB/documents/conference-resolution-english-rio-de-janeiro-2008-3>; Shaw *International Law* (n 266) 959; Wladyslaw Czaplinski, ‘Quelques Aspects de la Réunification de l'Allemagne’ (1990), 36 AFDI 89 96; Herdegen (n 255) § 29 para. 1 “suitable”; Andreas Zimmermann and James G Devaney, ‘State Succession in Treaties (2019)’ in: *MPEPIL* (n 2) para. 1; Zimmermann and Devaney, ‘State Succession in Matters Other than Treaties (2019)’ (n 295) para. 1; Verdross and Simma (n 23) 607/608, § 972; Hafner and Novak, ‘State Succession in Respect of Treaties’ (n 294) 396, 400; Dieter Papenfuß, ‘The Fate of the International Treaties of the GDR Within the Framework of German Unification’ (1998), 3(92) AJIL 469 470.

307 Cf. O'Connell *The Law of State Succession* (n 2) 3 “[t]ransfer of territory from on national community to another [...] one state ceases to rule in a territory, while another takes its place [...] the factual situation which arises when one State is substituted for another in sovereignty over a given territory”; similarly Herdegen (n 255) § 29 para. 1; cp. also Crawford *Brownlie's Principles of Public International Law* (n 3) 409, who adds a lawfulness requirement; for such requirement see also *infra*, Chapter II B) IV).

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II) Replacement of One State by Another State – Continuity and Succession

One of the essential differentiations in the international law on state succession is that between state continuity and succession.[308] The two categories are, with respect to the same territory, mutually exclusive;[309] if the personality of the state remains the same, i.e. if it continues, there is no room for state succession. Thus, before any discussion on state succession, it must first be ascertained if the circumstances, however revolutionary they have been, left the state intact as an individual entity.[310] Additionally, cases commonly seen as representing continuity, rather than succession, have to be accorded another significance with respect to the maintenance of private rights because the argument for the national legal order being maintained is far easier to make. The status of a continuator state is regularly employed, e.g., for the case of Russia after the dissolution of the Soviet Union,[311] but was denied to the (by then) Federal Republic of Yugoslavia (FRY, later Serbia and Montenegro) with respect to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY)[312].

There are mainly two theories for the determination of state continuity. According to the first theory, a state continues to exist if the basic constitu-

308 James Crawford, *The Creation of States in International Law* (2nd ed. OUP 2006) 667/668; Marek (n 61) 1 "The problem of the identity and continuity of a State is the problem of its very existence"; Shaw, 'State Succession Revisited' (n 259), 44; Andreas Zimmermann, 'Continuity of States (2006)' in: *MPEPIL* (n 2) para. 8; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 512/513; Ineta Ziemele, 'States, Extinction of (2007)' in: *MPEPIL* (n 2) para. 8; Crawford *Brownlie's Principles of Public International Law* (n 3) 412; Stern, 'La Succession d'États' (n 283), 39; Papenfuß (n 306), 470. Critical on the distiction Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998), 9(1) EJIL 142 153 "In practice, however, it has become very clear that such distinctions raise more questions than they answer" and Ian Brownlie, *Principles of Public International Law* (4th ed. Clarendon 1996) 82–85 "make a difficult subject more confused".

309 O'Connell *The Law of State Succession* (n 2) 3; Marek (n 61) 9; Crawford *Brownlie's Principles of Public International Law* (n 3) 412/413; Stern, 'La Succession d'États' (n 283), 39–47; but differently Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 161 and Hasani (n 2), 115–116.

310 Marek (n 61) 10.

311 See in more detail *infra*, Chapter IV B) III) 1).

312 See in more detail *infra*, Chapter IV B) IV) 1).

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tive attributes of a state, i.e. a defined territory, a people, and state power, persist.[313] Additionally, there must be a certain determination of "sameness".

> "That is to say, a State is the 'same' if it involves what may be regarded as the same independent territorial and governmental unit at relevant times. What matters is principally the historical continuity of the community the State embodies [...] A State may be said to continue as such so long as an identified polity exists with respect to a significant part of a given territory and people."[314]

Hence, while recognition by third states is considered as merely declaratory for statehood,[315] it is of particular relevance in determining a state's continuity or non-continuity[316]. The appeal of this theory lies in its reference to actual state practice and hence the acceptance of the *realpolitik* element underlying the recognition of new states. This acceptance makes the approach flexible but, at the same time, considerably open to political considerations rather than legal ones since recognition is arguably still at the discretion of each individual state.[317] The outcome of any recognition process can be considered unpredictable.

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313 Crawford *The Creation of States* (n 308) 671. This definition leans on the "three-elements-theory" by Jellinek (n 284) 394–434; see also Art. 1 Convention on Rights and Duties of Man (26 December 1933) LNTS 165 19 (Montevideo Convention).

314 Crawford *The Creation of States* (n 308) 669, 671.

315 Arnauld *Völkerrecht* (n 255) para. 97; Stern, 'La Succession d'États' (n 283), 52; cf. Jochen A Frowein, 'Recognition (2010)' in: *MPEPIL* (n 2) para. 10; Juan F Escudero Espinosa, 'The Principle of Non-Recognition of States Arising from Serious Breaches of Peremptory Norms of International Law' (2022), 21(1) Chinese JIL 79 84–93; Crawford, 'State (2011)' (n 286) para. 44.

316 Crawford *The Creation of States* (n 308) 671; cf. Shaw, 'State Succession Revisited' (n 259), 38, 45; Christian J Tams, 'State Succession to Investment Treaties: Mapping the Issues' (2016), 31(2) ICSID Review 314 319.

317 Daniel Thürer and Thomas Burri, 'Secession (2009)' in: *MPEPIL* (n 2) paras. 40, 41; Stern, 'La Succession d'États' (n 283), 54; cf. Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 507. Yet, because of the evident real-life consequences of recognition, its completely discretionary basis is sometimes doubted, cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 99-100; Stern, 'La Succession d'États' (n 283), 54 "autolimitation". Additionally, an exception exists in cases of emergence of a state from breaches of a peremptory norm of international law, cf. Escudero Espinosa (n 315) and *infra*, section IV).

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A second theory views a state as identical to the former entity if it carries the same rights and obligations with it.[318] This approach at first glance seems far more objective since it is not dependent on political value judgments. Moreover, the attitude of a state will be guided more by real consequences than by pure theoretical status. "Universal succession",[319] which under this theory would be logically impossible,[320] will almost never be claimed except in cases of assertion of continuity. However, distinguishing the categories of continuity and succession according to their consequences presupposes something it is meant to explain. It will not be possible to describe an international obligation as "the same" without attributing it to a certain entity.[321] Furthermore, not all international rights and obligations are susceptible to succession.[322] Finally, the second theory cannot accommodate some common perceptions of some actual cases, such as the

318 Marek (n 61) 5–14; Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 120; Zemanek (n 38), 189 "a problem of state responsibility"; cf. Zimmermann, 'Continuity of States (2006)' (n 308) para. 1; critical Crawford *The Creation of States* (n 308) 670–671.

319 The term of "universal succession" is one example where the indiscriminate use of vocabulary might not only lead to confusion but to real differences in legal characterization. It is mostly used to describe the taking over of all rights and obligations of the predecessor by the successor state, see e.g. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 121; Crawford *Brownlie's Principles of Public International Law* (n 3) 409. Others use the term to describe the (universal) territorial scope of change in responsibility, see e.g. Jennings and Watts (n 27) 209; Shaw, 'State Succession Revisited' (n 259), 39. Critical on the use of the term Marek (n 61) 10, footnote 3.

320 ibid 10–13. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 121 considers universal succession and continuity as two interpretations of the same factual situation; also Crawford *Brownlie's Principles of Public International Law* (n 3) 409.

321 Crawford *The Creation of States* (n 308) 670 "The rights are better referred to the entity than the entity to the rights"; cf. Marek (n 61) 10 "in the case of identity there is one subject of international law; in the case of succession there are at least two"; similar Stern, 'La Succession d'États' (n 283), 40–41.

322 E.g. according to majority opinion, rights to membership in an international organization do not pass to the successor state, cf. e.g. Crawford *Brownlie's Principles of Public International Law* (n 3) 428; Delbrück and Wolfrum (n 266) 168; cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 114; for cases of division of states Zimmermann and Devaney, 'State Succession in Treaties (2019)' (n 306) paras. 21-22.

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"resurrection" of the Baltic states.[323] These points do not mean that the critique with respect to the first approach is not cogent. But the vague and sometimes rather subjective criteria of "sameness" are essentially due to the definition's contingency on the malleable definition of statehood under public international law, something state succession cannot overcome.

In general, the continuity of states is presumed, even when fundamental territorial, personal, or political upheavals have taken place.[324] Thus, as a rule, there is no state succession when only *internal*, even dramatic, changes occur, as long as the state's *external* personality is not touched.[325] Generally, changes in the governmental power of a state, such as a *coup d'état* or military occupation are *not* considered instances of state succession.[326] The

323 Marek (n 61) 6; Crawford *The Creation of States* (n 308) 669/670, 689/690 with further examples. For further information on the case of the Baltic states see *infra*, Chapter IV) B) III) 2).

324 ibid 700–701, 714; Antonello Tancredi, 'Dismemberment of States (2007)' in: *MPEPIL* (n 2) para. 9; Arnauld *Völkerrecht* (n 255) para. 73; Ziemele, 'States, Extinction of (2007)' (n 308) paras. 2, 3 "Extinction of a State is clearly an exception in international law"; Koskenniemi and Lehto (n 255), 183 "la pratique préfère nettement la continuation à l'extinction".

325 Crawford *The Creation of States* (n 308) 679 with examples of the Russian, China's and the Arabic Revolution; Oscar Schachter, 'State Succession: The Once and Future Law' (1992-1993), 33 Va J Int'l L 253 254; Delbrück and Wolfrum (n 266) 160, para. 2.c) with reference to the example of China; Lauterpacht *Private Law Sources and Analogies* (n 61) 129–130; J. C Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (2nd ed. C.H. Beck 1872) 50/51; August Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (Duncker & Humblot 1874) 8 „Selbst Dynastien sind geschwunden, der Staat ist geblieben." („Even dynasties vanished, the state remained." [own translation from German]).

326 Cf. e.g. Verdross and Simma (n 23) 606-607, Heinrich B Oppenheim, *System des Völkerrechts* (2nd ed. U. Kröner 1866) 116–117; ILA, 'Resolution No 3/2008' (n 306) para. 3; Robert Y Jennings, 'General Course on Principles of International Law' (1967), 121 RdC 323 438; Jennings and Watts (n 27) § 57; Stern, 'La Succession d'États' (n 283), 40; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 513; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 159; Ziemele, 'States, Extinction of (2007)' (n 308) para. 3; Vagts (n 295), 281/282; Verdross and Simma (n 23) 606-607, paras. 969-971; Crawford *The Creation of States* (n 308) 678-679, 688, 701 (but critical with respect to the term "failed states" ibid 720–723). The ILC started the work on succession with the topic of "Succession of States and Governments". Even if in 1963 in ILC, 'Report on the Work of its Fifteenth Session' (1963), 1963(II) YbILC 187 224, para. 57 it decided to limit the study "only to the extent necessary to supplement the study on State succession", succession of governments was still included in the 1968 ILC, 'First Report on Succession of States and Governments in Respect of Treaties (Special Rapporteur Waldock)' (n 302),

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change of a state's name alone does not have any relevance for the state's identity.[327] Further, the change of size of a state's territory, and hence the number of people living in it, does not generally influence a state's personality.[328] Yet, again in practice, defining what constitute "internal" or "external" factors is often not easy, especially whether a constitutional change remains within the domestic sphere or might also have an impact on a state's personality.[329] Thus, the categories of continuity and succession are not as clear-cut and free of political agendas as their definitions might suggest. In such politically sensitive and internally often disruptive situations as those evoked by state succession, the final outcome will almost always not follow strict legal rules but will be the product of political bargaining.

III) Change of Responsibility for the International Relations

Additionally, there must be a change of "responsibility for the international relations of a territory". Here, "responsibility" is not to be understood in the

90. The topic of succession of governments was only eliminated in the following reports. But see also the comments of some states during the discussion of the draft articles on Succession of States in Respect of Treaties in the UNGA Sixth Committee arguing for a succession category of "social revolution", summarized in ILC, 'First Report on Succession of States in Respect of Treaties (Special Rapporteur Vallat)' (1974), 1974(II(1)) YbILC 1 14-16, paras. 50-57. Lauterpacht *Private Law Sources and Analogies* (n 61) 130 also alluded to the fact that non-significance of changes in government is essentially a legal premise, not a natural given; similar Schachter (n 325), 254–255. A recent author including governmental changes in the definition of succession is Tai-Heng Cheng, *State Succession and Commercial Obligations* (Transnational Publishers 2006) 38-53.

327 Crawford *The Creation of States* (n 308) 680, footnote 54; ILA, 'Resolution No 3/2008' (n 306) para. 3; Stern, 'La Succession d'États' (n 283), 40.

328 Crawford *The Creation of States* (n 308) 673, 678; ILA, 'Resolution No 3/2008' (n 306) para. 3; cf. Zimmermann, 'Continuity of States (2006)' (n 308) 13–14; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 513; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 159; Jennings and Watts (n 27) § 57; Stern, 'La Succession d'États' (n 283), 40; Vagts (n 295), 282.

329 Cf. Schachter (n 325), 254/255; see also Crawford *The Creation of States* (n 308) 673 "Even if the persistence of the constitutional system is not a strict prerequisite, the presumption of continuity is especially strong when the constitutional system of a state, despite the territorial change, remains the same". E.g., even if the dissolution of Czechoslovakia is generally considered a case of state succession, *infra*, Chapter IV) B) V) 1), Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 49/50 considers it a (mere) "constitutional act" .

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sense of the secondary rules of state responsibility but in the special context of succession.[330] The ILC commentary to Art. 2 VCSST

> "considered that the expression 'in the responsibility for the international relations of territory' is preferable to other expressions such as 'in the sovereignty in respect of territory' [...], because it is a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory in question".[331]

But conversely to what the reference to "common usage" might pretend, the meaning of "responsibility for the international relations of a territory" cannot be derived from common sense, from internal reference to a definition in the VCSST, or from external international law; it can only be detected by analyzing the drafting history of the VCSST.[332] Especially the term's relationship with the term of sovereignty was a manifest bone of contention within the ILC. *Sir Humphrey Waldock*, the first rapporteur on the issue of succession in respect of treaties, originally proposed the wording "possession of the competence to conclude treaties with respect to a given territory"[333] because the term "sovereignty" was perceived as too narrow and not "capable of covering such special cases as 'mandates', trusteeships and protected States".[334] Yet, several commission members insisted on the significance of the reference to sovereignty in order to exclude scenarios of

330 ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (1974), 1974(II(1)) YbILC 174 175/176, para. 4. Art. 39 VCSST (n 20) explicitly excluded this topic from its ambit. It is now dealt with under the heading of "State Succession to International Responsibility", cf. *supra*, footnote 43.

331 ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (n 330), 175/176, para. 4. Art. 2(a) VCSSPAD (n 22) consciously copied this provision and its underlying assumptions, see ILC, 'Draft Articles on Succession of States in Respect of State Property, Archives and Debts With Commentaries' (1981), 1981(II(2)) YbILC 20 21/22, paras. 3-4.

332 Cf. Lorenzo Gradoni, 'Art. 2' in Giovanni Distefano, Gloria Gaggioli and Aymeric Hêche (eds), *La Convention de Vienne de 1978 sur la Succession d'États en Matière de Traités: Commentaire Article par Article et Études Thématiques* (Bruylant 2016) 87 92, para. 6 and in detail on the drafting history of Article 2, ibid 100-107, paras. 23-32.

333 ILC, 'First Report on Succession of States and Governments in Respect of Treaties (Special Rapporteur Waldock)' (n 302), 90; ILC, 'Second Report on Succession in Respect of Treaties (Special Rapporteur Waldock)' (n 302), 50, 51, paras. 2-3.

334 ibid 51, para. 4.

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military occupation from the definition.[335] The more inclusive proposal by *Waldock*, defining succession as "the replacement of one State by another in the sovereignty of territory *or* in the competence to conclude treaties with respect to territory",[336] was again opposed by some members of the commission, mainly due to the unclear relationship between the two terms.[337] This "impasse"[338] was only solved by the drafting committee suggesting the above formula, which is found in the final convention.[339] Hence, the notion of sovereignty was mainly rejected in relation to its application in cases of dependent territories. The inclusion of decolonization scenarios into the topic of succession, however, was predetermined by the description of the ILC's mandate.[340] In light of Art. 2 lit. b) VCSST's drafting history, the term "responsibility for the international relations of a territory" therefore includes sovereignty, but *beyond* that encompasses changes in states not completely or only partly sovereign,[341] or situations in which the actual exercise of responsibility over a territory does not neatly coincide with the

335 Cf. ILC, 'Report on the Work of its Twentieth Session' (1968), 1968(II) YbILC 191 217, para. 47.

336 ILC, 'Second Report on Succession in Respect of Treaties (Special Rapporteur Waldock)' (n 302), 50 [emphasis added].

337 Cf. especially comments by Kearney, in ILC, 'Summary Records of the 1068th Meeting' (1970), 1970(I) YbILC 138 141, para. 34; Castañeda, ibid 157, para. 10; Thiam, ibid 162, para. 70; Bartoš; ibid 163, paras. 3, 4; Tabibi, ibid 164, para. 17. Summarily on the discussion ILC, 'Report on the Work of its Twenty-Second Session' (1970), 1970(II) YbILC 271 303, paras. 50, 51.

338 Gradoni, 'Art. 2' (n 332) 103, para. 27.

339 ibid 106/107, paras. 31, 32. For an instructive summary of the genesis of the definition cf. ILC, 'First Report on Succession of States in Respect of Treaties (Special Rapporteur Vallat)' (n 326), 26-27, paras. 107-110. ibid 27, para. 110 "the expression 'responsibility for the international relations of' met the wishes of those who objected to the use of the term 'sovereignty' and was sufficiently wide and flexible to satisfy those who thought that the expression 'capacity to conclude treaties' was inadequate." On the colonial connotations of the expression Barbara Miltner, 'Territory and Its Relationship to Treaties' in Dino Kritsiotis and Michael J Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 468 473 describing the expression as a "euphemism" which "downplayed the connection to colonialism"`.

340 UNGA, 'Report of the International Law Commission on the Work of its Fourteenth Session' (20 November 1962) UN Doc. A/RES/1765 (XVII) para. 3 lit.c) had instructed the ILC to "[c]ontinue its work on the succession of States and Governments [...] with appropriate reference to the views of States which have achieved independence since the Second World War".

341 Gradoni, 'Art. 2' (n 332) 109, para. 35.

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legal status of sovereignty.[342] Such a reading aligns as well with the opinion of the majority of writers on the issue linking state succession to a change in sovereignty.[343]

IV) Lawfulness of Succession

A further, intensely debated,[344] issue is the question of whether state succession can only be brought about by lawful means, i.e. whether its definition is premised on conformity with international law.[345] The most relevant

342 Examples are according to Miltner, 'Territory and Its Relationship to Treaties' (n 339) 481 territories under lease, overseas military bases, trust and non-self governing territories, condominia where a state, still responsible for the international relations of the territory at least for a certain amount of time does not exercise effective sovereignty. But see Jennings (n 326), 440 who excluded time-limited transmissions of the right to use the land, such as leases, from the category of successions.

343 O'Connell *The Law of State Succession* (n 2) 3; Jennings (n 326), 437; Crawford *Brownlie's Principles of Public International Law* (n 3) 409; cf. Herdegen (n 255) § 29 para. 1; Kirsten Schmalenbach, 'International Organizations or Institutions, Succession (2017)' in: *MPEPIL* (n 2) para. 1; Hasani (n 2), 114, 115; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 314/315. Differently, referring to the rise or fall in the number of states worldwide Arnauld *Völkerrecht* (n 255) para. 104. Explicitly on the relationship to Art. 2 (b) VCSST Gradoni, 'Art. 2' (n 332) 101, para. 23, footnote 51 and Gloria Gaggioli, 'Art. 6' in: *La Convention de Vienne sur la Succession d'États en Matière de Traités - Commentaire* (n 332) 181 207, para. 38 "Mis à part ces cas spéciaux, c'est bien de transfert de souveraineté sur un territoire dont il s'agit. En définitive, la 'responsabilité des relations internationales' est une prérogative souveraine."

344 The issue lately came up in the deliberations of the IDI as well as the ILC with respect to the topic of state succession in matters of state responsibility, see IDI, 'Deliberations, 14th Commission, First Plenary Session (2008): State Succession in Matters of State Responsibility' (2015), 76(Annex 3) YbIDI 607 and ILC, 'Seventieth Session, Provisional Summary Record of the 3432nd Meeting: Succession of States in Respect of State Responsibility' (18 July 2018) UN Doc. A/CN.4/SR.3432.

345 In favour of such requirement Crawford *Brownlie's Principles of Public International Law* (n 3) 409. Cf. also the comments by Kohen (Special Rapporteur) IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 626, 627; Koroma ibid 636; Tomka, ibid 676; without discussion Richard Happ and Sebastian Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016), 33(3) JInt'l Arb 245 253, footnote 48; citing Art. 6 VCSST Odysseas G Repousis and James Fry, 'Armed Conflict and State Succession in Investor-State Arbitration' (2015-2016), 22 ColumJEurL 421 446; cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96, 97; for Art. 15 VCSST Attila Tanzi and Lucrezia Iapichino, 'Art. 15' in: *La*

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examples are belligerent occupations, i.e. "situation[s] where the forces of one or more States exercise effective control over a territory of another State without the latter State's volition"[346] and the following annexation of the territory without the consent of the other state. Art. 6 VCSST and Art. 3 VCSSPAD unambiguously limit the respective conventions' scope to consequences of an internationally lawful succession.[347] This limitation, however, does not necessarily mean that the international law on state succession in general was not applicable to territorial changes in violation of international law.[348] The customary status of Art. 6 VCSST is unsettled.[349] Moreover, Art. 40 VCSST only stipulates that the convention "shall not prejudge any question that may arise in regard to a treaty from the military occupation of a territory."[350] Annexations or conquest had, for a long time, been a frequent and generally accepted mode of territorial acquisition.[351] Today, because of the generally agreed peremptory status of the prohibition of the use of force under Art. 2 para. 4 UN Charter (UNC),[352] territorial

Convention de Vienne sur la Succession d'États en Matière de Traités - Commentaire (n 332) 554-555, paras. 25-27.

346 Eyal Benvenisti, 'Occupation, Belligerent (2009)' in: *MPEPIL* (n 2) para. 1; cf. also Art. 42 Regulations Concerning the Laws and Customs of War on Land. Annex to Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907) in: Bevans, Treaties and Other International Agreements of the USA, Vol. I (Department of State Publication 1907) 643.

347 As can be taken from the ILC's deliberation, there was consensus that illegal actions should not fall under the term of succession, cf. Gaggioli, 'Art. 6' (n 343) 184, 186, paras. 4, 6. The mentioned discussion intending to exclude military occupations from the VCSST's ambit, *supra*, footnote 335, is further evidence of this conviction.

348 Daniel Costelloe, 'Treaty Succession in Annexed Territory' (2016), 65(2) ICLQ 343 350; the ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (n 330), Commentary to Art. 6 VCSST, 181, para. 1 assumed that "those articles are to apply to facts occurring and situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited."

349 Gaggioli, 'Art. 6' (n 343) 196, para. 22. On the drafting history of this provision ibid 184-195, paras. 4–15.

350 The VCSSPAD (n 22) does not contain a similar provision.

351 Rainer Hofmann, 'Annexation (2013)' in: *MPEPIL* (n 2) paras. 4, 5; for conquest and *debellatio* Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 51; cf. also *Island of Palmas Case* (n 36) 839.

352 Jochen A Frowein, 'Ius Cogens (2013)' in: *MPEPIL* (n 2) para. 8; Hofmann, 'Annexation (2013)' (n 351) 38; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001), 2001(II/2) YbILC 30 112/113, para. 4.

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changes in violation of that norm are considered as null and void.[353] Thus, illegal shifts with respect to the factual power over a territory do not constitute cases of state succession[354] since they cannot lead to the change of "responsibility for the international relations of a territory" in the sense elaborated on. This argument is in line with the above-mentioned generally held view that a belligerent occupation will not lead to a change in the external personality of the state.[355]

That assumption, however, is still challenged.[356] The main argument behind the challenge is that a power acquiring control over a territory by unlawful, often forceful, means shall not be put into a better position than

353 Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 51; Hofmann, 'Annexation (2013)' (n 351) para. 28; UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc. A/RES/25/2625 (XXV) "No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

354 ILC, 'Draft Articles on Succession of States in Respect of State Responsibility' [2019] Report on the Work of its Seventy-First Session (2019), UN Doc A/74/10 305, Commentary to Art. 5, 308; ILC, 'Second Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (6 April 2018) UN Doc. A/CN.4/719 paras. 36, 39; Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96, 97; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 320; Costelloe (n 348), 346.

355 Benvenisti, 'Occupation, Belligerent (2009)' (n 346) para. 1. Art. 39, 40 VCSST (n 20) explicitly negate the convention's applicability in cases of outbreak of hostilities and military occupation.

356 Cf. e.g. several statements by members of the IDI during the discussion on state succession in matters of state responsibility: Frowein, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 525/526, 635; Arsanjani, ibid 626; Benvenisti, ibid.; Tomuschat, ibid 626/627; Wolfrum, ibid 675/676; Pellet, ibid 676. Also USA, 'Observations on the Draft Articles on Succession of States in Respect of Treaties', 1974(II(1)) YbILC 328; Gaggioli, 'Art. 6' (n 343) 219, paras. 55-56; Odysseas G Repousis, 'Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo–Ukrainian Territorial Conflict' (2016), 32(3) Arbitr Int 459 464; Ziereis (n 58) 34, 41, 46; Patrick Dumberry, 'Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under the Ukraine–Russia BIT' (2018), 9(3) JIDS 506 514 "Those rules which are considered as reflecting customary international law will continue to apply" [footnote omitted] (but excluding the moving treaty frontiers rule ibid 515). For an analogous application Ago, ILC, 'Summary Record of the Twenty-Second Session, 1071st Meeting: Succession of States and Governments in Respect of Treaties' (1970), 1970(I) YbILC 168, para. 60 and Ronen *Transition from Illegal Regimes* (n 14) 251, footnote 12.

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a state taking over lawfully.[357] Fundamental rules such as the inviolability of international borders, encapsulated in Art. 11 VCSST, should continue to apply[358] and individuals should not be deprived of protection.[359] Moreover, some commentators point to the existence, and sometimes long persistence, of situations brought about by unlawful means,[360] which would need to be regulated in the interest of legal security and effectiveness.[361] Hence, the occupant should at least take on obligations towards the individuals.[362] Often, proponents of this view refer to the ICJ's *South West Africa* case, where the court elaborated:

> "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[363]

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357 Kazazi, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 675; Reinisch, ILC, 'Seventieth Session, Provisional Summary Record of the 3432nd Meeting' (n 344) 8; Grossman-Guiloff, ibid 7; but also response by Šturma (Special Rapporteur), ibid 13–14; see also statement by the agent of Belarus in the UNGA Sixth Committee, 'Summary Record of the Twenty-Nineth Meeting: Report of the International Law Commission on the Work of its Seventieth Session' (10 December 2018) UN Doc. A/C.6/73/SR.29 13, para. 81.

358 USA (n 356), 328; cf. Gaggioli, 'Art. 6' (n 343) 220, 225, paras. 58, 68–69.

359 Benvenisti, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 626; Costelloe (n 348), 363 speaks of a "legal vacuum"; see also Happ and Wuschka (n 345), 255 who nevertheless do not support the application of succession principles to occupation scenarios.

360 Frowein, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 625/626; Costelloe (n 348), 347/348.

361 Tomuschat, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 627.

362 Costelloe (n 348), 376-378; Rao, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 674; joint "explanatory statement" by Abi-Saab, Arsanjani, Bastid-Burdeau, Infante Caffi, Kazazi, Lee, Müllerson, Nolte, Rao, Reisman, Treves and Wolfrum, ibid 683/684; USA (n 356), 328.

363 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* 21 June 1971, Advisory Opinion, ICJ Rep 1971 16 para. 125 (ICJ); *The Peter Pázmány University v. The State of Czechoslovakia,* 15 December 1933, Appeal from a Judgment of

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Admittedly, it is often tough to determine a situation as unlawful in a world lacking a centralized authority.[364] Nevertheless, to include situations born out of severe violations of international law into the category of state succession is doctrinally confusing and practically futile if not dangerous for two reasons. First, this strand of argument mixes up the term of succession as a factual situation with that of succession as a legal consequence. Because this strand wants some obligations to survive, it labels the situation as a succession (or succession-like). The alleged rule that a state as a lawful successor to another state will be bound by certain obligations and therefore "disadvantaged" is often merely an allegation not proved by any state practice in many cases.[365] The view uses a legal scenery that is merely rhetorical (the succession into obligations) as justification for a rule that is contra-intuitive (an aggressor being a successor).

Second, as already mentioned, succession involves a system heavily contingent on other rules of international law, among them the essential rules on sovereignty and statehood. To include unlawful situations into its definition would partly decouple it from that basis. Moreover, state succession means the *permanent* transfer of responsibility for the international relations of a territory. Applying rules of state succession to situations outlawed by the international community implies accepting their permanence.[366] This acceptance runs counter to the general obligation not to recognize a situation entailed by the violation of peremptory norms as legal,[367] and to

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the Hungaro-Czechoslovak Mixed Arbitral Tribunal, Ser A/B No 61 208 (PCIJ). The ECtHR reflected on this position in *Loizidou v. Turkey,* Appl. No.15318/89, 18 December 1996, Decision on the Merits, ECHR 1996-VI para. 45 (ECtHR [GC]) and applied it in *Cyprus v. Turkey,* Appl. No. 25781/94, 10 May 2021, Decision on the Merits, ECHR 2001-IV 1 paras. 89-98 (ECtHR [GC]).

364 Which led Meron, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 635 to conclude that such legality prerequisite should not be applied; similarly Reisman, ibid 677; cf. also Gaggioli, 'Art. 6' (n 343) 183, para. 2.

365 Cf. ILC, 'Draft Articles on Succession of States in Respect of State Responsibility' (n 354), Commentary to Art. 5, 309 "[the requirement of legality] does not provide any advantage to a State violating international law. To the contrary, it does not give any legal effect to unlawful territorial situations."

366 See also Ronen *Transition from Illegal Regimes* (n 14) 160 "State succession is a forward-looking doctrine, premised on the validity of actions of the previous regime, and concerned with the maintenance of this validity under the new legal order. In contrast, transition from an illegal regime is premised on the invalidity of the actions of the previous regime."

367 Cf. ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary on Art. 41, 114, para. 5 "The obligation

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the legal maxim of *ex inuiria ius non oritur*.[368] In fact, the aggressor state could also avail itself of some of the privileges of being a successor.[369] In many cases, transferring only obligations but not rights becomes a difficult undertaking as the two categories are not always easy to differentiate: Clauses such as Art. 11 and 12 VCSST are not drafted in the language of rights and obligations but contain systematic decisions.[370]

Furthermore, not applying rules of state succession to illegal situations would not leave the inhabitants of the territory without protection. The conduct of hostilities on a territory generally has no effect on the applicability of international treaties.[371] Apt and universally applicable customary

[…] also prohibits acts which would imply such recognition." See on the general obligation of non-recognition for many UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations' (n 353); Hofmann, 'Annexation (2013)' (n 351) paras. 1, 4, 14–21, 34, 38; Escudero Espinosa (n 315). This duty, however, does not apply to the occupied state, that can freely decide about the fate of the domestic legal order, cf. Ronen *Transition from Illegal Regimes* (n 14) 160. See with respect to violations of the right of self-determination and humanitarian law *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004, Advisory Opinion, ICJ Rep 2004 136 200, para. 159 (ICJ). See also the international community's reaction to Russia's annexation of Crimea in 2014, e.g. UNGA, 'Resolution on the Territorial Integrity of Ukraine' (27 March 2014) UN Doc. A/RES/68/262.

368 Similarly ILC, 'Draft Articles on Succession of States in Respect of State Responsibility' (n 354), Commentary to Art. 5, 309; Gaggioli, 'Art. 6' (n 343) 223, para. 64; for Art. 15 VCSST Dumberry, 'Requiem for Crimea' (n 356), 515.

369 Cf. Comment by Lehto, ILC, 'Seventieth Session, Provisional Summary Record of the 3435th Meeting: Succession of States in Respect of State Responsibility' (24 July 2018) UN Doc. A/CN.4/SR.3435 7. Such advantages might consist in assuming assets and property of the former state.

370 Cf. ILC, 'First Report on Succession of States in Respect of Treaties (Special Rapporteur Vallat)' (n 326), 35, para. 176; Gaggioli, 'Art. 6' (n 343) 186, para. 7.

371 Cf. ILC, 'Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries' (2011), 2011(II(2)) YbILC 108 Commentary on Art. 3, 111-112. The rule of the inviolability of international borders encapsulated in Art. 11 VCSST also applies outside situations of state succession, *see* Art. 2 UN Charter; Jean-Paul Pancracio, 'Art. 11' in: *La Convention de Vienne sur la Succession d'États en Matière de Traités - Commentaire* (n 332) 373 para. 59; *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali),* 22 December 1986, ICJ Rep 1986 554 para. 24 (ICJ); Vagts (n 295), 289; Stern, 'La Succession d'États' (n 283), 308; Crawford *Brownlie's Principles of Public International Law* (n 3) 424 (sceptical towards the idea of localized treaties in general); Shaw, 'State Succession Revisited' (n 259), 63; for Art. 11 VCSST Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 399; Rein Müllerson, 'New Developments in the Former USSR and Yugoslavia' (1992-1993), 33

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rules under international humanitarian law cover such situations,[372] and human rights law still applies, partly also extra-territorially.[373] Occupation is thus often more a problem of attribution than one of a lack of legal rules.[374] Many authors conflate the argument for extending the territorial applicability of the occupant's treaty obligations with the argument for a succession of the occupant into the genuine sovereign's obligations.[375]

In the cited passage from the ICJ's *South-West Africa* decision,[376] the court pronounced on the permissibility of recognizing certain acts of the illegal occupant by third states. It did not deal with an obligation of the occupant. In the same vein, international institutions and states have taken a pragmatic approach to the rights of people under occupation and often recognized their civil status and accorded them pertaining rights.[377] This "provisional *de facto* recognition"[378] is different to classifying the situation as a succession. It merely acknowledges the *fact* of effective control over the territory by the occupant but does not condone a change of sovereignty over the territory. And such *de-facto* recognition as approved by the ICJ in *South West Africa* is a qualification of the rule of non-recognition,[379] not its rejection. The (potentially) still existing legal gaps in protection as compared to the situation before any occupation, such as the inability of individuals to appeal to an international court or tribunal, are a consequence of the exercise of illegal power over the territory. In this respect, the

Va J Int'l L 299 313, footnote 53; Samuel K N Blay, 'Territorial Integrity and Political Independence (2010)' in: *MPEPIL* (n 2) paras. 5-7.

372 Cf. Hofmann, 'Annexation (2013)' (n 351) para. 28; Benvenisti, 'Occupation, Belligerent (2009)' (n 346) paras. 12-31; also John Quigley, 'Mass Displacement and the Individual Right of Return' (1992), 68 BYbIL 65 70–71. See Art. 43 Annex to Hague Convention (IV) (n 346).

373 *ICJ Wall Opinion* (n 367) 177-181, paras. 102-113; Benvenisti, 'Occupation, Belligerent (2009)' (n 346) paras. 13-16; Costelloe (n 348), 359–360.

374 Cf. examples from ECtHR jurisprudence in ibid 367–369, 372/373; Marko Milanović and Tatjana Papić, 'The Applicability of the ECHR in Contested Territories' (2018), 67(04) ICLQ 779.

375 See e.g. Costelloe (n 348), 375-376 who speaks about succession into the *annexing state's* international obligations. However, in this case no question of taking over of another subject's obligations but rather of the extension of the occupant's *own* obligations arises.

376 *ICJ South West Africa (Advisory Opinion)* (n 363) para. 125.

377 Cf. Hofmann, 'Annexation (2013)' (n 351) para. 29.

378 ibid para. 30 [emphasis added].

379 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary to Art. 41, 115, para. 10.

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practical benefits of succession are relatively flimsy, assuming the occupier would repudiate them.

In summary, changes in territory brought about by forcible means infringing *jus cogens* norms such as Art. 2 para. 4 UNC should not be considered as cases of state succession.[380] This argument is supported by states' recent endorsement[381] of the draft Article 5 in the ILC's second report on the issue of succession of states in respect of state responsibility[382], which copies the wording of Art. 6 VCSST. In line with this endorsement, international tribunals having to deal with the potential application of treaties protecting individual rights in occupied territories have been cautious to apply rules outside the treaty context in order to solve a dispute and shied away from drawing analogies to succession.[383] While this view avoids (unnecessary) doctrinal inconsistencies and politically as well as legally undesirable results, it underscores the force of the basic norms of international law[384] and contributes to the unity of the international legal order.[385] Therefore, in the following analysis, cases of forcible occupation of a territory, such as the illegal annexation of Crimea,[386] will not come under

380 Cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96.

381 Cf. statements by Sweden (speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)), UNGA Sixth Committee, 'Summary Record of the Twenty-Eighth Meeting: Report of the ILC on the Work of its Seventieth Session' (30 October 2018) UN Doc. A/C.6/73/SR.28 para. 55, Austria, ibid para. 63; Japan, ibid para. 86; Czechia, ibid para. 100; Slovakia, ibid para. 110; Korea, UNGA Sixth Committee, 'Summary Record of the Thiertieth Meeting: Report of the ILC on the Work of its Seventieth Session' (6 December 2018) UN Doc. A/C.6/73/SR.30 para. 29; Estonia, ibid para. 37; Malaysia, ibid para. 76.

382 ILC, 'Second Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 354) para. 41.

383 According to the few publicly available information on investment litigation concerning Crimea (see footnotes 131-134, 158 in Dumberry, 'Requiem for Crimea' (n 356)), tribunals did not assume the take over of Ukrainian obligations by Russia but based their jurisdiction on provisions of particular treaties and e.g. interpreted the scope of the treaties' legal terms such as "territory". Supporting such approach Happ and Wuschka (n 345), 264.

384 Cf. Kohen, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 626, 627, 636, 678; Tomka, ibid 676.

385 See on the responsibility of actors in international law to develop a coherent system of international law Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009), 20(2) EJIL 265 289–290.

386 Christian Walter, 'Postscript: Self-Determination, Secession, and the Crimean Crisis 2014' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (OUP 2014) 293 especially

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scrutiny. The field of humanitarian law (*ius in bello*) will be consciously excluded from the ambit of this study.

C) Categories of State Succession

Even if delimited in line with these aforesaid requirements, the common definitions of succession in Art. 2 para. 1 lit. b) VCSST and Art. 2 para. 1 lit. a) VCSSPAD still cover diverse situations. Driven by a natural inclination towards systematization, international doctrine has invented several categories of different types of succession. These categories are routinely used in legal literature and their common understanding silently assumed. Yet, neither do they represent officially agreed standards nor is their use uniform, and modes of succession may, in reality, overlap to a significant extent. Even the VCSST and the VCSSPAD (Vienna Conventions) differ in their terminology.[387] To avoid political and potentially legal implications, states are often more than reluctant to precisely label a certain situation.[388] While the application of these categories thus always has to be taken with a grain of salt,[389] they do help in grouping different succession scenarios and therefore in understanding their relationship and relevance more easily.

310; Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014), 74 HJIL 367 380–391.

387 Cf. e.g. the VCSST (n 20) that only speaks of "separation of parts", Art. 34, 35, and the VCSSPAD (n 22) that distinguishes between "separation of parts", Art. 17, and "dissolution", Art. 18.

388 Especially for secessions Thürer and Burri, 'Secession (2009)' (n 317) para. 38.

389 Critical on the value of such categories Crawford *Brownlie's Principles of Public International Law* (n 3) 411–412; cautious also Jennings and Watts (n 27) § 60; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 146 "that we speak at all of 'annexation', 'cession', 'dismemberment', 'secession', or the like, is not because such categories are set in stone, nor indeed because they are terms of art, but because we accept them as useful and necessary descriptive categories. That they are either useful or necessary, however, is a reflection of the particular theory of succession adopted."

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I) Dismemberment (or Dissolution) and Separation

"The dismemberment of a State takes place when its territory becomes the territory of two or more new States. Consequently, the predecessor State ceases to exist and the newly formed States are regarded as its successors."[390] Recent prominent examples constitute the dissolution of the former Yugoslavia and of Czechoslovakia. Separation describes the *consensual* dissociation of a territory from a state[391] while secession is understood as "the *unilateral* withdrawal from a State of a constituent part"[392]. In both cases (separation and secession), different to dismemberment, the mother state continues to exist. The category of secession is controversial, especially concerning the prerequisite of unilateralism.[393] In reality, such a distinction is often hard to prove, and diplomatic practice is not without ambiguities.[394] It is thus not used as an independent category in this book.

The VCSST only knows the category of "separation of parts of a state" and basically does not differentiate between a situation when a state disintegrates completely or one when a "rump state" remains in place, cf. Art. 34, 36-38. Only Art. 35 VCSST is concerned with the latter case. The VCSSPAD explicitly distinguishes between the "separation of parts of a state", Art. 17,

390 Tancredi, 'Dismemberment of States (2007)' (n 324) para. 1 [references omitted]; also Zemanek (n 38), 210.

391 Thürer and Burri, 'Secession (2009)' (n 317) paras. 1, 4 (with certain reservations).

392 ibid para. 1 who, however, like Kevin Grimmeiß, *Sezession und Reaktion* (Mohr Siebeck 2019) 8-9 with reference to *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* 22 July 2010, Advisory Opinion, Dissenting Opinion Judge Koroma, ICJ Rep 2010 467 477, para. 23 (ICJ), do not consider the emergence of a new state as a prerequisite for secession but accept that the seceding territory may become part of another state; arguably also Milena Sterio, *Secession in International Law: A New Framework* (Edward Elgar 2018) 29. Against such possibility Crawford *The Creation of States* (n 308) 375; Georg Nolte, 'Secession and External Intervention' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 65 65 and arguably Aleksandar Pavković and Peter Radan, 'Introduction: What Is Secession?' in Aleksandar Pavković and Peter Radan (eds), *The Ashgate Research Companion to Secession* (Ashgate 2011).

393 See Grimmeiß (n 392) 11–17, defining secession as the separation of part of a state as a consequence of an active decision of the separating part; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520, 524 and Arnauld *Völkerrecht* (n 255) § 2 para. 104, defining separation as the opposite of complete dissolution regardless of its consensual nature. The prerequisite of the use of force is controversial, *pro* e.g. Crawford *The Creation of States* (n 308) 375 with reference to Marek (n 61) 62; *contra* Grimmeiß (n 392) 17–18.

394 Cf. ibid 11–14.

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30, 40, and "dissolution", Art. 18, 31, 41. For reason of clarity and alignment with the terminology of the Vienna Conventions, the term "separation" will be used here to encompass both, consensual and unilateral, separations of a part of territory from a state.[395] Such separations have taken place in Eritrea, Montenegro, South Sudan, and (arguably) the Kosovo, though the latter's quality as a state is still in dispute.

II) Incorporation and Merger (Uniting)

Contrary to those forms of disintegration, leading to an increase in the number of states, there are also cases of state succession effectively leading to fewer states: incorporations and mergers. With an incorporation (or absorption[396]) a formally independent sovereign state is completely integrated into another existing state, i.e. loses its personality while the other keeps its personality.[397] The most prominent example constitutes the uniting of the two German states in 1990. Cases in which neither of the two or more uniting states continues and in which a completely new state comes into existence, are called mergers,[398] e.g. the case of the unified Yemen. The Vienna Conventions do not differentiate between the scenarios of integration and merger and call both scenarios "uniting of states".[399]

395 In this way also Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283); Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 406; Arnauld *Völkerrecht* (n 255) § 2 para. 104.

396 Term used e.g. by Vagts (n 295), 285-286.

397 Cf. Zemanek (n 38), 211; Oliver Dörr, *Die Inkorporation als Tatbestand der Staatensukzession* (Duncker & Humblot 1995) 39.

398 Crawford *Brownlie's Principles of Public International Law* (n 3) 409; Zimmermann and Devaney, 'State Succession in Matters Other than Treaties (2019)' (n 295) para. 1; differently e.g. Papenfuß (n 37), 470 who calls this situation a "fusion" and uses "merger" as a category encompassing "fusions" and "incorporations".

399 Cf. Art. 31-33 VCSST (n 20) and Art. 16, 29, 39 VCSSPAD (n 22); but see also Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 521–522 who purport that the case of a voluntary incorporation was not anticipated by the VCSST.

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III) Cessions

The common Vienna Conventions' definition of cessions encompasses changes in the responsibility for a territory no matter whether a new state emerges and/or another state vanishes in consequence of the succession, i.e. irrespective of a change in the number of states worldwide. Mere transfers of parts of territory from one state to another are hence included in the definition. Such transfers are regularly effected by cession of territory, i.e. the "consensual [...] transfer of territorial sovereignty over a certain part of a territory by one state to another".[400] Cessions of territory that were not consensual but imposed upon one state by another (e.g., the ones after the First and Second World War) have not recently taken place and can therefore be excluded from the present analysis.

Cessions show the particularity that, while a change of sovereignty over a certain territory takes place, this change leads to no "external" changes of the personality of the states involved. Hence, these territorial transfers come closer to a case of continuity than to one of succession. They are guided by one of the few customary[401] rules of the law on succession embodied in Art. 15 VCSST, known as the "moving treaty frontiers rule". As the name suggests, transfers of territory are treated as changes in the demarcation of borders,[402] which does not resemble a succession scenario,

400 Dörr *Inkorporation* (n 397) 178 [own translation from German]. For a comprehensive definition of incorporation ibid 39, 40, 44-45, 178–180, 185-189. Importantly, "incorporation" of a territory into a state in this situation only relates to a part of a territory not having the, even partial, status of an independent subject of international law. It does not mean the incorporation of an independent state into another state; cf. Oliver Dörr, 'Cession (2019)' in: *MPEPIL* (n 2) para. 2.

401 *Sanum Investments Ltd. v, the Government of the Lao People's Democratic Republic, Award on Jurisdiction,* Case No. 2013-13, 13 December 2013 62-63, paras. 220-224 (PCA) and the sources cited there; Tanzi and Iapichino, 'Art. 15' (n 345) 546/547, para. 6; Costelloe (n 348), 343/344; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 337 "at least with respect to cessions"; Delbrück and Wolfrum (n 266) 162–163; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520, 521; Dörr, 'Cession (2019)' (n 400) para. 20. For an rule outside the Vienna Conventions cf. Jennings and Watts (n 27) § 65; Happ and Wuschka (n 345), 257; Strupp (n 2) 84/85.

402 In the same vein, Art. 14 VCSSPAD (n 22), with the regular caveat of mutual agreement, sets out that all immovable property and movable property of the transferred territory "connected with the activity of the predecessor State" will become property of the "successor" (cessionary). Again, the legal rule aligns with the new demarcation of borders. Art. 37 para. 2 VCSSPAD, in contrast, provides for an "equitable" partition of state debts.

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but rather the extension of a state's legal regime.[403] The ILC also remarked on this circumstance,[404] but chose to include cessions for relatively practical reasons:

> "[T]he cases covered by the rule do involve a 'succession of States' in the sense that this concept is used in the present draft articles, namely a replacement of one State by another in the responsibility for the international relations of territory. Moreover, the rule is well established in State practice and is commonly included by writers among the cases of succession of States." [405]

While most authors endorse the inclusion of cessions into the category of succession (often by simply referring to above-mentioned definition in the Vienna Conventions without further discussion),[406] others exclude them,[407] and some consider cession as a "special" case[408] of succession. Today, cessions are considered the type of succession with "greatest practical relevance".[409] As consensual cessions are routinely based on individual agreement between the states concerned, they touch much less on sovereignty concerns than do other succession scenarios. States' attitudes towards individual rights in cases of cessions can provide valuable evidence for the content and existence of a rule of acquired rights and are therefore included in the analysis. The Vienna Conventions were basically drafted

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403 Also Jennings and Watts (n 27) § 65 "there is no succession by the successor state to the treaty rights and obligations formerly applying to the territory, but rather a substitution of treaty regimes".

404 ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (n 330), Commentary on Art. 14, 208, para. 3, "The rule, since it envisages a simple substitution of one treaty regime for another, may appear *prima facie* not to involve any succession of States in respect of treaties." [italics in original].

405 ibid.

406 Jennings (n 326), 439-440 by emphasizing that a change in the number of states is no precondition for state succession; without discussion Herdegen (n 255) § 29 para. 1; Crawford *Brownlie's Principles of Public International Law* (n 3) 409; Vagts (n 295), 286; Dörr, 'Cession (2019)' (n 400) para. 1; but see, more subtle, Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 512.

407 Arnauld *Völkerrecht* (n 255) § 2 para. 104; arguably impicitly also Aust *Modern Treaty Law and Practice* (n 294) 320, who requires a change in the number of states for succession to take place.

408 Zemanek (n 38), 190; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 337 without further explanation of what this "particular regime" would look like.

409 Dörr, 'Cession (2019)' (n 400) para. 1.

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through the eyes of states and exclusively concern *international* treaties and *state* property and debts, i.e. the external relations of states vis-à-vis states.[410] For the inhabitants of the transferred territory, the "moving treaty frontiers rule" leads to discontinuity and not continuity, though.[411] It seems doubtful whether an analogous application of the principle with respect to the predecessor's domestic legal order is an appropriate solution. Even if evidence for the maintenance of individual rights can be taken from cessions, the inherent limits of the inference of general rules from this exceptional type of succession must be borne in mind.

IV) Decolonization

Controversial remains whether decolonization, i.e. the "process that signifies the attainment of independence of colonial territories, mandates, trusteeship territories, non-self-governing territories, and the remnants",[412] can be described as a genuine case of succession. This controversy arises because, at the time of independence, colonized territories were often not considered to be under the sovereignty of the colonial state or completely included into the latter's territory.[413] *Jennings* describes this situation as being "more akin to succession of governments than to succession of States" hence alluding to the fact that the continuing personality of the colonized state should not be challenged.[414] Some authors have tried to differentiate: While, e.g., under a protectorate, the personality of a state is more said

410 Art. 6 VCSSPAD (n 22) explicitly excludes state debts towards private creditors from its ambit. Furthermore, it has been noted that the principle of "equitable partition" of debts, no matter its customary status, is remarkably indefinite when it comes to the mode of distribution, cf. Carsten Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002), 96(2) AJIL 379 390.

411 Stern, 'La Succession d'États' (n 283), 135; Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96 "reference to agreement and equity smacks of a pious wish or a diplomatic technique for glossing over a practical difficulty."

412 Rahmatullah Khan, 'Decolonization (2011)' in: *MPEPIL* (n 2) para. 1.

413 Cf. Thürer and Burri, 'Secession (2009)' (n 317) paras. 26-27; Crawford *The Creation of States* (n 308) 613-615; comment of Castañeda, ILC, 'Summary Record of the Twenty-Second Session, 1071st Meeting' (n 356), 157, para. 10.

414 Jennings (n 326), 448.

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to continue,[415] this continuation would not be the case for mandates[416]. Decolonizations should, at least, plainly fall under the wide definition of the Vienna Conventions, which devote several of their provisions to so-called "newly independent states"[417] and in Art. 2 para. 1 lit. f) VCSST and Art. 2 para. 1 lit. e) of the VCSSPAD define them as "successor State[s] the territory of which immediately before the date of the succession of States [were] a dependent territory for the international relations of which the predecessor State was responsible". This inclusion into the Vienna Conventions has been continuously criticized for having spilt so much ink on an alleged remnant of the past.[418] Due to the ambit of this book, covering state succession as a practical phenomenon only from 1990 onwards,[419] decolonization is of limited significance here[420] and will therefore not be dealt with in detail. However, e.g., the independence of Eritrea and Sudan as well as the transfers of Hong Kong and Macau have historical roots in colonial times, which leads to particular consequences that are elaborated on in the following chapters.

V) Pacific Occupation

As set out in detail above, occupations, having been frequent and accepted ways of acquisition of territory in former times, today are not considered as a form of state succession since their violation of *jus cogens* norms prevents

415 Protectorates may take a variety of forms. Whether the protected state persists may therefore be subject to various considerations, cf. Crawford *The Creation of States* (n 308) 286–303. For protectorates as forms of a "partial succession" cf. Jennings and Watts (n 27) §§ 58, 60; Zemanek (n 38), 199–200, 203.

416 ibid 207-208. Crawford *The Creation of States* (n 308) 571-572, 574 accords mandates a "special" status.

417 Art. 16-30 VCSST (n 20), Art. 15, 28, 38 VCSSPAD (n 22).

418 Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 508–509; Verdross and Simma (n 23) 609, §974, 621, §997; Aust *Modern Treaty Law and Practice* (n 294) 321; Arnauld *Völkerrecht* (n 255) § 2 para. 108; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 473. Cf. Vagts (n 295), 283, 288; Oeter, 'German Unification and State Succession' (n 283), 353, 379.

419 In more detail on the reasons for this limitation, *infra*, Chapter VI A).

420 Cf. James Crawford, 'Remarks' (1992), 86 ASIL Proceedings 15 17 "if the notion of a 'dependent territory' is limited, as seems to have been intended, to territories under Chapters XI and XII of the UN Charter, then arguably the only territories that fall within that category, amongst the recent crop of new states, are the Baltic states."

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a change in sovereignty over the territory. However, there are cases of consensual occupation of a state's territory by another state or international organizations, where, by freely achieved agreement, "the former grants the latter, and the latter assumes, powers and responsibilities to maintain public order over a part of its territory and its population"[421]. *Benvenisti* lists as examples of such "pacific occupation" "treaties establishing military bases exclusively controlled by a foreign State" or "leases of territory for the exclusive use of another State and its nationals".[422] Here, an analogical application of succession rules is not precluded from the outset as these cases do not violate international law and show obvious similarities with such of cession of territory. Analogous to the argument, that the legal sovereign has "to ensure effective and continued application of provisions of [its own] human rights treaties by the occupant"[423], such obligations might also be assumed for rights acquired under the domestic legal order. Both could be regulated by the necessary occupation agreement.[424] Nevertheless, as mentioned, occupations are characterized by their temporary nature.[425] This difference distinguishes them significantly from all succession situations referred to above. Rules governing the factual exercise of power over a foreign territory were invented to regulate situations *until* the lawful sovereign would reenter the stage and take back control. Their object and purpose are thus different from state succession rules, which pursue regulating a *permanent* situation. An analogous application, therefore, has to be dismissed. Nevertheless, there are cases, such as the Kosovo, where succession was *preceded* by a "pacific" form of occupation, which had a considerable influence on the law in the territory and will, *therefore*, be covered by this analysis.

421 Eyal Benvenisti, 'Occupation, Pacific (2009)' in: *MPEPIL* (n2) para. 4.
422 ibid.
423 ibid para. 8. E.g., the UN mission in Kosovo was asked to report on the human rights situation there, see Christine M Chinkin, 'Human Rights' in: *Kritsiotis/Bowman Modern Law of Treaties* (n 339) 509 534.
424 Benvenisti, 'Occupation, Pacific (2009)' (n 421) 8.
425 ibid para. 2. Cf. Benvenisti, 'Occupation, Belligerent (2009)' (n 346) para. 1; Michael N Schmitt, 'Debellatio (2009)' in: *MPEPIL* (n 2) paras. 11-13.

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D) Conclusions

State succession means the replacement of one state by another in the responsibility for the international relations of territory and hence refers to the change of a factual *status quo*. The categorization of a situation as one of state succession does not automatically connote a transferal of rights and duties to the successor state. For the cases under scrutiny here, the phrase “responsibility for the international relations of territory” can, for the most part, be equated with sovereignty over the territory. The change in sovereignty over a territory must not have come about through a violation of *jus cogens* norms such as Art. 2 para. 4 UNC. Any other view would unnecessarily separate the field of state succession from general international law and violate the duty of non-recognition of situations emanating from a violation of peremptory norms. Cases of succession have to be distinguished from cases of continuity of a state’s personality. Under international law, a general presumption of continuity of states exists unless manifest changes affect the external personality of a state. Yet, the emergence or demise of a state is no prerequisite for succession, mere transfers of parts of territory (cessions) are also included but potentially deserve special treatment.

The types of succession discussed in the following are thus cases of dissolution, separation, cession, merger and incorporation of states. The analysis is based on case studies related to state practice on acquired rights in Yemen, Germany, the Soviet Union, the former Yugoslavia, Czechoslovakia, Ethiopia and Eritrea, Walvis Bay, Hong Kong, Macau, and Sudan and hence includes one example for each type of succession. However, before a detailed analysis of relevant state practice in Chapter IV, Chapter III looks at the reasons for the continued significance of the doctrine of acquired rights in today’s international legal order.

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